

047

IN THE SUPREME COURT OF FLORIDA

FILED

SEN. J. WHITE

FEB 5 1987

CLERK, SUPREME COURT

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Deputy Clerk

CASE NO. 69,770

STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs.)
)
 CLIFFORD WEBBER,)
)
 Respondent.)
 _____)

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
112 Orange Ave., Ste. A
Daytona Beach, FL 32014
(904) 252-3367

ATTORNEY FOR RESPONDENT

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RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

The respondent accepts the Statement of Case and Facts as set forth in the Petitioner's Brief on the Merits, with the following additions and clarifications:

Prior to the imposition of costs, the defendant was not given notice nor was he afforded any opportunity to be heard. (R55) [Additionally, in assessing the "statutorily imposed fines ... those which the legislature imposes" the court never orally indicated that a portion of the costs was imposed pursuant to Section 27.3455, Florida Statutes (1985). (R55) It was only in the written sentence that it appears the costs were in fact imposed pursuant to that statutory provision. (R34)]

At the district court level, the state never questioned the permissibility of raising the costs issue for the first time on direct appeal. (See Answer Brief of Appellee, attached as Appendix).

SUMMARY OF ARGUMENT

No contemporaneous objection is necessary to address the issue of costs on appeal since (1) the defendant was never afforded adequate notice and opportunity to object, and (2) the imposition of the costs rendered the sentence illegal, thus negating the need for such an objection.

Under pre-existing law, the granting of credit for gain-time by the Department of Corrections was mandatory and its forfeiture was subject to findings made in compliance with procedural safeguards. Section 27.3455, Florida Statutes (1985), provides for the automatic withholding of gain-time so long as court costs are not paid or until community service following incarceration is ordered. The automatic denial of gain-time for nonpayment of court costs imposes a burden and an additional penalty on Respondent which did not exist prior to its enactment, and the application of Section 27.3455 in this case therefore violates the ex post facto provisions of the Florida and United States Constitutions.

ARGUMENT

POINT I

THE IMPOSITION OF COSTS
PURSUANT TO SECTION 27.3455,
FLORIDA STATUTES (1985), MAY
BE RAISED FOR THE FIRST TIME ON
APPEAL, ESPECIALLY WHEN THE
DEFENDANT HAS NOT BEEN AFFORDED
ADEQUATE NOTICE AND OPPORTUNITY
TO OBJECT.

For the first time in this case, the state is questioning the defendant's ability to raise the appropriateness of Section 27.3455 costs on appeal without having made a contemporaneous objection at the trial level. This issue was never presented by the state in the full appeal in the district court in this cause. (Appendix) The state should thus be estopped from raising such a claim now in this Court; the state has waived a procedural defect, if any existed.

A contemporaneous objection is not necessary to preserve the argument of the imposition of costs pursuant to Section 27.3455, Florida Statutes (1985), where the defendant was not afforded adequate prior notice of or opportunity to object to the imposition of such costs. Jenkins v. State, 444 So.2d 947 (Fla. 1984); Harris v. State, 12 FLW 67 (Fla. 1st DCA December 22, 1986); Brooks v. State, 490 So.2d 173 (Fla. 5th DCA 1986). Since the ex post facto imposition of the costs upon an indigent renders the sentence illegal, no contemporaneous objection is necessary to preserve the issue for appeal. State v. Whitfield, 487 So.2d 1045 (Fla. 1986); State v. Rhoden, 448 So.2d 1013, 1016 (Fla. 1984);

Webber v. State, 497 So.2d 995 (Fla. 5th DCA 1986).

The district court of appeal, therefore, correctly addressed the merits of claim concerning the ex post facto imposition of costs against the indigent defendant.

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 the statute in the case was not merely procedural simply because it did not alter punishment prescribed for the offense. Likewise, the application of Section 27.3455(1), 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.

Section 944.275(4)(a), Florida Statutes (1983), 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 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.

Petitioner argues that because of the pre-existence of provisions for forfeiture of gain-time, in Sections 944.275(5) and 944.28, Section 27.3455(1) imposes no new penalty or additional punishment. Petitioner says that, by the enactment of Section 27.3455(1), it is not gain-time which is changed by only the procedure by which it is credited. See Petitioner's Brief on the Merits, p. 8.

This contention overlooks the very clear and material distinction between the pre-existing 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, whereas the former provisions of forfeiting gain-time required that there be findings of guilt made [§944.275(5), Fla. Stat. (1983)], and that a particular method for declaring a forfeiture of gain-time be followed. § 944.25(2)(c), Fla. Stat. (1983). Petitioner also cites the pre-existing law that refusal to obey a court order may constitute contempt, in order to argue that failure to pay court costs pursuant to Section 27.3455(1), being the nonpayment of a court-ordered fee, is the equivalent of a violation of the law of this State. See Petitioner's Brief on the Merits, p.9. § 944.28(2)(a), Fla. Stat. (1985).

Again, this argument fails to distinguish between a finding that a prisoner has violated a law, with its attendant procedural safeguards, and Section 27.3455(1)'s automatic withholding of gain-time. See §38.22, Fla. Stat. (1985) (Power and proceeding to punish contempt); Fla.R.Civ.P. 1.570(c), 1.982 (Civil contempt power and proceeding).

As the District Court found herein, Section 27.3455(1), (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. Petitioner acknowledges that Section 27.3455(1) is being applied retroactively in this case, to sentences for crimes which occurred prior to July 1, 1985. See Petitioner's Brief on the Merits, pp. 6,8-9. 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 reverse that portion of the trial court's judgment imposing court costs of two hundred dollars in each case should be affirmed.

CONCLUSION

For the reasons expressed herein, Respondent respectfully requests that this Honorable Court affirm the District Court's decision to reverse that portion of the trial court's order imposing court costs herein, and answer the certified question 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,

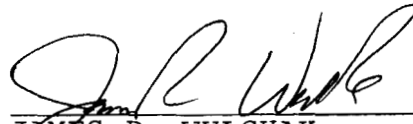
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112 Orange Ave., Ste. A
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to: The Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Ave., Daytona Beach, FL and Clifford Webber, # 100732, P. O. Box 221, Raiford, FL 32083 on this 4th day of February, 1987.



JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER