



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Taylor Carlisle
Criminal District Attorney
Kaufman County
Kaufman, Texas

Attention: Mr. Fred V. Meridith

Dear Sir:

Opinion No. 0-5131

Re: Should the justice of the peace remit the fines paid for violation of the 35 mile per hour speed limit?

Your letter of March 9, 1943, requesting the opinion of this department on the above question reads in part as follows:

"Please send me copy of the Attorney General's opinion holding invalid the Highway Department's ruling on the 35 mile an hour speed limit.

"The justices of the Peace in our County are receiving numerous requests for remission of the fines paid for violation of the 35 mile limit. What is the opinion and advice of your department in this connection?"

It is stated in A. L. R., Volume 26, page 1524:

"Ordinarily the question whether one who has paid a fine illegally or improperly imposed upon him can recover back the amount so paid may be said to depend upon certain factors, chief of which is that of voluntary or involuntary payment. If the payment is made under circumstances which amount to coercion or duress, so that it must be regarded as an involuntary one, the fine may generally be recovered; otherwise not. The cases in which it has been held that the payment was under duress are usually those in which the accused was imprisoned, or was threatened with imprisonment, and payment of the fine

Honorable Taylor Carlisle, page 2

was necessary to avoid or secure release from such imprisonment. Threatened or actual distraint of property may, perhaps, also, -- at least under some circumstances, -- be regarded as sufficient to constitute duress. But if the payment is by way of compromise merely, or is made only to avoid inconvenience or trouble, and the accused has other alternatives which are effective, -- as an appeal, -- the payment is generally regarded as voluntary and irrecoverable."

In Bailey v. Paullina, 69 Iowa 463, 25 N. W. 418, it was held that one who paid a fine under a void ordinance without protest could not recover the money paid. In Harrington v. New York, 81 N. Y. Supp. 667, it was held that one who paid a fine imposed by a magistrate who had no jurisdiction to impose it was not entitled to recover the money paid, when the payment was voluntary. It is stated in the case of Houlehan v. Kennebec County, 81 Atl. 449;

"The proposition that a fine illegally imposed, but voluntarily paid, under a mistake of law, cannot be recovered back, is supported by ample authority."

3524: It is further stated in A. L. R., Volume 26, page

"It is a well-settled fact that illegal payments coerced under duress or compulsion may be recovered, provided the compulsion furnishes the motive for the payment sought to be recovered, and proceeds from the person against whom the action is brought. Where money is paid on compulsion, the law raises an obligation to refund, and the form of the action is for money had and received to the plaintiff's use. 21 R. C. L. p. 145. This rule is supported by a number of cases in which fines have been illegally or improperly imposed and paid by the accused under circumstances constituting duress, especially where the payment is to avoid or secure release from imprisonment for nonpayment of the fine, it being held that a payment made under these

Honorable Taylor Carlisle, page 3

circumstances is an involuntary one, and that the fine may be recovered." (Citing numerous authorities.)

In the case of *Harrington v. New York*, supra, the court said "that even where the accused actually under unlawful arrest at the time the payment was made, it would be necessary to allege that the payment was procured by reason of such detention. And the mere allegation that payment was made because a fine imposed was held not to aver duress in fact. It was pointed out by one of the judges that fines had been classified with taxes and licenses in applying the rule that voluntary payment under a mistake of law cannot be recovered. . . ."

It was held in the case of *Bailey v. Paulina*, supra, that one who had been convicted of violation of the municipal ordinance which was void, but who had paid, without protest, the fine imposed, and had not raised the question of the validity of the ordinance, could not recover from the municipality the amount of the fine, and that this was true even though, at the time it was paid, he was under arrest. The court stating the question that was presented for its decision said:

"The facts appearing in the questions are these: (1) plaintiff's assignee was convicted and fined upon a void ordinance. (2) Upon his trial he did not raise any objection based upon the validity of the ordinance. (3) He paid the fine and costs without protest. (4) The payment was made while he was under arrest. It is shown that the payment was made without protest; which, as we understand the language, means that it was made by plaintiff's assignor without objection, or the denial of the justice of the claim, or assertion of his own rights. A payment so made is regarded as voluntary; and, in the absence of fraud, deceit or mistake of fact, the money cannot be recovered back. . . . It is not claimed that the defendant in the judgment was induced to make the payment through fraud, deceit or mistake of fact. It is, however, insisted that he was under duress, when he made the payment, by reason

Honorable Taylor Carlisle, page 4

of the fact that he was then under arrest. But it is not shown by the statement of facts found in the question, as certified to us, that the arrest had anything to do with the payment, or the defendant was constrained or influenced thereby to make it. It is not shown that, because of the duress, or the arrest, the defendant made the payment, nor can such a thing be inferred. We may readily presume that the defendant paid the fine and costs because he believed the judgment against him was valid, and this we are required to presume, in the absence of any showing of objection, or if the payment was made under protest."

It has been held that the payment is voluntary, and therefore irrecoverable, where, at the time of payment of the fine imposed, the accused has an option to pay the fine or to appeal, and he chooses to do the former, even though he subsequently appeals, and the conviction upon review is set aside. (D'Aloia v. Summit, 97 Atl. 722, affirmed in 99 Atl. 189.) At the time of payment of the fines in this case, the defendants were under arrest, upon complaint for violation of the city ordinance, having been sentenced to pay fine or serve time in jail. No protest was made against payment of the fine. The court said that the legality of duress consists in forcing a person to act against his will, and does not exist where the person on whom it is charged, it has been exercised as an option or choice as to whether he will do the thing or perform the act said to have been done under duress; that in this case there were two forms of appeal available to the defendant as alternatives to paying the fines, and that it seemed to be the rule that if defendants had an alternative to making the payment, they must be regarded as having been voluntary, and therefore not recoverable. The proposition that if one upon whom a fine is imposed by a court having no jurisdiction to try the offense and impose a fine has an alternative to pay the fine or to appeal, and payment is not essential to avoid threatened imprisonment, a payment with knowledge of the facts will be deemed voluntary, and the money cannot be recovered.

It is stated in Corpus Juris, Volume 49, page 759:

"Money paid under an unconstitutional or invalid statute or ordinance, without any circumstances of compulsion is paid under a mistake of

Honorable Taylor Carlisle, page 5

law, and so cannot be recovered, except in so far as recovery is permitted under the rule adopted in most states that payments made by public officers under mistake of law are recoverable."

We have carefully considered Article 952, Vernon's Annotated Code of Criminal Procedure, in connection with your request. This statute authorizes the governor to remit fines, however, we do not think that this statute has any application to the question under consideration.

It will be seen from the foregoing authorities that ordinarily the question whether one who has paid a fine illegally or improperly imposed upon him can recover back the amount so paid may be said to depend upon certain factors, chief of which is that of voluntary or involuntary payment. If the payment is made under circumstances which amount to coercion or duress, so that it must be regarded as an involuntary one, the fine may generally be recovered; otherwise not.

In view of the foregoing authorities, it is apparent that no categorical answer can be given to your question. The general rules above announced should be of some assistance to you in determining whether or not the fine and cost may be recovered in a particular case, under all the facts and circumstances connected therewith.

Yours very truly

ATTORNEY GENERAL OF TEXAS

APPROVED MAR 19, 1943
George S. Sullivan
ATTORNEY GENERAL

Ardell Williams

By

Ardell Williams
Assistant

AW:db

