

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,
Petitioner,
v.
JOSEPH YOST
Respondent

AUG 1988
CLERK, SUPREME COURT
By *[Signature]*
Case No. 68-949

PETITIONER'S BRIEF ON THE MERITS

BELLE B. TURNER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Ave. 4th Fl.
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On August 9, 1983, Yost was placed on probation for the offenses of burglary and grand theft¹ (R 33-36)². The total probationary period was ten years (R 34). On May 28, 1985, Yost entered a written plea of guilty to the offense of burglary of a dwelling (R 63-67). As part of the factual basis for the plea, Yost admitted that he and another person went to the home of Carlton Cox, entered without permission, and took three firearms and a bucket of coins (R 65,75). Yost said he had been formerly employed by Mr. Cox, and he knew the items of value would be found inside the house (R 76). Yost stated he needed the money to pay off some traffic tickets (R 76). In exchange for his plea of guilty to burglary, the state nolle prossed the other four counts (R 56, 73). Yost also entered a plea of guilty to violation of probation (R 95-97).

On July 19, 1985, Yost was sentenced to three years in prison for burglary of a dwelling; the earlier probation was set aside and he was placed on consecutive fifteen and five year terms of probation for burglary and grand theft, to be served consecutively to the prison sentence (R 28-29, 107-108, 114-118, 131-132). Additionally, the trial court

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1. §§ 810.02, 812.014, Fla. Stat. (1985).
 2. (R) refers to the record on appeal.

imposed a Public Defender lien of \$350, and court costs in the amount of \$200 pursuant to section 27.3455, Florida Statutes, (1985) (R 28, 119).

Notice of Appeal was timely filed on August 9, 1985 (R 120). The Office of the Public Defender was appointed to represent Yost on appeal (R 129). The only issue raised in the briefs was whether section 27.3455, Florida Statutes (1985) was being applied to offenses committed before its effective date in violation of the constitutional prohibition against ex post facto laws.

On May 22, 1986, the District Court of Appeal, Fifth District, entered its decision in this cause, and certified the following question as one of great public importance:

DOES THE APPLICATION OF SECTION 27.3455, FLORIDA STATUTES (1985) TO CRIMES COMMITTED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE VIOLATE THE EX POST FACTO PROVISIONS OF THE CONSTITUTIONS OF THE UNITED STATES AND OF THE STATE OF FLORIDA, OR DOES THE STATUTE MERELY EFFECT A PROCEDURAL CHANGE AS IS PERMITTED UNDER STATE V. JACKSON, 478 So.2d 1054 (Fla. 1985)?

Notice to Invoke the discretionary jurisdiction of this honorable court was timely filed on June 19, 1986. Petitioner's motion for extension of time was granted July 21, 1986. This honorable court ordered petitioner to serve its brief on or before August 21, 1986.

SUMMARY OF ARGUMENT

Under preexisting law, the court could withhold accrued gain time for failure to abide by the orders of the court, so this section does not impose a more onerous penalty. Gain time is computed exactly as before, the statute merely alters the procedure by which gain time is forfeited for non-payment. Section 27.3455, Florida Statutes (1985) does not violate the ex post facto provisions of the Constitutions of the United States or the State of Florida.

SECTION 27.3455, FLORIDA STATUTES (1985)
DOES NOT VIOLATE THE CONSTITUTIONAL
PROHIBITION AGAINST EX POST FACTO LAWS
BECAUSE THE IMPOSITION OF COSTS IS NOT
A MORE ONEROUS PENALTY, AND THE STATUTE
MERELY ALTERS THE PROCEDURE BY WHICH
COURT COSTS ARE IMPOSED: GAIN TIME
COMPUTATION IS UNAFFECTED BY THIS STATUTE

Section 27.3455, Florida Statutes (1985) became effective July 1, 1985.³ This statute provides for the mandatory imposition of court costs of two hundred dollars for every felony conviction, in addition to any other fines or costs. The costs are to be forwarded to the Local Government Criminal Justice Fund to compensate victims of crime and witnesses called to testify. The statute in effect at the time of Yost's sentencing provided that:

All applicable fees and court costs shall be paid in full prior to the granting of any gain time accrued. However, the court shall sentence those persons whom it determines to be indigent to a term of community service in lieu of the costs prescribed in this section, and such indigent persons shall be eligible to accrue gain time...

The district court determined that imposition of two hundred dollars court costs at Yost's sentencing on July 19, 1985, is an ex post facto violation. Art. I, § 10, Fla. Const.

The threshold question is whether this issue is preserved for review and is properly before this court. "The constitutional application of a statute to a particular set of facts...must be raised at the trial level." Trushin v.

3. This statute has been substantially revised. Ch. 86-154, Laws of Fla.

State, 425 So.2d 1126 (Fla. 1982). Yost objected when the costs were imposed at sentencing, "...citing his inability to make payment for that two hundred dollars and citing the... ex post facto argument." (R 30)

On its face, the statute is constitutional. Those defendants with an ability to pay are credited and awarded gain time exactly as before, provided they comply with the procedure for collection of the court ordered costs. Indigent defendants are also credited and awarded gain time exactly as before. The statute provides for alternate payment of the court costs by performing community service upon motion by the defendant. On its face, the statute is not retroactive, but petitioner recognizes the retroactive application in this case.

The standard method of advancing this claim is a petition for writ of habeas corpus. In Weaver v. Graham, 450 U.S. 28, 101 S.Ct. 960, 67 L.Ed2d 17 (1981), the pro se litigant sought a writ of habeas corpus in the Supreme Court of Florida, and when denied, he sought a writ of habeas corpus successfully in the United States Supreme Court. Since Yost is attacking the legality of his detention, habeas corpus review is appropriate.

This issue will not be ripe for review unless and until Yost refuses to pay the \$200 before his tentative release date. See, §944.275(3)(a) Fla. Stat. (1985) (date on which Yost would otherwise be entitled to be released through the normal accrual of gain time) At that time Yost should

file a petition for writ of habeas corpus. Even more appropriate, Yost could move at that time, pursuant to the statute itself, for the court to determine his indigency status. Upon a finding of indigency, the court would grant the gain time, release respondent, and sentence him to a term of community service in lieu of paying the \$200. Appellate courts should refrain from issuing advisory opinions. See, State v. Kinner, 398 So.2d 1360 (Fla. 1981), Pace v. King, 38 So.2d 823 (Fla. 1949). Moreover, Yost could pay the \$200 by his tentative release date, thereby rendering his challenge to this assessment moot.

On the merits, petitioner advances several arguments in support of the proposition that there is no ex post facto violation in this case. This statute does not alter the penal provisions because court costs are not a penalty. The court could always impose court costs, so the statute does not impose a more onerous penalty. §§ 939.01, 943.25, Fla. Stat (1985). The statute only changes the procedure in which costs are extracted from criminal defendants; this procedural change is not an ex post facto violation.

For a criminal law to be ex post facto, two factors must be present: it must be retrospective and it must disadvantage the offender affected by it. Even if a statute merely alters penal provisions accorded by the grace of the legislature, it is ex post facto if it is retroactive and more onerous than the law in effect on the date of the offense. Weaver v. Graham, 450 U.S. at 964-965. It is clear that this

statute is being applied retroactively. that is. to offenses committed before its effective date. However, this statute does not alter penal provisions. Weaver v. Graham, supra, concerned a statute that changed the gain time that would be awarded to prisoners. Here, the gain time is unchanged, only the procedure by which it is credited. The change in the way court costs are collected is not related to either the crime or the penalty. The statute does not alter the penal provisions, so it is not an ex post facto violation. Following Yost's argument, every time court costs were increased for any reason, that administrative decision would violate the constitutional prohibition against ex post facto laws.

The computation of gain time is unaffected by this statute. If a criminal defendant is not indigent for the purposes of this statute, gain time will still accrue, but it will be forfeited if the money is not paid by the defendant's tentative release date. Forfeiture of gain time for failure to pay a certain sum ordered by the court has always been proper pursuant to sections 944.275 (5) and 944.28, Florida Statutes (1985). Gain time may be forfeited if a "prisoner is found guilty of an infraction of the laws of this state or the rules of the department." § 944.275 (5), Fla. Stat. (1985) (applies to sentences imposed for offenses committed on or after July 1, 1978). Moreover, "all or any part of gain time earned by a prisoner according to the provisions of law shall

be subject to forfeiture if such prisoner shall...by action or word refuse to carry out any instruction duly given to him...or violate any law of the state or any rule or regulation of the department or institution." § 944.28 (2) (a) Fla. Stat (1985) (applied prior to date of Yost's offense). Failure to obey a court order of any kind constitutes contempt, and thus subjects the violator to forfeiture of gain time. See, § 38.23 Fla. Stat. (1985). The provision of section 27.3455 prohibiting the granting of accrued gain time for nonpayment of a court ordered fee is nothing but a restatement of the law as it existed prior to the commission of Yost's offense. Consequently, unlike the facts in Weaver, supra, the forfeiture of gain time in section 27.3455 does not change the amount or availability of gain time. Any change is merely procedural, which does not violate ex post facto. State v. Jackson, supra, Dobbert v. Florida, 432 U.S. 292, 97 S.Ct. 2290, 53 L.Ed2d 344 (1977).

In Dobbert the Florida death penalty statute was upheld against an ex post facto attack because the change in the statute was "clearly procedural". "Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto." Dobbert v. Florida, 432 U.S. at 293. Section 27.3455, Florida Statutes (1985) is also clearly procedural.

Even the indigent defendant cannot argue the statute imposes a greater quantum of punishment than previously authorized. An indigent does not lose gain time, nor does an indigent pay fees. Instead, an indigent must perform community service at

the termination of incarceration. Again, prior to the date of Yost's offense, the court had the authority to impose a split sentence, imposing incarceration and then a period of community service. § 775.091, Fla. Stat. (1985). Alternative dispositions include split sentences, public service, or any other disposition authorized by law. § 921.187 Fla. Stat. (1985).

Section 27.3455 is plain in its meaning: all persons who are found guilty of any felony or misdemeanor shall have additional costs imposed at the time of sentencing. In imposing costs under section 27.3455, the courts cannot distinguish between indigent defendants and nonindigent defendants; the language of the statute is mandatory.

However, a distinction is made between indigent and nonindigent defendants with regard to collection of such costs. The language of the statute is clear that immediate payment of these costs is not mandatory, as the enforcement procedures in the statute provide an alternative to payment capable of being exercised in the future, upon a determination of indigency. A determination of indigency for purposes of this section can be made at any time, as the court retains jurisdiction expressly for that purpose. Such a finding can be made at the time of sentencing upon proper motion to the court, or at any time thereafter. This feature of the statute recognizes that a person's circumstances can change after conviction. Monetary resources available to the defendant at the time of conviction may be exhausted, or conversely, time in prison can be converted

into money, for example, by writing a book. Failure to pay those costs forfeits accrued gain time; yet, due to the court's retention of jurisdiction, a defendant may still seek a determination of indigency to avoid payment of the costs and avoid forfeiture of his gain time resulting from his failure to obey a court order requiring payment. In exchange, the defendant must perform community service, something he could have been required to do in the first place under preexisting law.

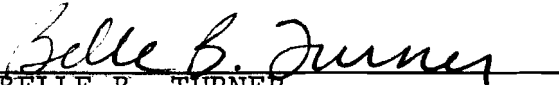
The imposition of the monetary payment of \$200 simply does not violate ex post facto doctrines since it is not an increase in the quantum of punishment but is merely a procedural change. The state submits that Yost has not rebutted the presumption of the constitutionality of section 27.3455 in that no added punishment or disadvantage exists to demonstrate ex post facto violations.

CONCLUSION

Based upon the arguments and authorities cited herein, petitioner respectfully requests this honorable Court to answer the certified question by finding that section 27.3455, Florida Statutes (1985) does not violate the ex post facto provisions of the Constitutions of the United States and the State of Florida.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL


BELLE B. TURNER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Brief on the Merits has been furnished, by delivery, to James Gibson, Public Defender, and Brynn Newton, Assistant Public Defender, at 112 Orange Avenue, Suite A, Daytona Beach, Florida, Attorney for Respondent, this 21st day of August, 1986.


BELLE B. TURNER
COUNSEL FOR PETITIONER