

Opinion No. 2011-128

January 23, 2012

The Honorable G. Chadd Mason
Circuit Judge
Fourth Judicial District, Fourth Division
Post Office Box 4703
Fayetteville, Arkansas 72702-4703

Dear Judge Mason:

You have asked for my opinion on a number of questions regarding a proposed pre-adjudication diversion program, which you describe as follows:

The proposed program to be known as “Work Court” would, upon agreement of the prosecuting attorney, the defendant and the Circuit Judge, provide for a transfer of the case to another Circuit Judge who would preside over the Work Court. The Work Court Judge could impose fines, court costs, fees, and restitution against the Defendant, all to be paid pre-adjudication.

The Work Court Judge, working with other agencies of State and local government, would find jobs for these Defendants with employers who agree to hire them at no less than minimum wage. The Defendant would execute a wage assignment to have his or her paycheck sent to the Work Court (or the Sheriff or other appropriate official, who would then disburse the funds to the clerk for fines, court costs, and fees.) If victim restitution is owed a check for such would be disbursed to the Prosecuting Attorney to send such to the victim.

The Work Court Judge would also sentence the Defendant to a certain number of days to work off his or her debt to society and the pay check would go to the General Fund. (It is hoped that

employers will keep these people on after they have completed the program at a salary commensurate with their position.) All proper tax deductions would be made by the employer before the check is remitted.

You have specifically asked in this regard:

1. Does a Circuit Judge have the authority to establish a diversion pre-adjudication program that is not specifically authorized by law?^[1]
2. Is there any aspect of this program as outlined above that would offend state or federal law?
3. It is felt a clearing account needs to be set up to initially receive the paycheck. Could the Work Court Judge set up a special account for the paycheck to be deposited and then write checks to the various officials as indicated? Could the Sheriff, if so ordered, open such an account and dispense the money accordingly?
4. If neither of these are possible, what office or official could receive the paychecks and dispense the money accordingly? The Clerk via the Registry of the Court?
5. Can or must the Quorum Court establish the account in any scenario?
6. If state law does not permit the program, does the Quorum Court have the authority to create such a program?
7. Is this program already authorized pursuant to A.C.A. § 16-93-303 and A.C.A. § 5-4-323? (Note that in the proposed program it is not contemplated that a plea will be entered.)

¹ You note in this respect that A.C.A. § 16-98-301 *et seq.* (Arkansas Drug Court Act) and A.C.A. § 9-27-323 (diversion of juvenile delinquency and family-in-need-of-services cases) provide for pre-adjudication diversion programs.

RESPONSE

The answer to your first question is likely “no,” in my opinion. This would seem to render moot Questions 2 through 5, but I will nevertheless note in response to your second question that several aspects of this particular proposed program would, for the reasons explained below, be contrary to state law. It is my opinion that the answer to Questions 6 and 7 is “no.”

Question 1 - Does a Circuit Judge have the authority to establish a diversion pre-adjudication program that is not specifically authorized by law? (A.C.A. § 16-93-301 et seq. and A.C.A. § 9-27-323 provide for pre-adjudication/diversion programs, one for drug court, the other for juvenile court....)

I assume this question is asked in contemplation of the so-called “Work Court” program described above. In my opinion, a circuit court probably lacks authority to implement a pre-adjudication diversion program of this sort on its own.² Although my research has yielded no Arkansas case directly on point, if faced with the question, I believe the Arkansas Supreme Court would likely conclude that the power to design a formal pretrial diversion program of this nature generally resides in the legislature. I anticipate the court would follow the lead of the Nebraska Supreme Court, reflected in the following passage, and conclude that the formalization of pretrial diversion programs is a legislative function, falling within the legislature’s power and duty to define crimes and fix punishment:

...formal pretrial diversion does not represent a natural outgrowth of the charging function, but, rather, a substantial change in the way society responds to the challenge of crime. It is the legislative branch of government that is charged with defining crimes and punishments. *See, State v. Divis*, 256 Neb. 328, 589 N.W.2d 537 (1999); *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985). In doing so, it sets the broad policy goals of this state’s criminal justice system, including whether for a particular type of crime the corrective goal should be retribution, deterrence, or rehabilitation. We believe that the formalization of pretrial diversion programs is the type of broad restructuring of the goals of the criminal justice system that is entrusted to the Legislature rather than to the

² Pretrial diversion programs have been described, generally, as “alternative procedures to the traditional process of prosecuting criminal defendants and are intended to augment the criminal justice system where prosecution would be counterproductive, ineffective, or unwarranted.” 4 A.L.R.4th 147 (2011) (§2[b] under “Preliminary Matters.”)

executive branch. Therefore, we hold that the power to design formal pretrial diversion programs is a legislative power....³

As indicated by this passage, the Nebraska court was addressing an argument that the statutory scheme violated separation of powers by infringing upon the prosecutor's discretion in deciding to charge an accused.⁴ The case is therefore distinguishable on this basis when addressing the "Work Court" program you have described, given that the prosecuting attorney's agreement is required under this proposed diversion program. However, I believe the Nebraska court's reasoning bears significantly on your question regarding a circuit judge's authority to establish such a program. The Nebraska court noted that designing a formal pretrial diversion program involves "a broader public policy decision that a particular type of rehabilitation program is the best way to deal with a particular type of crime."⁵ Formalizing the diversion process is thus best understood as a legislative function, in the court's view, because "[i]t is the legislative branch of government that is charged with defining crimes and punishments."⁶ The Arkansas Supreme Court also adheres to the view that "it is for the legislative branch of a state or federal government to determine the kind of conduct that constitutes a crime and the nature and extent of punishment which may be imposed."⁷ This view has led the court to consistently hold that sentencing in Arkansas is controlled entirely by statute.⁸ Trial courts cannot place additional

³ *Polikov v. Neth*, 270 Neb. 29, 39, 699 N.W.2d 802 (2005).

⁴ The court noted that individual prosecutors have always practiced pretrial diversion on an informal basis, *id.* at 31 (citation omitted), and that informal diversion practices of prosecutors have been seen as part of the charging function. *Id.* at 37 (citations omitted). It was contended that "the charging function is also broad enough to allow the county attorney to formalize diversion practices." *Id.*

My research indicates that this tension between the prosecutor's charging discretion and the requirements of pretrial diversion programs created by either statute or court rule is the predominant issue in cases involving the validity, construction, or application of such programs. *See* 4 A.L.R. 4th 147 (2011). By comparison, precedent is sparse on questions arising from tension between the legislative and judicial branches respecting such programs. *See id.*

⁵ 270 Neb. at 38.

⁶ *Id.* at 39.

⁷ *Sparrow v. State*, 284 Ark. 396, 397, 683 S.W.2d 218 (1985). *See also State v. Freeman*, 312 Ark. 34, 37, 846 S.W.2d 660 (1993); *Southern v. State*, 284 Ark. 572, 683 S.W.2d 933 (1985).

⁸ *Arkansas Discipline Comm. v. Hon. Proctor*, No. 09-738, slip op. at 35 (Ark. S. Ct. Jan. 25, 2010) (citing *Cross v. State*, 2009 Ark. 597, ___ S.W.3d ___). *See also Donaldson v. State*, 370 Ark. 3, 257 S.W.3d 74 (2007); *Bunch v. State*, 344 Ark. 730, 43 S.W.3d 132 (2001).

conditions on a sentence, other than as authorized by statute, or otherwise impose a sentence that is not authorized.⁹

Although pretrial diversion operates to defer prosecution rather than sentencing,¹⁰ it plainly is an alternative to the normal prosecution or sentencing process as a means of dealing with particular offenses.¹¹ This has led at least one other appellate state court to conclude that a trial court improperly imposed additional conditions on a defendant charged under a drug abuse act that allowed for treatment under a supervised program instead of prosecution.¹² Relying on decisions that were based on the premise that “dispositions imposed by the courts must be authorized by law,” the defendant argued that the act must explicitly authorize the additional conditions; otherwise the court lacks the authority to impose them.¹³ The Illinois court agreed, citing another case in which the court observed that “the legislature intended treatment under the Dangerous Drug Abuse Act to be an alternative to the normal ambit of prosecution or sentencing under the [general sentencing law].”¹⁴ The court therefore clearly viewed the statutory treatment option as falling within the legislature’s power over dispositions that may be imposed by the court.

If faced with your question, I believe the Arkansas Supreme Court would probably adhere to the approach reflected in these cases and similarly conclude that the legislature, not the courts, decides how particular crimes should be disposed of; and that as a consequence, designing a formal pretrial diversion program such as the “Work Court” program you have described is a legislative function.¹⁵ Indeed,

⁹ *E.g.*, *Jones v. State*, 2010 Ark. App. 280, ___ S.W.3d ___ (2010); *Richie v. State*, 2009 Ark. 602, ___ S.W.3d ___ (2009).

¹⁰ *See* n. 2, *supra*.

¹¹ *Accord State v. Cascade Dist. Ct.*, 94 Wn.2d 772, 776, 779, 621 P.2d 115 (1980) (noting, with regard to a particular deferred prosecution program created by statute, that “it is apparent the legislature has provided for deferred prosecution ... because of a need for sentencing alternatives which are more appropriate for some defendants than those available in the traditional criminal process[,]” and observing that the process provided by the statute “is fundamentally a new sentencing alternative of preconviction probation, to be added to the traditional choices of imprisonment, fine, and postconviction probation.”)

¹² *People v. Caldwell*, 118 Ill App.3d 1027, 455 N.E.2d 893 (1983).

¹³ *Id.*, 118 Ill.App.3d at 1030.

¹⁴ *Id.* at 1031 (citation omitted).

¹⁵ *Cf. State v. Freeman*, *supra* n. 6, 312 Ark. at 38 (observing that “[t]he legislature, not the courts, decides what is a crime and, within limits, what a sentence will be.”)

as you have noted, A.C.A. § 16-98-301 *et seq.* (the Arkansas Drug Court Act) and A.C.A. § 9-27-323 (diversion of juvenile delinquency and family-in-need-of-services cases) currently provide for pre-adjudication diversion programs. These are the circumstances in which the legislature has allowed for pre-trial diversion programs. I believe it may be successfully contended that when the legislature intends to provide for such programs it does so explicitly, leaving no room for a trial court to implement a program of the sort you have described, apart from any statutory framework.

I recognize that this conclusion sets Arkansas apart from a few states in which diversion programs are creations of the judicial branch.¹⁶ In New Jersey, for instance, so-called “pretrial intervention” was adopted pursuant to court rule.¹⁷ The New Jersey Supreme Court upheld the constitutionality of the rule, finding that it did not encroach on the powers delegated to the legislative or executive branches of government.¹⁸ As reflected in the following excerpt, the court reasoned that the pretrial intervention program is a “remedial aspect of a criminal proceeding”¹⁹ over which the judiciary has inherent authority:

We have previously adverted to the constitutional procedural power vested in the Supreme Court. Coupled with that is “[t]he judicial power” entrusted to the Court. N.J. Const. (1947) Art. VI, § I, par. 1. *Inherent in that judicial power is the judiciary’s authority to fashion remedies once its jurisdiction is invoked.* [Footnote and citation omitted.] This is not to say that the Court can deprive the Legislature of its right to determine that certain types of conduct constitute substantive crimes. [Citations omitted.] But we have held that: “[t]he fact that the Legislature has acted to provide a remedy does not mean that the judicial branch is limited to the boundary lines of strict legislative expression in fashioning or denying remedies in a particular case.” *State v. Carter*, 64 N.J. 382, 392 (1974). In *State v. Carter* we made it clear that:

¹⁶ See 22A C.J.S. Criminal Law § 559 (2011).

¹⁷ See *State v. Leonardis*, 71 N.J. 85, 103-105, 363 A.2d 321 (1976) (describing the enabling court rule, N.J.R. 3:28).

¹⁸ *State v. Leonardis*, 73 N.J. 360, 375 A.2d 607 (1977).

¹⁹ *Id.* at 370.

The court's power to fashion remedies in the realm of criminal justice is unquestioned. At common law, courts of criminal jurisdiction had the power to suspend sentences. [Citation omitted.] Probation has a deep-rooted common law basis. The enactment of a statute relating to a particular aspect of probation does not preempt the entire field. [Citation omitted.] It follows that a statute neglecting to mention probation would certainly not preempt the courts ability to provide for it.²⁰

The New Jersey court also based its ruling on the notion of a “blending” of powers among the three branches of government:

It is important to note that the separation of powers doctrine does not require an absolute division of powers among the three branches of government.... The aim of the constitutional provision is not to prevent cooperative action among the three branches of government, but to guarantee a system of checks and balances. This notion of a blending of powers is expressed in various opinions by both this Court and the United States Supreme Court, interpreting the State and Federal Constitutions.²¹

The Ohio Court of Appeals similarly affirmed a trial court's authority to implement a pretrial diversion program based on judicial rulemaking.²² The court viewed pretrial diversion as a quasi-judicial function because it was “tantamount to pretrial probation,”²³ reflecting adherence to the same view of the court's inherent power to fashion remedies as in New Jersey. The Ohio court also mentioned the notion of “a blending of the three powers of government.”²⁴

²⁰ *Id.* at 369-70 (emphasis added).

²¹ *Id.* at 370.

²² *Cleveland v. Mosquito*, 10 Ohio App. 3d 239, 461 N.E.2d 924 (1983). *See also Lane v. Phillabaum*, 182 Ohio App. 3d 145 (2008).

²³ 10 Ohio App. 3d at 240; 182 Ohio App. 3d at 149.

²⁴ 10 Ohio App. 3d at 241.

I believe it is clear from Arkansas Supreme Court decisions involving sentencing that our court does not view its rulemaking authority as including the inherent authority to fashion remedies.²⁵ Additionally, Arkansas plainly does not follow a malleable approach to the separation of powers doctrine. The law of Arkansas requires a “strict” application of the doctrine.²⁶ Our court has distinguished cases from states with only an implied doctrine and rejects the “blending” or overlapping of powers authorized in some states.²⁷

This leads me to predict that if faced with the question, our court would likely agree with the Nebraska Supreme Court that the formalization of pretrial diversion programs is a legislative function, falling within the legislature’s power and duty to define crimes and fix punishment. In my opinion, therefore, the answer to your first question is likely “no.” A circuit judge probably lacks authority to establish a diversion pre-adjudication program that is not specifically authorized by statute.

A response to Questions 2 through 5 appears unnecessary in light of the above response. I will nevertheless note with regard to Question 2—*Is there any aspect of this program as outlined above that would offend state or federal law?*—that a circuit court may not assess or collect any court costs other than those authorized by law.²⁸ Additionally, as a general matter, “[f]ees are collectible only when and to the extent authorized by law, and an officer demanding fees must point to a particular statute authorizing them.”²⁹ I note in this regard that there is specific authority under the Arkansas Drug Court Act for a drug court judge to order the offender to pay court costs and fees.³⁰ The absence of comparable authority in connection with the “Work Court” program you have described compels me to conclude that the contemplated fees and costs would be contrary to state law.

²⁵ See *Shelton v. State*, 44 Ark. App. 156, 159, 870 S.W.2d 398 (1994) (“The Arkansas Supreme Court has repeatedly held that the extent of sentencing in criminal cases is controlled by the legislature and that Arkansas circuit courts have no inherent authority to fashion sentences.”).

²⁶ *Spradlin v. Arkansas Ethics Commission*, 314 Ark. 108, 858 S.W.2d 684 (1993) (citing *Oates v. Rogers*, 201 Ark. 346, 144 S.W.2d 437 (1940)). See also *Spradlin v. Arkansas Ethics Commission: A Hard-Line Approach to Separation of Powers*, 48 Ark. L. Rev. 755 (1995).

²⁷ See *Spradlin*, *supra*.

²⁸ A.C.A. § 16-10-305(d) (Supp. 2011); Op. Att’y Gen. Nos. 2007-066; 2003-208.

²⁹ 67 C.J.S. *Officers* § 278.

³⁰ A.C.A. § 16-98-304 (Supp. 2011).

Question 6 - If state law does not permit the program, does the Quorum Court have the authority to create such a program?

The answer to this question is “no,” in my opinion. I believe it is clear that the creation of such a program would fall outside the county’s “local legislative authority” under Arkansas Constitution, Amendment 55.³¹ Circuit courts plainly are not a local matter for purposes of county legislative authority.³²

Question 7 - Is this program already authorized pursuant to A.C.A. § 16-93-303 and A.C.A. § 5-4-323? (Note that in the proposed program it is not contemplated that a plea will be entered.)

The answer to this question appears to be “no,” given that no plea or sentence is entered under the program you describe. Section 16-93-303 authorizes the judge to defer further proceedings in certain cases and place the first-time offender on probation. The statute applies as follows in the case of a first-time offender who *enters a plea*:

Whenever an accused *enters a plea of guilty or nolo contendere* prior to an adjudication of guilt, the judge of the circuit or district court, in the case of a defendant who has not been previously convicted of a felony, without making a finding of guilt or entering a judgment of guilt and with the consent of the defendant may defer further proceedings and place the defendant on probation for a period of not less than one (1) year, under such terms and conditions as may be set by the court.³³

Section 5-4-323 authorizes the court to impose certain additional requirements for suspension of sentence or probation in the case of persons *sentenced for a felony or Class A misdemeanor*:

(a)(1) As an additional requirement for suspension of sentence or probation, a court may require *any person who is sentenced for a felony or a Class A misdemeanor* to make a good faith effort toward completion of a high school diploma or a general education

³¹ See *Kollmeyer v. Greer*, 267 Ark. 632, 593 S.W.2d 29 (1980) (county ordinance imposing additional recording fees was inconsistent with state statute and invalid).

³² *Venhaus v. State ex rel. Lofton*, 285 Ark. 23, 684 S.W.2d 252 (1985).

³³ A.C.A. § 16-93-303(a)(1)(A)(i) (Supp. 2011) (emphasis added)..

development certificate unless the person has already achieved a high school diploma or a general education development certificate.

* * *

(b)(1) Unless the person is employed or has a skill that will facilitate immediate employment, the court may require *any person sentenced for a felony or a Class A misdemeanor* to make a good faith effort toward obtaining gainful employment by participating in an appropriate employment training program as an additional requirement for suspension of sentence or probation....³⁴

Because these statutes apply after entry of a plea by the defendant or sentencing by the court, they plainly do not encompass the proposed “Work Court” program as described in your request for my opinion.³⁵

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL
Attorney General

DM/EAW:cyh

³⁴ A.C.A. § 5-4-323 (Supp. 2011).

³⁵ The legislature recently established additional sentencing alternatives under Act 570 of 2011, the “Public Safety Improvement Act.” Section 21 of the act, codified at A.C.A. §§ 5-4-801–805 (Supp. 2011), authorizes a court to suspend imposition of sentence for an “eligible offender” (defined at § 5-4-801(2)), upon condition that the offender participate in a “community work project” (defined at § 5-4-801(1)). Again, because the act only applies to convicted offenders, it does not provide authority for the program you have described.