IN THE SUPREME COURT OF FLORIDA

GARY ENGESETH,

Petitioner, :

v. : CASE NO. 95,003

STATE OF FLORIDA, :

Respondent. :

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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I PRELIMINARY STATEMENT

Petitioner, GARY A. ENGESETH, was the defendant in the trial court, and the appellant in the First District Court of Appeal. He will be referred to herein as petitioner or by name. The State of Florida, prosecuting at trial, and appellee in the First District Court, will be referred to as respondent or as the state.

Reference to the record on appeal will be by use of the volume number (in Roman numerals), 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 (12 pt), an evenly-spaced computer generated font.

The identical issue presented herein was recently briefed for this court in Heird v. State, no. 94,348 and in Locke v. State, no. 94,396. This brief adopts the arguments set forth in Heird and Locke.

II STATEMENT OF THE CASE AND FACTS

After appellate counsel filed an Anders brief, the First District Court affirmed Engeseth's conviction and sentence for felony DUI. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The court also certified the question it had previously certified in Locke v. State, 719 So.2d 1249 (Fla. 1st DCA), review pending, no. 94,396 (Fla. 1998):

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

Engeseth filed notice to invoke discretionary jurisdiction of this Court on March 1, 1999, and has been directed by this Court to file his merit brief, which is herewith filed.

III SUMMARY OF ARGUMENT

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

IV ARGUMENT

ISSUE PRESENTED/CERTIFIED QUESTION

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

It appears to be settled law that the imposition of mandatory costs, fees and fines 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, costs and fines.

With respect to discretionary costs, fees and fines, 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 costs, fees and fines 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.P., 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 rendition of the sentence.

This rule initially allowed 10 days in which to file such a motion, but was subsequently amended to allow 30 days.

Section 924.051(3), Florida Statutes, also effective July 1, 1996, provides:

> 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 preserved in the trial court, or, if not properly preserved, would constitute fundamental error.

Subsection 924.051(8), Florida Statutes (Supp. 1996), 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), review denied, 698 So. 2d 543 (Fla. 1997), the First District addressed the effects of section 924.051(3) and Rule 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 the defendant'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 a motion to correct the sentence, Neal 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 cost, fee and fine 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 only after a judicial finding that the indigent defendant has the ability to pay. 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 (implied holding); Wood (explicit holding); Henriquez, supra (following Wood); 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.

Although specifically at issue here, the same is true with respect to attorneys' fee liens imposed pursuant to section 27.56, Florida Statutes, 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 at sentencing a hearing with an opportunity to contest the amount of the fee is required by procedural due process. Jenkins; 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) 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); 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 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 section 924.051(3), 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 motion to correct, the legislature was 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.

Petitioner is cognizant of the en banc decision of the Fifth District Court of Appeal in Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998), review granted, 718 So.2d 169 (Fla. 1998), which held there are no longer any fundamental errors in

sentencing after section 924.051 and Rule 3.800(b). 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 too idealistic, because the hard truth is that the written judgments and sentences - which disclose errors such as those complained of here - are not served timely 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 unaware. Thus, Rule 3.800(b) is far from a "failsafe" for the average defendant.

Petitioner did not receive adequate notice of the discretionary costs, fees and fines imposed here. 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, 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 the decision of the First District Court of Appeal, and remand this case to the First District for further consideration.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
Fla. Bar No. 0513253
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(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 Mr. Gary A. Engeseth, # 841144, Century Correctional Institution, 400 Tedder Road., Century, Fl 32535, this 30 day of March, 1999.

KATHLEEN STOVER

IN THE SUPREME COURT OF FLORIDA

GARY ENGESETH,

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v. : CASE NO. 95,003

STATE OF FLORIDA, :

Respondent. :

_____/

APPENDIX

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

GARY A. ENGESETH,

Appellant,

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

v.

STATE OF FLORIDA,

CASE NO. 97-3857

Appellee.

_____/

Opinion filed January 29, 1999.

An appeal from the Circuit Court for Escambia County. Judge Kim A. Skievaski.

Nancy A. Daniels, Public Defender, and Kathleen Stover, Assistant Public Defender, Tallahassee, and Gary A. Engeseth, pro se, for Appellant.

Robert A. Butterworth, Attorney General, and James W. Rogers, Senior Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED. We certify to the Florida Supreme Court, as a matter of great public importance, the same question that was certified in Locke v. State, 23 Fla. L. Weekly D2399 (Oct. 21, 1998).

BARFIELD, C.J., ERVIN and JOANOS, JJ., CONCUR.