

FILED _____

AT _____ O'clock ____ M
CLERK, DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,)
)
 Plaintiff,)
)
 vs.)
)
 KRISTEN MALONEY,)
)
)
 Defendant.)
)
 _____)

Case No. **CRM 2008 7594**

**MEMORANDUM DECISION AND
ORDER ON APPEAL**

I. BACKGROUND AND PROCEDURAL HISTORY.

Appellant Kristen Maloney (Maloney) was charged with domestic battery arising out of an incident at the Corner Bar on April 19, 2008. On April 21, 2008, Maloney, who was in custody at the time, made her first appearance before Magistrate Judge James Stow. She entered a not guilty plea and applied for the services of a public defender by tendering a Financial Statement. Judge Stow granted the request, and on April 21, 2008, appointed the office of the Kootenai County Public Defender and ordered Maloney to pay \$50.00 per month beginning May 1, 2008, until the sum of \$250.00 had been paid. Financial Statement and Order Regarding Public Defender, p. 2.

There is no indication in the record that Maloney ever objected to this reimbursement arrangement at the time Judge Stow entered the order on April 21, 2008.

As will be seen, Maloney seeks all the benefit of having a public defender being appointed on her behalf in all proceedings before the magistrates on her misdemeanor (and she seeks all the benefit of having a public defender being appointed on her behalf on this appeal), yet seeks to avoid that reimbursement, without objecting to that reimbursement at the time she was notified she would be getting that benefit of court appointed counsel.

On April 29, 2009, Kootenai County Deputy Public Defender Daniel G. Cooper filed a Notice of Appearance, Plea of Not Guilty and Demand for a Jury Trial. Cooper also filed Defendant's Request for Discovery on April 29, 2008. All of this work was done by Cooper prior to May 1, 2008, the due date of Maloney's first reimbursement payment of \$50.00. At no time that Cooper was doing this work did Cooper object, either on Maloney's behalf or on behalf of the office of the Kootenai County Public Defender, as to Judge Stow's reimbursement order.

On September 2, 2008, Maloney appeared for a Jury Trial Status Conference before Magistrate Judge Penny Friedlander. When her case was called, the prosecutor moved to dismiss the case due to insufficient evidence to sustain a conviction. Maloney then moved to have the reimbursement order vacated. This was the first time that Maloney had ever objected to Judge Stow's order of reimbursement. By waiting to object to reimbursement at this juncture, Maloney had just finished receiving all the benefit she could possibly receive regarding her appointment of the public defender. Judge Friedlander denied the motion, finding: (1) reimbursement was reasonable in light of Maloney's Financial Statement and (2) Maloney had received a beneficial result. At that September 2, 2008, hearing before Judge Friedlander, Maloney's attorney, Daniel G. Cooper, did not breathe a word about the research which Cooper told this Court at the March 26, 2009, oral argument on appeal, he had performed back in 2005. Tr. p. 1, L. 1 – p. 4, L. 20. No brief was furnished to Judge

Friedlander, no notice was given to the prosecutor in contravention of I.C.R. 47 and 45(c), and not a single case in support of that motion was cited to Judge Friedlander. *Id.*

On September 3, 2008, Maloney, through Cooper as her attorney, filed a Notice of Appeal of Judge Friedlander's denial of Maloney's motion to vacate, arguing that the public defender reimbursement order was unlawfully entered by Judge Stow and is therefore void.

Maloney, in her brief, presents three issues on appeal:

- 1) Whether Judge Friedlander erred in denying the motion to vacate the reimbursement order because Idaho Code § 19-854 does not provide courts the authority to enter reimbursement orders before services are rendered and costs are incurred?
- 2) Whether Judge Friedlander erred in denying the motion to vacate the reimbursement order because the order was premature?
- 3) Whether Judge Friedlander erred in upholding the reimbursement order because no evidence was ever admitted regarding the county's cost of providing legal services to Maloney?

Appellant's Brief, p. 5. Maloney in her brief appears to address the first and second issues concurrently in Section I of her brief on appeal.

II. STANDARD OF REVIEW.

The standard of review for statutory interpretation is well established. *Idaho Conservation League, Inc. v. Idaho State Dep't of Agriculture*, 143 Idaho 366-368, 146 P.3d 632, 634 (2006). The interpretation of a statute is a question of law which appellate courts freely review. *State v. Hart*, 135 Idaho 827, 829, 25 P.3d 850, 852 (2001). Interpretation of any statute begins with the examination of the statute's literal words. *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). Where statutory language is plain and unambiguous, courts give effect to the statute as written, without engaging in statutory construction. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999). Only where language is ambiguous will courts look to the rules of construction for guidance and consider the reasonableness of proposed interpretations. *Albee v. Judy*, 136 Idaho 226,

231, 31 P.3d 248, 253 (2001). Unless a contrary purpose is clearly indicated, ordinary words will be given their ordinary meaning when construing a statute. *Bunt v. City of Garden City*, 118 Idaho 427, 430, 797 P.2d 135, 138 (1990). In construing statutes, reviewing courts will ascertain and give effect to the purpose and intent of the legislature and will give substance and meaning to the provisions based on the whole act and every word therein. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990).

III. ANALYSIS.

Maloney's third issue on appeal, that "no evidence was ever admitted regarding the county's cost of providing legal services to Maloney" (Appellant's Brief, p. 5, pp. 12-14) will be discussed first. Maloney argues Judge Friedlander had no evidence before her as to the cost of providing Maloney court-appointed counsel when she affirmed the reimbursement order. *Id.*, p. 14. First of all, by the time Judge Friedlander denied Maloney's motion to vacate Judge Stowe's order, Judge Friedlander had detailed information on how much effort was expended by Cooper on behalf of Maloney. Second, Maloney fails to state this ground in her Notice of Appeal. Third, and most important, this argument, that there was no evidence as to the cost of providing court appointed counsel, was not in any way argued to Judge Friedlander. The entire basis of Cooper's argument before Judge Friedlander was as follows:

And I guess my view, your Honor, is first of all those types of orders um, I don't believe that when they're entered before any services are provided are actually lawful orders. I don't think that Idaho Code 19-954 suggests that, that's um, an appropriate order. I believe it's a recoupment statute, which is available um for – to the county prosecutor and to the court um, at a time of sentencing for there to be an imposition of attorney's fees, should there be a conviction.

In this case we certainly don't have a conviction.

And also, your Honor, I guess it's our view that there could be potential for abuses if, in fact, if the court was able or if the government

was able to order reimbursement uh, prior to any sentencing for the reason that people could be charged who are innocent and who haven't been sentenced. Merely as a (inaudible).. making um tool. And --

Tr. p. 3, Ll. 5-21. At no point before Judge Friedlander did Maloney's attorney Cooper make any mention of this argument that there was no evidence before the Court as to the cost of providing court appointed counsel. Cooper's failure to present that argument to Judge Friedlander is fatal. Since Cooper completely failed to raise this issue before Judge Friedlander as to any claimed lack of evidence as to the cost of providing court appointed counsel, it would be inappropriate for this Court to review such on appeal. I.C.R. 54.18, I.A.R. 35, *State v. Hoisington*, 104 Idaho 153, 657 P.2d 17 (1983); *Sun Valley Shopping Center, Inc. v. Idaho Power Co.*, 119 Idaho 87, 803 P.2d 993 (1991).

As shown by the entire argument of attorney Cooper before Judge Friedlander quoted above, the only arguments actually raised by Cooper before Judge Friedlander, were: 1) Judge Stow's order was unlawful because it was "entered before any services are provided", and 2) no reimbursement should be required of someone who was not convicted and sentenced. Those are the only two issues Cooper preserved for appeal.

The second of those two issues will be discussed first. While Cooper made the argument that there was no conviction before Judge Friedlander, Cooper failed to raise this argument in his briefing on behalf of Maloney. In fact, Maloney specifically withdrew the issue. Appellant's Brief, pp. 8-9, n. 1. However, in the same breath as the argument was withdrawn, Cooper discussed at length the genesis of that argument, *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct 2116 (1974), at length. Appellant's Brief, pp. 8-9. Given that discussion, this Court is unable to determine if Cooper has really withdrawn this argument.

Accordingly, a brief discussion is appropriate by this Court. The problem is *Fuller* discusses an Oregon statute that specifically requires a conviction prior to any repayment.

Id. Idaho's statutes lack that requirement. Idaho Code § 19-851 to Idaho Code §19-862.

That leaves the only issue surviving on this appeal as: Judge Stow's order was unlawful because it was "entered before any services are provided". Appellant's Brief, pp. 6-12.

Maloney's argument is that the reimbursement order was determined and entered prematurely and must be vacated because the order amounted to prepayment of costs for the services of appointed counsel, which I.C. § 19-854 does not permit. Appellant's Brief, p. 10. Maloney argues that the use of the word "reimburse" in I.C. § 19-854(d) means to pay back, and the Court cannot order prepayment of costs at the beginning of court-appointed representation. *Id.*, pp. 10-11. Thus, Maloney argues, Judge Stow was without authority on April 21, 2008, to order her to commence monthly payment *before* any legal services had been provided to her and, as such, his order was void. *Id.*, p. 11. Maloney argues that, as in the Illinois case she cited, *People v. Cozad*, 511 N.E.2d 211 (App.Ct. Ill. 4th Dist. 1987), without any information or basis to determine expenses incurred or the appropriate reimbursement rate, any order would have been speculative at best. *Id.*, pp. 11-12.

The quote from Cozad is: "Assessing attorney fees for purposes of reimbursement in advance of services being rendered is not appropriate." 511 N.E.2d 211, 217. What Maloney's counsel has done on this appeal, is to seize upon a phrase in a sentence, written in dicta, as part of a non-binding decision on this Court, written by an intermediate Illinois Appellate Court, interpreting an Illinois Statute that differs from the Idaho Statutes. As if that wasn't bad enough, the problem completely overlooked by Cooper is, the Illinois Appellate Court *affirmed* the trial court's order that Cozad "reimburse Champaign County \$1,000 for the services of his court-appointed counsel." 511 N.E.2d 211, 216, 219.

Additionally, as the State points out, the Illinois provides a hearing for determining the amount of restitution can be held at any time *after* appointment of counsel. Brief of Respondent, p. 6. The fact that the statute is so different and the fact that the Illinois Appellate Court affirmed the trial court's \$1,000 reimbursement order, make the quote Maloney relies upon, dicta, as the State correctly points out. Brief of Respondent's Brief, pp. 5-6.

The State notes Judge Friedlander denied abatement of the reimbursement order after Maloney had been receiving the services of the public defender for over four months. Brief of Respondent, p. 1. The State argues: “[s]he [Maloney] received Public Defender representation from written Notice of Appearance, Plea of Not Guilty and Demand for Jury Trial to the discovery process to contacting witnesses to pre-trial conference to preparation for trial to jury trial conference” and “She [Maloney] continues to receive the services of the Conflict Public Defender through this appeal process.” *Id.* The State argues I.C. § 19-852(a)(2) provides for representation at public expense to the extent an indigent person cannot provide for payment *at the time the court determines need.* *Id.*, pp. 3-4. The State notes Maloney was ordered to begin reimbursement on May 1, 2008, by which time the public defender had already performed services, as evidenced by the Notice of Appearance and Plea of Not Guilty and Demand for Jury Trial had already been filed. *Id.* “Therefore, it is obvious that legal services had been provided to Defendant **before** she was required by the order to begin paying for her legal representation.” *Id.*, p. 4. (emphasis in original). This Court agrees with the State’s argument that for Judge Stow, the efforts of counsel in representing Maloney were certainly foreseeable, indeed virtually a certainty, and as to Judge Friedlander, those services has been performed. *Id.*, pp. 6-7. “There was nothing wildly speculative about what services would be provided to her by the Public Defender.”

Id. p. 7. Indeed this Court asked Cooper at oral argument on this appeal if he had ever been appointed to a case as a deputy public defender where he subsequently did *no* work on that case. Cooper indicated to the Court that he had not. The State disagrees with Maloney's argument that Judge Friedlander had no basis to determine the cost of representation provided, because Judge Friedlander was aware of how many appearances had been made on behalf of Maloney, was aware discovery and other paperwork had been exchanged between counsel for Maloney and the State, and Maloney's counsel stated at the Status Conference, "And certainly I was in touch with [the prosecutor] a great deal with regard to witnesses that we had in the case and what their testimony was gonna be." *Id.*, p. 9, citing Tr., p. 2, LI. 14-17.

Idaho Code § 19-854(d) states

A needy person who receives the services of an attorney provided by the county may be required by the court to reimburse the county for all or a portion of the cost of those services. The immediate inability of the needy person to pay the reimbursement shall not, in and of itself, restrict the court from ordering reimbursement.

Importantly, I.C. § 19-854 requires determination of whether a person is needy pursuant to I.C. § 12-852, is to be performed by the Court *at the person's first appearance*. I.C. § 19-854(a). The requirement of determination of need and the requirement of reimbursement *are in the same Code section*, I.C. § 19-854(d). Although there is no requirement in the statute that the reimbursement order become effective at a date later than the determination of need and appointment of counsel, here, Judge Stow did order reimbursement to begin on May 1, 2008, *after* appointment of counsel and *after* services were in fact performed by the office of the public defender.

Maloney simply argues that the order was entered at a point in time where no services had yet been provided, and that somehow, that makes the order invalid. However,

Maloney completely overlooks the fact that the order did not become effective for purposes of reimbursement under *after* services were provided on her behalf. In fact, between the appointment of counsel and the date reimbursement was to begin the following occurred on behalf of Maloney: a not guilty plea was entered, a pre-trial conference was scheduled, a jury trial was scheduled, a notice of appearance and jury demand was filed, Maloney requested discovery, and the State responded to discovery.

Judge Friedlander had record of the additional filings and services provided to Maloney before her when she denied Maloney's motion to vacate the reimbursement order.

Additionally, Judge Friedlander made a finding that Maloney had received a beneficial result due to the dismissal four months after charging. Tr. p. 4, Ll. 16-18. Maloney has not provided this Court with any grounds to believe the reimbursement amount was unreasonable. Reimbursement was ordered to begin after services had begun and both Magistrate Judges Stow and Friedlander could reasonably determine that the services received were such that \$250.00 would reimburse the county for all or a portion of the services.

In addition to Maloney's argument finding no basis in *Cozad*, Maloney's argument finds no basis in the Idaho statutes. Under Idaho law, Maloney has a right, if "needy" to be represented at all stages, including appeal, beginning at the earliest time a person is entitled to be represented by counsel. Idaho Code § 19-852(b)(1) and (2). Idaho Code § 19-854(a) requires a determination of "neediness" at Maloney's first appearance. Judge Stow was required by law to advise Maloney at her initial appearance, while she was in fact in custody, that she had a right to counsel and the right to an attorney at public expense. Idaho Code § 19-853(b). When Judge Stow determined Maloney was "needy", Judge Stow had a duty to "promptly notify the public defender" of the appointment. Idaho Code § 19-

853(c). Judge Stow did that. The office of the public defender, in this case its deputy Daniel G. Cooper, was required by Idaho law to begin work because upon notification by the court of the assignment, the public defender shall represent the person. Idaho Code § 19-853(c). In fact, Cooper immediately after appointment, began working on Maloney's behalf, *before* the first reimbursement payment was due. This happens in every case, as Cooper admitted he could not recall a single case where he had been appointed where he did no work. To the extent that a person covered by Idaho Code § 19-852, is able to provide for an attorney, but is still needy, "the court may order him to provide for their payment." Idaho Code § 19-854(c). Finally:

A needy person who receives the services provided by the county may be required by the court to reimburse the county for all or a portion of the cost of those services. The immediate inability of the needy person to pay the reimbursement, shall not, in and of itself, restrict the county from ordering reimbursement.

Idaho Code § 19-854(d). This Court is simply unable to understand how Cooper can in good faith make the argument that Judge Stow's order was unlawful because it was "entered before any services are provided." Idaho Code § 19-854(d) tells Judge Stow, in mandatory language, to disregard Maloney's "immediate inability" to pay reimbursement ordered. At what time point in time *other than a first appearance*, when the public defender's future client is almost always in custody (because of their "neediness" they ordinarily cannot bond out), when all of this analysis under Idaho Code § 19-852 must be performed by a magistrate, would "immediate inability" be determined? Under Idaho's statutory scheme, the appointment of court appointed counsel must occur immediately, work must immediately begin by that appointed counsel. However, the reimbursement for such services, if any is ordered by the court, by operation of the word "reimbursement", will occur at a later point in time. The statutory scheme itself destroys Cooper's argument that

Judge Stow's order was unlawful because it was "entered before any services are provided." The language of Idaho Code § 19-854(d) destroys Cooper's argument. That statute reads: "A needy person who receives the services provided by the county may be required by the court to reimburse the county for all or a portion of the cost of those services." It is written in present tense, where the needy person, Maloney in this case, "receives" the legal service provided by the county. The statute does not read: "A needy person who has received the services provided by the county may be required by the court to reimburse the county for all or a portion of the cost of those services." The statute certainly does not read: "A needy person who receives the services provided by the county may be required by the court to reimburse the county for all or a portion of the cost of those services, but only if the magistrate judge that determined neediness and appointed that needy person counsel at county expense, later determines the needy person should reimburse the county for all or a portion of the cost of those services." That interpretation is, in essence Cooper's argument on behalf of Maloney. There is absolutely no basis for that interpretation.

IV. REIMBURSEMENT FOR ATTORNEY FEES ON APPEAL.

At oral argument, this Court asked Cooper for information on what time he has spent on this appeal and how he is paid for his services. At the present time, Cooper is a conflict public defender, and informed the court that he is paid \$3,250.00 a month, for performing his services as an attorney for about 45 hours a week. That would amount to about \$16 per hour for his services. Cooper's brief on appeal is fourteen pages, and Cooper indicated at oral argument that the extensive research he had done for this appeal was conducted back in 2005, when he was working for the office of the Kootenai County Public defender. This Court determined that a reimbursement of \$300.00 by Maloney to the County for the

costs associated with her appeal was appropriate. Idaho Code § 19-832(b)(1) and (2).

IT IS HERBY ORDERED THAT Magistrate Judge Penny Friedlander's denial of Maloney's motion to vacate Magistrate Judge Stow's order to have Maloney reimburse Kootenai County \$250.00 for the cost of her court appointed attorney found in the Financial Statement and Order Regarding Public Defender, dated April 21, 2008, is AFFIRMED.

IT IS FURTHER ORDERED that Maloney reimburse Kootenai County \$300.00 for the cost of her court appointed attorney on appeal.

DATED this 27th day of March, 2009.

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of March, 2009 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – DANIEL G. COOPER
Prosecuting Attorney – ROY GOWEY
Kristen Maloney
815 W. Emma Ave
Coeur d'Alene, ID 83814

Honorable Penny Friedlander
Honorable James Stow

CLERK OF THE DISTRICT COURT
KOOTNEAI COUNTY

BY: _____
Deputy