Costs, pretrial intervention program

Number: INFORMAL

Date: March 30, 2007

The Honorable Sandra Taylor
Chief Judge, Sixteenth Judicial Circuit of Florida
502 Whitehead Street
Key West, Florida 33040

Dear Judge Taylor:

According to your letter, the State Attorney of the Sixteenth Judicial Circuit, has recently suggested that costs of prosecution may be assessed against a criminal defendant who has not been convicted of a crime by reason of his diversion into a pretrial intervention program when such costs are not explicitly authorized by statute.
You have asked for this office's comment on this proposition.

Article I, section 19, Florida Constitution, provides that "[n]o person charged with crime shall be compelled to pay costs before a judgment of conviction has become final."[1] In implementing this constitutional provision, the Florida Criminal Code[2] states in part:

"[C]ourt costs shall be assessed and collected in each instance a defendant pleads nolo contendere to, or is convicted of, or adjudicated delinquent for, a felony, a misdemeanor, or a criminal traffic offense under state law, or a violation of any municipal or county ordinance if the violation constitutes a misdemeanor under state law."

Pursuant to section 939.02, Florida Statutes, "[a]ll costs accruing before a committing trial court judge shall be taxed against the defendant on conviction or estreat of recognizance." Further, "[a] defendant in a criminal prosecution who is acquitted or discharged is not liable for any costs or fees of the court or any ministerial office, or for any charge of subsistence while detained in custody."[3]

Chapter 948, Florida Statutes, providing generally for probation and community control, describes the pretrial intervention program. Pursuant to section 948.08, Florida Statutes, the Department of Corrections supervises the pretrial intervention program for those persons charged with a crime "before or after any information has been filed or an indictment has been returned in the circuit court."[4] The program provides counseling, education, supervision, and medical and psychological treatment as these services are appropriate and available.[5]

Participation in the pretrial intervention program is limited to certain offenders and requires the consent of "the victim, the state attorney, and the judge" as well as the approval of the program administrator. In order to participate in the program, the defendant, after consulting with his or her attorney, must knowingly waive the right to a speedy trial for the period of his or her diversion.[6] Pursuant to the provisions of the statute, the criminal charges against an offender are continued without final disposition for a specified period.[7]

Resumption of pending criminal proceedings shall be undertaken at any time if the program administrator or state attorney finds that the offender is not fulfilling his or her obligations under this plan or if the public interest so requires. The court may not appoint the public defender to represent an indigent offender released to the pretrial intervention program unless the offender's release is revoked and the offender is subject to imprisonment if convicted.[8]

At the conclusion of the intervention period, the administrator shall recommend 1) that the case revert to normal channels for prosecution if the offender's participation in the program has not been satisfactory; 2) that the offender needs further supervision; or 3) that charges be dismissed without prejudice if prosecution is not deemed necessary.[9] It is the responsibility of the state attorney to make the final determination as to whether prosecution should continue.[10] Based on a review of the operation of this program, diversion to the pretrial intervention program established by section 948.08, Florida Statutes, does not appear to constitute a conviction, but suspends prosecution until completion of the program and a determination to continue prosecution or dismiss the charges.

Florida case law recognizes that pretrial diversion represents a conditional determination by the prosecutor not to prosecute and is a discretionary function of that office. In *Cleveland v. State* ,[11] the Florida Supreme Court considered the nature of the pretrial intervention program contained in section 944.025, Florida Statutes (now section 948.08, Florida Statutes), in considering whether a trial court could review the refusal of a state attorney to consent to a qualified offender's admission to a pretrial intervention program. In determining that each party in the action has total discretion to refuse to consent to participation in pretrial diversion, the Court stated that pretrial diversion is essentially a conditional decision not to prosecute similar to a *nolle prosequi* situation.

As a pretrial decision, it does not divest the state attorney of the right to institute proceedings if the conditions established for participation and completion are not met.[12] The Court stated that "[t]he pretrial intervention program is merely an alternative to prosecution and should remain in the prosecutor's discretion."[13]

In *State v. Board*,[14] the Fifth District Court of Appeal had before it a case in which the defendant's pretrial intervention agreement had been revoked. The defendant had filed a motion seeking specific performance of the agreement and the trial court had granted that motion and ordered the state to reinstate the defendant's pretrial intervention status. In quashing the trial court's order, the appellate court cited *Cleveland, supra*, and noted that

"pretrial intervention is an alternative to prosecution and thus the decision to admit a defendant to pretrial intervention must remain in the prosecutor's discretion. The supreme court in *Cleveland* specifically noted that the state attorney has discretion to reinstate prosecution, which is consistent with the view that the pretrial diversion decision is a prosecutorial function. In addition, the court pointed out that the legislature did not provide for any type of judicial review when creating the pretrial intervention program."[15]

The court noted that the pretrial intervention program places no limitations on the state's discretion to reinstate prosecution after pretrial intervention has been approved.

In *State v. Gullett*,[16] the court compared the provisions of the general pretrial intervention program set forth in section 948.08(2) with the drug pretrial intervention program described in section 948.08(6), Florida Statutes:

"The statute proscribing the requirements for the general pretrial intervention program explicitly conditions eligibility on the state's consent and provides that the state must ultimately determine whether to dismiss the charges or continue prosecution. *See* § 948.08(2) and (5). In contrast, section 948.08(6) concerning the drug pretrial intervention program does not make the state's consent a prerequisite to eligibility and mandates that *the trial court* determine whether to order further treatment, dismiss the charges, or continue prosecution."[17] (emphasis in original)

Thus, it appears that a decision to admit an offender to a pretrial intervention program pursuant to section 948.08(2), Florida Statutes, is prosecutorial in nature and not subject to review by the executive or judicial branch.

In light of the nature of this program and the fact that the State Attorney for the Sixteenth Judicial Circuit has not asked for this office's comments on the program in that circuit, I cannot say that the State Attorney does not have discretion to include such terms in a pretrial intervention program as he may determine are appropriate.

This informal advisory opinion is provided by the Division of Opinions in an effort to be of assistance to you. The conclusions herein are those of the writer and do not represent a formal opinion of the Attorney General.

Sincerely,

Gerry Hammond
Assistant Attorney General

GH/t
---

[1] *See Martin v. State*, 600 So. 2d 20 (Fla. 2nd DCA 1992), in which the court held that a defendant, found guilty but with adjudication withheld by the court, could not be assessed court costs because there had been no final judgment of conviction.

[2] Chapter 775, Fla. Stat.; *and see* s. 775.011(1), Fla. Stat., providing a short title.

[3] Section 939.06(1), Fla. Stat.

[4] Section 948.08(1), Fla. Stat.

[5] *Id.*

[6] Section 948.08(2), Fla. Stat.

[7] Section 948.08(3), Fla. Stat.

[8] Section 948.08(4), Fla. Stat.

[9] Section 948.08(5), Fla. Stat.

[10] *Id.*

[11] 417 So. 2d 653 (Fla. 1982).

[12] *See* s. 948.08(4) and (5), Fla. Stat.

[13] 417 So. 2d at 654. *And see Willacy v. State,* 640 So. 2d 1079, 1082 (Fla. 1994) (pretrial intervention is "merely an alternative to prosecution"); and *S.K. v. State*, 881 So. 2d 1209 (Fla. 5th DCA 2004) (pretrial intervention is an alternative to prosecution). See generally, 22A C.J.S. *Criminal Law* s. 425 "Effect of diversion and deferral."

[14] 565 So. 2d 880 (Fla. 1990).

[15] *See also State v. Green,* 527 So. 2d 941, 942 (Fla. 2d DCA 1988) (decisions concerning pretrial diversion programs are purely prosecutorial and are not subject to judicial review).

[16] 652 So. 2d 1265 (Fla. 4th DCA 1995).

[17] *Id.* at 1266.