

May 26, 2011

The Honorable Martin P. Votel
Preble County Prosecuting Attorney
101 East Main Street
Courthouse, 1st Floor
Eaton, Ohio 45320

SYLLABUS:

2011-017

R.C. 5705.10(D) requires fees paid by persons participating in a pre-trial diversion program established pursuant to R.C. 2935.36 to be deposited into a special fund created under R.C. 5705.09(F) for use in defraying the costs of supervising persons participating in the program. (2003 Op. Att’y Gen. No. 2003-005, overruled on the basis of statutory amendment.)



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OPINION NO. 2011-017

The Honorable Martin P. Votel
Preble County Prosecuting Attorney
101 East Main Street
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Eaton, Ohio 45320

Dear Prosecutor Votel:

You have requested an opinion whether there is a manner by which a county prosecuting attorney may retain fees paid by persons participating in a pre-trial diversion program established pursuant to R.C. 2935.36 to fund the program. Under the current system in Preble County, the fees are collected and deposited in the county general fund. The fees are commingled with other moneys in the general fund and used for general county purposes, rather than credited to a separate account within the county general fund and used for the purpose specified in R.C. 2935.36.¹

R.C. 2935.36(A) authorizes a county prosecuting attorney to establish a pre-trial diversion program and charge a person who participates in the program a reasonable fee for supervision services:²

The prosecuting attorney may establish pre-trial diversion programs for adults who are accused of committing criminal offenses and whom the prosecuting attorney believes probably will not offend again. *The prosecuting attorney may require, as a condition of an accused's participation in the program, the accused to pay a*

¹ For county budgeting purposes, “[a]n ‘account’ is a procedural device which segregates revenue within a ‘fund,’ for a particular purpose.” 1986 Op. Att’y Gen. No. 86-100 at 2-558.

² 2003 Op. Att’y Gen. No. 2003-005 determined that a county prosecuting attorney may not require a person who participates in a pre-trial diversion program established pursuant to R.C. 2935.36 to pay a fee for supervision services. After the Attorney General issued 2003 Op. Att’y Gen. No. 2003-005, the General Assembly amended R.C. 2935.36 to authorize a county prosecuting attorney to charge such a person a reasonable fee for supervision services. 2003-2004 Ohio Laws, Part I, 396, 934 (Am. Sub. H.B. 95, eff. June 26, 2003, with certain sections effective on Sept. 26, 2003, or other dates). On the basis of this statutory amendment to R.C. 2935.36, we overrule 2003 Op. Att’y Gen. No. 2003-005.

reasonable fee for supervision services that include, but are not limited to, monitoring and drug testing. The programs shall be operated pursuant to written standards approved by journal entry by the presiding judge or, in courts with only one judge, the judge of the court of common pleas[.] (Emphasis added.)

See also R.C. 2935.36(B)(3) (a person who enters a pre-trial diversion program must “[a]gree, in writing, to pay any reasonable fee for supervision services established by the prosecuting attorney”).

R.C. 2935.36(A) specifies clearly that the fees imposed by the county prosecuting attorney are to be used by the county prosecuting attorney to defray the costs of supervising persons participating in a pre-trial diversion program, and a straightforward reading of R.C. 2935.36(A) compels the conclusion that R.C. 2935.36(A) restricts the purpose for which the fees may be used. *See Provident Bank v. Wood*, 36 Ohio St. 2d 101, 105-06, 304 N.E.2d 378 (1973) (“[i]t is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent. If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly” (citation omitted)). The fees collected under R.C. 2935.36 are thus limited to the purpose prescribed by R.C. 2935.36—that is, use by the county prosecuting attorney in supervising persons participating in the pre-trial diversion program.

While a county prosecuting attorney is authorized to use the fees collected under R.C. 2935.36 to defray the costs of supervising persons participating in a pre-trial diversion program, nothing in this statute or elsewhere in the Revised Code authorizes a county prosecuting attorney or other county official who collects the fees to retain custody of the fees. *Cf.* R.C. 325.071 (a county sheriff may hold and disburse his furtherance of justice funds); R.C. 325.12 (a county prosecuting attorney may hold and disburse his furtherance of justice funds); 1992 Op. Att’y Gen. No. 92-030 at 2-114 and 2-115 (mandatory drug fine moneys, proceeds from the sale of contraband, and forfeited moneys that constitute a law enforcement trust fund “are to be held and controlled, in the first instance, by the county prosecuting attorney or county sheriff that has received such moneys or proceeds”). Instead, fees collected under R.C. 2935.36 by a county prosecuting attorney or other county official must be deposited in the county treasury. *See* R.C. 9.38; R.C. 325.27; R.C. 325.31; *see also* 1992 Op. Att’y Gen. No. 92-025 at 2-90 n.6 (“the provisions authorizing a county department, official, or board to hold public funds independently of the county treasury are special provisions in that such provisions specifically authorize a person or entity to hold and disburse public funds that generally are required to be held and disbursed by the county treasurer”). *See generally* 1997 Op. Att’y Gen. No. 97-036 at 2-215 (“[i]f the General Assembly had intended to grant an [alcohol, drug addiction, and mental health services] board the authority to maintain custody of the moneys of a joint-county [alcohol, drug addiction, and mental health services] district, the General Assembly could have communicated that intention expressly, having done so in other instances”).

When fees collected under R.C. 2935.36 are deposited in the county treasury, the fees must be paid into a fund. *See* R.C. 5705.09; R.C. 5705.091; R.C. 5705.10; R.C. 5705.12; R.C. 5705.131. Pursuant to R.C. 5705.09, a county is required to establish various funds in the county treasury, including a general fund, a special fund for each special levy, a special bond fund for each bond issue,

a special fund for each class of revenues derived from a source other than the general property tax, which the law requires to be used for a particular purpose, and a trust fund for any amount received by a subdivision in trust.³

Various statutes prescribe the funds into which fees and other moneys collected by county officials are to be paid. *See, e.g.*, R.C. 311.29(D); R.C. 313.16; R.C. 313.161; R.C. 319.63(C); R.C. 323.32(B); R.C. 325.31(A); R.C. 955.20; R.C. 1901.261(B)(1); R.C. 3113.34; R.C. 5705.10; R.C. 5747.51(J). Pursuant to R.C. 5705.10(D), all county “revenue derived from a source other than the general property tax and which the law prescribes shall be used for a particular purpose, *shall be paid into a special fund for such purpose.*” (Emphasis added.) Use of the word “shall” indicates that R.C. 5705.10(D)’s directive is mandatory since there is no clear and unequivocal legislative intent that the word “shall” receive a construction other than its ordinary usage. *See Dep’t of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St. 3d 532, 534, 605 N.E.2d 368 (1992). This means that, if the law prescribes a particular purpose for which revenue collected by county officials is to be used, R.C. 5705.10(D) requires the revenue to be paid into a special fund and used for only that purpose.⁴ *See* R.C. 5705.09(F); 2009 Op. Att’y Gen. No. 2009-001 at 2-6; *see also* R.C. 5705.10(H) (“[m]oney paid into any fund shall be used only for the purposes for which such fund is established”).

³ R.C. 5705.12 provides that “[i]n addition to the funds provided for by [R.C. 5705.09, R.C. 5705.121, R.C. 5705.13, and R.C. 5705.131],” a county “may establish, with the approval of and in the manner prescribed by the auditor of state, such other funds as are desirable, and may provide by ordinance or resolution that money derived from specified sources other than the general property tax shall be paid directly into such funds.” In accordance with R.C. 5705.12, the Preble County Board of Commissioners requested the Auditor of State to approve the establishment of a fund for fees collected under R.C. 2935.36. This request was denied by the Auditor of State.

Because we conclude that a county is required and authorized under R.C. 5705.09(F) to create a special fund for fees collected under R.C. 2935.36, the county is not required to obtain the approval of the Auditor of State to establish such a fund under R.C. 5705.12. The authority conferred upon a county by R.C. 5705.12 is in addition to that set forth in R.C. 5705.09. *See* 1962 Op. Att’y Gen. No. 2955, p. 288, at 291 (R.C. 5705.12 “does, however, provide an exception” to R.C. 5705.09). If a county does not have authority under R.C. 5705.09 or another statute to establish a fund for a particular purpose without the approval of the Auditor of State, the county may in accordance with R.C. 5705.12 request the Auditor of State to approve the establishment of a fund for that purpose.

⁴ In some instances county revenue must be deposited into the county general fund, rather than a special fund, and used for a particular purpose. *See, e.g.*, R.C. 311.171(F); R.C. 319.63(C); R.C. 2929.28(C)(1). In such situations, the county revenue must be deposited into the county general fund and used for the specified purpose. *See* 2006 Op. Att’y Gen. No. 2006-009. *See generally* 1981 Op. Att’y Gen. No. 81-035 (discussing the segregation of portions of county general fund moneys whose permitted uses are restricted).

The term “revenue” is not defined by statute for purposes of R.C. 5705.10. Thus, it is appropriate to use the ordinary dictionary definition of this term when interpreting R.C. 5705.10. R.C. 1.42; *see* 1979 Op. Att’y Gen. No. 79-113 at 2-379. The common definition of “revenue” includes, among other things, “the annual or periodical yield of taxes, excises, customs, duties, and other sources of income that a nation, state, or municipality collects and receives into the treasury for public use : public income of whatever kind.” *Webster’s Third New International Dictionary* 1942 (unabr. ed. 1993). The term “revenue” is generally used to encompass income of all sorts collected by a county for public use. *See* 1984 Op. Att’y Gen. No. 84-067 at 2-218. Accordingly, the term “revenue,” as used in R.C. 5705.10, encompasses fees collected by county officials under R.C. 2935.36, and, as such, R.C. 5705.10(D) requires that these fees be deposited into a special fund for use in defraying the costs of supervising persons participating in the pre-trial diversion program.⁵

The General Assembly has not established a special fund in the county treasury for fees paid by persons participating in a pre-trial diversion program established pursuant to R.C. 2935.36. *See, e.g.,* R.C. 955.20 (“[t]he registration fees provided for in [R.C. 955.01-.14] constitute a special fund [in the county treasury] known as ‘the dog and kennel fund’”). Absent such authority, R.C. 5705.09(F) requires a county to establish a special fund in the county treasury for such fees. *See generally* R.C. 5705.10(D) (county revenue that is required to be used for a particular purpose must be deposited in a special fund). R.C. 5705.09(F) requires a county to establish “[a] special fund for each class of revenues derived from a source other than the general property tax, which the law requires to be used for a particular purpose.” Accordingly, fees paid by persons participating in a pre-trial diversion program established pursuant to R.C. 2935.36 are to be deposited into a special fund created under R.C. 5705.09(F) and used to defray the costs of supervising persons participating in the program.

In conclusion, it is my opinion, and you are hereby advised that R.C. 5705.10(D) requires fees paid by persons participating in a pre-trial diversion program established pursuant to R.C. 2935.36 to be deposited into a special fund created under R.C. 5705.09(F) for use in defraying the costs of

⁵ Except as provided therein, R.C. 325.27 and R.C. 325.31 require all fees collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of the court of common pleas, county engineer, or county recorder to be paid into the county general fund. To the extent of any conflict, the specific language of R.C. 5705.10(D) requiring fees collected under R.C. 2935.36 to be paid into a special fund for use in defraying the costs of supervising persons participating in a pre-trial diversion program prevails over the more general language of R.C. 325.27 and R.C. 325.31. *See* R.C. 1.51.

In addition, pursuant to R.C. 5705.14(E), fees collected by the county auditor, county treasurer, probate judge, sheriff, clerk of the court of common pleas, county engineer, or county recorder under R.C. 2935.36 and paid into the county general fund may be transferred from the general fund to a special fund. Thus, any fees collected under R.C. 2935.36 and paid into the county general fund may be transferred to the special fund holding fees paid by persons participating in a pre-trial diversion program established pursuant to R.C. 2935.36.

The Honorable Martin P. Votel

- 5 -

supervising persons participating in the program. (2003 Op. Att’y Gen. No. 2003-005, overruled on the basis of statutory amendment.)

Respectfully,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a long, sweeping tail on the "e".

MICHAEL DEWINE
Ohio Attorney General