IN THE SUPREME COURT OF FLORIDA

RONALD JAMES RICHARDS,

Petitioner,

FSC Case No. SC19-24

vs.

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF CASE AND FACTS

Ronald Richards was charged with grand theft in case number 2016-301281-CFDB.[1] (R 74) He entered a plea of no contest and was sentenced to 36 months probation. (R 82, 108-11) At sentencing, the trial court inquired whether it "normally has what, a $150 police agency fee?" (R 19) The State acquiesced and the trial court imposed a $150 cost of investigation to the Daytona Beach Shores Police Department. (R 19, 85)

Mr. Richards filed a motion to correct sentencing error which challenged the imposition of the investigative cost. (R 132-35) It was argued that the record was devoid of any written documentation supporting the cost. Likewise, no agent from the police department requested the cost. Therefore, the cost was imposed in error. (R 133)

A hearing was held on the motion to correct. (R 152-63) At the hearing, the State agreed that the cost of investigation was not specifically contemplated in the plea form. (R 160) The trial court found that the imposition of a general $150 cost of investigation was "exactly what we typically do." (R 161) Thereafter, the motion to correct sentencing error was denied. (R 143, 162)

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[1] Case number 2014-303606-CFDB, involving a violation of probation, was also included in the Record on Appeal. The 2014 case has no bearing on the arguments herein because the cost at issue was not imposed.

Mr. Richards appealed the trial court's general policy of imposing a $150 investigative cost in all cases, regardless of whether there was a proper request, supporting documentation, or even any investigation at all. As a result, Mr. Richards requested that the cost be stricken from the judgment. In addition, it was argued that the State should be precluded from seeking reimposition of the cost on remand. Mr. Richards noted that, when the State failed to request the cost of investigation at sentencing, the decision of the Fifth District Court of Appeal (hereinafter, "Fifth DCA") was in conflict with other Florida appellate courts as to the State's ability to request and prove the cost on remand.

The Fifth DCA held that the trial court erred in imposing the investigative cost "in the absence of a request from the State or any evidence from the investigating agency." *Richards v. State*, 258 So. 3d 576 (Fla. 5th DCA 2018). The case was remanded to the trial court to strike the investigative cost from the judgment. However, the Fifth DCA noted that, on remand, "the State should be given the opportunity to request the imposition of investigative costs." *Id.*

Mr. Richards filed his notice of intent to invoke jurisdiction on January 3, 2019, arguing that this Court should review the portion of the Fifth DCA's decision which allowed the State the opportunity, on remand, to request and prove a cost of investigation which was never originally requested. The Fifth DCA's

decision is in conflict with the First, Second, and Fourth District Court's of Appeal. This Court accepted jurisdiction on March 25, 2019.

SUMMARY OF ARGUMENT

The Fifth DCA properly held that the trial court erred in imposing a cost of investigation in the absence of a request from the State or any evidence from the investigating agency. Richards' case was remanded to the trial court to strike the investigative cost from the judgment. However, the Fifth DCA noted that the State should be given the opportunity to request the imposition of investigative costs on remand. This was error. In addition, this decision is in conflict with the First, Second, and Fourth District Courts of Appeal.

The plain language of the statute controls this issue. The current version of the statute requires a singular triggering event for the imposition of an investigative cost: a request. In the absence of a request, the statute is not activated and does not apply. In that event, the State should be foreclosed, on remand, from seeking a cost that it never originally requested. This proper interpretation of the statute has been adopted by the First, Second, and Fourth District Courts of Appeal.

This Court should quash the portion of the Fifth DCA's decision allowing the State, on remand, to seek a cost that was never originally requested. This Court should adopt the decisions of the First, Second, and Fourth District Courts of Appeal on this issue.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL ALLOWING THE STATE, ON REMAND, THE OPPORTUNITY TO SEEK AND PROVE AN INVESTIGATIVE COST THAT WAS NEVER ORIGINALLY REQUESTED IS ERRONEOUS, AT ODDS WITH THE PLAIN LANGUAGE OF THE STATUTE, AND IS IN CONFLICT WITH A MAJORITY OF FLORIDA APPELLATE COURTS.

This case involved the imposition of a cost of investigation. The controlling statute states, in pertinent part:

> In all criminal and violation-of-probation or community-control cases, convicted persons are liable for payment of the costs of prosecution, including investigative costs incurred by law enforcement agencies, by fire departments for arson investigations, and by investigations of the Department of the Financial Services Commission, *if requested by such agencies*.

§938.27(1), Fla. Stat. (2017) (Emphasis added). Here, in Richards' case, the Fifth DCA determined that the trial court erred in imposing the cost of investigation in the absence of a request from the State or any evidence from the investigating agency. *Richards v. State*, 258 So. 3d 576 (Fla. 5th DCA 2018). The Fifth DCA was correct on this point. The issue in this case centers around the relief given by the court. Richards' case was remanded to the trial court to strike the investigative cost from the judgment. *Id*. However, the State was given the opportunity to

request the imposition of the cost for the first time on remand. *Id*. This holding was erroneous and is in conflict with other Florida appellate court decisions.

i. The basis of the Fifth District Court's decision

The Fifth DCA's holding that the State, on remand, shall be given the opportunity to support the imposition of an investigative cost that was never originally requested stems from the court's prior decision in *McCarthy v. State*, 893 So. 2d 689 (Fla. 5th DCA 2005). In *McCarthy*, the court held:

> In this case, it is undisputed that neither the State Attorney's office nor the Daytona Beach Police Department requested or documented their costs. Therefore, these costs must be stricken from the judgment. The prevailing view of Florida courts is that if the State fails to offer proof to support a cost claim against a defendant, the State should be given a new hearing and another opportunity to offer proof. *See* *Pagliuca v. State*, 860 So. 2d 1095 (Fla. 5th DCA 2003) and cases cited therein. *If the courts do not view the failure to provide documentation at the first hearing as fatal, there seems to be no good reason to find the failure to make the request to be fatal. We therefore reverse, but remand to give the State another opportunity to request and document the stricken costs*.

McCarthy, 893 So. 2d at 690. (Emphasis added). The Fifth DCA's reasoning is clear from the emphasized language above. However, this reasoning is flawed.

ii. Changes to the statute

In *McCarthy*, the Fifth DCA addressed the 2002 version of the statute. At

that time, subsection (1) read:

> In all criminal cases the costs of prosecution, including investigative costs incurred by law enforcement agencies, by fire departments for arson investigations, and by investigations of the Division of Financial Investigations of the Department of Banking and Finance, if requested and documented by such agencies, shall be included and entered in the judgment rendered against the convicted person.

§938.27(1), Fla. Stat. (2002).

In 2003, the following changes were made to the statutory subsection at issue:

> In all criminal cases**, convicted persons are liable for payment of** the **documented** costs of prosecution, including investigative costs incurred by law enforcement agencies, by fire departments for arson investigations, and by investigations of the ~~Division of Financial Investigations of the~~ Department of **Financial Services or the Office of Financial Regulation of the Financial Services Commission** ~~Banking and Finance~~, if requested ~~and documented~~ by such agencies.

H.B. 113-A, 2003 Fla. Sess. Law Serv. Ch. 2003-402 (Fla. 2003). The bolded language above was added to the statute by the Legislature and the language with a strike through it was removed. The only notable change in 2003 was moving "documented" from the end to the beginning of the subsection.

The more relevant change occurred in 2008 when the statute was amended

as follows:

> In all criminal **and violation-of-probation or community-control** cases, convicted persons are liable for payment of the ~~documented~~ costs of prosecution, including investigative costs incurred by law enforcement agencies, by fire departments for arson investigations, and by investigations of the Department of Financial Services or the Office of Financial Regulation of the Financial Services Commission, if requested by such agencies.

C.S.S.B. 1790, 2008 Fla. Sess. Law Serv. Ch. 2008-111 (Fla. 2008). As shown above, the Legislature added "and violation-of-probation or community-control" to the types of cases that the statute applies and, more importantly, the word "documented" was removed entirely.

iii. Decisions in conflict with the Fifth DCA

The Fifth DCA's holding in *McCarthy* was based on an interpretation of the statute's language in 2002, where the cost was proper "if requested **and** documented by such agencies." In the event the State failed to provide sufficient documentation to support the cost it requested, they were allowed, on remand, to comply with the statutory requirements. The Fifth DCA held that the failure to make the request was no different than the failure to provide documentation, therefore the State's failure on either should not be fatal. This distinction could possibly apply if addressing a pre-2008 version of the statute. However, the

Legislature specifically eliminated the word "documented" from the statute in 2008. Despite this change, the Fifth DCA has not altered its holding accordingly. This is error and the Fifth DCA's remedy is in conflict with the First, Second, and Fourth District Courts of Appeal.[2]

Unlike the Fifth DCA, the Second DCA has modified its stance on this issue as the statute has evolved. In 2008, the court's holding aligned with the Fifth DCA. *See* *Love v. State*, 992 So. 2d 823 (Fla. 2d DCA 2008) ("The record does not reflect that any agency requested payment of this cost[.] . . . On remand, the court may reimpose the cost if the statutory requirements are met"). However, in 2018 the Second DCA properly adjusted their holding based on the plain language of the statute. In *Mercado v. State*, 2018 WL 5019739, *1 (Fla. 2d DCA Oct. 17, 2018), the court held:

> We affirm Mercado's judgment and sentence in all respects except we remand for the trial court to strike the $100 in prosecution/investigative costs because the plain language of section 938.27(1), Florida Statutes (2016),

[2] It does not appear that the Third District Court of Appeal has addressed this specific issue. The last case from the Third DCA to mention the statute was *State v. Dominguez*, 27 So. 3d 782 (Fla. 3d DCA 2010). In *Dominguez*, the trial court refused to award investigative costs, despite the State's request. This was error. On remand, the State was given the opportunity to prove the costs it requested and defense was given the opportunity to object to or disprove those expenses. *Dominguez*, 27 So. 3d at 784. *Dominguez* involved a request from the State and, therefore, is not relevant to the issue now raised.

> requires that the costs be requested and there is no such request on the record before us. The prosecution/ investigative costs may not be reimposed on remand.

Mercado, 2018 WL 5019739 at *1. (Citations omitted).

Likewise, the Fourth DCA has properly reformed its holding as statutory changes occurred. As recently as 2014, the Fourth DCA's holding aligned with the Fifth DCA. *See* *Jackson v. State*, 137 So. 3d 470 (Fla. 4th DCA 2014) ("Here, the record reflects that no investigating agency moved for fees[.] . . . Accordingly, the investigative costs entered against Appellant must be reversed and remanded for the trial court to either strike the costs or re-impose the costs if the statutory requirements are met"). In 2017, the Fourth DCA, recognizing the shift in the decisions interpreting the statute, also properly revised their holding. In *Chambers v. State*, 217 So. 3d 210 (Fla. 4th DCA 2017), the court held:

> We also reverse the trial court's imposition of a $50 charge for investigative costs where the record does not demonstrate that the state requested reimbursement for these costs. On remand, the trial court shall strike imposition of these costs, but because the state did not request these investigative costs below, the trial court may not re-impose these costs.

Chambers, 217 So. 3d at 214. (Citations omitted).

Finally, the First District Court of Appeal has repeatedly held that the State does not get an opportunity on remand to prove an investigative cost that was

never originally requested. *See* *Vaughn v. State*, 65 So. 3d 138 (Fla. 1st DCA 2011) ("On remand, the state may not seek to reimpose these costs because the record does not demonstrate that the state requested these costs"); *DeSalvo v. State*, 107 So. 3d 1185 (Fla. 1st DCA 2013) ("On remand, the trial court may reimpose the stricken fine, surcharges, and indigent legal assistance fees after following the appropriate procedures, but the court may not reimpose the stricken investigative costs because they were not requested by the State") (internal citations omitted); *Mills v. State*, 177 So. 3d 984 (Fla. 1st DCA 2015) ("On remand, the trial court may not reimpose this investigative cost because there is no record evidence the state requested the cost"); *Thomas v. State*, 236 So. 3d 1159 (Fla. 1st DCA 2018) ("[T]here was no request on the record for the imposition of this cost[.] . . . Based on the plain language of the statute, the investigative costs must be stricken, and they may not be reimposed on remand").

iv. Analysis

As noted in *Thomas* and *Mercado*, the issue should be addressed by reading the plain language of the statute. "It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis." *State v. J.M.*, 824 So. 2d 105, 109 (Fla.2002). In order to discern legislative intent, this Court looks first to the plain and obvious meaning of the statute's text. *McCloud v. State*, 260

So. 3d 911, 914 (Fla.2018). If the statute is "clear and unambiguous," then this Court does not look beyond the plain language or employ the rules of construction to determine legislative intent - it simply applies the law. *Id.* Here, the statute is clear and there is no reason to look beyond the plain language.

After the 2008 amendment, the Legislature made clear that only one action triggered the application of the statute: a request. Absent a request, the statute does not come into play and the State is foreclosed from meeting the statutory requirements on remand. Other appellate courts in this state have recognized this distinction and conformed their decisions accordingly. The Fifth DCA's holding remains at odds with the plain language of the statute and the decisions of nearly all appellate courts in Florida.

Richards respectfully requests this Court quash the decision of the Fifth DCA as it relates to the State's ability, on remand, to seek reimposition of an investigative cost that it did not originally request. This Court should adopt the decisions of the First, Second, and Fourth District Courts of Appeal and their proper interpretations on this issue.

CONCLUSION

WHEREFORE, Mr. Richards respectfully requests this Court quash the decision of the Fifth District Court of Appeal regarding the State's ability, on remand, to seek a cost that it failed to originally request. Mr. Richards requests this Court adopt the decisions of the First, Second, and Fourth District Courts of Appeal on this issue.

Respectfully submitted,

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically to the Florida Supreme Court, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925, at www.myflcourtaccess.com; delivered electronically to the Office of the Attorney General, 444 Seabreeze Boulevard, fifth floor, Daytona Beach, Florida 32118, at crimappdab@myfloridalegal.com; and a true and correct copy thereof delivered by mail to Ronald Richards, 2753 Terryville Rd. Apt. 1, Canastota, NY 13032 on this 15th day of April, 2019.

Matthew Funderburk

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