

**OPINION  
74-184**

September 27, 1974 (OPINION)

Mr. Brian W. Keohane  
State's Attorney  
Golden Valley County  
Beach, ND 58621

Dear Keohane:

This is in response to your letter of 17 September 1974 with regard to "fine" and "costs" than can be charged by the county justice courts of this state.

You call our attention to the provisions of section 33-12-33 of the North Dakota Century Code that state:

"Fines used to pay costs - Residue paid to county treasurer. When in a criminal action the fine is paid, the justice must apply the money in payment of the legal costs and expenses of the prosecution and pay over the residue, if any, to the county treasurer."

Your question is stated as:

"Whether or not a County Justice may charge costs in addition to the statutory finds, and second can he still allocate a part of the fine money to the payment of costs in addition to costs levied."

As we understand the question from prior telephone conversations, many of the statutes prescribe a maximum and/or minimum fine, and the question relates to whether "costs" can be charged in addition to the "fine" or whether same must be charged as a part of the "fine". Thus, for example, section 12-23-01 of the North Dakota Century Code provides that the offense therein described is punishable by a "fine of not less than ten dollars not more than one hundred dollars. \* \* \*". In this example our conclusion would thus be that the "costs" charged would necessarily have to be in excess of the minimum ten dollar "fine", that the "costs" could be in excess of the maximum one hundred dollar "fine" and that a defendant convicted of the offense described therein could be charged the maximum one hundred dollar "fine" and in addition to the one hundred dollar "fine" could be required to pay "costs".

We feel it is necessary to go into the history of the statute. As you may note from the source notes to said section 33-12-33, the last legislative action thereon was the adoption of chapter 111 of the 1885 Session Laws. All subsequent changes therein have apparently been the result of recodification, compilation, etc. with regard to existent laws. We note for example that the wording changes in adoption of the North Dakota Revised Code of 1943 are explained in the revisor's notes as: "Revised for clarity without change in meaning". However, there has to have been a change in "meaning" somewhere between 1885 and the current date.

The 1885 Act, as shown in section 6174 of the Compiled Laws Dakota 1887 provided:

"6174. Upon payment of the fine to the justice, the officer must discharge the defendant, if he is not detained for any other legal cause, and apply the money to the payment of the expenses of the prosecution, and pay over the residue, if any, within ten days to the county treasurer, which shall be placed in and become a part of the general county fund. If a fine is imposed and paid before commitment, it must be applied as prescribed in this section." (emphasis supplied by us)

You might also note in this regard section 2224 of the Compiled Laws Dakota 1887 providing:

"2224. All fines, forfeitures and pecuniary penalties prescribed as a punishment for crime and collected under the general laws of the territory, and all money paid into the county treasury for license to sell intoxicating liquors in the various counties, shall be placed in and become a part of the general county fund." (emphasis supplied by us)

However, you will note that as of October 1, 1889, the North Dakota Constitution was adopted which provides in part in section 154 thereof that:

"Section 154. The interest and income of this fund together with the net proceeds of all fines for violation of state laws and all other sums which may be added thereto by law, shall be faithfully used and applied each year for the benefit of the common schools of the state, and shall be for this purpose apportioned among and between all the several common school corporations of the state in proportion to the number of children in each of school age, as may be fixed by law and no part of the fund shall ever be diverted, even temporarily, from this purpose or used for any other purposes whatever than the maintenance of common schools for the equal benefit of all the people of the state; provided however, that if any portion of the interest or income aforesaid be not expended during any year, said portion shall be added to and become a part of the school fund." (emphasis supplied by us)

(Note also section 153 of the North Dakota Constitution providing for the preservation of the funds thus created and dedicating same to the purposes indicated). In the interests of brevity we will not go into all of the statutes implementing this change but as you are undoubtedly aware, due to the adoption of the constitutional provisions cited, the net proceeds of all fines for violation of the state laws now become a part of the common school fund rather than a part of the county general fund.

At this point looking to the current statutes as has been noted, section 33-12-33 does provide for payment of the legal costs and expenses of the prosecution, and section 29-26-22 (which also was changed to its present wording through various codifications and compilations) provided:

"29-26-22. Judgment for fines and costs - Docketing and

enforcement. In all cases of conviction the costs of the prosecution shall be taxed against the defendant. A judgment that the defendant pay a fine and costs, or either, must be docketed, and thereafter constitutes a lien upon the real estate of the defendant in like manner as a judgment for money rendered in a civil action."

While we do not find a decision of the Supreme Court of this state distinguishing between "fine" and "costs" (though you might see such cases as Hegar v. DeGroat 56 N.W. 150, 3 N.D. 354, 358 and other cases cited in materials enclosed giving general definition type material) there are apparently numerous cases from other jurisdiction that do so. Thus we find in WORDS AND PHRASES Permanent Edition Volume 9A page 637 the following:

"An absolute pardon will not excuse one convicted of crime from the payment of "costs" for they are neither fines nor forfeitures, and are not imposed by way of punishment, and hence a complete pardon granted one convicted of crime cannot be interposed to defeat a nunc pro tunc order amending the judgment, so as to impose on accused the burden of paying the costs. Villines v. State, Ark., 151 S.W. 1023, 43 L.R.A., N.S. 207."

Also, we find in WORDS AND PHRASES Permanent Edition Volume 17, pages 51 and 52 the following:

"The costs in a trial did not constitute part of the "fine" so as to entitle defendant to a jury trial on charge for which the maximum fine was fifty dollars. State v. Wade, Ohio App., 88 N.E.2d. 311, 312.

Costs of prosecution are not a part of the "fine" within meaning of statute providing that trial by jury exists in all cases for violation of statutes and ordinances except where penalty involved does not exceed a fine of fifty dollars. City of Cincinnati v. Wright, 67 N.E.2d. 358, 362, 77 Ohio App. 261.

Costs, though generally following sentence, are no part of "fine" actually imposed. Hudson v. State, 129 So. 106, 99 Fla. 1021.

The words "fines and forfeitures, as contained in Const. Article 5, subsection 17, authorizing the Governor to remit such fines and forfeitures as may be prescribed by law, do not include costs in a criminal case. Ryan v. State, 95 N.E. 561, 176 Ind. 281.

A judgment for costs in a criminal prosecution is not a "fine" imposed as a punishment for an offense, and its discharge in bankruptcy is not contrary to public policy, as an interference with the course of justice in the criminal prosecution. Olds v. Forrester, 102 N.W. 419-420, 126 Iowa, 456.

The terms "fine" and "penalty" signify a mulct for an omission to comply with some requirement of law, or for a positive infraction of law, and do not include the costs which accrue from the prosecution. Lord v. State, 37 Me. 177, 179.

Costs follow sentence, but are no part of the "fine actually imposed" within Const. Article 85, limiting the criminal jurisdiction

of the Supreme Court where a fine is actually imposed. State v. Price. 50 So. 794, 795, 124 La. 917, 134 Am. St. Rep. 523, 18 Ann. Cas. 881.

"Fine", as used in Laws 1835-36, p. 740 subsection 47, 39 P.S. subsection 323, relating to the release of persons imprisoned for the nonpayment of any fine or costs of prosecution, on application to the court of common please, under certain circumstances, would not include a sentence to pay the costs of a prosecution in a criminal proceeding, as a fine is a penalty imposed on a person who has transgressed the law; a man who is merely sentenced to pay the costs of prosecution being neither a criminal, nor a transgressor of the law. Appeal of Luzerne County, 19 A. 1063, 135 Pa. 468.

The sum which may be exacted from one as a punishment for his criminal misconduct is that definite and certain sum, called a "fine," which the court is empowered to impose upon him. Costs in a criminal proceeding are merely incidental, and form no part of the fine, and consequently may be modified and increased on appeal by the state, though Code 1873, subsection 4539, I.C.A. subsection 793.20, provides that a judgment in a criminal case cannot be reversed or modified on appeal, in this state, so as to increase the punishment. State v. Belle, 60 N.W. 525, 526, 92 Iowa, 258."

Looking to the definition of the term "fine" Black's Law Dictionary, Revised Fourth Edition page 759 we find a variety of definitions dependent on context and field of law involved though the basic definition of the verb "fine" seems to be:

"To impose a pecuniary punishment or mulct."

The basic definition of the noun seems to be:

"A sum money paid at the end, to make an end of a transaction, suit, or prosecution; mulct; penalty."

Both section 33-12-33 and section 29-26-22 recognize that a difference exists between the "fine" and "costs". While their history is of interest in ascertaining the legislative intent obviously the same, as currently shown in the North Dakota Century Code, have been adopted as statutes under their present wording.

We believe it quite clear that the term "fine" as used in such statutes as section 12-23-01 of the North Dakota Century Code means the amount imposed as a penalty. Noting that "costs of the witnesses appear to be properly taxable" (see our letter of 24 January 1962 and correspondence enclosed herewith), we would otherwise have to reach the implausible result that if too much witnesses expense would be incurred in the process of prosecution, no "fine" as punishment for the offense could be imposed. Obviously also in district court prosecutions not subject to the provisions of section 33-12-33, section 29-26-22 makes it obvious that the defendant will be required to pay the "fine" and "costs".

On these bases we necessarily do conclude that the purposes of section 33-12-33 of the North Dakota Century Code, under the current state of the law, are to require that at the time of collection of

the fine, the costs of prosecution also be collected and that the term "FINES" as contained in the title of the statute refers to the broader definition of that term - i.e., the sum of money paid at the end of the proceedings, to end same. Under both section 33-12-33 and section 29-26-22 in the case of conviction the Court must tax costs against the defendant.

Thus in specific answer to your question, a County Justice must charge costs in addition to the statutorily specified amount of "fines" and he may not allocate any part of the statutorily specified amount of the fine to the payment of costs.

We hope the within and foregoing will be sufficient for your purposes.

Sincerely,

ALLEN I. OLSON

Attorney General