STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

October 14, 2024

Opinion No. 24-016

State Liability for Costs in Criminal Matters

Question 1

If "[t]he State shall . . . pay the accrued costs in all criminal prosecutions for offenses punishable by death or by confinement in the penitentiary where the accused shall have been convicted by trial or guilty plea," is the State required to pay costs accrued in the General Sessions Criminal Court pursuant to probable cause preliminary hearings for criminal prosecutions meeting the requirements of Tenn. Code Ann. § 40-25-131(b)?

Opinion 1

For prosecutions meeting the terms of Tenn. Code Ann. § 40-25-131(b) *and* falling within the class of cases set out in Tenn. Code Ann. § 40-25-129(a)(1)-(3), the State must pay costs accrued for preliminary hearings.

Question 2

If the State is responsible for payment of court-ordered mental-health evaluations and treatment for defendants charged with a felony in accordance with Tenn. Code Ann. § 33-2-1109(a)(2), is the State required to pay such costs when the mental-health evaluation and treatment is ordered by the General Sessions Criminal Court as well as by the Criminal Court?

Opinion 2

If the Criminal, Circuit, or General Sessions Court orders the mental health evaluation or treatment pursuant to Tenn. Code Ann. § 33-7-301 and the court does not order the defendant to pay the costs of that evaluation or treatment, the State must pay those costs.

ANALYSIS

1. Generally, "[a] defendant convicted of a criminal offense shall pay all costs that have accrued in the cause." Tenn. Code Ann. § 40-25-123(a). So unless a specific exception to that general rule applies, convicted defendants must pay the costs for preliminary hearings.

The exceptions to the convicted-defendants-pay-costs rule are not a model of clarity. The Tennessee Code starts with the statement that "[n]either the state nor any county of the state shall pay or be liable in any criminal prosecution for any costs or fees . . . except in the following classes of cases: (1) All felony cases, where the prosecution has proceeded to a verdict in the circuit or

criminal court; (2) All cases where the defendant has been convicted in a court of record and the court has made a finding at any evidentiary hearing that the defendant is indigent and remains indigent at the time of conviction;" and (3) prosecutions against prison inmates and committed juveniles under certain circumstances. Tenn. Code Ann. § 40-25-129(a)(1)-(3). In our view, this language sets out a general command as to when the State and counties *cannot* pay or be liable for costs. That is, § 40-25-129(a) does not, in itself, shift any burden on the State or counties to pay costs; it simply sets out the class of cases in which that burden *may* be shifted.

The Tennessee Code does have a handful of statutes that shift costs to the State or counties. Tennessee Code Annotated § 40-25-131(b) is one such statute. It provides that "[t]he state shall . . . pay the accrued costs in all criminal prosecutions for offenses punishable with death or by confinement in the penitentiary where the accused shall have been convicted by trial or by guilty plea."

Section 40-25-131(b)'s shift of costs, though, must operate within the class of cases in which § 40-25-129(a) allows the State and counties to be liable.[1] That means, for felony prosecutions where the accused is "convicted by trial," the State can be held liable for costs under the class of cases in § 40-25-129(a)(1). But for felony prosecutions where the accused is "convicted . . . by guilty plea," the defendant does not fall within § 40-25-129(a)(1) because the case did not "proceed[] to a verdict." For guilty pleas, a convicted defendant must ordinarily[2] show and the court must find that the defendant is indigent and remains indigent at the time of conviction before cost liability shifts to the State under the class of cases in § 40-25-129(a)(2).

Section 40-25-129(a)(2) permits cost shifting for "cases where the defendant has been convicted in a court of record. . . ." A "General Sessions court is not a court of record." *State v. Willoughby*, 594 S.W.2d 388, 391 (Tenn. 1980); *State v. Black*, 897 S.W.2d 680, 682 (Tenn. 1995). But costs accrued in General Sessions Court may still qualify for shifting under § 40-25-129(a)(2) in cases where the defendant is ultimately "convicted in a court of record."

The costs shifted by § 40-25-131(b) include costs associated with a preliminary hearing in General Sessions Court. For purposes of § 40-25-131, "costs" means "all costs accruing under existing laws on behalf of the state or county, as the case may be, for the faithful prosecution and safekeeping of the defendant[.]" Tenn. Code Ann. § 40-25-133.[3] Costs accrued pursuant to a preliminary hearing relate to the faithful prosecution of the defendant because "a preliminary hearing is a critical stage in a criminal prosecution in Tennessee." *McKeldin v. State*, 516 S.W.2d 82, 86 (Tenn. 1974).

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[1] To the extent of any irreconcilable conflict, the newer § 40-25-129(a) (2016 Tenn. Pub. Acts, ch. 782, § 1) prevails over the older § 40-25-131 (1970 Tenn. Pub. Acts, ch. 461, § 1). *See Brewer v. Lincoln Brass Works, Inc.*, 991 S.W.2d 226, 229 (Tenn. 1999) ("Where two statutes conflict and cannot be reconciled, the prior act will be repealed or amended by implication to the extent of the inconsistency between the two statutes.").

[2] Tennessee Code Annotated § 40-25-129(c) also permits limited cost shifting even without an indigency determination for necessary witness expenses that are "requested by the district attorney and approved by the court."

[3] The only exceptions to that definition are some costs associated with guarding the jail or transporting a prisoner out of the county for safekeeping, which are paid by the county in which the crime was alleged to have been committed. *Id.*

Accordingly, for prosecutions meeting the terms of § 40-25-131(b) *and* consistent with the limits on state liability under § 40-25-129(a)(1)-(3), the State must pay costs accrued for preliminary hearings.

2. Generally, "[n]o service recipient may receive care at the state's expense from a program operated by the [Department of Mental Health and Substance Abuse Services]." Tenn. Code Ann. § 33-2-1109(a). But there is a specific exception to this general rule for persons "subject to evaluation, diagnosis[,] or treatment under . . . chapter 7, part 3 of [title 33] and charged with a felony[.]" Tenn. Code Ann. § 33-2-1109(a)(2).

Tennessee Code Annotated § 33-7-301(a) allows Criminal, Circuit, or General Sessions Courts to order mental health evaluation and treatment for criminal defendants as follows:

> When a defendant charged with a criminal offense is believed to be incompetent to stand trial, or there is a question about the defendant's mental capacity at the time of the commission of the crime, the criminal, circuit, or general sessions court judge may, upon the judge's own motion or upon petition by the district attorney general or by the attorney for the defendant and after hearing, order the defendant to be evaluated on an outpatient basis . . . If, and only if, the outpatient evaluator concludes that further evaluation and treatment are needed, the court may order the defendant hospitalized[.]

When the Criminal, Circuit, or General Sessions Court orders evaluation or treatment pursuant to § 33-7-301(a), the State may be required to pay the associated costs. Tennessee Code Annotated § 33-7-304(a) provides that "[t]he cost of evaluation and treatment under this part will be a charge upon the funds of the state." But "[i]f 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 defendant to pay all or part of the costs and expenses." *Id*. Thus, the State must pay the costs of any mental health evaluation and treatment ordered by a Criminal, Circuit, or General Sessions Court for a defendant charged with a felony unless the court orders the defendant to pay those costs.

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