

4-23

IN THE SUPREME COURT OF FLORIDA

TIMOTHY WOOD,)
)
 Petitioner/Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Respondent/Appellee.)

FILED
 APR 1 1983
 Case No. 71,913
 SUPREME COURT
 TALLAHASSEE, FLORIDA

DISCRETIONARY REVIEW OF DECISION OF THE
 SECOND DISTRICT COURT OF APPEAL
 STATE OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

This case is before the court upon the basis of a question certified by the Second District Court of Appeal to be of great public importance. This court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(v), Fla. R. App. P. In this brief the parties will be referred to by their proper names or as they stand before this court. The references to the record on appeal will be indicated by the letter "R" followed by the appropriate page number. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Petitioner's statement of the case and facts with the following exception. Petitioner states that on appeal he argued that imposition of costs was error in that he received no notice that court costs would be imposed. This court should note that counsel for Mr. Wood not only did not object in the trial court to the imposition of costs (R.105-106), but appellate counsel for Mr. Wood filed a brief in the Second District Court of Appeal asserting there was "no meritorious argument to support the contention that the trial court committed reversible error." (Appendix I, Appellant's Brief p.2). Counsel accordingly asked to withdraw from representation of Mr. Wood pursuant to Anders v. California, 386 U.S. 738 (1967). Mr. Wood did not file a pro se brief. The District Court of Appeal affirmed the judgment and sentence but nevertheless certified as a question of great public importance the question concerning imposition of costs previously certified in Barker v. State, No. 86-3077 (Fla. 2d DCA Jan. 13, 1988) [13 F.L.W. 217]. (Appendix II).

SUMMARY OF THE ARGUMENT

This Court has said an indigent defendant has a due process right to notice and opportunity to be heard prior to the imposition of costs. In this case, the Second District Court of Appeal found based upon its prior decisions, that the failure to object at the sentencing hearing when the judge announced his intention to impose costs constituted a waiver of the issue for appeal. Other courts have found the failure to provide notice constituted fundamental error negating the contemporaneous objection requirement.

However, the error is not fundamental because it does not go to the foundation of the case or to the merits of the cause of action. The failure to give notice prior to the imposition of costs which are mandated by statute and which are anticipated by defense counsel must not be deemed fundamental, especially in the absence of any allegation of prejudice stemming from the lack of notice.

Though the error could be easily corrected, defense counsel should not be allowed to sandbag the courts by keeping silent about the notice requirements until the case is on appeal, only to cry foul at this time without establishing prejudice.

Since Wood did not object to the imposition of costs, he has waived the issue; and since the absence of prior notice does not constitute fundamental error, Wood is not entitled to relief. Accordingly, the imposition of costs must be affirmed.

ARGUMENT

ISSUE

THE ABSENCE OF CONTEMPORANEOUS OBJECTION TO
THE IMPOSITION OF COSTS CONSTITUTED A WAIVER
OF THE PRIOR NOTICE REQUIRED BY JENKINS V.
STATE, 444 So.2d 947 (Fla. 1984).

At Wood's sentencing hearing the trial court clearly stated its intention to impose court costs. (R.105-106) Defense counsel made no objection whatsoever. On appeal to the Second District Court of Appeal the public defender asserted there was no meritorious argument to support the contention that the trial court committed reversible error. (Appendix I, p.2) Counsel asked to withdraw pursuant to Anders v. California, 386 U.S. 738 (1967). Although appellate counsel drew the appellate court's attention to the costs issue, counsel apparently felt the issue was not sufficiently worthy of merit to require remand. Counsel now for the first time argues vigorously that the court committed reversible error by imposing costs without providing Mr. Wood adequate notice under Jenkins v. State, 444 So.2d 947 (Fla. 1984). Petitioner not only waived his right to challenge the imposition of costs by failing to object in the trial court, he further by-passed any opportunity for review by failing to present this or any other issue in the appellate court following appellate counsel's filing of an Anders brief.

Despite the failure of Petitioner and counsel to properly raise the cost issue on appeal, the Second District Court of Appeal addressed the issue and found the absence of any objection

to the imposition of costs constituted a waiver of the right to assert objections to the assessments on appeal, including objections regarding the procedural notice requirements. See, Jenkins, supra. The court certified as a question of great public importance the question previously certified in Barker v. State, No. 86-3077 (Fla. 2d DCA Jan 13, 1988) [13 F.L.W. 217].

The question before this Court then becomes whether a contemporaneous objection is necessary to preserve for appellate review the propriety of imposing costs on an indigent defendant at a sentencing hearing without the prior notice required by Jenkins v. State, supra. Respondent and the Second District Court of Appeal urge that the absence of the objection constitutes waiver of the issue and so the imposition of the assessments in this case must be affirmed.

It has long been the law in Florida that a reviewing court will not consider points raised for the first time on appeal. Castor v. State, 365 So.2d 701 (Fla. 1978). Even constitutional errors, other than those constituting fundamental error, are waived unless timely raised in the trial court. Clark v. State, 363 So.2d 331 (Fla. 1978).

Jenkins v. State, supra, holds an indigent defendant has a due process right to be given notice and an opportunity to be heard prior to the imposition of court costs. However, the failure to follow the Jenkins requirements does not rise to the level of fundamental error which excuses the failure of the defendant to object to the imposition of costs at a sentencing

hearing for several reasons.

Fundamental error is error which goes to the foundation of the case or goes to the merits of the cause of action, Clark, supra, and should be applied only in the cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application. Ray v. State, 403 So.2d 956 (Fla. 1981). The failure to give a defendant written notice prior to the imposition of costs, which imposition is mandated by statute and of which at least the attorney has notice, can hardly be deemed fundamental error. This collateral issue does not go to the foundation of the case either for or against the defendant and it certainly does not go to the merits of the cause of action. Neither is the well-anticipated imposition of costs without notice a jurisdictional error.

Likewise, the failure to provide defendants with prior notice in these cases does not rise to a level that the interest of justice compels invocation of the fundamental error doctrine. The defendants and attorneys are on notice that costs will be imposed by the existence of the statutes.

The failure of either the defendant or the attorney to object does not stem from surprise or lack of preparation, but from the absence of any true objection or prejudice. See Barker, supra. At this stage, neither indigence nor the ability to pay is an issue; the absence of notice is not vital. Also, the costs will not be collected without a finding that the indigent has the ability to pay, so the necessity for preparation for the

imposition of costs is illusory.

The cases in which fines, costs and liens are imposed at the sentencing hearing, to the utter silence of the defendant and attorney, are numerous. See Barker, at 217. As is usually the case, Mr. Wood does not suggest a defense to the imposition of costs which he was forced to abandon due to the lack of notice. Indeed, Wood fails, as do most defendants, (see Barker at 218) to allege any prejudice at all stemming from the absence of prior notice. Without prejudice, the error cannot be considered fundamental.

For the reasons stated above, the Fifth District Court of Appeal erred in deeming the failure to give the defendant adequate notice and opportunity to objection fundamental in Outar v. State, 508 So.2d 1311 (Fla. 5th DCA 1987). Contrary to what the court said in Outar, due process does not require a judicial determination that the defendant has an ability to pay; it merely requires adequate notice and an opportunity to object to the imposition of costs. Without a showing of prejudice due to the absence of notice, the error is not fundamental. Barker.

The Fifth District Court of Appeal may be implicitly receding from its holding in Outar in Reynolds v. State, No. 87-259 (Fla. 5th DCA Dec. 17, 1987) [12 F.L.W. 2887]. There they found the failure to raise the imposition of costs waived where the issue had not been raised in a previous appeal of the case. "However this case can serve as a vehicle to give notice that this type of error will not be considered until it has been first

submitted to the trial court for correction." 12 F.L.W. at 2887.

Deeming the failure to give such notice a fundamental error in cases like the one sub judice, where there is no prejudice alleged or shown, allows the defendant and their attorneys to sandbag the system and squander precious judicial resources. It is not too onerous a burden to require a defendant to object when he feels cost assessments are wrongly being imposed in order to preserve the question for appellate review.

It would be far better for defense counsel to bring to the trial judge's attention that Jenkins requires notice and a hearing prior to the imposition of costs on an indigent defendant, and give the trial judge and the state the opportunity to meet the Jenkins requirements.

Barker, 13 F.L.W. 217, 218.

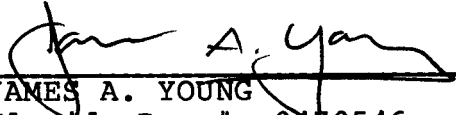
Because the failure to afford the Petitioner formal notice prior to the imposition of costs is not fundamental error, the failure to object constitutes a waiver of the right to appeal the imposition of these assessments. Accordingly, the imposition of such costs should be affirmed.

CONCLUSION

Based on the foregoing citations of authority and argument, Respondent respectfully requests this Court to affirm the Second District Court of Appeal's decision in Wood v. State, and affirm the imposition of the costs by the trial court in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Deborah K. Brueckheimer, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000 - Drawer PD, Bartow, Florida 33830, this 29th day of March, 1988.



OF COUNSEL FOR RESPONDENT