STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED – MAY 30, 2012)

STATE OF RHODE ISLAND	:	
	:	
V.	:	**C.A. NO. P1 2006-3554A**
	:	**C.A. NO. P1 2006-2456A**
PAUL WINIARSKI	:	

DECISION

GIBNEY, P.J. Paul Winiarski ("Appellant") appeals the decision ("Decision") of a Superior Court General Magistrate ("Magistrate"), denying the Motion for Remission of Costs with respect to the $550 fee imposed in his sentencing for first degree robbery and the $450 fee imposed in his sentencing for larceny greater than $500 (the "Fees"). Jurisdiction is pursuant to G.L. 1956 § 8-2-11.1(e). For the reasons set forth herein, this Court "accepts" the Magistrate's Decision.

I
Facts and Travel

On December 5, 2005, Appellant was charged with larceny greater than $500. Appellant, on the same date, entered a plea of nolo contendere for which he was sentenced to a five-year term with five years of the term suspended. Appellant, as part of said sentence, was also placed on five years probation and ordered to pay an assessment fee of $450 relative to court costs.

On June 13, 2006, Appellant was charged with first degree robbery. Appellant, on the same date, entered a plea of nolo contendere for which he was sentenced to a thirty-year term retroactive to the offense date with twenty years of the term suspended. Appellant, as part of said sentence, was also placed on twenty years probation and ordered to pay an assessment fee of $550 relative to court costs.

On October 26, 2011, Appellant filed a Motion for Remission of Costs, pursuant to G.L. 1956 § 12-18.1-3(d), for the remission of "all fines and costs currently assessed against him." Appellant argued that "upon his release from confinement he will be without the means with which to defray the expense of fines and costs currently accessed against him." In support of the motion, Appellant listed the general state of the economy, high unemployment rates, and his criminal records as factors precluding employment. Appellant also noted that he is reliant upon "SSI, Welfare, or relies on other community based assistance to survive."

On November 1, 2011, the Magistrate in charge of the Fines, Costs, and Restitutions Calendar denied Appellant's motion via letter. In pertinent part, such letter states: "[a]fter careful review of all the facts in this case, your motion is, hereby, denied. After your release, work placement or parole, a payment schedule will be arranged for you. It is your obligation to contact the Cost Office after your release date."

On March 12, 2012, Appellant, acting pro se, filed 1) a notice of appeal; 2) a motion to assign; 3) a petition for writ of habeas corpus; 4) a motion to correct sentence; and 5) a motion for appointment of counsel. Before this Court for review is the Magistrate's decision denying Appellant's Motion for Remission of Costs.

II
Standard of Review

The Superior Court's review of a magistrate decision is specifically governed by § 8-2-11.1(e). Such section provides:

> "A party aggrieved by an order entered by the general magistrate shall be entitled to a review of the order by a justice of the relevant court. Unless otherwise provided in the rules of procedure of the court, such review shall be on the record and appellate in nature. The court shall, by rules of procedure, establish procedures for review of orders entered by a general magistrate, and for enforcement of contempt of a general magistrate."

Superior Court Administrative Order No. 94-12, specifically delineating a magistrate's powers, provides for de novo review of the appellate matter. Said order provides:

> "The Superior Court Justice shall make a de novo determination of those portions to which the appeal is directed and may accept, reject, or modify, in whole or in part the judgment, order or decree of the Master. [1] The justice, however, need not formally conduct a new hearing and may consider the record developed before the Master, making his or her own determination based on that record whether there is competent evidence upon which the Master's judgment, order or decree rests. The Justice may also receive further evidence, recall witnesses or recommit the matter to the master with instructions."

Thus, a Superior Court justice conducts de novo review of the portions of the record appealed. See Paradis v. Heritage Loan and Investment Co., 678 A.2d 440, 445 (R.I. 1996) (finding that "the trial justice's de novo review of the [magistrate's] decision, based solely upon the record was proper"). In review, the Superior Court Justice "may consider the record developed before the Master" and "need not formally conduct a new hearing." Such review also may warrant a new hearing and further evidence. At the same time, the Superior Court Justice "may also receive further evidence, recall witnesses," or remand the matter.

III
Decision

A
Ripeness

In the instant case, Appellant challenges the Fees levied subsequent to his plea of nolo contendere for larceny greater than $500 and first degree robbery. Section 12-18.1-3 provides: "[i]f the court determines that the defendant does not have the ability to pay the costs as set forth in this section, the judge may by specific order mitigate the costs in accordance with the court's

[1] The term, "Master," was amended to "Magistrate" by P.L. 1998, ch. 442 § 1.

determination of the ability of the offender to pay the costs." Appellant contends that he lacks the ability to pay the imposed Fees. Specifically, Appellant maintains that he currently lives on a fixed income and the general state of the economy, high unemployment rates, and his criminal record preclude future employment. Appellant further reasons that such Fee "will only act as a vehicle for reincarceration simply because [he] is indigent."

In order for a claim to be properly adjudicated, its surrounding facts must be sufficiently concrete. The United States Supreme Court has held that "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Texas v. United States, 523 U.S. 296, 300 (1998) (quoting Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 581 (1985) (quoting 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3532, 112 (1984))). Moreover, our Supreme Court has ruled: "[a] plaintiff has standing when 'the plaintiff alleges that the challenged action has caused him [or her] injury in fact, economic or otherwise.'" Weybosset Hill Investments, LLC v. Rossi, 857 A.2d 231, 239 (R.I. 2004) (quoting Rhode Island Ophthalmological Society v. Cannon, 113 R.I. 16, 22, 317 A.2d 124, 128 (1974)). Such "injury in fact" has been defined as "an invasion of a legally protected interest which is (a) concrete and particularized * * * and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" Ahlburn v. Clark, 728 A.2d 449, 451 (R.I. 1999) (quoting Pontbriand v. Sundlun, 699 A.2d 856, 862 (R.I. 1997)).

Appellant is still incarcerated with multiple years left to serve. Consequently, Appellant has not been ordered to make payment on any fees, costs, or fines and will not be required to do so until after release. Thus, Appellant's alleged injury is hypothetical as it is yet to occur. See Ahlburn, 728 A.2d at 451. The overall health of the economy, the unemployment rate, and Appellant's employment status, along with any other issues relative to economic hardship,

cannot be determined until his future "release, work placement, or parole." Upon "release, work placement, or parole," it is Appellant's obligation to contact the Office of Costs and Fines for development of an appropriate payment schedule based on his then-present circumstances, which will be reviewed at that time. See Texas, 523 U.S. at 300.

B
Appointment of Counsel

Appellant has also filed a Motion for Appointment of Counsel to appeal the Magistrate's decision to deny Appellant's Motion for Remission of Costs. In this case, the Magistrate declined to adjudicate the underlying matter for lack of ripeness.

At this juncture, Appellant—who is not confronted with the prospect of any additional loss of liberty—does not require counsel because there is no need to argue for relief where injury is not real. Legal proceedings have not occurred. See State v. Gaylor, 971 A.2d 611, 613 (R.I. 2009) (explaining that a claim is not ripe if the claim rests upon "future events that may not occur as anticipated, or may not occur at all") (quoting Thomas, 473 U.S. at 581); see also Palazzolo v. State, 746 A.2d 707, 713 (R.I. 2000) (where the Rhode Island Supreme Court articulated that "the requirement of ripeness is based on the principle that [the] Court will not render advisory opinions or function in the abstract"). Accordingly, the Court will not entertain a motion for appointment of counsel for remission of costs at this time.

For purposes of discussion, however, this Court does note that a criminal defendant's right to counsel "flows from different constitutional provisions[,] depending on the nature of the proceedings." United States v. Palomo, 80 F.3d 138, 141 (5th Cir. 1996). More specifically, the Sixth Amendment to the United States Constitution[2] provides a criminal defendant with the right

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[2] The Sixth Amendment to the United States Constitution provides:

to counsel during all "'critical stages'" of a criminal prosecution, State v. Oliveira, 961 A.2d 299, 308-09 (R.I. 2008), "where substantial rights of a criminal accused may be affected."[3] Mempa v. Rhay, 389 U.S. 128 (1967).

The United States Supreme Court has been reluctant to extend the Sixth Amendment right to counsel to proceedings that it concluded were not clearly "criminal proceedings." See, e.g., Morrissey v. Brewer, 408 U.S. 471 (1972) (finding that revocation of parole is not a part of a criminal prosecution); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (holding that "[p]robation revocation, like parole revocation, is not a stage of criminal prosecution, but does result in a loss of liberty"). Although sentencing is a critical stage of the criminal process which implicates a defendant's right to counsel, the critical stage terminates upon the imposition of sentence. The subsequent execution of the sentence is not a critical stage of a criminal proceeding in which a defendant has a Sixth Amendment right to the assistance of counsel. 21A Am. Jur. Criminal Law § 865. Similarly, a hearing to determine whether an accused is indigent and in need of appointment of counsel is not a critical stage of a criminal proceeding. 22 C.J.S. Criminal Law § 350.

Appellant's Motion for Remission of Court Costs pursuant to § 12-18.1-3(d), is not a critical stage in criminal prosecution. In fact, "collection of court costs from a criminal

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> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

[3] The right to counsel is also protected by R.I. Const. art. 1, § 10, which incorporates language similar to that of the Sixth Amendment.

defendant is enforceable as a money judgment in a civil case." 30 Am. Jur. 2d. Costs § 111. In this case, Appellant is bringing a motion to reduce the amount of court costs to be collected pursuant to § 12-18.1-3(d), which provides that a judge may "by specific order mitigate the costs in accordance with the court's determination on the ability of the offender to pay the costs." Sec. 12-18.1-3(d). Since a motion for remission of costs is civil in nature, Appellant would not have an absolute constitutional right to counsel. See, e.g., Bryant v. Wall, 896 A.2d 704, 708 (R.I. 2006) (where the Supreme Court held that "[p]ostconviction proceedings are civil in nature" and therefore do not afford an applicant a constitutional right to counsel).

IV
Conclusion

After review, this Court finds that Appellant presently lacks standing to ask for remission of costs and fines as his claims are not ripe for adjudication. Accordingly, this Court "accepts" the Magistrate's Decision regarding Appellant's Motion for Remission of Costs.