

N.D.A.G. Letter to Johnson (Sep. 26, 1986)

September 26, 1986

Mr. Dennis Edward Johnson
McKenzie County State's Attorney
P.O. Box 1288
Watford City, ND 58854

Dear Mr. Johnson:

Thank you for your letter dated August 12, 1986.

You have inquired as to whether or not a court can properly assess post-conviction incarceration expenses as costs in a criminal case pursuant to N.D.C.C. § 11-15-07. That section provides for various fees which may be charged by the sheriff, including prisoner meals.

N.D.C.C. § 12.1-32-02(1)(a) authorizes a court to assess, as part of a sentence, the reasonable costs of a defendant's prosecution. In addition, N.D.C.C. § 29-26-22 authorizes the "costs of the prosecution" to be taxed against a defendant in a case of a conviction. Unfortunately, the term "costs of the prosecution" has not been defined by the North Dakota Legislature. However, words used in any statute are to be understood in their ordinary sense unless a contrary intention plainly appears in the statute. N.D.C.C. § 1-02-02.

Both N.D.C.C. §§ 29-26-22 and 12.1-32-02(1)(a) refer to the cost of the defendant's prosecution. The term "criminal prosecution" has been defined as:

An action or proceeding instituted in the proper court on behalf of the public, for the purpose of securing a conviction and punishment of one accused of a crime.

Black's Law Dictionary (Rev. 4th Ed. 1968) at 448.

N.D.C.C. § 29-26-22 requires that the court include in the criminal judgment the facts justifying the amount of costs assessed as part of a sentence. Once the judgment has been entered which assesses costs against a defendant after such fact-finding process, it would not appear that later expenses may be assessed as "costs of the prosecution." Until such time as a defendant has actually served his jail sentence, it would be unknown as to the exact amount of post-conviction incarceration expenses which have been incurred as a result of the service of the jail sentence. A court could not make the factual justification assessing costs at the time of the judgment since it would not have the benefit of knowing the amount of the later incarceration costs.

Should a defendant be sentenced to serve a jail sentence with no provision for probation or not pursuant to a plea agreement for payment of incarceration expenses, I do not believe that the post-conviction incarceration expenses can be assessed as "costs of the prosecution."

However, a different situation may exist should a defendant receive a probationary sentence with the condition that such defendant pay incarceration expenses or a plea agreement exists requiring such payment. Recently this office issued North Dakota Attorney General's Opinion 86-26 which concluded that court-appointed defense counsel fees or expenses are not costs of the prosecution pursuant to N.D.C.C. § 29-26-22. However, that opinion also referred to the North Dakota Supreme Court cases of State v. Kottenbroch, 319 N.W.2d 465 (N.D. 1982) and State v. Thorstad, 261 N.W.2d 899 (N.D. 1978). In Kottenbroch, it was held that a court may order the repayment of indigent defense counsel expenses as a condition of probation. In Thorstad, the court held that a defendant may be required to pay court-appointed attorney fees pursuant to a plea agreement. Applying the reasoning of the Kottenbroch and Thorstad cases, it is possible that post-conviction incarceration expenses could be required to be paid by defendant if made a condition of probation or as part of a plea agreement. At this time, I can locate no North Dakota case law which would either specifically authorize or prohibit such a conclusion.

N.D.C.C. § 12.1-32-07 does not prevent a court from imposing such a condition of probation. However, as stated in N.D.C.C. § 12.1-32-07(1), the condition of probation must be such as the court "in its discretion deems reasonably necessary to ensure that the defendant will lead a law-abiding life or to assist him to do so." In Kottenbroch, the court placed emphasis upon the rehabilitative effect that the repayment of court-appointed counsel fees would have upon a defendant.

N.D.C.C. § 12.1-32-07(4) authorizes the court, upon notice to the probationer, to modify or enlarge the conditions of a probation anytime prior to the expiration or termination of that probation. Therefore, it would seem possible that a court could hold a hearing at some time after a sentence of probation had been imposed to determine the exact incarceration expenses so as to allow the court to assess these incarceration expenses as a further condition of the probation. This hearing will permit the probationer to raise objections to the amount or the assessment of such expenses as part of a probation sentence.

The incarceration expenses would probably not be considered restitution since North Dakota state law apparently limits the payment of restitution to a victim of the defendant's criminal conduct. N.D.C.C. §§ 12.1-32-07(2)(e) and 12.1-32-08.

Although it is possible that incarceration expenses may be imposed upon a defendant pursuant to a plea agreement or as a condition of probation, care should be exercised so that such expenses do not include any apportionment of maintenance costs, utility expenses, or amortization of capital expenditures, such assessments being specifically prohibited by N.D.C.C. § 29-26-22. In addition, enforcement of this condition may be difficult if the defendant is willing but unable to pay such expenses.

This office has received numerous inquiries within the past several months concerning whether or not certain expenses could be considered to be "costs." It is my understanding that a bill may be presented to the next legislative session specifically defining what are "costs of the prosecution." It is hoped that this legislative enactment will ensure that proper guidelines exist for the assessment of costs against a convicted defendant.

I trust that this response will assist you in resolving this difficult, and often complex, issue.

Sincerely,

Nicholas J. Spaeth

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