Opinion No. 87-09

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OPINION OF: HAL STRATTON, Attorney General

BY: William McEuen, Assistant Attorney General

TO: Mr. Samuel W. Jones, Executive Director, Judicial Standards Commission, 2539 Wyoming, N.E., Suite A, Albuquerque, New Mexico 87112

QUESTIONS

Does a New Mexico judge have power to require, as a condition to suspension of execution of a fine or as a condition of probation, that a defendant pay money to a charitable or other non-governmental organization in no way aggrieved by the defendant's offense?

CONCLUSIONS

No.

ANALYSIS

Section 31-20-6, NMSA, 1987 Comp. (1985 Cum. Supp.) sets forth a trial judge's authority to impose conditions upon a person whose sentence is suspended or deferred. Any conditions not authorized statutorily may not be imposed. State v. Holland, 91 N.M. 386, 574 P.2d 605 (Ct. App. 1978). Section 31-20-6 does not authorize expressly a judge to require a monetary contribution to an organization not aggrieved by the offense.

Section 31-20-6(7) authorizes a court to require a probationer "to satisfy any other conditions reasonably related to his rehabilitation". Our courts have interpreted that provision as authorization for a variety of conditions which will not be struck down unless (i) there is no reasonable relation to the offense for which the defendant was convicted;

(ii) the condition relates to activity that is not itself criminal; and (iii) the condition requires or forbids conduct that is not reasonably related to deterring future criminality. State v. Taylor, 104 N.M. 88, 717 P.2d 64 (Ct. App.), cert. den., 103 N.M. 798, 715 P.2d 71 (1986).

It seems apparent that the first two criteria could not be met. A contribution to an unaggrieved organization has no relationship to the criminal activity leading to conviction, and clearly relates to an activity that is not itself criminal. The last criterion, a reasonable relationship to the deterrence of future crimes, requires analysis.

It might be argued that a charitable contribution tends to engender a sense of social responsibility, similar to community service. See State v. Padilla, 98 N.M. 349, 648 P.2d 807 (Ct. App. 1982) (community service is related to prevention of antisocial behavior). It may also be argued, however, that writing a check to a charity has none of the rehabilitative aspects seen in performing work for a charity. United States v. Gustafson, 587 F. Supp. 548 (D. Minn. 1984). Absent explicit statutory authorization for requiring such contributions, courts generally refuse to allow their imposition upon probationers. See, e.g., United States v. John Scher Presents Inc., 746 F.2d 959 (3rd Cir. 1984); United States v. Wright Contracting, Co., 728 F.2d 648 (4th Cir. 1984); United States v. Haile, 795 F.2d 489 (5th Cir. 1986); United States v. Missouri Valley Constr., Co., 741 F.2d 1542 (8th Cir. 1984); United States v. Clovis Retail Liquor Dealers Trade Ass'n., 540 F.2d 1389 (10th Cir. 1976); State v. Morrison, 459 So.2d 1320 (La. App. 1984); People v. White, 500 N.Y.S.2d 825 (N.Y.A.D 1986); State v. Theroff, 657 P.2d 800 (Wash. App. 1983).

In sum, it is our opinion that the condition at issue does not reasonably relate to deterring future criminality nor meet the other requirements of State v. Taylor. Overwhelming judicial discomfort with the concept of forced charitable contributions by probationers support our conclusion that such conditions cannot be considered relevant to rehabilitation. Absent a clear legislative determination to the contrary, we do not believe state judges have the power to require a defendant to pay money to a charitable organization unaggrieved by the defendant's offense.

ATTORNEY GENERAL

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