

OPINION NO. 90-109**Syllabus:**

1. In a county operating under a county-appointed counsel system, organized pursuant to R.C. 120.33(A), the court of common pleas and municipal courts are precluded by R.C. 120.33(A) from taxing the fees of court-appointed representation as court costs against individuals convicted or acquitted of felonies or misdemeanors.
2. A county prosecuting attorney has a duty, pursuant to R.C. 2949.14, to examine each item charged in a bill of costs to a nonindigent individual convicted of a felony and to certify to it if correct and legal, and a duty, under R.C. 309.08(A), in every case of conviction to cause execution to be issued for the costs, to faithfully urge collection of such costs, and to pay all collected costs in his possession to the county treasurer.

To: Russell B. Wiseman, Crawford County Prosecuting Attorney, Bucyrus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 31, 1990

I have before me your request for my opinion regarding the taxing of indigent counsel fees as court costs. Specifically, you ask:¹

1. May the Common Pleas and Municipal Courts tax indigent counsel fees as court costs against defendants convicted of felonies or misdemeanors?

¹ In accordance with conversations between members of our respective staffs, I have rephrased your specific questions.

2. May the Common Pleas and Municipal Courts require collection of indigent counsel fees, as costs, against acquitted defendants?
3. To what extent is the county prosecuting attorney obligated to effect collection of court costs?

I note at the onset that R.C. Chapter 120 requires a county to "provide legal representation to indigent adults and juveniles who are charged with the commission of an offense or act that is a violation of a state statute and for which the penalty or any possible adjudication includes the potential loss of liberty" and in certain postconviction proceedings. R.C. 120.16(A)(1); *accord* R.C. 120.26(A)(1); *see* R.C. 120.06; R.C. 120.33; *see also* 1987 Op. Att'y Gen. No. 87-064, at 2-393 and 2-394. *See generally* Ohio R. Crim. P. 44(A) ("[w]here a defendant charged with a serious offense² is unable to obtain counsel, counsel shall be assigned to represent him at every stage of the proceedings from his initial appearance before a court through appeal as of right, unless the defendant, after being fully advised of his right to assigned counsel, knowingly, intelligently, and voluntarily waives his right to counsel" (footnote added)). A county may provide legal representation to indigents through any of four systems: appointment of a county public defender, *see* R.C. 120.13-.18; appointment of a joint county public defender, *see* R.C. 120.23-.28; establishment of a county-appointed counsel system, *see* R.C. 120.33(A); or establishment of a contract with the state public defender for his legal representation of indigent persons, *see* R.C. 120.33(B). *See generally* Op. No. 87-064, at 2-394. Information provided indicates that Crawford County operates under a county-appointed counsel system. I will address, accordingly, your specific questions in the context of a county-appointed counsel system.

R.C. 120.33(A) sets forth the specific provisions concerning the creation and administration of a county-appointed counsel system. Division (A) provides, in relevant part:

In lieu of using a county public defender or joint county public defender to represent indigent persons in the proceedings set forth in division (A) of section 120.16 of the Revised Code, the board of county commissioners of any county may adopt a resolution to pay counsel who are either personally selected by the indigent person or appointed by the court. The resolution shall include those provisions the board of county commissioners considers necessary to provide effective representation of indigent persons in any proceeding for which counsel is provided under this section. The resolution shall include provisions for contracts with any municipal corporation under which the municipal corporation shall reimburse the county for counsel appointed to represent indigent persons charged with violations of the ordinances of the municipal corporation.

....
 (4) Counsel selected by the indigent person or appointed by the court at the request of an indigent person in a county that adopts a resolution to pay counsel, except for counsel appointed to represent a person charged with any violation of an ordinance of a municipal corporation that has not contracted with the county commissioners for the payment of appointed counsel, *shall be paid by the county* and shall receive the compensation and expenses the court approves....

The fees and expenses approved by the court shall not be taxed as part of the costs and shall be paid by the county. However, if the person represented has, or may reasonably be expected to have, the means to meet some part of the cost of the services rendered to him, he shall reimburse the county in an amount that he reasonably can be expected to pay.... (Emphasis added.)

² For purposes of the Ohio Rules of Criminal Procedure, "serious offense" is defined as "any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months." Ohio R. Crim. P. 2(C).

R.C. 120.33(A), thus, expressly states that the fees and expenses of legal representation provided through a county-appointed counsel system are not to be taxed as part of the costs. Cf. R.C. 2941.51 ("[c]ounsel appointed to a case or selected by an indigent person under division (E) of section 120.16 or division (E) of section 120.26 of the Revised Code, or otherwise appointed by the court, except for counsel appointed by the court to provide legal representation for a person charged with a violation of an ordinance of a municipal corporation, shall be paid for their services by the county the compensation and expenses that the trial court approves.... The fees and expenses approved by the court under this section shall not be taxed as part of the costs and shall be paid by the county"). Rather, the primary responsibility for these fees and expenses rests with the county.³ R.C. 120.33(A); see also R.C. 120.18 (reimbursement by the state to a county for providing legal representation to indigents through a county public defender's office); R.C. 120.28 (reimbursement by the state to a county for providing legal representation to indigents through a joint county public defender's office); R.C. 2941.51(A) (payment of court-appointed counsel by the county). See generally Ohio R. Crim. P. 18(B)(5) ("[t]he reasonable expenses of the prosecuting attorney incurred in consequence of a change of venue, compensation of counsel appointed pursuant to [Ohio R. Crim. P.] 44...shall be allowed and paid out of the treasury of the political subdivision in which the action originated").

The plain language of R.C. 120.33(A), thus, compels the conclusion that courts of common pleas and municipal courts may not tax indigent counsel fees as court costs against defendants convicted of felonies or misdemeanors. See generally *Provident Bank v. Wood*, 36 Ohio St. 2d 101, 105-06, 304 N.E.2d 378, 381 (1973) ("[i]t is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent. If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly" (citations omitted)). Additionally, the language of R.C. 120.33(A) is not contingent upon the outcome of the criminal prosecution. See 1978 Op. Att'y Gen. No. 78-004, at 2-8. As a consequence, R.C. 120.33(A) also precludes courts of common pleas and municipal courts from collecting counsel fees, as costs, from acquitted defendants.

I turn now to your final question, which asks to what extent the county prosecuting attorney is obligated to effect collection of court costs. R.C. 309.08(A), which sets forth the general powers and duties of a county prosecuting attorney, provides, in part:

In every case of conviction, the prosecuting attorney forthwith shall cause execution to be issued for the fine and costs, or costs only, as the case may be, and he faithfully shall urge the collection until it is effected or found to be impracticable to collect, and forthwith shall pay to the county treasurer all moneys belonging to the state or county which come into his possession.

See also R.C. 2949.11 ("[u]nless otherwise required in the Revised Code, an officer who collects a fine shall pay it into the treasury of the county in which such fine was assessed, within twenty days after the receipt of the fine, to the credit of the county general fund"). The language of R.C. 309.08(A) explicitly mandates that a county

³ I note that a county which has established a county-appointed counsel system is entitled to a reimbursement from the state for a portion of the costs and expenses of providing legal representation to indigent persons. R.C. 120.33(A); cf. R.C. 120.18; R.C. 120.28; R.C. 2941.51. Further, "if the person represented has, or may reasonably be expected to have, the means to meet some part of the cost of the services rendered to him," the county may seek reimbursement from the person in an amount that the person can reasonably be expected to pay. R.C. 120.33(A); cf. R.C. 2941.51(D). Since you have specifically asked about the taxing of indigent counsel fees as court costs, I will confine my analysis accordingly.

prosecuting attorney has a duty in every case of conviction to cause execution to be issued for the costs, to faithfully urge collection of such costs, and to pay all collected costs in his possession to the county treasurer. *See generally Dorrian v. Scioto Conserv. Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one) ("shall" is generally interpreted as imposing a mandatory duty); *State ex rel. Stanton v. Zangerle*, 117 Ohio St. 436, 439, 159 N.E. 823, 824-25 (1927) ("[t]here is no dispute...as to what the law specifically provides with respect to these matters. There is practically no occasion for any construction of the statutes. They are very definite and very plain, and need only to be read to ascertain their meaning").

Additionally, R.C. 2949.14 requires a county prosecuting attorney to examine and certify the complete itemized bill of the costs made in the prosecution of a nonindigent person for a felony. Said section specifically provides:

Upon conviction of a nonindigent person for a felony, the clerk of the court of common pleas shall make and certify under his hand and seal of the court, a complete itemized bill of the costs made in such prosecution, including the sum paid by the board of county commissioners, certified by the county auditor, for the arrest and return of the person on the requisition of the governor, or on the request of the governor to the president of the United States, or on the return of the fugitive by a designated agent pursuant to a waiver of extradition except in cases of parole violation. *Such bill of costs shall be presented by such clerk to the prosecuting attorney, who shall examine each item therein charged and certify to it if correct and legal.* Upon certification by the prosecuting attorney, the clerk shall attempt to collect the costs from the person convicted. (Emphasis added.)

Hence, a county prosecuting attorney is required under R.C. 2949.14 to examine each item charged in a bill of costs to a nonindigent individual convicted of a felony and to certify to it if correct and legal. *See generally Dorrian v. Scioto Conserv. Dist.; State ex rel. Stanton v. Zangerle.*

Based upon the foregoing, it is my opinion and you are hereby advised that:

1. In a county operating under a county-appointed counsel system, organized pursuant to R.C. 120.33(A), the court of common pleas and municipal courts are precluded by R.C. 120.33(A) from taxing the fees of court-appointed representation as court costs against individuals convicted or acquitted of felonies or misdemeanors.
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