



The Senate of Texas Jurisprudence Committee

SENATOR RODNEY ELLIS
Chairman

SENATOR CHRIS HARRIS
Vice-Chairman

The Honorable Dan Morales
Attorney General
State of Texas
P. O. 12548
Austin, Texas 78711-2548

August 22, 1997
RO-987
RECEIVED

AUG 28 1997

Opinion Committee

RECEIVED
AUG 27 1997
GOVERNMENTAL INQUIRY
UNIT

FILE # ML-39749-97
I.D. # 39749

Dear General Morales:

In my capacity as Chair of the Committee on Jurisprudence of the Texas State Senate, I request an official opinion from your office regarding the proper construction of the recently-enacted Senate Bill No. 1417. That bill, *inter alia*, amends Chapter 51 of the Government Code by adding Subchapter K, the provisions that prompt my concerns.

Currently, courts in Texas are permitted to direct a defendant convicted of an offense whose punishment involves the imposition of a fine to pay the entire fine and costs of court when sentence is pronounced, pay the entire amount at some specified later date, or pay a specified amount at designated intervals over a period of time.¹ Subchapter K of Chapter 51 of the Government Code imposes a fee of \$25 to cover the costs of administration in instances in which a court directs a defendant to pay a specified amount at designated intervals over time. Subchapter K of Chapter 51 of the Government Code provides the following:

SUBCHAPTER K. TIME PAYMENT FEE

Sec. 51.921. TIME PAYMENT FEE. (a) In addition to other fees authorized or required by law, the clerk of each district court, statutory county court, county court at law, and justice court shall collect a fee of \$25 from a person who:

- (1) has been convicted of a felony or misdemeanor;

¹ Article 42.15 of the Code of Criminal Procedure, which applies to all courts other than justice or municipal courts, provides:

(a) When the defendant is fined, the judgment shall be that the defendant pay the amount of the fine and all costs to the state.

(b) When imposing a fine and costs a court may direct a defendant:

- (1) to pay the entire fine and costs when sentence is pronounced;
- (2) to pay the entire fine and costs at some later date; or
- (3) to pay a specified portion of the fine and costs at designated intervals.

Article 45.48 of the Code of Criminal Procedure, which applies to justice and municipal courts, contains language identical to that set forth in Article 42.15.

(2) has been ordered to pay a fine, court costs, or restitution by the court; and

(3) seeks to pay the fine, court costs, or restitution over a period of time rather than immediately.

(b) Court fees under this section shall be collected in the same manner as other fees, fines, or costs in the case. The officer collecting the fees shall keep separate records of the money collected under this section and shall deposit the money in the county or municipal treasury, as appropriate.

(c) The custodian of the county treasury shall keep a record of the amount of money on deposit collected under this section and shall send 50 percent of the fees collected under this section to the comptroller at least as frequently as monthly. The comptroller shall deposit the fees received to the credit of the general revenue fund.

(d) The custodian of the county treasury shall deposit 10 percent of the fees collected under this section to the comptroller at least as frequently as monthly. The comptroller shall deposit the fees received pursuant to this subsection to credit of the Office of Court Administration Collections Grant Account.

(e) The custodian of the county treasury shall deposit 40 percent of the fees collected under this section in the general revenue account of the county or municipality.

Because questions have arisen about the meaning, scope, and constitutionality of Senate Bill No. 1417, I submit several questions regarding the proper construction of Subchapter K.

My first question is:

In light of Attorney General Opinion DM-123 (1992), does Subchapter K, by making the service available and payment for the service fee optional with the person convicted, violate the due process or equal protection clauses of the Texas Constitution?

I submit that the answer to the first question is "No".

My question is prompted by the issuance of Attorney General Opinion DM-123 (1992), in which you declared unconstitutional a statute that authorized the commissioners courts in counties with statutory county courts to impose an additional \$10 as a court cost in each conviction "to be used for court-related purposes for the support of the judiciary." The opinion noted that

[s]ection 51.702, by its very nature, does not apply to any county which has no statutory county court. Thus, if any county elects to participate in the scheme under that section, such county will after July 1 [the effective date of the provision], necessarily impose, for every conviction, a punishment which is greater, by \$10.00, than a conviction for the same offense in a county which either is ineligible to participate in the statutory scheme, or elects not to do so.

Attorney General Opinion DM-123, *supra*, at 2. The opinion then quoted from an earlier Attorney General Opinion, JM-880 (1988), which held that costs imposed in misdemeanor cases involving state criminal statutes must be uniform statewide:

In Texas, costs in misdemeanor criminal cases are assessed as part of the punishment. . . . A law allowing different costs to be assessed in different counties for the same penal offense would have the effect of allowing the penalty of state-defined crimes to vary from county to county and would violate both “due process” and “equal protection” constitutional rights.

Attorney General Opinion JM-880 at 3; *see also* Attorney General Opinion JM-1120 (1989). The opinion based this statement on a series of court cases, which had held that

a law that fixes a greater punishment in one county than in other counties for the violation of a state law cannot be upheld and is in contravention of constitutional protections afforded by both the state and the federal constitutions.

Ex parte Carson, 159 S.W.2d 126, 129 (Tex. Crim. App. 1942).² For two reasons, I conclude that the rule of law set forth in Attorney General Opinion DM-123 is not apposite to Subchapter K and that Subchapter K does not violate permit the imposition of differing punishments in different counties.

First, the fee imposed to pay for the costs of providing the service, *i.e.*, accepting the tender of payments for fines, court costs, and restitution over a period of time rather than immediately, is not itself part of the punishment or the costs of court. Payments of fines and costs of court are not optional with defendants convicted of offenses; once a fine and costs of court are imposed by a court, a defendant is compelled to pay. However, payment of the fee authorized by Senate Bill No. 1417 is optional, at least insofar as the decision to request the right to make payments at intervals over time is optional. The fee authorized by Senate Bill No. 1417 is merely a fee imposed on a person

² In *Ex parte Carlson*, *supra*, the court held invalid a statute that provided for payment of \$1.00 as costs in criminal cases in those counties having eight or more district courts and three or more county courts; the imposition did not apply in other counties. In *Ex parte Sizemore*, 8 S.W.2d 134 (Tex. Crim. App. 1928), the court invalidated a road law applicable to one particular county, which allowed only the sum of fifty cents per day to be applied for the payment of fines and costs imposed in misdemeanor cases, while a general law granted an allowance of three dollars per day in similar situations. *See also Ex parte Ferguson*, 132 S.W.2d 408 (Tex. Crim. App. 1939); *Ex parte Mann*, 46 S.W. 828 (Tex. Crim. App. 1989).

More recently, in *Memet v. State*, 642 S.W.2d 528 (Tex. App. Houston [14th Dist.] 1982, *pet. ref'd*), the court struck down section 5(c) of article 2372w, V.T.C.S., a statute which provided that the offense of operating without a permit a sexually oriented commercial enterprise was a Class C misdemeanor in any city with a comprehensive zoning ordinance, but a Class B misdemeanor in any city without such an ordinance. The court declared that the statute was

unconstitutional as a denial of due process and equal protection for prescribing different penalties for the same conduct in different cities of the state.

who seeks to avail himself of a service offered by the court. If a person convicted of an offense seeks not to pay his fine and court costs over a period of time but rather to pay the entire amount immediately or pay the entire amount by a specified date, the fee will not be imposed, because the service will not be needed.

Second, even if we were to assume, *arguendo*, that the fee were considered a cost of court, the fact that the use of the service is optional on the part of all persons convicted of offenses would in no way render the subchapter unconstitutional. In the scheme addressed in Attorney General DM-123, the commissioners courts were empowered to decide whether to impose the additional cost on persons convicted of offenses in their counties; it was a sort of “local option” imposition. The fact of the cost’s being imposed on a “local option” basis, depending on the vote of each county commissioners’ court, compelled your office to conclude that the cost imposed was not imposed uniformly and, therefore, was unconstitutional. Under Subchapter K, no local option is involved. The fee would be imposed uniformly throughout the state in every county and municipality. Whether the service would be used and the payment of the fee thereby tendered is a matter for each person convicted of an offense and each court to decide. Therefore, I conclude that Subchapter K is constitutional.

My second question is:

Is the time payment service available only to those convicted of an offense after the effective date of the bill or is it available to all persons charged with a crime but whose offense has not yet been adjudicated prior to the effective date of the bill?

Essentially, I am asking whether Subchapter K of Chapter 51 of the Government Code applies retrospectively. I submit that it does not.

Section 16 of Article I of the Texas Constitution prohibits the Legislature from enacting “retroactive laws”:

No bill of attainder, ex post facto law, *retroactive law*, or any law impairing the obligation of contracts, shall be made.

TEX. CONST. art. I, § 16 (emphasis added). A “retroactive law” is one that takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or adopts a new disability with respect to transactions or considerations already past. *McCain v. Yost*, 282 S.W.2d 898 (Tex. 1956); *Inman v. Railroad Commission*, 478 S.W.2d 124 (Tex. Civ. App. - 1972, writ ref’d n.r.e.); *International Sec. Life Ins. Co. v. Maas*, 458 S.W.2d 484 (Tex. Civ. App. - 1970, writ ref’d n.r.e.).³ Generally, retroactive laws are regarded with disfavor. *Deacon v. City of Euless*, 405 S.W.2d 59 (Tex. 1966); *Hutchings v. Slemmons*, 174 S.W.2d 487 (Tex. 1943). Courts may apply

³ Although, Section 16 of Article I forbids retroactive application of legislative enactments, statutes relating to procedure or to remedies do not fall within the prohibition. *Holt v. Wheeler*, 301 S.W.2d 678 (Tex. Civ. App. - 1957, err. dismissed); *Phil H. Pierce Co. v. Watkins*, 263 S.W. 905 (Tex. 1924); *Harrison v. Cox*, 524 S.W.2d 387 (Tex. Civ. App. 1975, writ ref’d n.r.e.).

statutes retrospectively only if it appears by fair implication from the language used that it was the legislature's intention to make the statute applicable to both past and future transactions. *Ex parte Abell*, 613 S.W.2d 255 (Tex. 1981); *Coastal Indust. Water Auth. v. Trinity Portland Cement Div., Gen. Portland Cement Co.*, 563 S.W.2d 916 (Tex. 1978); *State v. Humble Oil & Ref. Co.*, 169 S.W.2d 707 (Tex. 1943).

If the legislature had intended the bill to reach criminal offenses committed prior to the bill's date, it could have included language in the bill so providing.⁴ However, in this instance, there is no language in the bill that supports the argument that the legislature intended that it apply retrospectively. Consequently, I submit that the bill applies only to those offenses that are committed after the effective date of the bill.

My third question asks:

Did the Legislature intend to include county constitutional courts within the ambit of Section 51.921 of the Government Code?

⁴ For example, SECTION 83 of a 1995 bill relating to the prosecution, punishment, and creation of certain criminal offenses makes one section retrospective in application and provides:

Notwithstanding Section 6.04, Chapter 900, Acts of the 73rd Legislature, 1993, the Board of Pardons and Paroles may grant parole to any person convicted of a capital felony only on a two-thirds vote of the entire membership of the board, as required by Subsection (g), Section 7, Article 42.18, Code of Criminal Procedure, regardless of whether the person was sentenced for an offense committed before, on, or after September 1, 1993.

Acts 1995, 74th Leg., ch. 318, § 83.

By way of contrast, SECTION 3 of a 1995 bill relating to the use of certain court services and facilities after a change of venue has been ordered in a criminal proceeding specifically applies only prospectively and provides:

The change in law made by this Act applies to a criminal case in which the indictment or information is presented to the court on or after the effective date of this Act. A criminal case in which an indictment or information is presented before the effective date of this Act is covered by the law in effect which the indictment or information was presented, and the former law is continued in effect for that purpose.

Acts 1995, 74th Leg., ch. 651, § 3. Likewise, Section 2 of the 1995 bill relating to the punishment for certain assaults committed by one member of a family against another family member provides:

(a) The change in law made by this Act applies only to an offense committed on or after the effective date of this Act. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

(b) An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose.

Acts 1995, 74th Leg., ch. 659, § 2.

I conclude that it did.

Subsection (a) of Section 51.921 of the Government Code provides the following:

(a) In addition to other fees authorized or required by law, the clerk of *each district court, statutory county court, county court at law, and justice court, and municipal court* shall collect a fee of \$25 from a person who:

- (1) has been convicted of a felony or misdemeanor;
- (2) has been ordered to pay a fine, court costs, or restitution by the court; and
- (3) seeks to pay the fine, court costs, or restitution over a period of time rather than immediately.

GOV'T CODE, § 51.921 (emphasis added).

Subsection (a) includes the phrase “statutory county court” as well as “county court at law”. Obviously, the phrases have the same meaning; read literally, one phrase is superfluous. At issue is whether the Legislature intended the phrase “statutory county court” to read “constitutional county court”.

Generally, a court will not re-draft a statute, by inserting or striking out words or clauses, in order to construe it, especially in an instance in which the intention of the Legislature is clearly expressed in plain and unambiguous language. *Mauzy v. Legislative Redistricting Board*, 471 S.W.2d 570 (Tex. 1971); *Empire Gas & Fuel Co. v. State*, 47 S.W.2d 265 (Tex. 1932). After all, it is not the proper function of the judiciary to correct legislative errors, mistakes, or omissions. *Seay v. Hall*, 667 S.W.2d 19 (Tex. 1984) (*superseded by statute*); *Creager v. Hidalgo County Water Improv. Dist.*, 283 S.W. 151 (Tex. Comm'n App. - 1926, judgment adopted). However, courts have added a word or phrase to a particular part or section of a statute in order to carry out the manifest intent of the Legislature, as disclosed by the entire enactment. *Mauzy v. Legislative Redistricting Board*, *supra*; *Sweeny Hospital Dist. v. Carr*, 378 S.W.2d 40 (Tex. 1964). Under these circumstances, a word or phrase may be supplied, *State v. Shoppers' World*, 389 S.W.2d 107 (Tex. 1964); *Mauzy v. Legislative Redistricting Board*, *supra*, or one term may be substituted for another. *Davis v. State*, 225 S.W. 532 (Tex. Crim. App. 1920); *McCouston v. Fenet*, 144 S.W. 1155 (Tex. Civ. App. - 1912), *rev'd on other grounds*, 147 S.W. 867 (Tex. 1913). For two reasons, I conclude that a court, if presented with this issue, would hold that the Legislature intended the phrase “statutory county court” to read “constitutional county court.”

First, the manifest intention of the Legislature in enacting Senate Bill No. 1417 requires such a reading. Subsection (a) of Section 51.921 reaches the clerks of “*each district court, statutory county court, county court at law, justice court, and municipal court*”. It is clear from even a cursory reading of the statute that the Legislature intended to reach all courts empowered by the Texas Constitution or statutes to impose criminal sanctions on defendants. It would make no sense to construe the section not to include constitutional county courts. And courts are required to construe statutes in ways so as not to impute to the Legislature the intent to do an unreasonable or nonsensical thing. *State Highway Dep't. v. Gorham*, 162 S.W.2d 934 (Tex. 1942); *Anderson v.*

Penix, 161 S.W.2d 455 (Tex. 1942).

Second, if a statute admits of more than one construction, courts are required to construe the statute in a way so as to render the statute constitutional. *State v. Shoppers' World, supra; County of Cameron v. Wilson*, 326 S.W.2d 162 (Tex. 1959). If a court were to construe the phrase "statutory county courts" as it is written, then persons who are convicted of an offense in constitutional county courts would not be permitted to avail themselves of the time payment service. Section 51.921 would then be subject to constitutional challenge on the basis that it violates the equal protection clauses of the Texas and United States Constitutions. *See* TEX. CONST. art. I, § 3; U.S. CONST., Amend. XIV. Consequently, I submit that a court, if presented with this question, would construe the phrase "statutory county courts" of subsection (a) of Section 51.921 to mean "constitutional county courts".

My fourth question asks:

In order that a person be eligible for the time payment service under Section 51.921 of the Government Code, the person must be "convicted of a felony or misdemeanor". Does someone who is offered deferred adjudication fall within the ambit of the term "convicted"?

For two reasons, I conclude that he does not.

First, typically when the Legislature intends that a fee imposed on a person who is "convicted" also be imposed on someone who receives deferred adjudication, the Legislature clearly so provides. *See, e.g.,* CODE OF CRIMINAL PROCEDURE, arts. 102.004, 102.005, 102.013, 102.014, 102.015, 102.016, 102.017, 102.018, 102.051, and 102.081 (wherein the Legislature specifically includes persons receiving deferred adjudication within the ambit of "convicted"). *But see* CODE OF CRIMINAL PROCEDURE, arts. 102.002, 102.007, 102.0071, 102.008, 102.009, and 102.011 (wherein Legislature is silent regarding whether persons receiving deferred adjudication are "convicted"). Because the Legislature failed to include language indicating that persons "convicted" for purposes of Section 51.921 of the Government Code includes persons receiving deferred adjudication, I conclude that such persons do not fall within the ambit of Subchapter K of Chapter 51 of the Government Code.

Second, and more important, a person receiving deferred adjudication would never avail himself of the time payment service, because deferred adjudication, by definition, requires that any fine imposed by the court will be deferred until certain court-imposed conditions are met by the defendant to the satisfaction of the court. Only if the defendant fails to satisfy the conditions imposed when he agrees to accept deferred adjudication will the fine that would have been imposed but for deferred adjudication finally be imposed. And only then, after the person is "convicted" would he need to avail himself of the time payment service.

My fifth question asks:

Section 51.921 of the Government Code permits persons convicted of felonies and misdemeanors to pay their fines, court costs, and or restitution “over a period of time” rather than “immediately”. Does “immediately” mean when sentence is pronounced by the court?

I conclude that the answer to my fifth question is “Yes”.

As I noted at the beginning of this letter requesting an official opinion from your office, provisions in the Code of Criminal Procedure permit a court to direct a defendant to pay his fine, costs of court, and fees upon the pronouncement of sentence, at some future specified date, or at stated intervals. Several states permit such installment payments. *See e.g.*, Cal. Penal Code, § 1205 (1970) (misdemeanors); Del. Code Ann., Tit. 11, § 4332(c) (Supp. 1968); Md. Ann. Code, art. 39, § 4(a)(2) (Supp. 1970); Miss. Code Ann. § 99-37-3(2)(b) (Supp. 1981); Mass. Gen. Laws Ann., ch. 279, § 1A (1959); N.Y. Code Crim. Proc. § 470-d(1)(b) (Supp. 1970); Or. Rev. Stat. § 137.106(2)(b); Pa. Stat. Ann., Tit. 19, § 953 (1964); Wash. Rev. Code, § 9.92.070. The procedure has been widely endorsed as effective not only to collect the fine, but also to save the expense of maintaining a prisoner and avoid the necessity of supporting his family under the state welfare program while he is confined.⁵ I submit that, if a defendant is required to tender payment of fines and court costs “immediately”, he is required to tender payment at the time that a judge pronounces sentence. If the court directs that the defendant tender payment for the total amount of the fines, costs of court, and fees at a later specified date or at later specified intervals, then the court is not directing the defendant to tender payment “immediately”.

My sixth question asks:

In the event that a court consolidates several charges against one defendant into one case, does Section 51.921 permit the imposition of a fee for each charge consolidated or for each case?

⁵ *See e.g.*, Final Report of the National Commission on Reform of Federal Criminal Laws, Proposed New Federal Criminal Code § 3302(2) (1971); American Bar Association, Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures, § 2.7(b), pp. 119-122 (Approved Draft 1968); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 18 (1967); ALI, Model Penal Code § 302.1(1) (Proposed Official Draft 1962). *See also* Comment, “Equal Protection and the Use of Fines as Penalties for Criminal Offenses”, U. ILL. L. F. 460 (1966); Note, “The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines”, 64 MICH. L. REV. 938 (1966); Note, “Imprisonment for Nonpayment of Fines and Costs: A New Look at the Law and the Constitution”, 22 VAND. L. REV. 611 (1969); Note, “Fines and Fining — An Evaluation”, 101 U. PA. L. REV. 1013 (1953); J. Sellin, *Recent Penal Legislation in Sweden* 14 (1947); Cordes, “Fines and Their Enforcement”, 2 J. Crim. Sci. 46 (1950); S. Rubin, H. Weihofen, G. Edwards & S. Rosenzweig, *The Law of Criminal Correction*, p. 253 and n. 154 (1963); E. Sutherland & D. Cressey, *Principles of Criminology*, p. 276 (6th ed. 1960).

I submit that Section 51.921 authorizes the imposition of one fee for each order to pay a fine, court costs, or restitution; if several charges are consolidated into one case and then one fine, with court costs, fees, and restitution, is imposed, then one fee may be imposed to provide for the administration of the service.

Perhaps an example will illustrate my concern. If a person receives citations for driving with a broken headlight, for failing to carry proof of insurance, and for failure to carry his driver's license, that person has committed three offenses and, theoretically, could be subject to three separate fines. However, in an instance in which a court consolidates the offenses and imposes just one fine, I submit that only one fee may be imposed to pay for the administration of the time payment service offered by Section 51.921, because that section authorizes the payment service when a defendant has been ordered to pay "a fine, courts costs, or restitution". (Emphasis added.) Of course, if the court so directs, the defendant can be required to pay the total amount of fines, costs of court, fees, and restitution at a later specified date. Under such a sentence, no fee would be imposed, because the defendant has not been directed to tender payment at specified intervals over a stated period of time.

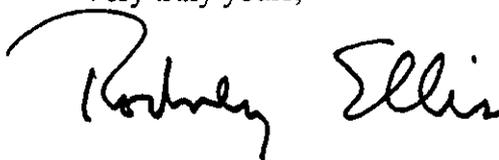
My final question asks:

Is the service fee imposed by Section 51.921 of the Government Code a "cost of court"?

Subsection (b) of Section 51.921 of the Government Code provides, *inter alia*, that "[c]ourt fees under this section shall be collected in the same manner as other fees, fines, or costs in the case." My concern centers on priority of payment in the event that you conclude that the fee imposed by Section 51.921 is considered a "cost of court." See, e.g., Attorney General Opinions DM-407 (1996); M-1076 (1972). I submit that the fee imposed is not a "cost of court". Rather, it is a fee charged to defray the costs of a service that the court is providing, and, as a consequence, any priority regarding the proper disposition of fees collected does not control the disposition of this fee. Assuming that a defendant seeks to pay his fine and court costs over a period of time rather than immediately, the payment of the time service fee is the first step before any payments for fines and court costs may be tendered by the defendant. The time service fee is anterior to and separate from typical "costs of court" imposed in a case.

Because Senate Bill No. 1417 becomes effective at the first of September and because court clerks throughout the state are currently preparing to implement the new provisions in anticipation of the bill's effective date, I would greatly appreciate an expedited response to this request for an official opinion.

Very truly yours,



Rodney Ellis
Chair
Committee on Jurisprudence
Texas State Senate