

N.D.A.G. Letter to Stormon (July 15, 1985)

July 15, 1985

Mr. J. Howard Stormon
City Attorney
Stormon Law Office
P.O. Box 159
124 Main Avenue East
Rolla, ND 58367

Dear Mr. Stormon:

Thank you for your letter of May 17, 1985.

You have inquired as to whether or not indigent defendant's attorney's fees are includable as costs of prosecution pursuant to a Dunseith City Ordinance No. 2.0108 which reads as follows:

COSTS OF PROSECUTION. In every case of conviction of a violation of any ordinance, or any part thereof, the cost of prosecution shall be assessed against the person convicted, as part of the punishment.

The City of Dunseith has authority to assess costs of prosecution against a defendant as part of a sentence after having been convicted of an offense. As you are aware, a city may enact an ordinance only within a specific grant of power from the State Legislature or if the authority to enact such ordinance is implied from such a specific grant of power. Ujka v. Sturdevant, 65 N.W.2d 292 (N.D. 1954).

Both N.D.C.C. §§ 40-05-06 and 40-18-13 authorized a municipal court to utilize the sentencing alternatives provided by N.D.C.C. § 12.1-32-02. N.D.C.C. § 12.1-32-02(1)(a) authorizes a defendant to be sentenced to pay the reasonable costs of his prosecution.

Your inquiry is whether or not, under the Dunseith City Ordinance, indigent defense attorney fees are "costs of prosecution."

N.D.C.C. § 29-07-01.1 is of little help in resolving this issue. That section specifically requires a defendant with appointed counsel to "pay to the county or state such sums as the court shall direct." The North Dakota Legislature has not included municipalities as one of the entities to which a defendant with appointed counsel shall pay all or a portion of the indigent attorney fees.

The term "costs of prosecution" has not been defined by the North Dakota Legislature. However, the common understanding of the meaning of this term may be utilized to aid in its interpretation and definition. Unless a contrary intention plainly appears in the statute,

words used in any statute are to be understood in their ordinary sense. N.D.C.C. § 1-02-02.

The costs sought to be assessed by the Dunseith City Ordinance specifically refer to criminal prosecutions. The term "criminal prosecution" has been defined as:

An action or proceeding instituted in a proper court on behalf of the public, for the purpose of securing a conviction and punishment of one accused of crime. Blacks Law Dictionary, Rev. 4th Ed., P. 448.

The city ordinance, as well as N.D.C.C. § 12.1-32-02(1)(a), specifically does not refer to the "costs of defense." The "costs of prosecution" are those costs which necessarily must be expended during the criminal prosecution of a defendant to gain his conviction and punishment. Had the North Dakota Legislature intended that the "costs of prosecution" could be extended to include the "costs of the criminal proceedings" which would encompass indigent attorney fees, it could have specifically made such a provision.

In State v. Allred, 254 N.W.2d 701 (N.D. 1977), court appointed attorney fees were assessed by the trial court as costs. However, in resolving this case, the Supreme Court did not discuss the propriety of assessing such attorney's fees as costs of the prosecution. The only issue presented was whether or not the defendant was subjected to discriminatory treatment in the assessing of costs against him.

It is my conclusion that indigent attorney fees are not includable as "costs of prosecution" which can be properly assessed by the City of Dunseith pursuant to the sentencing alternative of N.D.C.C. § 12.1-32-02(1)(a).

However, indigent attorney fees may be made a part of other sentencing alternatives although not specifically referred to as "costs of prosecution." Two North Dakota Supreme Court cases have recognized instances when a defendant may be required to pay indigent attorney fees. In State v. Thorstad, 261 N.W.2d 899 (N.D. 1978), the defendant attacked the constitutionality of the assessment of court appointed attorney fees against him. The court found that the defendant had entered into a plea agreement to pay the court appointed attorney fees likening such plea agreement to a contract between the state and the defendant.

In State v. Kottenbroch, 319 N.W.2d 465 (N.D. 1982), the Supreme Court upheld a court's order imposing as a condition of the defendant's probation a requirement that he repay the cost of his court appointed defense counsel even though the recoupment statute of N.D.C.C. § 29-07-01.1 did not expressly provide that repayment may be made as a condition of probation. The defendant argued that the Legislature intended that repayment of court appointed attorney fees be treated as civil judgment.

The court recognized that North Dakota state law grants to a sentencing judge wide discretion in imposing conditions for a deferred imposition of sentence. The court found that the trial court did not abuse its discretion imposing a condition of probation that the

defendant repay the costs of his court appointed attorney. It also found numerous reasons to permit such a condition including education of the probationer as to the costs involved to impress upon him his responsibility for them, and deter the defendant from future criminal activity. The court also determined that the condition requiring repayment may act as an incentive to the probationer to more vigorously seek employment and to help him become a more useful and productive member of society.

As a result of these cases, it appears that the sentencing alternatives of N.D.C.C. § 12.1-32-02, which are applicable to municipal courts, permit the imposition of a condition of probation that the defendant repay such attorney fees. In addition, defendant may be required to pay these fees if they are a part of a contractual and voluntary plea agreement. These attorney fee costs will not be assessed as a "cost of prosecution" but rather, either as a part of the terms of the contractual plea agreement or within the confines of State v. Kottenbroch, supra, as a condition of probation.

It should be noted that enforcement of a defendant's obligation to repay his court appointed attorney fees may be difficult. A municipal court will be prohibited from committing a person to jail for incarceration when the sole reason for his nonpayment of the costs is his indigency. N.D.C.C. § 40-11-12. In addition, as recognized by the court in State v. Kottenbroch, supra, no probation can be revoked simply because the probationer is unable to pay the costs of his court appointed counsel. Before revoking a probationer's probation, the court must find that the probationer is capable, but unwilling, to repay the costs of his defense.

I have included with this letter a copy of the indigent defense procedures and guidelines prepared by the North Dakota Legal Counsel for Indigents Commission of the North Dakota Supreme Court. You will notice in this document that it is the recommendation of the commission that indigent defense cost reimbursement not be made a condition of a sentence, but that more effective reimbursement remedies are available through civil means. Since this document presents only suggested guidelines and procedures, it is being sent to you only for your information.

I trust that this letter has answered your inquiry.

Very truly yours,

Nicholas J. Spaeth

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Enclosure