O.A. 3-293 017 w/app

IN THE SUPREME COURT OF FLORIDA

11-13

BOARD OF COUNTY COMMISSIONERS,
PINELLAS COUNTY, FLORIDA,

Petitioner,

vs.

Case No. 79,839
DCA Case No. 91-01332

TOM F. SAWYER,

Respondent.

_____/

PETITIONER'S INITIAL BRIEF

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original

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PRELIMINARY STATEMENT

In this brief, the Petitioner, Board of County Commissioners Pinellas County will be referred to as the "County". The Respondent will be referred to as an "acquitted or discharged defendant".

Citations to the Appendix will be made by the letter "A" and the appropriate page number.

STATEMENT OF THE CASE AND FACTS

This is an appeal from an Order of the Second District Court of Appeal holding that investigative costs are taxable costs within the meaning of Section 939.06, Florida Statutes (1989).

The Second District reversed the trial court ruling which denied Mr. Sawyer, who is a non-indigent discharged criminal defendant, the right of reimbursement from Pinellas County for the investigative costs he incurred in his defense. (A. 2). The Second District resolved the case under statutory interpretation and certified that its holding was in conflict with decisions of the Third and Fifth District Courts of Appeal. (A. 4) Pinellas County invoked the discretionary jurisdiction of this Court and this Court accepted jurisdiction on September 23, 1992. (A. 10)

SUMMARY OF THE ARGUMENT

The sole issue before the court is whether the Second District properly found that an acquitted defendant's investigative costs are taxable costs subject to reimbursement by the County under Section 939.06, Florida Statutes (1989). Earlier decisions by the Third District and the Fifth District have held that investigative costs are not taxable costs.

The County asserts that the Second District fails to properly apply the concept of mutuality to the issue of reimbursement of investigative costs because the court failed to distinguish the County with its obligations and rights from city and state law enforcement agencies' obligations and rights. Under the Second District's reasoning, the result is inequitable and illogical because the County is liable for reimbursement based on the non-mutual investigative costs of non-county law enforcement agencies.

The Second District exceeded the reasonable scope of statutory authority by including investigative costs within the meaning of taxable costs. As a result, the County is burdened with incalculable and inequitable expenses which strain the already limited financial resources of the County.

ARGUMENT

I. THE CONCEPT OF MUTUALITY RELIED UPON BY THE SECOND DISTRICT FAILS WHEN PROPERLY APPLIED TO THE REIMBURSEMENT OF INVESTIGATIVE COSTS

In the instant case, the Second District relied upon the concept of mutuality in its analysis and conclusion that investigative costs are taxable costs under Section 939.06, Florida Statutes (1989). However, investigative costs are not mutual between the County and an acquitted defendant.

Section 939.06 authorizes the reimbursement of taxable costs to a non-indigent defendant who has been acquitted or discharged of criminal charges. Section 939.01 provides city, county or state law enforcement agencies with the right to request reimbursement of their investigative costs from a convicted defendant.

In the instant case, the Second District applied the mutuality concept in interpreting Section 939.06 to include investigative costs within the meaning of taxable costs. (A. 3). The Second District relied on the mutuality rationale in Powell v. State, 314 So.2d 788 (Fla. 2d DCA 1975). "Since under § 914.06 the county could tax the reasonable compensation of its expert witnesses as costs against a convicted defendant, we think that an acquitted, non-indigent defendant may do likewise against the county." Id. at 789.

It is critical to note that the mutuality concept enunciated by the court in Powell does not exist in the instant case. In this case, the analysis must be applied to the County vis-a-vis a discharged defendant with respect to city, county and state law

enforcement agencies' investigative costs.

The Second District failed to distinguish between the costs borne by the County on behalf of the state attorney and indigent defendant and those investigative costs incurred by city, county and/or state law enforcement agencies, which costs are borne by the appropriate city, county or state budgetary authority. The County is neither statutorily liable for nor legally able to tax as costs the investigative expenses of city or state law enforcement agencies under Section 939.01.

Statutory authority defines taxable costs as the costs of criminal proceedings which the County is mandated to pay on behalf of the state attorney or an indigent defendant. §§27.34(2); 27.56; 914.06, 924.17, Fla. Stat. (1991). The costs of criminal proceedings which the County is mandated to pay are, by law, subsequently taxed against a convicted defendant as reimbursement to the County. §§27.3455(1); 27.3455(4); 37.3455(6)(a); 914.06; 939.01, Fla. Stat. (1991). These same costs are taxed against the County when borne by a non-indigent defendant who is acquitted or discharged. §§939.06; 939.07, Fla. Stat. (1991).

Similar to the statutory authority, Florida courts apply the concept of mutuality in determining taxable costs. For example, in Wood v. City of Jacksonville, 248 So.2d 176 (Fla. 1st DCA 1971), the First District held that the cost of an appellate trial transcript was a taxable cost. The court noted that the appellate rules required the County to pay the transcript cost for an indigent defendant. The rules also provided that the

County transcription costs could be taxed against a convicted defendant. The defendant prevailed on appeal and the trial court found that the transcript costs should be taxed in his favor under 939.06. Lillibridge v. City of Miami, 276 So.2d 40 (Fla. 1973).

Similarly in Hayes v. State, 387 So.2d 539 (Fla. 5th DCA 1980), the Fifth District held that taxable costs include: the preparation and filing of the record on appeal; witness subpoena costs and mileage costs; the witness fee, and court reporter and deposition costs. Under a mutuality analysis, those costs found to be taxable against the County were also costs the County was required to tax against the defendant, if convicted. The costs analyzed in Hayes were enumerated in statutory sections 27.56; 914.06; 914.11, Florida Statutes (1979).

In Powell, the Second District explicitly based its decision on strict mutuality in holding that expert witness fees are taxable costs. Powell at 789. Conversely, the absence of strict mutuality is clear in those court decisions finding that certain items are not taxable costs under 939.06.

In Doran v. State, 296 So.2d 86 (Fla. 2d DCA 1974), the Second District denied reimbursement to the acquitted defendant for bail bond premiums and a towing fee. Holton v. State, 311 So.2d 711 (Fla. 3d DCA 1975); Dinauer v. State, 317 So.2d 792 (Fla. 1st DCA 1975). These authorities reflect the proposition that absent the requirement that the County pay the costs for either the state attorney or an indigent defendant, and tax the costs against the convicted defendant, there is no basis for an

acquitted defendant to tax the same costs against the County.

In the instant case, the Second District held that the County is liable for an acquitted defendant's investigative costs because the 1987 amendment to Section 939.01 provides law enforcement agencies with a right to recover their investigative expenses from a convicted defendant. (A. 2). The court stated that "investigative costs represent a type of costs mutually borne by the prosecution and the defense." (A. 4). The court failed to recognize that the County and city or state law enforcement agencies are not the same entity. The County is a political subdivision of the State. City police departments and state departments of law enforcement are municipal and state agencies. Ch. 30; 321; 943, Fla. Stat. (1991).

It would be inequitable and illogical for the County to be required to reimburse an acquitted defendant for city or state law enforcement agencies investigative expenses, which the County does not pay and cannot tax as costs against a convicted defendant. Yet, the Second District's reasoning attempts to apply the mutuality concept to treat the County and city and state law enforcement agencies as one governmental entity, i.e., "the prosecutor." (A. 4). What the Second District fails to distinguish in its rationale is the critical fact that the County does not bear the burden of paying city or state law enforcement agencies' investigative costs.

In a criminal proceeding, the County is statutorily responsible for paying the state attorney's costs of prosecution

and the public defender/indigent defendant's costs of defense. §§27.34(2); 27.56; 914.06; 924.17, Fla. Stat. (1991). City and state law enforcement agencies bear their own investigative expenses. Because the County and city and state law enforcement agencies bear different costs, there is not a mutual relationship between the County's costs and an acquitted defendant's costs.

In fact, the 1987 statutory amendment to Section 939.01 does not grant the County the authority to tax and recover investigative costs for the benefit of the County. Rather, the amendment allows all law enforcement agencies the right to request the taxation and recovery of their investigative costs for the benefit of their agencies. §§ 939.01(1); 939.01(9), Fla. Stat. (1991). Therefore, because the County and the acquitted defendant do not share a mutual burden to pay and/or tax investigative costs, there can be no rational basis pursuant to the Second District's mutuality analysis to support the court finding that investigative costs are taxable costs.

II. THE SECOND DISTRICT UNREASONABLY EXTENDED THE DEFINITION OF TAXABLE COSTS UNDER SECTION 939.06 TO INCLUDE INVESTIGATIVE FEES

The Second Districts' treatment of investigative fees as taxable costs unreasonably strains the statutory scope of authority of Section 939.06 resulting in staggering expenses to the County, in direct contrast to the court's previous caveat in Doran.

In Doran, the Second District noted that there are many expenses which one may incur when facing criminal charges. Yet the court limited the definition of taxable costs to "only those

items reasonably within the scope of statutory authority." Doran at 87 (emphasis added). In Doran, the court did not broaden the scope of statutory authority under 939.06 to include bail bond premiums. The court stated that it was unwilling to impose upon the public, without specific legislative authority, "the staggering expense which would follow." Id.

However, in the instant case, the Second District unreasonably expanded the scope of statutory authority to include investigative costs among reimbursable taxable costs. The unavoidable result of the court's ruling is that the County will be burdened with the "staggering expense" cautioned against in Doran.

In the instant case, the Second District acknowledges that its holding increases the fiscal obligations of the government. (A. 4) This acknowledgement and the court's holding directly contradicts the court's statement in Doran that it was unwilling to impose upon the public, without specific legislative authority, such "staggering expense."

Further, the Second District's reasoning fails when it concludes that had the legislature intended to exclude investigative costs, it would have expressed that intention through legislation subsequent to Powell. (A. 4) It is unreasonable for the Second District to interpret legislative inaction as a sign that the legislature intended to place an inequitable financial burden upon the County.

In sharp contrast to the Second District's reasoning, in Benitez v. State, 350 So.2d 1100 (Fla. 3d DCA 1977), cert.

denied, 359 So.2d 1211 (Fla. 1978), the Third District disallowed recovery of investigative costs noting that such a recovery would "place an incalculable burden upon the State." Id. at 1102. The Third District stated that the reimbursement of investigative fees must be left to the legislature and that "judicial legislation" by the court would be improper. Id

Chief Judge Schoonover in his dissent in the instant case cites Benitez, stating that without the legislature expressly providing for the reimbursement of investigative fees, the requirement should not be read into the law. (A. 7). Clearly, the Second District's reasoning violates the well established principle of law that while courts construe and interpret the law, they do not make the laws and should not judicially legislate. Hancock v. Board of Public Instruction of Charlotte County, 158 So.2d 519, 522 (Fla. 1963).

III. THE THIRD DISTRICT AND THE FIFTH DISTRICT HAVE PROPERLY INTERPRETED SECTION 939.06 TO EXCLUDE INVESTIGATIVE COSTS.

In Benitez, the Third District held as a matter of law that investigative costs were not reimbursable taxable costs. Benitez at 1102. In Osceola County v. Otte, 530 So.2d 478 (Fla. 5th DCA 1988), the Fifth District followed the ruling in Benitez. The 1987 statutory amendment to 939.01 was the law at the time the Fifth District rendered its decision in Osceola County.

In the instant case, the Second District discounts the Osceola County decision because it followed Benitez without expressly considering the 1987 amendment to section 939.01. (A. 4). However, just as an individual is charged with knowledge of

the law, Louisville Drying Machine Co. et al. v. State, 17 So.2d 703, 704 (Fla. 1944), so too is a court presumed to have the same knowledge. Mitchum v. State, 251 So.2d 298, 300 F(Fla. 1st DCA 1971). Therefore, it is proper to assume that the Fifth District in Osceola County knew and considered the 1987 amendment when it ruled that investigative fees were not taxable costs.

The Second District stands alone in its reasoning, interpretation and conclusion that investigative costs are taxable costs. Further, the Second District's position has created a circumstance which unavoidably levies staggering inequitable expenses upon the limited and already strained financial resources of the County.

CONCLUSION

For all of the above stated reasons and based upon the above cited authority, Pinellas County requests that this Court quash the Second District Court of Appeal's decision and reinstate the trial court's order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copy hereof has been furnished to SONDRA GOLDENFARB, ESQ. 2454 McMullen Booth Road, Suite 501-A, Clearwater, FL 34619, by hand delivery this 19th day of October, 1992.

Suzanne T. Daly

SUZANNE T. DALY

caofma261

INDEX TO APPENDIX

Rec'd
5-23-92

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

TOM F. SAWYER, Appellant, v. BOARD OF COUNTY COMMISSIONERS, PINELLAS COUNTY, FLORIDA, Appellee.	Case No. 91-01332

Opinion filed March 20, 1992.

Appeal from the Circuit Court
for Pinellas County;
Catherine M. Harlan, Judge.

Sondra Goldenfarb and
Joseph G. Donahey, Jr.,
Clearwater, for Appellant.

Suzanne T. Daly,
Assistant County Attorney,
Clearwater, for Appellee.

James T. Miller, Jacksonville,
Amicus Curiae by Florida
Association of Criminal
Defense Lawyers, for
Appellant.

LEHAN, Judge.

This is an appeal from an order of the trial court which, properly relying upon Benitez v. State, 350 So. 2d 1100 (Fla. 3d DCA 1977), cert. denied, 359 So. 2d 1211 (Fla. 1978) and Osceola County v. Otte, 530 So. 2d 478 (Fla. 5th DCA 1988), denied appellant, who is a nonindigent, acquitted criminal defendant, the right of reimbursement from Pinellas County for investigative costs appellant incurred in his defense. The amount of those costs paid by defendant had been previously certified by the court, apparently in accordance with the procedure outlined in Sawyer v. State, 570 So. 2d 410 (Fla. 2d DCA 1990) and Clark v. State, 570 So. 2d 408 (Fla. 2d DCA 1990). Reimbursement to defendant had then been refused by the county. We reverse.

Section 939.06, Florida Statutes (1989), provides for the reimbursement to an acquitted criminal defendant of what the statute calls "taxable costs" but does not define the term. The interpretation of that term has been left to the courts. See Doran v. State, 296 So. 2d 86 (Fla. 2d DCA 1974).

Especially since section 939.01, as amended in 1987, provides for the taxation against convicted criminal defendants of investigative costs incurred by law enforcement agencies, we hold that investigative costs are also taxable costs within the meaning of section 939.06. Thus, the interpretation of the term "taxable costs" which we apply has the same rational basis as that applied by this court in Powell v. State, 314 So. 2d 788, 789 (Fla. 2d DCA 1975) ("Since under § 914.06 the county could tax the reasonable compensation of its expert witnesses as costs

against a convicted defendant, we think that an acquitted, non-indigent defendant may do likewise against the county.").

That the legislature has not changed section 939.06 since the 1974 opinion of this court in Doran may be taken to indicate legislative intent in approval of the Doran ruling, as well as that in Powell, to the effect that finding a rational basis for an interpretation of the term "taxable costs" in that section has been left to the courts. See 49 Fla. Jur. Statutes § 166 (1984) (citing White v. Johnson, 59 So. 2d 532 (Fla. 1952)).

Our interpretation of that term in section 939.06 in light of section 939.01 is consistent with Powell, based upon the concept of mutuality. That the legislature has favored mutuality in the context of civil litigation expenses is illustrated by the 1988 addition of subsection (2) to section 57.105 concerning the award of attorneys fees to a party to a litigated contract which only provides for such an award to the other party. That subsection changed the law as reflected in prior jurisprudence so that in cases in which the party who is required to take action to enforce the contract prevails, the court may award attorney's fees in favor of that party even when the contract only provides for the award of attorney's fees to the other party.

The mutuality concept relative to an effective defense in criminal litigation is implicitly involved in White v. Board of County Commissioners of Pinellas County, 537 So. 2d 1376 (Fla. 1989). White determined, albeit on constitutional, separation of powers grounds, that in a capital case an indigent citizen

prosecuted by the state through the state's counsel should not be deprived of effective counsel for his defense through an unrealistically low cap on fees which may be paid to his counsel, notwithstanding "the potential burden placed on county treasuries." Id. at 1379.

In contrast to the holding of Doran that bail bond premiums incurred by acquitted criminal defendants are not taxable against the prosecution, investigative costs represent a type of costs mutually borne by the prosecution and defense.

We recognize of course that our holding adds to governmental fiscal obligations. But if that was not intended by the legislature, the legislature could have provided otherwise, especially after the 1975 Powell opinion on which we rely in principle. Of course, the legislature might provide otherwise in the future if it should decide that our holding does not accurately reflect current legislative intent.

Since we resolve this case under statutory interpretation, we need not address the additional constitutional equal protection arguments of defendant and amicus curiae.

We certify that our holding is in conflict with Benitez and Osceola County. However, Benitez was decided before the 1987 amendment to section 939.01, and Osceola County followed Benitez in 1988 without expressed consideration of that amendment.

Upon remand the trial court shall enter judgment against the county for the investigative costs incurred by

defendant which are determined to have been reasonable and necessary.

Reversed and remanded for proceedings consistent herewith.

PATTERSON, J., Concurs.
SCHOONOVER, C.J., Dissents with opinion.

SCHOONOVER, Chief Judge, Dissenting.

I respectfully dissent. I would affirm and hold that the trial court correctly followed our sister courts' decisions in Osceola County v. Otte, 530 So. 2d 478 (Fla. 5th DCA 1988), and Benitez v. State, 350 So. 2d 1100 (Fla. 3d DCA 1977), cert. denied, 359 So. 2d 1211 (Fla. 1978).

At common law neither party could be charged with the costs of the other, and it was only by statute that such costs came to be allowed. But even then, both in England and in this country, costs were not chargeable to the sovereign or the state unless there was an express provision in the law to authorize such costs. Buckman v. Alexander, 24 Fla. 46, 3 So. 817 (Fla. 1888).

Although the determination of which costs are taxable has been left to the courts, only those items reasonably within the scope of statutory authority are taxable. Doran v. State, 296 So. 2d 86 (Fla. 2d DCA 1974). This court has held that we should be reluctant to read into the law a necessity for the imposition upon the public of staggering expenses which would be caused by requiring reimbursement of bail bond premiums incurred by those who are ultimately acquitted or discharged. Doran; see also Holton v. State, 311 So. 2d 711 (Fla. 3d DCA 1975). I am also reluctant to read into the law a requirement that the public reimburse acquitted or discharged defendants for their investigative expenses and would not do so.

If the legislature in enacting section 939.06 intended to require that an acquitted or discharged defendant be reimbursed for the investigative costs incurred in defending charges brought against them, it could have easily expressed that intention. The legislature has specifically dealt with investigative expenses in many instances. See, e.g., §§ 27.56(1)(a); 45.061(3)(a); 253.03(13); 373.129(6); 489.132(3) 631.54(5); 895.05(7); 895.07(8); 939.01(1), Fla. Stat. (1989).

Since the legislature did not expressly provide for these expenses in section 936.06, we should not read this requirement into the law. Osceola County; Benitez.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT
DCA CASE NO. 91-01332

BOARD OF COUNTY COMMISSIONERS,
PINELLAS COUNTY, FLORIDA,

Defendant, Petitioner,

vs.

TOM F. SAWYER,

Plaintiff, Respondent.

_____/

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that BOARD OF COUNTY COMMISSIONERS, PINELLAS COUNTY, FLORIDA, Defendant, Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered March 20, 1992. The decision expressly and directly conflicts with a decision of another district court of appeal on the same question of law, and is certified to be in direct conflict with decisions of other district courts of appeal.

Respectfully submitted,

Suzanne T. Daly

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315 Court Street
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(813) 462-3354
FL Bar No. 0772887
Attorney for DEFENDANT,
PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to SONDRA GOLDENFARB, ESQ., 2454 McMullen Booth Road, Suite 501-A, Clearwater, FL 34619 and to JAMES T. MILLER, ESQ., on behalf of Florida Association of Criminal Defense Lawyers, 407 Duval County Courthouse, Jacksonville, FL 32202 this 5th day of May, 1992.

SUZANNE T. DALY
Assistant County Attorney

CAOFMA/261

Supreme Court of Florida

WEDNESDAY, SEPTEMBER 23, 1992

BOARD OF COUNTY COMMISSIONERS, PINELLAS COUNTY, FLORIDA, Petitioner, vs. TOM F. SAWYER, Respondent.	**	ORDER ACCEPTING JURISDICTION AND SETTING ORAL ARGUMENT CASE NO. 79,839 DISTRICT COURT OF APPEAL, SECOND DISTRICT - NO. 91-01332

The Court has accepted jurisdiction of this case and will hear oral argument at 9 a.m. TUESDAY, MARCH 2, 1993.

A maximum of TWENTY minutes to the side is allowed, but counsel is expected to use only so much of that time as is necessary.

Petitioner's brief on the merits shall be served on or before OCTOBER 19, 1992; respondent's brief on the merits shall be served 20 days after service of petitioner's brief on the merits; and petitioner's reply brief on the merits shall be served 20 days after service of respondent's brief on the merits. Please file an original and seven copies of all briefs. UNLESS BRIEFS ARE TIMELY FILED, THE PRIVILEGE OF ORAL ARGUMENT WILL BE FORFEITED.

The Clerk of the District Court of Appeal, SECOND District, shall file the original record on or before NOVEMBER 13, 1992.

NO CONTINUANCES WILL BE GRANTED EXCEPT UPON A SHOWING OF EXTREME HARDSHIP.

BARKETT, C.J., McDONALD, GRIMES and HARDING, JJ., concur

OVERTON, J., concurs and would consider without oral argument

A True Copy

TEST:

Sid J. White
Clerk Supreme Court
By: Sara Gainey
Deputy Clerk

cc: Hon. William A. Haddad, Clerk
Suzanne T. Daly, Esquire
Sondra Goldenfarb, Esquire
James T. Miller, Esquire