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IN THE SUPREME COURT OF THE STATE OF FLORIDA

JUL 18 1997

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

Case No. 89,792

4th DCA Case No. 951679

Eric Ilkanic,
Petitioner,

v

City of Fort Lauderdale, et al.,
Respondents.

DISCRETIONARY REVIEW OF DECISION OF
THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

Table of Authorities iii

Preliminary Statement iv

Issues on Appeal v

Statement of the Case and Facts 1

Summary of Argument 3

Argument 6

Conclusion 8

Certificate of Service 9

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Bennett v. Arkansas</u> , 485 U.S. 395, 108 S.Ct. 1204, 99 L.Ed.2d 455 (1988)	8
<u>Butterworth v. Caggiano</u> , 605 so. 2d 56 (Fla. 1992).	3,4
<u>Downing v. State</u> , 593 So. 2d 607 (Fla. 5th DCA 1992).	4
<u>Ergos v. State</u> , 670 So. 2d 1079 (Fla. 2d DCA 1996).	4
<u>Laskey v. State Farm Insurance Co.</u> , 296 So.2d 9 (Fla. 1974).	6
<u>Mishkin v. City of Fort Lauderdale</u> , 661 So. 2d 415 (Fla. 4th DCA 1995)	3
<u>Rinaldi v. Yeager</u> , 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966).	6
<u>State v. Beasley</u> , 580 So. 2d 139 (Fla. 1991)	7
<u>Trushin v. State</u> , 425 So. 2d 1126 (Fla. 1982).	3
<u>U.S. v. Doyan</u> , 909 F. 2d 412 (10th Cir. 1990).	5
Section 960.291(1), <u>Fla.Stat.</u> (1995).	3
Section 4, Article X, <u>Fla.Const.</u> (1968).	<u>in passim</u>

PRELIMINARY STATEMENT

The petitioner adopts the preliminary statement set forth in the initial brief on the merits.

References to the respondent's answer brief on the merits will be designated by the symbol "AB." References to respondent's appendix will be designated by the symbol "RA."

References to the petitioner's supplemental appendix will be designated by the symbol "SA."

ISSUE ON APPEAL

WHETHER THE TRIAL COURT CORRECTLY DECLARED UNCONSTITUTIONAL THE CIVIL RESTITUTION LIEN ACT?

WHETHER THE ACT VIOLATES THE HOMESTEAD PROTECTION GIJARANTEED BY SECTION 4, ARTICLE X OF THE FLORIDA CONSTITUTION?

WHETHER THE CIVIL RESTITUTION LIEN ACT VIOLATES EQUAL PROTECTION?

WHETHER THE CIVIL RESTITUTION LIEN ACT VIOLATES DUE PROCESS?

WHETHER THE CIVIL RESTITUTION LIEN ACT IS UNCONSTITUTIONALLY VAGUE?

STATEMENT OF THE CASE AND FACTS

The petitioner relies on the Statement of the Case and Facts set forth in the Initial Brief on the Merits.

SUMMARY OF ARGUMENT

The trial court correctly held found unconstitutional the civil restitution act. The statute violates section 4, Article X of the Florida Constitution by allowing a lien to be placed on an individual's homestead. The statute violates equal protection treating differently persons liable for damages or losses in criminal cases from persons liable for damages or losses in civil cases. The statute also violates due process by arbitrarily setting the amount of liquidated damages and by denying a convicted person a hearing to determine the amount of damages owed and his ability to pay that amount. Furthermore, the statute is unconstitutionally vague.

ARGUMENT

THE ACT VIOLATES THE HOMESTEAD PROTECTION GUARANTEED BY SECTION 4, ARTICLE X OF THE FLORIDA CONSTITUTION

The respondent argues that this issue is not properly before this Court because it was not raised below. (AB at 3) However, it is important to note that the trial court sua sponte declared unconstitutional the Civil Restitution Lien and Crime Victim's Remedy Act (the act). The petitioner was unrepresented by counsel and made no argument regarding the respondent's motion for imposition of a lien. Furthermore, the petitioner was the appellee below and answered the respondent's (appellant below) arguments.

This Court may consider any issue that affects a case properly before it. Trushin v. State, 425 So. 2d 1126 (Fla. 1982) Given the procedural history of this case, this Court should exercise its discretion and decide whether the act violates the homestead protection guaranteed by the Florida Constitution.

The respondent relies on Mishkin v. City of Fort Lauderdale, 661 So. 2d 415 (Fla. 4th DCA 1995) in support of its argument that the lien authorized by the act does not constitute a "judgment, decree or execution." (AB at 3) However, the order at issue in Mishkin was rendered by a code enforcement board. At bar, the act authorizes courts to render civil restitution liens which attach "against the real or personal property owned by a convicted offender." Section 960.291(1) Florida Statutes (1995) In Butterworth v. Caggiano, 605 So. 2d 56, 61 (Fla. 1992), this Court stated that the homestead exemption should be afforded a liberal, non-technical interpretation. A lien ordered by a court constitutes a judgment, decree or execution under such an interpretation of the homestead provision.

In Ergos v. State, 670 So. 2d 1079 (Fla. 2d DCA 1996), the district court directed the circuit court to vacate its order imposing a lien on homestead property for criminal restitution. The court held that the circuit court was barred from imposing the lien by article X, section 4 of the Florida Constitution. Similarly, in Downing v. State, 593 So. 2d 607 (Fla. 5th DCA 1992), the district court held that a court could not consider homestead property in determining whether a person charged with violation of probation for failure to pay restitution had the ability to pay. Id. at 608. These decisions were founded on the constitutional protection afforded homestead property

The respondent further argues the criminal nature of the lien excepts it from the homestead exemption. (AB at 4) In Caggiano, *supra* at 60, this Court stated:

It makes no difference that the attempted divestiture in this case was an adjunct to a criminal proceeding. As the Supreme Court of Kansas declared in construing its state's constitutional homestead exemption:

The homestead provision of our Constitution sets forth the exceptions and provides the method of waiving the homestead rights attached to the residence. These exceptions are unqualified. They create no personal qualifications touching the moral character of the resident nor do they undertake to exclude the vicious, the criminal, or the immoral from the benefits so provided. The law provides for punishment of persons convicted of illegal acts, but the forfeiture of homestead rights guaranteed by our Constitution is not part of the punishment.

Florida law likewise prohibits the implication of exceptions or limitations to article X, section 4.

(Citations omitted) Restitution for cost of incarceration is not an exception to the homestead exemption.

Section 4, Article X of the Florida Constitution prohibits judgment liens, decrees or execution on homestead property "except for the payment of taxes and assessments thereon,

obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty.” Such an exemption from liens also exists under the same section of the Florida Constitution for “personal property to the value of one thousand dollars.” The act’s provision allowing for the imposition of liens on any personal property and any real property conflicts with the Florida Constitution.

THE ACT VIOLATES EQUAL PROTECTION

The respondent argues that this Court should apply the rational basis test when analyzing whether the act violates equal protection. (AB at 7) However, the cases relied upon by the respondent do not involve homestead property.

In U.S.v Doyan, 909 F. 2d 412 (10th Cir. 1990), cited by respondent, the circuit court held that section 5E1.2(I) of the federal sentencing guidelines does not violate equal protection.

The court stated:

Where a federal statute neither abridges a fundamental right, not imposes a “suspect classification,” we apply a rational basis test to determine whether the statute has a “rational relationship to a legitimate governmental interest. Rational basis scrutiny is appropriate in the present case because the constitutional claim concerning the fine implicates no fundamental constitutional right on the part of convicted felons to have the costs of their imprisonment and supervision paid by the taxpayers. Nor is there any suggestions that the contested fine has been imposed on the basis of a suspect classification such as race.

Id. at 416. As stated above, the act at bar infringes on the fundamental property right to homestead. Strict scrutiny is the appropriate standard of review.

However, should this Court determine that the rational basis test applies, the act fails to meet this standard. The respondent refers to and attaches the Florida Department of Corrections 1993-94 Annual Report as “part of the record” supporting the \$50.00 per day assessment. (AB at

6) However, that report was submitted as an appendix by the respondent in the district court and the district court granted petitioner's (appellee below) motion to strike. (SA) The report was not entered into evidence in the trial court and the report is not subject to judicial notice. In addition, the petitioner was incarcerated in a city jail facility

A convicted person cannot avail himself of the protections afforded civil debtors. Rather, the act mandates that he be liable--without any opportunity to object--for liquidated damages to the State and its local subdivisions without proof of actual damages. The act treats differently convicted persons from persons against whom actions for damages are lodged in civil court. The district court, although requiring a finding that the defendant has the ability to pay before imposition of the lien, did not address the statute's failure to require proof of damages.

In Laskey v. State Farm Insurance Co., 296 So. 2d 9, 18 (Fla. 1974), this Court held that "[i]n order to comply with the requirements of the Equal Protection Clause, statutory classifications must be reasonable and non-arbitrary, and all persons in the same class must be treated alike." The classification that automatically makes a convicted person liable for liquidated damages, without proof of damages, is arbitrary and bears no relationship whatsoever to the legislative purpose of ensuring full restitution for damages caused by the person's sentence. There is no legitimate reason to require convicted persons to make restitution for unproven damages, while requiring persons not charged under a criminal statute to make restitution only for damages proved in court.

If the purpose of the act is to ensure full restitution for actual damages and losses to the state and its subdivisions, then neither the overall class of convicted persons nor any of its subclasses has any relevance to the purpose for which the classes were purportedly established. In

Rinaldi v. Yeager, 384 U.S. 305, 86 S. Ct. 1497, 16 L. Ed. 2d 577 (1966), the Supreme Court struck down a New Jersey statute requiring unsuccessful incarcerated appellants to reimburse the county for the cost of their appellate transcripts. The Court stated:

Those appellants who have been sentenced only to pay fines have been accorded the same benefit by the county -- a transcript used in an unsuccessful appeal, and all that distinguishes them from their institutionalized counterparts is the nature of the penalty attached to the offense committed. There is no defensible interest served by focusing on that distinction as a classifying feature in a reimbursement statute, since it bears no relationship whatever to the purpose of the repayment provision. Likewise, an appellant subject only to a suspended sentence or to probations is likely to differ from an inmate only in the extent of his criminal record. That, too, is a trait unrelated to the fiscal objective of the statute. Finally, the classification cannot be justified on the ground of administrative convenience.

86 S.Ct at 1500.

Similarly, the classification of persons convicted of capital or life felonies and persons convicted of other crimes establishes two irrational classes within the act. The “cost” of a person’s incarceration is based on the degree of the offense the person is convicted of committing. The classifications based on the degree of the offense has no relation to the legislature’s stated purpose of ensuring that restitution is made for actual damages. A classification based on degree of crime fails to achieve the legislature’s stated purpose and results in a denial of equal protection.

THE ACT VIOLATES PROCEDURAL DUE PROCESS

The respondent argues that this Court’s opinion in State v. Beasley, 580 So. 2d 139 (Fla. 1991), erroneously “suggests” that procedural due process requires that there must be a determination of ability to pay before enforcement of an order for costs. (AB at 15). However,

the Beasley opinion did not merely suggest that procedural due process be afforded before the enforcement of an order for costs, the court held that due process must be furnished:

Applying the two-part procedural due process protections as delineated in *Jenkins*, we first must examine whether Beasley had adequate notice and opportunity to be heard. As to notice, publication in the Laws of Florida or the Florida Statutes gives all citizens constructive notice of the consequences of their actions. Thus, Beasley had adequate notice.

Beasley also had an opportunity to be heard at the sentencing hearing and raise any pertinent objections. Having been given adequate notice and an opportunity to be heard, the assessment of costs complied with due process.

Id. at 142. The district court applied Beasley to the statute at bar and held that the lien could not be imposed without a determination of a defendant's ability to pay. Imposition of a lien, however, is more than a mere assessment of costs or financial liability, A court order assessing costs does not carry with it the legal ramifications and interference of property rights associated with the imposition of a lien. Moreover, the district court below did not address the statute's failure to provide a hearing regarding the actual damages incurred. Absent a hearing to determine what property is exempt' from imposition of a lien, exempt property may be wrongfully subject to a lien and hence, wrongfully "taken."

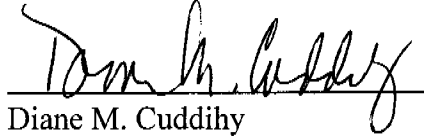
CONCLUSION

The argument presented above support the trial court's order declaring unconstitutional the civil restitution lien. The act violates the constitutional protection of the homestead, due process, equal protection and is unconstitutionally vague. The petitioner respectfully requests this Honorable Court to declare unconstitutional the civil restitution lien act.

¹ In Bennett v. Arkansas, 485 U.S. 395, 108 S.Ct..1204, 99 L.Ed.2d 455 (1988), the United States Supreme Court held that social security benefits are exempt from legal process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U.S.

Mail to Assistant Attorney General David M. Schultz, Department of Legal Affairs, 1655 Palm

Beach Lakes Blvd, Suite 300, West Palm Beach, 33401-2299, this 17th day of July, 1997.



Diane M. Cuddihy