IN THE SUPREME COURT OF FLORIDA

BOARD OF COUNTY COMMISSIONERS,
PINELLAS COUNTY, FLORIDA,

Petitioner,

vs.

TOM F. SAWYER,

Respondent.

CASE NO. 79,839
DCA CASE NO. 91-01332

RESPONDENT'S JURISDICTIONAL ANSWER BRIEF

On Review from the District Court
of Appeal, Second District
State of Florida

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as submitted except to take issue with Petitioner's characterization of the Second District Court of Appeals' holding below (Petitioner's Brief, page 1). The District Court specifically held that the 1987 amendment to Section 939.01, Florida Statutes, which provides that "investigative costs" are included in the costs properly taxable against a convicted criminal defendant, mandates a similar inclusion of investigative costs in Section 939.06, Florida Statutes, which provides for reimbursement of costs to a discharged or acquitted criminal defendant.

SUMMARY OF ARGUMENT

There is no "express [or] direct conflict" between this case and any other district court decision, because this case presented a matter of first impression, i.e., does the 1987 statutory amendment to Chapter 939, Florida Statutes, require mutuality and reciprocity in the award of investigative costs to the successful party litigant in a criminal proceeding? Neither of the cases which allegedly creates jurisdictional conflict deals with the effect of the statutory amendment. Therefore, there being a dispositive distinguishing "fact," there is no conflict.

ARGUMENT

THE SECOND DISTRICT COURT OF APPEALS' DECISION, WHICH RELIES ON A 1987 STATUTORY AMENDMENT, DOES NOT "EXPRESSLY AND DIRECTLY CONFLICT" WITH OTHER DISTRICT COURT OPINIONS WHICH EFFECTIVELY PRE-DATED THE AMENDMENT.

Over thirty years ago, in reflecting on its "conflict" jurisdiction, this Court correctly perceived its role in connection with discretionary review of district court opinions as being designed to "stabilize the law by a review of decisions which form patently irreconcilable precedents." Florida Power & Light Co. v. Bell, 113 So.2d 697 (Fla. 1959)(e.s.). In the present case, the opinion below is completely reconcilable with the cases cited by Petitioner as creating conflict, 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).

Benitez preceded by ten years the statutory amendment on which the Second District has here premised its decision. In Osceola County, decided in 1988, the Fifth District was apparently never asked to consider the effect of the 1987 amendment. Neither case, therefore, can be said to be factually "on all fours" with the case here under discussion.

Although the Second District acknowledged a superficial

"conflict," the opinion itself goes on to distinguish Benitez and Osceola County from the pending case because of the dispositive effect of the amendment to the criminal costs statute in 1987, Chapter 939, Florida Statutes (1989). See page 4 of Opinion (Appendix).

In short, where no other district court of appeals in Florida has ruled as to the impact of the 1987 statutory amendment on pre-existing case law, there is no "conflict" on which to base this Court's jurisdiction.

CONCLUSION

There being no "express and direct conflict" between the decision below and any other district court of appeals decision, this Court has no jurisdiction to review the decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to SUZANNE T. DALY, ESQ., Assistant County Attorney, 315 Court Street, Clearwater, Florida 34616 and to JAMES T. MILLER, ESQ., on behalf of Florida Association of Criminal Defense Lawyers, 407 Duval County Courthouse, Jacksonville, FL 32202 this 19 day of May, 1992.

Sondra Goldenfarb

SONDRA GOLDENFARB

FILED
3-23-92

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

TOM F. SAWYER,

Appellant,

vs. Case No. 91-01332

BOARD OF COUNTY COMMISSIONERS,
PINELLAS COUNTY, FLORIDA.

Appellee.

_____/

MOTION FOR CLARIFICATION

In accordance with Fla. R. App. P. 9.330, the Appellee, BOARD OF COUNTY COMMISSIONERS, PINELLAS COUNTY, FLORIDA, respectfully moves for clarification of the Opinion of this Court filed on March 20, 1992, and states:

1. On March 20, 1992, this Court filed its opinion reversing the trial court ruling that investigative costs are not taxable costs under Section 939.06, Florida Statutes (1989).

2. The opinion of this Court states in part:

> "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."

3. Appellee respectfully asks this Court to clarify whether the quoted language of the Opinion is intended to serve as certification by the Second District Court of Appeal to the Supreme Court of Florida as described in Fla. R. App. P. 9.030(a)(2)(A)(vi), that its decision is in direct conflict with decisions of other district courts of appeal.

WHEREFORE, Appellee moves this Court for an opinion clarifying the decision filed on March 20, 1992.

Respectfully submitted,

SUZANNE T. DALY
Assistant County Attorney
315 Court Street
Clearwater, Florida 34616
(813) 462-3354
SPN NO. 01060011
FLA. BAR NO. 0772887
Attorney for APPELLEE

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 31st day of March, 1992.

SUZANNE T. DALY
Assistant County Attorney

CAOFMA/261

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

TOM FRANKLIN SAWYER Plaintiff, Appellant vs. BOARD OF COUNTY COMMISSIONERS PINELLAS COUNTY, FLORIDA Defendant, Appellee	)	Appeal No. 91-01332

REPLY TO MOTION FOR CLARIFICATION

Appellant, TOM F. SAWYER, by and through his undersigned lawyer, respectfully urges this Honorable Court to deny Appellee's Motion for Clarification, or in the alternative, to recede from any suggestion that direct decisional conflict is being "certified" under Fla. R. App. P. 9.030 (a)(2)(A)(vi), and as grounds therefor says:

1. The Court's Opinion, while using the term "certify," cannot be interpreted to mean the certification of direct decisional conflict referred to in the cited appellate rule, because the Opinion itself recognizes the determinative nature of the 1987 statutory amendment which was not involved in the allegedly "conflicting" cases; as the Opinion points out, Benitez preceded the amendment and Osceola County made no reference to it.

2. The issue raised and decided in this cause in fact is one of first impression, i.e. the 1987 amendment to Section 939.01, Fla. Stat. requires a reinterpretation of Section 939.06,

Fla. Stat. A matter of first impression, by definition, cannot create the direct conflict required by the cited appellate rule.

Wherefore, Appellant opposes Appellee's Motion for Clarification as unnecessary.

Respectfully submitted,

TANNEY, FORDE, DONAHEY, ENO & TANNEY, P.A.

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Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply to Motion for Clarification has been furnished by U.S. Mail to Suzanne Daly, Esquire, Office of the County Attorney, 315 Court Street, Clearwater, FL 34616, and James T. Miller, Esquire, as amicus curiae for FACDL, 407 Duval County Courthouse, Jacksonville, FL 32202, this 2d day of April, 1992.

Sondra Goldenfarb

sawyer\civil\reply.clar

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

APRIL 10, 1992

TOM F. SAWYER, Appellant(s), v. BOARD OF COUNTY COMM., PINELLAS COUNTY, FL., Appellee(s).	)	Case No. 91-01332

BY ORDER OF THE COURT:

Counsel for appellee having filed a motion for clarification, upon consideration, it is

ORDERED that said motion is hereby denied.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

WILLIAM A. HADDAD, CLERK

c: Sondra Goldenfarb, Esq.
Suzanne T. Daly, Esq.
James T. Miller, Esq.
Karleen DeBlaker, Clerk

/TT