

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

State of New Hampshire

v.

Frank Maniscalco

98-S-482-485

98-S-591-594

ORDER

Frank Maniscalco, the defendant, has filed a Motion to Vacate Order on Payment of Counsel Fees. The court appointed a public defender to represent Mr. Maniscalco after he was charged with eight counts of forgery. Mr. Maniscalco pled guilty to the indictments on January 9, 2001. At the time, he was already serving a 2-3 year sentence at the Massachusetts Correctional Institute in Shirley. Concurrent with that sentence, the court committed Mr. Maniscalco to the New Hampshire State Prison for 12 months on indictments 98-S-591 to 98-S-594. Consecutive to that sentence, the court suspended Mr. Maniscalco's sentences on indictments 98-S-482 to 98-S-485.

All of the court's standard sentencing orders state as one of their conditions that "[t]he defendant shall reimburse the State for counsel fees in a manner determined by the Office of Cost Containment." Each sentencing order for suspended sentences further states that "[f]ailure to comply with [its] conditions may result in the imposition of any suspended or deferred sentence." ¹

¹ Each sentencing order for the stand committed sentences

At the time of sentencing, Mr. Maniscalco objected to the order for repayment of counsel fees and subsequently filed the instant motion.

Mr. Maniscalco argues that requiring the reimbursement of counsel fees as part of his sentencing orders violates his right to equal protection under Part I, article 15 of the New Hampshire Constitution as well as his right to counsel under the 6th and 14th amendments to the United States Constitution. In particular, Mr. Maniscalco contends that the current sentencing orders create separate classes of criminal defendants, those who can and those who cannot afford private counsel, and thereby impinge upon the indigent defendant's fundamental "right to counsel at the expense of the State if the need is shown." N.H. Const. pt. I, art. 15.

"Because part I, article 15 of the New Hampshire Constitution provides at least as much protection to criminal defendants . . . as does the fourteenth amendment to the United States Constitution, [the court] need not undertake a separate federal analysis." State v. LaForest, 140 N.H. 286, 289 (1995) (citations omitted). The right to counsel is a fundamental right. State v. Tapply, 124 N.H. 318, 325 (1983). With this fundamental right comes the implicit guarantee that the State will pay for counsel whenever a defendant, charged with an offense punishable by

simply stated that "[t]he defendant is ordered to . . . comply with all of the terms of this sentence."

incarceration, is unable to do so. See N.H. Const. pt. I, art. 15; see generally Gideon v. Wainwright, 372 U.S. 335 (1963) (precursor to 1966 amendment to Part I, article 15, which provides counsel to indigent defendants at State's expense).

In New Hampshire, RSA Chapter 604-A comprises the statutory scheme for providing representation to indigent criminal defendants. Section 604-A:9 specifically addresses repayment and prescribes that "[a]ny adult defendant who has had counsel or a public defender assigned to the defendant at the expense of the State shall be ordered by the court . . . to repay the State through the unit of cost containment." RSA 604-A:9, I (Supp. 2000). In accord with this statute, the court, on standard sentencing forms, ordered Mr. Maniscalco to reimburse the State for counsel fees as determined by the Office of Cost Containment but reserved the issue for ruling. The sentencing forms for the suspended sentences further stipulated that Mr. Maniscalco's failure to comply could result in the imposition of the suspended sentence.

"Repayment of the cost of legal counsel assessed against one who has been convicted of a crime, however, is not a part of his punishment for that crime." Opinion of the Justices, 121 N.H. 531, 539-540 (1981). As matters now stand, the court could impose Mr. Maniscalco's suspended sentences simply because he failed to pay counsel. Thus, the punishment of Mr. Maniscalco for his

failure to pay would be one and the same with his punishment for forgery. Another defendant, who was able to afford private counsel but failed to pay, would escape like punishment. The court could only enforce payment of a debt to private counsel with civil contempt, not with criminal sanctions.

"The first question in an equal protection analysis is whether the State action in question treats similarly situated persons differently." Opinion of the Justices (Limitation on Civil Actions), 137 N.H. 260, 265-66 (1993) (quoting Appeal of Marmac, 130 N.H. 53, 58 (1987)). The current sentencing forms do treat similarly situated persons differently and, therefore, could present a viable equal protection claim if actual harm were to result. "[A] State may [not] impose . . . discriminatory terms merely because the obligation is to the public treasury rather than to a private creditor." James v. Strange, 407 U.S. 128, 138-39 (1972); see also id. at 134 (declining to reach question of whether the statutory obligation for repayment impermissibly deters exercise of right to counsel). As they now read, the court's standard sentencing forms create a potential for harm unique to indigent defendants.

Ordering repayment of counsel fees on each of Mr. Maniscalco's sentencing orders was solely a matter of administrative convenience and not a statutory requirement. As such, it remains entirely within this court's discretion to change

its current method of recoupment. The court accordingly exercises that discretion and rules that reimbursement of counsel no longer comprises any part of its sentencing orders.

Effective immediately, the court will provide a separate order for reimbursement of counsel fees, one that will not impose criminal sanctions for failure to pay. The court further orders that any reference to payment of counsel be deleted from Mr. Maniscalco's extant sentencing orders.

So Ordered.

May 14, 2001

DATE

/S/

PATRICIA C. COFFEY
Presiding Justice