IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,165

3d DCA Case No. 89-2284

THE STATE OF FLORIDA,

Petitioner,

vs.

DANIEL LAVERNE VAMPER,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF PETITIONER

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INTRODUCTION

This is an appeal from a question certified, by the Third District Court of Appeal, to be of great public importance. The symbols "R" and "T" will be used respectively to refer to the record on appeal and the transcript of proceedings.

STATEMENT OF THE CASE

A single-count information, charging the Respondent Vamper with carrying a concealed firearm, was filed on May 19, 1989. (R. 1-3). At arraignment, that same day, Vamper was represented by the Public Defender's Office and entered a plea of nolo contendere to the charge. The Honorable Philip Davis, who was substituting for the Honorable Martin Kahn, withheld adjudication, gave credit for time served and imposed $225 in costs. (R. 6-7, T. 3-6). Following a motion by Vamper's attorney, Judge Davis ordered the Metro Dade Police Department to return the forty-six hundred dollars ($4,600) confiscated during the arrest. (R. 5, T. 6).

On June 22, 1989, the Honorable Martin Kahn issued a Rule to Show Cause to the Metro Dade Police Department to show why property had not been returned to Vamper. (R. 30, T. 10-11). On July 6, 1989, Vamper's attorney asked that the hearing on the Rule to Show Cause be postponed to allow the ninety day period for initiation of forfeiture proceedings to expire. (T. 17). The attorney also requested that the amount in the Rule to Show Cause

be amended to two thousand, four hundred, eighty-five dollars (2,485). (T. 19). Judge Kahn stated that he was going to enter an order putting a lien on the funds to recover for the public defender's costs and continued the hearing until August 2, 1989. (T. 18-19).

A Final Judgment Assessing Attorney's Fees and Costs was entered by Judge Kahn on July 13, 1989. (R. 19-20). The judgment ordered fifteen hundred dollars ($1,500) deducted from Vamper's money held by the police department, as reasonable attorney's fee. A motion attacking the Particulars of Assessed Attorney's Fees was filed by Vamper's attorney on July 27, 1989. (R. 8-18). The motion was heard and denied by Judge Kahn on August 2, 1989. (T. 24-29). An Order for Return of Property, for the balance of nine hundred, eighty-five dollars ($985), was entered by the trial court. (R. 22).

On appeal in the District Court of Appeal of Florida Third District, Vamper raised the following arguments:

I

> The trial court erred in imposing a lien on the defendant's property in the amount of $1,500 for attorney's fees and costs.

II

> The trial court erred in assessing costs against the defendant pursuant to Sections 27.3455, Florida Statutes (1988), 960.20, Florida Statutes (1987) and 943.25, Florida Statutes

(1988), without prior notice or an opportunity to be heard.

The State of Florida conceded error on the first issue and the Third District Court reversed and remanded for a new hearing on the amount of attorney's fees to be assessed.

With respect to the second issue, the Third District Court certified the following question of great public importance:

> WHETHER, SUBSEQUENT TO THE EFFECTIVE DATE OF CHAPTER 86-154, LAWS OF FLORIDA, INABILITY TO PAY IS A DEFENSE TO THE ASSESSMENT (BUT NOT ENFORCEMENT) OF COSTS AGAINST A CRIMINAL DEFENDANT?
>
> (R. 31-36).

POINT ON APPEAL

WHETHER, SUBSEQUENT TO THE EFFECTIVE DATE OF CHAPTER 86-154, LAWS OF FLORIDA, INABILITY TO PAY IS A DEFENSE TO THE ASSESSMENT (BUT NOT ENFORCEMENT) OF COSTS AGAINST A CRIMINAL DEFENDANT?

SUMMARY OF THE ARGUMENT

In light of federal appellate court decisions regarding the assessment of costs against indigent defendants, Petitioner respectfully submits that this issue should be reevaluated. Due process considerations do not come into play until the government seeks to enforce collection of the assessments at a time when the defendant is unable through no fault of his own to comply. Moreover, the trial court has a mandatory duty to asses the costs as the legislative use of the word "shall" indicates that the costs must be imposed. Furthermore, Chapter 86-154, Laws of Florida, repealed the automatic loss of gain time, thus the rationale of Mays v. State is no longer applicable to sentences imposed since 1987.

ARGUMENT

SUBSEQUENT TO THE EFFECTIVE DATE OF CHAPTER 86-154, LAWS OF FLORIDA, INABILITY TO PAY IS NOT A DEFENSE TO THE ASSESSMENT OF COSTS AGAINST A CRIMINAL DEFENDANT.

Petitioner is well aware of the many cases that have been reversed on appeal where costs were imposed by the trial court against indigent defendants without notice and opportunity to be heard in the defendant's ability to pay those costs. In this appeal, the State respectfully submits that those decisions require a degree of reevaluation in light of recent developments in the federal appellate courts regarding the assessment of costs against indigent defendants.

In this case, the respondent appealed the imposition of costs which fell under three statutory sections, §27.3455, Fla. Stat. (Supp. 1988), §943.25, Fla. Stat. (1987) and §960.20, Fla. Stat. (1987).

Section 27.3455, Fla. Stat. (Supp. 1988), provides:

> When any person pleads guilty or nolo contendere to, or is found guilty of, any felony, misdemeanor, or criminal traffic offense under the laws of this state or the violation of any municipal or county ordinance which adopts by reference any misdemeanor under state law, there shall be imposed as a cost in the case, in addition to any other cost required to

be imposed by law, a sum in accordance with the following schedule:

(a) Felonies $200

(b) Misdemeanors.....$50

(c) Criminal traffic.....$50

(emphasis supplied).

Section 943.25(3), Fla. Stat. (1987), provides:

> All courts created by Art. V. of the State Constitution shall, in addition to any fine or other penalty, assess $3 as a court cost against every person convicted for violation of a state penal or criminal statute or convicted for violation of a municipal or county ordinance. However, such assessment shall not be imposed in addition to civil penalties provided in §318.18. Any person whose adjudication is withheld pursuant to the provisions of §318.14(9) or §318.14(10) shall also be assessed such cost.
>
> (emphasis supplied).

Section 960.20, Fla. Stat. (1987), provides:

> When any person pleads guilty or nolo contendere to, or is convicted of any felony, misdemeanor, or criminal traffic offense under the laws of this State or the violation of any municipal or county ordinance which adopts by reference any misdemeanor under state law, there shall be imposed as an additional cost in the case, in addition and prior to any other costs required to be imposed by

> law, the sum of $20. Any person whose adjudication is withheld pursuant to the provisions of §318.14(10) shall also be assessed such cost.
>
> (emphasis supplied).

In spite of Florida cases reversing court costs assessments, Petitioner requests this Court to reevaluate the issue in light of the recent decision of the United States Court of Appeals in the case of United States v. Cooper, 870 F.2d 586 (11th Cir. 1989). In Cooper, the court held:

> Appellant is serving three concurrent federal prison sentences, having pled guilty to three counts alleging firearm offenses. In addition to imposing these prison sentences, the district court required appellant to pay a mandatory fifty dollar assessment as prescribed by 18 U.S.C. § 3013 (a)(2)(B)(1982) on each count. Appellant contends, in this 28 U.S.C. §2255 (1982) proceeding, that the assessments are unconstitutional as applied to him, because he is indigent. We disagree, adopting the reasoning of the First and Second Circuits in *United States v. Rivera-Valez*, 839 F.2d 8 (1st Cir. 1988); United *States v. Pagan*, 785 F.2d 278 (2d Cir.), *cert. denied*, 479 U.S. 1017, 107 S.Ct. 667, 93 L.Ed.2d 719 (1986).

The Rivera-Velez case, cited by the Cooper court, held:

> We agree with the Second Circuit. The mere existence during indigency of an outstanding penal liability does not violate a defendant's rights. Constitutional considerations will come into play "only if the

> government seeks to enforce collection of the assessments 'at a time when [the defendant is] unable through no fault of his own to comply.'" Id. at 381, quoting *United States v. Hutchins*, 757 F.2d 11, 14-15 (2d Cir. 1985). See also, *United States v. Atkinson*, 788 F.2d 900, 903-04 (2d Cir. 1986). So long as Rivera-Valdez remains indigent, he has ample protections against being sanctioned improperly for nonpayment, and, of course, his financial circumstances could improve over time.

United States v. Rivera-Valez, 839 F.2d 8 (1st Cir. 1988).

The findings of these federal circuit courts are further bolstered by the case of United States v. Pagan, 785 F.2d 378 (2d Cir.), cert. denied, 479 U.S. 1017, 107 S.Ct. 667, 93 L.Ed.2d 719 (1986), upon which they rely. A fact critical to the instant case, as was the case in Pagan, is that the trial court had a mandatory duty to make this assessment.

In Pagan, 785 F.2d at 381, the Second Circuit rejected the argument that application of these mandatory assessments against indigent defendants violates due process. In rejecting this claim, the Second Circuit noted that Pagan's complaint was not yet ripe:

> Thus, the imposition of assessments on an indigent, per se, does not offend the Constitution. Constitutional principles will be implicated here only if the government seeks to force collection of the assessments 'at time when [Pagan is] unable through no fault of his own to comply.

Id. The Second Circuit concluded its analysis in Pagan by noting "it is at the point of enforced collection of the principal or additional amounts, where an indigent may be faced with the alternatives of payment or imprisonment, that he may assert a constitutional objection on the grounds of his indigency." Id. at 382. Because the type of financial assessment and the constitutional claim raised in this case mirrors the situation of these federal cases, Petitioner suggests that a reevaluation of current Florida law is necessary.

Florida courts repeatedly refer to two decisions to justify reversal of court costs assessments. Jenkins v. State, 444 So.2d 947 (Fla. 1984), and Mays v. State, 519 So.2d 618 (Fla. 1988). Petitioner contends that adoption of the federal standard would be consistent with Jenkins in that the holding in that case is simply that "before the provision for repayment is enforced, a judicial determination must be made that the defendant had the ability to pay," and that due process requires "adequate notice" to the indigent defendant that the county is seeking recovery of those costs. Jenkins v. State, 444 So.2d at 950. Thus, the requirement of Jenkins that there must be an adequate notice with an opportunity to object prior to assessment is truly of little value given the mandatory nature of the amount to be assessed.

The Legislature's selection of the word "shall" in conjunction with the assessment provision connotes a mandatory duty on the part of the trial court to impose the costs.

Likewise, Mays v. State, 519 So.2d 618, focuses on the determination of indigency vis-a-vis assessment of costs pursuant to §27.3455. However, the statute at that time forbade a defendant from accruing gain time unless these particular costs were paid. Significantly, Chapter 86-154, §1, Laws of Florida (1986), amended §27.3455 and removed the "punishment" provision as it pertained to nonpayment of these mandatory costs. There is no longer an automatic loss of gain time associated with failure to pay costs and the underlying rationale of Mays is no longer applicable to sentences imposed since 1987. Thus, subsequent to the effective date of Chapter 86-154, Laws of Florida, the question of ability to pay would only come into play at the enforcement, rather than assessment, stage.

CONCLUSION

Based upon the foregoing arguments and citations of authority, this Court should answer the certified question in the negative, that inability to pay is not a defense to the assessment of costs against a criminal defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF APPELLANT** was furnished by mail to **VALERIE JONAS**, Assistant Public Defender, 1351 N.W. 12th Street, Miami Florida 33125 on this 30th day of August, 1990

ANITA J. GAY
Assistant Attorney General

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