

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.34



DIVISION ONE
FILED: 07-15-2010
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0041
)
Appellee,) DEPARTMENT S
)
v.) **MEMORANDUM DECISION**
)
EVARISTO SANCHEZ FRIAS,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Mohave County

Cause No. CR 2008-0227

The Honorable Robert R. Moon, Judge

AFFIRMED IN PART; VACATED IN PART

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Robert A. Walsh, Assistant Attorney General
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender Kingman
Attorney for Appellant

T I M M E R, Chief Judge

¶1 Evaristo Sanchez Frias appeals his convictions and dispositions imposed after a jury trial. Frias argues the trial court committed fundamental error by ordering him to reimburse

Mohave County for a portion of jury fees as a term and condition of probation. The State confesses error, and for the reasons that follow, we agree.

¶2 In October 2008, a jury convicted Frias of burglary in the third degree, theft, and criminal damage. Thereafter, the trial court suspended imposition of sentence and placed Frias on intensive probation for all counts. Among other terms and conditions of probation, the court ordered Frias to "make and pay reimbursement through the Clerk of the Superior Court of Mohave County for [his] portion of jury fees . . . in the total amount of \$1,500.00." As the court explained,

The total cost to the county for jury fees was \$2,783.07. This is a constitutional right, but so is the right to counsel. And we are authorized to order defendants who get probation to reimburse the county for attorney's fees.

I'm not going to impose the entire jury cost, but I'm going to impose a contribution.

And so it's ordered that the defendant's portion of the jury fees will be \$1,500.

¶3 Frias argues the trial court "lacked any statutory authority to impose" the above fee, and even if the court had authority to do so, the order was unconstitutional as it essentially penalized him for invoking his right to a jury trial. The State concedes the trial court lacked statutory

authority to impose the fee and points out the legislature has expressly allocated jury fees as "a county charge in criminal cases." The State further contends the fee imposed was not a punitive fine and urges us to refrain from addressing Frias's constitutional argument.

¶4 We agree with the parties that the trial court lacked authority to impose the jury fee. A trial court may not order a defendant to reimburse the county for a portion of jury fees as a term and condition of probation in the absence of statutory authority. *State v. Payne*, 223 Ariz. 555, 569, ¶ 48, 225 P.3d 1131, 1145 (App. 2009) (recognizing "[t]he American legal tradition . . . does not, absent specific statutory authority, require defendants to reimburse the government for the costs of their . . . criminal prosecutions" (quoting *United States v. Bevilacqua*, 447 F.3d 124, 127 (1st Cir. 2006))). Here, the trial court relied on authority bestowed by Arizona Revised Statutes ("A.R.S.") section 11-584(B)(3)¹ (Supp. 2009),² which

¹ We cite to the current versions of the statutes discussed herein as no substantive changes have occurred.

² Section 11-584(B)(3) provides, in relevant part,

Although the services of the public defender or court appointed counsel shall be without expense to the defendant, the court may . . . [r]equire that the defendant, including a defendant who is placed on probation, repay to the county a reasonable amount to reimburse the county for the cost of the defendant's legal defense.

permits the court to order a defendant to reimburse the county for the cost of court-appointed counsel. Section 11-584(B)(3) does not expressly or impliedly grant the court authority to order the reimbursement of jury fees, however. See *Assoc. Dairy Prods. Co. v. Page*, 68 Ariz. 393, 395, 206 P.2d 1041, 1043 (1949) ("Implied powers do not exist independently of the grant of express powers and the only function of an implied power is to aid in carrying into effect a power expressly granted."). Like the parties, we are not aware of any authority empowering the court to impose jury fees on a criminal defendant. Indeed, as the State asserts, the legislature had expressly provided that jury fees are "a county charge in criminal cases." A.R.S. § 21-122 (2002);³ see also A.R.S. § 11-601(4) (Supp. 2009).⁴ We therefore hold that the trial court erred by ordering Frias to reimburse the county for a portion of the jury fees. *Payne*, 223 Ariz. at 569, ¶ 49, 225 P.3d at 1145

³ Section 21-122 provides,

While the jury is kept together, either during the progress of the trial or after retirement for deliberation, the court shall, at the expense of the county, provide the jury with suitable and sufficient food, lodging and other reasonable necessities, and the expense shall be a county charge in criminal cases. Such charges shall be assessed against the losing party in civil cases.

⁴ Section 11-601(4) provides, "County charges are . . . [s]ums required by law to be paid to grand and trial jurors and indigent witnesses in criminal actions."

