ORIGINAL

FILED
SID J. WHITE
DEC 17 1998
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE
SUPREME COURT OF FLORIDA

MICHAEL W. LOCKE,

Petitioner,

vs.

CASE NO. 94,396

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW OF
A DECISION OF
THE FIRST DISTRICT COURT OF APPEAL

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CAROL ANN TURNER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 243663
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

IN THE
SUPREME COURT OF FLORIDA

MICHAEL W. LOCKE,

Petitioner,

vs.

CASE NO. 94,396

STATE OF FLORIDA,

Respondent.

_____/

I. PRELIMINARY STATEMENT

The appellant, MICHAEL W. LOCKE, was the defendant in the trial court below, and the appellant in the First District Court of Appeal. He will be referred to herein as "petitioner" or by his proper name, "Locke." The State of Florida, prosecuting at trial, and appellee in the First District Court of Appeal, will be referred to as "respondent" or "state."

The two volumes comprising the record on appeal will be referred to by the Roman numerals "I" and "II" respectively, followed by the applicable page number.

Pursuant to an Administrative Order of the Supreme Court dated July 13, 1998, counsel certifies this brief is printed in Courier New Regular (12 pt) Western, an evenly-spaced computer generated font.

II. STATEMENT OF THE CASE AND FACTS

Locke, a convicted felon, and his girlfriend, Latonya Williams, got into an argument. The two were about to move to Alabama from Escambia County, although not together (II 74). Locke left with Williams's newly purchased car, into the trunk of which she had already packed plastic bags containing her clothes, and she called the sheriff (II 64).

She received a call from a friend with information that her car was at the Econo Lodge, and the deputy who was talking with her called in another officer to check out the Econo Lodge (II 22). The second deputy testified that he was told the petitioner was armed (II 91)

When the second deputy arrived at the Econo Lodge, Locke was removing items from the trunk of the car, slinging them towards the door of a motel room. The officer saw a .22 rifle in the trunk of the car and inquired as to its ownership. Locke first said it was his, but then said it was "hers." (II 31-32) Locke testified he later told the officer that Williams may have purchased the gun for his son for squirrel hunting purposes (II 85, 98). Several cartridges were found under the driver's seat.

At trial, there was conflicting evidence as to the ownership of the gun. Williams testified that she had bought the gun from her brother as a gift for Locke's son, Michael. She said she put it in the trunk of the car because she was getting ready to move.

She said she hadn't bought cartridges for the gun (II 63-72). The first officer to speak with her, however, testified that she told him Locke was armed and the gun belonged to him (II 83-84).

Locke was found guilty as charged (I 9; II 145). The court found Locke to be an habitual felony offender, and sentenced him to 60 months incarceration (I 30). The court orally announced court costs in the amount of $449, which was to be reduced to civil judgment. Locke was sentenced contemporaneously on other charges, so an assumption arises that the court announced an aggregate amount of costs.

On the written judgment and sentence for this particular case, the following costs and fines appeared:

> $3 teen court "pursuant to County Ordinance 96-47"
>
> $3 juvenile assessment "pursuant to County Ordinance 96-48
>
> $5 court costs "per Administrative Order"

(I 92) and

> "a fine of $174.00, pursuant to section 775.083, Florida Statutes, plus $9.00 as the 5% surcharge required by section 960.25, Florida Statutes"

None of these were announced separately in open court.

A brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) was filed with the First District Court of Appeal, with petitioner noting that varying district courts of Florida had taken different positions with regard to the necessity for oral pronouncement of individual costs and fees and the oral provision

of statutory authority for those fees.

The First District Court of Appeal published an *en banc* decision on October 21, 1998, which is attached hereto as an Appendix.

On November 20, 1998, petitioner filed a timely Notice to Invoke Discretionary Jurisdiction of this court pursuant to Fla.R.App.P. 9.030(a))(2)(A)(v) and Art. V, section (3)(b)(4), Fla.Const. On November 24, 1998, this court entered an order postponing its decision on jurisdiction and directing briefing of the merits.

III. SUMMARY OF ARGUMENT

Statutory notice of *discretionary* costs and fees is insufficient, as there is no certainty that such fees and costs will be imposed. Failure of adequate notice constitutes a violation of due process, which is a fundamental error not requiring contemporaneous objection to preserve the issue for appellate review.

IV. ARGUMENT

ISSUE: WHETHER THE FAILURE OF THE TRIAL COURT TO ORALLY PRONOUNCE EACH STATUTORILY AUTHORIZED COST INDIVIDUALLY AT THE TIME OF SENTENCING CONSTITUTES FUNDAMENTAL ERROR.

The identical issue was recently briefed for this court in Case No. 94,348, *Heird v. State*. This brief adopts the arguments set forth in *Heird*.

It appears to be settled law that the imposition of mandatory costs and fees need not be individually pronounced at sentencing because the statutes authorizing and requiring the imposition of mandatory fees give constructive notice to the defendant of such fees and costs.

With respect to discretionary costs and fees, however, petitioner contends that the statutes authorizing the imposition of such fees give notice only of the authority for their imposition, but because of their discretionary nature, fail to give notice to the defendant that they will be imposed in his or her individual case. Therefore, discretionary fees and costs must be orally pronounced at sentencing and, if required by statute or rule, notice of the right to contest the imposition or the amount of any such cost, fee or fine must also be given to satisfy due process of law.

Before the effective date of the Criminal Appeal Reform Act, it was well-established that discretionary costs must be orally

pronounced and, in addition, the statutory authority for such costs must be orally announced or included in the written court order.

Rule 3.800(b), Fla.R.Crim.Pro., effective July 1, 1996 states:

> (b) Motion to Correct Sentencing Error. A defendant may file a motion to correct the sentence or order of probation within thirty days after rending of the sentence.

This rule initially allowed ten days in which to file such a motion, but was subsequently amended to allow 30 days in which to do so.

Section 924.051(3), Fla.Stat., also effective July 1, 1996, states:

> (3) an appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly prserved in the trial court, or, if not properly preserved, would constitute fundamental error.

Section 924.051(8), Fla. State. (Supp. 1996), further provides:

> It is the intent of the Legislature that all terms and conditions of direct appeal and collateral review be strictly enforced including the application of procedural bars, to ensure that all claims of error are raised and resolved at the first opportunity. It is also the Legislature's intent that all procedural bars to direct appeal and

> collateral review be fully enforced by the courts of this state.

In *Neal v. State*, 688 So. 2d 392 (Fla. 1st DCA), *rev. den*, 698 So. 2d 543 (Fla. 1997), the First District addressed the effects of Section 924.051(3), Fla. Stat. (1996), and Fla.R.Crim.P. 3.800(b), both effective July 1, 1996, and concluded that Section 924.051(3) was procedural and did not violate the constitutional prohibitions on ex post facto laws. Rejecting Neal's claim that the sentence was an improper departure because that issue had not been preserved in the trial court either by objection or by filing of a motion to correct the sentence, the *Neal* court nevertheless reversed the imposition of a lien for services of the public defender because the trial court had failed to give notice and an opportunity to be heard. The court concluded that the failure to provide such notice and opportunity to be heard was fundamental error, relying on *Henriquez v. State*, 545 So. 2d 1340 (Fla. 1989), which in turn had cited *Wood v. State*, 544 So. 2d 1004 (Fla. 1989). *See also Beasley v. State*, 695 So. 2d 1313 (Fla. 1st DCA 1997); *Strickland v. State*, 693 So. 2d 1142 (Fla. 1st DCA 1997); *Springer v. State*, 557 So. 2d 188 (Fla. 1st DCA 1990); *Ford v. State*, 556 So. 2d 483 (Fla. 2d DCA 1990); *Cruz v. State*, 554 So. 2d 586 (Fla. 3d DCA 1989).

The primary rationale of the holding by Florida's appellate courts that certain costs and fees errors are fundamental is that

procedural due process must be satisfied. Procedural due process requires (1) notice of the assessment and a full opportunity to object 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. *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 attorneys' fees has been held to be fundamental error by this court. *Jenkins, supra,* (implied holding); *Wood, supra,* (explicit holding); *Henriquez, supra,* (following *Wood, supra*); and *State v. Beasley*, 580 So. 2d 139 (Fla. 1990).

This court has also held that costs which are mandatorily imposed by statute 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, thus satisfying the requirements of due process. *State v. Beasley, supra.* Such constructive notice is limited, however, to mandatory costs. *Id.*, n.4.

Discretionary costs which *may* be imposed by the court do, however, require notice and an opportunity to object at

sentencing because the statute does not constructively notify the defendant that the discretionary cost will be imposed in his or her case.

The same is true with respect to attorneys' fee liens imposed pursuant to Section 27.56, Fla. Stat., because that statute does not mandate the imposition of a specific fee, but leaves the determination of the amount 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, supra; Henriquez, supra; Bull v. State*, 548 So. 2d 1103 (Fla. 1989).

Notice of the right to contest and the right to a hearing is also embodied in the Florida Rules of Criminal Procedure. Rule 3.710(d), Fla.R.Crim.Pro., provides:

> At the sentencing hearing:
>
> * * *
>
> (d)(1) If the accused was represented by a public defender or special assistant 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.

In addition to the due process rationale supporting a finding of 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. *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, "[i]t 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 costs are, in a sense, illegal." *Holmes v. State*, 658 So. 2d 1185 (Fla. 4th DCA 1995). 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 exces 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 s. 924.051(3), Fla. Stat., as part of the Criminal Appeal Reform Act, 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 this court and the district courts, as discussed above.

Because the appellate courts have held certain cost errors to be fundamental under certain conditions, it must be presumed that when the Florida Legislature enacted Section 924.051(3), which permits fundamental errors to be raised on appeal notwithstanding the failure to preserve the issues in the trial court by contemporaneous objection or a motion to correct, the legislature wwas aware of which sentencing errors previously had been determined to be fundamental error and the basis or rationale for these holdings. Nothing in Section 924.051(3) indicates an intent on the part of the legislature to limit or redefine the meaning of "fundamental error" as the term is used in this statute or as it had been applied in pre-existing case law.

Appellant is cognizant of the en banc decision of the Fifth District Court of Appeal in *Maddox v. State*, 23 Fla. L. Weekly D720 (Fla. 5th DCA March 13, 1998) which held there are no longer any fundamental errors in sentencing subsequent to the effective date of s. 924.051 and Rule 3.800(b) on July 1, 1996. The court in *Maddox* viewed the rule as a "failsafe" which obviates the need for the concept of fundamental error in sentencing.

Petitioner contends that this view is perhaps idealistic, because the hard truth is that the written judgments and

sentences--which disclose the errors such as those complained of here--are not served on the defendant or defense counsel. If the necessary documents are not timely served, then counsel is unable to seek correction for something of which he or she is ignorant. Thus, Rule 3.800(b) is far from a "failsafe" for the average defendant.

Here, the announcement of a lump sum imposition of $449 in costs and fees was not sufficient notice to the petitioner. The absence of notice of intent to impose discretionary costs and the absence of an opportunity to be heard are violative of due process, and thus constitute fundamental error, addressable on direct appeal.

V. CONCLUSION

Based on the facts of this case, the rules and statutes cited, the statutory principles, case law and legal argument presented, petitioner respectfully requests that this court answer the certified question in the affirmative, disapprove of the decision of the First District Court of Appeal, and remand this case to the First District Court of Appeal for further consideration.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

for K. Rowe #573253
CAROL ANN TURNER
Assistant Public Defender
Fla. Bar No. 243663
Leon County Courthouse
Suite 401
301 South Monroe Street
Tallahassee, Florida 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida; and a copy has been mailed to appellant on this 17th day of December, 1998.

for KRTowe
CAROL ANN TURNER