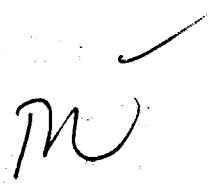


IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
) Petitioner,)
)
 vs.)
)
) BENNIE FRANK WILLIAMS,)
)
) Respondent.)
)
 _____)

CASE NO. 69,317



RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
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OTHER AUTHORITY:

Section 27.3455, Florida Statutes (1985)	i, 1, 2, 4, 5, 6
Section 27.3455(1), Florida Statutes (1985)	i, 2, 5
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SUMMARY OF ARGUMENT

POINT I: A contemporaneous objection was not needed to preserve for appellate review the question which was certified by the District Court to be one of great public importance, that question being a sentencing issue. The purpose for which the contemporaneous objection rule exists is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge.

POINT II: The application of Section 27.3455, Florida Statutes (1985), to sentences imposed for crimes committed prior to the statute's effective date violates the ex post facto provisions of the United States and Florida Constitutions, because it applies to events occurring before its enactment and disadvantages those affected by it. Although provisions for the forfeiture of gain-time had been in existence prior to the enactment of Section 27.3455, the statute is not merely procedural because it authorizes the automatic withholding of gain-time.

ARGUMENT

POINT I

A CONTEMPORANEOUS OBJECTION IS NOT REQUIRED TO PRESERVE FOR APPELLATE REVIEW THE ISSUE OF WHETHER THE RETROACTIVE APPLICATION OF SECTION 27.3455(1), FLORIDA STATUTES (1985), VIOLATES THE EX POST FACTO PROVISIONS OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

Petitioner argues that Respondent has failed to preserve for appellate review the question which the District Court sua sponte has certified to be one of great public importance, i. e., whether the application of Section 27.3455, Florida Statutes (1985), to crimes committed prior to the statute's effective date violates the ex post facto provisions of the United States and Florida constitutions. Petitioner cites Clark v. State, 363 So. 2d 331 (Fla. 1978), and Castor v. State, 365 So. 2d 701 (Fla. 1978), for the proposition that even constitutional errors are waived unless timely raised in the trial court. Castor and Clark, however, both pertain to trial errors, and their requirement for a contemporaneous objection is based on practical necessity so that an alleged error may be corrected by the trial judge at an early stage. Castor, supra, 365 So. 2d at 703 (Fla. 1978). The contemporaneous objection rule is intended to give trial judges an opportunity to address objections made by counsel in trial proceedings and correct errors. The purpose for the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge. State v. Rhoden, 448 So. 2d 1013, 1016 (Fla. 1984). Although Rhoden involved a

different sentencing error than here, its reasoning that the purpose for the contemporaneous objection rule is not present in the sentencing process should apply in this case. As in Rhoden, there are no proceedings subsequent to the trial court's sentencing error which might be necessitated or affected by counsel's failure to object.

Petitioner further argues that Williams v. State, 414 So. 2d 509 (Fla. 1982), requires that the issue of ex post facto application of sentencing statutes requires a contemporaneous objection to be preserved for appellate review. The Fifth District Court of Appeal, in Brumley v. State, 455 So. 2d 1096 (Fla. 5th DCA 1984), stated that:

. . . This position is arguable under Williams v. State, 414 So. 2d 509 (Fla. 1982), and is one which we had previously adopted [. . .], but this principle has apparently been rejected by the Florida Supreme Court in State v. Rhoden, 448 So. 2d 1013 (Fla. 1984), where the court held that the purpose for which the contemporaneous objection rule exists is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing judge.

Id., 455 So. 2d at 1097 (Citations omitted). The District Court's decision in Brumley v. State was approved by this Honorable Court in State v. Brumley, 471 So. 2d 1282 (Fla. 1985).

The issue presented to this Honorable Court by the District Court is therefore preserved.

POINT II

THE APPLICATION OF SECTION 27.3455,
FLORIDA STATUTES (1985), TO CRIMES
COMMITTED PRIOR TO THE EFFECTIVE
DATE OF THE STATUTE VIOLATES THE
EX POST FACTO PROVISIONS OF THE
CONSTITUTIONS OF THE UNITED STATES
AND OF THE STATE OF FLORIDA.

Article I Section 10 of the Florida Constitution prohibits the passage of any ex post facto law. Even if a statute merely alters penal provisions accorded by grace of the legislature--such as gain-time--it violates the ex post facto clause of the United States Constitution if it is both retrospective and more onerous than the law in effect on the date of the offense. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); Art. I §9 Cl. 3, U. S. Const. In Weaver, Section 944.275, Florida Statutes (1975), was declared unconstitutional because it reduced the amount of gain-time which could be earned by prisoners whose crimes occurred before the statute's effective date. The Supreme Court held that even though the statute in that case did not alter punishment prescribed for the offense, it was not merely procedural. Likewise, the application of Section 27.3455, Florida Statutes (1985), to defendants whose crimes occurred prior to July 1, 1985, the effective date of the new statute, violates the ex post facto provisions of the United States and Florida Constitutions. Respondent was convicted of a crime alleged to have occurred on May 1, 1985.

Petitioner likens this case to the situation in May v. Florida Parole and Probation Commission, 435 So. 2d 834 (Fla. 1984), and asserts that Respondent had "at best, nothing more than a tenuous expectancy regarding his punishment."

Petitioner's Brief, Page 9. Section 944.275(4), Florida Statutes (1983) (not amended in 1985), provided that the Department of Corrections shall grant basic gain-time at the rate of ten days for each month of each sentence imposed on a prisoner. Sections 944.275(5) and 944.28 provided and provide that gain-time may be forfeited or shall be subject to forfeiture for violations of the laws of Florida or the rules of the Department of Corrections. The pre-existence of these provisions, however, does not mean that Section 27.3455 imposes no new penalty or additional punishment. There is a very big difference between the existent provisions for forfeiting accrued gain-time and the new law which does not allow gain-time to be granted until the new requirements are met. The withholding of gain-time awards, moreover, is automatic so long as Section 27.3455(1) is not complied with, where the former provisions for forfeiting gain-time required that there be findings of guilt made, and that a particular procedure for declaring a forfeiture of gain-time be followed. §§944.275(5), 944.28(2)(c), Fla. Stat. (1983).

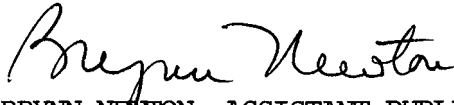
As the District Court found herein, Section 27.3455(1), Florida Statutes (1985), clearly violates the constitutional prohibitions against ex post facto laws because it does not permit gain-time to accrue while the costs remain unpaid or, as to indigent defendants, it requires the court to impose a sentence of community service after incarceration. It is not merely procedural because an additional penalty is being imposed by the new statute against defendants who do not or cannot pay these costs. The elements which render a penal law ex post facto—that it apply to events occurring before its enactment and that it disadvantage the offender affected by it—are present in this case. Weaver v. Graham, supra. The District Court's decision to vacate that portion of the trial court's sentence imposing court costs of two hundred dollars should be affirmed.

CONCLUSION

For the reasons expressed herein, Respondent Bennie Frank Williams respectfully requests that this Honorable Court affirm the District Court's decision to reverse that portion of the trial court's order which imposes court costs herein, and answer the certified question in the affirmative by finding that the application of Section 27.3455, Florida Statutes (1985), to crimes committed prior to July 1, 1985, violates the ex post facto provisions of the Constitutions of the United States and of the State of Florida.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, by hand delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Bennie Frank Williams, P. O. Box 500, Olustee, Florida 32072, this 3rd day of November, 1986.



ATTORNEY