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Robert R. Corbin

December 26, 1986

Mr. Peter Haynes
Executive Director
Arizona Criminal Justice Commission
1275 West Washington
Phoenix, Arizona 85007

Re: I86-124 (R86-095)

Dear Mr. Haynes:

You have asked a number of questions concerning the collection of penalty assessments pursuant to A.R.S. § 13-812 for deposit in the Victim Compensation Fund created by A.R.S. § 41-2401.01. We will consider all of your questions in the following response.

You first inquire whether, upon conviction of a felony, the imposition of the penalty assessment to benefit the Victim Compensation Fund is mandatory or discretionary with the sentencing court. In a related inquiry you ask whether the sentencing court has any discretion with respect to requiring payment of the penalty assessment as a condition of probation. Based on the following discussion, we conclude that both assessment of the penalty and the requirement of payment of the penalty assessment as a condition of probation are mandatory.

A.R.S. § 13-812 provides:

A. In addition to any other fine or assessment, each person convicted of a felony shall be assessed a penalty of:

1. One hundred dollars if the person is an individual.

2. Five hundred dollars if the person is an enterprise.

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B. Monies received pursuant to this section shall be transferred to the victim compensation fund established pursuant to section 41-2401.01.

(Emphasis added.)

A.R.S. § 13-808(B) states:

If a defendant is sentenced to pay a fine or restitution is also sentenced to probation the court may make payment of the fine or restitution a condition of probation. In addition the court shall require as a condition of probation the payment of any penalty, assessment, fine or surcharge required by law.

(Emphasis added.)

The use of the word "shall" indicates a mandatory duty unless the context indicates otherwise. Arizona Downs v. Arizona Horsemen's Foundation, 130 Ariz. 550, 554, 637 P.2d 1053, 1057 (1981). Chapter 8 of Title 13 of the Arizona Revised Statutes, A.R.S. §§ 13-801 through 13-812, pertains to restitution and fines. Contrast the use of "shall" in A.R.S. § 13-812(A) and A.R.S. § 13-808(B) with the use of the term "may" in A.R.S. § 13-804(A):

Upon a defendant's conviction for an offense causing economic loss to any person, the court, in its sole discretion, may order that all or any portion of the fine imposed be allocated as restitution to be paid by the defendant to any person who suffered an economic loss as caused by the defendant's conduct.

(Emphasis added.)

We note, moreover, that the legislature has, on another occasion, clearly stated when its intent was to make imposition of a penalty assessment discretionary. In A.R.S. § 41-2403(C), as amended Laws 1986, (2nd Reg. Sess), Ch. 167, § 1, the legislature made the 37% surcharge penalty assessment created by that statute discretionary by stating:

The judge may waive all or any part of the penalty assessment the payment of which would

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work a hardship on the person convicted or adjudicated or on his immediate family.

There is no comparable provision with respect to the penalty assessment required by A.R.S. § 13-812.

We conclude that the use of the word "shall" in A.R.S. §§ 13-812 and 13-808(B) in the context of other provisions, discussed above, demonstrates the intention of the legislature that the penalty assessment is intended to be mandatory and that payment of the penalty assessment must be required as a condition of probation.

You have also asked whether, in light of the mandatory nature of the penalty assessment, the court may, nevertheless, take into account the economic circumstances of the defendant in assessing the penalty. As we concluded above, the penalty assessment and the amount of the assessment is not discretionary but is required by law. It must be assessed upon conviction of a felony, regardless of the defendant's financial means.

We note, however, that although payment of the penalty assessment is required to be a condition of any probation that is imposed, the court should take into consideration the defendant's economic circumstances and determining whether to imprison the defendant or revoke his probation for failure to pay the assessment. See Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); In re Collins, 108 Ariz. 310, 497 P.2d 523 (1972).

You also ask whether the sentencing court has discretion to allow delayed or installment payments of the penalty assessment. The statute is silent on the question. However, in Laws 1986, (2nd Reg. Sess.), Ch. 248, § 9, the legislature specifically provided for payment plans in the payment of restitutions and fines. A.R.S. § 13-804(D) now provides:

After the court determines the amount of restitution, the court shall specify the manner in which the restitution is to be paid. In deciding the manner in which the restitution is to be paid, the court shall consider the economic circumstances of the defendant.

A.R.S. § 13-808(A) provides:

If a defendant is sentenced to pay a fine alone or in addition to any other sentence,

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the court may grant permission for payment to be made within a specified period of time or in specified installments.

Expression of one or more items of a class and exclusion of other items of the same class generally implies the legislative intent to exclude those items not included. Pima County v. Heinfeld, 134 Ariz. 133, 654 P.2d 281 (1982). Therefore, we conclude that the legislature did not intend to grant the courts the discretion to schedule delayed or installment payments of this penalty assessment.

You also inquire whether the mandatory penalty assessment of A.R.S. § 13-812 applies to each felony count of which a person has been convicted or only to each cause number. For the following reasons, we conclude that the penalty must be assessed for each felony count that results in conviction.

Different cause numbers pertaining to one individual can arise for many reasons; for example, a defendant may commit crimes while already under indictment for other crimes or the county attorney may have jurisdiction of one case, while the Attorney General has jurisdiction of another. We find no rational basis for assessing a person several times when he has been convicted of multiple felony counts in separate cause numbers, while assessing a person convicted of several felony counts in one cause number only once.

Furthermore, the statutes enacted for the protection of persons who unlawfully have been taken advantage of should be liberally construed in favor of these persons. Bullard v. Garvin, 1 Ariz.App 249, 251, 401 P.2d 417, 419 (1965). The language of A.R.S. § 41-2401.01(B) demonstrates the intent of the legislature to assist victims of crime:

The Arizona Criminal Justice Commission shall allocate monies in the victim compensation fund to public and private agencies for the purpose of establishing, maintaining and supporting programs that compensate victims of crime.

The legislature's clear intention to raise funds to assist victims of crime should not be limited by creating an artificial distinction between defendants who have committed multiple crimes, but are charged in separate versus single cause numbers.

You have asked what consequences flow from the failure of a person convicted of a felony to pay penalty assessments.

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We will consider this question first with respect to the consequences to a probationer, and second with regard to a defendant who completes his term of probation or sentence without full payment of the penalty assessment.

As discussed earlier, A.R.S. § 13-808 specifically provides that payment of the penalty assessment is a condition of probation. Rule 27.7(c)(2), Arizona Rules of Criminal Procedure, provides, in part, as follows:

Upon determination that a violation of a condition or regulation of probation occurred, the court may revoke, modify or continue probation.

Thus, failure to make payment would be a violation of probation and would be a basis for revocation of probation, in the court's discretion. As we have previously indicated, the court should take into consideration the defendant's ability to pay prior to revoking his probation.

If a defendant nevertheless completes his term of probation or sentence without full payment of the penalty assessment, the defendant is still liable for full payment. This remedy is provided in A.R.S. § 13-805 which states:

A. The trial court shall retain jurisdiction of the case for purposes of modifying the manner in which court-ordered payments are made until paid in full, or until the defendant's sentence expires. At the time the defendant completes his period of probation or his sentence, the court shall enter both:

1. Judgment in favor of the state for the unpaid balance, if any, of any fines, costs, fees, surcharges or assessments imposed.

. . . .

B. The judgments may be enforced and renewed as any civil judgment.

(Emphasis added.) We believe the term "assessments" as used in this statute encompasses the assessments authorized by A.R.S. §§ 41-2401.01 and 13-808.

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Your final question is in regard to what procedures are required to be followed in collecting monies generated by penalty assessments under A.R.S. § 13-812 and forwarding them to the Victim Compensation Fund.

A.R.S. § 41-2401.01 is silent regarding the procedures for collecting monies for the Victim Compensation Fund. On the other hand, the legislature has set out collection procedures for two similar funds, the Emergency Medical Service's Operating Fund, A.R.S. § 36-2219 and the Criminal Justice Enhancement Fund, A.R.S. § 41-2403. Those procedures are nearly identical to each other and are found in A.R.S. § 36-221(C) and (D) as well as in A.R.S. § 41-2403(D) and (E).^{1/} While the legislature has not specifically provided for a method for the collection of monies for the Victim Compensation Fund, we do not believe it would be unreasonable to follow the procedures set out for the Medical Service's Operating Fund and the Criminal Justice Enhancement Fund.

Sincerely,

Bob Corbin

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Attorney General

BC:HRB:DDH:gm

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A.R.S. § 36-2219(C) and (D) provide:

C. After a determination by the court of the amount due, the clerk of the court shall transmit, on the last day of each month, the assessments collected pursuant to subsections A and B of this section and an itemized statement of the fines and assessments collected pursuant to subsections A and B of this section to the county treasurer, except that police courts shall transmit the assessments and the itemized statement of the fines and assessments to the city treasurer.

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The Honorable Carolyn Warner
The Honorable Jim Cooper
The Honorable Jim Green
The Honorable Bill DeLong
The Honorable Jacque Steiner
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limitation shall be determined by adjusting the total amount of expenditures of local revenues for all school districts for fiscal year 1979-1980 to reflect the changes in student population in the school districts and the cost of living AND MULTIPLYING THE RESULT BY 1.10. The aggregate expenditures of local revenues for all school districts shall not exceed the limitation prescribed in this section, except as provided in Subsection (3) of this section.

Your questions involve whether the 10% increase in aggregate expenditure limitation created by Proposition 101 can be applied to the current fiscal year, either by the terms of the proposition itself through action by the Economic Estimates Commission ("EEC"), or by the Legislature. It is our opinion that the amendment to art. IX, § 21(2) applies only to subsequent fiscal years.

Constitutional provisions, like statutes, have only prospective effect unless a clear intent to the contrary is expressed. See, e.g., American Federation of Labor v. American Sash & Door Co., 67 Ariz. 20, 39, 189 P.2d 912, 925 (1948), aff'd, 335 U.S. 538 (1949). The constitutional provision in question placed a limit on school district expenditures for fiscal 1986-1987 based on an amount determined by the EEC prior to May 1, 1986. In making that determination the EEC is required to follow art. IX, § 21(2) as it existed at that time. There is nothing in the language of the amendment which permits the EEC to redetermine an amount which was correct when made. Nor can the Legislature authorize the EEC to substitute a new determination for the one which was constitutionally mandated. Cf. Trico Electric Cooperative v. Ralston, 67 Ariz. 358, 363, 196 P.2d 470, 473 (1948).

Nonetheless, the Legislature may, in effect, increase the limit as provided in art. IX, § 21(3), which states:

Expenditures in excess of the limitation determined pursuant to subsection (2) of this section may be authorized for a single fiscal

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1/ (Continued)

D. The penalty assessment and the itemized statement as required in subsection C of this section shall be transmitted by the appropriate authorities specified in subsection C of this section to the state treasurer on or before the tenth day of each month.

A.R.S. § 41-2403(D) and (E) provide:

D. After determination by the court of the amount due, the clerk of the court shall transmit, on the last day of each month, the assessments collected pursuant to subsections A and B and an itemized statement of the fines, civil sanctions and assessments collected pursuant to subsections A and B to the county treasurer, except that police courts shall transmit the assessments and the itemized statement of the fines, civil sanctions and assessments to the city treasurer.

E. The thirty-seven per cent penalty assessment and the itemized statement as required in subsection D shall be transmitted by the appropriate authorities specified in subsection D to the state treasurer on or before the tenth day of each month, for deposit in the criminal justice enhancement fund.