IN THE SUPREME COURT OF FLORIDA

ERIC GABRIEL GRIFFIN
PETITIONER,

V CASE NO SC07-168

STATE OF FLORIDA,
RESPONDENT.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS ON REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL STATE OF FLORIDA

BILL MCCOLLUM
ATTORNEY GENERAL

ROBERT J. KRAUSS
Chief Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar No. 238538

TIMOTHY A. FREELAND
Assistant Attorney General
Florida Bar No. 0539181
Concourse Center Bldg. Four
3507 Frontage Road, Suite 200
Tampa, Florida 33607
Phone: (813) 287-7900
Fax: (813) 281-5500

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Petitioner was convicted after a jury trial of sexual battery while using a deadly weapon and burglary with battery. While his case was pending on appeal, Petitioner filed a Motion to Correct Sentencing Error pursuant to Fla. R. Crim. Proc. 3.800(B)(2), wherein he asserted that the trial court improperly imposed costs pursuant to Fla. Stat. 939.185 and 938.085, and improperly sentenced Petitioner as a Prison Releasee Reoffender in reliance upon documents which were never properly authenticated. The trial court failed to address the Motion and it was deemed denied as a consequence thereof, and Petitioner’s appeal proceeded.

On review, the Second District Court of Appeal affirmed Petitioner's convictions with regard to the unauthenticated documents because it concluded that defense counsel waived the argument by failing to make a contemporaneous objection, and in any event the documents, authenticated or no, were never shown to be inaccurate and therefore Petitioner failed to demonstrate that he was prejudiced thereby.

The Second District reversed, however, as to costs imposed pursuant to Fla. Stat. 939.185 and 938.085 because

it concluded that because said costs were enacted after the date when Petitioner committed the crime, they therefore violated the Ex Post Facto clause of the U.S. Constitution. In so ruling, the Second District certified conflict with the First District Court of Appeal decision in Ridgeway v. State, 892 So. 2d 538 (Fla. 1st DCA 2005). The instant appeal followed.

SUMMARY OF THE ARGUMENT

Issue One: The prohibition against Ex Post Facto laws does not apply to Petitioner's case because the trial court's imposition of costs intended to defray certain expenses did not amount to punishment.

Issue Two: Because this argument is outside the scope of the conflict issue, this Court should decline to address it. Further, the Second District's decision does not serve to restrict the scope of 3.800(B)(2) motions; instead, it denied Petitioner's claim because it lacked merit.

Issue Three: As with issue Two, the argument advanced herein is outside the scope of the conflict issue. Further, the present method of imposing PRR sentencing does not amount to "taxation without representation."

ARGUMENT
ISSUE ONE

COSTS IMPOSED BY THE TRIAL COURT DO NOT VIOLATE "EX POST FACTO" PROHIBITION

I. Standard of Review:

This Court has discretionary jurisdiction to review cases arising from the district courts of appeal where a decision from one district court of appeal is certified to be in direct conflict with a decision of another district court of appeal pursuant to Fla. R. App. Proc. 9.030(a)(2)(A)(vi). In the instant case, the Second District Court of Appeal certified that its decision in Griffin v. State, 947 So. 2d 610 (Fla. 2nd DCA 2007) conflicts with Ridgeway v. State, 892 So. 2d 538 (Fla. 1st DCA 2005) on the issue of whether certain court costs imposed against Petitioner violate the prohibition against ex post facto laws where the statute authorizing those costs was enacted after the date of the crime in question.

II. Argument:

Petitioner's argument here is that the Second District's decision correctly struck the trial court's imposition of costs because the statute which imposed those costs was enacted *after* the date of the crime Petitioner was found guilty of committing. The parties are in

agreement that Petitioner was found guilty of a crime that he committed in 2002; Fla. Stat. Secs. 939.185 and 938.085 were enacted after that date. The question to be resolved here is whether these costs authorized by the Florida Legislature may be retroactively imposed without violating the constitutional prohibition against ex post facto laws.

Initially, it is important to note that courts have uniformly held that the Ex Post Facto clause does not prohibit retrospective application of laws which are determined not to be punitive. For example, in Westerheide v. State, 831 So. 2d 93 (Fla. 2002), this Court concluded that the civil commitment of inmates pursuant to the Jimmy Ryce Act could be applied retrospectively without violating the prohibition against Ex Post Facto laws because the Jimmy Ryce Act was not intended as punishment, but rather to treat inmates who were determined under the Act to require it. Thus a statute only violates the Ex Post Facto clause where it is determined to be punitive.

The controlling case here is Goad v. Florida Department of Corrections, 845 So. 2d 880 (Fla. 2003). In Goad, the defendant was sentenced in 1991, and challenged the imposition of costs enacted by the legislature which took effect in 1994. This Court concluded that even though the legislation which authorized the costs clearly post-

dated the criminal offense, the State is nevertheless permitted to recover such costs, because, like in Westerheide, the effect of the legislation at issue was civil in nature, rather than punitive.

Specifically, this Court noted that the starting point in evaluating whether a law violates the ex post facto clause is the legislative intent. The statute in Goad was enacted for the purpose of recovering the costs of incarceration as well as restitution for uncompensated victims of crime. This Court concluded that because the purpose of the law was to compensate the State for expenses, the costs could be applied retroactively because they were not punitive in nature. In so ruling, this Court identified seven factors to be considered in determining whether a "costs" statute is punitive or civil: 1) whether the sanction involves an affirmative disability or restraint; 2) whether it has historically been regarded as a punishment; 3) whether it comes into play only upon a finding of scienter; 4) whether its operation will promote the traditional aims of punishment-retribution and deterrence; 5) whether the behavior to which it applies is already a crime; 6) whether an alternative purpose to which it may be rationally connected is assignable for it; and 7) whether it appears excessive in relation to the alternative

purpose assigned. Goad, id at 884. This Court then went on to conclude that the legislative intent of trying to recover the legitimate expenses of incarceration was civil rather than punitive, and therefore could not violate the prohibition against ex post facto laws, because such laws are intended only to prohibit the enactment of *punitive* legislation.

In the instant case, the plain language of the statutes at issue are similar to the one addressed in Goad. The costs identified in Fla. Stat. Sec. 939.185 are imposed to cover (in part) the expenses in four areas- the costs of operating the state courts system, the costs of operating legal aid programs, the costs incurred in staffing and funding the public law library, and the costs of operating teen court programs, juvenile assessment centers, and other juvenile alternative programs. Section 938.085 is intended to reimburse the State for costs associated with the Rape Crisis Fund. In other words, the purpose of imposing the costs identified by the legislature is solely to reimburse the county for programs operated by it, which are primarily for the benefit of criminal defendants. There is nothing in the language of either statute to suggest that either is intended as a punitive measure. As such, it would appear that these costs fall squarely within the ambit of such

legislation as that identified by this Court in Goad, and the Second District's conclusion that they were was improperly imposed should be rejected.

Similarly, in State v. Yost, 507 So. 2d 1099 (Fla. 1987) addressed the issue of which types of costs violate the ex post facto rule. In Yost, this court concluded that the ex post facto rule prohibits costs which carry a penalty for non-payment, but not otherwise. Thus, as in Petitioner's case, where the non-payment of the costs involved would result only in the possible imposition of a civil lien, there is no basis for concluding that the ex post facto rule prohibits the imposition of the costs at issue. See Yost at 1101.

The First District Court of Appeal in Ridgeway v. State, 892 So. 2d 538 (Fla. 1st DCA 2005), with whom the Second District has certified conflict, correctly stated the rule which applies here. Where the effect of imposition of a given law is punitive, in that it affects the length of punishment, it may be considered to be an ex post facto law and may not be applied retroactively. Conversely, the imposition of certain costs intended to recover expenses incurred by the State in providing services for those accused of crime has no relation to the punishment of a given defendant. As such, the costs authorized by Fla.

Stat. Sec. 939.185 and 938.085 were properly imposed in Petitioner's case, and this Court should reverse the Second District's ruling to the extent that it conflicts with the decision in Ridgeway.

ISSUE TWO

THE SECOND DISTRICT'S INTERPRETATION OF RULE 3.800(B)(2) WAS CORRECT

Petitioner next asserts that the Second District improperly rejected his motion to correct illegal sentence filed pursuant to Fla.R.Crim.Proc. 3.800(B)(2). Respondent would first remind Petitioner that this claim is outside the scope of the conflict issue, and is therefore not subject to review by this Court. Battle v. State, 911 So. 2d 85 (Fla. 2005). In Williams v. State, 889 So. 2d 804 (Fla. 2004), this Court addressed a certified question from the Second District Court of Appeal regarding whether Anders procedures are applicable to Ryce commitment proceedings. This Court declined to address another issue raised by Petitioner since it was outside the scope of the certified question and was not the basis of its discretionary review. See also Friedrich v. State, 767 So. 2d 451 (Fla. 2000); Paulucci v. Gen. Dynamics Corp., 842 So. 2d 797, 799 (Fla., 2003); Allstate Ins. Co. v. Manasse, 707 So. 2d 1110, 1112 (Fla. 1998)(Court declined to address issue of attorney's fees which was outside the scope of certified question).

Turning to the merits of Petitioner’s claim, however, the intent of this rule was to provide a vehicle authorizing the correction of sentencing errors detected during the pendency of appellate review which could not have been recognized at the time of sentencing. The rule allows a means whereby such errors may be corrected, and if need be, subsequently addressed during plenary review by the appellate court. Petitioner’s complaint suggests that the Second District improperly restricted the scope of the rule at issue, but as we shall see, his claim is without merit.

Petitioner’s motion at the trial level was directed at the method used by the State to establish his eligibility for PRR sentencing pursuant to Fla. Stat. 775.082. Specifically, he asserted that the trial court improperly considered documents used by the State to establish the propriety of Petitioner's sentence as a prison releasee reoffender. The record reflects that the State used certified copies of documents procured from the State Department of Corrections to establish Petitioner’s prior felony record, as well as the date of his release from prison. This information was necessary to the trial court’s determination of his eligibility for sentencing pursuant to the PRR statute. Petitioner recognizes that defense counsel

made no contemporaneous objection to the State's use of these documents; however, he asserts that counsel's decision not to require the State to produce a live witness was the type of claim that is properly advanced in a Rule 3.800(B)(2) motion. The State Second DCA soundly rejected Petitioner's claim, primarily because he failed to establish that he was prejudiced. He is therefore not entitled to the relief that he presently seeks.

Petitioner never did, nor does he now, assert that he was prejudiced by trial counsel's actions. There is no argument that the certified documents presented by the State as proof of Petitioner's eligibility for PRR sentencing were erroneous. Rather, Petitioner's claim is that the import of the Second District's ruling is to require that claims of the type he now advances can only be presented in a post-conviction motion filed pursuant to Fla.R.Crim.Proc. 3.850, as a claim alleging ineffective assistance of counsel. The State does not necessarily disagree with Petitioner's argument, but instead asks whether there is a need for this Court to address the claim in the manner advanced by Petitioner.

There is no claim, and never has been, that Petitioner's status as a PRR was incorrectly determined by the trial court. Instead, Petitioner's claim is that he

should have more than one method of advancing an argument which is clearly covered by Rule 3.850. In support of his claim, Appellant directs our attention to Gray v. State, 910 So. 2d 867 (Fla. 1st DCA 2005), Desue v. State, 908 So. 2d 1116 (Fla. 1st DCA 2005) and Peterson v. State, 911 So. 2d 184 (Fla. 1st DCA 2005). In all of these cases, however, the claim of error arose out of circumstances where a timely objection was made. Thus Petitioner's claim that these three cases "arguably" clarify the matter is disingenuous, at best. Instead, none of the cases advanced by Petitioner address a circumstance where the PRR sentence was imposed on the basis of documentation, as was the case here, in the absence of any timely objection. The State agrees that had a timely objection been made in Petitioner's case, the State would have been obligated to produce a live witness to authenticate the documents at issue. However, the record plainly shows that Appellant made no such objection (T. 368-369). Petitioner advances no claim regarding the accuracy of the information relied upon by the trial court in determining Appellant's release date, and the Second District's ruling in this regard was based primarily on a finding that no claim of error was advanced, at any time, directed towards establishing a claim that Petitioner's PRR sentence was improperly imposed.

Petitioner’s assertion that the Second District’s ruling improperly restricts the application of Rule 3.800(B)(2) is inapposite. Petitioner has not shown that he was prejudiced by the lower court’s ruling, and even if he were, Rule 3.850 grants him an avenue for pursuing a claim of ineffective assistance of counsel. The State would therefore urge this Court to find that no reversible error exists, and reject Petitioner’s request for relief.

ISSUE THREE

IMPOSITION OF PRR SENTENCE DOES NOT AMOUNT TO "TAXATION WITHOUT REPRESENTATION"

Petitioner's final claim is also outside of the scope of the certified question, and Respondent would therefore ask this Court to reject it for the same reasons advanced with regard to Issue Two.

On the merits, however, Petitioner's present claim is that because the jury is not permitted to know the effect of a guilty verdict in circumstances where a defendant qualifies for PRR sentencing, they are, in effect, imposing additional taxation upon themselves and the rest of society without the knowledge of the consequences of their actions. Thus, according to Petitioner, they are subjecting themselves to taxation under circumstances where there is no effective representation. The Second District addressed the identical issue in Calloway v. State, 914 So. 2d 12 (Fla. 2d DCA 2005) and concluded that it was, in a word, "absurd."

The circumstances described by Petitioner provide a curious question. On the one hand, it is well settled that criminal defendants are absolutely entitled to have each criminal trial determined on the merits of the facts relating to that crime alone, and, under normal

circumstances, the State is absolutely prohibited from informing the jury that the defendant has previously been convicted of a crime, with certain obvious exceptions. Petitioner's present claim, however, presents the delicious absurdity of the opposite. If Petitioner had his way, he would, apparently, require that where a PRR sentence is contemplated, the jury be informed at some point prior to deliberations in the guilt phase of the trial, that the defendant is recently released from prison and that a guilty verdict on their part will result in a certain, lengthy sentence being imposed.

The State, frankly, is unable to understand what Petitioner would have us do. It would appear that Petitioner wishes for us to approve a jury instruction which advises the jury that the defendant, because of the fact that he has recently been released from prison, will be required to serve a sentence of no less than thirty years should they determine that the evidence establishes his guilt beyond a reasonable doubt. If this is truly what Petitioner seeks, the State urges him to propose such an instruction and is certain that the majority of prosecutors of this State would delight in being given the permission and authority to advise the jury of the fact that the defendant was recently released from prison and now stands

accused of committing a new offense. It is possible that some juries might, out of pity, elect to acquit some defendants, in hopes that by doing so they would encourage the accused to find the true path and stray no more.

The State recognizes that Petitioner believes the PRR statute to be unduly burdensome, no doubt due to the fact that it applies to him and has resulted in his being incarcerated for thirty more years with no hope for early release. However, it has been determined beyond cavil in the State of Florida that the jury, even under circumstances where a PRR sentence is contemplated, is duty bound to determine the facts of the case; once those facts have been established and the guilt (or lack thereof) of the defendant has been determined beyond a reasonable doubt, the trial judge, not the jury, is then obligated to make the necessary findings to impose the proper sentence. See McDowell v. State, 789 So. 2d 956 (Fla. 2001) and Gurley v. State, 906 So. 2d 1264 (Fla. 4th DCA 2005). In the present case, the trial court made a determination as to when the defendant was released from prison (T. 369), and sentenced Appellant accordingly pursuant to the applicable law. This Court should therefore affirm.

CONCLUSION

Respondent respectfully requests that with regard to issue One, this Honorable Court reverse the Second District's decision in Griffin v. State, and direct that the costs imposed pursuant to Fla. Stat. Sec. 939.185 and 938.085 be imposed. With regard to the remaining issues, the State would ask that this Court affirm.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Brad Permar, Assistant Public Defender, c/o Polk County Courthouse, P.O. Box 9000 Drawer PD, Bartow, Florida, 33831 on this 27th August, 2007.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

BILL MCCOLLUM
ATTORNEY GENERAL

_____

ROBERT J. KRAUSS
Chief-Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar No. 238538

_____

TIMOTHY A. FREELAND
Assistant Attorney General
Florida Bar No. 539181
Concourse Center 4
3507 E. Frontage Road, Suite 200

Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500

COUNSEL FOR RESPONDENT

APPENDIX

A. Second District Court Opinion filed January 5, 2007- Griffin v. State, 946 So. 2d 610 (Fla. 2d DCA 2007)