



**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,)
) **WD81666**
 Respondent,)
 v.) **OPINION FILED:**
)
 JOHN B. WRIGHT,) **December 11, 2018**
)
 Appellant.)

**Appeal from the Circuit Court of Lafayette County, Missouri
Honorable Kelly Halford Rose, Judge**

**Before Division Two:
Alok Ahuja, P.J., Thomas H. Newton, and Mark D. Pfeiffer, JJ.**

Mr. John Wright appeals from a judgment of the Lafayette County Circuit Court denying his motion to retax costs which sought to eliminate the jail debt assessed against him. We reverse.

Mr. Wright pleaded guilty to the misdemeanor offenses of stealing and resisting arrest on July 27, 2016, and was sentenced to ninety days in the county jail. The clerk prepared a fee report and taxed as costs the "Board Bill" totaling \$1,358.28. The total amount taxed as costs, including the Board Bill, was \$1,501.78. The court issued a show cause order for Mr. Wright to re-appear on August 17, 2016, and every month following, to review payments Mr. Wright has made. Mr. Wright has made payments totaling \$380.00 and requests a refund for any money erroneously paid.

Legal Analysis

The State seeks to dismiss this appeal. The State’s motion alleges several grounds for dismissal. First, the State claims that Mr. Wright has not cited an applicable standard of review for Point II and, therefore, the appeal should be dismissed for lack of conformity with Rule 84.04(e). While we agree that Mr. Wright has failed to provide this Court with an applicable standard of review on Point II, this omission is not grounds for an automatic dismissal. Missouri case law states repeatedly that “[f]ailure to *substantially* comply with Rule 84.04’s requirements preserves nothing for review and is grounds for dismissing an appeal.” *Rockwell v. Wong*, 415 S.W.3d_805, 806 (Mo. App. E.D. 2013) (emphasis added) (also cited by *Steele v. Schnuck Markets, Inc.*, 485 S.W.3d 823, 824 (Mo. App. E.D. 2016)). “[C]ompliance is necessary ‘to ensure that appellate courts do not become advocates by inferring facts and arguments that the appellant failed to assert.’” *Id.* (quoting *Wong v. Wong*, 391 S.W.3d 917, 918 (Mo. App. E.D. 2013)). We believe Mr. Wright has substantially complied with the requirements of Rule 84.04 and this omission will not require this Court to become an advocate.

The State’s second claim for dismissal is that Mr. Wright “failed to object to the board bill being assessed as costs at sentencing, [and thus] did not properly preserve this issue for appeal.” The lack of preservation is not grounds for automatic dismissal, and we discuss this issue further below.

The State’s third claim for dismissal is that the appeal is nonjusticiable because it is moot. The State argues that, because Mr. Wright made payments voluntarily and not under protest before this appeal, he has not protected his right to appeal. The State

relies on *State v. Welch*, 701 S.W.2d 770 (Mo. App. E.D. 1985), where the Eastern District held that “to preserve any issues for appeal in a criminal case the defendant must make payment of a fine under circumstances that record the payment as not voluntarily made, if payment occurs before appeal.” *Id.* at 771. In *Welch*, the judgment of the court was a fine of \$50.00 and costs. *Id.* at 770. The defendant was never ordered to serve any time in jail so it is assumed that the “costs” mentioned did not include a board bill or costs of incarceration. Additionally, it is noted that on the day the defendant was found guilty and sentenced to pay the fine and costs, he did so in full and without comment. *Id.* at 771. Here, however, Mr. Wright has not paid the amount owed in full and still has outstanding debt. The issue is therefore not moot.

In the fourth argument for dismissal, the State claims that this appeal is not ripe for review because Mr. Wright has not been subjected to any loss of liberty for failure to pay the costs. Furthermore, the State argues that because Mr. Wright has made several payments already, he should be able to make future payments and, thus, an indigency hearing is not necessary. The basis of Mr. Wright’s appeal is that he is indigent and, therefore, should not have to pay the costs he has incurred. If he is in fact indigent, it is reasonable to assume that he has and will continue to suffer hardship if forced to continue making payments.

In the the fifth and final argument for dismissal, the State claims that counsel for Mr. Wright exceeded the scope of his authority under section 600.042, and that Mr. Wright is not entitled to counsel at this stage. We do not believe that counsel has exceeded the scope of his representation allowed by statute. Section 600.044 states that “[a] defender who undertakes to represent an eligible person shall continue to do

so at every stage of the case or proceeding, including the filing of a motion for new trial and the processing, briefing, and argument of an appeal, until the defender is relieved of his duties by the director or is permitted by a court to withdraw.” The Missouri State Public Defender (MSPD) represented Mr. Wright when he pleaded guilty and he is therefore entitled to continued representation for the appeal. The motion to dismiss is denied. We will proceed with the points on appeal.

In the first point on appeal, Mr. Wright claims that the trial court erred when it overruled his motion to retax costs because, according to the statutes, jail debt cannot be taxed as costs, in that the court did not comply with sections 221.070.2 and 488.5028.¹ This point raises a question of statutory construction and, therefore, an issue of law, which we review *de novo*. *Investors Alliance, LLC v. Bordeaux*, 428 S.W.3d 693, 695 (Mo. App. E.D. 2014).

As to costs, our courts have reiterated that

At common law costs as such in a criminal case were unknown. As a consequence it is the rule as well in criminal as in civil cases that the recovery and allowance of costs rests entirely on statutory provisions [and] no right to or liability for costs exists in the absence of statutory authorization. Such statutes are penal in their nature, and are to be strictly construed.

State v. D.S., 606 S.W.2d 653, 654 (Mo. banc 1980) (quoting *Cramer v. Smith*, 168 S.W.2d 1039, 1040 (Mo. banc 1943)). “The legal principle controlling here is that no item is taxable as costs unless specifically so provided by statute.” *Id.* (citation and internal quotation marks omitted). Under the rule of strict construction, applicable “in both civil and criminal cases,” “the officer or other persons claiming costs, which are

¹ Statutory references are to RSMO (2016), unless otherwise indicated.

contested, must be able to put his finger on the statute authorizing their taxation.” *Ring v. Charles Vogel Paint & Glass Co.*, 46 Mo. App. 374, 377 (1891).

The total amount taxed against Mr. Wright is as follows: (1) LET- County= \$2.00, (2) Dom Viol-Crim/County Ordinance= \$2.00, (3) Inmate Pris Detainee Security= \$2.00, (4) Misdemeanor Costs w/SRF= \$102.50, (5) CVC= \$10.00, (6) Board Bill-Deft= \$1,358.28, and (7) Time Payment Fee= \$25.00. With the exception of the “board bill,” for each of the above mentioned items, there is a corresponding statute that allows the cost to be taxed against Mr. Wright.² Those statutes provide either that the charge may be “assessed as costs,” or labels the charge a “surcharge.” Several of those statutes also provide that the charge “shall be collected and disbursed as provided by sections 488.010 to 488.020” – statutes which expressly provide for the collection and disbursement of “court costs.” See §§ 488.024, 488.607, 488.5026.2, 488.5336.1, 595.045.1 and .8.

The section pertaining to the “Board Bill” or cost of imprisonment is section 221.070. Unlike the statutes relating to the other costs taxed against Mr. Wright, section 221.070 does not provide that the board bill may be “assessed as costs,” that it

² *LET-County* is authorized by section 488.5336 (“[a] surcharge of two dollars may be assessed as costs in each criminal case involving... a violation of any criminal or traffic laws of the state”); the *Domestic Violence fund* is authorized by section 488.607 ([t]he governing body of any county... may, by order or ordinance provide for an additional surcharge in the amount of up to four dollars per case for each criminal case”); the *Inmate Prisoner Detainee Security* fund is authorized by section 488.5026 (“a surcharge of two dollars shall be assessed as costs in each court proceeding...in all criminal cases”). The *misdemeanor costs* and the *SRF fund* are authorized by section 488.024 (“there shall be assessed and collected a surcharge of three dollars in all...criminal cases including violation of any county ordinance or any violation of criminal or traffic laws of this state”); the *Crime Victims’ Compensation Fund (CVC)* is authorized by section 595.045.8.1 (“a surcharge...shall be assessed as costs... in all criminal cases”); and lastly, the *Time Payment Fee* is authorized by section 488.5025 (“a court may assess a fee of twenty-five dollars on each person who pays a court-ordered judgment, penalty, fine, sanction, or court costs on a time-payment basis”).

constitutes a “surcharge” in the case, or that it “shall be collected and disbursed as provided by sections 488.010 to 488.020.” Instead, section 221.070.1 provides:

Every person who shall be committed to the common jail within any county in this state...for any offense or misdemeanor...shall bear the expense of carrying him or her to said jail, and also his or her support while in jail, before he or she shall be discharged; and the property of such person shall be subjected to the payment of such expenses, and shall be bound therefor, from the time of his commitment, and may be levied on and sold, from time to time, under the order of the court having criminal jurisdiction in the county, to satisfy such expenses.

The statute also states that if a person has not paid all of the money owed upon release from custody “and has failed to enter into or honor an agreement with the sheriff to make payments toward such debt according to a repayment plan, the sheriff may certify the amount of the outstanding debt to the clerk of the court in which the case was determined.” § 221.070.2. Once the outstanding debt has been reported to the clerk, the clerk “shall report to the office of state courts administrator [OSCA] the debtor’s full name, date of birth, and address, and the amount the debtor owes to the county jail.” § 221.070.2. If the debtor satisfies the debt or begins making regular payments in accordance with an agreement entered into with the sheriff, the sheriff will notify the circuit clerk who will notify OSCA that the debtor is no longer considered delinquent. § 221.070.2.

The State references sections 550.010 and 550.030 to support its argument that taxing these costs to Mr. Wright is justified. Section 550.010 states that “[w]henver any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for the cost of incarceration, including a reasonable sum to cover occupancy costs, shall be paid by the state or county.” § 550.010. Section 550.030 states that the county will pay costs when “the

defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant.” § 550.030; *see also* § 550.210 (in certifying a “fee bill” to the Department of Corrections for payment by the State, the court and prosecutor shall certify that “no costs charged in the fee bill, fees for the cost of incarceration, including a reasonable sum to cover occupancy costs, excepted, were incurred on the part of the defendant”).

We recognize that sections 550.010 and 550.030 appear to contemplate that costs of incarcerations may be taxable as “costs.” They do so, however, in the context of an “exception to an exception”: the provisions of chapter 550 provide that the State and county are liable to pay the costs incurred in prosecution of an indigent defendant, *except for* costs “incurred on the part of the defendant,” *except for* “fees for the cost of incarceration, including a reasonable sum to cover occupancy costs.”³

Despite the provisions of chapter 550, RSMo, the fact remains that the statute creating this liability—section 221.070—does not provide for taxation of the costs of incarceration as court costs, but instead provides an alternate mechanism for collection by reporting the outstanding debt to OSCA. The statute specifying the measures OSCA may take to collect on this liability, § 488.5028, quite plainly distinguishes between

³ We also recognize that section 221.070.1 provides that an inmate’s property “may be levied on and sold . . . under the order of the court having criminal jurisdiction in the county” to satisfy the “board bill” expenses. While this provision appears to contemplate that the “board bill” charges would be reflected in the court’s judgment, separate statutory provisions, enacted at the same time, *already* gave circuit courts the power to seize and sell a criminal convict’s property to satisfy “all fines and costs which he may be adjudged to pay.” *See* sections 546.860 and 546.870. A comparison of section 221.070.1 to sections 546.860 and 546.870 suggests that the legislature did not perceive the “board bill” liability to constitute a “fine” or “cost.”

court costs on the one hand and the costs of incarceration under section 221.070 on the other. It provides in relevant part:

1. If a person fails to pay court costs, fines, fees, or other sums ordered by a court, to be paid to the state or political subdivision, a court may report any such delinquencies in excess of twenty-five dollars to the office of state courts administrator and request that the state courts administrator seek a setoff of an income tax refund. The state courts administrator shall set guidelines necessary to effectuate the purpose of the offset program. The office of state courts administrator also shall seek a setoff of any income tax refund and lottery prize payouts made to a person whose name has been reported to the office as being delinquent pursuant to section 221.070.

2. The office of state courts administrator shall provide to:

(1) The department of revenue, the information necessary to identify each debtor whose refund is sought to be set off and the amount of the debt or debts owed by any debtor who is entitled to a tax refund in excess of twenty-five dollars and any debtor under section 221.070 who is entitled to a tax refund of any amount; and

(2) The state lottery commission, the information necessary to identify each debtor whose lottery prize payouts are sought to be set off and the amount of the debt or debts owed by the debtor under section 221.070.

With respect to a debtor's liability for "court costs, fines, fees, or other sums ordered by a court," subsections 488.5028.1 and .2 provide that the amount is collectible (1) only if it exceeds \$25.00; and (2) only from the debtor's state income tax refund. On the other hand, if the debt is for the cost of incarceration under section 221.070, the statute provides that it is collectible (1) in "any amount" (2) from income tax refunds, *or* from lottery prize payouts to which the debtor is otherwise entitled.

In addition to the provisions specifically addressing collection from tax refunds or lottery prizes, other provisions of chapter 488, RSMo also indicate that the "board bill" is not a taxable "court cost." For example, § 488.012.1 provides that "the clerk

of each court of this state responsible for collecting court costs shall collect the court costs authorized by statute, in such amounts as are authorized by supreme court rule adopted pursuant to sections 488.010 to 488.020.” Subsection 488.012.2 then provides that “[t]he supreme court shall set the amount of court costs authorized by statute, at levels to produce revenue which shall not substantially exceed the total of the proportion of the costs associated with administration of the judicial system defrayed by fees, miscellaneous charges and surcharges.” Sub-section 488.012.3 sets forth a schedule for court costs, to be effective “prior to adjustment by the supreme court.” The “board bill” is not included in this schedule. Nor do “board bill” charges appear in Supreme Court Operating Rule 21.01, which sets forth updated amounts for various types of court costs. Further, section 488.5029 provides for the refusal or suspension of hunting and fishing licenses to persons with unpaid “debts” under section 221.070; this statute never refers to this “board bill” liability as a “cost,” and provides this additional remedy solely with respect to the “board bill” liability, and not with respect to any item denominated as a “court cost.”

Thus, even if we said that sections 550.010 and 550.030 provide some limited support for the taxation of costs of incarceration as court costs, sections 221.070, 488.5028, and other provisions of chapter 488, all indicate that the costs of incarceration are recoverable in a different fashion, and *distinguish* the financial

liability created by section 221.070 from “court costs.”⁴ Because the right to tax items as court costs can be created only by express statutory authorization and because such statutes are strictly construed, we cannot hold that the debt for costs of incarceration established by section 221.070 is taxable as a cost against a criminal defendant where the relevant statutes are at best ambiguous concerning the taxability of such debt as a court cost.⁵

Based on the record, it is clear that the trial court did not follow sections 221.070 and 488.5028 when it assessed these costs against Mr. Wright. The State argues in its brief that the language stating that the “sheriff may certify the amount of the outstanding debt to the clerk of the court in which the case was determined” does not create an absolute obligation. Whether or not section 221.070.2 *requires* the sheriff to certify unpaid board expenses to the circuit clerk, however, the fundamental point remains: nothing in section 221.070 provides specific authorization for the taxation of an unpaid board bill as a court cost.

Although the record does not specifically indicate that the sheriff reported the costs to the clerk of the court, it is clear that the clerk knew of the costs and was

⁴ Notably, section 221.070.2, and the provisions of section 488.5028.1 and .2 referring to the collection of debts arising under section 221.070, were enacted as part of the same bill in 2013. *See* S.B. 42, 97th Gen. Assembly, 1st Session (2013). At the time of the 2013 revisions, section 488.5028 *already* permitted the court to report to OSCA “[i]f a person fails to pay court costs, fines, fees or other sums ordered by a court” in excess of twenty-five dollars, and permitted a set-off of that liability against any income tax refund to which the individual was entitled. Thus, section 488.5028 *already* provided a mechanism for collection of “court costs.” The fact that the legislature in 2013 added additional language to the statute, creating a similar (but not identical) collection remedy for the liability created by section 221.070, indicates that the legislature did not read the existing language of section 488.5028 as creating a remedy for collection of the debt created under section 221.070. *See, e.g., State v. Liberty*, 370 S.W.3d 537, 561 (Mo. banc 2012) (“When the Legislature amends a statute, it is presumed that the legislature intended to effect some change in the existing law.” (citation omitted)).

⁵ This case presents no issue concerning the payment of incarceration expenses by State or county agencies, and this opinion should not be read to address such issues.

therefore obligated to report any outstanding debt to OSCA. This did not happen, and instead the court scheduled multiple show-cause hearings at which Mr. Wright made small payments toward his total debt. The term “show-cause hearings” is never mentioned sections 221.070 and 488.5028 and is therefore not the proper method by which to collect costs. Based on the trial court’s adoption of a procedure which lacked statutory authorization, we grant point one and reverse the trial court’s ruling on the motion to retax.

Due to the disposition of Point I, effectively providing all of the relief requested by Point II, we need not and do not decide Point II.

Conclusion

The trial court erred when it failed to follow the proper procedure in section 221.070. We reverse the trial court’s decision which refused to retax costs. On remand, the circuit court should retax the costs assessed against Mr. Wright by removing his liability under section 221.070 from the court costs.⁶

/s/ Thomas H. Newton
Thomas H. Newton, Judge

Alok Ahuja, P.J., and Mark D. Pfeiffer, J. concur.

⁶ To date, Mr. Wright has paid \$380.00 toward the costs in this matter; it appears that \$236.50 of this amount constitutes payment to discharge his liability under section 221.070. Mr. Wright asks us to order that this \$236.50 be refunded to him. Mr. Wright does not argue, however, that he is not *liable* for the costs of his incarceration by operation of section 221.070; instead, he only argues that this debt cannot be assessed (and collected) as a “court cost.” Because Mr. Wright does not challenge his underlying liability for his board costs, a refund of the amount he has paid toward his board expenses is unwarranted. For a full breakdown of Mr. Wright’s total costs and the payments he has made, please see Appendix A.

APPENDIX A

Report: CZR0086 (v9.1)

MISSOURI JUDICIARY
 15TH JUDICIAL CIRCUIT
 LAFAYETTE
 CASE PARTY FEE REPORT

Date: 17-Apr-2018
 Time: 3:37 PM
 Page: 1

CASE ID: 16LF-CR00382 ST V JOHN B WRIGHT

FEES AND ADJUSTMENTS

Party Fees

Party Name (Party ID)

WRIGHT, JOHN B (WRIJB5227)

Defc

<u>Code</u>	<u>Description</u>	<u>Date</u>	<u>Fee Amount</u>	<u>Balance Due</u>
<u>Payment Plan</u>				
3046	LET-County 23469	29-Jul-2016	\$2.00	\$0.00
3090	Dom Viol-Crim/County Ordinance 23469	29-Jul-2016	\$2.00	\$2.00
3194	Inmate Pris Detainee Security 23469	29-Jul-2016	\$2.00	\$0.00
3308	Misdemeanor Costs w/SRF 23469	29-Jul-2016	\$102.50	\$0.00
3032	CVC-\$10 Other 23469	29-Jul-2016	\$10.00	\$10.00
3012	Board Bill-Defc 23469	01-Aug-2016	\$1,358.28	\$1,109.78
3188	Time Payment Fee 23469	29-Aug-2016	\$25.00	\$0.00
Total Fees:			\$1,501.78	\$1,121.78
Grand Total Case and Party Fees:			\$1,501.78	\$1,121.78

CASE ID: 16LF-CR00382

ST V JOHN B WRIGHT

RECEIPTS

Party Name (Party ID)	Detc Code	Description	Date	Receipt No.	Bond/ Acct ID	Void Ind.	Non-Monetary Amount	Monetary Amount
WRIGHT, JOHN B (WRIJB5227)	1100	Cash	03-Aug-2016	15LF161809			\$0.00	\$30.00
WRIGHT, JOHN B (WRIJB5227)	1103	Credit Card	20-Sep-2016	15LF163233			\$0.00	\$30.00
WRIGHT, JOHN B (WRIJB5227)	1103	Credit Card	24-Oct-2016	15LF164224			\$0.00	\$30.00
WRIGHT, JOHN B (WRIJB5227)	1103	Credit Card	02-Dec-2016	15LF165297			\$0.00	\$30.00
WRIGHT, JOHN B (WRIJB5227)	1112	Echecks - PBW	29-Dec-2016	15LF166248			\$0.00	\$30.00
PRC:10815907 PBW:PBW23889								
WRIGHT, JOHN B (WRIJB5227)	1112	Echecks - PBW	01-Mar-2017	15LF168054			\$0.00	\$40.00
PRC:10866197 PBW:PBW27140								
WRIGHT, JOHN B (WRIJB5227)	1112	Echecks - PBW	03-May-2017	15LF170214			\$0.00	\$30.00
PRC:10920095 PBW:PBW30520								
WRIGHT, JOHN B (WRIJB5227)	1112	Echecks - PBW	12-Jun-2017	15LF171540			\$0.00	\$30.00
PRC:10952551 PBW:PBW32475								
WRIGHT, JOHN B (WRIJB5227)	1112	Echecks - PBW	04-Aug-2017	15LF173193			\$0.00	\$30.00
PRC:11000247 PBW:PBW35218								
WRIGHT, JOHN B (WRIJB5227)	1112	Echecks - PBW	09-Oct-2017	15LF175167			\$0.00	\$25.00
PRC:11059444 PBW:PBW38583								
WRIGHT, JOHN B (WRIJB5227)	1112	Echecks - PBW	15-Nov-2017	15LF176294			\$0.00	\$25.00
PRC:11094456 PBW:PBW40739								
WRIGHT, JOHN B (WRIJB5227)	1112	Echecks - PBW	30-Nov-2017	15LF176713			\$0.00	\$25.00
PRC:11107906 PBW:PBW41485								
WRIGHT, JOHN B (WRIJB5227)	1112	Echecks - PBW	19-Jan-2018	15LF178281			\$0.00	\$25.00
PRC:11150210 PBW:PBW44325								

CASE ID: 16LF-CR00382 ST V JOHN B WRIGHT

RECEIPTS

<u>Party Name</u> <u>(Party ID)</u>	<u>Detc</u> <u>Code</u>	<u>Description</u>	<u>Date</u>	<u>Receipt No.</u>	<u>Bond/ Acct ID</u>	<u>Void</u> <u>Ind.</u>	<u>Non-Monetary</u> <u>Amount</u>	<u>Monetary</u> <u>Amount</u>	
							<u>Party Total Receipts:</u>	<u>\$0.00</u>	<u>\$380.00</u>
							<u>Grand Total Receipts:</u>	<u>\$0.00</u>	<u>\$380.00</u>