



RQ - 0086 - JC

KERR COUNTY ATTORNEY

DAVID M. MOTLEY

COUNTY COURTHOUSE, SUITE BA-103 · 700 MAIN STREET · KERRVILLE, TEXAS 78028

RECEIVED

JUL 20 1999

July 15, 1999

RECEIVED

JUL 20 1999

Opinion Committee

The Honorable John Cornyn
Texas Attorney General
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711

ATTORNEY GENERAL'S OFFICE

FILE # ML-40908-99 Elizabeth Robinson
I.D. # 40908 827

Re: What is the proper disposition of additional fines assessed and collected pursuant to a probation modification, as between the Kerr County Adult Community Supervision and Corrections Department and the Kerr County Clerk?

Dear General Cornyn,

A question has arisen in Kerr County as to the proper disposition of additional fines assessed and collected pursuant to a modification of a judgment which has placed a defendant on community supervision (hereinafter "probation"). Both the Kerr County Clerk and the Kerr County Adult Community Supervision and Corrections Department make reasonable arguments that the money should be deposited with them. As we are unable to find any authority that would clarify how this issue should be resolved, we are asking your office for assistance in reaching a resolution of the issue. The attached brief will set out the factual background and the arguments made by the two departments in more detail.

We respectfully request that you forward this request to your opinions committee for review and reply, and that such reply be provided within 60 days, as provided by Tex. Govt. Code §552.306. Thank you in advance for your kind attention to this matter.

Best regards,

David M. Motley
Kerr County Attorney

E:\WPDOCS\LETTERS\CORNYN2.LTR

BRIEF

ISSUE:

What is the proper disposition of additional fines assessed and collected pursuant to a probation modification, as between the Kerr County Adult Community Supervision and Corrections Department and the Kerr County Clerk?

ARGUMENT AND AUTHORITIES:

A question has arisen in Kerr County as to the proper disposition of fines assessed and collected pursuant to a modification of a judgment which has placed a defendant on community supervision (hereinafter "probation"). In order to clarify the nature of our inquiry, the following example will be used:

D is charged with a Class B misdemeanor, for which the possible range of punishment is up to 180 days in jail, and up to a \$2,000.00 fine. D pleads guilty, and is assessed the entire 180 days in jail, fully probated, and is assessed the entire \$2,000.00 fine, of which \$1,500.00 is to be probated.

After several months, D's probation officer receives information that D has committed a new offense, which constitutes a violation of D's probation. D is arrested on a Motion to Revoke or Modify Probation, and a hearing is held on the motion. At the hearing, the judge decides that the D's probation should be modified rather than revoked, and as punishment for the violation, reinstates \$1,000.00 of the \$1,500.00 fine that was originally probated.

D, duly chastened, and attempting now to comply fully with his terms and conditions of probation, arrives at the courthouse, with \$1,000.00 in hand (having previously paid the original \$500.00 fine assessed at the time of sentencing). Unfortunately, the probation department tells D that he must give them the money, and the Kerr County Clerk tells him that the money must be deposited with them. D is at a loss.

Both the Kerr County Clerk and the Kerr County Adult Community Supervision and Corrections Department make reasonable arguments that the money should be deposited with them.

The Kerr County Clerk urges that the \$1,000.00 should be deposited with that office, given that the county clerk is the entity authorized to collect fines and fees assessed in the Kerr County Court at Law. *See* TEX. CODE CRIM. PROC. art. 103.003.

The Kerr County Adult Community Supervision and Corrections Department, however, takes the position that while fines initially assessed on a probation judgment should be deposited with the county clerk, pursuant to art. 103.003, additional fines assessed must be deposited with the probation department, pursuant to TEX. CODE CRIM. PROC. art. 42.12 §22(d). The Department urges that when the judge reinstates some of the fine which was originally suspended in a probation judgment, he is imposing an "additional fine," which by virtue of the provisions of TEX. CODE CRIM. PROC. art. 42.12, §22(a)(3), must be deposited in a fund for use by the probation department (*See* TEX. GOVT. CODE Chpt. 76).

The contrary argument is, of course, that the judge, in the circumstances described above, has not imposed any "additional" fine, but has rather simply reinstated some of the previously suspended fine originally assessed. There being no additional fine, TEX. CODE CRIM. PROC. art. 42.12, §22(a)(3) and (d) do not even apply. In support of this analysis, one can look to the definition of the word "additional" (definition: "existing by way of addition; added." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, 1984) which denotes an amount added on top of an original amount. In the foregoing example, \$2,000.00 was the original fine. The fact that \$1,500.00 of this sum was originally suspended, and then \$1,000.00 was reinstated, does not change the character of the original \$2,000.00 as the original amount of fine.

If, however, we are to consider that the reimposition of previously suspended fine is not "additional fine" within the meaning of TEX. CODE CRIM. PROC. art. 42.12, §22(a)(3), we are left with the problem of ascertaining what the legislature meant by "additional fine."

If the original probation judgment had assessed only \$1,000.00 in fine, could the judge go back and add another \$1,000.00 fine to D's judgment pursuant to this article? If the answer to this question is yes, such an interpretation would arguably violate D's rights to rely on his original plea bargain, which contemplated a maximum fine assessment of \$1,000.00. It is well-established that the sentencing court has the continuing power to modify the terms and conditions of probation during D's probationary period, but it is less clear that this power includes the right to modify essential terms of the underlying judgment. Arguably, if D's decision to plead guilty was made in reliance on the State's promise that he would under no circumstances be required to pay more than \$1,000.00 as a fine, any modification which increases the fine to more than this amount could have implications for the voluntariness of his plea.

In short, it is entirely unclear what the legislature intended when it enacted TEX. CODE CRIM. PROC. art. 42.12, §22(a)(3).

WHEREFORE PREMISES CONSIDERED, Kerr County respectfully requests that the Honorable Attorney General address this issue and render an opinion interpreting TEX. CODE CRIM. PROC. art. 42.12, §22(a)(3) in a manner that will allow Kerr County to properly allocate monies collected pursuant to said statutory provision.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ilse D. Bailey". The signature is stylized and cursive.

ILSE D. BAILEY
Assistant County Attorney
Kerr County Courthouse
700 Main Street
Suite BA-103
Kerrville, Texas 78028
State Bar No. 01523800
Phone: (830) 792-2220
Fax: (830) 792-2228
e-mail: ilseb@kerrca.org