

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN  
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751  
TELECOPIER: 296-6296

**ATTORNEY GENERAL OPINION NO. 92- 90**

Charles A. Peckham  
Atwood City Attorney  
P.O. Box 46  
Atwood, Kansas 67730

Re: Crimes and Punishments; Kansas Criminal Code;  
Classification of Crimes Penalties--Sentencing;  
Authorized Dispositions; Probation; Costs

Minors--Kansas Juvenile Offenders Code--Authorized  
Dispositions; Probation; Costs

Cities and Municipalities--Code of Procedure for  
Municipal Courts; Trials and Proceedings Incident  
Thereto--Sentence; Possible Disposition; Probation;  
Costs; Home Rule Powers

Synopsis: A district or municipal court is precluded by  
statute from assessing costs of supervision of  
public service performed by a person on probation.  
A city may provide for assessment of such costs by  
a municipal court by charter ordinance. Cited  
herein: K.S.A. 12-4112; 12-4509; K.S.A. 1991 Supp.  
21-4602; 21-4603; 21-4610; K.S.A. 21-4610a;  
22-3801; K.S.A. 1991 Supp. 28-170; 28-172; 28-172b;  
38-1663; 38-1663b.

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Dear Mr. Peckham:

You request our opinion regarding whether a court may order assessment of costs of supervision of a person performing public service while on probation. Specifically you ask:

I. may a district court, as a part of an order of probation, order assessment of the costs of supervision of an adult defendant while performing public service;

II. may a district court order assessment of such costs against a juvenile offender;

III. may a municipal court order assessment of such costs against a defendant; and

IV. may a city, by charter ordinance provide for assessment of such costs in municipal court cases.

I. Adult Defendants in District Court.

K.S.A. 1991 Supp. 21-4603(2) provides, in part:

"(2) Except as provided in subsection (3), whenever any person has been found guilty of a crime, the court may adjudge any of the following:

"(a) Commit the defendant to the custody of the secretary of corrections or, if confinement is for a term less than one year, to jail for the term provided by law;

"(b) impose the fine applicable to the offense;

"(c) release the defendant on probation subject to such conditions as the court may deem appropriate, including orders requiring full or partial restitution. In felony cases, the court may include confinement in a county jail not to exceed 60 days, which need not be served consecutively, as a condition of probation;

. . . .

"(i) impose any appropriate combination of (a), (b), (c), (d), (e), (f), (g) or (h)." (Emphasis added).

K.S.A. 1991 Supp. 21-4602(3) sets forth the definition of probation:

"(3) 'Probation' means a procedure under which a defendant, found guilty of a crime upon verdict or plea, is released by the court after imposition of sentence, without imprisonment except as provided in felony cases, subject to conditions imposed by the court and subject to the supervision of the probation service of the court. In felony cases, the court may include confinement in a county jail not to exceed 60 days, which need not be served consecutively, as a condition of probation pursuant to subsection (2)(c) of K.S.A. 21-4603 and amendments thereto. (Emphasis added).

K.S.A. 1991 Supp. 21-4610 provides for conditions of probation. Subsection (1) provides a broad grant of authority to the trial court in setting such conditions:

"(1) Except as required by subsection (4), nothing in this section shall be construed to limit the authority of the court to impose or modify any general or specific conditions of probation, suspension of sentence or assignment to a community correctional services program, except that the court shall condition any order granting probation, suspension of sentence or assignment to a community correctional services program on the defendant's obedience of the laws of the United States, the state of Kansas and any other jurisdiction to the laws of which the defendant may be subject."

Subsection (4) then provides:

"(4) In addition to any other conditions of probation, suspension of sentence or assignment to a community correctional

services program, the court shall order the defendant to comply with each of the following conditions:

"(a) Make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant's crime, in an amount and manner determined by the court and to the person specified by the court, unless the court finds compelling circumstances which would render a plan of restitution unworkable;

"(b) pay the probation or community correctional services fee pursuant to K.S.A. 21-4610a, and amendments thereto; and

"(c) reimburse the state general fund for all or a part of the expenditures by the state board of indigents' defense services to provide counsel and other defense services to the defendant. In determining the amount and method of payment of such sum, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose. A defendant who has been required to pay such sum and who is not willfully in default in the payment thereof may at any time petition the court which sentenced the defendant to waive payment of such sum or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may waive payment of all or part of the amount due or modify the method of payment."

The sections quoted above all seem to grant trial courts broad discretion in ordering conditions of probation. In practice, however, the actual application of these statutes has been fairly narrow. For instance, in State v. Wallbridge, 248 Kan. 65, 68 (1991), the court said, "We have consistently recognized that probation is a privilege granted by the

sentencing court and that court has broad power and authority in imposing conditions of probation. . . ." Despite this statement, the court went on to hold that a court could not order a defendant to serve county jail time as a condition of probation. 248 Kan. syl. ¶ 3. [Wallbridge was legislatively overruled in part by the 1991 amendments to K.S.A. 21-4602(3) and 21-4603(2).]

In a case more directly on point, State v Jones, 11 Kan.App.2d 428 (1986), the court held that K.S.A. 21-4610 did not grant a trial court authority to order, as restitution, that manpower costs incurred to capture an escaped prisoner be subject to reimbursement as a condition of parole. The court said that allowing recovery of such costs would be similar to allowing recovery of investigative costs, something clearly not contemplated by the statutes. 11 Kan.App.2d at 430. Jones stands for the proposition that "costs" are not subject to restitution and may not be recovered absent a specific statutory provision.

One of the limits set forth in K.S.A. 1991 Supp. 21-4610(4) is that the court "shall order" a probation fee, pursuant to K.S.A. 21-4610a. This section provides for specific set fees, and contains no language which would seem to permit increasing the fees to cover costs of supervision. Further, we note that recovery of court costs is provided for in K.S.A. 22-3801 and K.S.A. 1991 Supp. 28-171, 28-172a, 28-172b, none of which include a provision for the recovery of such costs.

Based on Jones and the absence of any statutory language specifically approving recovery of costs of supervision, it is our opinion that a district court may not order an adult defendant to pay costs of supervision of community service as a condition of probation. This is consistent with our previous opinion that district courts may not order a defendant to pay the room and board costs incurred by the county jailing authorities. Attorney General Opinion 84-25.

## II. Juvenile Defendants in District Court.

The statutes covering disposition of juvenile offenders are found at K.S.A. 1991 Supp. 38-1663 and 38-1663b. The Jones rationale applies equally to juvenile proceedings; such costs are not "restitution." Absent a specific statutory grant of authority for collection of such costs, we conclude the court may not order the juvenile to pay them as a condition of probation.

III. Adult Defendants in Municipal Court.

K.S.A. 12-4509 provides for dispositions in municipal cases. It is quite similar to K.S.A. 21-4603. As such, recovery of such sums is not "restitution" and Jones applies. Recovery of costs is provided for in K.S.A. 12-4112 which provides:

"No person shall be assessed costs for the administration of justice in any municipal court case, except for witness fees and mileage as set forth in K.S.A. 12-4411 and amendments thereto and for the assessment required by K.S.A. 12-4116 for the training, testing and continuing judicial education of municipal judges."

In a previous opinion we concluded that a municipal court had no authority under the code of municipal procedure to order a defendant to pay room and board costs incurred by jailing authorities. Attorney General Opinion No. 84-25.

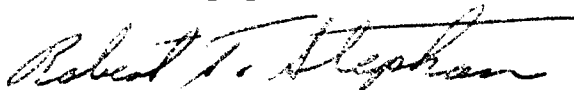
Absent a specific provision allowing recovery of such costs, we are of the opinion they are not recoverable under the code of municipal procedure.

IV. Imposition of Such Costs Pursuant to  
Charter Ordinance.

In City of Junction City v. Griffen, 227 Kan. 332(1980), the court held that the Kansas code of procedure for municipal courts was not uniformly applicable to all cities, and that therefore a city, by charter ordinance, could validly exempt itself from the provisions of said code. Based on Griffen, in a previous opinion we concluded that a city could, by charter ordinance, exempt itself from the limits on court costs contained in K.S.A. 12-4112. Attorney General Opinion No. 82-161.

We are of the opinion, based on Griffen and our previous opinion, that a city may, by charter ordinance, make recovery of costs of supervision of defendants performing public service on probation from municipal court a condition of probation.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Steve Phillips  
Assistant Attorney General