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IN THE SUPREME COURT OF THE STATE OF FLORIDA

MICHAEL H. LIVINGSTON,  
Petitioner,

v.

STATE OF FLORIDA,  
Respondent.

FEB 19 1987  
CLERK OF THE COURT  
By \_\_\_\_\_  
Deputy Clerk

CASE NO. 69,807

RESPONDENT'S BRIEF ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS

The District Court of Appeal, Fifth District, entertained this case twice, both times addressing the issue of speedy trial. Livingston v. State, 497 So.2d 998 (Fla. 5th DCA 1986); State v. Livingston, 475 So.2d 1328 (Fla. 5th DCA 1985). The first appeal started exactly where this case ends, with the order of July 2, 1984, denying the defendant's first motion for discharge under the speedy trial rule. This order set in motion the ninety day speedy trial rule, which the court ruled was extended to a date outside the time by defense agreement. The second "motion for discharge filed on October 3, 1984, was premature, and should not have been granted." Id. at 1329. This case reviews the correctness of the denial of the first motion for discharge filed June 14, 1984. The trial court based its denial of the motion for discharge on the grounds that Livingston had not been available for trial during substantial portions of the period from his arrest on May 12, 1981, to his arrest on a capias on May 2, 1984 (R 128-13)<sup>1</sup>

Livingston was arrested on May 12, 1981, for the vehicular homicide of Viola Woolt Jacobs in Brevard County, Florida (R 106). After a No Information was filed June 15, 1981, petitioner was discharged from jail, but on August 12, 1981, the state filed an information charging petitioner with vehicular homicide (R 106). When the information could not be served, a capias issued. Livingston was arrested on this capias on May 2, 1984 (R

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<sup>1</sup> (R ) refers to record on appeal.

107).

After this cause was remanded to the trial court, petitioner entered a plea of nolo contendere, reserving his right to appeal the denial of the motion for discharge. On March 12, 1986, Livingston was sentenced to two and one-half years in prison, followed by two years probation.

On November 20, 1986, the Fifth District affirmed the conviction. That portion of the sentence imposing court costs was reversed, and a question of great public importance was certified to this honorable court for resolution.

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 OR THE STATE OF FLORIDA, OR  
DOES THE STATUTE MERELY EFFECT A  
PROCEDURAL CHANGE AS IS PERMITTED UNDER  
STATE V. JACKSON, 478 SO. 2d 1054 (1985)?

See, State v. Yost, Case No. 68,949.

SUMMARY OF ARGUMENT

POINT ONE: The trial court correctly denied appellant's motion for discharge under the speedy trial rule because there was substantial evidence that petitioner was eluding prosecution.

POINT TWO: 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.

POINT ONE

THE TRIAL COURT CORRECTLY DETERMINED THAT PETITIONER GAVE FALSE ADDRESSES UPON ARREST AND ACTIVELY CONCEALED HIMSELF, THEREBY RENDERING HIM UNAVAILABLE FOR TRIAL PURSUANT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.191.

ARGUMENT

Respondent contends that the trial court correctly denied the first motion for discharge. Petitioner herein argues only that it was error to deny his motion on the basis of the rule, he does not assert a violation of his constitutional right to speedy trial. The trial court's order is presumptively correct, and should not be disturbed on appeal when based on factual findings amply supported by the record. DeConingh v. State, 433 So.2d 501 (Fla. 1983).

At the time of his arrest on May 12, 1981, petitioner gave two addresses, 888 S. Atlantic Avenue, Cocoa Beach, and a post office box (R 28). From the vehicle registration, the arresting officer obtained a third address, 348 Woodland Avenue (R 28). Petitioner was not living at either of these addresses at the time of his arrest. No one lived at 888 S. Atlantic until October, 1981, because it was being renovated (R 37). Petitioner's girlfriend and sometimes roommate, Dana Hopfer, was not living at the 348 Woodland Avenue address at the time of his arrest (R 11). The post office box was in Hopfer's name and the street address she listed with the post office was 348 Woodland Avenue (R 17). Therefore, none of the addresses given by petitioner were valid. Immediately upon his release from jail, Livingston moved to another city (R 8). Livingston and Hopfer

moved from Merritt Island to Melbourne to Canaveral to Cocoa Beach to Palm Bay during this time period (R 8).

It is undisputed that Livingston did not have a driver's license, did not have any utilities listed in his name, and did not have a telephone between 1981 and 1984 (R 120).

Petitioner incorrectly states that between May 12, 1981, and his 1984 arrest he was in regular contact with his employer Paul Putnam. In fact, Livingston testified that he was employed by both Putnam and Donald Blades, as well as self-employed during this period (R 8). Putnam testified that he did not see petitioner or know of his whereabouts for over a year between 1981 and 1984. Putnam also testified that in 1981 after the accident, Livingston told Putnam he was moving to another town to avoid service of process in a potential civil suit for wrongful death from this incident (R 49).

Petitioner also places great emphasis on the fact that his girlfriend, Dana Hopper, his wife since May, 1984, maintained traceable addresses. However, even the public defender's investigator was unable to locate Ms. Hopper (R 24). It is clear that Livingston failed to keep in contact with his attorney. Johnson v. State, 463 So.2d 514 (Fla. 1st DCA 1985).

Petitioner relies upon Fyman v. State, 450 So.2d 1250 (Fla. 2d DCA 1984), for the proposition that an accused has no duty to remain available for trial on new charges of which he has no knowledge. See also, Fla. R. Crim. P. 3.191(h)(2). However, if there is evidence that the accused knew or should have known that he was wanted by the police or that he was evading arrest, the

burden is on the accused to establish by competent proof that he was available. Richardson v. State, 340 So.2d 198 (Fla. 4th DCA 1976), State ex rel Green v. Patterson, 279 So.2d 362 (Fla. 2d DCA 1973), Bouchacra v. Leffler, 413 So.2d 791 (Fla. 5th DCA 1982), Fla. R. Crim. P. 3.191(e).

There was evidence that petitioner actively avoided service of process. Appellant gave false addresses at arrest, and maintained no traceable ties to the community through utilities, telephone or driver's license records. C.f. Wright v. State, 387 So.2d 1060 (Fla. 5th DCA 1980), Richardson v. State, supra. Petitioner did not stay in contact with his attorney. Paul Putnam, his sometimes employer, lost contact with Livingston several times during this period, including over a year. From these facts, the trial court correctly concluded that petitioner was concealing himself to evade prosecution. Petitioner has failed to sustain his burden of demonstrating that the trial court's ruling was error.

POINT TWO

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.<sup>2</sup> This statute provides for the mandatory imposition of court costs of \$200 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 petitioner'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 community control in lieu of \$200 at Livingston's sentencing on March 12, 1986, is an ex post facto violation. Art. I, § 10, Fla. Const.

The threshold question is whether this issue is preserved for review and properly before this court. "The constitutional

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<sup>2</sup> This statute has been substantially revised. Ch. 86-154, Laws of Fla.

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). There was absolutely no objection posed before the trial court when sentence was imposed (R 95-96). The constitutionality of the statute as applied is not preserved for appellate review.

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 respondent 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.Ed.2d 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 petitioner is attacking the legality of his detention, habeas corpus review is appropriate.

This issue will not be ripe for review until Livingston begins to serve the community service portion of his sentence. 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).

On the merits, respondent 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 the 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 petitioner'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 petitioner'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 non-payment of a court ordered fee is nothing but a restatement of the law as it existed prior to the commission of petitioner'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. 229, 43 L.Ed.2d 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 Livingston'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).

The imposition of the monetary payment of \$200 community service in lieu thereof, 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 petitioner 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 argument and authorities presented herein, respondent respectfully prays this honorable court to affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on the Merits has been furnished by delivery to Assistant Public Defender Brynn Newton at 112 Orange Avenue, Daytona Beach, Florida 32014, this 2<sup>th</sup> day of February, 1987.

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