

IN THE SUPREME COURT OF OHIO

CASE NO. 2007-1863

CITY OF MIDDLEBURG HEIGHTS, STATE OF OHIO
Plaintiff-Appellant,

-vs-

VINCENT QUINONES
Defendant-Appellee.

ON APPEAL FROM CUYAHOGA COUNTY
COURT OF APPEALS CASE NO. 88242

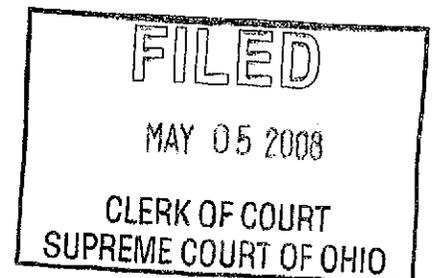
MERIT BRIEF OF
DEFENDANT-APPELLEE, VINCENT QUINONES

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ARGUMENT

PROPOSITION OF LAW NO. 1: THE STATUTORY LANGUAGE OF R.C. §1901.26 ALLOWS LOCAL COURT COSTS IMPOSED UNDER THAT STATUTE TO BE IMPOSED ON A “PER CHARGE” RATHER THAN “PER CASE” BASIS

A. OVERVIEW.

The appeal presently before this Court involves a challenge to the manner in which municipal court costs are to be charged in Cuyahoga County. As far as the Merit Brief of Plaintiff-Appellant reveals, not a single court anywhere has disagreed with the interpretation of R.C. §1901.26 which was applied by the unanimous Court of Appeals in the proceedings below. Nor is there any reason to believe that any other tribunals have had any difficulty following the statute in this manner, other than the Berea Municipal Court.¹

Because the Clerk of the Berea Municipal Court had been imposing costs on a “per offense” instead of “per case” basis, Defendant-Appellee, Vincent Quinones, was assessed costs in excess of \$1,200.00, even though the fines imposed of \$565.00 were less than half that amount.² This patently disproportionate and excessive charge was produced by multiplying most of the individual costs due by the number of offenses cited, effectively quadrupling the amount which would have otherwise been owed. While his ensuing appeal focused primarily upon the merits of his conviction for the traffic offenses, Defendant included a specific Assignment of Error arguing that the costs should have been calculated strictly on a “per case” instead of “per offense” basis.

¹ Plaintiff-Appellant, City of Middleburg Heights, is contained within the jurisdiction of the Berea Municipal Court.

² These figures were so startling that they were reported in a Cleveland Plain Dealer article on August 1, 2007 following the release of the Court of Appeals Opinion.

Incredibly, no Brief was ever filed by Plaintiff in the Court of Appeals proceedings. Defendant's Assignments of Error all remained unopposed, including the final one pertaining to court costs. In a unanimous opinion, the Eighth District nevertheless proceeded to carefully analyze the merits of the appeal. With regard to court costs, the Court concluded that the plain and ordinary language set forth in R.C. §1901.26, §2947.23, and several other statutes only permitted costs to be charged by municipal courts on a "per case" basis. In other words, multiplying the figure by the number of violations included in the case was impermissible. *Middleburg Hts. v. Quinones*, 8th Dist. No. 88242, 2007-Ohio-3643, 2007 W.L. 2051994 ¶ 81-97.

It was only in an ensuing Motion for Reconsideration dated July 27, 2007 that Plaintiff asserted, for the first time in the proceedings, that multiplying costs on a "per offense" basis is indeed legitimate under the statutes Defendant had been citing. The appellate court was berated for supposedly failing to consider the Berea Municipal Court's unusual approach to court costs notwithstanding the unexplained absence of any briefing on the part of the municipality. The Motion for Reconsideration was denied by the Court in an Entry dated August 29, 2007.

The initial decision not to challenge Defendant's appeal in the Eighth District was sound. Multiplying court costs on a "per offense" basis was plainly improper and violative of the terms of the applicable statutes. As the noticeable absence of any contrary authorities attests, the Eighth District's approach to imposing costs strictly on a "per case" basis is sound and should be left intact.

B. NEW ARGUMENTS ON APPEAL.

Before turning to the merits of this Proposition of Law, it should be remembered that Ohio law has long disfavored the interjection of new arguments on appeal. *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elec.* (1992), 65 Ohio St.3d 175, 177, 602 N.E.2d 622, 624;

Scott v. East Cleveland (8th Dist. 1984), 16 Ohio App.3d 429, 431, 476 N.E.2d 710, 713-714. It has been cogently explained that:

The forum of a reviewing court is not a place where for the first time a point which has not been deemed of essence at the trial and which has not been seriously pressed to the attention of the court is to be brought to the front for the mere technical purpose of securing a reversal of a judgment which the court finds otherwise correct. 2 Ohio Jurisprudence Sec. 150, pages 298-299. [emphasis added].

Fawick Airflex Co., Inc. v. United Elec. Radio & Mach. Workers of Am., Local 735 (8th Dist. 1950), 56 Ohio Law Abs. 65, 90 N.E.2d 610, 616. With no Brief having been filed in the Eighth District, all of the positions which Plaintiff is now asserting were raised only after the appellate court had already ruled.³

Plaintiff will undoubtedly maintain in its Reply that the “per offense” construction of the applicable statutes were timely raised in the Motion for Reconsideration that was submitted following the release of the appellate court’s opinion. Adopting such a precedent would have profound consequences for the orderly administration of appellate justice. Notwithstanding the dictates of App.R. 16(B) and 18(A), no appellee would ever have to bother with preparing a brief in an appeal. In the event the trial court was not affirmed, a motion for reconsideration could always be submitted under Plaintiff’s view. Should such an application prove to be unsuccessful, further review could then be sought in the Supreme Court. This Court should take this opportunity to confirm that any litigant who opts against filing an appellate court brief forfeits the right to challenge the decision which is ultimately rendered.

C. THE “PER CASE” RESTRICTION.

³ As was tacitly recognized by the Eighth District, Defendant certainly raised his own issues on appeal in a timely and appropriate fashion. The astounding cost bill was first levied against him shortly after final judgment was rendered in the municipal court proceedings. He immediately appealed that decision to the Eighth District and dedicated his final Assignment of Error to the inappropriateness of the Clerk’s practices.

In the event that this Court nevertheless elects to entertain Plaintiff's belated efforts to justify the Clerk's cost multiplying practices, the sensible decision of the Court of Appeals should nevertheless be affirmed. In Ohio, the authority to tax costs is strictly a matter of legislative control. *Centennial Ins. Co. v. Liberty Mut. Ins. Co.* (1982), 69 Ohio St.2d 50, 51, 430 N.E.2d 925, 926; *State v. Fitzpatrick* (8th Dist. 1991), 76 Ohio App.3d 149, 153, 601 N.E.2d 160, 162. Only those costs that have been explicitly approved by the General Assembly can be charged. *State v. Christy* (December 20, 2004), 3rd Dist. No. 16-04-04, 2004-Ohio-6963, 2004 W.L. 2940888 ¶ 21-22; *State v. Watkins* (1st Dist. 1994), 96 Ohio App.3d 195, 198-199, 644 N.E.2d 1049, 1051. In accordance with this authority the legislature has directed in R.C. §2947.23(A)(1), that:

In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs. ***
[emphasis added]

The phrase "costs of prosecution" refers to all "court costs". *Christy*, 2004-Ohio-6963 ¶ 22.

The costs imposed pursuant to R.C. §2947.23 are mandatory and must be included in the sentencing entry. *State v. Threatt*, 108 Ohio St.3d 277, 281, 2006-Ohio-905, 843 N.E.2d 164, 167 ¶ 17; *State v. Clevenger*, 114 Ohio St.3d 258, 259, 2007-Ohio-4006, 871 N.E.2d 589, 591 ¶ 3. In interpreting the phrase "criminal cases" which appears in that statute, the panel turned to two (2) persuasive Attorney General Opinions. *Quinones*, 2007-Ohio-3643 ¶ 89-97. In both instances, cost collection statutes were at issue which allowed certain funds to be collected on behalf of the State for each "case". *Ohio Attny. Op. Nos. 91-022 & 91-039*. After thoroughly analyzing numerous other statutes employing this term, the Attorney General concluded that multiplying the costs on the basis of each "offense" within the "case" was impermissible. *Id.* The Eighth District concluded in the proceedings below that:

It is our view that the Attorney General's reasoning with respect to assessing additional costs is instructive in the case at bar. When applying the plain language of the R.C. 2947.23, "[i]n all criminal cases[.]" it is our view that court costs should be assessed for each case and not for each offense. As such, [Defendant's] fifth assignment of error is well taken.

Quinones, 2007-Ohio-3643 ¶ 97.

Appended to Plaintiff's Brief is a copy of Attorney General Opinion No. 2007-030 which has been described as "a well-researched and reasoned opinion". *Merit Brief of Plaintiff-Appellant*, p. 7. That analysis fully supports the result reached by the Eighth District. The Attorney General had been asked by Cuyahoga County Prosecuting Attorney William D. Mason to consider whether the court costs authorized by R.C. §2949.093 could be charged on a "per offense" instead of a "per case" basis. *Attny. Gen. Op. 2007-030*, p. 1. Significantly, the Attorney General reaffirmed the validity of Opinion No. 91-022, which had formed the basis of the Eight District's decision in the case *sub judice*. *Id.*, pp. 6-7.

More importantly, the Attorney General recognized in the more recent Opinion the numerous authorities holding that a municipal court may impose costs only to the degree specifically authorized by statute. *Attny. Gen. Op. 2007-030*, pp. 2-3. In determining whether R.C. §2949.093 allowed such charges to be imposed on a per offense basis, it was significant that the enactment explicitly referred to "moving violations". *Id.*, p. 4. The phrase "moving violation" had been specifically defined in R.C. §2949.093 to refer, as one would expect, to the discrete offense itself. *Id.*, fn. 4. This led the Attorney General to conclude that imposing costs for each "moving violation" in a municipal court case under that particular statute had been duly authorized by the General Assembly. *Id.*, pp. 6-8. Citing aforementioned Opinion No. 91-022, the State's legal counsel was careful to note, however, that:

*** [W]hen the General Assembly intends for a court cost to be

assessed only once per case, rather than per violation in a case, it has clearly conveyed that intention. For example, R.C. 2743.70 and R.C. 2949.091 require a court, in which any person is convicted of or pleads guilty to any offense other than a traffic offense that is not a moving violation, to impose a specific sum of money “as costs in the case.” 1991 Op. Att’y Gen. No. 91-022 examined the language of R.C. 2743.70(A)(1) and R.C. 2949.091(A)(1) and concluded that the court costs imposed by these two statutes are to be charged per case, rather than per offense. [footnote omitted; emphasis added]

Id., pp. 6-7.

Turning now to the general cost collection statutes that were the subject of *Quinones*, the General Assembly repeatedly utilizes the phrases “cases”, “action”, and “proceeding” in R.C. §2947.23(A)(1) and §1901.26(A)(1)(a). For example, it has provided that:

The legislative authority of a municipal corporation may by ordinance establish a schedule of fees to be taxed as costs in any civil, criminal, or traffic action or proceeding in a municipal court for the performance by officers or other employees of the municipal corporation’s police department or marshal’s office or any of the services specified in sections 311.17 and 509.15 of the Revised Code. [emphasis added]

R.C. §1901.26(A)(1)(b)(i). According to Ohio Atty. Gen. Op. No. 2007-030, the statutes’ explicit references to “cases”, “action”, and “proceeding” instead of a “violation” means that costs are only to be imposed only once per case. This was also the precise holding of *Quinones*, 2007-Ohio-3643. Rather obviously, the legislature did not include any language in the pertinent portions of R.C. §2947.23 and §1901.26 allowing separate costs to be charged for each alleged “offense” or “violation”. The terms “action” and “proceeding” are synonymous with the term “case”, which the Attorney General has now found on multiple occasions to signify that per offense calculation methods are improper. *Ohio Attn’y Op. No. 91-022, 91-039 & 07-030*. The Eighth District plainly did not err.

Plaintiff has rebuked the lower court because there “is no mention of R.C. §1901.26(B) in the *Quinones* decision.” *Merit Brief of Plaintiff-Appellant*, p. 4. Parties who fail to file Briefs are hardly in a position to criticize courts which supposedly neglect to identify the correct statutes. Moreover, the Eighth District specifically cited subsection (A) of that statute and there is no reason to believe that the panel was somehow oblivious to subsection (B). *Quinones*, 2007-Ohio-3643 ¶ 88.

Even if Plaintiff had presented an argument in a Brief in favor of application of subsection (B), that portion of the statute had no conceivable relevance here. Subsection (B) only authorizes certain “special projects” costs and directs that:

The municipal court may determine that, for the efficient operation of the court, additional funds are necessary to acquire and pay for special projects of the court including, but not limited to, the acquisition of additional facilities or the rehabilitation of existing facilities, the acquisition of equipment, the hiring and training of staff, community service programs, mediation or dispute resolution services, the employment of magistrates, the training and education of judges, acting judges, and magistrates, and other related services. Upon that determination, the court by rule may charge a fee, in addition to all other court costs, on the filing of each criminal cause, civil action or proceeding, or judgment by confession. *** [emphasis added]

R.C. §1901.26(B)(1). Special project costs are permitted under *R.C. §1901.26(B)(1)* only when adopted “by rule.” *City of Defiance v. Petrovish* (3rd Dist. 1988), 61 Ohio App.3d 32, 34, 572 N.E.2d 139, 140. Since official court rules are widely published and available to all, the legislature’s intent was plainly to ensure that all such extraneous charges are openly and publicly disclosed. The subsection of the statute which Plaintiff is touting also requires that such “special project costs” must be assessed “on the filing” of the action and not just at the conclusion of the criminal proceedings. *R.C. §1901.26(B)(1)*. By including this specific language in the legislation, the General Assembly plainly expected that special project costs would be itemized

on each defendant's docket at the outset of the proceeding so that he/she would be mindful at all times of the true costs that would be assessed upon a plea or conviction. There is nothing in the record before this Court confirming that Defendant's staggering cost bill was based entirely upon "special project costs" which had been adopted in advance by rule and assessed on the filing of the criminal cause.⁴ *Id.* Plaintiff's criticisms of the Court of Appeals for failing to affirm the costs on the basis of this portion of the statute are thus unfounded.

The fact that a proper record was never developed in the proceedings below has not been lost upon Plaintiff. The municipality had filed a Motion to Supplement the Record in this Court on March 4, 2008 which contains numerous documents (all of which were both unauthenticated and extraneous to the record) purporting to show precisely how the costs were calculated against Defendant. By all appearances, none of these exhibits had been available for the appellate court's consideration. This Court rejected the Motion on March 27, 2008.

Since Plaintiff cannot show that the costs which were assessed against Defendant were for "special projects" adopted in compliance with R.C. §1901.26(B)(1), the definition of "criminal cause" which appears in subsection (B)(2) is immaterial in this instance. The broader cost collection statutes, such as R.C. §2947.23, repeatedly used the term "case" which both the Eighth District and the Ohio Attorney General have recognized is distinguishable from an

⁴ The Rules of the Berea Municipal Court were amended effective January 30, 1995. The only language that the undersigned counsel has been able to identify pertaining to special project costs provided, prior to its repeal, that:

Rule No. 23 – Computerized Legal Research Fee – Repealed
May 1, 1995

Computer funds pursuant to §1901.26(A)(2) have been created by Court order and are not properly a part of Court Rules.

Id., p. 9. This directive is actually the antithesis of what the General Assembly expects. As clearly and unmistakably set forth in R.C. §1901.26(B)(1), the special project fees are "properly" disclosed in the rule and not by a court order that is available only to those who know to request it. *Petrovish*, 61 Ohio App.3d at 34.

“offense” or “violation”.

It is certainly significant that in the seventeen (17) year period which has followed the issuance of the Ohio Attorney General Opinions in 1991, the legislature has made no discernable attempt to modify the applicable enactments so as to permit cost multiplying on a “per offense” basis. In *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004-Ohio-5717, 816 N.E.2d 1061, this Court examined the Attorney General’s policy with regard to how refunds would be handled under Ohio’s Lemon Law. Writing for the majority, Justice Lundberg Stratton reasoned that:

We presume that the General Assembly was aware of the policy that remained in place for years. Nevertheless, the General Assembly took no steps to legislatively overrule the long-standing policy when amending the Lemon Law in 1999. Such legislative inaction in the face of long-standing interpretation suggests legislative intent to retain the existing law. Furthermore, “courts, when interpreting statutes, must give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which the legislature has delegated the responsibility of implementing the legislative command.” *State ex rel. McLean v. Indus. Comm.* (1986), 25 Ohio St.3d 90, 92, 25 OBR 141, 495 N.E.2d 370; *Jones Metal Products Co. v. Walker* (1972), 29 Ohio St.2d 173, 181, 58 O.O.2d 393, 281 N.E.2d 1. Therefore, under these circumstances, where the legislature has granted the authority to the Attorney General to adopt rules governing the informal dispute-resolution mechanisms, we defer to the Attorney General’s policy on mileage setoffs. [emphasis added; footnote omitted].

Id., at 468. See also *State of Ohio v. Cichon* (1980), 61 Ohio St.2d 181, 399 N.E.2d 1259, 1261 (“In our view, such legislative inaction in the face of long standing judicial interpretations of that section evidences legislative intent to retain existing law.”); *State ex rel. Myers v. Chiaramonte* (1976), 46 Ohio St.2d 230, 348 N.E.2d 323, 329 (recognizing that inaction by the General Assembly is a factor to consider in determining legislative intent).

D. POSITION OF THE BEREA MUNICIPAL COURT.

A quick response is warranted to the *Amicus Curiae* Brief which was submitted by the Clerk of the Berea Municipal Court in support of Plaintiff's demand for a reversal of the Eighth District's decision. As previously noted, this is the same Clerk which had been responsible for inflating Defendant's cost bill on a "per offense" basis. In attempting to justify this troubling practice, the Clerk has explained that:

In the instant matter, as [Defendant] was charged with four separate offenses, there were in fact four separate cases for reporting purposes against him in the Berea Municipal Court. Because four separate cases for reporting purposes was required, the Clerk was required to open and maintain four separate case jackets. This additional maintenance required of the Clerk results, or should result, in additional costs to the traffic offender once the traffic offender is convicted on each charge.

Merit Brief of Raymond J. Wohl, Clerk of Court of the Berea Municipal Court, and the City of Berea as Amicus Curiae filed March 14, 2008, pp. 7-8.

The notion that municipal court defendants should be expected to pay four (4) times the amount actually authorized by the General Assembly because of the additional expenses purportedly incurred by having to "open and maintain four separate case jackets" is patently absurd. If the Clerk truly believes that his office cannot function unless court costs are multiplied in this manner, his efforts should be directed to the legislature. This Court recognized not long ago that the General Assembly is the "ultimate arbiter of public policy." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 472, 2007-Ohio-6948, 880 N.E.2d 420, 428 ¶ 21, quoting *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163 ¶ 21. The statutes which govern Defendant's cost bill simply do not authorize the charges to be imposed for each "offense" or "violation", and this Court should refuse to engraft these terms through judicial fiat. "In matters of construction, it is the duty of this court to give

effect to the words used, not to delete words used or to insert words not used.” *Cleveland Elec. Illum. Co. v. Cleveland* (1988), 37 Ohio St.3d 50, 524 N.E.2d 441, paragraph three of the syllabus (citation omitted).

The Amicus Brief is devoted primarily to a lengthy discussion of the Rules of Superintendence, which stop well short of advocating the view that the statutory term “case” actually means “offense”. The Superintendence Rules merely “provide basic guidelines for facilities of municipal and county courts” and thus cannot be viewed as an attempt to wrest control from the legislature. See *e.g.*, *State ex rel. Taylor v. City of Delaware* (1982), 2 Ohio St. 3d 17, 18, 442 N.E.2d 452, 454; *State v. Johnson* (November 24, 2003), 12th Dist. No. CA2002-07-016, 2003 W.L. 22764425 ¶ 12. Moreover, these administrative regulations are not intended to function as rules of practice and procedure. *State v. Mahoney* (1st Dist. 1986), 34 Ohio App.3d 114, 116-117, 517 N.E.2d 957, 960. The Rules of Superintendence have been devised to compliment statutory enactments, not supersede them. *State v. Smith* (8th Dist. 1976), 47 Ohio App.2d 317, 328, 354 N.E.2d 699, 707. No justification therefore exists for overturning the Eighth District’s common sense interpretation of R.C. §2947.23(A)(1) and the other statutes directing that costs are to be assessed with respect to “cases” and not artificially multiplied by the number of violations.

PROPOSITION OF LAW NO. 2: COURT COSTS MAY BE CHARGED ON A “PER CHARGE” BASIS IF AUTHORIZED BY STATUTE.

Plaintiff’s second Proposition of Law simply contains a statement which no one has ever denied is correct in these proceedings. The Eighth District had specifically recognized that court cost collection is purely a matter of legislative control. *Quinones*, 2007-Ohio-3643 ¶ 85, quoting *State ex rel. Commrs. of Franklin Cty. Commrs. v. Guilbert* (1907), 77 Ohio St. 333, 338-339, 83

N.E. 80. As previously discussed in connection with the first Proposition of Law, the problem for Plaintiff is that no statutes have been identified which would have allowed Defendant's cost bill to be quadrupled on the grounds that four (4) offenses were charged against him. Unless and until the General Assembly is persuaded that such practices are indeed necessary, costs should be taxed once for each "case" or "action" consistent with R.C. §1901.26(A)(1)(a) and §2947.23(A) (1).

CONCLUSION

For the foregoing reasons, this Court should reject Plaintiff's Propositions of Law and affirm the unanimous decision of the Eighth Judicial District Court of Appeals in all respects.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Stipulation was served via regular U.S. mail

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