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OF WEST VIRGINIA

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SUPREME COURT OF APPEALS

No. 25890 -- State of West Virginia, ex rel. Steven Canterbury, Executive Director of West Virginia Regional Jail and Correctional Facility Authority v. Carl "Worthy" Paul, Magistrate for Ohio County

Starcher, C.J., concurring in part and dissenting in part:

The majority opinion in this case is one of the greatest thefts of constitutional power that I have ever seen. The majority opinion trampled on both the concept of separation of powers and the concept of double jeopardy -- and did it so quietly that no one is likely to even notice.

While I concur with the majority that the now-defunct 1996 version of *W.Va. Code*, 50-3-2 *could* be read to require a magistrate to collect the $55.00 in court costs in every criminal case where a defendant is adjudged guilty, whether by plea or trial, I also believe that Magistrate Paul properly acted as a constitutional officer in interpreting the less-than-clear statutory language.

I must dissent because the majority opinion ignores Magistrate Paul's status as a constitutional officer. Article VIII, section 10 of the *West Virginia Constitution* establishes magistrate courts and their basic jurisdiction over criminal matters. The *Constitution* also specifies that the Legislature cannot require that magistrates be attorneys; however, Magistrate Paul is himself a licensed attorney. Because many magistrates are not attorneys, the Supreme Court Administrative Office provides magistrates with legal assistance in interpreting statutes.

As a constitutional officer, on October 22, 1997 Magistrate Paul wrote a letter to the Supreme Court Administrative Office asking for the assistance of legal counsel to clarify the meaning of *W.Va. Code*, 50-3-2 [1996]. Ten months later, the Administrative Office responded with a general advisory memorandum directed to all magistrates that was intended to clarify several legal questions raised by magistrates, including Magistrate Paul's question. This August 26, 1998 memorandum suggested that magistrates were required by *W.Va. Code*, 50-3-2 [1996] to collect the $55.00 fee whenever a defendant was found guilty, whether by plea or trial.

One fact is missing from the majority opinion: the memorandum from the Administrative Office begins with a caveat stating that magistrates are not bound to follow the advice in the memorandum. The memorandum states:

> The purpose of this memo is to address a number of recurring "miscellaneous" issues which have been brought to our attention by magistrates during conferences or via phone calls. Please be reminded that the following information is provided for purposes of education and informal reference only. The only official statements of the law are those contained in opinions and orders of the courts, and in state and federal codes.

The majority opinion avoids this paragraph of the memorandum, and reaches the conclusion that the Court is "very troubl[ed] that Magistrate Paul continued to refuse to collect these

costs even after the administration of this Court *directed* that all magistrates do so[.]"[1] I do not read the memorandum as *directing* magistrates to act in a mandatory fashion.

The Constitution posits only the "judicial power of the State" in the Supreme Court, and gives the Court the "general supervisory control over all . . . magistrate courts." *W.Va.Const.* Art. VIII, §§ 1, 3. The purpose of this constitutional clause is to provide a unified court system and to centralize administrative authority in this Court. Under the authority of this constitutional clause, this Court can also promulgate administrative rules and procedures. *See Gilman v. Choi*, 185 W.Va. 177, 406 S.E.2d 200 (1990).

But nowhere in the *Constitution* is there any authority allowing this Court, through its Administrative Office, to administratively interpret a criminal statute, and force that interpretation upon a circuit judge or magistrate. Yet that is exactly what the majority opinion in this case says can happen.

According to the majority opinion, the Supreme Court's Administrative Office can issue its administrative interpretation of a statute -- any statute -- and any magistrate or judge must follow that interpretation, even if it is totally contrary to the language of the

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[1]The majority opinion also states the Court is "very troubl[ed] that Magistrate Paul refused to collect these costs . . . after the Legislature changed the statute." The Legislature amended *W.Va. Code*, 50-3-2 on March 10, 1999 -- the exact same day that Petitioner Canterbury filed his writ of prohibition with this Court. The statute did not take effect until 90 days after passage, or June 8, 1999.

There is nothing in the record to suggest that Magistrate Paul did not collect the statutory fee after March 10, 1999. It is also unclear from the majority's opinion why Magistrate Paul was supposed to apply the 1999 version of *W.Va. Code*, 50-3-2, 3 months before it took effect.

statute, the constitution, or any case law. And, of course, as an interpretation by an "officer of government," the courts must give deference to that interpretation. This Court has stated:

> Where a statute is of doubtful meaning, the contemporaneous construction placed thereon by the officers of government charged with its execution is entitled to great weight, and will not be disregarded or overthrown unless it is clear that such construction is erroneous.

Syllabus Point 7, *Evans v. Hutchinson*, 158 W.Va. 359, 214 S.E.2d 453 (1975).

So if anyone can find a statute "of doubtful meaning," you need only seek the advice of the Administrative Office for a construction of the statute -- and no magistrate, or presumably judge, anywhere in this State, may disregard that construction. Period. Granted, there's no constitutional authority for this position, but that's what the majority's opinion says.

The majority opinion also tramples on fundamental principles of double jeopardy. The *West Virginia Constitution* protects a defendant against being "twice put in jeopardy of life or liberty for the same offence." *W.Va.Const.* Art. III, § 5. The defendants who plead guilty before Magistrate Paul paid their fines, did their time, and are more than likely going about their business without a clue of what the majority did in this case. Remember -- neither the defendants nor the Ohio County Prosecuting Attorney are parties to this action.

The defendants are about to get a surprise when they are dragged back into court to be again "put in jeopardy of life or liberty for the same offense," by requiring that they pay up an additional $55.00. The majority cannot seriously contend that it is not a

punishment to require a criminal defendant to pay a "fee" upon conviction. A punishment is "any pain, penalty, suffering or confinement inflicted upon a person . . . for some crime or offense." *Black's Law Dictionary*. At a minimum, under *W.Va. Code*, 17B-3-3a [1992] the Department of Motor Vehicles "shall suspend the license of any resident . . . [when such person defaults] on the payment of costs . . . which were imposed on the person by the magistrate court . . ." Hence, the defendants will be required to pay the $55.00 fee to the magistrate court or face some restraint -- such as the loss of driving privileges.

The majority sloughs this problem off, finding that under *W.Va. Code*, 59-2-11 [1923], "[t]he laws of costs shall not be interpreted as penal laws[.]" The majority concludes that because the $55.00 in costs are not penal, double jeopardy is not implicated. In other words, even though these defendants face a penalty such as losing their license, the penalty isn't penal because there is a statute saying it isn't a penalty.

I believe that *W.Va. Code*, 59-2-11 has absolutely no application to this case. The statute applies entirely to courts acting within their equity jurisdiction, not acting within their criminal jurisdiction. Under the common law, costs could not be recovered from an opponent in an equitable proceeding. *W.Va. Code*, 59-2-11 was enacted to allow a prevailing party to recover costs. This position is supported by the language of the statute, which specifically links the word "costs" to the "discretion of a court of equity over the subject of costs."[2]

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[2]*W.Va. Code*, 59-2-11 [1923] states:

(continued...)

Finally, if it looks like a duck and sounds like a duck, it's a duck. The fees in a penal case are part of the penalty. The majority opinion requires Magistrate Paul to "administratively" collect a penalty that is the result of a conviction, or face additional penalties -- and do so after the defendant has already concluded his or her sentence. This flatly violates the double jeopardy protections of the *West Virginia Constitution.*

If Magistrate Paul truly failed to collect $89,882.00 in fees at $55.00 per defendant, it means that the Ohio County prosecutor had in the range of 1,634 opportunities to appeal Magistrate Paul's interpretation of the statute, or 1,634 opportunities to seek a writ of prohibition from the Circuit Court of Ohio County or this Court. The prosecutor obviously never thought Magistrate Paul's actions were problematic.

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[2](...continued)

> The laws of costs shall not be interpreted as penal laws; nor shall anything in this article take away or abridge the discretion of a court of equity over the subject of costs, except that in every case in an appellate court costs shall be recovered in such court by the party substantially prevailing.

I can find no case where this Court has ever applied *W.Va. Code,* 59-2-11 in the context of a criminal case. An identical, predecessor statute from the Mother State of Virginia has similarly never been applied in the criminal arena. *Va. Code,* 17.1-600 [1998] states that :

> The laws of costs shall not be interpreted as penal laws; nor shall anything in this chapter take away or abridge the discretion of a court of equity over the subject of costs . . .

Virginia's statute has repeatedly been interpreted to apply only to equity cases. The cases from Virginia indicate that "these sections, as thus codified, have remained unchanged" since their enactment in 1849, and that they "apply to suits in chancery" -- and by inference, it is obvious that the Virginia statute was never intended to apply to criminal cases. *City of Richmond v. County of Henrico,* 185 Va. 859, ___, 41 S.E.2d 35, 38 (Va. 1947).

It is therefore totally unfair and unreasonable for this Court to require Magistrate Paul, or the magistrate court clerk, to go back and wrest fees from people who paid their fines and did their time over 19 months ago. I would suggest that in addition to being unconstitutional, it is impractical, if not impossible, to collect fees from persons who may live anywhere (because the fee is to be collected from every defendant, not just those living in Ohio County, or even in West Virginia), and who have no idea about the existence of this case.

In sum, I agree that *W.Va. Code*, 50-3-2 [1996] could be interpreted to mean a defendant must pay the fee upon conviction, whether by plea or trial. However, I cannot agree with the reasoning employed by the majority opinion to require that the fees be retrospectively collected, in violation of the *Constitution*. I therefore concur in part and dissent in part to the majority's opinion.