SC97604

IN THE SUPREME COURT OF MISSOURI

GEORGE RICHEY,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of St. Clair County, Missouri,
Case No. 14SR-CR00320
The Honorable Jerry J. Rellihan

RESPONDENT'S BRIEF

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF FACTS

Respondent accepts Appellant's Statement of Facts with the following exceptions and additions:

Appellant claims that an additional "Board Bill" in the amount of $2,275.00 was assessed for time spent in custody "on a failure to pay warrant resulting from Appellant's inability to pay the initial "Board Bill."" In fact, Appellant was arrested pursuant to a warrant issued for failure to obey the judge's order. (Legal File, D18). Although Appellant now claims that his failure to comply with the order to pay the initial board bill was a result of his inability to pay the costs, there is no evidence in the record to support that claim.

At no time prior to entering his guilty plea in the underlying criminal case did Appellant claim to be unable to pay the court costs assessed against him. There is nothing in the record that indicates that he was unable to do so at the time of the sentence or that he raised the issue with the court at that time. There is nothing in the record to indicate that Appellant raised the issue of his alleged inability to pay the costs with the court during the nine month grace period he was given, by agreement, to pay the costs.

Appellant's Statement of Facts states that the trial court is "potentially issuing warrants for the arrest of anyone who fails to pay as scheduled or fails to appear as required." It is inappropriate to include in the Statement of Facts allegations of the "potential" issuance of warrants, whether for Appellant or the people other than Appellant ("anyone") referenced in Appellant's Statement of Facts.

Appellant was ordered to pay all court costs, including his initial board bill, on or before December 31, 2015. (Legal File, D17). Appellant completely failed to comply with

that written order regarding payment of costs, and the trial court issued a warrant for failure to obey an order on January 4, 2016. (Legal File, D18). Appellant did not make any payments whatsoever with respect to such costs before the issuance of the warrant. (Legal File, D64, p. 2).

Appellant was arrested pursuant to the trial court's warrant and appeared before the court on February 5, 2016, at which time Appellant stated that he was applying for representation by the Public Defender. (Legal File, D21).

Appellant appeared before the trial court with counsel on March 2, 2016. (Legal File, D23). The matter was set for trial "regarding issue of payment of costs" on March 18, 2016. (Legal File, D23) For reasons that are not clear from the record, the trial date was continued to April 6, 2016. (Legal File, D1, p. 9).

On April 6, 2016, Appellant again appeared before the trial court. (Legal File, D26). At that hearing, Appellant acknowledged his failure to comply with the court's order regarding payment of costs. (Legal File, D26). In an attempt to purge his contempt, Appellant agreed to pay $750.00 that day toward costs and agreed to pay $250 per month thereafter until he had fully complied with the court's order. (Legal File, D26). Appellant was released from custody that day and a payment review hearing was scheduled for May 4, 2016. (Legal File, D1, p. 9).

Appellant failed to comply with his agreement of April 6, 2016. (Legal File, D64, p. 2). As a result, Appellant has been required to appear before the trial court from time to time to review case status. (Legal File, D1, pp. 10-18).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S MOTION TO RETAX COSTS BECAUSE "JAIL DEBT" (BOARD BILL) IS AUTHORIZED BY STATUTE AND SUPREME COURT RULE TO BE TAXED AS COSTS

In Point I, Appellant argues that the trial court erred in overruling his motion to retax costs because "jail debt" is not authorized by statute to be taxed as a court cost. Because Missouri law clearly and unambiguously authorizes the cost of incarceration to be taxed as a court cost, Appellant's Point I is without merit and should be denied.

I. Board bills accruing pursuant to Section 221.070 RSMo. are "court costs."

Appellant's brief repeatedly uses the term "jail debt" to describe the board bill charged to him for his support in the county jail pursuant to Section 221.070 RSMo.[1] Appellant concedes that he is financially responsible for the cost of his support pursuant to Section 221.070 (App. Br. 25), but argues that such obligation could not be taxed to him as a court cost (and collected as such). Appellant's argument is entirely predicated on the erroneous belief that there is no specific statutory authority permitting board bills to be taxed as costs.

Chapter 488 of the Revised Statutes of Missouri (Sections 488.00. *et seq.*) authorizes and requires courts to impose and collect court costs. Section 488.010 defines "[c]ourt costs" as "the total of fees, miscellaneous charges and surcharges, imposed in a particular

[1] Statutory references are to RSMo. (2016) unless otherwise indicated.

case." "Fees" are defined as "the amount charged for services to be performed by the court." *Id.* "Miscellaneous charges" are defined as the "amounts allowed by law for services provided by individuals or entities other than the court." *Id.* "Surcharges" are defined as "additional charges allowed by law which are allowed for specific purposes designated by law." *Id.*

Pursuant to Section 221.070.1, a person committed to the county jail for any offense or misdemeanor shall, upon a plea of guilty or finding of guilt, be liable for the expense of "carrying him or her to said jail, and also his or her support while in jail…." This liability, commonly referred to as a "board bill," is a "miscellaneous charge" under Section 488.010 and is therefore a "court cost" as defined therein.

When a person is committed to a county jail by court order (including an arrest warrant), the sheriff and jailer of such county are required to receive such person. Section 221.040 MO. REV. STAT. If a sheriff or jailer refuses to receive any such person, he or she is guilty of a misdemeanor. *Id.* While a person is committed to the county jail, the sheriff and jailer are required by law and human decency to provide such person with necessary support, including food and bedding. *See, e.g.*, Section 221.310 MO. REV. STAT.

The cost of such support is the amount that a prisoner (after a finding of guilt) is required to repay pursuant to Section 221.070.1. Such amount is also clearly a "miscellaneous charge," as such term is defined in Section 448.010(3). The sheriff is required to provide a service to both the prisoner, who needs to eat, and the court, who has ordered the prisoner to be held in custody but has no holding facility of its own. The sheriff is allowed by law under Section 221.070 to charge an amount for providing this service.

Sections 550.010 and 550.030 in turn provide that, upon conviction, the defendant shall be "adjudged to pay the costs," although the cost of incarceration shall be assessed to the county if the defendant is "unable to pay."

All of this is straightforward and clear. These statutes unambiguously provide for the taxation of board bills under Section 221.070 as "miscellaneous charges," and thus as "court costs" pursuant to Section 488.010. The Eastern District of the Missouri Court of Appeals recently held, in a nearly identical case, that "under the plain language of the statutes, the court has statutory authority to tax the Defendant's board bill as a 'miscellaneous charge,' which is one of the three statutorily defined categories of court costs the court is authorized to impose under Section 488.010." *State v. Comparato*, No. ED106589 (Oct. 16, 2018), Slip op. at 5 (Appendix, A58-65).

Notwithstanding the clear meaning of the applicable statutory provisions, Appellant and assorted *amici curiae* have invited this Court to engage in a tortuous and unnecessary exercise in statutory interpretation in order to obfuscate the plain meaning of these statutes and defeat a venerable and legal means of collecting board bills from convicted offenders.

A. Delinquent court costs, including board bills, are referred to as debts.

Appellant places great weight on the fact that Section 221.070.2 sometimes refers to the board bill liability as a "debt", and that the word "debt" appears in the heading of the statute (the word "debt" does not appear in Section 221.070) (App. Br. 22-29). Appellant appears to argue, without citing any authority, that a debt can never be a cost, fine, fee or other sum ordered to be paid by a court. Based on that unsupported assertion, Appellant

then argues that such debt can only be collected pursuant to the provisions of Section 488.5028 and therefore cannot be taxed as a court cost. (App. Br. 26).

Because Section 221.070 makes a defendant liable for the cost of his support in the county jail, it is fair to refer to any delinquent liability thereunder as a debt. But Appellant's assertion that something that constitutes a debt in that sense cannot be a "court cost" is not supported by the law or common sense. In fact, Section 488.5028.2(1) itself uses the word "debt" to refer to both delinquent board bills owed pursuant to Section 221.070 and unpaid "court costs, fines, fees, or other sums ordered by a court…." Section 488.5028.2 provides that the office of state courts administrator (OSCA) shall provide the department of revenue with:

> the information necessary to identify each debtor whose refund is sought to be set off and the amount of the debt or debts owed by any debtor who is entitled to a tax refund in excess of twenty-five dollars and any debtor under section 221.070 who is entitled to a tax refund of any amount…. (emphasis added)

Section 488.5028 provides slightly different procedures and limitations on OSCA's efforts to collect board bills under Section 221.070, on the one hand, and all other "court costs, fines, fees, or other sums ordered by a court," on the other hand. Board bills can be collected without any minimum, while other court costs can only be collected pursuant to Section 488.5028 if they exceed twenty-five dollars. Board bills can be collected by setting off income tax refunds and lottery prize winnings, while other costs are limited to income tax refund setoffs. Section 488.5028.2 refers to any amount owed as a court cost, fine, fee or other sums ordered by a court, including a board bill, as a "debt" and the person who owes is a "debtor." The actual words used in Section 488.5028 demonstrate that there is

no basis for Appellant's assertion that the use of the word "debt" in Section 221.070 with respect to delinquent board bills means that such obligation cannot be "court costs," since all such delinquent obligations are referred to as "debt" in that statute.

B. The additional collection remedies and procedures for board bills do not mean that they are not taxable court costs.

Section 221.070 itself provides for two distinct collection remedies. In Section 221.070.1, the sheriff may levy and sell the prisoner's property "under the order of the court having criminal jurisdiction in the county, to satisfy such expenses." Section 221.070.2 permits, but does not require, the sheriff to certify delinquent board bills to the circuit clerk, who in turn is to report the delinquency to OSCA for collection.

Section 488.5028 sets out the procedure pursuant to which OSCA is to attempt to collect delinquent board bills, as well as slightly different procedures for the collection of other costs costs, fines, fees, or other sums ordered by a court.

In addition, in 2013, the legislature enacted Section 488.5029, which creates a process for the suspension of hunting and fishing licenses for those who are delinquent in payment of board bills. This collection process is not available for the collection of other amounts.

Appellant argues that the existence of these additional remedies (or different procedures) for collection of board bills means that these are the exclusive remedies for the collection of board bills. (App. Br. 24-26). Appellant cites no authority for this argument, but asserts (App. Br. 26) that the provisions of Sections 221.070 and 488.5028, when read together, "clearly" indicates that board bills "*shall* be collected only by" the process set out

in Section 488.5028. Appellant then concludes that since board bills can (according to his argument) only be collected by these specific remedies, they cannot be "court costs."

There is no basis in the plain language of any of the relevant statutes to determine that the collection processes prescribed by Sections 221.070.2 and 488.5028 are exclusive. Nothing in the language of Section 221.070 states that the certification process under 271.020.2 means that the sheriff cannot still execute under 271.020.1. Obviously, a sheriff could call on the court to assist the sheriff collect a board bill by execution and simultaneously ask OSCA to assist pursuant to Sections 488.5028 and 488.5029. "The fact that the sheriff may initiate civil collection proceedings with the state courts administrator by certifying any delinquency to the court clerk is merely one option for collecting defendant's unpaid board bill." *Comparato*, Slip op. at 6 (Appendix, A63).

If a board bill is a "court cost" as defined in Section 488.010, then the fact that different kinds of court costs are provided with different or additional collection remedies is irrelevant. But a central tenet of Appellant's position is that these differential remedies mean that board bills are in fact not "court costs." Neither Appellant nor any *amici curiae* have cited any authority to support this claim.[2]

In his brief, the Attorney General argues that other provisions within Chapter 488 confirm that "jail debt" does not constitute "court costs." (Atty. Gen. Br. 14-17). The fact that Section 488.5028 contains slightly different procedures for the collection of board bills

[2] The Attorney General acknowledges that a negative inference based on the existence of differential collection remedies contained within Section 221.070 and elsewhere is of limited support to Appellant's arguments herein. (Atty. Gen. Brief 19).

versus other court costs is alleged, without authority, to constitute a clear legislative determination that board bills are not court costs. (Atty. Gen. Br. 15). The existence of Section 488.5029, which applies only to board bills, is claimed to be further evidence of this clear legislative intent. (Atty. Gen. Br. 15). The Attorney General makes this argument despite the fact that these procedures are both contained in Chapter 488, which the Attorney General himself notes "is the statutory chapter that directly addresses 'court costs.'" (Atty. Gen. Brief 14). If board bills are not court costs, why address their collection in Chapter 488? The applicable provisions of Sections 488.5028 and 488.5029 could have been included within Section 221.070 itself. The Attorney General's argument appears to be that because Chapter 488 provides additional (and more robust) collection options for board bills than other court costs, the legislature must have, by implication, meant to exclude board bills from the definition of "court costs" found within Chapter 488 itself. In substance, the Attorney General claims that the inclusion of mechanisms for the collection of board bills within the chapter dealing with the collection of court costs means that board bills are not court costs. The argument is illogical and without merit.

C. There is no mandatory language that must be included in a statute creating court costs.

Although the creation of a court cost requires "express statutory authority," there are no specific words that must be used in a specific statute. *State ex rel. Merrell v. Carter*, 518 S.W.3d 798, 800 (Mo. banc 2017). The Attorney General argues that the legislature's failure to use the words "surcharge" or "costs" or a "similarly clear statement" in Section 221.070 "indicates that jail debt is not taxable as a court cost." (Atty. Gen. Br. 20).

In his brief, the Attorney General identified multiple statutes that refer to a liability as a "surcharge." (Atty. Gen. Br. 20-21). He also cites two statutes that use the term "costs." (Atty. Gen. Br. 21-22). He does not cite to any statute that refers to a liability as a "miscellaneous charge," although that term is expressly included in the definition of court costs found in Section 488.010. A careful review of the Revised Statutes by the undersigned counsel did not discover any statute that refers to a liability as a "miscellaneous charge." But if a liability is substantively a "miscellaneous charge," as defined by the legislature, then the liability is a court cost, even if the liability is not expressly identified as such.

It is undisputed in law and practice that fees for guardian ad litem are taxable court costs. No statute known to counsel expressly identifies these fees as "court costs," "miscellaneous charges" or "surcharges." Nonetheless, they have been held to be a "miscellaneous charge" and therefore a court cost under Section 448.010. *In re G.F.*, 276 S.W.3d 327, 330 (Mo. Ct. App. E.D. 2009). "Clearly, guardian ad litem fees are amounts allowed by law for a service provided by an individual other than the court – specifically, the guardian ad litem. Thus, a guardian ad litem fee is a 'miscellaneous charge," which also renders it a 'court cost.'" *Id.* A liability is a "court cost" if it fits within the definition thereof in Section 488.010, regardless of the specific words used. The "express statutory authority" required by this Court's prior cases is satisfied when a statute expressly creates a liability that meets the statutory definition of "court costs," regardless of the specific words used.

D. Providing board is a service, even if prisoners do not enjoy being in jail.

As noted above, in *Comparato*, the Eastern District found that a board bill is, under the plain language of the applicable statutes, a "miscellaneous charge," which makes it a "court cost." Slip op. at 5 (Appendix, A62). The court reasoned that (1) a board bill imposed pursuant to Section 221.070.1 is "an amount allowed by law for services provided by … an entity other than the court," (2) the "service" is the defendant's room and board while in jail and (3) the entity providing the service is the county jail. *Id.* That holding is consistent with the plain language of the applicable statutes.

The Attorney General argues that the Eastern District "stretched the meaning of the word 'services' in that statutory definition beyond its ordinary and natural meaning…." (Atty. Gen. Br. 12). The Attorney General defines the word "service" as "conduct or performance that assists or benefits someone or something," and then claims that the county jail does not assist or benefit an inmate by holding him or her in custody in the jail. (Atty. Gen. Br. 12).

Although it is likely true that most prisoners do not believe that being imprisoned is an aid or benefit to them, the Attorney General's argument on this point is a sophistic.[3] Section 221.070.1 imposes liability on an inmate for the cost of the inmate's "support while in jail...." It is inarguable that providing food to an inmate is to provide "support," and that

[3] Anecdotally, the undersigned counsel, like many prosecutors, have been told by defendants that time spent in the county jail has benefitted them in various ways, especially by helping them stop abusing alcohol and/or controlled substances. None of these defendants wanted to be in jail, but they later claimed that their time there was beneficial in some respects.

such support benefits the person receiving it. When the county jail feeds an inmate housed there, it is assisting and benefiting the inmate, even if the inmate would prefer to be elsewhere. Section 221.070 does not impose liability on a prisoner for the costs associated with restraining the inmate's liberty, but for the food and other support provided to the inmate. This was the "service" referenced by the Eastern District in *Comparato*, and the Attorney General's argument to the contrary is unpersuasive.

II. The General Assembly has expressly designated board bills under Section 221.070 as court costs.

The plain language of Sections 221.070, 488.010, 550.010 and 550.030 all clearly and unambiguously classify a board bill as a "court cost." But Appellant and the *amici curiae* claim that because none of these statutes ever "expressly" call a board bill a court cost, a complicated and inconsistent interpretation of these statutes leads to the conclusion, by implication, that board bills are not court costs.

The General Assembly has, however, expressly designated the liability created by Section 221.070 as a court cost. In Section 3.150, the General Assembly declared that Section 221.070 is a "law imposing court costs, fees, miscellaneous charges and surcharges…." Other relevant statutes, including Section 221.120 (imposing liability on an inmate for the cost of medical care provided to the inmate while in the county jail) and Chapter 550 in its entirety, were also designated in Section 3.150 as imposing "court costs." Although Appellant's argument tortures the plain language of these statutes in order to

obfuscate their meaning, Section 3.150 certainly constitutes the express designation that Appellant claims is required.[4]

III. The Supreme Court has already determined that board bills under Section 221.070 are court costs.

The Attorney General argues that Section 488.012 and Supreme Court Operating Rule 21.01 further demonstrate that a board bill under Section 221.070 is not a court cost because board bills are not designated as such in the statute or order. (Atty. Gen. Br. 16-17).

Section 488.012.1 directs court clerks to "collect the court costs authorized by statute…." Section 488.012.2 directs this Court to set the amount of court costs authorized by statute, while Section 488.012.3 sets forth a baseline schedule of fees for different kinds of court costs (all or substantially all of which are fees for services provided by the court;

[4] Section 3.150 directed the revisor of statutes to "codify all sections of law or portions of sections of law imposing court costs, fees, miscellaneous charges, and surcharges . . . into one chapter of the revised statutes of Missouri." The statute goes on to identify specific statutes, including Section 221.070, that impose court costs. Although some of the designated statutes were moved into Chapter 488, many, including Section 221.070, were not. Appellant may argue that the revisor's failure to move Section 221.070 and related statutes into Chapter 488 reflects a determination (by someone) that these statutes do not impose court costs. That argument would be wrong. Several statutes that impose liabilities that Appellant concedes are court costs are identified in Section 3.150 but were not moved. For example, Section 595.045, which imposes a "surcharge" to support the Crime Victims' Compensation Fund, was designated for recodification in Section 3.150, but has not been moved. Appellant concedes that the surcharge for the Crime Victims' Compensation Fund is a court cost that can be taxed to him. (App. Br. 18-19).

none are surcharges, which are set independently by statute). None of these subsections address board bills pursuant to Section 221.070.

Section 488.018.1 directs court clerks to "disburse court costs collected by, or under the authority of, the clerk, in the manner provided by supreme court rule."

This Court has adopted Operating Rule 21 to govern, among other things, the collection and disbursement of court costs, fees, miscellaneous charges and surcharges. The Attorney General is correct that Operating Rule 21.01 does not mention board bill charges, instead merely updating the baseline charges identified in Section 488.012.3. Of more significance, however, is Operating Rule 21.03(c), which directs court clerks, in relevant part, to:

> disburse collections of court costs, fees, miscellaneous charges, and surcharges.... All disbursements shall be made pursuant to a schedule approved by this Court. The schedule shall provide that stated percentages of the consolidated amount be distributed to stated entities. In addition, the schedule shall establish a hierarchy of disbursement for fees not included in the consolidated amount.

Pursuant to Operating Rule 21.03(c), this Court approved the referenced schedule, which was promulgated in this Court's Order "In re: Collection schedules, schedules for disbursements, and hierarchies for disbursement of court costs, fees, miscellaneous charges, and surcharges," dated August 28, 2014. (Appendix, A30). The hierarchy of disbursements of collected court costs is found on pages 12 and 13 of such Order. (Appendix, A41-42). Item 29 of the hierarchy is entitled "Board Bill/Incarceration Costs (221.070 & 221.105 RSMo.)" Interestingly, all of the other court costs that were taxed to

Appellant and that he concedes are properly taxed (App. Br. 18-19) are also set forth on the hierarchy of distribution promulgated by this Court.[5]

In Operating Rule 21.03(c) and the schedule promulgated thereunder, this Court has expressly directed court clerks to collect board bills arising under Section 221.070. Notwithstanding Appellant's convoluted attempts to prove that board bills can only be collected by OSCA pursuant to Sections 488.5028 and 488.5029, this Court has, in Operating Rule 21.03(c) and the schedule promulgated thereunder, expressly directed Missouri's court clerks to collect board bills under Section 221.070 as court costs.

IV. Appellant entered into a negotiated plea in which he agreed to pay his board bill by a date certain.

An item may be taxed as costs when authorized by statute "or by agreement of the parties." *Groves v. State Farm Mut. Auto. Ins. Co.*, 540 S.W.2d 39, 44 (Mo. banc 1976). Because Appellant agreed to taxation of costs, including his initial board bill of $3,150.00, against him as part of his negotiated plea in the underlying criminal case, these amounts can be taxed against him even if he is correct that a board bill pursuant to Section 221.070 is not a statutorily designated court cost.

[5] The "LET-County" surcharge authorized by Section 488.5336 is item 26 on the hierarchy. The "Domestic Violence fund" surcharge authorized by Section 488.607 is item 25 on the hierarchy. The "Inmate Prisoner Detainee Security fund" surcharge authorized by Section 488.5026 is item 27 on the hierarchy. The general misdemeanor costs and the Crime Victims Compensation Fund surcharge are subsumed within the "Consolidated Amount," which is item 1 on the hierarchy.

On April 1, 2015, Appellant pleaded guilty to the Class A misdemeanor of violating an order of protection and was sentenced to serve 90 days in the county jail, with credit for time served. (Legal File, D17). The offense was committed on August 1, 2014. (Legal File, D3). At that time, the violation of a Class A misdemeanor was punishable by imprisonment in the county jail for up to one year (Section 558.011) and a fine of up to $1,000 (Section 560.016).

Appellant was represented by counsel when he pleaded guilty (Legal File, D17), and he did so as part of a negotiated plea. Misdemeanor pleas are not required to be on the record, and Appellant's plea in the underlying criminal case was done orally and not on the record. *See* Rule 24.03 MO. R. CRIM. PROC. (requiring felony pleas to be on the record). The prosecuting attorney and appellant's attorney corresponded about a possible plea agreement in the months prior to the plea (Appendix, A21-26). Initially, Appellant rejected the State's plea offer and the matter was scheduled for a bench trial on March 4, 2015. (Legal File, D1, p. 6). The Appellant failed to appear for trial and a warrant was issued on March 4, 2015. (Legal File, D1, p. 6). Appellant was arrested pursuant to the warrant and the bench trial was rescheduled for April 1, 2015. (Legal File, D1, p. 6). Appellant did not make bond and remained in custody pending trial. (Legal File, D1, p. 6). On March 25, 2015, Appellant's attorney e-mailed the prosecuting attorney that he was meeting with Appellant the next day and he expected him to plead guilty. (Appendix, A25).

On April 1, 2015, Appellant pleaded guilty per the negotiated plea agreement. In exchange for his guilty plea, the State recommended a sentence of 90 days (substantially less than the maximum sentence of 365 days). No fine was to be assessed, but it was

specifically agreed that Appellant would pay all costs, including his board bill under Section 221.070, on or before December 31, 2015. The trial court's docket entry recapitulated the plea agreement and included an order that Appellant would pay a board bill of $3,150, plus other costs in the amount of $116.50, on or before December 31, 2015. (Legal File, D17).

It is the custom and practice in St. Clair County to address board bills in negotiated plea agreements. Part of the negotiations include discussions of the ability to pay and the length of time necessary to enable the pleading defendant to do so. That was the process that occurred in connection with Appellant's negotiated guilty plea, and it was embodied in the trial court's order. Appellant was not compelled to agree to the taxation of the costs, but he did so. The State honored its agreement and there is no reason why the Appellant should be excused from honoring his agreement.

POINT II

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S MOTION TO RETAX COSTS BECAUSE SECTION 550.030 DOES NOT REQUIRE AN "ABILITY TO PAY" HEARING AT THE TIME OF SENTENCING

In Point II, Appellant argues that the trial court erred in overruling his motion to retax costs because Appellant is not responsible for any assessed costs because the trial court did not make an affirmative determination at the time of sentencing that Appellant was able to pay such costs. Because nothing in Missouri law requires a court to *sua sponte* conduct a hearing on the ability of a defendant to pay assessed costs before doing so, Appellant's Point II is without merit and should be denied.

I. Standard of Review.

Although Appellant's Point II begins with a subheading entitled "Standard of Review," no actual standard of review is set forth in Appellant's Brief with respect to this point relied on. Rule 84.04(e) requires, for each claim of error, a concise statement describing whether the error was preserved for appellate review; if so, how it was preserved; and the applicable standard of review. Rule 84.04(e) MO. R. CIV. PROC. Appellant's Point II does not contain any of the required statements. Nothing in the record indicates that Appellant ever raised the trial court's alleged error with the court. Nothing indicates that there was any effort to preserve the alleged error for appellate review. As a result of these deficiencies, Point II of Appellant's Brief should be dismissed.

II. Missouri law does not require a judicial determination of the ability to pay costs at the time of sentencing when the issue is not raised by the defendant.

Appellant claims that "Missouri law sets out a process that courts must follow before a criminal defendant is assessed costs in the case. This process includes a judicial determination regarding ability to pay *at the time of sentencing*." (App. Br. 31).

Appellant does not provide any authority to support his assertion that such a process exists and that it requires a determination to pay at the time of sentencing. There is no such authority. Appellant's claim is entirely inaccurate.

Section 550.030 provides that if a defendant is jailed and is unable to pay the costs (including the cost of incarceration), then most costs (including the cost of incarceration) will be taxed to the county. Neither Section 550.030 or any other applicable statute or rule sets out the process that the trial court is to utilize under Section 550.030 to determine if the defendant is unable to pay the costs.

It is undisputed that Appellant (who was represented by counsel) did not raise the issue of inability to pay costs with the trial court at the time of sentencing. Appellant did not make any request at that time that the court waive costs. Instead, Appellant affirmatively agreed to pay those costs as part of a negotiated plea.

Appellant appears to argue that the trial court had an affirmative duty to *sua sponte* address his ability to pay costs at the time of sentencing, but presents no authority for the claim. Appellant claims that the "plain language" of Section 550.030 requires the trial court to make an ability to pay determination (App. Br. 36), but it is obvious that the statute does not create any such obligation in the absence of a claim by a defendant.

In attempting to create the process that he claims Missouri law already requires, Appellant cites a number of cases addressing Section 514.040, which sets out the process in civil actions for permitting plaintiffs to proceed in forma pauperis. (App. Br. 30-36). He does not cite any cases construing Section 550.030 to require the process he claims is mandated.

Importantly, Section 514.040 does not require a court to *sua sponte* inquire of civil plaintiffs to determine if they are poor persons. Instead, a plaintiff wishing to proceed as a poor person must seek leave of the trial court to do so. The burden is placed on the civil plaintiff to request relief.

Appellant goes on to claim that the evidence before this Court is sufficient to establish, as a matter of law, that Appellant is indigent "such that she [*sic*] is unable to pay the costs in this matter" pursuant to Section 550.030. (App. Br. 34). However, although the record contains evidence regarding Appellant's financial condition in 2016 and after, there is no evidence in the record regarding Appellant's financial condition on April 1, 2015, when he was sentenced and costs were taxed against him. The record does contain Appellant's Application and Affidavit for Public Defender Services (Appellant's Appendix, A48-A49), but that application is dated August 23, 2017. The record also contains an unverified letter from Appellant regarding his financial condition, dated March 10, 2016 (Legal File, D24), as well as another public defender application, dated March 7, 2016. (Legal File, D25). There is nothing in the record regarding Appellant's financial condition on April 1, 2015, which is the relevant date. If the trial court were currently considering imprisoning Appellant for failure to pay costs, it would be required to first

address Appellant's current ability to pay before it could do so. *See State ex rel. Fleming v. Missouri Board of Probation and Parole*, 515 S.W.3d 224, 229-32 (Mo. banc 2017). But nothing about Appellant's current ability to pay affects the propriety of the assessment of costs against him on April 1, 2014, and no evidence is before this court (or was before the trial court at sentencing) regarding Appellant's financial condition at that time other than the fact that he was represented by the public defender. (Legal File, D7).

Ultimately, Appellant is arguing that if a defendant is indigent, as determined by the Public Defender, then that defendant is automatically "unable to pay" assessed costs. (App. Br. 34). That is not the law in Missouri. If the legislature desired to relieve indigent defendants of all liability for costs as a matter of right, it could do so. Instead, however, Section 550.030 applies to relieve costs only when the defendant is "unable to pay." In many cases, an indigent defendant will be able to pay the costs assessed against them. Where a defendant is unable to pay those costs, it is the defendant's obligation to raise the issue with the trial court so that the court can make an appropriate determination based on the facts at that time. The law does not require that trial courts take upon themselves the burden of initiating an ability to pay determination whenever any costs are assessed against any defendant.[6] If the legislature wishes to impose that burden in the future, it can do so,

[6] Appellant apparently believes that Section 550.030 requires trial courts to hold ability to pay hearings in all cases, even when the defendant is represented by private counsel and even when the assessments are pursuant to negotiated pleas. Appellant's brief (App. Br. 38) references five other cases from St. Clair County, and includes docket sheets from those cases in Appellant's Appendix, A50-A62. In three of those cases, the defendant was represented by private counsel and not the public defender. All five cases were negotiated plea agreements. (Appendix, A54-A57).

but there is nothing in the "plain language" of Section 550.030 or any other statute that imposes that obligation today.

POINT III

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S MOTION TO RETAX COSTS BECAUSE THE "JAIL DEBT" (BOARD BILL) INCURRED AFTER APPELLANT WAS ARRESTED PURSUANT TO A FAILURE TO OBEY ORDER WARRANT WAS RELATED TO THE UNDERLYING CONVICTION AND APPELLANT WAS IN CONTEMPT OF THE TRIAL COURT'S ORDER

In Point III, Appellant argues that the trial court erred in overruling his motion to retax costs because the board bill for the time he was in custody pursuant to a failure to obey warrant does not relate to a finding of guilt, which is required to make a defendant liable for his support under Section 221.070. Because Appellant pleaded guilty to the underlying criminal offense, and the second board bill was triggered by Appellant's failure to obey a written order made as part of his sentence therein, Appellant's Point III is without merit and should be denied.

I. Defendant's second board bill arose out of his failure to comply with his original sentence and logically relates back to that plea of guilty.

Appellant was held in custody in the county jail on the trial court's warrant for failure to obey an order from February 1, 2016, through April 6, 2016. (Legal File, D64, p. 1). As a result, he was assessed a board bill of $2,275.00, which was taxed to him as costs in the underlying criminal case. (Legal File, D64, p. 1).

Appellant contends that because he was not found guilty of a new offense in connection with the second board bill, it cannot be taxed to him pursuant to Section 221.070. (App. Br. 44-45).

Appellant is correct that he was not found guilty of a new offense. But he was imprisoned prior to a hearing on his failure to obey the court's order that was part of his original sentence. The time he spent in the county jail was a direct result of the sentence he received but failed to comply with in the original case. A hearing was scheduled to determine whether he was in contempt for failure to comply with his sentence.

The expenses of any imprisonment that accrue after conviction are to be paid as directed by the law regulating criminal proceedings. Section 221.160 MO. REV. STAT. The second board bill is an expense that accrued after conviction and therefore falls within the ambit of Section 221.070, without the necessity of a second finding of guilt for a new offense. If a defendant is imprisoned by the trial court post-conviction for failure to comply with the sentence, it would be illogical to treat any board bill attributable to that imprisonment as somehow distinct from the underlying conviction. It is instead a cost incurred as a result of the court's need to enforce compliance with its sentence and judgment and should be taxed as a court cost to the same extent as the original board bill.

CONCLUSION

For the reasons set forth above, all of Appellant's claims herein are without merit and the trial court's denial of Appellant's Motion to Retax Costs should be upheld.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. The brief includes the information required by Rule 55.03;

2. The brief complies with the limitations contained in Rule 84.06(b);

3. According to the word count function of counsel's word processing software (Microsoft® Word 2016), the brief contains 6,850 words; and

4. The brief has been electronically filed pursuant to Rule 103.08, thereby completing service in opposing counsel.

/s/ Joshua P. Jones
Joshua P. Jones

CERTIFICATE OF SERVICE

On this 24th day of January, 2019, I hereby certify that I filed the above and foregoing electronically by way of the Court's e-filing system, which served a copy to all counsel of record.

/s/ Joshua P. Jones
Attorney for Respondent