

FILED

October 14, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., concurring:

Although I fully join in the majority opinion, I concur to explain an aspect of the case which was not specifically addressed in the majority opinion. The majority opinion agreed with the State's confession of error regarding repayment of attorney's fees and expert witness fee resulting from Mr. Cummings' defense. I examine this aspect of the case because I do not want the majority opinion to be taken out of context.

The restitution order in this case provides, in pertinent part, that "[t]he Court further Orders that the defendant's attorney fees and the professional fees of the defendant's expert witness . . . be taxed as costs to the defendant." Mr. Cummings objected to this provision of the restitution order because his "attorney's fees and . . . expert's Accountant's fees are not restitution for a victim's losses and should not be classified as restitution, and should not have appeared in the restitution order." Mr. Cummings also asserted that under the restitution order Womancare, Inc., as the victim of Mr. Cummings' crimes, will collect the costs of the attorney's and expert witness fees, even though Womancare, Inc. did not pay

those sums. After my own review of the record,¹ I agree that the restitution order in this case is sufficiently ambiguous, in light of the State's failure to raise any argument to the contrary, that the restitution order could be read to require Mr. Cummings to pay his attorney's fees and defense costs to Womancare, Inc. I also agree that there is no basis--statutory or judicially created--supporting such a result. However, I wish to emphasize that this conclusion is dictated by the ambiguity of the restitution order and that it *should not* be taken as a recognition that a defendant may never be required to pay the cost of his appointed counsel and defense fees *to the State*.

Here, Mr. Cummings was appointed counsel by the trial court under the provisions of the West Virginia Public Defender Services Act (hereinafter "PDSA") because he was indigent. W. Va. Code § 29-21-16 (1990) (2001 Repl. Vol.) The statutory basis authorizing a circuit court to order a defendant to repay to the State the fees of his or her appointed lawyer as well as the expenses of the defense is found in the PDSA's repayment provision which provides, in pertinent part:

In the circumstances and manner set forth below, circuit judges may order repayment to the state, through the office of the clerk of the circuit court having jurisdiction over the proceedings, of the costs of representation provided under this article:

¹See *State v. Allah Jamaal W.*, 209 W. Va. 1, 4 n.6, 543 S.E.2d 282, 285 n.6 (2002) (quoting Syl. Pt. 8, *State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991)) ("This Court is not obligated to accept the State's confession of error in a criminal case. We will do so when, after a proper analysis, we believe error occurred.")

In every case in which services are provided to an indigent person and an adverse judgment has been rendered against such person, the court may require that person, and in juvenile cases, may require the juvenile's parents or custodian, to pay as costs the compensation of appointed counsel, the expenses of the defense and such other fees and costs as authorized by statute.

W. Va. Code § 29-21-16(g)(1) (1990) (2001 Repl. Vol.). Thus, in appropriate circumstances as spelled out in the PDSA, a defendant may be required to repay *the State* the fees his or her appointed attorney has received as a result of the representation, as well as expenses of the defense. Indeed, this Court has followed W. Va. Code § 29-21-16(g) and affirmed a circuit court's imposition upon a convicted defendant the obligation to repay the cost of appointed counsel. *See State v. Murrell*, 201 W. Va. 648, 651, 499 S.E.2d 870, 873 (1997) (voiding repayment order only to the extent that it required repayment while defendant was incarcerated in violation of subsection (g)(3), but requiring a repayment hearing once he was released from prison).²

I also note that any future confusion between restitution under the West Virginia Victim Protection Act, W. Va. Code § 61-11A-4 & 5 (1984) (2000 Repl. Vol.) and repayment of appointed attorney's fees and costs of defense under the PDSA, W. Va. Code § 29-21-16(g), can be eliminated by entry of separate restitution and repayment orders and/or by specifically detailing that the repayment of a court appointed attorney's fees and defense

²The Public Defender Services Act's reimbursement provision also lists a number of rights the convicted defendant enjoys under the act's repayment provisions. W. Va. Code § 29-21-16(g)(2)-(4).

expenses is made under the authority of W. Va. Code § 29-21-16(g).

With the foregoing understanding, I concur in the majority opinion. I am authorized to state that Justice Maynard joins me in this concurring opinion.