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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2011-2012

CR-12-0036

Willie James Walker II

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC11-5072)

BURKE, Judge.

On May 12, 2011, Willie James Walker II was arrested for discharging a firearm into an occupied vehicle. Walker's bond was set at \$7,500. On November 22, 2011, Walker was indicted and charged with the offense of discharging a firearm into an

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occupied vehicle, a violation of § 13A-11-61, Ala. Code 1975. On September 26, 2012, the charge was reduced to menacing, a violation of § 13A-6-23, Ala. Code 1975, and Walker pleaded guilty. He was sentenced to 12 months' imprisonment and was ordered to pay a \$100 fine and a bail-bond fee of \$262.50 pursuant to § 12-19-311(a)(1)b., Ala. Code 1975. At the sentencing hearing, defense counsel objected to the assessment of the bail-bond fee, arguing that the imposition of it would be ex post facto law and noting that Walker did not make bond so there was no court administrative cost involved. On October 4, 2012, Walker filed a motion to reconsider the assessment of the bail-bond fee, which the circuit court subsequently denied.

On appeal, Walker argues, among other things, that the imposition of the bail-bond fee for his offense, which occurred on May 12, 2011, was unconstitutional as applied to him because, he argues it violates the ex post facto clause contained in the Alabama Constitution and in Art. I, §10, of the United State Constitution, which states, in pertinent part: "No state shall ... pass any ... ex post facto law." We note that on appeal the State concedes that "[a] remand is

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necessary because the imposition of the bail bond fees pursuant to Section 12-19-311, Code of Alabama (1975) in this case violates the ex post facto clause." (State's brief, at 5.)

Section 12-19-311, Ala. Code 1975, provides, in pertinent part:

"(a) (1) In addition to all other charges, costs, taxes, or fees levied by law on bail bonds, additional fees as detailed in paragraph a. and paragraph b. shall be imposed on every bail bond in all courts of this state.

"...The fees shall be assessed as follows:

"....

"b. For a misdemeanor offense, a bail bond fee in the amount of 3.5 percent of the total face value of the bail bond or one hundred dollars (\$100), whichever is greater, but not to exceed four hundred fifty dollars (\$450). For a felony offense, a bail bond fee of 3.5 percent of the total face value of the bail bond or one hundred fifty dollars (\$150), whichever is greater, but not to exceed seven hundred fifty dollars (\$750). Except that if a person is released on a judicial public bail, recognizance, or signature bond, including a bond on electronic traffic and nontraffic citations, the fee shall be affixed at twenty-five dollars (\$25). For purposes of this section, face value of bond shall mean the bond amount set by court or other

authority at release, not the amount posted at release on bail.

". . . .

"(2)(c) Upon the failure to pay the fee in paragraph a. of subdivision (1) of subsection (a) and upon a finding of contempt in subsection (d), the bondsman, surety, guaranty, or individuals required to pay the fee shall be punished by a fine of not less than five hundred dollars (\$500) in addition to the fee imposed in paragraph a. of subdivision (1) of subsection (a). The fine shall not be remitted, waived, or reduced unless the person(s) fined can show cause to the court that he or she cannot pay the fine in the reasonably foreseeable future."

Section 12-19-311(a)(1)b., Ala. Code 1975, was approved by the governor on May 22, 2012, and became effective on August 1, 2012.

In Walker v. State, 433 So. 2d 469 (Ala. 1983), the Alabama Supreme Court recognized the following definition of ex post facto law:

"An ex post facto law is one which makes criminal and punishes an act which was done before the passage of the law and which was innocent when done, aggravates a crime or makes it greater than it was when committed, changes the punishment and inflicts a greater punishment than was prescribed when the crime was committed, or alters the legal rules of evidence and receives less or different testimony than was required to convict at the time the offense was committed."

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Walker, 433 So. 2d at 471 (citing Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798)). In Salter v. State, 971 So. 2d 31, 36 (Ala. Civ. App. 2007), the Alabama Court of Civil Appeals stated:

"In Smith v. Doe, 538 U.S. [84] at 97, 123 S.Ct. 1140 [(2003)], the Supreme Court recognized that whether a statute violates the Ex Post Facto Clause or the Double Jeopardy Clause depends on resolution of the same question: Does the statute unconstitutionally impose a second punishment for the same criminal offense? If the statute is merely intended by the legislature to establish a civil regulatory scheme and is not punitive in nature or effect, it will be upheld as a constitutional exercise of legislative power. The party asserting the unconstitutionality of the statute must show 'the clearest proof' that a statute intended to create a civil regulatory scheme is actually a punitive criminal act. 538 U.S. at 92, 123 S. Ct. 1140."

This Court has stated that "[a]n ex post facto law is a law passed after the commission of an act that increases the legal consequences of the act." State v. C.M., 746 So. 2d 410, 416 (Ala. Crim. App. 1999) (citing Collins v. Youngwood, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)). Rule 26.11(c), Ala. R. Crim. P., provides that "[d]ocket fees and other costs in criminal cases shall be assessed upon conviction," and Rule 26.11, Ala. R. Crim. P., states that "[c]ourt costs shall be deemed part of the penalty." In Dixon

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v. State, 920 So. 2d 1122 (Ala. Crim. App. 2005), this Court stated that restitution and statutory assessments, like a fine, are components of a sentence. 920 So. 2d at 1130. Likewise, in Citizenship Trust v. Keddie-Hill, 68 So. 3d 99, 104 (Ala. 2011), the Alabama Supreme Court recognized a statutory \$12 DNA-database fee as part of the criminal sentence.

In Caldwell v. State, 55 Ala. 133, 136 (Ala. 1876), the Alabama Supreme Court stated that "any statute enacted after the commission of an offense, which increases the cost to be adjudged on conviction, necessarily increases the punishment on non-payment. Such statute, when applied to past offenses, is ex post facto." Additionally, in United States v. Prather, 205 F.3d 1265 (11th Cir. 2000), the district court levied a statutory special assessment amount of \$100 against Prather for each of Prather's offenses; however, the special assessment amount had been raised from \$50 to \$100 after the date of the commission of Prather's offenses. The United States Court of Appeals for the 11th Circuit remanded the case for recalculation of a special assessment at the rate of \$50 per count "[b]ecause the Ex Post Facto Clause of the

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Constitution forbids retroactive application of criminal sanctions". 205 F.3d at 1272; See also United States v. Jones, 489 F.3d 243, 254 (6th Cir. 2007) (finding that Jones was entitled to the benefit of the previous assessment amount of \$50 per felony because he committed his crimes before the increase and applying the \$100 assessment would violate the Ex Post Facto Clause).

In the present case, Walker was arrested for the offense on May 12, 2012, which was before the statute, § 12-19-311, Ala. Code 1975, became effective. Thus, the circuit court's imposition of the bail-bond fee pursuant to § 12-19-311 violated the ex post facto clause. Accordingly, we remand this case to the circuit court with directions to amend Walker's sentence to exclude the imposition of the bail-bond fee in accordance with this opinion. Due return shall be made to this Court within 21 days of the date of the release of this opinion.

REMANDED WITH DIRECTIONS.

Windom, P.J., and Kellum and Joiner, JJ., concur. Welch, J., concurs in the result.