

OPINION NO. 72-122

Syllabus:

1. In the absence of specific statutory authorization, a county treasurer may not isolate funds for the use of the prosecuting attorney in prosecuting tax delinquent land foreclosure proceedings.

2. Funds held by a county treasurer pursuant to R.C. 5723.11, 2109.57 and 2113.64 must be disposed of pursuant to instructions contained therein and are not available for diversion to other uses.

3. If there are unencumbered and unappropriated moneys in the county treasury, the board of county commissioners is required to appropriate the amount allowed by the court of common pleas for the prosecuting attorney's annual budget. R.C. 309.06. The prosecuting attorney may also use funds available under R.C. 375.12 to meet the costs of foreclosure proceedings. In an emergency, the prosecuting attorney and the board of county commissioners may make application to the court of common pleas for an additional appropriation to enable the prosecuting attorney to carry out the proper functions of his office. R.C. 305.14 and 305.17. The court of common pleas is not required to order the prosecuting attorney to have a title search made in a tax delinquency land foreclosure proceeding. R.C. 5721.03 and 5721.06.

To: David D. Dowd, Jr., Stark County Pros. Atty., Canton, Ohio

By: William J. Brown, Attorney General, December 28, 1972

Your request for my opinion as to responsibility for the payment of advertising, abstracting titles, and court costs in tax delinquent land foreclosure proceedings, contains the following questions:

1. May the County Auditor isolate from the tax collections obtained by the Treasurer prior to the distribution to the several political subdivisions and the schools, sufficient funds to finance the foreclosure of those lands certified by the Delinquent Land Tax Certificate to the Prosecuting Attorney by using funds to pay for abstracts or title certificates, advertising, and court costs?

Should you determine that your opinion to this question may be answered in the affirmative, we would propose to remit to the Stark County Treasurer for distribution according to law those funds collected from the sale of the lands thus foreclosed, however, retaining sufficient funds as to continue other foreclosure proceedings on a rotary fund basis.

2. May the funds held by the County Treasurer under Section 5723.11 and the such other unclaimed funds held by the Treasurer from various proceedings in the Probate Court and the Court of Common Pleas under Sections 2109.57 and 2113.64 be used as a revolving fund for the foreclosure of land and lots on the Delinquent Land Tax Certificates?

3. May the County Commissioners be required to

appropriate such funds as the Prosecuting Attorney shall certify as are necessary to foreclose the Delinquent Land Tax Certificates certified to this office?

4. If the funds are otherwise not available for the County Prosecuting Attorney to proceed under Chapter 5723., Ohio Revised Code, upon the presentation to him of the Delinquent Land Tax Certificates by the County Auditor for the commencement of foreclosure proceedings within the specified statutory period of six months, what action should this office take as to such Delinquent Land Tax Certificates?

By way of background, you state that you are required to institute a foreclosure proceeding whenever a delinquent land tax certificate comes to you from the auditor: that the court costs of a tax foreclosure action under R.C. 5721.18 and 5721.19, including an abstract or certificate of title, may be from \$150 to \$300; that, should the proceeding result in a forfeiture of the premises to the state under R.C. 5723.01, there is no provision for reimbursement of the court costs; that the proceeds from the sale of the forfeited land often are not sufficient to cover the costs; that hundreds of small parcels of land have been certified to you by the county auditor for foreclosure action; that your office does not have sufficient funds to pay for the title work and the additional personnel necessary to proceed with these actions and the board of county commissioners has advised you that no additional funds are available; and that many of the urbanized counties in the state are faced with similar problems.

1. You ask whether the county auditor may isolate a sufficient amount from the tax collections, prior to distribution by the treasurer, to finance the foreclosure actions; and whether you may, pursuant to such action by the auditor, retain a sufficient amount from the proceeds of foreclosure sales to enable you to continue further foreclosure actions.

It is well settled that neither the county auditor nor the county treasurer may direct or permit a payment from the public treasury unless such payment is authorized by statute. State, ex rel. Ferguson v. Maloon, 172 Ohio St. 343, 347-348 (1961); Opinion No. 2538, Opinions of the Attorney General for 1961; Opinion No. 2674, Opinions of the Attorney General for 1961; cf. State, ex rel. Board v. Allen, 86 Ohio St. 244 (1912).

The revenue derived by a county from tax collections is directed to be deposited in the treasury to the credit of various specified funds. R.C. 5705.09 - 5705.10, inclusive. All other moneys due to the county are to be certified by the auditor to the treasurer to be credited to specific funds pursuant to R.C. 319.13, which provides in part:

Except as to moneys collected on the tax duplicate, the county auditor shall certify all moneys into the county treasury, specifying by whom to be paid, what fund to be credited, charge the treasurer with such moneys, and preserve a duplicate of the certificate in his office. * * *

The costs of a foreclosure action are, under R.C. 5721.10, specifically directed to be paid into the general fund of the county. That Section provides in part:

* * * there shall be taxed by the court, as costs in the foreclosure proceedings instituted on said certification, the cost of an abstract or certificate of title, to the property described in said certification, if the same is required by the court, to be paid into the general fund of the county. * * * (Emphasis added.)

Finally, the treasurer is directed to handle all moneys of the county under the provisions of the Uniform Depository Act and to realize earnings from the deposits. R.C. Chapter 135. As your letter states, there is nothing in the Revised Code to permit reimbursement of the expenses incurred by your office, and I can find no provision of the Code which would authorize the procedure which you suggest.

2. Your second question asks whether the unclaimed proceeds resulting from foreclosure actions (R.C. 5723.11) and various probate proceedings (R.C. 5721.20) may be used to meet the costs of foreclosure proceedings. I see no escape from the conclusion that the reasoning in the previous Section is controlling here also. There are specific provisions that such moneys be held and managed for the benefit of the rightful owners. R.C. 2109.57 and 2113.64.

3. You then ask whether the board of county commissioners can be required to appropriate the necessary funds to meet the expenses of your office in foreclosure actions.

The provisions of the Revised Code must first be examined to determine what funds are available for the operation of your office. Provision for the prosecuting attorney's operating budget is made by R.C. 309.06, which reads as follows:

On or before the first Monday in January of each year, the judge of the court of common pleas, or, if there is more than one judge, the judges of such court in joint session, may fix an aggregate sum to be expended for the incoming year for the compensation of assistants, clerks, and stenographers of the prosecuting attorney's office.

The prosecuting attorney may appoint such assistants, clerks, and stenographers as are necessary for the proper performance of the duties of his office and fix their compensation, not to exceed, in the aggregate, the amount fixed by the judges of such court. Such compensation, after being so fixed, shall be paid to such assistants, clerks, and stenographers monthly, from the general fund of the county treasury, upon the warrant of the county auditor.

If there is unencumbered and unappropriated money in the county treasury, the board of county commissioners has no authority to substitute its judgment for that of the common pleas court and must appropriate the amount fixed by the court. State, ex rel. Mettler v. Stratton, 139 Ohio St. 86 (1941); State, ex rel. Foster v. Board of County Commissioners, 16 Ohio St. 2d 89 (1968).

There are other provisions for the expenses incurred by the prosecutor in the performance of his duties. R.C. 309.10 and 325.13 have application only to criminal cases and are no help here. However, R.C. 325.12 provides in part:

There shall be allowed annually to the prosecuting

attorney, in addition to his salary and to the allowance provided for by section 309.06 of the Revised Code, an amount equal to one half of the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice. Upon the order of the prosecuting attorney, the county auditor shall draw his warrant on the county treasurer, payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided by this section to be paid out of the general fund of the county.

Furthermore, there is provision for a renewed application by the prosecuting attorney to the court of common pleas for the appointment of additional assistants, when the circumstances require it. The board of county commissioners is required to fix the compensation of such assistants and to pay all their reasonable expenses, which certainly must include the court costs of the cases they handle. R.C. 305.14 provides as follows as to the appointment of such assistants:

If it deems it for the best interests of the county, the court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county board or officer, in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such county board or officer is a party or has an interest, in its official capacity.

And R.C. 305.17 provides, with respect to their compensation and expenses, as follows:

The board of county commissioners shall fix the compensation of all persons appointed or employed under sections 305.13 to 305.16, inclusive, of the Revised Code, which, with their reasonable expenses, shall be paid from the county treasury upon the allowance of the board. No law requiring a certificate that the money for such compensation and expenses is in the treasury shall apply to the appointment or employment of such persons. (Emphasis added.)

See also Opinion No. 749, Opinions of the Attorney General for 1917; Opinion No. 21, Opinions of the Attorney General for 1919; Opinion No. 3714, Opinions of the Attorney General for 1931; Opinion No. 4255, Opinions of the Attorney General for 1932; and Opinion No. 285, Opinions of the Attorney General for 1963.

Most of the above depends, as has already been noted, on whether there is money in the county treasury to meet the proposed additional expenses. State, ex rel. Mattler v. Stratton, supra. If there is none, the prosecuting attorney cannot be expected to perform functions which are beyond the capacity of his authorized staff of assistants. As a last resort, however, the court has the authority to cut the costs in appropriate cases by dispensing with the title search. I have previously quoted R.C. 5721.10, and it will have been observed that that Section makes provision for the expense of an abstract of title to be taxed as costs, only "if the same is required by the

court." (Emphasis added.) Since an action to foreclose a tax lien on land is not an action to quiet title, but is a proceeding in rem in which notice by publication is sufficient and which will result in acquisition of unimpeachable title by the purchaser (Hunter v. Grier, 173 Ohio St. 158 (1962); R.C. 5721.18 - R.C. 5721.19, inclusive), the court, in its discretion, may well decide not to order title searches in appropriate cases. There is no requirement that all parties who have an interest in the land be given notice of the foreclosure proceeding. Notice by publication containing the names of those listed in the tax duplicate as owners is sufficient. R.C. 5721.03 and 5721.06.

In view of what has already been said, there is no necessity for further response to your fourth question.

In specific answer to your questions it is my opinion, and you are so advised, that:

1. In the absence of specific statutory authorization, a county treasurer may not isolate funds for the use of the prosecuting attorney in prosecuting tax delinquent land foreclosure proceedings.

2. Funds held by a county treasurer pursuant to Sections 5723.11, 2109.57 and 2113.64, Revised Code, must be disposed of pursuant to instructions contained therein and are not available for diversion to other uses.

3. If there are unencumbered and unappropriated moneys in the county treasury, the board of county commissioners is required to appropriate the amount allowed by the court of common pleas for the prosecuting attorney's annual budget. R.C. 309.06. The prosecuting attorney may also use funds available under R.C. 325.12 to meet the costs of foreclosure proceedings. In an emergency, the prosecuting attorney and the board of county commissioners may make application to the court of common pleas for an additional appropriation to enable the prosecuting attorney to carry out the proper functions of his office. R.C. 305.14 and 305.17. The court of common pleas is not required to order the prosecuting attorney to have a title search made in a tax delinquency land foreclosure proceeding. R.C. 5721.03 and 5721.06.