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fects of electrocution extends for four pages in the transcript, and we find no error in the court's overruling the objection. Additionally, the court properly disallowed the testimony of a defense witness who had observed numerous executions. *Shriner v. State,* 386 So.2d 525 (Fla.1980), *cert. denied,* 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 829 (1981).

Stewart also claims that the state introduced improper aggravating evidence, exceeded the scope of cross-examination, and argued nonstatutory aggravating circumstances to the jury. The record, however, shows that the complained-of evidence supported the statutory aggravating factors, that the state conducted a proper cross-examination, and that the final argument fell within the wide latitude permitted for argument.

After resting in the sentencing proceeding, but prior to argument, the defense requested permission to reopen its case to put on one more witness. The defense wanted this witness, a detective, to testify as to the contents of a sworn statement made by an acquaintance of Stewart's. To support his request defense counsel stated that he wanted to show that the acquaintance had lied in her statement. Before this Court, however, Stewart claims that disallowing this testimony precluded him from showing evidence of remorse because the acquaintance's statement said that Stewart had told her he was sorry for what he had done.

[12-14] Reopening a case for additional testimony is discretionary, *Hoey v. Fletcher,* 39 Fla. 325, 22 So. 716 (1897). Notwithstanding the failure to object to the court's ruling,[6] we find that the trial court did not abuse her discretion in this instance. Moreover, by changing his assessment of the import and effect of the sworn statement Stewart has improperly raised in this Court a ground for review not brought before the trial court.

We also find that the trial court did not err in refusing to give all of Stewart's proposed instructions or in finding that five aggravating,[7] but no mitigating circumstances had been established. As the trial court pointed out, the standard sentencing instructions adequately cover the matters included in the proposed instructions. There is no evidence that the judge and jury failed to properly weigh and consider the evidence presented to them, and the record amply supports the trial court's written findings of fact.

Finding no error in this well-prepared and well-tried case, we affirm both the conviction and sentence.

It is so ordered.

ALDERMAN, C.J., and ADKINS, BOYD, OVERTON, SUNDBERG, McDONALD and EHRLICH, JJ., concur.

A. Curtis POWERS, Clerk of the Circuit Court, Petitioner,

v.

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF JACKSONVILLE, a corporation, Respondent.

No. 61300.

Supreme Court of Florida.

Aug. 26, 1982.

Rehearing Denied Nov. 4, 1982.

Mortgagee filed objection to clerk of circuit court's entitlement to registry fee, in

6. Defense counsel merely acquiesced in the court's denial.

7. The court found the following aggravating factors under § 921.141(5), Fla.Stat.: under sentence of imprisonment, previous conviction of crime involving use or threat of violence, felony murder, pecuniary gain, and heinous, atrocious, and cruel.

addition to fee provided for by statute for clerk's services in administering a judicial sale, following foreclosure sale at which a third-party bidder submitted highest and best bid. The Circuit Court, Alachua County, Chester B. Chance, J., entered order requiring clerk to pay over to mortgagee sum withheld as registry fee, and the District Court of Appeal affirmed at 404 So.2d 786. The Supreme Court held that in addition to statutory fee for clerk's services during judicial sale, clerk was also entitled to the registry fee.

Decision of the District Court quashed and case remanded.

Alderman, C.J., dissented and filed opinion, with which Overton and McDonald, JJ., concurred.

Clerks of Courts ⟹29

In addition to fee provided for clerk of circuit court for his services in administering a judicial sale, clerk was also entitled to collect statutory registry fee on proceeds paid by a third-party bidder at foreclosure sale. West's F.S.A. §§ 28.24(14), 45.031.

Dennis R. Long, Alachua County Atty., Gainesville, for petitioner.

David L. Fleming and Michael A. Wodrich of Rogers, Towers, Bailey, Jones & Gay, Tallahassee, for respondent.

PER CURIAM.

We review the decision of the District Court of Appeal, First District, in *Powers v. First Federal Savings & Loan Association of Jacksonville*, 404 So.2d 786 (Fla. 1st DCA 1981), which affects a class of constitutional officers. The district court held that the $25 fee provided for in section 45.031(1), Florida Statutes (1979),[1] is the only fee to which the clerk of the circuit court is entitled for administering a judicial foreclosure sale pursuant to chapter 45. We disagree and hold that the clerk is also entitled to collect a registry fee provided for in section 28.24(14), Florida Statutes (1979),[2] on proceeds paid by a third-party bidder at a foreclosure sale conducted pursuant to section 45.031.

In the present case, the Clerk of the Circuit Court of Alachua County, A. Curtis Powers, held a foreclosure sale pursuant to a summary final judgment of foreclosure entered by the circuit court. This final judgment provided that upon confirmation of the sale as provided by statute or by order of the court, the clerk shall disburse the proceeds of the sale by paying "(a) the costs and expenses of this action incurred after the date hereof, and said attorneys' fees, (b) the remaining amounts due the Plaintiff with interest thereon as provided by statute from the date hereof through the

1. Section 45.031 provides in pertinent part:

In any sale of real or personal property under an order or judgment, the following procedure may be followed as an alternative to any other sale procedure if so ordered by the court.

(1) SALE BY CLERK.—In the order or final judgment, the court shall direct the clerk to sell the property at public sale on a specified day that shall be not less than 20 days after the date thereof, on terms and conditions specified in the order or judgment.

The clerk shall receive a service charge of $25 for his services in making, recording, and certifying the sale and title that shall be assessed as costs. The court may enlarge the time of the sale. Notice of the changed time of sale shall be published as provided herein.

(6) DISBURSEMENTS OF PROCEEDS.—On filing a certificate of title the clerk shall disburse the proceeds of the sale in accordance with the order or final judgment, and shall file a report of the disbursements and serve a copy of it on each party not in default in substantially the following form: (Caption of Action)

2. Section 28.24 provides in pertinent part:

The clerk of the circuit court shall make the following charges for services rendered by his office in recording documents and instruments and in performing the duties enumerated. However, in those counties where the clerk's office operates as a fiscal unit of the county pursuant to s. 145.022(1), the clerk shall not charge the county for such services.

(14) For receiving money into the registry of court:

(a) First $500, percent

(b) Each subsequent $100, percent

date of sale." The judgment provided that any surplus after payments would be paid into the registry of the court.

After the sale, the clerk filed his Certificate of Sale certifying that the highest and best bid for the property was submitted by a third-party bidder. He later issued a Certificate of Title in the mortgage foreclosure and filed his Certificate of Disbursements of Proceeds of Sale by Clerk in Mortgage Foreclosure. This Certificate of Disbursements included a "clerk's registry fee" of $149.60. The clerk, pursuant to section 45.031, also collected $25 as a judicial sale fee. First Federal Savings & Loan, the plaintiff in the foreclosure proceedings, filed an objection to this certificate and asserted, among other things, that the clerk erroneously withheld as his service charge the fee of $149.60 provided in section 28.24(14) for receiving money into the registry of the court in violation of section 45.031(1) which provides a fee of $25 for such services and in violation of the final judgment which orders that only surplus, after payments specified therein, be paid into the registry of the court. The circuit court held that the clerk had erroneously withheld a registry fee of $149.60 and ordered the clerk to issue this sum to First Federal. It reasoned that the clerk's service charge provided for in chapter 45 includes the receipt and disbursement of funds in the event that there is a third-party bidder and that the funds received by the clerk in connection with conducting a judicial sale are not those funds described by section 28.24(14) as moneys received into the registry of the court.

The clerk appealed to the district court, but the district court agreed with the trial court that section 45.031(1) provides the exclusive charge for the clerk's services in connection with the sale of real or personal property for forced sale. It stated that the fee provided for the clerk for his services in administering the judicial sale is an alternative to and an exception to the general fee set forth in section 28.24.

Judge Liles dissented on the bases that section 28.24 is mandatory and that no exceptions are provided. He reasons, and we agree, that sections 28.24 and 45.031 involve two separate functions and that section 45.031 does not create a clear exception to section 28.24, thereby permitting preemption of the fee required by section 28.24. In *Taylor v. Tampa Electric Company*, 356 So.2d 260 (Fla.1978), we said that the language of section 28.24 is mandatory and any exception to this statute should be clear.

As petitioner argues and as Judge Liles points out, these two statutory provisions are easily harmonized. The $25 fee is for the conducting of the sale, the filing of all required certifications, the issuance of the certificate of title, and the recording and certifying the title. Where he is required to hold money in the registry of the court as in the present case where there is a third-party bidder at the foreclosure sale, the clerk provides a separate and distinct function for which he must collect a charge pursuant to section 28.24(14). If the legislature intends otherwise, it must make this exception clear.

Accordingly, we quash the decision of the First District and remand for further proceedings consistent with this decision.

It is so ordered.

ADKINS, BOYD, SUNDBERG and EHRLICH, JJ., concur.

ALDERMAN, C.J., dissents with an opinion, with which OVERTON and McDONALD, JJ., concur.

ALDERMAN, Chief Justice, dissenting.

I would approve the decision of the First District Court and hold that section 45.031(1) constitutes a clear exception to the mandatory language of section 28.24(14). Section 45.031 governs judicial sales procedure and sets out the fee to be charged by the clerk for his services in this regard. This fee is $25. I agree with the First District that this fee is clearly an alternate fee and an exception to the fee provided for in section 28.24(14).

Taylor v. Tampa Electric Company is distinguishable from the present case because

the eminent domain statute involved in that case did not provide an alternate fee as does section 45 031

OVERTON and McDONALD, JJ, concur

STATE of Florida, Petitioner,

v.

Ken Scott KILPATRICK, Respondent.

No. 61349.

Supreme Court of Florida.

Sept. 14, 1982

Rehearing Denied Nov 9, 1982

State moved to reinstate petition for discretionary review after administrative dismissal on grounds of untimely filing. The Supreme Court, Overton, J., held that motion for rehearing en banc before District Court of Appeal, which was filed separately and not in conjunction with motion for rehearing under rule authorizing motion for rehearing to be filed within 15 days of order or within such other time set by court, did not toll time for filing petition for review in Supreme Court until District Court of Appeal issued its mandate.

Motion denied.

Boyd, J, dissented

Appeal and Error ⚷345(2)

Motion for rehearing en banc before District Court of Appeal, which was filed separately and not in conjunction with motion for rehearing under rule authorizing motion for rehearing to be filed within 15 days of order or within such other time set by court, did not toll time for filing petition for review in Supreme Court until District Court of Appeal issued its mandate where, although State filed en banc rehearing motion under rule pertaining to rehearing in bond validation matters, it appeared clear from motion's contents that State intended motion to be filed under en banc rule, and rule did not provide for separate motions for en banc rehearing and thus required no order or response from District Court of Appeal West's F S.A Rules App Proc Rules 9.330(a, c, d), 9 331(c)

Jim Smith, Atty Gen., and Lawrence A Kaden, Asst. Atty Gen, Tallahassee, for petitioner

Philip J. Padovano, Tallahassee, for respondent

OVERTON, Justice

This cause is before the Court on the state's motion to reinstate its petition for discretionary review after an administrative dismissal on the grounds of untimely filing The real issue is whether a motion for a rehearing en banc before a district court of appeal, which was filed separately and not in conjunction with a motion for rehearing under rule 9 330(a), has the effect of tolling time for filing a petition for review in this Court until the district court issues its mandate We hold that the time for petitioning this Court was not tolled because the separately filed motion for en banc review was a nonallowable motion under rule 9 331 and was in fact a nullity As a result, the administrative dismissal was correct

For a better understanding of the issues, we set forth chronologically the critical events in this proceeding.

On September 17, 1981, the First District Court of Appeal issued its opinion reversing the trial court 403 So 2d 1104

On September 24, 1981, the state filed a motion entitled "Motion for Rehearing En Banc," in which the state, "pursuant to Fla R App P 9 330(c), requests the Court grant rehearing en banc in the above-styled cause" At the conclusion of the motion "the State asserts that rehearing en banc should be granted because the court over-

By Representative Drage

1 A bill to be entitled
2 An act relating to judicial sales; amending s.
3 45.031, F.S., requiring successful bidders at a
4 judicial sale to post a deposit with the clerk;
5 providing an effective date.
6
7 Be It Enacted by the Legislature of the State of Florida:
8
9 Section 1. Subsections (2), (3), (4), (5), (6), (7),
10 and (8) of section 45.031, Florida Statutes, are renumbered as
11 subsections (3), (4), (5), (6), (7), (8), and (9),
12 respectively, and a new subsection (2) is added to said
13 section to read:
14 45.031 Judicial sales procedure.--In any sale of real
15 or personal property under an order or judgment, the following
16 procedure may be followed as an alternative to any other sale
17 procedure if so ordered by the court:
18 <u>(2) DEPOSIT REQUIRED.--At the time of the sale the</u>
19 <u>successful high bidder shall post with the clerk a deposit</u>
20 <u>equal to 5 percent of the final bid or $1,000, whichever is</u>
21 <u>less. The deposit shall be applied to the sale price at the</u>
22 <u>time of payment. If final payment is not made within the</u>
23 <u>prescribed period, the clerk shall readvertise the sale as</u>
24 <u>provided in this section, and pay all costs of the sale from</u>
25 <u>the deposit. Any remaining funds shall be applied toward the</u>
26 <u>judgment.</u>
27 Section 2. This act shall take effect October 1, 1985.

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HOUSE SUMMARY

Requires the successful bidder at the time of a judicial sale to post with the clerk a deposit equal to 5 percent of the final bid or $1,000, whichever is less. Provides for a resale when final payment is not made as required.

Florida House of Representatives

H. Lee Moffitt, Speaker Steve Pajcic, Speaker pro tempore
Committee on Judiciary

Hamilton D. Upchurch
Chairman

~~John Thomas~~ James Burke
Vice Chairman

Richard Hixson
Staff Director

January 2, 1984

M E M O R A N D U M

TO: Representative Tom Drage
Bill Gorman
Fred Baggett

FROM: Chris Haughee CH

RE: Judicial sales; deposit by high bidder

Attached is draft language for an amendment to s. 45.031, Florida Statutes, relating to the procedure to be followed by the clerk of the court in judicial sales. The problem, as I understand it, is that successful high bidders occasionally do not fulfill their final payment obligation. The clerk may readvertise with the attendant costs, or award the sale to the second highest bidder.

The proposed language requires the successful high bidder to post a deposit which will be applied to the sale price at the time of payment. If final payment is not made, for any reason, the costs of a second sale would be paid out of the deposited amount and the remaining funds returned to the depositor. In this form, the proposal is a nonpunitive, hold-harmless concept. A forfeiture provision could be drafted for all or part of the deposit to benefit the judgment debtor or some other fund.

I have placed this provision in Chapter 45, F.S., but I frankly do not know whether that is the proper, or only, spot for it.

Your comments and suggestions are solicited.

CH/kc
attachment

15 134

45.031 Judicial sales procedure.—In any sale of real or personal property under an order or judgment, the following procedure may be followed as an alternative to any other sale procedure if so ordered by the court:

(1) SALE BY CLERK.—In the order or final judgment, the court shall direct the clerk to sell the property at public sale on a specified day that shall be not less than 20 days after the date thereof, on terms and conditions specified in the order or judgment. In cases when a person has an equity of redemption, the court shall not specify a time for the redemption, but the person may redeem the property at any time before the sale. Notice of sale shall be published once a week for 2 consecutive weeks in a newspaper of general circulation, as defined in chapter 50, published in the county where the sale is to be held. The second publication shall be at least 5 days before the sale. The notice shall contain:

(a) A description of the property to be sold.
(b) The time and place of sale.
(c) A statement that the sale will be made pursuant to the order or final judgment.

(d) The caption of the action.
(e) The name of the clerk making the sale.

The clerk shall receive a service charge of $25 for his services in making, recording, and certifying the sale and title that shall be assessed as costs. The court may enlarge the time of the sale. Notice of the changed time of sale shall be published as provided herein.

(2) At the conclusion of the sale the successful high bidder shall post with the clerk a deposit equal to 5% of the final bid or $5,000, whichever is less. The deposit shall be applied to the sale price at the time of payment. If final payment is not made within the prescribed period, the clerk shall readvertise the sale as provided in this section, and pay all costs of the sale from the deposit. Any remaining funds shall be refunded to the depositor.

Renumber subsequent subsections.

Kent

Florida House of Representatives

James Harold Thompson, Speaker Elaine Gordon, Speaker pro tempore
Committee on Judiciary

Hamilton D. Upchurch
Chairman

James C. Burke
Vice Chairman

Richard Hixson
Staff Director

March 11, 1985

The Honorable Tom Drage
Post Office Box 87
Orlando, Florida 32802

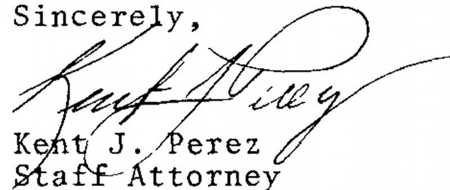
Dear Tom:

Please find enclosed two suggestions for possible legislation concerning judicial sales. I suggest you discuss these with Bill Gorman of Orange County, who seems to prefer the 5% draft. Whatever proposal is developed should be sent to Bill Drafting before Friday, March 22nd.

Sheriff Sales are addressed by F.S. 30.231 which requires a fee for execution sales and a reasonable cost deposit to be made in advance. An additional deposit is required pursuant to F.S 56.22, should resale be necessary. The Florida Sheriff's Association has no apparent problem with their statutory scheme.

Please call me should any questions arise.

Sincerely,



Kent J. Perez
Staff Attorney

KP/kc
enclosure
cc: Mr. Bill Gorman

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208 House Office Building Tallahassee, Florida 32301 (904) 488-1663

STORAGE NAME: SS HB 607-85

Date: April 7, 1985
Revised:
Final:

HOUSE OF REPRESENTATIVES
COMMITTEE ON JUDICIARY
STAFF ANALYSIS

BILL# HB 607 SPONSOR T. Drage

EFFECTIVE DATE IDENTICAL/SIMILAR BILLS

RELATING TO Judicial Sales

OTHER COMMITTEES OF REFERENCE

I. SUMMARY:

A. Present Situation:

Section 45.031 F.S. currently provides a judicial sales procedure for real or personal property sold pursuant to order or judgment. Under s.45.031(1), the clerk receives a service charge of $25 for making, recording, and certifying the sale and title, assessed as costs.

Section 28.24, F.S. enumerates specific service charges by the clerk of the circuit court. Subsection (13) allows a fee for the receipt of money into the registry of the court.

Section 56.22 F.S. addresses execution sales by the sheriff and procedurally allows for the readvertisement and resale of property not initially sold, upon receipt of an additional deposit to cover the cost incurred in connection with maintaining the property until time of sale.

B. Effect of Proposed Changes:

HB 607 would require the successful high bidder to deposit with the clerk, at the time of the sale an amount equal to 5 % of the final bid or $1000, whichever is less, to be applied toward the sale. If payment is not made as prescribed, the deposit is utilized to pay all costs of resale with any remaining funds to be applied toward the judgment.

II. ECONOMIC IMPACT:

A. Public: None

B. Government: None

III. COMMENTS: None

IV. AMENDMENTS:

V. PREPARED BY Kent J. Perez

VI. STAFF DIRECTOR Richard Hixson

REVISED: ______________ BILL NO. HB 607

DATE: May 21, 1985 Page 1

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	ANALYST	STAFF DIRECTOR		REFERENCE	ACTION
1.	Skuthan JS	Lester BL	1.	JCL	Fav
2.			2.		
3.			3.		

SUBJECT:

Judicial Sales

BILL NO. AND SPONSOR:

HB 607 by
Representative Drage

I. SUMMARY:

A. Present Situation:

Section 45.031, F.S., provides a judicial sale procedure whereby the clerk of the court is empowered to sell real or personal property. This procedure may be used in any sale involving real or personal property under an order or judgment; however, authorization of the circuit court is necessary before this procedure can be utilized.

When a judicial sale occurs pursuant to s. 45.031, F.S., the clerk receives a service charge of $25.00 for his services in making, recording and certifying the sale and title.

B. Effect of Proposed Changes:

This bill creates a new subsection providing that a successful high bidder at a judicial sale authorized by s. 45.031, F.S., must post with the clerk a deposit equal to five percent of the final bid or $1,000, whichever is less. This deposit would be applied to the sale price at the time of payment. If the final payment is not made within the alloted period, this bill authorizes the clerk to readvertise the sale and pay all costs of the sale from the deposit with any remaining funds to be applied toward the judgment.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

Bidders at judicial sales conducted pursuant to s. 45.031, F.S., will be required to post a substantial deposit to assure payment of the bid.

B. Government:

This bill will benefit government in those instances wherein the clerk must suffer the time and expense of readvertising and selling property at a judicial sale.

III. COMMENTS:

There is no companion Senate bill.

IV. AMENDMENTS:

None.

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