

1977 S.C. Op. Atty. Gen. 255 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-323, 1977 WL 24662

Office of the Attorney General

State of South Carolina

Opinion No. 77-323

October 17, 1977

*1 TO: Mr. James A. Neal
Director-State ASAP/Drug Diversion
S. C. Commission on Alcohol and Drug Abuse

QUESTIONS PRESENTED:

1. In a DUI or drug abuse case, can a trial judge impose as a condition of probation the requirement that the defendant attend as ASAP or Drug Diversion Program and pay the administrative/service fee for admission to such a program?
2. In a second or third offense DUI case, can a trial judge require that a portion of the fine paid be applied toward the administrative/service fee for an ASAP Program?

AUTHORITIES:

Sections 24–21–430, 44–51–620, 61–13–480, 61–13–490, 44–53–580, Code of Laws of South Carolina (1976); A.B.A. Standards Relating to Probation; Uniform Drug Rehabilitation Act; 21 Am.Jur., Criminal Law; State v. Teal, 108 S.C. 455, 95 S.E. 69 (1918); People v. Baker, 112 Cal. Rptr. 137, subsequent op. on reh., 39 Cal. App.3d 550, 113 Cal. Rptr. 248.

DISCUSSION:

You have presented two questions regarding the judicial requirement that a defendant attend an ASAP or Drug Diversion Program and pay the fee for admission to such a program.

1. You have first inquired as to whether a trial judge may impose as a condition of probation a requirement that a defendant attend an ASAP or Drug Diversion Program and pay the administrative/service fee for admission to such a program. For the reasons which follow, it is our opinion that he may lawfully do so.

In South Carolina, conditions of probation are governed by Section 24–21–430, Code of Laws of South Carolina (1967), which lists a number of conditions that may be imposed. The list, however, is not intended to be exhaustive and exclusive, as the statute also provides that the sentencing court may impose ‘any other’ conditions which it sees fit. As the A.B.A. Standards Relating to Probation has pointed out, the primary purpose of probation is rehabilitation of the offender and a condition consistent with that goal would be ‘pursuing prescribed educational or vocational training.’ A.B.A. Standards at 14. More recently, the Commissioners on Uniform State Laws have provided in the Uniform Drug Rehabilitation Act at Section 413 that an appropriate condition of probation for a drug dependent defendant would be the requirement that he participate in a treatment program. (see also 21 Am.Jur.2d, Criminal Law, Section 565.) So, the imposition of this condition by a judge is both within his discretion under State law and consistent with the rehabilitative goal of probation.

Whether the convicted individual can be required to pay an administrative/service fee for enrollment in such a rehabilitative program is a more complex question, particularly in view of the general rule that a defendant cannot be forced to pay the costs of rehabilitation as a condition of probation. 21 Am.Jur.2d, Criminal Law, Section 565. However, this rule does not prohibit

the trial court from imposing on the convicted individual the requirement of making any monetary payment. For example, a probationer may be required to pay a fine, restitution or reparation to aggrieved parties, actual damages or loss. *Ibid.* The South Carolina case of [State v. Teal](#), 108 S.C. 455, 95 S.E. 69 (1918), appears to be in accord with this proposition, holding that a sentence may be suspended on the condition that the defendant pay child support to the mother which he seduced. Furthermore, one of the primary rationales for prohibiting the imposition of the requirement that a convicted person pay 'costs' as a condition of probation is that such 'costs' are so uncertain and may become a potentially unlimited [People v. Baker](#), 112 Cal. Rptr. 137, subsequent op. on reh. 39 Cal. App.3d 550, 113 Cal. Rptr. 248. That rationale would not be applicable to the instant situation, since the amount would definitely be set. Finally, Section 44–51–620, [Code of Laws of South Carolina](#) (1976), which provides for the collaboration of the South Carolina Probation, Pardon and Parole Board and the Commission on Alcohol and Drug Abuse in the admission of probationers in rehabilitative programs, requires that 'Patients who are able to pay for their medical care and hospitalization shall be required to do so.' The conclusion, then is that if the defendant in a DUI or drug offense is able to pay the administrative/service fee of a rehabilitative program, such payment may be imposed as a condition of probation. Furthermore, since, as you note, persons who are unable to pay the administrative/service fee are admitted to such programs nonetheless, there would appear to be no constitutional question raised by the practice described.

CONCLUSION:

*2 Therefore, it is the opinion of this Office that trial judges may lawfully impose as a condition of probation a requirement that the defendant attend an ASAP or Drug Diversion Program and pay the administrative/service fee for admission to such program.

2. You have next asked whether, in a second or third offense DUI case, a trial judge may lawfully require that a portion of the fine paid be applied toward the administrative/service fee for an ASAP Program. It is our opinion that he may not.

Since judges do not have the discretionary authority to determine where money collected by fines may be allocated [see generally Sections 61–13–480, 61–13–490, 44–53–580, [Code of Laws of South Carolina](#) (1976), which set down a statutory scheme for distribution of fine monies], a trial court could not impose a fine and then direct the Clerk of Court to pay part of that fine to the Commission. Therefore, the only appropriate way a convicted individual could be required to pay the administrative/service fee would be to impose direct payment by the defendant to the Commission as a condition of probation.

CONCLUSION:

Therefore, it is the opinion of this Office that, in second or third offense DUI cases, a trial judge may not require that a portion of the fine paid be applied toward the administrative/service fee for an ASAP Program.

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