

Office of the Attorney General
State of North Dakota

Opinion No. 86-26

Date Issued: September 19, 1986

Requested by: Owen K. Mehrer
Stark County State's Attorney

--QUESTIONS PRESENTED--

I.

Whether court-appointed defense counsel fees or expenses are 'costs of prosecution' pursuant to N.D.C.C. § 29-26-22.

II.

Whether an affidavit of identification, as required in N.D.C.C. § 28-20-15, is applicable to a judgment entered pursuant to N.D.C.C. § 29-26-22.

III.

Whether it is the responsibility of either the judgment creditor or debtor to satisfy, or partially satisfy, a judgment for fines and costs entered pursuant to N.D.C.C. § 29-26-22.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that court-appointed defense counsel fees or expenses are not 'costs of the prosecution' pursuant to N.D.C.C. § 29-26-22.

II.

It is my further opinion that an affidavit of identification, as required in N.D.C.C. § 28-20-15, is applicable to a judgment entered pursuant to N.D.C.C. § 29-26-22.

III.

It is my further opinion that, absent the return of an execution satisfying a judgment, it is the responsibility of either the judgment creditor or debtor to satisfy, or partially satisfy, a judgment for fines and costs entered pursuant to N.D.C.C. § 29-26-22.

--ANALYSES--

I.

N.D.C.C. § 29-26-22 provides for the taxing of the costs of the prosecution against a criminal defendant. That statute provides as follows:

29-26-22. JUDGMENT FOR FINES AND COSTS--STATEMENT TO BE FILED BY COURT--DOCKETING AND ENFORCEMENT. In all cases of conviction, the costs of the prosecution may be taxed against the defendant. If the court does assess costs as part of its sentence, the court shall include in the judgment the facts justifying the amount assessed. Costs shall not include any apportionment of salaries of judicial or law enforcement officers, nor shall any apportionment of maintenance costs, utility expenses, or amortization of capital expenditures be included in any assessment of costs. 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.

Furthermore, N.D.C.C. § 12.1-32-02(1)(a) authorizes a court to require payment of the reasonable costs of a convicted person's prosecution as a sentencing alternative.

The term 'costs of the prosecution' has not been defined by the North Dakota Legislature. However, 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.

Both N.D.C.C. §§ 29-26-22 and 12.1-32-02(1)(a) refer to the costs 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. p. 448.

Neither of these statutory provisions refer to the 'costs of the defense.' The 'costs of the 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 'costs of the prosecution' include the 'costs of the criminal proceedings,' which would encompass indigent attorneys fees, it would have specifically made such a provision.

It is my conclusion that indigent attorneys fees and expenses are not includable as 'costs of the prosecution' within the provision of N.D.C.C. § 29-26-22.

This is not to say that such fees are not collectable from a defendant. N.D.C.C. § 29-07-01.1 authorizes a state's attorney to seek recovery of any such expenses within six years of the date when the amount was paid on the defendant's behalf. That section provides:

29-07-01.1. PAYMENT OF EXPENSES FOR DEFENSE OF INDIGENTS. Lawyers appointed to represent needy persons shall be compensated at a reasonable rate to be determined by the court. Expenses necessary for the adequate defense of a needy person, when approved by the judge, shall be paid by the county wherein the alleged offense took place if the action is prosecuted in county court, and by the state if the action is prosecuted in district court. The state shall also pay the defense expenses in any felony action prosecuted in county court pursuant to subsection 7 of section 27-07.1-17. A defendant with appointed counsel shall pay to the county or state such sums as the court shall direct. The state's attorney of the county wherein the action was prosecuted shall seek recovery of any such sums any time he determines the person for whom counsel was appointed may have funds to repay the county or state within six years of the date such amount was paid on his behalf.

In addition, as noted in *State v. Kottenbroch*, 319 N.W.2d 465 (N.D. 1982), the court may order the repayment of indigent defense counsel expenses as a condition of probation. Furthermore, a defendant may be required to pay court-appointed attorneys fees pursuant to a plea agreement. *State v. Thorstad*, 261 N.W.2d 899 (N.D. 1978).

These attorney fee costs will not be assessed as 'costs of the prosecution' but, rather, either as part of the terms of a contractual plea agreement or within the confines of *State v. Kottenbroch*, as a condition of probation.

II.

The relevant statutes discussing the docketing of money judgments are as follows:

28-20-15. AFFIDAVIT OF IDENTIFICATION REQUIRED BEFORE FILING OF JUDGMENTS.--No judgment for the recovery of money against any person shall be docketed or entered until the judgment creditor, his agent, or attorney shall have filed with the clerk of the district court an affidavit stating the full name, occupation, place of residence, and post-office address of the judgment debtor, to the best of affiant's information and belief, and if the debtor has a known street address,

or residence number, or both, it shall be given. This section shall not apply to any case where a judgment is taken against a corporation, copartnership, public official, or party sued in a representative capacity. Failure to file such affidavit, or the filing of a defective or insufficient affidavit, shall not invalidate the judgment docketed or entered, but the clerk of the district court entering or docketing a judgment without such affidavit of identification, shall be liable to any person damaged thereby in the sum of five dollars.

29-26-22. JUDGMENT FOR FINES AND COSTS--STATEMENT TO BE FILED BY COURT--DOCKETING AND ENFORCEMENT. . . . 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 a like manner as a judgment for money rendered in a civil action.

A judgment for fines and costs docketed pursuant to N.D.C.C. § 29-26-22 is treated as a money judgment which could otherwise be entered pursuant to N.D.C.C. Ch. 28-20. N.D.C.C. § 28-20-15 specifically provides that 'no judgment for the recovery of money against any person shall be docketed or entered until the judgment creditor, his agent, or attorney shall have filed with the clerk of the district court' the affidavit of identification required by that section. Since a N.D.C.C. § 29-26-22 judgment is treated as a money judgment rendered in a civil action, an affidavit of identification must be filed.

III.

N.D.C.C. § 28-20-25 provides as follows:

28-20-25. DISCHARGE OF RECORD. Upon the return of an execution issued upon a judgment that has been satisfied, or the presentation of a satisfaction duly executed, to the clerk of any district court, the clerk shall immediately note upon the judgment docket the date and manner of the cancellation.

In addition to these two procedures for satisfaction of a judgment, a judgment debtor may utilize the methods of N.D.C.C. § 28-20-28 or Rule 7.1(b) of the North Dakota Rules of Court should a judgment creditor not be found or refuse to satisfy a judgment.

N.D.C.C. § 28-20-24 authorizes satisfaction of a judgment by the judgment creditor or his representative. That section provides:

28-20-24. SATISFACTION OF JUDGMENT.--Any judgment rendered or docketed in any district court of this state may be canceled and discharged by the clerk thereof, upon the filing with him of an acknowledgment of the satisfaction thereof signed by the party in whose favor the judgment was obtained, or by his attorney of record,

his executor or administrator, or his assignee, and duly acknowledged in the manner required to admit a deed of real property to record.

Although a judgment creditor or his representative will generally execute a satisfaction of a judgment a refusal by the judgment creditor to execute such satisfaction will require action by the judgment debtor to remove the judgment, in whole or in part, from the court's judgment rolls. N.D.C.C. § 28-20-24 does not require that a judgment creditor or his representative satisfy a judgment in whole or in part. Should the judgment creditor refuse to satisfy the judgment and should an execution not be returned as wholly satisfied, the judgment debtor will have the responsibility to seek a court order satisfying the judgment pursuant to the provisions of N.D.C.C. § 28-20-28 or N.D.R.O.C. 7.1(b).

I recognize that fines or costs will be paid directly to the clerk of court. If a judgment for fines or costs has been docketed, I would suggest that the state's attorney and the clerk of court establish a procedure whereby these judgments be satisfied, in whole in or in part, upon payment of the fines or costs by a defendant/debtor.

--EFFECT--

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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Attorney General

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