

FILED  
IN COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

SEP 28 2000

JAMES W. PATTERSON  
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LLOYD EUGENE DOWDY, )  
 )  
 Appellant, )  
 )  
 v. ) No. F-99-1265  
 )  
 STATE OF OKLAHOMA, )  
 )  
 Appellee. )

**ORDER DENYING REHEARING AND  
DIRECTING ISSUANCE OF MANDATE**

Appellant was convicted in a jury trial before the Honorable William Mattingly, Associate District Judge, of Second Degree Burglary (Counts I and II) (21 O.S.1991, § 1435), and Injuring a Public Building (Count III) (21 O.S.1991, § 349), all counts After Former Conviction of Two or More Felonies, Case No. CF-98-297, in the District Court of Osage County. Appellant was sentenced to twenty-five (25) years imprisonment in each count. This Court affirmed Appellant's convictions and sentences in *Dowdy v. State*, opinion not for publication, August 22, 2000.

Appellant is now before the Court on a Petition for Rehearing, Rule 3.14, *Rules of the Court of Criminal Appeals*, 22 O.S.Supp.1998, Ch. 18, App. According to Rule 3.14, a Petition for Rehearing shall be filed for two reasons only:

- (1) That some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or
- (2) That the decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument.

In his sole ground for rehearing, Appellant argues our decision that his claim of error regarding the imposition of costs of incarceration was raised prematurely on direct appeal is in direct conflict with Rule 8.8, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (1998). Rule 8.8 was not called to the Court's attention in the appellate brief.

We have reviewed Appellant's allegation and find that he is not entitled to a rehearing. In our opinion, we set forth the well established rule of law that when a defendant is sentenced to a term of incarceration and assessed fines, costs and/or fees resulting from the prosecution, a determination of the defendant's ability to pay any fines and costs assessed by the trial court is not properly raised on direct appeal. *Honeycutt v. State*, 834 P.2d 993, 1000 (Okla.Cr.1992). As the fines, costs, and fees are not due until after a defendant is released from custody, it is premature to determine at the time of the direct appeal, the defendant's financial status and ability to pay.

Procedures for determining a defendant's ability to pay are set forth in Section VIII of our Court Rules. Specifically, Rule 8.8 provides for a direct appeal from a Final Order of Detention for Non-Payment issued by a trial court. Rule

8.8 states in part that the appeal from a final order of non-payment is limited to whether the trial court abused its discretion in entering the final order of detention. Rule 8.8(A) further states:

The propriety of any fine, cost, or other assessment made within the original judgment and sentence is not a proper subject of an appeal from an order of detention. Such claims must instead be raised in a direct appeal from the judgment and sentence.

It is this phrase which Appellant contends conflicts with *Honeycutt* and our decision in his direct appeal.

To the contrary, this part of the rule supports our decision on direct appeal. Claims involving the appropriateness of the imposition of any fine, costs, or other assessments, *i.e.*, whether they were warranted by the evidence presented at trial, and claims of excessive fines and costs are properly raised on direct appeal as those issues can be adjudicated at the time of the direct appeal. However, issues regarding the defendant's ability is a separate issue which cannot be properly adjudicated at the time of direct appeal. By omitting claims from a direct appeal concerning inability to pay, a defendant has not waived his right to challenge the issue. Appeals can be taken pursuant to Section VIII of our Court rules. Therefore, the directive set forth in Rule 8.8 (A), to raise any issues pertaining to the propriety of the fines and costs on direct appeal, is not inconsistent with *Honeycutt* or our decision in Appellant's case.

In a related issue, Appellant asserts the assessment of incarceration fees should be determined by a "reasonable certainty" as are restitution fees. *See*

*Honeycutt*, 834 P.2d at 1000-1001. Under 22 O.S.1991, § 991a(A)(1)(a) when ordering defendant to pay restitution, the trial judge must first determine whether the restitution can be paid without imposing manifest hardship on the defendant or his immediate family; and second, the extent of the damage to the victim must be determinable with reasonable certainty. The assessment of costs for incarceration is provided for in 22 O.S.Supp.1996, § 979a. This section provides for costs of incarceration to be determined with specificity, not merely "reasonable certainty." "The costs for incarceration shall be an amount equal to the actual cost of the services and shall be determined by the chief of police for city jails, by the county sheriff for county jails or by contract amount, if applicable." 22 O.S.Supp.1996, § 979a. Therefore, we reject Appellant's request to have costs of incarceration determined with "reasonable certainty."<sup>1</sup>

Accordingly, we find our decision is not in conflict with controlling statutory or case law. Rehearing is denied.

Based upon the foregoing, this Motion for Rehearing is **DENIED**. The Clerk of this Court is ordered to issue the mandate forthwith.

**IT IS SO ORDERED.**

**WITNESS OUR HANDS AND THE SEAL OF THIS COURT** this <sup>28</sup>38 day  
of September, 2000.

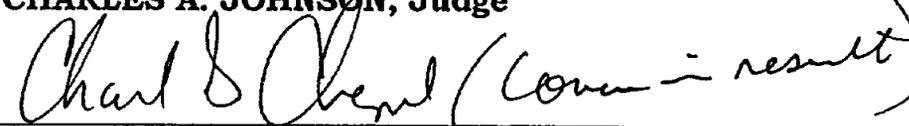
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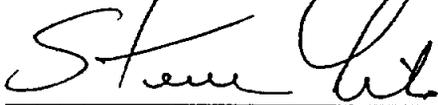
<sup>1</sup> In the present case, the costs of incarceration were determined by the county sheriff and filed with the court. (O.R.135, Osage County Sheriff Inmate Incarceration Costs). No objection to the amount of the costs was raised by the defense. The trial judge accepted the evidence and ordered the payment of \$9,228.00, to be paid pursuant to the Judgment and Sentence. (O.R. 136, 153).

  
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**RETA M. STRUBHAR, Presiding Judge**

  
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**GARY L. LUMPKIN, Vice Presiding Judge**

  
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**CHARLES A. JOHNSON, Judge**

  
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**CHARLES S. CHAPEL, Judge**

  
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**STEVE LILE, Judge**

ATTEST:

