



Michigan Supreme Court

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John A. Hohman, Jr.
State Court Administrator

MEMORANDUM

DATE: July 24, 2014

TO: Judges
Court Administrators
Juvenile Registers

FROM: John A. Hohman, Jr.
State Court Administrator

RE: *People v Cunningham* - Frequently Asked Questions #2

In light of *People v Cunningham*, ___ Mich ___ (2014),¹ the State Court Administrative Office (SCAO) has updated the [Circuit Court Fee and Assessments Table](#) and the [District Court Fee and Assessments Table](#). The Michigan Judicial Institute (MJJ) has also revised Part G of Chapter 3 of the [Criminal Proceedings Benchbook, Vol. 2](#). Courts are encouraged to review the revisions. Further, the following questions and answers provide information regarding the imposition of costs.²

Q: Do local ordinances provide authority for a court to assess costs?

A: This determination is a judicial decision.

Q: Is there a list of cost factors that can be included in the calculation of “costs of prosecution?”

A: No. Although “costs of prosecution” are included in the penalty provisions of several statutes, costs of prosecution have been limited by case law. Cases over the last 70+ years have provided some general guidance on approved and disapproved costs:

¹ In *People v Cunningham*, ___ Mich ___, (2014), the Michigan Supreme Court held that two statutory provisions that provide the general authority for sentencing courts to impose “costs,” MCL 769.1k(1)(b)(ii) and MCL 769.34(6), do not independently authorize the imposition of costs, such as court costs; rather, *separate* statutory authorization must exist for the imposition of costs.

² Additional questions and answers are provided in a [memo dated June 25, 2014](#).

- “When authorized, the costs of prosecution imposed ‘must bear some reasonable relation to the expenses actually incurred in the prosecution.’” *People v Dilworth*, 291 Mich App 399, 401; 804 NW2d 788 (2011), quoting *People v Wallace*, 245 Mich 310, 314; 222 NW 698 (1929).
- “Furthermore, those costs may *not* include ‘expenditures in connection with the maintenance and functioning of governmental agencies that must be borne by the public irrespective of specific violations of the law.’” *Dilworth*, 291 Mich App at 401, quoting *People v Teasdale*, 335 Mich 1, 6; 55 NW2d 149 (1952).
- Costs of prosecution must bear some *direct* relation to actual costs incurred in prosecution, and cannot include the costs of the day-to-day functions of the prosecutor, law enforcement, or other governmental unit, even if the functions resulted in arrest and prosecution. See *Teasdale*, 335 Mich at 5-7; *Saginaw Pub Libraries v Judges of the 70th Dist Court*, 118 Mich App 379, 387-388; 325 NW2d 777 (1982); *People v Barber*, 14 Mich App 395, 401-403; 165 NW2d 608 (1968).
- The trial court record must “set[] forth [the] basis for [the] computation [of costs] . . . [and must] disclose an adequate basis therefor.” *People v Wein*, 382 Mich 588, 592; 171 NW2d 439 (1969).
- Expert witness costs constitute “‘expenses specifically incurred in prosecuting the defendant[]’” within the meaning of MCL 771.3(5) (authorizing the imposition of such costs against a probationer). *People v Brown*, 279 Mich App 116, 138-139; 755 NW2d 664 (2008).
- “[A]ssessing costs against a defendant for a jury in a criminal case is not permissible” under a provision authorizing the imposition of costs of prosecution. *People v Hope*, 297 Mich 115, 118-119; 297 NW 206 (1941) (approving, however, costs for witness fees, officers’ fees, and “costs assessed in the justice court”) (citations omitted).
- Restitution to a unit of government for the general cost of prosecution is not permitted. See *People v Newton*, 257 Mich App 61, 69-70; 665 NW2d 504 (2003) (holding that “the trial court erred in ordering [the] defendant to pay \$2,500 *restitution* to the Barry County Sheriff’s Department[]” under MCL 780.766(1) (providing that “[v]ictims entitled to restitution include a ‘governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of a crime[]’”), because “the general cost of investigating and prosecuting criminal activity is not direct ‘financial harm as a result of a crime[]’”) (emphasis supplied).

Q: Are court costs authorized if the defendant is placed on probation?

A: As a condition of probation, the court *may* require the probationer to pay certain additional costs as a condition of probation. MCL 771.3(2)(c). If the court requires the probationer to pay discretionary costs under MCL 771.3(2), the costs shall be limited to expenses specifically incurred in prosecuting the defendant, providing legal assistance to the defendant, and supervision of the probationer. MCL 771.3(5).

The court may require a probationer to pay discretionary costs under MCL 771.3(2) only if “the probationer is or will be able to pay them during the term of probation[,]” taking “into account the probationer’s financial resources and the nature of the burden that payment of costs will impose, with due regard to his or her other obligations.” MCL 771.3(6)(a). Additionally, a probationer who is not in “willful default” may petition for a remission of any unpaid portion of the minimum state cost or discretionary costs. MCL 771.3(6)(b).

Q. Is SCAO going to provide a list of criminal offenses in which the charging statute provides for the costs of prosecution or court costs?

A: The only charging statutes we are aware of that provide for court costs are MCL 445.377(1) and MCL 750.159j(2). For costs of prosecution and other cost provisions (other than court costs) applicable to individual criminal offenses, see the new [Table of Felony Costs](#) and the new [Table of Misdemeanor Costs](#) in the MJI’s [Criminal Proceedings Benchbook, Vol. 2](#). SCAO also recommends that, before sentencing, the prosecutor or probation officer review the charging statute and advise the court of the allowable costs.