

#5/Apr 2014

**STATE OF MICHIGAN
IN THE SUPREME COURT**

Appeal from the Court of Appeals
Judges: Fitzgerald, P.J. and O'Connell and Shapiro, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

FREDERICK L. CUNNINGHAM

Defendant-Appellant

Supreme Court No. 147437

Court of Appeals No. 309277

Lower Court No.11-17200 FH

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147437

**DEFENDANT-APPELLANT'S SUPPLEMENTAL AUTHORITY
AFTER ORAL ARGUMENT**

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STATEMENT OF QUESTION PRESENTED

- I. DID THE TRIAL COURT ERR IN ASSESSING \$1,000 IN COURT COSTS BASED ON THE GENERAL COSTS OF PROSECUTING INDIVIDUALS IN ALLEGAN COUNTY INCLUDING THE OVERHEAD COSTS OF OPERATING THE COURTHOUSE BECAUSE COSTS ARE LIMITED TO THE SPECIFIC EXPENSES OF THE CASE AND DO NOT INCLUDE OPERATING EXPENSES WHICH ARE PROPERLY BORNE BY THE PUBLIC AS A WHOLE AND NOT THE INDIVIDUAL DEFENDANT?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Defendant-Appellant Frederick Cunningham incorporates the Statement of Facts from the previously-filed merits brief.

I. THE TRIAL COURT ERRED IN ASSESSING \$1,000 IN COURT COSTS BASED ON THE GENERAL COSTS OF PROSECUTING INDIVIDUALS IN ALLEGAN COUNTY INCLUDING THE OVERHEAD COSTS OF OPERATING THE COURTHOUSE BECAUSE COSTS ARE LIMITED TO THE SPECIFIC EXPENSES OF THE CASE AND DO NOT INCLUDE OPERATING EXPENSES WHICH ARE PROPERLY BORNE BY THE PUBLIC AS A WHOLE AND NOT THE INDIVIDUAL DEFENDANT.

During oral argument on April 3, 2014, Justice David F. Viviano asked whether an unlimited interpretation of the language “[a]ny fine” of MCL 769.1k(1)(b)(i) would run afoul of the separation of powers doctrine. *See* Const 1963, art 3, § 2.¹

The answer is “Yes,” and the same answer applies to the language “[a]ny cost” found in MCL 769.1k(1)(b)(ii).

If the phrases “[a]ny fine” and “[a]ny cost” are interpreted to provide no limit on the assessment of fines and costs, the Legislature will have unconstitutionally delegated its sentencing authority to the trial court.

“[T]he ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). Costs are not permitted absent statutory authority. *People v Wallace*, 245 Mich 310, 313; 222 NW 698 (1929).

When the Legislature delegates authority to another branch of government, that authority does not include a provision for unlimited sentencing discretion. *Slaughter v People*, 2 Doug 334, 339-341, 1842 WL 2830 (Mich). In the *Slaughter* case, the Legislature delegated authority to the common council of the City of Detroit to make by-laws and ordinances aimed at

¹ Section 2 provides: “The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.”

preventing houses of ill repute. 2 Doug at 339. The council adopted an ordinance that did precisely that with a provision that the offense “shall be punished by fine and imprisonment, or either, at the discretion of the court.” *Id.* This Court concluded the ordinance was unconstitutional because it provided “discretion so dangerous and unusual” and so vast that it could not survive constitutional challenge:

But it is unnecessary for us to pronounce the act of 1832, unconstitutional. I do not, myself, perceive that it is so. It is the “ordinance” under which the plaintiff in error was convicted that I think unconstitutional. I go farther, and suggest a doubt, whether, under the act of 1832, the common council possessed the *power* of passing the first section of the ordinance under which the proceedings in the case were had. The power to prevent and suppress houses of ill-fame, does not necessarily invest the common council with power to pass a law which makes it a criminal offense for any person to keep such a house, and impose a penalty of fine and imprisonment, *without any limitation as to the amount of the fine, or the term of imprisonment.* To confer upon a municipal corporation powers so vast as those asserted in the ordinance, powers by which a court, proceeding in a *summary way*, may incarcerate a citizen, for a day or a year, or five years, and impose a pecuniary penalty of one dollar, or one thousand dollars, *at its discretion*, appears to me to be repugnant to all notions which we have formed of the nature of the institutions under which we live. I cannot believe for a moment, that the act of 1832 will warrant an exercise of power which might be wielded for purposes of oppression. No instance can be found in our laws where a *discretion* so broad has been conferred, even upon our higher judicial tribunals, where the proceedings are had according to the course of common law; and surely it could not have been intended to clothe an inferior jurisdiction with a *discretion so dangerous and unusual.* [2 Doug at 340-341; emphasis in original.]

If the language “[a]ny fine” and “[a]ny cost” of MCL 769.1k(1)(b) has no limits, the Legislature will have unconstitutionally delegated its sentencing authority to state trial judges to determine the nature and amount of permissible fines and costs. This was not the intent of the Legislature, and such an interpretation cannot withstand constitutional scrutiny.

Defendant-Appellant would also briefly address this Court’s recent decision in *People v Harris*, ___ Mich ___ (Docket No. 146212, 4/3/14). In *Harris*, the Court concluded the word

“any’ is commonly understood to encompass a wide range of things . . . “ Slip Op at 11. This interpretation does no harm to Appellant’s argument as MCL 769.1k(1)(b) is an authorizing statute only (authorizing fines and costs for delayed sentences and deferred judgments of guilt) and does not address the nature and amount of fines and costs. Rather, the Revised Judicature Act, MCL 600.2401 *et seq*, and other criminal statutes authorizing costs address the nature of taxable costs and the proper amount of those costs. *See United States v Ross*, 535 F2d 346, 350 (CA 6, 1986) (federal statute authorizing costs for vexatious conduct does not address nature and amount of those costs, but merely authorizes costs where there is vexatious conduct).

WHEREFORE, Defendant respectfully requests that this Court reverse the decision of the Court of Appeals, adopt the dissenting opinion of Judge Douglas Shapiro, and expressly recognize that neither MCL 769.1k(1)(b)(ii) nor MCL 769.34(6) independently authorizes costs in criminal cases.

Respectfully submitted,

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