IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,990

THE STATE OF FLORIDA,

Petitioner,

vs.

DARNELL HEADINGS,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

VALERIE JONAS
Assistant Public Defender
Florida Bar No. 0616079

Counsel for Petitioner

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS.....ii

SUMMARY OF ARGUMENT.....1

ARGUMENT.....3

CONCLUSION.....13

CERTIFICATE OF SERVICE.....14

TABLE OF CITATIONS

PAGE

Barker v. State
518 So.2d 450 (Fla. 2d DCA 1988).....4

Brown v. State
484 So.2d 1324 (Fla. 3d DCA), review denied,
492 So.2d 1330 (Fla. 1986).....10

Bull v. State
548 So.2d 1103 (Fla. 1989).....8

Forman v. Florida Land Holding Corporation
102 So.2d 596 (Fla. 1958).....13

Fuller v. Oregon
417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).....3, 4

Hanks v. Wainwright
360 So.2d 783 (Fla. 1st DCA 1978).....7

Jenkins v. State
444 So.2d 947 (Fla. 1984).....3

Lee v. State
422 So.2d 928 (Fla. 3d DCA),
review denied, 431 So.2d 989 (Fla. 1983).....10

Mays v. State
519 So.2d 618 (Fla. 1988).....4

Morgan v. Cook
344 So.2d 577 (Fla. 1977).....7

Mullane v. Central Hanover Bank of Trust
339 U.S. 306, 70 S.Ct. 652 (1950).....5

Rankin v. Wainwright
351 F.Supp. 1306 (M.D.Fla. 1972).....7

Shipley v. State
528 So.2d 902 (Fla. 1988).....4

State v. Dwyer
332 So.2d 333 (Fla. 1976).....13

State v. Glosson
462 So.2d 1082 (Fla. 1985).....10

United States v. Cooper
870 F.2d 586 (11th Cir. 1989).....9

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).....9

United States v. Rivera-Velez
839 F.2d 8 (1st Cir. 1988).....9

Wood v. State
544 So.2d 1004 (Fla. 1989).....4

OTHER AUTHORITIES

UNITED STATES CONSTITUTION

Fourteenth Amendment.....10

FLORIDA STATUTES

§ 943.25(4) (1990).....5
§ 960.20 (1990).....5
§ 27.3455 (1990).....4, 5
§ 27.56 (1990).....8, 9
§ 944.28(1) (1973) 7

FLORIDA RULES OF CRIMINAL PROCEDURE (1980)

Rule 3.720.....6, 7, 9

Chapter 86-154, Laws of Florida.....5

Black's Law Dictionary 1577 (rev. 4th ed. 1968).....13

Tribe American Constitutional Law, second ed. (1988).....11

IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,990

THE STATE OF FLORIDA,

Petitioner,

vs.

DARNELL HEADINGS,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT

SUMMARY OF ARGUMENT

The state argues that this Court should recede from the requirement of Jenkins v. State, 444 So.2d 947 (Fla. 1984), of notice and a hearing, prior to assessment of court costs, because (1) publication of the cost statutes provides all the notice due; and (2) the sentencing hearing, pursuant to Rule 3. 720, Florida Rules of Criminal Procedure (1990), provides all the hearing due, but that because the imposition of costs is mandatory, the defendant need not be heard on this issue at that time.

Mr. Headings responds that: (1) publication of the cost statutes does not constitute adequate notice sufficient to comport with procedural due process requirements under the state and federal constitutions; and (2) notice provided at the

sentencing hearing provided by Rule 3.720, Florida Rules of Criminal Procedure, with an opportunity to be heard at that time regarding imposition of costs, would satisfy the requirements of procedural due process, and the mandatory character of the cost statutes does not obviate the need to determine in accordance with Jenkins, an indigent defendant's foreseeable ability to pay costs in the future.

ARGUMENT

In Jenkins v. State, 444 So.2d 947 (Fla. 1984), this Court held that court costs, pursuant to §§ 943.25(4) and 960.20, Florida Statutes (1989), could be assessed against a convicted indigent criminal defendant, so long as the defendant received procedural due process, as set forth in Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). In Fuller, the United States Supreme Court upheld a legislative scheme for recoupment of attorneys fees and costs, against an indigent criminal defendant, because the obligation of repayment was conditional only. The obligation could not be imposed, at sentencing, if "there is no likelihood that a defendant's indigency will end." Nor could the obligation subsequently be enforced against one who could not meet it without substantial hardship. The legislation was "tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce the obligation only against those who actually become able to meet it without hardship." 94 S.Ct. at 2125. The scheme thus contemplated two hearings: one at the time of assessment, to determine foreseeable ability; and one at the time of enforcement, to determine actual ability, without undue hardship.

Jenkins adopted the provision set forth in Fuller for a hearing prior to the assessment of costs, to determine "foreseeable ability"; and a hearing prior to enforcement, to determine actual ability without undue hardship:

> "The state must . . . provide adequate notice of such assessment to the defendant with full opportunity to object to the assessment of those costs. In addition, enforcement of the

> collection of those costs must occur only after a judicial finding that the indigent defendant has the ability to pay in accordance with the principle enunciated in Fuller v. Oregon. 444 So.2d at 950.

This Court extended the requirement of notice and a hearing, prior to assessment and prior to enforcement, to costs imposed pursuant to § 27.3455, Florida Statutes (1990). See Mays v. State, 519 So.2d 618 (Fla. 1988); Shipley v. State, 528 So.2d 902 (Fla. 1988); Wood v. State, 544 So.2d 1004 (Fla. 1989). This Court has held that because notice, and a judicial determination of foreseeable ability go "to the very heart of the requirements of the due process clause of our state and federal constitutions[,] [t]he denial of these basic constitutional rights constitutes fundamental error." See Wood, 544 So.2d at 1006 (construing Jenkins as impliedly holding such due process violations are fundamental error); and Shipley, 528 So.2d at 903. In quashing the decision of the District Court of Appeal in Barker v. State, 518 So.2d 450 (Fla. 2d DCA 1988), which required a contemporaneous objection to a Jenkins violation, because costs would assertedly routinely be reimposed upon remand, this Court stated:

> Were this true in every case, there would be no need for notice and hearings. Unfortunately, costs are sometimes incorrectly assessed against defendants. It is the rights of these persons whom the due process clause seeks to protect, and it is fundamental error for a court to fail to protect those rights. Without adequate notice and a meaningful hearing, a court has no way of knowing who should pay costs and who should not. Without adequate notice and a meaningful hearing, the requirements of due process have not been met.

Wood, 544 So.2d at 1006.

This Court's consistent requirement of notice and a hearing prior to assessment was not therefore a response to any self-enforcing characteristic of the cost statutes to which its holdings were addressed: the cost statutes implicated in Jenkins, the progenitor of Wood, contain no self-enforcing features. The requirement of pre-assessment notice in Jenkins was designed to ensure specifically against the requirement of repayment from one whose indigency will not, in all likelihood, cease; and to ensure generally against an inaccurate or erroneous assessment for any other reason. Therefore, the question certified to this court:

> 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?

must be answered in the affirmative.

(1) Publication of the cost statutes is not a constitutional substitute for actual notice of the imposition of court costs.

The state maintains that the mere publication of §§ 943.25(4), 960.20 and 27.3455, Florida Statutes (1990) constitutes reasonable notice, under the due process provisions of the state and federal constitutions, that costs will be imposed upon conviction. (Petitioner's Brief, pp. 6-9). It is apodictic that mere publication of a pending deprivation of life, liberty or property does not comport with the procedural due process requirement of notice, where the provision of actual notice is reasonably possible or practicable. Mullane v. Central Hanover Bank of Trust, 339 U.S. 306, 70 S.Ct. 652 (1950). Because costs are ordinarily imposed at the time of sentencing, actual notice can reasonably be provided to the defendant at that

time. There is no cognizable state interest to be served by a trial court's refusal to provide actual notice to a defendant who is then in its presence for the purpose of sentencing. Publication of the cost statutes is not a constitutional substitute for the provision of actual notice, under these circumstances.

(2) The sentencing hearing provided pursuant to Rule 3.720, Florida Rules of Criminal Procedure (1980) is an appropriate forum for hearing prior to the imposition of court costs, so long as actual notice and a meaningful opportunity to be heard are then provided.

The state further contends that the hearing provided pursuant to Rule 3.720, Florida Rules of Criminal Procedure (1990), suffices to provide the indigent defendant a meaningful opportunity to be heard regarding the imposition of costs. Respondent agrees. So long as the indigent defendant is provided notice, at that time, and a meaningful opportunity to be heard, upon inquiry at that time, regarding his foreseeable ability to discharge the assessment, the sentencing hearing is the appropriate forum in which to make this determination.

However, as the state concedes, trial courts often impose costs at sentencing merely by checking the appropriate box on the judgment and sentence forms, and without then notifying the defendant of its intent to do so, or inquiring into his foreseeable ability to discharge this obligation. (Petitioner's Brief, pp. 13-14). The state defends this practice, by asserting that the defendant is not in any case entitled to be heard on the issue, because the imposition is mandated by the cost statutes.

(Petitioner's Brief, pp. 12-13, 15-16). But the fact that a penalty is mandatory does not obviate the need for a hearing prior to imposition.[1] Rule 3.720, Florida Rules of Criminal Procedure (1990) requires that the trial court inquire whether legal cause exists why sentence should not be imposed.[2] This requirement applies to both mandatory and discretionary sentences. Jenkins, in relying on Fuller, holds that where an indigent defendant lacks the foreseeable ability to discharge the assessment of court costs, the obligation to make payment in the future should not be imposed. At the point that determination is made, "legal cause" exists for failing to impose court costs.

---

1 The state has relied upon Morgan v. Cook, 344 So.2d 577 (Fla. 1977) for the proposition that where a penalty is mandatory, it may be imposed automatically, without notice or an opportunity to be heard. (Petitioner's Brief, p. 16). In Morgan, this Court held constitutional Section 944.28(1), Florida Statutes (1973), which provided for the forfeiture of earned and extra gain time, without notice and a hearing, upon a prisoner's escape, "[f]or reasons stated in Rankin v. Wainwright, 351 F.Supp. 1306 (M.D.Fla. 1972)." 344 So.2d at 578. Rankin does not in fact support this result. Rankin held only that where a prisoner had been acquitted of escape, § 944.28 did not apply to effect a forfeiture of his gain time. Rankin did not purport to address the question of that statute's facial validity. See Hanks v. Wainwright, 360 So.2d 783 (Fla. 1st DCA 1978)(decrying the absence of rationale for the holding in Morgan).

2 The defendant may show as legal cause that:

> "(2) That he has been pardoned of the offense for which he is about to be sentenced;
>
> (3) That he is not the same person against whom the verdict or finding of the court or judgment was rendered;
>
> (4) If the defendant is a woman and sentence of death is to be pronounced, that she is pregnant;

Rule 3.720(a)(1)-(4).

The state submits that this court's opinion in Bull v. State, 548 So.2d 1103 (Fla. 1989) supports its position that no hearing is required prior to assessment of court costs. Bull held that no hearing is required prior to assessment of attorneys fees and related costs, pursuant to § 27.56, Florida Statutes (1990):

> "Petitioner argues that rule 3.720(d)(1) is deficient in that he must be given an opportunity to challenge the imposition of *any* lien for the services of an appointed attorney. We disagree. Section 27.56 provides for the assessment of fees and costs as a matter of law. It is only the amount which is potentially at issue".

In fact, Rule 3.720 expressly provides for notice prior to assessment of fees:

> "(d)(1) If the accused was represented by a public defender or special assistant public defender, the court shall notify the accused of the imposition of a lien pursuant to section 27.56, Florida Statutes (1979)".

Rule 3.720(d)(1). Significantly, unlike the cost statutes at issue here, the assessment of fees, pursuant to § 27.56, is discretionary, not mandatory:

> "(1)(a) The court having jurisdiction over any defendant who has been determined to be guilty of a criminal act . . . <u>may</u> assess attorney's fees and costs against the defendant."

§27.56(1)(a). It may be that the requirement of a determination of foreseeable ability, pursuant to Fuller, upon which Bull expressly relies, is intended to constrain the court's discretion in this regard. It may be that at the time of hearing upon the

amount of fees to be assessed, pursuant to § 27.56(7)[3] and Rule 3.720(d)(1)[4], lack of foreseeable ability is a defense to the imposition of fees in any amount. In any event, Bull does not purport to address the question whether a hearing is required prior to assessment of court costs, noting only that its holding does not conflict with Jenkins. 548 So.2d at 1105.

Finally, the state relies upon 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); United States v. Rivera-Velez, 839 F.2d 8 (1st Cir. 1988); and United States v. Cooper, 870 F.2d 586 (11th Cir. 1989); for the proposition that notice and a hearing are required only prior to enforcement, but not prior to assessment of costs pursuant to a mandatory cost provision, such as those

---

3 (7) The court having jurisdiction of the defendant-recipient may, at such stage of the proceedings as the court may deem appropriate, determine the value of the services of the public defender, special assistant public defender, or appointed private legal counsel and costs, at which time the defendant-recipient or parent, after adequate notice thereof, shall have opportunity to be heard and offer objection to the determination, and to be represented by counsel, with due opportunity to exercise and be accorded the procedures and rights provided in the laws and court rules pertaining to civil cases at law.

§ 27.56(7), Florida Statutes (1990).

4 (d)(1) If the accused was represented by a public defender or special assistant public defender, the court shall notify the accused of the imposition of a lien pursuant to section 27.56, Florida Statutes (1979). The amount of the lien shall be given and a judgment entered in that amount against the accused. Notice of the accused's right to a hearing to contest the amount of the lien shall be given at the time of sentence.

Rule 3.720(d)(1), Florida Rules of Criminal Procedure (1990).

involved below. Needless to say, the legislature cannot, by mandating the assessment or enforcement of court costs, or the imposition of any penalty, extinguish a defendant's right to procedural due process. In any case, Pagan, which is the basis for Cooper and Rivera-Velez, holds only that the substantive due process and equal protection provisions of the federal constitution do not forbid the assessment of court costs against an indigent defendant.[5] Fuller says the same thing, with the proviso that the defendant's rights to procedural due process must be met. Neither Pagan nor its progeny purport to abolish, nor even address the procedural due process requirements established in Fuller and Jenkins, as well as in Wood, Mays and Shipley, of notice and a hearing prior to the assessment and prior to the enforcement of court costs, pursuant to §§ 943.25, 960.20, 27.3455, Florida Statutes.

Two values have been identified in connection with the procedural due process requirement of notice and a hearing: the instrumental value of a hearing in assuring that the laws are accurately and consistently applied; and the intrinsic value of participation in the process, from persons affected by its operation. This latter value has been described as follows:

> [T]here is *intrinsic* value in the due process

---

[5] It is important to note that the holding in Jenkins explicitly rests not only on the United States Constitution, Amendments 5 and 14, but also on Article I, § 9 of the state constitution, which is more expansive, and more protective of the criminal defendant than is the Fourteenth Amendment to the United States Constitution. See State v. Glosson, 462 So.2d 1082 (Fla. 1985); Brown v. State, 484 So.2d 1324 (Fla. 3d DCA), review denied, 492 So.2d 1330 (Fla. 1986); Lee v. State, 422 So.2d 928 (Fla. 3d DCA), review denied, 431 So.2d 989 (Fla. 1983).

> right to be heard, since it grants to the individuals or groups against whom government decisions operate the chance to participate in the processes by which those decisions are made, an opportunity that expresses their dignity as persons. From this perspective, the hearing may be considered both as a "mode of politics," and as an expression of the rule of law, regarded here as the antithesis of power wielded without accountability to those on whom it focuses. Whatever its outcome, such a hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her, and perhaps the separate satisfaction of receiving an explanation of why the decision is being made in a certain way. Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome [the instrumental valve]; these rights to interchange express the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one. . . . At stake here is not just the much-acclaimed *appearance* of justice but, from a perspective that treats process as intrinsically significant, the very *essence* of justice.

Tribe, American Constitutional Law, second ed. (1988).

The requirement that the trial court notify the indigent defendant of its intent to assess costs, and inquire into his foreseeable ability, at the time of sentencing, instead of merely checking boxes on forms, serves both values secured by the procedural due process clause: the instrumental value in assuring that costs are correctly imposed against one with the foreseeable ability to pay them; and the intrinsic value in recognizing the dignity of indigent persons and affording them the opportunity for human interaction in a process which affects them. It cannot seriously be contended that the requirement that the trial court provide notice and a hearing on the imposition of court costs, to

an indigent defendant who is then before it, will constitute a significant burden upon the criminal justice system. The fact is that many indigent defendants will never become solvent, but will instead suffer all their lives from the stigma, deprivation and despair of poverty. A determination at sentencing that a defendant's indigency will never end - a poignant probability in many cases - would avoid futile efforts at future enforcement, to which inability to pay would concededly be a defense.

CONCLUSION

The rule of stare decisis, that is, "[t]o abide by, or adhere to, decided cases", Black's Law Dictionary 1577 (rev. 4th ed. 1968), "is a fundamental principle of Florida law." State v. Dwyer, 332 So.2d 333, 335 (Fla. 1976). While "its application is not obligatory in any particular case, it is considered appropriate in most instances in order to produce consistency in the application of legal principles unless for some compelling reason it becomes appropriate to recede therefrom." Forman v. Florida Land Holding Corporation, 102 So.2d 596, 598 (Fla. 1958).

No precedents or arguments supplied by the State support departure from this Court's consistent and unambiguous command that a defendant receive notice and a hearing prior to the assessment and the enforcement of court costs. The state has not argued, nor could it, that the Jenkins requirement of pre-assessment notice has generated any significant hardship or injustice. This court should therefore not recede from the requirement of Jenkins and its progeny.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

BY: _____
VALERIE JONAS
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, IVY R. GINSBERG, 401 N.W. Second Avenue, Suite N-921, Miami, Florida 33128 this 28th day of February, 1990.

VALERIE JONAS
Assistant Public Defender

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1990

DARNELL HEADINGS, **

Appellant, **

vs. ** CASE NO. 89-2815

THE STATE OF FLORIDA, **

Appellee. **

Opinion filed October 23, 1990.

An Appeal from the Circuit Court for Dade County, Phillip W. Knight, Judge.

Bennett H. Brummer, Public Defender, and C. Robert Mathis, Special Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General, and Ivy R. Ginsberg, Assistant Attorney General, for appellee.

Before NESBITT, JORGENSON, and GERSTEN, JJ.

PER CURIAM.

Appellant, Darnell Headings, appeals his conviction for first degree arson. Appellant also appeals the assessment of costs against him. We affirm in part, and reverse in part.

Appellant's conviction emanates from a fire he set in his jail cell. Prior to trial, appellant was psychiatrically evaluated and found to have been sane at the time of the offense, and, competent to stand trial. Nevertheless, at trial, appellant sought to introduce a defense of insanity.

Appellee, the State, filed a motion in limine seeking to exclude all evidence relating to insanity. The trial court granted the State's motion based on appellant's failure to comply with rule 3.216, Florida Rules of Criminal Procedure, which requires prior notice to the State.

Appellant contends that the trial court erred in granting the motion in limine. Secondarily, appellant contends that the trial court erred in assessing costs against appellant without notice or an opportunity to be heard regarding his insolvency.

The State asserts that the trial court properly excluded all evidence relating to appellant's alleged insanity because: (1) appellant had failed to comply with rule 3.216, Florida Rules of Criminal Procedure, requiring notice of intent to rely on an insanity defense; and (2) the evidence was insufficient to support such a defense. The State concedes that the trial court erred in assessing costs without affording appellant an opportunity to be heard.

Rule 3.216, Florida Rules of Criminal Procedure states in relevant part:

> (b) when in any criminal case it shall be the intention of the defendant to rely on the defense of insanity ... no evidence offered by the defendant for the purpose of establishing such defense shall be admitted ... unless advance notice in writing ... shall have been given ....

Written notice is to be provided no later than fifteen days after the arraignment or the filing of a written plea.

The rule further provides that "[u]pon good cause shown for the omission of the notice," the court has the discretion to "grant the defendant 10 days to comply with such notice requirement." See, e.g., Jones v. State, 362 So.2d 1334 (Fla. 1978).

We find that no good cause was shown for the omission of the notice. The trial court, therefore, did not abuse its discretion in granting the State's motion in limine. See Fla. R. Crim. P. 3.216; see also Jones v. State, 362 So.2d at 1334; Coney v. State, 348 So.2d 672 (Fla. 3d DCA 1977).

The only suggestion of insanity in this case was appellant's proffered testimony of a corrections officer who would have testified that after the fire, appellant was hysterical, irrational, and uncommunicative. We agree with the State that the evidence sought to be admitted was insufficient to suggest an insanity defense. See Yohn v. State, 476 So.2d 123 (Fla. 1985).

Court costs were assessed against appellant without notice and an opportunity to be heard on his ability to pay. In Vamper v. State, 562 So.2d 816 (Fla. 3d DCA 1990), this court addressed this issue, holding that inability to pay is a defense to the assessment of costs. This court certified the question in Vamper as one of great public importance.

The question certified in Vamper is presently pending before the Florida Supreme Court. Vamper v. State, No. 76,165.

Accordingly, we again certify the question here, as was done in Vamper, as one of great public importance and reverse the assessment of costs. We find no merit in appellant's other contention and therefore affirm his conviction.

Affirmed in part, reversed in part.