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Opinion No. 11-76

County's Responsibility for Payment of Court-Ordered Mental Health Evaluations

QUESTIONS

1. Whether counties are responsible for the costs of mental health evaluations or treatments of misdemeanor defendants conducted pursuant to Tennessee Code Annotated, Title 33, Chapter 7, Part 3.

2. Whether the costs of such mental health evaluations or treatments may be allocated to a municipality where the evaluation or treatment is ordered by a city court exercising concurrent jurisdiction with the courts of general sessions.

OPINIONS

1. Except in cases in which a trial court finds that a misdemeanor defendant is able to pay some or all of the costs of a mental health evaluation or treatment, and in its discretion so orders, the county is liable for such costs.

2. No. Tennessee does not impose liability by statute upon municipalities for costs arising in connection with the enforcement of state laws.

ANALYSIS

1. Under former law, the costs of mental health evaluation, diagnosis, or treatment of certain criminal defendants were borne by the State. *See* Tenn. Code Ann. §33-2-1109(a)(2) (2007) (providing for care at state expense of persons subject to evaluation, diagnosis or treatment under Tenn. Code Ann. §§ 33-7-301(a), -303(a)). Such defendants included those believed to be incompetent to stand trial or as to whom there was a question about mental capacity at the time of the commission of the offense. *See* Tenn. Code Ann. § 33-7-301(a) (2007). Additionally, expenses relating to the diagnosis and evaluation of persons acquitted on a verdict of not guilty by reason of insanity were chargeable to the State. *See* Tenn. Code Ann. § 33-7-303(a) (2007).

Effective June 25, 2009, these provisions were amended by 2009 Tenn. Pub. Acts, ch. 531. In particular, the following new section was added to Tennessee Code Annotated, Chapter 7, Part 3:

> 33-7-304. Cost of Evaluation and Treatment.
>
> (a) The cost of evaluation and treatment under Chapter 7, Part 3 of this title, if the defendant is charged with a misdemeanor, will be a charge upon the funds of the county. If the court finds the defendant financially able to pay all or part of the costs and expenses for the evaluation and treatment, the court may order the same. Payment shall be made to the clerk of the general sessions court for remittance to the person, agency or facility to whom compensation is due, or if the costs and expenses have been paid by the county, to the appropriate office of the county.
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> (b) Costs of the care or treatment of any defendant ordered by the court and who is charged with a misdemeanor shall be paid by the state only when specifically authorized by law.

2009 Tenn. Pub. Acts, ch. 531, § 45. Additionally, section 33 of the Act specifies that persons subject to evaluation, diagnosis or treatment under Chapter 7, Part 3 must be "charged with a felony" in order for the associated costs to be payable by the State. *Id.* § 33. The effect of these amendments is to allocate to the counties the costs of evaluation, diagnosis, or treatment of defendants in misdemeanor cases that were formerly chargeable to the State.

Chapter 531 sets forth a salient exception.[1] The court "may" order a defendant to pay some or all of the costs for evaluation and treatment upon finding that the defendant has the means to do so. *Id.* § 45(a). The term "may" ordinarily "connotes discretion or permission; and it will not be treated as a word of command unless there is something in the context or subject matter of the act or statute under consideration to indicate that it was used in that sense." *Colella v. Whitt*, 202 Tenn. 551, 556, 308 S.W.2d 369, 371 (1957). We see nothing in the Act that would compel the conclusion that the term was intended in a mandatory sense. Under former law, a person subject to evaluation, diagnosis, or treatment under Tenn. Code Ann. §§ 33-7-301(a), -303(a) was entitled to maintenance at state expense even if not indigent.[2] *See* Tenn. Code Ann. §

[1] Chapter 531 additionally specifies that expenses associated with two types of mental health evaluations are to be treated as "court costs". These are competency evaluations of non-indigent petitioners in post-conviction proceedings, 2009 Tenn. Pub. Acts, ch. 531, § 46, and outpatient treatment of persons adjudged not guilty by reason of insanity who are not committable but who are deemed to pose a future substantial risk of serious harm, *id.* § 51. Counties are not ordinarily liable for court costs of non-indigent defendants in misdemeanor cases. *See* Tenn. Code Ann. § 40-25-129; *see also State v. Brown*, 169 Tenn. 119, 83 S.W.2d 250, 251 (1935) (holding, under predecessor statute, that "the county is not liable for any costs upon acquittal in misdemeanor cases"); Op. Tenn. Att'y Gen. No. 79-480 (Nov. 7, 1979) (opining that "the county has no liability for costs in General Sessions Court criminal cases in which the defendant is adjudged guilty but is not declared indigent").

[2] Tenn. Code Ann. § 33-2-1109(a)(1) retains for persons who are indigent an exception to the general prohibition on maintenance of service recipients at state expense. In our view, this provision does not indicate that counties are not liable for the costs of evaluation and treatment of indigent misdemeanor defendants under Chapter 7, Part 3. *See, e.g. State v. Davis*, 173 S.W.3d 411, 415 (Tenn. 2005) ("specific statutory language will control over general statutory language"). A contrary reading—such that the State would be responsible for the mental health evaluation costs of indigent misdemeanor defendants, while non-indigent defendants could be required to bear their own costs—would render section 45's allocation of costs to the counties nugatory. *See, e.g., State v. Hudson*, 562 S.W2d

33-2-1109(a)(1) & (2) (2007); *State v. Black*, 815 S.W. 166, 197 (Tenn. 1991) ("Each part and every word of a statute is presumed to have meaning and purpose and should not be construed as superfluous or as surplusage."). Construing Chapter 531 as vesting the court with discretion to assess mental health evaluation costs against a county even upon a finding that a misdemeanor defendant has financial means is consistent with this backdrop. Because an order of costs and expenses is discretionary only, we do not believe the court is obligated to make a determination on its own motion as to a defendant's ability to pay in the first instance, although it may well choose to do so.

2. Certain city courts may exercise concurrent jurisdiction with general sessions courts over criminal actions. *See* Tenn. Code Ann. § 40-1-107. The judge of such a court might order evaluation or treatment of a misdemeanor defendant under Title 33, Chapter 7, Part 3. In a previous opinion, this Office noted that "Tennessee does not impose liability by statute upon municipalities for costs arising in connection with the enforcement of state laws," and concluded that, absent such statutory assessment of liability, "none exists." Op. Tenn. Att'y Gen. No. 84-340 (Dec. 20, 1984) (opining that a city is not liable to the county for the costs of incarcerating in the county jail an indigent person convicted of the offense of driving while intoxicated when such charge is initiated on a state warrant, and the case is tried in city court). This opinion holds good with respect to the enactment of Chapter 531. Because section 45 of the Act specifically provides that the costs of evaluation and treatment of misdemeanor defendants under Chapter 7, Part 3 "will be a charge upon the funds of the county," there is no legal basis for allocating such expenses to a municipality.

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416, 418 (Tenn. 1978) (applying principle of statutory construction against readings that would render act "self-defeating and nugatory").

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