

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 93-F-21

Date issued: November 18, 1993

Requested by: Elaine Little, Director, North Dakota
Department of Corrections and
Rehabilitation

- QUESTIONS PRESENTED -

I.

Whether the Department of Corrections and Rehabilitation's collection of a monthly supervision fee pursuant to N.D.C.C. ? 54-23.3-04(16) from previously sentenced offenders on active supervision is impermissible as an ex post facto application of the law.

II.

Whether the Department of Corrections and Rehabilitation has the authority to allow "community service" in lieu of payment of the supervision fee imposed pursuant to N.D.C.C. ? 54-23.3-04(16).

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that the Department of Corrections and Rehabilitation's collection of a monthly supervision fee pursuant to N.D.C.C. ? 54-23.3-04(16) from previously sentenced offenders on active supervision is not an ex post facto application of the law.

II.

It is my further opinion that the Department of Corrections and Rehabilitation has the authority to allow "community service" in lieu of payment of the supervision fee imposed pursuant to N.D.C.C. ? 54-23.3-04(16).

- ANALYSES -

I.

ATTORNEY GENERAL'S OPINION 93-21
November 18, 1993

The 1993 Legislative Assembly has given the Department of Corrections and Rehabilitation the following added powers and duties as provided in N.D.C.C. ? 54-23.3-04(16):

To collect costs and fees from persons on correctional supervision for the supervision services, control devices, and programs as implemented by the department to assist in making community corrections an effective alternative to incarceration. A person on active supervision is presumed able to pay assessed fees unless the director, giving due consideration to the fiscal obligations and resources of the probationer, determines otherwise. A person with the ability to pay assessed fees who refuses to pay must be returned to the court for a judicial determination.

The authority granted by N.D.C.C. ? 54-23.3-04(16) is to an executive agency to collect costs and fees for services, devices and programs provided to persons on correctional supervision. Offenders on correctional supervision are assessed the costs and fees beginning with the effective date of the statute. I am informed that the fees do not vary based on the severity of the crime for which the offender was convicted but are assessed equally to all receiving correctional supervision or benefitting from a given community program. The fees are imposed regardless of the date of the crime for which the offender was convicted or the date of conviction. The intent of these supervision fees is not to punish, but for the legitimate governmental purpose which the statute spells out: "to assist in making community corrections an effective alternative to incarceration." N.D.C.C. ? 54-23.3-04(16).

Article I, Section 18 of the North Dakota Constitution and Article I, Section 10 of the United States Constitution prohibit ex post facto laws. An ex post facto law has been defined by the United States Supreme Court as:

1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
2. Every law that aggravates a crime, or makes it greater than it was, when committed.
3. Every law that changes the punishment, and inflicts a greater

punishment, than the law annexed to the crime, when committed. 4. Every law that alters the legal rules of evidence and receives less, or different, testimony, than the law required at the time of the commission of the offense in order to convict the offender.

Calder v. Bull, 1 U.S. 269, 273 (1798). The North Dakota Supreme Court has adopted this definition when analyzing whether a law or its application violates the constitutional provisions against ex post facto laws. State v. Jensen, 333 N.W.2d 686, 693-694 (N.D. 1983). See also State v. Haverluk, 432 N.W.2d 871 (N.D. 1988).

In a more recent discussion of the constitutional ex post facto prohibition the United States Supreme Court has said:

The ex post facto prohibition forbids the Congress and the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation. In accord with these purposes, our decisions prescribe that two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.

Weaver v. Graham, 450 U.S. 24, 28-29 (1981)(citations omitted).

In determining whether the imposition of extradition costs on a defendant who was extradited prior to the statutory amendment authorizing the collection of such costs constituted an ex post facto law, the court in State v. Blair, 474 N.W.2d 630 (Mn. Ct. App. 1991), looked to the purpose of the statute.

In holding that ordering the defendant to pay the extradition costs was not an ex post facto application of the statute, the

court relied on the fact that the purpose of the statute was reimbursement of the state rather than punishment of the defendant. Id. at 638. Likewise, in State v. Dean, 743 P.2d 98 (Kan. Ct. App. 1987), the court held that extradition fees as well as other court costs were not intended to penalize the defendant but rather were intended to allocate the expenses incurred.

As stated in N.D.C.C. ?54-23.3-04(16), the purpose of North Dakota's imposition of correctional supervision fees is "to assist in making community corrections an effective alternative to incarceration." The charging of supervision fees has been considered a proper correctional practice. An Arizona court observed:

To require a probationer to help defray the state's costs of supervising his probation should be beneficial in the rehabilitation of the defendant, and such reimbursement into the probation fund will strengthen the criminal justice system's ability to finance its probation services. We find there is nothing unconstitutional in the Arizona Legislature enacting legislation that requires a financially capable probationer to help defray the state's cost of maintaining him while on probation.

State v. Mears, 654 P.2d 29, 32 (Ariz. Ct. App. 1982).

N.D.C.C. ? 54-23.3-04(16) allows the director of the Department to determine that a person on active supervision is unable to pay the assessed fees based on consideration of the fiscal obligations and resources of the probationer. Thus, inability to pay the fees would not affect an offender's opportunity to be placed on correctional supervision. Further, any failure to pay the fees creates a civil liability rather than a criminal liability. The statute merely calls for any probationer who can afford to pay but refuses to do so to be returned to court for a judicial determination. It does not provide for the automatic revocation of probation if the fees are not paid.

Since the costs and fees assessed pursuant to N.D.C.C. ? 54-23.3-04(16) are for the costs of providing the supervision, devices and programs by the Department and are not imposed as a penalty or punishment for the crime for which

the offender was convicted, application of the monthly supervision fees to all offenders on active supervision on and after the effective date of the legislation does not constitute an ex post facto application of the statute.

II.

The North Dakota Legislature has granted the Department of Corrections and Rehabilitation extensive authority in developing and administering correctional programs. The director of the Department has been granted the power and duty: "to develop necessary programs and services for adult . . . offenders, within legislative appropriations, to provide for their treatment and rehabilitation and to recognize their special needs" [N.D.C.C. ? 54-23.3-04(3)], "to establish policies and procedures necessary to carry out the responsibilities of the department," [N.D.C.C. ? 54-23.3-04(5)], and "to promote the development of alternatives to conventional incarceration for those offenders who can be dealt with more effectively in less restrictive, community-based facilities and programs" [N.D.C.C. ? 54-23.3-04(10)]. N.D.C.C. ? 54-23.3-04(16) authorized the collection of costs and fees by the Department "to assist in making community corrections an effective alternative to incarceration."

These statutory provisions grant the Department broad authority to formulate policies and procedures to provide for community-based programs that will meet the offenders' "special needs" and contribute to their rehabilitation.

To be involved in a constructive "community service" activity in lieu of paying the assessed supervision fee, when fiscal circumstances require, should help the offender's self-image and give the offender an experience in an aspect of society that perhaps would otherwise be unavailable. This therefore serves the Department's goals and objectives for the offender. The Department's "community service" policy in lieu of payment is not beyond the powers, duties, and responsibilities granted the Department by the Legislature.

- 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.

ATTORNEY GENERAL'S OPINION 93-21
November 18, 1993

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