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In the Supreme Court of Florida

CASE NO. 94,348

WAVELL HEIRD,

Appellant/Petitioner,

v.

THE STATE OF FLORIDA,

Appellee/Respondent.

ON APPEAL FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT, IN AND FOR JACKSON COUNTY, FLORIDA, THE HONORABLE MICHAEL C. OVERSTREET, JUDGE

REPLY BRIEF OF PETITIONER ON THE MERITS

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_____/

PRELIMINARY STATEMENT

Citations in this brief to designate record references are as follows:

"R. __" — Record on Appeal to this Court;

"T. __" — Transcripts of Proceedings in the Trial Court.

"AB. _" — Appellee's Amended Answer Brief.

All cited references will be followed by the relevant page number(s). All other citations will be self-explanatory or will otherwise be explained.

Pursuant to an Administrative Order of the Supreme Court dated July 13, 1998, counsel certifies this brief is printed in 14 point Goudy, a proportionately spaced, computer generated font.

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DOES THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHORIZED COST INDIVIDUALLY AT THE TIME OF SENTENCING CONSTITUTE FUNDAMENTAL ERROR?

Petitioner will continue to rely on the arguments presented in his Initial Brief on the Merits, with the following arguments in response to the state's arguments:

The state argues that "'fundamental error' no longer exists in the sentencing context," relying on *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998), *rev. pending*, Case No. 92,805. [AB. 4].

Respectfully, the notion that fundamental error no long exists in the sentencing context simply eviscerates the statutory provision preserving review of issues of fundamental error, *see* § 924.051(3), Fla. Stat. (1997), and is contrary to decisions of this Court finding fundamental error in the context of sentencing. *See, e.g., State v. Mancino*, 714 So. 2d 429 (Fla. 1998) ("A sentence that patently fails to comport with statutory or constitutional limitations is by definition 'illegal.'").

In response to the Petitioner's argument that imposition of the $40 application

fee to the Indigent Criminal Defense Trust Fund was fundamental error, the state responds that this fee was authorized by statute because, when the Petitioner was sentenced, the statute authorizing the discretionary imposition of the fee had gone into effect. [AB. 9]. *See*, § 27.52(1)(c), Fla. Stat., effective January 1, 1997. However, the offense in this case was committed on March 17, 1996, at a time when no "application fee" was authorized by statute. The state otherwise fails to respond to the Petitioner's arguments that this statute does not apply to him. Indeed, the imposition of this fee, which was not statutorily authorized at the time of the offense, is an impermissible *ex post facto* application of the statute and clearly fails to comport with constitutional limitations. Consequently, this was fundamental error as defined by this Court in *State v. Mancino*, *supra*.

The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen.

> This doctrine finds expression in several provisions of our Constitution. [footnote omitted]. The specific prohibition on ex post facto laws is only aspect of the broader constitutional protection against arbitrary changes in the law. In both the civil and the criminal context, the Constitution places limits on the sovereign's a ability to use its law-making power to modify bargains it has made with its subjects. The basic principle is one that protects not only the rich and the powerful, *United States v. Winstar Corp.*, 518 U.S. ___, 116 S.Ct. 243, 135 L.Ed.2d 964 (1996), but also the indigent defendant engage in negotiations that may lead to an acknowledgment of guilt

and a suitable punishment.

Lynce v. Mathis, 117 S.Ct. 891, 895 (1997).

The very concept of fundamental error, and the manner in which it has been defined by case law, does not have a single expression or basis. *In Hopkins v. State*, 632 So. 2d 1372, 1374 (Fla. 1994), this Court said that fundamental **error** is "**error** which goes to the foundation of the case or goes to the merits of the cause of action." *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970). If a procedural defect is declared **fundamental error,** then the error can be considered on appeal even though no objection was raised in the lower court. *Id.*; *Ray v. State*, 403 So. 2d 956, 960 (Fla. 1981). "[F]or an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process." *State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993).

The concept of fundamental error is not limited solely to "illegal" sentences, as the State seemingly suggests [AB 10], although "illegal" sentences are clearly fundamental error. *See, Davis v. State*, 661 So. 2d 1193 (Fla. 1995); *State v. Gallaway*, 658 So. 2d 983 (Fla. 1995); *State v. Mancino, supra.* Indeed, the most pervasive expression of fundamental error seems to be rooted in the concept of a denial of procedural due process. *See, e.g., State v. Johnson, supra.* The primary

rationale is whether procedural due process has been satisfied by notice and an opportunity to be heard. Procedural due process requires (1) notice of the assessment and a full opportunity to objection to the assessment and (2) enforcement of collection of those costs only after a judicial finding that the indigent defendant has the ability to pay them (an issue not present at this time in this case). *Jenkins v. State*, 444 So. 2d 947 (Fla. 1984), citing *Fuller v. Oregon*, 417 U.S. 40 (1974). *See also Bearden v. Georgia*, 461 U.S. 660, 665 (1983)("[d]ue process and equal protection principles converge in the Court's analysis in these cases.").

The failure to comply with procedural due process requirements with respect to costs and attorney's fees has been held to be fundamental error by the Florida Supreme Court. *Jenkins v. State*, 444 So. 2d 947 (Fla. 1984)(implied holding); *Wood v. State*, 544 So. 2d 1004 (Fla. 1989)(explicit holding); *Henriquez v. State*, 545 So. 2d 1340 (Fla. 1989)(following *Wood v. State*); *State v. Beasley*, 580 So. 2d 139 (Fla. 1990).

The court also has held that costs which are, by statute, to be mandatorily imposed in every case, do not require notice of the intent to impose them at the time of sentencing because the statutes themselves are deemed to provide constructive notice of those mandatory costs, satisfying the requirements due process. *State v. Beasley*, 580 So. 2d 139, 142 (Fla. 1990). Such constructive notice is limited,

however, to mandatory costs.[1] *Id.*, n.4.

However, discretionary costs — which by authorizing statute *may* be imposed by the court — do require notice and an opportunity to object at sentencing because in the absence of such notice the statute does not constructively apprize the defendant that the discretionary cost will be imposed in his or her individual case. The same is true with respect to attorney's fee liens imposed pursuant to § 27.56, Fla. Stat., because that statute does not mandate the imposition of a specific fee, but rather leaves the determination of the amount of the fee to the discretion of the trial court. Thus, notice of the right to contest the amount and to require a hearing at sentencing of the opportunity to contest the amount of the fee is required by procedural due process. *Jenkins*; *Henriquez*; *Bull v. State*, 548 So. 2d 1103 (Fla. 1989). Notice of the right to contest and the right to a hearing is also affirmatively embodied in the Florida Rules of Criminal Procedure. Fla. R. Crim. P. 3.720(d) provides:

> At the [sentencing] hearing:
>
> * * *

[1]The mandatory costs in criminal cases, as then provided by statute, appear to be a $3 pursuant to § 943.25(3), Fla. Stat.; $50 costs pursuant to § 960.20, Fla. Stat.; and $200 felony pursuant to § 27.3455, Fla. Stat. Those same costs are currently authorized by Part I of Ch. 938, which is entitled Mandatory Costs in All Cases, and being §§938.01, 938.03, and 938.05(1)(a), respectively.

s

> (d)(1) If the accused was represented by a public defender or special assistance public defender, the court shall notify the accused of the imposition of a lien pursuant to section 27.56, Florida Statutes. 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.**
>
> (2) If the accused requests a hearing to contest the amount of the lien, the court shall set a hearing date within 30 days of the date of sentencing.

(Emphasis added).

In addition to the due process rationale supporting a finding fundamental error, fundamental error has also been found where, for example, investigative costs were imposed without a request for such costs or documentation to support the assessment as required by statute, and, therefore, the imposition of that cost was illegal. *See, e.g. Bisson v. State*, 696 So. 2d 504 (Fla. 5th DCA 1997); *Abbott v. State*, 1998 WL 25574 (Fla. 4th DCA 1997); *Golden v. State*, 667 So. 2d 933 (Fla. 2d DCA 1996).

Further, "It is well established that a court lacks the power to impose costs in a criminal case unless specifically authorized by statute. . . Thus, the imposition of those cases are, in a sense, illegal." *Holmes v. State*, 658 So. 2d 1185 (Fla. 4th DCA 1995). *See also, State v. Mancino, supra.* If illegal because the costs are not authorized by statute, or because the court has failed to identify an authorizing statute for such costs, it would constitute fundamental error. This is also true where the cost

imposed is in excess of that authorized by statute. *Primm v. State*, 614 So. 2d 658 (Fla. 2d DCA 1993); *Robbins v. State*, 413 So. 2d 840 (Fla. 3d DCA 1982).

Prior to the enactment of § 924.051(3), Fla. Stat., the question of whether certain sentencing errors with respect to the imposition of costs, fees and attorney fee liens constituted fundamental error had been repeatedly addressed by the Florida Supreme Court and the district courts, as discussed above.

Because the appellate courts had held certain cost errors to be fundamental error under certain conditions, it must be presumed that when the Legislature enacted § 924.051(3), which permits fundamental errors to be raised on appeal notwithstanding the failure to otherwise preserved the issues in the trial court by objection or by a 3.800(b) motion to correct, the Legislature was aware of, or must be presumed to have been aware of, which sentencing errors previously had been determined to be fundamental and the basis or rationale underpinning those holdings. Nothing in § 924.051(3), indicates any intent on the part of the Legislature to limit, redefine or alter the meaning of "fundamental" error as the term is used in the statute and as it had been previously applied in the case law of this state.

For all of the reasons presented in the Initial Brief as well as here, Petitioner

urges this Court to find that the imposition of the challenged costs in his case constituted fundamental error.

CONCLUSION

Appellant/Respondent, WAVELL HEIRD, based on the foregoing, respectfully urges the Court to vacate the costs, fees and fine, and to disapproved the decision of the district court, and to grant such other relief the Court deems just and equitable.

Respectfully submitted,

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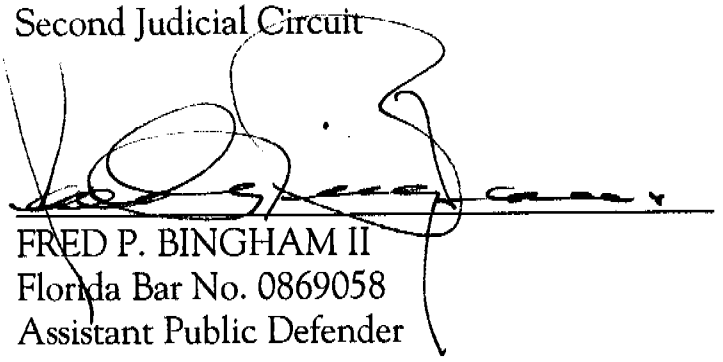

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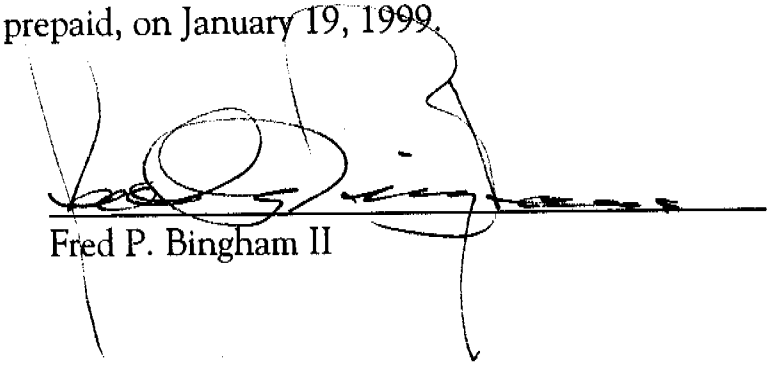
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to James W. Rogers, Esq., Senior Assistant Attorney General, and Trisha E. Meggs, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to the Respondent by U.S. Mail, first-class postage prepaid, on January 19, 1999.



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