

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff Below, Respondent**

vs) **No. 11-0133** (Harrison County 10-F-96-3)

Jack Conner, Defendant Below, Petitioner

FILED

February 14, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the Circuit Court of Harrison County, wherein the petitioner's motion to modify the payment of his court fees following his jury trial was denied. This appeal of the order denying the petitioner's motion to modify the payment of his court costs was timely perfected by counsel, with Petitioner Conner's appendix accompanying the petition. The State responds confessing error.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds prejudicial error. A memorandum decision is appropriate under Rule 21 of the Revised Rules.

As more fully explained herein, the Court is of the opinion that the circuit court erred in denying the petitioner's motion to modify the payment of his court fees. Because the Court agrees with the State's confession of error, the decision of the Court is set forth in a memorandum decision rather than an opinion. Pursuant to Syllabus Point 1 of *Armstead v. Dale*, 170 W.Va. 319, 294 S.E.2d 122 (1982) and the considerations provided in *Cottrell v. Public Finance Corp.*, 163 W.Va. 310, 256 S.e.2d 575 (1979), court fees and costs imposed upon a criminal defendant should not cause an undue hardship to the defendant and his or her family. Accordingly, this case satisfies the "limited circumstance" requirement of Rule 21(d) and it is appropriate for the Court to issue a memorandum decision rather than an opinion.

Petitioner was convicted of petit larceny in 2010. At sentencing, the circuit court ordered the petitioner to pay restitution to one of the victims in the amounts of twenty-five dollars independently and seventy-five dollars jointly and severally with his co-defendants, pay restitution to another victim in the amounts of twenty-six dollars independently and seventy-eight dollars jointly and severally with his co-defendants, pay the costs of his proceedings within 180 days from the sentencing date and when the State of West Virginia has a judgment against the petitioner for the amount of these costs, pay a fee of twenty

dollars per month to defray the costs of probation supervision, and pay a fee of five dollars per month to the West Virginia Community Corrections Fund.

The court costs amounted to \$2,651.50, which included \$2,384.50 in jury fees. It also came to light that another county was already providing paid probation services for the petitioner. The petitioner filed a motion to modify or waive the fees associated with his probation in Harrison County and the amount of court costs assessed in this case, upon which the circuit court conducted a hearing and entered an order granting the petitioner's motion, in part. The State took no position at the hearing. The circuit court granted the petitioner's motion pertaining to his future fees associated with his probation in Harrison County, but denied his request to waive payment of his court costs. The circuit court made findings that with the petitioner's income from the Social Security Administration of \$674.00 per month,¹ food stamps of seventy-one dollar per month, and monthly expenses of \$646.00, he would have in excess of ninety-nine dollars² of discretionary income per month. It concluded that "[a] probation condition . . . is constitutionally acceptable if it is tuned to the probationer's ability to pay without undue hardship and is subject to modification if his indigency persists or reoccurs." Syl. Pt. 1, *Armstead v. Dale*, 170 W.Va. 319, 294 S.E.2d 122, (1982) (citing W.Va. § Code 62-12-9)). Further, the circuit court held that under West Virginia Code § 52-1-17, it was mandated to assess a jury cost and under *State ex rel. Holcomb v. Nibert*, 212 W.Va. 499, 575 S.E.2d 109 (2002), it is generally not permitted to dismiss fines and costs against a defendant once it assesses them against him or her. Accordingly, the circuit court denied the petitioner's motion pertaining to waiving his court costs and granted the petitioner's subsequent motion to extend the time to pay these costs until April 7, 2014, i.e., thirty-eight months.

On appeal, the petitioner argues that the circuit court's reliance on West Virginia Code § 52-1-17 and *State ex rel. Holcomb v. Nibert* is misplaced and that it erred in refusing to modify the petitioner's motion pertaining to waiver of court costs. The petitioner argues that the circuit court ignored the directives of West Virginia Code § 62-12-9(b) that provide that a court may impose court costs subject to modification at any time. In further support, the petitioner argues that the case of *Armstead* must be considered along with the case of *Cottrell*

¹ The circuit court mistyped the petitioner's monthly income as \$647.00. A review of the petitioner's pre-sentence investigation report contained in the appendix indicates that his monthly income is \$674.00. The petitioner's brief and State's brief in this appeal also state the petitioner's income as \$674.00.

² Because the circuit court mistyped the petitioner's monthly income, the amount for his discretionary income was also incorrectly calculated in the circuit court order as seventy dollars per month.

v. Public Finance Corp., 163 W.Va. 310, 256 S.E.2d 575 (1979), in which this Court outlined issues and expenses in considering whether an “undue hardship” would be placed upon a defendant and his or her family. Considerations for undue hardship include whether there is enough money to meet ordinary and necessary expenses with enough left over for unforeseen expenses and some discretionary spending. *Cottrell v. Public Finance Corp.*, 163 W.Va. 310, 316-17, 256 S.E.2d 575, 580 (1979). The fees and costs should not make it impossible for the defendant to provide for his or her family, the deduction of fees and costs should not restrict the defendant to all but the barest of necessities, and payment of fees and costs should not place any person in the position of having no money for discretionary spending. *Id.* The petitioner notes that at sentencing, the circuit court had yet to know of the amount of court costs. Given that \$2,651.50 spread over thirty-eight months would amount to an additional monthly deduction of approximately sixty-nine dollars and seventy-eight cents from his ninety-nine dollars of discretionary income, the petitioner would be left with only twenty-nine dollars and twenty-two cents in discretionary income. Because this amount would be inadequate to meet any unforeseen expenses, the petitioner argues that the circuit court erred in denying his motion to waive these court costs.

In response, the State confesses error. “[T]he Attorney General has the power and discretion to confess reversible error in criminal appeals before this Court.” *Manchin v. Browning*, 170 W.Va. 779, 789, 296 S.E.2d 909, 919 (1982). In the instant matter, the State agrees that requiring the petitioner to pay court costs in the amount of \$2,651.50 would place an undue hardship on the petitioner. The State likewise argues Syllabus Point 1 of *Armstead* and the guidelines provided in *Cottrell* in support of its position. Consequently, the State concludes that this Court should direct that the circuit court grant the petitioner’s request for the waiver of his court costs.

For the foregoing reasons, we reverse the circuit court decision entered on December 17, 2010, and remand for further proceedings consistent with this memorandum decision.

Reversed and Remanded.

ISSUED: February 14, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh