

IN THE SUPREME COURT OF FLORIDA

**CASE NO. 93, 491**

**DAVID GOODWIN,**

Petitioner,

-vs-

**STATE OF FLORIDA,**

Respondent.

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**ON PETITION FOR DISCRETIONARY JURISDICTION FROM  
THE DISTRICT COURT OF APPEAL OF FLORIDA,  
FOURTH DISTRICT**

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**SUPPLEMENTAL BRIEF OF RESPONDENT ON THE MERITS**

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**PRELIMINARY STATEMENT**

Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Fourth District. Petitioner, DAVID GOODWIN, was the Respondent in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stand before this Court. The symbol "R." designates the original record on appeal, and the symbol "T." designates the transcript of the trial court proceedings.

Respondent certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

**STATEMENT OF THE CASE AND FACTS**

Respondent relies on the facts set out in its original brief on the merits. Respondent makes the following additions to those facts:

Petitioner was tried and convicted on April 16 and 17, 1997, and was sentenced on May 30, 1997. Petitioner filed the notice of appeal on June 5, 1997. The Fourth District filed its opinion on April 8, 1998.

**SUMMARY OF ARGUMENT**

Section 924.051(7) is remedial in nature. It does not impinge on a defendant's substantive rights. Rather, the statute reaffirms existing standards of review that do not come into question until the time of appeal. Accordingly, because Petitioner was tried, convicted, and appealed after the effective date of the statute, the Fourth District properly applied section 924.051(7) to the instant case.

**ARGUMENT**

**SUPPLEMENTAL ISSUE**

THE CRIMINAL APPEAL REFORM ACT WAS PROPERLY APPLIED TO THE INSTANT CASE SINCE PETITIONER WAS TRIED, CONVICTED, AND SENTENCED, AND HIS APPEAL WAS TAKEN AND DECIDED, AFTER THE EFFECTIVE DATE OF THE ACT.

Preliminarily, Respondent contends that Petitioner failed to preserve the supplemental issue for consideration by this Court. See State v. Dupree, 656 So. 2d 430, 432 (Fla. 1995)(issue not properly before court where not previously raised in trial court or district court). Although the Fourth District clearly applied section 924.051(7), Florida Statutes (Supp. 1996), to the instant case, and Petitioner moved for rehearing on that basis, Petitioner never asserted any *ex post facto* concerns. Hence, Petitioner failed to preserve the retroactivity claim for review. See Parker v. Dugger, 537 So. 2d 969, 972 (Fla. 1988)(defendant procedurally barred from raising *ex post facto* issue where it had not been previously asserted). See also Monsour v. State, 572 So. 2d 18, 19 (Fla. 4th DCA 1990); Dominquez v. State, 508 So. 2d 1316, 1317 (Fla. 1st DCA 1987); Atkins v. State, 506 So. 2d 10, 11 (Fla. 2d DCA 1987); Brown v. State, 428 So. 2d 369, 371 (Fla. 5th DCA 1983).

The inhibition on *ex post facto* laws does not give a defendant the right to be tried in all respects by the law that was in force when the crime was committed; the constitutional provision does not limit legislative control of remedies. Dobbert v. Florida, 432 U.S.

282, 292 (1977). Hence, remedial statutes do not fall within the constitutional prohibition against retroactive legislation, and, therefore, may be given immediate effect. Department of Agric. & Consumer Servs. v. Bonanno, 568 So. 2d 24, 30 (Fla. 1990); Village of El Portal v. City of Miami Shores, 362 So. 2d 275, 278 (Fla. 1978). In fact, if a statute is remedial, it must be applied retrospectively to serve its intended purpose, regardless of whether it is procedural or substantive in nature. See City of Orlando v. Desjaridins, 493 So. 2d 1027, 1028 (Fla. 1986); Cebrian By and Through Cebrian v. Klein, 614 So. 2d 1209, 1212 (Fla. 4th DCA 1993).

The State submits that section 924.051(7) is remedial, so that the Fourth District properly applied it to this case. Section 924.051(7) provides that the party challenging a judgment or order of a trial court has the burden of demonstrating that prejudicial error occurred. A burden of proof statute can be considered remedial. See Hapney v. Central Garage, Inc., 579 So. 2d 127 (Fla. 2d DCA 1991)(statute categorizing burden of proof in relation to covenant not to compete in equity case considered to be remedial). In Ziccardi v. Strother, 570 So. 2d 1319 (Fla. 2d DCA 1990), the court rejected the appellees' argument that section 772.104, Florida Statutes, part of the Civil Remedies for Criminal Practices Act, in which the legislature changed the burden of proof of injury to clear and convincing evidence instead of the standard

preponderance of the evidence, could not be applied to cases arising from conduct predating the statute.

The court reasoned that because the statute was enacted to correct problems resulting in civil actions being included in criminal statutes, it was remedial in nature. 570 So. 2d at 1321. It noted that remedial statutes only confirm existing rights and duties so that they may be applied to cases being heard after the effective date of legislation. Id.

In State v. Kelley, 588 So. 2d 595, 597 (Fla. 1st DCA 1991), the court concluded that because the amendment to section 924.07, Florida Statutes, which created the right for the State to appeal from orders granting motions for judgments of acquittals, conferred a means to redress injury, the statute was remedial. The court decided that the State could appeal from an order granting a judgment of acquittal even though the offense was committed prior to the effective date of the amendment, because the statute was effective at the time the order was entered.

In enacting section 921.051, the legislature intended that all claims of error be raised and resolved at the first opportunity. See Section 921.051(8), Florida Statutes (Supp. 1996). Obviously, the legislature has sought to streamline the criminal appeals system. The State submits that the purpose of section 924.051(7) is to prevent parties from asserting nonprejudicial or frivolous claims on appeal that only serve to waste judicial resources. The

statute, therefore, is remedial in nature.

A law must do more than simply disadvantage a party in order to violate the *ex post facto* clause. California Dep't of Corrections v. Morales, 514 U.S. 499, 508-509 (1995). To be in violation of the *ex post facto* clause, a law must alter the definition of criminal conduct or increase the penalty by which a crime is punishable. Id.; Gwong v. Singletary, 683 So. 2d 109, 112 (Fla. 1996). Section 924.051(7) neither changes a crime nor affects the penalty associated with the crime. In fact, the State submits that it does not change the nature of appellate review, but only clarifies a challenging party's duty with regard to errors that do not impinge on federally guaranteed constitutional rights.

Section 924.051(7) reaffirms the presumption of correctness that a judgment or order has on appeal. See Spinkellink v. State, 313 So. 2d 666, 671 (Fla. 1975). Moreover, the reviewing court still has the duty to evaluate the impact of any error on the verdict despite section 924.051(7). See Heuss v. State, 687 So. 2d 823, 824 (Fla. 1996).

Section 924.33, Florida Statutes, provides that no judgment shall be reversed unless the appellate court is of the opinion, after reviewing the entire record, that error was committed that injuriously affected the substantial rights of the appellant. This Court has long interpreted section 924.33 to require a challenging party to demonstrate reversible error. See O'Steen v. State, 111

So. 725, 729 (Fla. 1927). Notably, the United States Supreme Court has similarly interpreted the federal statute akin to section 924.33 as requiring the party seeking to set aside a judgment to show that prejudice resulted. See Palmer v. Hoffman, 318 U.S. 109, 116 (1943). See also United States v. Killough, 848 F. 2d 1523, 1527 (11th Cir. 1988).

Petitioner argues that section 924.051(7) impacts on a defendant's substantive right to a fair trial. Petitioner ignores, however, that notwithstanding a judgment's presumption of correctness and section 924.33, Florida courts have applied, and continue to apply, the harmless error standard adopted by this Court in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) to constitutional errors.

In Brecht v. Abrahamson, 507 U.S. 619, 631-632 (1993), the court explained that the federal harmless error statute is only applied to claims of nonconstitutional error. It said that the harmless beyond-a-reasonable-doubt standard, adopted in DiGuilio, is applied to claims of constitutional error. 507 U.S. at 630.

Later, in Dowling v. United States, 493 U.S. 342, 346-347, 354. (1990), the court agreed with the circuit court's determination that a less stringent standard than the harmless error rule applied because the error was merely evidentiary and not constitutional in nature. The trial court in Dowling admitted testimony over the defendant's claim that it was barred by collateral estoppel. The

Supreme Court reasoned that because the evidence was only barred by the common-law doctrine of collateral estoppel, the Government was not "constitutionally" barred from using the contested testimony. 493 U.S. at 350.

The court recognized that the testimony had the potential to prejudice the jury. However, it stated that the question was whether the evidence was so extremely unfair that its admission violated "fundamental conceptions of justice." Id. at 352. It suggested that if it did not, then the testimony could be dealt with through nonconstitutional sources like the rules of evidence. It explained, "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate "fundamental fairness" very narrowly." Id.

In this case, like in Dowling, the alleged violation was evidentiary in nature. Because the alleged error did not amount to a denial of due process in light of the circumstances of this case, it was unnecessary for the Fourth District to apply the harmless error rule articulated in DiGuilio.

Generally, with regard to law not affecting the nature of a criminal offense or the degree of penalty, parties are governed by the law that existed at the time of their proceeding. Whittaker v. Eddy, 147 So. 868, 873 (Fla. 1933). With regard to section 924.051(3), all of the district courts have found that the statute

requiring challenging parties to preserve error for appeal applies to cases where the judgments and sentences are entered after the effective date of the statute. See, e.g., Nunez v. State, 721 So. 2d 346, 349 n. 4 (Fla. 2d DCA 1998); Hicks v. State, 711 So. 2d 1366, 1367 n. 3 (Fla. 3d DCA 1998); Maddox v. State, 708 So. 2d 671, 621 (Fla. 5th DCA 1998); Dean v. State, 702 So. 2d 1358 (Fla. 1st DCA 1997); Medberry v. State, 699 So. 2d 857, 859 (Fla. 5th DCA 1997); Johnson v. State, 697 So. 2d 1245 (Fla. 1st DCA 1997). This has been true even where the offenses were committed prior to the statute's effective date. See, e.g., Romano v. State, 718 So. 2d 283, 284 (Fla. 4th DCA 1998); Neal v. State, 688 So. 2d 392, 395 (Fla. 1st DCA 1997).

The State submits that Section 924.051(7) should be considered from the time the appeal is taken since it deals with the challenging party's duty on appeal, and not at trial or sentencing. See State v. Greenberg, 564 So. 2d 1176, 1177 (Fla. 3d DCA 1990)(court deemed operative event of remedial expungement statute to be date that petition to expunge or seal criminal history was filed). So, if the appeal is taken after the effective date of the statute, then section 924.051(7) applies. In this case, not only was the appeal taken after the effective date, but Petitioner was not tried or sentenced until after that date.<sup>1</sup> Thus, even under

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<sup>1</sup> This is also the timing in Jones v. State, Case No. 93, 805, with which this case has been consolidated.

the reasoning applied with regard to the preservation requirement under section 924.051(3), the statute would have applied to this case.

In sum, section 924.051(7) is remedial in nature. It does not impinge on a defendant's substantive rights. Rather, the statute reaffirms existing standards of review. Accordingly, the Fourth District properly applied section 924.051(7) to the instant case because any error was evidentiary and did not amount to a denial of due process.

**CONCLUSION**

WHEREFORE based on the foregoing arguments and authorities, the decision of the District Court of Appeal should be AFFIRMED and the certified question answered in the AFFIRMATIVE, at least with regard to violations of state rules and laws as opposed to federal constitutional rights.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy hereof has been furnished to, TATJANA OSTAPOFF, Assistant Public Defender, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401 on March \_\_\_\_, 1999.

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Counsel for Respondent

