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IN THE FLORIDA SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

REGINALD B. FOSTER,

Plaintiff,

v. Case No.: 37 2013 CA 002558

FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES,

Defendant.

/

FOSTER'S MOTION FOR REHEARING

Pursuant to Fla.R.Civ.P. 1.530, Plaintiff REGINALD B. FOSTER ("Foster") moves the Court for a rehearing of the summary judgment rendered on March 6, 2014, in favor of Defendant FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES ("DMV") and states as follows in support of this motion:

A motion for rehearing pursuant to Fla.R.Civ.P. 1.530 calls to the court's attention "any error, omission, or oversight that may have been committed" in a final order and broadly provides the trial court an opportunity to reconsider its ruling. *Balmoral Condo. Ass'n v. Grimaldi*, 107 So.3d 1149, 1151 (Fla. 3d DCA 2013) (quoting *Langer v. Aerovias, S.A.*, 584 So.2d 175, 176 (Fla. 3d DCA 1991)). A motion for rehearing is timely when filed no later than 15 days after the filing of

the judgment in a non-jury action. Fla.R.Civ.P. 1.530(b). This motion timely calls attention to four errors in the Order Granting Department's Motion for Summary Judgment ("Order").

The Order outlines the possible relief available to a driver whose license the DMV suspended for failure to pay court costs and fines (legal financial obligations or "LFOs"), when he lacks the ability to pay them. In addition to a direct challenge against the DMV as Foster has done here, the trial court found that there are "two methods for a[nother] court to review the person's ability to pay and provide relief" to the driver. *Id*. at 5. First, a driver whose license is suspended can pay the LFOs through an installment plan pursuant to § 28.246(4), Fla. Stat. *Id*. at 5. "The reasonableness of the payment plan is reviewed by the court." *Id*. Second, the driver may petition the criminal court to convert the LFOs into an obligation to perform community service pursuant to § 938.30, Fla. Stat. *Id*. at 2-3. In light of these two statutory methods by which a driver who cannot afford to pay the LFOs may have his driver's license reinstated, the trial court ruled the DMV may constitutionally suspend a driver's license upon notice of nonpayment of LFOs from the clerk. *Id*. at 5. Consequently, the court found that the DMV had no need to inquire about the reason for the nonpayment or whether the driver lacked the ability to pay the LFOs. *Id*. Furthermore, the trial court cautioned that any inquiry by the DMV into the driver's ability to pay would effectively "put the

[DMV] in the position of reviewing decisions of [a] court" and thus transgress the province of another branch of government.

However, four errors are present in this Order. (1) Despite what the trial court found, Sections 28.246(4) and 938.30, Fla. Stat. do not as a matter of law assure a driver of an attainable method of having his driver's license reinstated. Therefore, absent the DMV's inquiry into and an exception for a driver who lacks the ability to pay the LFOs, the DMV is unconstitutionally directed to suspend a driver's license for failure to pay the LFOs when the driver lacks the ability to pay them. (2) In practice, this likely happened to Foster because no evidence suggests that either the Orange County clerk or court would or recently did inquire into his ability to pay or reinstate his license. (3) This violates Foster's substantive due process rights and fundamental fairness because no legitimate government interest can be advanced by sanctioning or continuing to sanction a person for an *involuntary* act or inaction, like the inability to pay LFOs. (4) Consistent with the separation of powers, the DMV can determine a person's ability to pay the LFOs because only in rare circumstances—and never as required by law—has a court actually determined a driver's ability to pay.

1. Florida law assures no method for a driver whose has license has been suspended for failure to pay LFOs (when he lacks the present ability to pay them) to have his license reinstated.

For a driver like Foster, whose license has been suspended for failure to pay LFOs (when he lacks the present ability to pay them), § 28.246(4), Fla. Stat., provides no assurance that the driver can enroll in an affordable payment plan. Four features of the law explain why. (1) First, the law requires the clerk to "accept partial payments" and "enter into a payment plan." *Id*. However, the clerk only has a duty to enroll persons "who the court determines is indigent for costs." *Id*. Yet, in the vast majority of instances—including in Foster's case—the *clerk* alone, and not the court, determines indigent status when a person requests a public defender. *See* § 27.52(1), Fla. Stat. Accordingly, in the vast majority of cases, the clerk may be under no obligation to enroll a driver on a payment plan as an alternative to losing his or her license because the *court* did not determine the indigency. (2) Second, § 28.246(4), Fla. Stat., directs the clerk to enroll the driver on "a payment plan" without qualifying whether the plan must be "affordable" or "reasonable." *Id*. Although the statute provides a presumption for determining when a person has the "ability to pay," the law does not require the clerk to set the installments accordingly. (3) Third, although § 28.246(4), Fla., Stat., grants jurisdiction for a court to "review the reasonableness of the payment plan," it neither provides for a review by right nor equates "reasonableness" with

"affordable." In this way, even if a court were to decide to review the clerk's payment plan, the court is not required to ensure that a driver whose license is suspended for failure to pay LFOs is offered an affordable payment plan. Furthermore, because review is discretionary and without any guidelines, it is unclear how an aggrieved driver could even appeal a criminal court's failure to review or review a plan for affordability. (4) Fourth, § 28.246(4), Fla. Stat., provides no guidance or direction for when a driver's circumstances change and can no longer stay maintain the installment plans, as happened to Foster. Consequently, the clerk or the court may simply disenroll the driver for nonpayment and suspend his driver's license without any consideration of ability to pay.

Similarly, § 938.30, Fla. Stat., provides no assurance that a driver like Foster may convert his LFOs into an obligation to do community service as method to satisfy the LFOs and have his driver's license reinstated. The law *allows*, but does not require, a court to convert the LFOs into an obligation to do community service. § 938.30(2), Fla. Stat. Yet, some courts have rejected any authority to convert the LFOs into an obligation to do community service in some circumstances. For example, in *State v. Jackson*, No. 2005 CF 000889 (Fla. 2nd Cir. Escambia Cnty.), Chief Judge Terry Terrell ruled he had no authority to convert the LFOs into community service because the "financial responsibility

arising out of a criminal case [had been] reduced to a lien." *Id*., attached and incorporated as Exhibit 18.

Ultimately, §§ 28.246(4) and 938.30, Fla. Stat., leave much to the whims of the clerk and court. They do not provide any assurance that a driver whose license has been suspended for failure to pay LFOs will be offered an opportunity to enroll in an affordable payment plan or perform community service. Therefore, they fail to provide any safeguards against the DMV's unconstitutionally suspending a driver's license for failure to pay the LFOs, when he lacks the present ability to do so. The trial court should not rely on these methods in denying Foster relief here.

2. The DMV failed to support its motion with evidence that the Orange County clerk and criminal court actually provided Foster with an opportunity to have his license reinstated.

The clerk's and court's implementation of §§ 28.246(4) and 938.30, Fla. Stat., vary by county. Some clerks refuse to enroll a driver on a payment plan after a driver defaults by falling behind on the installment payments; some clerks refuse to enroll a driver on a payment after the account has been assigned to a collections agency pursuant to § 28.246(6), Fla. Stat.; some courts permit these actions. Some courts refuse to convert LFOs into an obligation to do community service. The record is silent how the Orange County clerk and court would presently handle Foster's attempts to reinstate his license. As a matter of fact, the record before this court is simply insufficient to determine whether the clerk and court in Orange

County would provide Foster an alternative to a suspended license—either in the form of an affordable payment plan or converting the LFOs into community service. Indeed, the scant evidence in the record on this point indicate that Orange County refused to enroll Foster on a payment plan. *See* Clerk's *Register of Actions*, pdf pp. 11 ("10/07/2013 Order Denying Motion to be referred to Collection's Court"), 18 (same), 23 (same), 28 (same) 32 (same), attached to the Parties' Stipulation (hereinafter "Stipulation") and incorporated herein as Ex. 1. Therefore, this trial court's ruling that Foster had in fact "two judicial methods to provide relief for inability to pay," Order at 6, is simply unsupported by the evidentiary record. We do not know whether Foster could obtain relief in Orange County.[1]

3. No rational basis supports suspending a driver's license for failure to pay LFOs when he lacks the present abiltiy to pay them.

The Order contravened binding Florida Supreme Court precedent by concluding that "the recovery of criminal fines and court costs" is advanced by the DMV's suspension of Foster's license for failure to pay the LFOs, notwithstanding his ability to pay them. Order at 5. *State v. Beasley*, 580 So. 2d 139 (Fla. 1991), and its progeny clearly rule that Florida violates "fundamental fairness" when it

[1] Although this dearth of evidence precludes summary judgment for the DMV, the court may still award summary judgment to Foster because his claims do not rest on this factual assertion.

sanctions a person for an *involuntary* act or inaction, like inability to pay LFOs. Sanctioning a criminal defendant for failure to pay LFOs when he lacks the ability to pay them is pointless because it cannot not make the payment "suddenly forthcoming." *Bearden v. Georgia*, 461 U.S. 660, 670-71 (1983). That *Beasley* and *Bearden* concerned the sanction of revocation of probation instead of suspension of a driver's license at issue here does not dampen their reasoning's application to Foster. *See* Order at 6 (distinguishing these cases as inapplicable). As a matter of law, no sanction—whether it be incarceration, the loss of an important property interest, *see* Answer, ¶ 19, or even amputation—can aid the collection of the LFOs from a person who simply lacks the ability to pay them, like Foster. The severity of the sanction is irrelevant to whether it furthers a legitimate government interest.[2]

[2] One may argue that the prospect of finding oneself in this very position—unable to pay the LFOs and consequently losing a driver's license—is simply another collateral consequence of a committing a crime that furthers the government general interest in crime deterrence. However, to the extent this could be a justification for punishing a person for an involuntary condition of inability to pay, *Beasley* and its progeny implicitly reject it. Perhaps because the relationship is too tenuous, the Florida Supreme Court never considered that these involuntary collateral consequences could deter someone from committing a crime. Indeed, if the legislature intended suspend licenses as an additional punishment for crimes, it clearly could do that directly. *See, e.g,* § 812.0155, Fla. Stat. However, such punishment or exclusion would have to apply uniformly to all convicted felons, not just the poor ones who cannot afford to pay the LFOs. *Tate v. Short*, 401 U.S. 395 (1971) (ruling it is a denial of equal protection to limit punishment to payment of a fine for those who are able to pay it but require another sanction for those who cannot); *Williams v. Illinois*, 399 U.S. 235 (1970).

Alternatively, the trial court reasons that if the driver must have the ability to pay for the sanction to make sense, then Foster's ability to pay had already been determined in Orange County. Accordingly, the court rules that "there [is] no need for yet another hearing by the [DMV]" and the DMV should not "review[] decisions of the court." Order at 5. However, nothing in the record indicates that the clerk or court Orange County determined or conducted a hearing his *present* ability to pay the LFOs. The record reveals no opportunity to enroll on a payment plan since 2012. In fact, the scant evidence in the record shows at best that he was not permitted to enroll in a payment plan in the fall of 2013. Clerk's *Register of Actions*, pdf pp. 11 ("10/07/2013 Order Denying Motion to be referred to Collection's Court"), 18 (same), 23 (same), 28 (same) 32 (same), Ex. 1. Furthermore, the record is altogether silent about whether the payment plan was or would be affordable. Therefore, the DMV's reliance on the Orange clerk and court to assure Foster had the ability to pay—or the very least, the opportunity to enroll on an affordable payment plan or convert the LFOs to community service—is simply misplaced. Neither as a matter of fact nor law, did the Orange clerk and court have to or actually did determine Foster ability to pay.

4. No separation of powers principle or rule of law is invaded when the DMV ensures it is properly suspending a license by inquiring into the reason the driver failed to pay the LFOs.

The DMV may inquire[3] into why a driver failed to pay the LFOs before suspending his license for failure to pay them. Only in rare factual circumstances absent here, and never as a matter of law would such an inquiry amount to a rehearing of a fact determined by a court. Many times the clerks, not the court, determines ability to pay. Florida law directs the clerk to enroll a driver on a payment plan in limited circumstances. § 28.246(4), Fla. Stat. When the clerk demands an unaffordable payment plan (or refuses to set a payment plan at all) and the court does not review this, the DMV's inquiry into what the clerk has done presents no separation of powers or rule of law dilemma because both the clerk and the DMV are executive agencies. However, even when the court elects to reviews "the reasonableness of the payment plan" set by the clerk, the DMV can still inquire into Foster's ability to pay the LFOs. *Id*. The court's review is of the affordability of the payment plan, not whether the driver can pay all the LFOs at one time. When the court rules not on the amount of the payment plan, but on

[3] Importantly, Foster argues the DMV violated his procedural due process because it failed to provide a pre-deprivation opportunity for Foster to challenge the suspension for failure to pay the LFOs because he lacked the ability. Foster observes that although the record review provided by Fla. Admin. Code r. 15A-1.0195 could possibly occur *before* the suspension, the DMV would not consider ability to pay in such a hearing. Oddly, the trial court uses this fact to reject Foster's demand that the DMV provide a pre-deprivation hearing because "the hearing would have served no purpose." However, Foster desires a meaningful pre-deprivation hearing on his *ability to pay the LFOs*, not the unsatisfactory record review envisioned by r. 15A-1.0195.

whether the person is entitled to one in the first place, the DMV's determination of inability to pay would undermine the court's determination of ineligibility for a payment plan. The same applies to § 938.30, Fla. Stat., where a court may deny a person's request to convert the LFOs into community service for reasons other than his inability to pay the LFOs. Thus, as a matter of law, no separation of powers issue is necessarily created by the court's previous ruling on a payment plan or motion to convert LFOs. As a matter of fact, because no one in Orange County has recently considered Foster's present ability to pay the LFO, the DMV's determination would not invade the province of the Orange County clerk or court.

Therefore, this trial court need not hesitate to inquire into Foster's inability to pay or direct the DMV to do so as required by the Florida Constitution.

WHEREFORE, Foster respectfully requests that the Court rehear the parties' cross motions for summary judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have supplied a true and accurate copy of the forgoing on March 21, 2014, to the following via Email at the following address:

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Respectfully Submitted,

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IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO.: 2005 CF 000889 A,
2006 CF 004399 A
DIVISION: "K"

CRYSTAL DEVINE JACKSON,

Defendant.
_____/

ORDER DENYING DEFENDANT'S CONSOLIDATED MOTION TO CONVERT FINANCIAL OBLIGATIONS INTO A COMMUNITY SERVICE OBLIGATION

Counsel for the Defendant in a presently pending unrelated case has filed a Motion to Convert Financial Obligations into Community Service Obligation regarding the above two listed case numbers. In addition the motion includes a misdemeanor case number of which this court has no jurisdiction.

The relevant Court costs and other financial responsibilities arising out of the above two listed case numbers have long since been reduced to judgment. Liens were entered for the relevant amounts in October of 2007, following violation of probation in the above two cases.

Once a financial responsibility arising out of a criminal case is reduced to a lien there is no authority to convert the balance to community service.

In effect, the Defendant's Motion is an untimely Motion for Post Conviction Relief for matters that have long since been established as the law of the case. The various entities that are recipients of any fees or costs are vested with the right to attempt to collect.

It is, therefore, **ORDERED AND ADJUDGED** that:

Exhibit 18

The Defendant's Consolidated Motion to Convert Financial Obligations into a Community Service Obligation is ***denied.***

DONE AND ORDERED in Chambers, at Pensacola, Escambia County, Florida on this 11th day of December, 2012.

Terry D. Terrell
Circuit Judge

Copies to:

Dana Oberhausen, Assistant State Attorney
John Knowles, Assistant Public Defender