IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

GARY STEPHEN BEASLEY,

Respondent.

Case No. 76,102

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts in the state's brief.

SUMMARY OF ARGUMENT

A. The state is asking this Court to revisit one of the best-settled issues in Florida criminal law: the requirements of notice, opportunity to be heard, and finding of ability to pay prior to the assessment of statutory court costs. This Court has thoroughly addressed these requirements in relation to all three statutes involved in the instant case. The District Courts of Appeal have published literally hundreds of decisions following this Court's dictates. The state in the instant case has presented no good reason for overruling this long line of precedent.

B. This Court's well-settled rulings regarding costs must be applied to the five percent surcharge on fines provided by Section 960.25, Florida Statutes (1987). The surcharge is established by the same statutory chapter as the costs and it is collected and disbursed in the same manner and for the same purpose. To treat the surcharge differently would be to place the statutes in conflict with one another, as well as to deny defendants the constitutional rights applicable to such assessments.

ARGUMENT

WHETHER THE IMPOSITION OF COSTS AGAINST AN INDIGENT DEFENDANT IS DIFFERENT THAN THE COLLECTION OF THOSE COSTS MAKING THE QUESTION OF ABILITY TO PAY PREMATURE UNTIL ATTEMPT IS MADE TO COLLECT SUCH COSTS? [CERTIFIED QUESTION].

A.

This certified question, as well as all of the arguments made by the state in its brief, have already been answered by this Court. The governing principles laid down by this Court have since become enshrined as settled law in literally hundreds of reported case decisions. The state's contentions in the instant case that new law has come along and that this Court should revisit the issue are futile and must be rejected by this Court.

The court costs at issue here were imposed under Sections 960.20, 943.25(4), and 27.3455, Florida Statutes (1987) (R 59). In Jenkins v. State, 444 So.2d 947 (Fla. 1984), this Court held that the costs authorized by Sections 960.20 and 943.25(4) could not be imposed without prior notice to the defendant that these costs would be assessed against him at the sentencing hearing and without a judicial determination that the defendant has the ability to pay. In Mays v. State, 519 So.2d 618 (Fla. 1988) this Court held that the same requirements apply to the costs authorized by Section 27.3455. Since those two decisions by this Court, an extraordinary number of opinions has been published reversing imposition of costs under all three statutes. Respondent finds quite plausible the state's claim (p. 25 of brief) that over 600 reversals based upon Jenkins are cited in Shephard's Florida Citations. Respondent would also point out that over 400 citations

to the costs issue appear in the indices to the Florida Law Weekly for just the last two and one-half years, from the 1988 Annual Index through the latest weekly index. Surely no other point of law is as well-settled in this state as the costs issue.

The state in its brief brings forth three supposed changes in the law which it urges as bases for overruling Jenkins and Mays. First, there is this Court's decision in Bull v. State, 548 So.2d 1103 (Fla. 1989). Bull, however, dealt not with costs under Sections 960.20, 943.25(4), or 27.3455, but rather with the assessment of attorney's fees for counsel appointed to indigent defendants. Furthermore, this Court in Bull addressed Jenkins and found no conflict between it and the decision reached in Bull. 548 So.2d at 1105. Plainly Jenkins does not require re-examination in light of Bull.

Second, the state urges this Court to consider three federal decisions: United States v. Pagan, 785 F.2d 378 (2d Cir. 1986); United States v. Cooper, 870 F.2d 586 (11th Cir. 1989); and United States v. Rivera-Velez, 839 F.2d 8 (1st Cir. 1988). However, Pagan, the lead case, was decided in 1986 and was therefore available when Mays, decided in 1988, was argued before this Court. Rivera-Velez and Cooper did little more than cite Pagan. Therefore, these cases present nothing new which could not have been considered by this Court in Mays. In fact, both Mays and Jenkins apply the controlling federal standards set forth in Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).

Third, the state points out the post-Mays change in Section 27.3455, eliminating the statute's denial of gain time to prisoners who have not paid their assessed costs. Mays, however, did not

turn upon the gain time forfeiture provision. It merely extended Jenkins to Section 27.3455. Indeed, the opinion noted in footnote 2 that with the elimination of the community service option in the 1985 version of Section 27.3455, there was no longer any procedural distinction between this section and Sections 960.20 and 943.25. The changes in Section 27.3455 therefore give no reason for this Court to revisit Mays.

In essence the state's position here is no different than that which this Court considered in Jenkins and Mays. The state claims that the publication of the statutes themselves meets the due process requirements of notice, while an opportunity to be heard is provided by the sentencing hearing - the state would place the burden upon the defendant to object and present evidence that he should not be assessed costs even where he is not individually notified of the assessment. The state's version of due process has already been rejected by this Court. In Mays, this Court approved Gaffney v. State, 497 So.2d 1292 (Fla. 5th DCA 1986), which reversed the costs assessment where the record failed to show that the defendant was given notice and an opportunity to object and where the court failed to make a determination that the indigent defendant had the ability to pay. If the individual record in a given case must show notice and opportunity to be heard, then the mere publication of the statutes is insufficient to meet these requirements. This Court has also previously rejected the state's attempt to place the burden to object upon the defendant. In Wood v. State, 544 So.2d 1004 (Fla. 1989), this Court held that violation of the due process requirements of Jenkins is fundamental error, requiring no contemporaneous objection for review.

The state raises the specter of a "special hearing" (p. 16 of brief) in addition to the sentencing hearing for the imposition of costs. However, no extra hearing is presently required. All that is required is notice and an opportunity to be heard meeting due process standards. There is no reason that costs cannot be assessed at the sentencing hearing as long as these requirements are met. In fact, current law requires the determination of ability to pay to be made at the time of sentencing, rather than later when payment is sought to be enforced; it is the state's view that the indigency determination may be deferred which would lead to additional burdensome hearings. In Mays this Court approved Hughes v. State, 497 So.2d 938 (Fla. 1st DCA 1986). In Hughes, the court held that indigency is to be determined at the time of sentencing and that it is error not to make the determination at that point. See also Lawton v. State, 492 So.2d 404 (Fla. 1st DCA 1986). Obviously the most efficient way to deal with the costs issue is to provide notice and the opportunity to be heard at the sentencing hearing and to make the determination of ability to pay at that time. Present law requires no more and no less. The state has presented no good reason why present law should be changed.

Indeed, to change the law on this issue at this point would probably be one of the most startling rejections of precedent in Florida legal history, in view of the literally hundreds of recent published decisions following this Court's decisions in Jenkins and Mays. The issue of a few dollars in costs might appear to be of little consequence when raised over and over again on appeal. However, the real question is why the trial courts continue to impose costs in violation of this Court's clear pronouncements on

the subject. To cease raising the issue in the face of the trial courts' persistent disregard of the law would be to simply abandon a valid legal position and succumb to an overwhelming refusal of the courts to follow the law. This Court has viewed the issue as a substantial and serious one in its decisions on it. This Court should not retreat from those decisions; such a retreat would only give the appearance that this Court was caving in to the trial courts' refusal to follow law settled by this Court. This Court's chief concern in this case must be why there continues to be a flood of litigation occasioned by the trial courts' failure to follow the clear dictates of this Court.

B.

In its opinions in this case, the Fourth District Court of Appeal addressed in relation to the costs issue the five percent surcharge on fines established by Section 960.25, Florida Statutes (1987), amounting in this case to $2,500.00. The District Court in its first opinion discussed the costs issue without specifying the costs involved in the instant case. Respondent had argued, though, that the improperly imposed costs included the five percent surcharge (R 58). On Respondent's motion for rehearing and clarification, the court held that the surcharge was not a cost as contemplated by Mays v. State, 519 So.2d 618 (Fla. 1988).[1] The question of whether the five percent surcharge is a cost falling

[1] In another case decided while rehearing was pending in the instant case, another panel of the District Court termed the surcharge "costs" and reversed its imposition under Mays and Jenkins v. State, 444 So.2d 947 (Fla. 1984). Cox v. State, 15 F.L.W. D1745 (Fla. 4th DCA July 5, 1990).

within the purview of Mays and Jenkins is therefore properly before this Court for review. Once an issue is certified to this Court, this Court then has jurisdiction over the entire case and authority to address all issues involved in it. Reed v. State, 470 So.2d 1382 (Fla. 1985); Savoie v. State, 422 So.2d 308, 310 (Fla. 1982).

The District Court on rehearing held that the five percent surcharge is a fine rather than a cost and therefore refused to reverse its imposition along with the imposition of the other statutory costs. This decision was incorrect because the surcharge is indeed a cost which must be subject to the requirements of Jenkins and Mays, discussed above under subheading A of this brief.

It appears that this Court has addressed Section 960.25 on only two occasions. In State v. Champe, 373 So.2d 874 (Fla. 1979), this Court upheld the five percent surcharge on criminal fines but struck it down as applied to civil penalties. In LaRue v. State, 397 So.2d 1136 (Fla. 1981), this Court struck down the former provision of Section 960.25 imposing the surcharge upon bail bonds. In neither case did this Court exempt the statute from the requirements of Jenkins and Mays.

This Court must now hold that the five percent surcharge is subject to the dictates of Jenkins and Mays concerning notice, opportunity to be heard, and finding of ability to pay. Section 960.25 is part of the same chapter as Section 960.20, which this Court addressed in Jenkins. This Court can look to other sections of a statutory chapter in order to determine the intent and meaning of the specific provisions of the chapter under consideration. Davies v. Bossert, 449 So.2d 418, 420 (Fla. 3d DCA 1984). Insofar as possible statutes must be construed in harmony with one another,

to avoid conflict between them, and not in isolation from other statutes on the same subject. City of Boca Raton v. Gidman, 440 So.2d 1277, 1282 (Fla. 1983); Guarantee Trust Life Insurance Company v. Fundora, 343 So.2d 71 (Fla. 3d DCA 1977); Panama City Airport Board v. Laird, 90 So.2d 616 (Fla. 1956). To exempt Section 960.25 from the requirements placed upon Section 960.20 by Jenkins would place the two sections in conflict with one another.

In addition, the proceeds of the surcharge, like the proceeds of Section 960.20, go into the Crimes Compensation Trust Fund. Section 960.21, Florida Statutes (1987). In both Champe and LaRue the destination of the funds was crucial to the decision. Champe overturned the surcharge on civil penalties because the proceeds went to victims of crime. LaRue overturned the surcharge on bail bonds because the proceeds went to fund the Crimes Compensation Commission rather than the administration of the bail bonding process. Both the surcharge and costs involved in the instant case are destined for the same purposes and are collected in the same manner. Both therefore must be subject to the same constitutional limitations in their imposition.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court to affirm the decision of the Fourth District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to James W. Rogers, Bureau Chief, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 this 21st day of August, 1990.

Counsel for Respondent