

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Court of Appeals No. 330876

-vs-

Circuit Court No. 13-1315 FH

SHAWN CAMERON

Defendant-Appellant

WASHTENAW COUNTY PROSECUTOR

Attorney for Plaintiff-Appellee

MARILENA DAVID-MARTIN (P73175)

Attorney for Defendant-Appellant

APPLICATION FOR LEAVE TO APPEAL

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Shawn Cameron

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Statement of Questions Presented

- I. Does the assessment of court costs against Mr. Cameron pursuant to amended MCL 769.1k constitute an unconstitutional tax and should it be vacated?**

Trial Court answers, "No".

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

**Judgment Appealed From Relief Sought
and Concise Allegations of Error**

Mr. Cameron appeals the April 4, 2017 published decision of the Court of Appeals in *People v Cameron*, ___ Mich App ___ (2017), attached as Appendix C. This decision was the first published decision to hold (1) that the court costs imposed under MCL 769.1k were a tax, not a fee, and (2) that the tax was constitutional.

The Court of Appeals correctly held that the court cost assessment of MCL 769.1k is a tax and not a fee. The tax is a revenue raising measure and does not seek to regulate behavior. The tax is not proportionate to the service because the public is the beneficiary of the tax, not the individual payee. Lastly, a defendant assessed a tax under MCL 769.1k is required to pay the tax.

The Court of Appeals incorrectly held, however, that the tax was constitutional as it did not violate of the Distinct-Statement Clause or the Separation of Powers Clause of the Michigan Constitution. Contrary to the Court of Appeals' conclusions, the tax is obscure, is not clearly stated in the statute, and the Legislature has not delegated its taxing authority with sufficient guidance or limitations.

This Court should grant leave or issue a memorandum opinion, and hold that the tax is unconstitutional as applied to Mr. Cameron and all criminal defendants subject to MCL 769.1k. This is an issue of significant importance to the state as this statute applies in all criminal proceedings and can have a substantial financial

impact on many individuals in the state, as well as the administration of the courts.

MCR 7.305(B)(1)&(2).

Statement of Facts

Shawn Cameron was sentenced in January 2014 following a conviction in Washtenaw County. As part of his sentence, the trial court assessed \$1,611 in court costs. (1/9/14, 16). Mr. Cameron appealed his conviction and sentence. On July 28, 2015, the Court of Appeals affirmed Mr. Cameron's conviction, but remanded the case to the trial court for consideration of the reasonableness of the amount of court costs pursuant to *People v Cunningham*, 496 Mich 145; 852 NW2d 118 (2014) and *People v Konopka*, 309 Mich App 345; 869 NW2d 651 (2015). (7-28-15 Opinion of the Court of Appeals, Appendix A).

On remand, the trial court issued an order authorizing the imposition of \$1,611 in court costs. (Trial Court Order, Appendix B). In support of its conclusion that \$1,611 was a reasonable amount, the trial court stated:

The Washtenaw County Trial Court previously established a factual basis for the court costs it has imposed on each felony case at the time of sentencing. The costs were computed based on the ten year average annual total court budget of \$16,949,292 multiplied by the average annual percentage of all filings which are felonies, i.e., 22%, which revealed the average annual budget for the Washtenaw Trial Court's handling of all of its criminal felony cases. This amount was then divided by the average annual number of felony filings over [the] last 6 years ([§]2,217) which resulted in the average court costs of handling each felony case at \$1,681. [Appendix B].

The court, therefore, concluded that \$1,611 is reasonably related to the actual costs incurred by the trial court and reinstated the \$1,611 court cost assessment.

On appeal from that decision, Mr. Cameron challenged that finding, arguing that the imposition of the court cost constituted an unconstitutional tax and must

be vacated. In an April 4, 2017 published decision, the Court of Appeals found that the imposition of the court cost was indeed a tax, but declined to find it unconstitutional. *People v Cameron*, __ Mich App __ (2017); (4-4-17 Opinion of the Court of Appeals, Appendix C).

Mr. Cameron currently appeals the decision of the Court of Appeals.

- I. **The assessment of court costs against Mr. Cameron pursuant to amended MCL 769.1k constitutes an unconstitutional tax and must be vacated.**

Standard of Review and Issue Preservation

Mr. Cameron did not raise this challenge in the trial court. This Court applies de novo review to questions of statutory interpretation and issues of constructional law. *People v Cunningham*, 496 Mich 145, 149; 852 NW2d 118 (2014). Likewise, the Court applies de novo review to constitutional challenges to a statute. *People v Garza*, 469 Mich 431, 433; 670 NW2d 662 (2003).

Argument

The amended cost provision of MCL 769.1k is a tax because it was designed to raise revenue to support the operation of the courts and its payment is not voluntary. It is an unconstitutional tax because it is set by the courts (rather than the Legislature) and set in an undefined amount.

Following a conviction, amended MCL 769.1k(b) authorizes the imposition of the following costs:

- (i) Any fine authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty.
- (ii) Any cost authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty.
- (iii) Until 36 months after the date the amendatory act that added subsection (7) is enacted into law, any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved

in the particular case, including, but not limited to, the following:

- (A) Salaries and benefits for relevant court personnel.
- (B) Goods and services necessary for the operation of the court.
- (C) Necessary expenses for the operation and maintenance of court buildings and facilities.
- (iv) The expenses of providing legal assistance to the defendant.
- (v) Any assessment authorized by law.
- (vi) Reimbursement under section 1f of this chapter. [Internal footnotes omitted].

The levying of a tax is prohibited without first seeking the approval of the electorate under Const 1963, art 9, §31, “The Headlee Amendment.” Thus, a tax imposed without voter approval “unquestionably violates” §31, but a charge that is a user fee does not. *Bolt v City of Lansing*, 459 Mich 152, 158-159; 587 NW2d 264 (1998).

A) The assessment of court costs is a tax, not a fee for services

The Court of Appeals correctly held that MCL 769.1k(1)(b)(iii) is a tax after finding that it was revenue raising, was not proportionate to the service, and was involuntarily imposed. *People v Cameron*, __ Mich App __ (2017); (4-4-17 Opinion of the Court of Appeals, Appendix C).

While there is no bright-line test for distinguishing between a valid user fee and a tax, the appellate courts have outlined multiple factors that distinguish a fee from a tax. *Jackson Cnty v City of Jackson*, 302 Mich App 90, 99, 101; 836 NW2d

903 (2013). The three primary gauges of a fee are: “(1) a fee serves a regulatory purpose [rather than revenue raising], (2) a fee is proportionate to the necessary costs of the service, and (3) a fee is voluntary.” *Bolt*, 459 Mich at 161-162. Black’s Law Dictionary (9th ed) defines “tax” as: “A charge, usu. monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue.” The definition of “user fee” is “[a] charge assessed for the use of a particular item or facility.”

A fee and tax can be distinguished by tendency of a tax to support a general government function providing a general benefit. “Exactions which are imposed primarily for public rather than private purposes are taxes. Revenue from taxes, therefore, must inure to the benefit of all, as opposed to exactions from a few for benefits that will insure to the persons or group assessed.” *Bolt*, 459 Mich at 161, quoting *Duckesherer Farms, Inc v Direction of Department of Agriculture*, 405 Mich 1, 15-16; 273 NW2d 877 (1979). Put another way, “[t]he distinction between a fee and a tax is one that is not always observed with nicety in judicial decisions, but according to some authorities, any payment exacted by the state or its municipal subdivisions as a contribution toward the cost of maintaining governmental functions, where the special benefits derived from their performance is merged in the general benefit, is a tax.” *Bolt*, 459 Mich at 165-166.

Considering the storm water services charge before it in *Bolt*, this Court held that the charge was a tax because it served a capital investment purpose rather than a regulatory purpose. In fact, there was no evidence of regulation or service

provided regarding the water run-off (no determination of the level of pollutants, nor treatment) and nothing the property owners could choose to use or decline. The service charge was a compulsory tax and the Court found it unconstitutional. *Id.* at 169.

Applying that analysis here, the amended cost provision of MCL 769.1k is also a tax. It does not “serve a regulatory purpose rather than revenue-raising purpose,” it is not “proportionate” to the cost of the services rendered, and it is not “voluntary.” *Id.* at 161-162. Instead, the amended version of MCL 769.1k acts as a revenue-generating measure, the permissible costs are *not* tied to the actual expenses of the case, and the criminal defendant’s use of court services is not voluntary.

In analyzing each of these factors, the Court of Appeals correctly held that MCL 769.1k(1)(b)(iii) is a tax. *Cameron, supra*, at *4 (Appendix C).

1. *MCL 769.1k(1)(b)(iii) is revenue raising rather than regulatory*

The statute makes plain the revenue generating purpose. The intent is to maintain the operation of the courts by funding: “(A) Salaries and benefits for relevant court personnel. (B) Goods and services necessary for the operation of the court. (C) Necessary expense for the operation and maintenance of court buildings and facilities.” MCL 769.1k(b)(iii)(A-C). As the Legislative Analysis of this bill acknowledges, the courts already assess different amounts at sentencing for other purposes: a fine for punishment, expenses of legal assistance and costs of prosecution, and state and crime victim reimbursements. (Legislative Analysis,

Appendix D). This particular assessment will “pay a part of the court’s overhead costs” and has been estimated by some local governments to amount to “10 percent or more of their budget for any given year.” Appendix D.

Following the decision in *Cunningham, supra*, the amended MCL 769.1k was intended to prevent budget shortfalls and address the concern that “the burden to replace lost revenue may fall on local residents rather than on those using the criminal justice system.” Appendix D.

In this case, the Court of Appeals correctly held that MCL 769.1k(1)(b)(iii) is a revenue raising measure based its plain language and under the holding of *People v Konopka (On Remand)*, 309 Mich App 345, 370; 869 NW2d 651 (2015). *Cameron, supra*, at *4 (Appendix C).

2. MCL 769.1k(1)(b)(iii) is not a user fee proportionate to services rendered

Amended MCL 769.1k is not a user fee because Mr. Cameron is not a “user” of any service. As discussed *infra*, a defendant is not in court voluntarily. The “Defendant” is the person sued or accused and must deny, contest or oppose (an allegation or claim). *Black’s Law Dictionary*. Along the same lines, *Merriam-Webster* defines “defend” as “to fight or work hard in order to keep (something such as a right, interest, cause, etc.) from being taken away” - here, Mr. Cameron’s very liberty. Thus, by definition, the criminal defendant does not receive a benefit or service from the criminal courts, rather he is fighting hard to avoid the taking of his rights and liberty. A “user,” in contrast, seeks a government service and may pay a

fee for the value of the service or benefit for however much of the service they wish to use. *Bolt*, 459 Mich at 165, 167.

Further, the fee is not proportionate to the “service,” because the courts confer benefit to the public (justice, fairness, order) not the particular person on whom the costs are imposed. *Id.* at 165 (a true “fee” confers benefits on the particular person on whom it is imposed); *Dawson v Secretary of State*, 274 Mich App 723, 747; 739 NW2d 723 (2007) (regulatory costs must be “reasonable” or proportional to the costs of regulation).

Under MCL 769.1k(1)(b)(iii), courts may assess any costs “reasonably related to the actual costs incurred by the trial court” without separately calculating those costs. Because costs may be calculated “without separately calculating those costs involved in the particular case,” MCL 769.1k(1)(b)(iii), the same amount of costs may be imposed for the case that resolves quickly as the case that resolves slowly following a long trial and the same amount of costs may be imposed for any class of felony—from those simple felonies with a two year maximum to capital offenses.

A further sign that amended MCL 769.1k is not a user fee is its inapplicability to civil litigants. There is no comparable authority for imposing court operating expenses or the salaries and benefits of court personnel on the civil litigant.¹ Prosecutors are similarly never assessed court costs, even in cases of

¹ Of note, in *Foreman v Treasurer of Oakland County*, 57 Mich App 231, 234-39; 226 NW2d 67 (1974), the Court of Appeals found that probate fees whose amount were based on the value of assets involved in the estate, were fees rather than taxes – because of the administrative services provided.

wrongful convictions. If court operating expenses were truly a user fee, they would apply to all litigants who use the courts.

The Court of Appeals properly found that court costs under MCL 769.1k were proportionate to the individual, but were disproportionate to the service because the costs benefited the public as a whole, not merely the individual making payment. In finding the court costs were proportionate for the individual, the court relied on the fact that the costs are presumed reasonable given that the trial court calculated the costs using a formula recommended by the Supreme Court Administrative Office. *Cameron, supra*, at *5 (Appendix C).

The court did, however, find that the court costs were disproportionate to the service. The court held that “although the court costs at issue comport with the requirements of MCL 769.1k(1)(b)(iii) and *Konopka*, they nevertheless are not ‘proportionate to the service rendered’ because any service rendered from the trial court’s role in the prosecution of defendant benefits primarily the public, not defendant.” *Cameron, supra*, at *6 (Appendix C).

3. *MCL 769.1k is not voluntary*

The prosecution and Court of Appeals agreed that costs associated with MCL 769.1k are entirely involuntary. *Cameron, supra*, at *7 (Appendix C). Defendants are compelled to court by warrant or summons. MCR 6.102 & 6.103. The costs are assessed following a determination of guilt, at the time of sentencing. MCL 769.1k(1). The costs apply even if defendant is placed on probation, or if probation is revoked or discharged. MCL 769.1k(3). And, if defendant has resources to pay and

has not made a good-faith effort to do so, he may be imprisoned, jailed or incarcerated for non-payment. MCL 769.1k(10). Thus, the court costs are compulsory and a “tax is compulsory by law.” *Bolt*, 459 Mich at 167-168.

For these reasons, the Court of Appeals correctly held that the court costs authorized under MCL 769.1k(b)(iii) and assessed in this case are a tax. As a tax, MCL 769.1k(1)(b)(iii) is unconstitutional if it does not comply with the Distinct-Statement Clause.

B) The tax is unconstitutional because it is not distinctly stated within the statute, and because the court, rather than the legislature, sets the amount.

The Court of Appeals incorrectly concluded that the tax of MCL 769.1k complied with Michigan’s Distinct-Statement Clause, and was therefore constitutional. “The Distinct-Statement Clause is violated if a statute imposes an obscure or deceitful tax, such as when a tax is disguised as a regulatory fee.” *Cameron, supra*, at *8 quoting *Gillette Commercial Operations v Department of Treasury*, 312 Mich App 394, 347; 312 Mich App 394 (2015) (quotation marks and citations omitted).

The Legislature may create a tax, but that tax must be stated distinctly to pass constitutional muster: “Every law which imposes, continues or revives a tax shall distinctly state the tax.” Const 1963, art 4 § 32.

The intent of the distinct statement clause is “to prevent the Legislature from being deceived in regard to any measure for levying taxes, and from furnishing money that might by some indirection be used for objects not approved by the

Legislature.” *Dawson*, 274 Mich App at 747 (emphasis in the original); quoting *Westinghausen v People*, 44 Mich 265, 267; 6 NW 641 (1880), quoted in *Rockwell Spring & Axle Co v Romulus Twp*, 365 Mich 632, 637–638; 114 NW2d 166 (1962); see also *Dukesherer Farms, Inc. v Dep’t of Agriculture Director*, 73 Mich App 212, 221; 251 NW2d 278 (1977) (holding that even if a statutory assessment were construed to instead be a tax, the statute would not be unconstitutional because the language of the statute “is not obscure or deceitful”).

In support of its holding that the costs were neither obscure nor deceitful, the court found that the costs assessed under MCL 769.1k are “reasonably related” to the costs incurred by the court and are supported by a factual basis. *Cameron, supra* at *8. Even though the statute “does not set or specifically limit the amount of costs a court may impose,” the court found that the “transparency and accountability in connection with the costs imposed. . . weigh[s] against a result that is obscure or deceitful.” *Id.*

The Court of Appeals placed a heavy burden on Mr. Cameron in stating that he has failed to prove that the “court costs collected are misdirected to a use unintended by the Legislature.” *Cameron, supra* at *9, citing *Gillette, supra*. Because he did not establish intentional misdirection, the court found that Mr. Cameron did not meet his burden of proving the statute violated the Distinct-Statement Clause. But the statute on its face violates the Distinct-Statement Clause because its nature as a tax is not distinctly stated in the statute and citizens

in various counties throughout the state are not provided with any guidance as to how the tax will be assessed and in what amount.

In *Dawson*, the Court of Appeals held that the driver's responsibility fees met the requirements of the Distinct-Statement Clause. The court found the statute in question "clearly stated" the amount of assessment to be paid by drivers convicted of specific felony or misdemeanor offenses (either at \$1,000.00 or \$500.00 per year for two consecutive years). *Dawson*, 274 Mich App at 747. Because the actual fees paid were not obscure or deceitful, the statute was not unconstitutional.

In contrast, amended MCL 769.1k(1)(b)(iii) at issue here makes no reference to creating a "tax" and sets no specific amount or rate of calculation. Instead, trial courts are permitted to set costs in an undefined amount based on the individual operating and maintenance costs of each court. The statute does not make clear what proportion of the operating and maintenance costs will be borne by criminal defendants. There is no statutory limitation. This lack of definition for either amount or rate is obscure and thereby unconstitutional.

C) The tax is unconstitutional because it is not distinctly stated within the statute, and because the court, rather than the Legislature, sets the amount.

The amended cost statute also violates the separation of powers provision of Article 3, Section 2 of the Michigan Constitution of 1963 ("No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.") The amended cost statute delegates to the trial court the authority to determine the amount of the tax. Yet

the power to tax rests solely with the Legislature pursuant to Article 9, Sections 1 and 2 of the Michigan Constitution of 1963 (§ 1: “The legislature shall impose taxes sufficient with other resources to pay the expenses of the state government.” § 2: “The power of taxation shall never be surrendered, suspended or contracted away.”)

The Court of Appeals held that the Legislature may delegate its powers of taxation on other branches of government if the Legislature provides guidance and parameters to the other branch. The court refused to find a separations of power violation in holding that MCL 769.1k(b)(iii) provides adequate guidance to the circuit courts by allowing them to impose “any costs reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case,” *Cameron, supra* at *11 (internal quotes omitted).

There are some instances where the Legislature may constitutionally delegate its authority. But, to remain constitutional, such delegation should not be without limitation. Here, the delegation of authority to impose costs “reasonably related” is without appropriate limitation. As noted above, there is no limitation or guidance to determine what proportion of the operation and maintenance costs of the courts shall be borne by criminal defendants.

Criminal defendants are not a special class of citizens who must bear the expenses of government by means of a higher tax imposed on them alone. This point was made by Court of Appeals Judge Douglas Shapiro in his dissenting opinion in *Cunningham*:

Convicted felons have committed crimes and we punish them for doing so. They may be fined, incarcerated, or

placed under other forms of supervision and restrictions upon their conduct. However, they remain citizens of our state. Whatever their conduct, they do not constitute a special class upon whom the courts may assess higher taxes or fees to pay for the expense necessary to maintain the constitutionally required operations of government. [*People v Cunningham (After Remand)*, 301 Mich App 218, 225; 836 NW2d 232 (2013) (Shapiro, J. dissenting); *rev'd on other grds* 469 Mich 145; 852 NW2d 118 (2014).]

For all of the above reasons, this Court should conclude that the Legislature has authorized a tax under MCL 769.1k (eff. 10-17-14), in violation of the Michigan Constitution. This Court should hold that the tax is unconstitutional as applied to Mr. Cameron and all criminal defendants subject to MCL 769.1k.

Summary and Relief

Mr. Cameron asks this Honorable Court to either grant this application for leave to appeal, or issue a memorandum opinion and hold that the tax is unconstitutional as applied to Mr. Cameron and all criminal defendants subject to MCL 769.1k, or any appropriate peremptory relief.

Respectfully submitted,

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