

STATE OF TENNESSEE

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Opinion No. 04-099

June 24, 2004

Defendant's Liability for Court Costs in Pretrial Diversion Program

QUESTION

Must court costs be included in a pretrial diversion memorandum of understanding in order for a defendant participating in the program to be liable for such costs?

OPINION

No. Although the pretrial diversion statute provides that a district attorney may choose to include payment of court costs in the memorandum of understanding, the trial court still retains discretion to allocate responsibility for court costs and, if the trial court taxes costs against the defendant in the exercise of that discretionary authority, the defendant is liable to pay them.

ANALYSIS

Ordinarily, defendants convicted of an offense are absolutely liable for court costs. *See* Tenn. Code Ann. § 40-25-123 (requiring that “[a] defendant convicted of a criminal offense *shall* pay all the costs which have accrued in the cause”) (emphasis added). However, defendants who enter and successfully complete a pretrial diversion program have not been convicted of any offense. *Pizzillo v. Pizzillo*, 884 S.W.2d 749, 755 (Tenn.Ct.App.1994). Such defendants “retain their presumption of innocence because they have not been required to plead to or to stand trial on the charge.” *Id.*

Tennessee Code Annotated § 40-15-105, the pretrial diversion statute, provides that qualified defendants may enter into a memorandum of understanding with the district attorney, which, upon approval by the trial court, suspends prosecution of an offense for up to two years in exchange for abiding by certain conditions provided for in the statute. The statute provides the district attorney with the discretion to impose one or more of these conditions, one of which is that the defendant pay court costs. *See* Tenn. Code Ann. § 40-15-105(a)(2)(E).¹ The trial court is bound to approve the

¹The pretrial diversion statute makes a distinction between court costs and costs associated with operation of the pretrial diversion program. Section 40-15-105(a)(1)(A) states that “as a condition of such suspension, the qualified defendant *shall* agree to pay ten dollars (\$10.00) per month as part payment of expenses incurred by the agency, department, program, group or association in supervising the defendant.” (emphasis added) The statute affords the

memorandum of understanding, except under very narrow circumstances. *See* Tenn. Code Ann. § 40-15-105(b)(2).²

However, regardless of the conditions in a memorandum of understanding, the trial court still retains the discretion to allocate court costs, even when a requirement to pay court costs is not imposed as a condition of pretrial diversion in a memorandum of understanding. Tennessee Code Annotated § 40-25-114 provides that “[t]he court has also discretion in controlling the taxation of costs, and in no case shall the state or county be charged therewith, unless the court so order, specifying in the order the officers and witnesses whose costs are to be taxed, together with the amount due each.”

Accordingly, it is the opinion of this office that even though a memorandum of understanding may not include payment of court costs as a condition of pretrial diversion, the trial court nevertheless retains the authority to allocate payment of court costs to participants in pretrial diversion programs.

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district attorney no discretion on this matter. In addition, the district attorney in his discretion may include in the memorandum of understanding, as a condition of diversion, a requirement that the defendant pay any additional costs associated with any treatment or counseling programs, based on the defendant’s ability to pay. *See* Tenn. Code Ann. § 40-15-105(a)(2)(F).

²A trial court shall approve the memorandum of understanding unless (1) the prosecution has acted arbitrarily and capriciously; (2) the memorandum of understanding was obtained by fraud; (3) diversion of the case is unlawful; or (4) the certificate from the Tennessee Bureau of Investigation required by § 40- 15-106 is not attached. Tenn. Code Ann. § 40-15-105(b)(2). Thus, the absence of a provision requiring the payment of court costs is not grounds for rejecting a memorandum of understanding.

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