IN THE SUPREME COURT OF FLORIDA

JAMES R. McDONOUGH,

APPELLANT,

v.

Case No. SC06-301
DCA Case No. 1D05-3857
Cir. Ct. 2003 CA 002973

LEO COX,

APPELLEE.

REPLY BRIEF OF APPELLANT McDONOUGH

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

BILL McCOLLUM
ATTORNEY GENERAL

Joy A. STUBBS
Assistant Attorney General
Florida Bar No. 0062870

The Capitol, PL-01
Tallahassee, Fla. 32399-1050
Telephone: (850) 414-3300

COUNSEL FOR APPELLANT

Table of Contents

Table of Citations

Other Authorities

Summary of Argument

As confirmed by this Court's recent opinions in Schmidt v. McDonough, Cox's case is not collateral criminal. Appellee's single subject challenge to a provision of a 13-year old Legislative Act does not have a "practical effect" on the length of time he actually serves in prison. Cox's action, if anything, is a "mixed" petition, thereby qualifying the action for treatment under the Prisoner Indigency Statute (section 57.085).

This Court should reverse the district court's decision and find that the holding in Schmidt v. Crusoe does not extend to Cox's case.

Argument

I. APPELLEE'S CASE IS NOT EXEMPT FROM SECTION 57.085.

Contrary to Cox's assertion, Cox's case is not collateral criminal. Where prisoner gain time is concerned, a case is "collateral criminal" because of the *practical effect* that the gain time claim has on the length of time an inmate actually serves in prison. Schmidt v. McDonough, 951 So. 2d 797, 802 (Fla. 2006).

Cox characterizes his action as having "direct impact" on the amount of time he has to actually spend in prison. See Answer Brief of Appellee, at p. 8. Yet, Cox's challenge concerns the activities of the Legislature and is well

beyond the actions of the Department and his criminal sentencing court. Cox's action below challenged Ch. 93-406, Laws of Florida, as containing a provision which violated the single subject clause of the Florida Constitution, to wit: section 40, creating the Correctional Privatization Commission. See McDonough's App. A, Initial Brief of Appellant. He seeks a favorable determination on the merits of the single subject question to ultimately repudiate *another* provision of the act, to wit: section 26 which amended Florida Statutes section 944.275(6)(2) to provide that "[b]asic gain-time under this section shall be computed on and applied to all sentences imposed for offenses committed on or after July 1, 1978, and before January 1, 1994." See McDonough's App. A, Initial Brief of Appellant.

Certainly, Cox's action may result in some kind of declaration concerning section 40.[1] However, even *if* Cox were to obtain a declaration that section 40 violates the single subject clause, such a determination does not necessarily result in an automatic gain time windfall to Cox. He must establish entitlement to the quantitative

[1] Cox is appealing the lower tribunal's disposition of his single subject claim on the merits in the First District Court of Appeal. See McDonough's App. D, Initial Brief of Appellant.

relief he seeks under 944.275(6)(2) despite the range of possible judicial dispositions, including severability, or curative action by the Legislature. See e.g. Moreau v. Lewis, 648 So. 2d 124, 128 (Fla. 1995)(finding the offending subsection is severable from the remainder of the legislative act); Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991)(in response to declaration of single subject violation, the Legislature called a special session and separately reenacted the provisions of the contested chapter law, expressly providing that these two acts would apply retroactively to the original effective date). While the doctrine of severability is applicable in the single subject rule context only in certain situations, see Heggs v. State, 759 So. 2d 620, 629 (Fla. 2000), and the Legislature might not intervene, the very existence of such variables demonstrate how a single subject action such as Cox's is inconclusive to the length of time a prisoner actually spends in prison.

In Schmidt v. McDonough, 951 So. 2d 797 (Fla. 2006)(hereafter "Schmidt II"), this Court discussed its opinion in Schmidt v. Crusoe, 878 So. 2d 361 (Fla. 2003)(hereafter "Schmidt I"). The Court restated the holding of Schmidt I as,

> The Court in Schmidt held that a mandamus petition challenging the **revocation of gain time** is a 'collateral criminal proceeding' and is exempt from the prepayment and lien requirements of section 57.085.(emphasis added)

Schmidt II, 951 So. 2d at 802. The Court explained that the designation of gain time claims as "'collateral criminal proceedings' was based on the *practical effect* that gain time claims have on the length of time an inmate actually serves in prison." Schmidt II, 951 So. 2d at 802. Thus, the Court recognizes that a collateral criminal claim must do more than speculate that a prisoner might accrue additional gain time if the suit had merit.

In the first place, the first question that must be settled in Cox's case is not one concerning the Department's mathematics as to Cox's gain time, but rather the status of a general legislative enactment. Cox is not challenging an administrative determination of the Department. Rather, Cox challenges action of the Legislature through a civil action available to citizens at liberty. See Cox v. Crosby, 2006 Fla. App. LEXIS 823, * 4-5 (Hawkes, J, dissenting). The same day this Court issued Schmidt II, the Court issued Bush v. State, 945 So. 2d 1207 (Fla. 2006). There, the Court again discussed Schmidt I:

> . . .In order to give effect to the legislative intent underlying the statute, which was to

> diminish frivolous civil filings but not to diminish *legitimate challenges to sentence-reducing credit determinations*, the Court in Schmidt was constrained to hold that the statutory exception was applicable to Schmidt's mandamus petition challenging the forfeiture of gain time.

Bush, 945 So. 2d at 1213 (emphasis added). By explaining the intent to exempt "legitimate" challenges to sentence-reducing credit determinations from section 57.085, the Court makes clear that circuitous claims such a Cox's are not exempt.

Cox, nevertheless, argues that his liberty interest is implicated, and describes his action as "functionally similar to a statutory habeas proceeding." See Answer Brief of Appellee Cox, at pgs. 8 & 13. First, the writ of habeas corpus is not so broadly defined. Its purpose is "to furnish a speedy hearing and remedy to one whose liberty is unlawfully restrained." Murray v. Regier, 872 So. 2d 217, 222 (Fla. 2002). As such, it is accorded special treatment without compare to any other action, including one for declaratory relief. See Art. 1; § 13, Constitution of Florida; see Gorman v. Fla. Parole Comm'n, 817 So. 2d 940 (Fla. 1st DCA 2002)(finding prisoner alleged entitled to immediate release, thus exempting the action from all court costs and filing fees). Review by means of habeas corpus is not appropriate if an inmate is not making a claim to the

right to immediate release. See Burgess v. Crosby, 870 So. 2d 217, 220 (Fla. 1st DCA 2004). While Cox attempts to make a case for "speedier release," his case is not one for immediate release. See Stovall v. Cooper, 860 So. 2d 5, 7 (Fla. 4th DCA 2003)(holding that if a prisoner's sentence would have expired had the Department properly awarded gain time, habeas corpus is the proper remedy). Therefore, drawing a similarity between his action and the writ of habeas corpus is misplaced.

Regarding gain time, such is a matter of grace that an inmate does not have a vested right to receive without a legislative enactment. McGee v. Fla. Dep't of Corr., 935 So. 2d 62, 63 (Fla. 1st DCA 2006)(citing Waldrup v. Dugger, 562 So. 2d 687, 694-95 (Fla. 1990). Moreover, an attempt to liken Cox's case to that in Lynce v. Mathis, 519 U.S. 433 (1997), for purposes of analyzing a liberty interest is misplaced. In Lynce, provisional gain time that Lynce had been *awarded* was retroactively canceled and resulted in Lynce's reincarceration. See Lynce, 519 U.S. 433, 447 (U.S. 1997) ("the 1992 Florida statute did more than simply remove a mechanism that created an opportunity for early release for a class of prisoners whose release was unlikely; rather, it made ineligible for early release a class of prisoners who were previously eligible--including

some, like petitioner, who had actually been released.”). In the instant case, as Judge Hawkes aptly wrote, “[Cox] does not seek to get back what he lost. Instead, he seeks to receive what he never had.” Cox, 2006 Fla. App. LEXIS 823, * 7 (Hawkes, J, dissenting).

To the extent Cox has a gain time claim that would have a practical – not a speculative or theoretical - effect on his sentence, it is a piggy-backed with a civil single-subject claim. Such an action constitutes a “mixed” petition and is not exempt from section 57.085. In Schmidt II, the Court stated:

> . . .exempting "mixed" petitions from the requirements of the prisoner indigency statute would violate the plain language of section 57.085, which provides for a single exception to its prepayment and lien requirements: "This section does not apply to a criminal proceeding or a collateral criminal proceeding." § 57.085 (10), Fla. Stat. (2005). The statute makes no exception for prisoners' civil claims, whether standing alone or piggy-backed onto gain time claims. Further, the original purpose of section 57.085 was to discourage the filing of frivolous civil claims by prisoners, see ch. 96-106, preamble, at 92-93, Laws of Fla. If the Court were to hold that "mixed" petitions are exempt from the prepayment and lien requirements of section 57.085, such a ruling would undermine that purpose by inviting the filing of frivolous civil claims that are piggy-backed onto gain time claims. . .

951 So. 2d at 803.

In Austin v. McDonough, 948 So. 2d 970 (Fla. 1st DCA 2007), a prisoner was found to have brought a mixed petition. The Court explained,

> Appellant, a prisoner, filed grievances after he was disciplined when he pled no contest to charges that he disrespected a prison employee. The grievances were denied. Appellant then appealed directly to the Secretary of the Department of Corrections (DOC). The appeals were returned without action because the DOC determined that the appeals were untimely. Appellant filed another round of appeals with the DOC, arguing therein that the original appeals were timely. The second round of appeals were also returned without action. Appellant then filed in the lower tribunal a petition for writ of mandamus which, in part, sought a declaratory judgment. For this filing, a lien was imposed against Appellant's trust account pursuant to section 57.085, Florida Statutes. . . .
>
> . . .we affirm the trial court's order denying mandamus. We also affirm the imposition of the liens issued on October 27, 2005, December 9, 2005, and May 3, 2006, because Appellant's petition contained a civil claim piggy-backed onto a gain time claim. Schmidt v. McDonough, 951 So. 2d 797, 2006 Fla. LEXIS 2948, 32 Fla. L. Weekly S16 (Fla. 2006).

Austin v. McDonough, 948 So. 2d 970, 970-971 (Fla. 1st DCA 2007).

Cox's action is analogous to Austin's. Like Austin, Cox must first obtain judicial relief for something extraneous to his gain time. In Austin, the prisoner sought timely acceptance of his grievance; in Cox, Appellee seeks to have a legislative act found unconstitutional on single subject

grounds. In that Cox's action contains a civil claim, the imposition of a lien pursuant to §57.085, Fla. Stat., is appropriate. Accordingly, this Court should reverse the district court's decision and find that the holding in Schmidt v. Crusoe does not extend to Cox's case.

II. THE CONSTITUTIONALITY OF § 57.085 IS NOT PROPERLY BEFORE THIS COURT AS THE BASIS OF THE CERTIFIED QUESTION OR AN ISSUE RAISED IN THE LOWER TRIBUNAL; HOWEVER, THE LIEN PROVISION OF § 57.085 DOES NOT VIOLATE THE ACCESS TO COURTS PROVISION OF THE FLORIDA CONSTITUTION.

Cox argues in the alternative that this Court should invalidate the lien provision of 57.085, Florida Statutes, because he claims it restricts his right to court access. Initially, this argument is outside the scope of the question certified by the First District and this Court's use of its discretionary jurisdiction. While Appellant recognizes that once this Court accepts discretionary jurisdiction over a certified question it may address anything in the opinion below. This practice is generally discouraged, especially when, such as the case at bar, the argument is made for the first time at the Supreme Court level. This argument was neither made nor addressed by the First District. Further, it was not the basis for this Court's discretionary jurisdiction and therefore this Court should decline

to address this argument. See Bautista v. State, 863 So. 2d 1180, 1188 (Fla. 2003) (declining to address Bautista's collateral argument regarding the enhancement of his convictions as it was outside the scope of the certified question and the Fourth District Court of Appeal did not rule on the issue). See Major League Baseball v. Morsani, 790 So. 2d 1071, 1080 n.26 (Fla. 2001)(stating that this Court generally declines to review issues which are outside the scope of a certified question); see also, Williams v. State, 889 So. 2d 804, 806 n. 2 (Fla. 2004)(declining to address claim that was outside the scope of the certified question and was not the basis of our discretionary review.).

Even so, Cox's constitutionality argument is without merit. This Court has explicitly stated that the right for indigents to proceed without payment of costs is a substantive one that "could be properly limited by the Legislature, including a requirement that inmates contribute toward the costs of their lawsuits and ultimately pay in full if they subsequently become able to do so." Jackson v. Florida Dep't of Corrections, 790 So. 2d 381, 384 (Fla. 2000). Further, section 57.085 does not obstruct a prisoner's fundamental right to court access.

Mitchell v. Moore, 786 So. 2d 521 (Fla. 2001), cited by Appellee, is unlike the case at bar. In Mitchell an onerous copy requirement was invalidated as restricting access to courts. In that case the Appellant Mitchell was forced to attach thousands of pages of his previously filed actions prior to instituting the current action. With the lien provisions of section 57.085, inmates may still access courts and file their suits, with one small restriction, if they are found to have the ability to pay, the court system (and the taxpayer) will receive a small payment from their canteen spending accounts for their continued use of government resources. See Mitchell, 786 So. 2d at 531, n. 9 (explaining the operation of the pay-as-able provisions). This causes the inmate to prioritize and decide what is more important to them - having the money in their canteen account to buy a soda or filing another lawsuit.

There is no restriction to access as Cox claims, but instead a measured system to curtail the filing of frivolous suits, such as the instant civil action challenging the single subject requirement of a statute by Cox. Further, the district courts of appeal have shown themselves well suited to monitor the application of the state's indigency statutes (whether it is 57.085 or 57.081)

to ensure constitutional access to courts based on the pertinent and particular facts of each situation. See e.g. Saba v. Bush, 883 So. 2d 858, 859 (Fla. 1st DCA 2004)(providing for review); Huffman v. Moore, 778 So. 2d 411, 412 (Fla. 1st DCA 2001)(correcting error in dismissing action for failure to make partial payment provision); Harper v. Moore, 737 So. 2d 1232 (Fla. 1st DCA 1999)(holding dismissal for failure to make the initial payment would be error under such circumstances where hold on prisoner's inmate trust account prevented inmate from withdrawing the $ 5 needed for his prepayment); Pace v. State, 763 So. 2d 375 (Fla. 2d DCA 2000)(ordering reimbursement of erroneously collect fees); Johnson v. Burns, 804 So. 2d 345, 347 (Fla. 4th 2001)(defining an "indigent" prisoner). Even in Mitchell, the Court recognized the pay-as-able provisions of section 57.085 as "stop-and-think" measures, not "chilling" measures. In considering whether the remedy would disrupt the court system, the Court stated that, "since this Court has not struck down the payment part of the Prisoner Indigency Statute, meaning that inmates still will pay for their lawsuits, we think some inmates will decide that their lawsuits were not sufficiently important for them to seek reinstatement." Id. 786 So. 2d at 531. Indeed, this Court

stated in another access to courts case that, "[w]e again applaud the efforts of the Legislature in this regard and intend to fully enforce the substantive payment-related provisions of the Prisoner Indigency Statute." Jackson, 790 So. 2d 398.

Finally, Cox appears to argue that whatever his action be labeled, the Legislature did not intend an action such as his to be subject of a civil filing fee. See Answer Brief of Appellee Cox, at pg. 17. This, however, is not the status of statutory law in Florida. In Schmidt II, this Court recognized that, "[w]hile some prisoner filings, such as habeas petitions, generally may be filed free of filing fees and other court costs, many prisoner filings are subject to such costs. See, e.g., §§ 34.041, 35.22, Fla. Stat. (2005). Both the general indigency statute, section 57.081, and the prisoner indigency statute, section 57.085, apply only to those filings that are not free of costs." 951 So. 2d at 799. Thus, whatever Cox's non-habeas corpus action may be construed by this court to be, it is subject - by law- to some form of indigency review, either for purposes of section 57.081, section 57.082, or section 57.085.

Conclusion

Wherefore, the Appellant respectfully request that this Court reverse the decision of the lower tribunal.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

_____
JOY A. STUBBS
Assistant Attorney General
Florida Bar No. 0062780

The Capitol, PL-01
Tallahassee, FL 32399-1050
Telephone: (850) 414-3300
Facsimile: (850) 488-4872
joy.stubbs@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Matthew H. Mears, Holland & Knight LLP, Post Office Drawer 810, 315 South Calhoun Street, Suite #600, Tallahassee, Florida 32301-1872 on this 18th day of June, 2007.

_____
Assistant Attorney General

CERTIFICATE OF TYPESTYLE AND TYPESIZE

The undersigned certifies that Respondent's response uses Courier New 12 pt. type.

_____
Assistant Attorney General