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SUPREME COURT OF ARKANSAS

No. CR-11-1137

PARTNE KIESLING-DAUGHERTY APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** June 27, 2013 MOTION FOR COSTS, FROM PULASKI COUNTY CIRCUIT COURT, SEVENTH DIVISION (NO. 60CR-10-3498) DENIED.

JIM HANNAH, Chief Justice

Partne Kiesling-Daugherty has filed a motion for award of costs on appeal. Kiesling-Daugherty was cited for driving sixteen miles over the speed limit. After being fined in the Jacksonville District Court, she appealed to the Pulaski County Circuit Court, where a jury convicted her of speeding in excess of fifteen miles per hour over the speed limit. She appealed to the Arkansas Court of Appeals, which reversed and dismissed her conviction on September 19, 2012. *See Daugherty v. State*, 2012 Ark. App. 512. Kiesling-Daugherty then filed a motion for award of costs on appeal, pursuant to Arkansas Supreme Court Rule 6-7 (2012). The State responded that sovereign immunity bars Kiesling-Daugherty from recovering costs from the State. We accepted certification of this motion from the court of appeals to determine whether, in this case, the State may be liable for costs under Rule 6-7, which provides in relevant part as follows:

> (b) Reversal. The appellant may recover (1) brief costs not to exceed $3.00 per page with total costs of the brief not to exceed $1000.00, (2) the filing fee of $150.00 and

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the technology fee of $15.00, (3) the circuit clerk's costs of preparing the record, and (4) the court reporter's cost of preparing the transcript.

The State contends that, notwithstanding the Rule, it is not liable for payment of costs in this case because it has sovereign immunity. Article 5, section 20 of the Arkansas Constitution provides that "[t]he State of Arkansas shall never be made a defendant in any of her courts." In determining whether the doctrine of sovereign immunity applies, the court must decide if a judgment for Kiesling-Daugherty would operate to control the action of the State or subject it to liability. *LandsnPulaski, LLC v. Ark. Dep't of Correction*, 372 Ark. 40, 42, 269 S.W.3d 793, 795 (2007). If so, the suit is one against the State and is barred by the doctrine of sovereign immunity, unless an exception to sovereign immunity applies. *See id.*, 269 S.W.3d at 795.

In this case, a judgment for costs against the State would subject it to liability. Therefore, Kiesling-Daugherty's claim against the State is barred by the doctrine of sovereign immunity unless an exception applies.[1] Kiesling-Daugherty contends that the doctrine of sovereign immunity does not preclude the award of costs on appeal in this case because the State is the moving party seeking specific relief. In support of her contention, she avers that the State is the party that brought the criminal complaint against her, pursued the case

[1]This court has recognized three ways in which a claim of sovereign immunity may be surmounted: (1) where the State is the moving party seeking specific relief, (2) where an act of the legislature has created a specific waiver of sovereign immunity, and (3) where the state agency is acting illegally or if a state agency officer refuses to do a purely ministerial action required by statute. *Ark. Dep't of Cmty. Correction v. City of Pine Bluff*, 2013 Ark. 36, at 4, ___ S.W.3d ___, ___. Although we have recognized that the legislature may create a specific waiver of sovereign immunity by statute, *see id.*, ___ S.W.3d at ___, we have not held that this court can create a specific waiver of sovereign immunity by court rule.

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through the district court and the circuit court, and defended its position on appeal at the court of appeals. She asserts that Rule 6-7 applies to all parties before this court and that when the State "subjects itself" to this court, then it must abide by the rules of this court.

In *Arkansas Department of Human Services v. State*, 312 Ark. 481, 850 S.W.2d 847 (1993), the Department of Human Services ("DHS"), a state agency,[2] petitioned for custody of certain juveniles, and in a subsequent action for court costs and restitution arising from the offenses these juveniles had committed, DHS claimed that the doctrine of sovereign immunity prohibited the assessment of costs and restitution against DHS. The juvenile court ruled that DHS had waived sovereign immunity by obtaining custody of each juvenile and by appearing in the delinquency proceedings. *Id.* at 488, 850 S.W.2d at 851. We reversed, explaining that

> [i]n none of the proceedings now before us was DHS the initial moving party. Its appearances subsequent to the complaints being filed against the juveniles was pursuant to DHS's obligation to obtain custody of the juveniles in the dependency-neglect proceedings and appear in the delinquency proceedings. The Juvenile Court recognized this by stating, "In order for them [DHS] to carry out their assigned responsibilities they must initiate Petitions in Juvenile Court and thus voluntarily subject themselves to the jurisdiction of that Court." . . . DHS was under an obligation to appear. It thus did not voluntarily waive sovereign immunity.

Id. at 488–89, 850 S.W.2d at 851.

In the instant case, after receiving information that Kiesling-Daugherty had committed a traffic violation, the prosecuting attorney pursued a criminal charge against her. In doing so, the prosecutor carried out his duty "of filing informations against those he deems guilty and refusing to file against those he believes to be innocent." *See Venhaus v. Brown*, 286 Ark. 229,

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[2]This court has extended the doctrine of sovereign immunity to include state agencies. *Id.* at 3, ___ S.W.3d at ___.

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230, 691 S.W.2d 141, 143 (1985). On appeal, the duties of the prosecutor were transferred to the Office of the Attorney General ("AG"), which must "prosecute or defend for the State in cases brought into this Court." *See Siverburg v. State*, 30 Ark. 39, 40 (1875); *see also* Ark. Code Ann. § 25-16-704(a) (Repl. 2002) ("The Attorney General shall attend the several sittings of the Supreme Court and shall maintain and defend the interests of the state in all matters before that tribunal."). Here, to carry out its duty, the AG was obligated to represent the State on appeal and thus voluntarily subjected itself to the jurisdiction of the appellate court. *See Ashcraft v. State*, 141 Ark. 361, 363, 222 S.W. 376, 367–77 (1919) (per curiam) (noting that the Attorney General is required to represent the State in criminal appeals). The AG did not, however, voluntarily waive sovereign immunity when it was under an obligation to appear. *See Ark. Dep't of Human Servs. v. State*, 312 Ark. at 489, 850 S.W.2d at 851. Accordingly, we deny the motion for costs on appeal.

Motion denied.

BAKER and HART, JJ., dissent.

KAREN R. BAKER, Justice, dissenting. I dissent from the majority opinion because sovereign immunity does not preclude the assessment of costs pursuant to Arkansas Supreme Court Rule 6-7 (2012).

Sovereign immunity is jurisdictional immunity from suit. *State v. Goss*, 344 Ark. 523, 42 S.W.3d 440 (2001); *Milberg, Weiss, Bershad, Hynes & Lerach, LLP v. State*, 342 Ark. 303, 28 S.W.3d 842 (2000). Here, Daugherty has not initiated suit or execution against the State for the costs that would allow the State to claim sovereign immunity. Rather, Daugherty

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is seeking assessment of costs in accordance with Rule 6-7. Pursuant to the rule, the circuit court's decision was reversed on appeal, and thus she is entitled to costs.

While we determine liability for costs, it is the circuit court that renders judgment. *Trice v. City of Pine Bluff*, 282 Ark. 251, 252, 667 S.W.2d 952, 953 (1984). It is well established that an appellant who wins reversal is entitled to recover appeal costs. *Powell v. State*, 233 Ark. 438, 345 S.W.2d 8 (1961). Daugherty has a statutory remedy. *Id.* (citing earlier version of Ark. Code Ann. § 16-92-105(d) (Repl. 2007). Additionally, Daugherty might seek payment of her costs from the State through the Arkansas State Claims Commission. *See Milberg supra*; *see also* Ark. Code Ann. § 19-10-201 to -215 (Repl. 2006 & Supp. 2011). In accordance with Rule 6-7, this court should assess costs against the State.

Thus, I respectfully dissent.

JOSEPHINE LINKER HART, Justice, dissenting. After the Arkansas Court of Appeals reversed and dismissed her conviction, Daugherty filed a motion seeking recovery of her costs in accordance with Arkansas Supreme Court Rule 6-7 (2012). Because she is entitled to recovery of costs under the rule, we should grant.

The majority confuses liability for costs with execution of a judgment for costs. We determine liability for costs. *Trice v. City of Pine Bluff*, 282 Ark. 251, 667 S.W.2d 952 (1984). Further, this court has established that an appellant who wins reversal is entitled to costs incurred on appeal. *Powell v. State*, 233 Ark. 438, 345 S.W.2d 8 (1961). Whether Daugherty would be entitled to a writ of execution against the State is not an issue before this court because it was not part of her petition. While the State argues that sovereign immunity

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prevents recovery of costs, its argument is premature. It fails to recognize that Daugherty has not filed a suit against the State of Arkansas but instead seeks, as Rule 6-7 permits her to do, reimbursement for costs she expended before her appeal could be heard in the Arkansas Court of Appeals.

The executive branch as represented by the Attorney General's Office fails to recognize that this court is an equal branch of the three branches of government that constitute the sovereign, and it was this court acting as "the sovereign" that promulgated rules requiring Daugherty to pay these costs and the rule providing for recovery of her costs on reversal of her conviction. *See In re Supreme Court License Fees*, 251 Ark. 800, 483 S.W.2d 174 (1972) (noting that the judiciary is a coordinate branch of the state government, of equal dignity with the legislative and executive departments). It is untenable that one branch of "the sovereign" could neutralize the power of an equal branch of "the sovereign" by imposing the defense of sovereign immunity, thus stripping that branch—the judiciary—of its constitutionally granted rulemaking authority. This court's interest in orderly, expeditious proceedings justifies the imposition of costs, and the power to make an award of costs is incident to our inherent jurisdiction and authority over the orderly administration of justice between all litigants. *See generally Hutto v. Finney*, 437 U.S. 678, 696 (1978). Daugherty also has a statutory remedy, *see Powell*, *supra* (citing an earlier version of Ark. Code Ann. § 16-92-105(d) (Repl. 2006)), which also was promulgated by an equal branch of the government, the legislature, in its capacity as "the sovereign." The executive branch likewise cannot neutralize the power of the legislative branch by claiming sovereign immunity.

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In accordance with Rule 6-7, this court should assess costs against the State and direct the clerk to issue a mandate showing that Daugherty may recover costs on appeal. The majority's holding restricts this court's authority to award costs to a prevailing citizen in an appeal before this court. In doing so, it ignores the Arkansas Constitution's grant of authority to this court to accomplish its constitutionally mandated functions under amendment 80 and this court's attendant promulgation of Rule 6-7.

Thus, I respectfully dissent.

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