IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

NO. WD81666

STATE OF MISSOURI,

Respondent

v.

JOHN B WRIGHT,

Appellant

Appeal from the Circuit Court of Lafayette County
15th Judicial Circuit
Hon. Kelly Rose

APPELLANT'S REPLY BRIEF

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ARGUMENT

Respondent advances two primary arguments in its Brief: (1) that Mo. Rev. Stat. § 550.010 "exempts the county from paying fees for the cost of incarceration" (page 13)[1]; and (2) the onus is on the defendant in establishing indigency for purposes of determining ability to pay (page 16). Both of these arguments are mistaken.

Respondent in a sense is correct in arguing that the costs of incarceration are a cost "incurred on the part of the defendant." However, this is true only because Mo. Rev. Stat. § 550.010 specifically creates an "exception" for the fees for the costs of incarceration. As noted in 2A Sutherland*, Statutory Construction* (6th ed., West Group 2000), § 47:11, at 252, "true statutory exceptions exist only to exempt something which would otherwise be covered."

Mo. Rev. Stat. § 550.010 provides that "[w]henever any person shall be convicted[2] of any crime or misdemeanor he shall be adjudged to pay the costs, and

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[1] These page numbers reference Respondent's Brief.

[2] This language ("convicted") is important because it plainly and unambiguously states that costs cannot be assessed against a defendant unless the defendant is actually *convicted*. So, for example, if the court suspends the imposition of sentence under the authority of Mo. Rev. Stat. § 557.011.2, then the defendant cannot be liable for costs unless thereafter sentence is imposed. Further, consistent with the statutory structure of Chapter 550, RSMo., liability for costs in a given case may ultimately fall upon the state or county, depending on the sentence and the defendant's ability to pay, as stated recently by the Missouri Supreme Court: "if [defendant] is ultimately convicted of the felony charges against him and

no costs incurred on his part, *except fees for the cost of incarceration, including a reasonable sum to cover occupancy costs*, shall be paid by the state or county."

Respondent is obviously incorrect in reading the exception in Mo. Rev. Stat. § 550.010 as providing that the cost of incarceration "is a fee that is not to be paid by the county" (page 9). In fact, the exception in Mo. Rev. Stat. § 550.010, under traditional rules of statutory construction, states exactly the opposite of what Respondent is suggesting – namely, that the "fees for the cost of incarceration" are the *only*[3] cost incurred on the part of the defendant that is to be paid by either the state or county.[4]

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sentenced to imprisonment in the penitentiary, any costs Defendant is unable to pay, except costs incurred on behalf of Defendant, would be taxable to the state, not the county. See Sec. 550.020.1, RSMo 2000." *State ex rel. Merrell v. Carter,* 518 S.W.3d 798, 800 (Mo. banc 2017). For this reason, costs should not be taxed until the criminal matter has been finally "determined" as that term is used in Mo. Rev. Stat. § 550.140. In *Cramer v. Smith,* 168 S.W.2d 1039, 1041 (Mo. banc 1943), the Supreme Court held that "determined" is meant in the sense of "terminated, or brought to an end, finished – and this not merely insofar as the trial court might have been presently concerned, but as implying finality." Under existing Missouri precedent, "[a] suspended sentence is a suspension of active proceedings in a criminal prosecution. It is not a final judgment." *State v. Gordon,* 344 S.W.2d 69, 71 (Mo. 1961). Appellant points this out only because there are countless indigent defendants in this state who are being required by trial courts to pay costs under a suspended imposition of sentence. See, for example, Cause Number ED106710; SD35509; and WD81762.

[3] Importantly, "[w]here there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied." Sutherland, *supra*, at 250.

[4] Harry Pener writes that "the only cost incurred on behalf of a convicted defendant which either the county or state can be required to pay, is the cost of board."

It is also important to observe that the heading of this statute states: "**550.010. State or county to pay only reasonable occupancy costs and cost of incarceration."** As if there were already some ambiguity over this question, the heading of this statute helps to make clear that the state or county is in fact responsible for paying the "cost of incarceration." See Sutherland*, supra*, § 47:14, at 258, "the headings [of a statute] may serve as an aid to legislative intent."

Finally, if Respondent's argument were correct in that neither the state nor the county should be required to pay the fees for the cost of incarceration, then that would result in putting an end to the practice of taxing the fees for the cost of incarceration against the state in felony cases. Counties would no longer be able to receive payments from the Department of Corrections whenever a defendant is sentenced to imprisonment in the penitentiary under the authority of Mo. Rev. Stat. § 221.105. This would spell doom for the counties. As reported by the Fulton Sun back in 2017, for "some counties – the smaller ones with 6,000 people – their budget is built around that payment." Fulton Sun, "*Delays plague payments for prisoners: Counties suffer under $19 million shortfall*," December 15, 2017.

The illogic of Respondent's entire argument, moreover, can be seen in the fact that the state *was* required to pay the fees for the cost of incarceration in

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Pener, *The Missouri Criminal Costs System Re-Examined*, 46 UMKC L. Rev. 1, 52 (1977).

Appellant's separate felony case out of Lafayette County in Cause Number 16LF-CR007335-01 in the amount of $9,572.36. (See Reply Brief Appendix, A30-A31). Why should the state pay in the felony, but not so for the county in the misdemeanor?

Respondent's second primary argument in its Brief is that under Mo. Rev. Stat. § 550.030, in passing upon the question of determining ability to pay, it is the defendant's burden to establish indigency – or, in Respondent's words, "Appellant … has not made a prima facie showing of indigency … [and that] [t]he record is lacking evidence as to Appellant's actual indigent status" (page 14). In fact, Respondent freely admits that "the trial judge made no inquiry into whether the defendant was actually a poor person. In the case before this Court, no such inquiry was made" (page 15). Under Respondent's theory, trial courts have no obligation or responsibility to determine ability to pay in assessing costs in criminal cases.

Accordingly, the issue presented in this appeal involves the question of what procedures, if any, are required in the determination regarding Appellant's ability to pay under Mo. Rev. Stat. § 550.030.[5] Appellant has suggested in his initial Brief that a practical and easily administered and highly workable rule would be that a

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[5] The same is true with respect to determining ability to pay in felony cases under Mo. Rev. Stat. § 550.020.1.

person qualifying as indigent for purposes of representation by the Missouri Public Defender (MSPD) is also necessarily unable to pay the costs. Alternatively, the court may *presume* inability to pay costs if a person has been screened and found eligible for representation by MSPD.[6]

This rule would have the advantage of, among other things, complying with the Missouri Supreme Court's admonition to trial courts to "hold all accused to a high standard of proof of indigency and to make every effort possible to fully verify indigency." *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 67 (Mo. banc 1981). This rule would also very likely create the need for some kind of hearing with respect to the appointment of MSPD in criminal cases, since trial courts will know that if the defendant is found to be indigent for purposes of representation by MSPD, then the defendant will also necessarily (or very likely) be determined to be unable to pay the costs. As it now stands, we have a highly contradictory system whereby many criminal defendants are found to be indigent for purposes of representation by MSPD, but yet are still being ordered to pay the costs at the conclusion of their criminal case.[7]

[6] Although "the initial determination of indigency is made by the public defender, [that determination is] subject to appeal to the court before which the case is pending. § 600.086.3." *See State ex rel. Gordon v. Copeland,* 803 S.W.2d 153, 157 (Mo. App. S.D. 1991).

[7] It is no surprise that many trial court dockets are overwhelmed by payment review hearings involving indigent defendants who, because they cannot afford to pay the

As a point of reference, this Court is directed to consult the recent opinion by the Washington Supreme Court in *State v. Blazina*, 182 Wash.2d 827 (Wash., 2015), in which the Court held that the trial court "had a *statutory obligation* to make an individualized inquiry into a defendant's current and future ability to pay before the imposition of [costs]" (emphasis added). The Washington Supreme Court ruled that "the record must reflect this inquiry … [and that] [p]ractically speaking, this imperative … means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." *Id.* at 837-38.[8]

Missouri law similarly imposes upon trial courts a "statutory obligation" to make an individualized inquiry into a defendant's financial resources before the defendant can be ordered to pay costs.[9] Again, practically speaking, this

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costs, either do not pay at all or contribute only a small amount every month. Further, the inability to pay costs means that courts retain jurisdiction over indigent defendants long after they are released from their sentence and/or period of supervision, "result[ing] in a chaos of review unlimited in time, scope, and expense." *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 230 (Mo. banc 2017). These costs can range from about $200.00 on the low end to more than $16,000.00. *See* 14BB-CR00161-02 (total fees in the amount of $16,163.50).

The Washington statute provides that "[t]he court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent." RCW 10.01.160(3). See also RCW 9.94A.760(3), which provides that "[t]he court shall not order the offender to pay the cost of incarceration if the court finds that the offender at the time of sentencing is indigent."

To the extent that Respondent is claiming we can infer Appellant is able to pay the costs by virtue of the fact that "Appellant has admittedly made some payments imperative means that the court must do more than simply sign a judgment and sentence with boilerplate language stating that the court engaged in the required inquiry. To this end, this Court should also hold, as the Court did in *Blazina*, that "if someone does meet the … standard for indigency, [then] courts should seriously question that person's ability to pay [costs]." *Id.* at 839. Simply put, "the state cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose [costs]." *Id.* at 837.[10]

Missouri courts have long held, in the context of determining "insolvency" under Mo. Rev. Stat. § 452.340.4, that "[a] trial court's judgment is not supported by substantial evidence when there is no evidence in the record tending to prove a fact that is necessary to sustain the circuit court's judgment as a matter of law" (internal quotations omitted). *Keller v. Keller*, 516 S.W.3d 906, 915 (Mo. App. W.D. 2017).

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towards his costs in this matter and having resources, showing in fact he does have the ability to pay costs" (page 16), such reasoning was rejected recently by the Missouri Supreme Court in *State ex rel. Fleming v. Missouri Board of Probation and Parole,* 515 S.W.3d 224, 227 (Mo. banc 2017), a case involving an indigent defendant who had his constitutional rights violated as result of the trial court failing to conduct an ability to pay hearing, notwithstanding the fact that "when threatened with revocation, [the defendant] would pay."

[1] This Court is also encouraged to watch the oral argument in the *Blazina* case, which can be accessed at the tvw.org website.

Further, in the context of determining maintenance payments, insolvency is defined as the "inability to pay debts as they become due in the ordinary course of business," which requires some inquiry by the trial court. *Braddy v. Braddy*, 326 S.W.3d 567, 572 (Mo. App. E.D. 2010). Similarly, in the context of awarding attorney's fees under both Mo. Rev. Stat. § 455.075 and Mo. Rev. Stat. § 452.355.1, Missouri courts have long held that "a court must know what debts each party owes and what non-employment income each party has before it can determine either need or ability to pay." *K.M.D. v. Alosi*, 324 S.W.3d 477, 480 (Mo. App. W.D. 2010).

All of these cases demonstrate that the trial court has a "statutory obligation" to inquire into a party's financial resources and ability to pay. Accordingly, the proper remedy for such error, at a minimum, is "remand to the trial court for further proceedings on the issue of [ability to pay]." *Alosi*, 324 S.W.3d at 481. However, this Court can also very well hold, based on the record on appeal in this matter, that "[b]ecause the record is devoid of any evidence to support the award [of costs against Appellant], we reverse the trial court's decision outright." *J.S. v. D.W.*, 395 S.W.3d 44, 45 (Mo. App. E.D. 2013).

The Honorable Karl DeMarce, Chair of the Costs, Fines and Fees Subcommittee for the Task Force on Criminal Justice in Missouri, has written that "[d]ue consideration must be given to ability to pay to avoid disproportionate impacts on low-income persons." *See* K. DeMarce, "*How the Fines and Fees Issue Impacted the Missouri Courts*," Trends in State Courts 2017, p. 2.[11] This "disproportionate impact" on indigent persons serves as a "regressive form of punishment as the same level of debt presents an increasingly larger burden as one moves lower on the income scale." *See* Council of Economic Advisers Issue Brief, "*Fines, Fees, and Bail*," December 2015, p. 3. This report went on to conclude that in many states, "approximately 20 percent of all jail inmates were incarcerated for failure to pay criminal justice debts," and cited specifically to Ferguson, Missouri, as an example of counties using costs and fees "as a tool to raise revenue." Finally, the report concluded that "judges [who] issue warrants to arrest and jail indigent individuals for failure to pay debts [is] a practice that may violate constitutional rights." *Id.*

In Missouri, these abuses, unfortunately, are not isolated to the Ferguson municipal court, which is a fact made clear in the Department of Justice report on this subject, noting that "other municipalities in the area have engaged in a number

[11] The Chief Justice of the Missouri Supreme Court has similarly stated in her January 2015 state of the judiciary address presented to a joint session of the Missouri General Assembly that "Courts must give consideration to those unable to pay." See also COSCA Policy Paper, "*The End of Debtor's Prisons: Effective Court Policies for Successful Compliance with Legal Financial Obligations*," (2015), p. 11, "[i]t is incumbent on court administrators to establish ways for courts to assess ability to pay accurately."

of [these] practices." DOJ Report, "*Investigation of the Ferguson Police Department*," (2015), p. 49.[12] Indeed, many of the more alarming findings mentioned in the DOJ report are practices that are quite common in many of the associate divisions of the circuit court of this state: "the court's routine use of arrest warrants to secure collection and compliance when a person misses a required court appearance or payment";[13] "assessment methods that do not appropriately consider a person's ability to pay"; "[i]f a person cannot afford bond, there is no opportunity to seek recourse from the court";[14] and the fact that

[12] To the extent that Respondent is claiming that this issue is not preserved because "Appellant agreed to pay the costs aggregating $1,476.78 (page 10) and/or "Appellant failed to object to the board bill being assessed as costs at sentencing" (page 8), The DOJ report states that "such payment plans [or agreements to pay] do not serve as a substitute for an ability-to-pay determination." DOJ report, p. 53. Further, "[t]he clerk's ministerial duty to tax costs is not affected by the expiration of the time during which the trial court has control over a judgment. Once court costs are taxed by the clerk, any party may file a motion to retax costs so that the trial court can review the clerk's bill of costs." *Solberg v. Graven*, 174 S.W.3d 695, 701 (Mo. App. S.D. 2005).

[13] Although Respondent takes pains to emphasize that Appellant "has never been subjected to additional jail time for failing to pay" (page 5), the DOJ report makes clear that "[w]hile issuing … warrants … is sometimes framed as addressing the failure to abide by court rules, in practice, it is clear that warrants are primarily issued to coerce payment." DOJ report, p. 56.

[14] These warrants frequently contain a financial bond condition that is usually set in the amount of the outstanding court costs, which itself violates the principle that "the only legal purpose of bail is to assure the attendance of the accused." *D.R.P. v. M.P.P.*, 484 S.W.3d 822, 830 n. 2 (Mo. App. W.D. 2016). (See Reply Brief Appendix, A32).

"[a]ttempts to raise legal claims are met with retaliatory conduct."[15] *Id*. These practices need to stop by Order of this Court. Alternatively, given the obvious importance and general interest of the issues involved in this case, Appellant also suggests that this Court transfer this case to the Missouri Supreme Court under the authority of Rule 83.02 for the purpose of reexamining existing law.

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[15] See, for example, Appellant's pending probation revocation matter in Cause Number 16LF-CR00735-01, which was only initiated after the appeal was filed in this cause.

CONCLUSION

WHEREFORE, based on the foregoing reasons, Appellant prays that this Court reverse the trial court judgment overruling Appellant's Motion to Retax Costs, and further to eliminate the jail debt as an item that was taxed as costs against Appellant in this case, to Order the circuit clerk to refer this debt to the office of state courts administrator, to Order the trial court to determine whether Appellant is unable to pay the costs, and to refund Appellant all monies erroneously paid to the court as costs.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief complies with the information required by Rule 55.03, that it complies with the limitations contained in Rule 84.06(b), and that it contains 3,632 words in the brief as determined by the word count of the word-processing system used to prepare the brief.

Respectfully submitted,

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