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IN THE SUPREME COURT OF FLORIDA

FILED
OCT 18 1968
CLERK OF THE SUPREME COURT
TALLAHASSEE, FLORIDA

STATE OF FLORIDA,
Petitioner,

vs.

CASE NO. 69,330

JERRY GORDON,
Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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OTHER AUTHORITIES

§27.3455, Fla. Stat (1985)	2,4,5,6, 7,8,9,11
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STATEMENT OF THE CASE AND FACTS

On February 8, 1985, respondent, JERRY LEE GORDON, JR., was charged by information with the crime of second degree grand theft,¹ said crime alleged to have occurred on January 29, 1985 (R 20).² Thereafter, on September 6, 1985, in exchange for the state's agreement not to file a charge of failure to appear, respondent entered a plea of guilty to the crime as charged (R 42-45).

On October 23, 1985, respondent appeared before the Honorable Kenneth M. Leffler for sentencing (R 1-12). Although respondent's recommended sentencing guidelines score entitled him to a presumptive sentence of community control or twelve (12) to thirty (30) months incarceration (R 49-50), respondent was sentenced to thirty (30) months in prison with credit for 102 days served, to be followed by thirty (30) months probation (R 8, 53-55, 58-59), because respondent was not deemed suitable for community control, having violated his probation by the commission of the instant offense (R 5).

Court costs in the total amount of \$222.00 were also imposed upon the respondent (R 9, 58).³ A timely objection to

¹ §§812.014(1), 812.014(2)(b)1, Fla. Stat. (1985).

² (R) refers to the record on appeal.

³ Court costs in the amount of \$200.00 were apparently assessed under section 27.3455, Florida Statutes (1985), despite the erroneous reference to section 960.20, Florida Statutes contained in the trial court's order of probation (R 58). The additional \$22.00 appears to have been assessed under sections 943.25 and 960.20, Florida Statutes (1985) (R 58).

the application of section 27.3455, Florida Statutes (1985) to the respondent was overruled by the trial court (R 10). Thereafter, on November 15, 1985, a timely notice of appeal was filed (R 60), and the Office of the Public Defender was appointed to represent the respondent on appeal (R 66).

The sole issue raised by respondent on appeal to the Fifth District Court of Appeal concerned the propriety of imposing court costs pursuant to section 27.3455, Florida Statutes (1985), upon an indigent defendant following timely objection. (See, Initial Brief of Appellant). One of the grounds for error in this regard involved the asserted ex post facto application of section 27.3455, Florida Statutes (1985) to an offense committed prior to the effective date of such legislation.

On August 14, 1986, the Fifth District Court of Appeal reversed that portion of respondent's judgment imposing court costs pursuant to section 27.3455, certifying 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 PRO-
VISIONS OF THE CONSTITUTIONS
OF THE UNITED STATES AND OF
THE STATE OF FLORIDA, OR DOES
THE STATUTE MERELY EFFECT A
PROCEDURAL CHANGE AS IS PER-
MITTED UNDER STATE v. JACKSON,
478 So.2d 1054 (Fla. 1985)?

(This question was previously certified in Yost v. State, 489 So.2d 131 (Fla. 5th DCA 1986), and jurisdiction was accepted by this court in State v. Yost, Case No. 68,949). In addition, the

remaining court costs imposed upon the respondent in the instant case were reversed without prejudice to the state to prove entitlement thereto. Notice to invoke the discretionary jurisdiction of this court was timely filed on September 10, 1986. This brief on the merits follows.

SUMMARY OF ARGUMENT

Section 27.3455 is not penal in nature. The statute merely alters the procedure by which gain time is forfeited for nonpayment of court-ordered costs. Prior to the effective date of such statute, a trial court could impose court costs in excess of the mandatory amount of \$200.00, as well as withhold accrued gain time for an inmate's failure to abide by orders of the court. Consequently, petitioner would assert that section 27.3455 does not impose any penalty whatsoever, much less a more onerous one than that permitted under pre-existing law. Hence, section 27.3455 does not violate constitutional prohibitions against ex post facto legislation.

POINT ON APPEAL

THE APPLICATION OF SECTION
27.3455, FLORIDA STATUTES
(1985), TO A CRIME COMMITTED
PRIOR TO THE EFFECTIVE DATE
OF SUCH STATUTE DOES NOT
VIOLATE CONSTITUTIONAL
PROHIBITIONS AGAINST EX
POST FACTO LEGISLATION.

Respondent was sentenced to thirty months in prison, to be followed by thirty months probation (R 8, 53-55, 59-9). A condition of probation required respondent to pay court costs in the amount of \$200.00 pursuant to section 27.3455, Florida Statutes (1985) (R 58). Section 27.3455, Florida Statutes (1985), became effective on July 1, 1985; respondent's crime was committed on January 29, 1985 (R 20). The statute provides for the mandatory imposition of court costs in the amount of \$200.00 for every felony conviction, in addition to any other fines or costs. Although the subject statute has subsequently undergone substantial revision (Ch. 86-154, Laws of Fla.), the law in effect at the time of respondent's sentencing provided as follows:

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 intermediate appellate court determined that the imposition of court costs under section 27.3455 upon the respondent for a crime committed prior to July 1, 1985 violated the ex post facto

provisions of the United States and Florida Constitutions.

Petitioner must respectfully disagree.

Prior to addressing the subject certified question on the merits, petitioner would address several threshold issues concerning preservation and ripeness. First, although the respondent was declared indigent at trial as well as for purposes of appeal (R 23, 66), no objection to the assessment of costs on the basis of financial status was raised by respondent in the trial court (R 10). "The constitutional application of a statute to a particular set of facts . . . must be raised at the trial level." Trushin v. State, 425 So.2d 1126 (Fla. 1982). This lack of preservation highlights petitioner's assertion that the respondent's claim is not yet ripe for judicial resolution.

Arguably, the special condition of probation imposing court costs does not yet affect the respondent. Indeed, respondent would not be adversely affected by the application of section 27.3455, Florida Statutes (1985), until such time as he was due to be released from the Department of Corrections upon completion of his thirty-month sentence, with the allowance of gain time. See, §944.275(3)(a), Fla. Stat. (1985). If at such time respondent determines himself to be aggrieved by the imposition of such costs, the appropriate remedy for attacking the legality of respondent's detention is a petition for writ of habeas corpus. See, Weaver v. Graham, 450 U.S. 28, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

Moreover, with regard to the ripeness question, petitioner would point out that this honorable court, like the

courts below, cannot possibly predict respondent's future inability to pay the costs imposed. Indeed, it would have been improper, as well as premature, for the trial court to have determined on its own motion the respondent's future inability to pay the costs imposed. See, United States v. Hutchings, 757 F.2d 11 (2d Cir.), cert. denied, ___ U.S. ___, 105 S.Ct. 3511 (1985). Significantly, the legislature has obviated the necessity for judicial clairvoyance in this area by permitting a sentencing court to retain jurisdiction for the purpose of determining, upon motion, the current financial status of a once-indigent defendant. Upon a finding of indigency, a term of community service may be ordered in lieu of the payment of costs. Of course, this scenario assumes that a defendant will not have already satisfied his financial obligation under section 27.3455 prior to his tentative release date, thereby rendering any challenge to the costs assessed moot. In light of the foregoing, it is respectfully submitted that this honorable court refrain from issuing an advisory opinion in this cause. See, State v. Kinner, 398 So.2d 1360 (Fla. 1981).

Moving now to the merits of the question presented, it is petitioner's contention that no ex post facto violation occurred in the instant case on several grounds. First, petitioner would point out that section 27.3455, Florida Statutes (1985), is constitutional on its face. 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 court costs. Indigent defendants are also credited and awarded gain time

exactly as before; the statute merely provides for alternate payment of court costs by performing community service, upon motion by the defendant. As a consequence, although the subject statute is not retroactive on its face, petitioner acknowledges the retroactivity of same in its application to the instant case.

In order 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 alters penal provisions accorded by the grace of the legislature, such legislation is only 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. While it is clear that the subject statute is being applied retroactively, that is, to offenses committed before its effective date, this statute does not alter penal provisions because court costs are not a penalty. The primary effect of section 27.3455 is to change the procedure by which court costs are exacted from criminal defendants. Court costs were previously authorized upon conviction under section 939.01, Florida Statutes (1985). Consequently, the trial court could have imposed costs in excess of \$200.00 prior to the effective date of section 27.3455.

Moreover, 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).

In addition, "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 instruction." §944.28(2)(a) Fla. Stat. (1985) (applied prior to date of instant 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 respondent's crime. Consequently, the forfeiture of gain time under section 27.3455 does not change the amount or availability of gain time. Any change is merely procedural in nature, which does not violate ex post facto prohibitions. State v. Jackson, 478 So.2d 1054 (Fla. 1985); Dobbert v. Florida, 432 U.S. 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977).

In Dobbert, supra, 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. Likewise, petitioner would assert that the statute presently under review is also procedural in nature. In light of the foregoing analysis, petitioner would request this honorable court to declare the subject statute constitutional as applied in the instant case under Jackson, supra.

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, quashing the decision of the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing petitioner's brief on the merits has been furnished by mail to: Kenneth Witts, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32014, on this October 13, 1986.



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