

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: No. 95-11,246
	: 95-11,247
	:
	:
vs.	: CRIMINAL
	:
MICHAEL W. FARMER,	: Petition for Relief
M.W. FARMER COMPANY,	:
Defendants	:

ORDER

AND NOW, this ____ day of June , 1999, upon consideration of the defendants' Petition for Relief relating to the costs of investigation and prosecution of the above-captioned matters, it is ORDERED and DIRECTED as follows:

The Court GRANTS the defendants' Petition with respect to the soil samples. In its verdict, the Court could not find beyond a reasonable doubt that the materials in or on the soil were wastes. This finding was due, in part, because it was not clear that the soil staining came from cleaning or handling underground storage tanks. The area sampled also was an area where trucks and other heavy equipment were parked. The material on the soil could have been **product** which inadvertently dripped from these vehicles. Since the Court could not find that the materials were wastes beyond a reasonable doubt, the Court rejects the Commonwealth's argument that the soil samples support the defendants' convictions for operating a hazardous waste facility and are therefore recoverable as costs. Rather, the Court finds that the soil samples only relate to the dumping counts of which the defendants were acquitted and, therefore, the

Commonwealth cannot recover the fees associated with the soil samples.

The Court also GRANTS the defendants' Petition with respect to the drum samples. The Court finds that the defendants are not responsible for the samples of the drums which were not characteristically hazardous. Since these drums were not hazardous, they do not relate to the defendants' conviction for operating a hazardous waste facility. Furthermore, because the Court cannot determine with any certainty whether the materials contained within the drums came from industrial or commercial generators, the sampling of these drums did not relate to the defendants' convictions for operating a residual waste processing facility. Therefore, the Court finds that the defendants' are not responsible for the costs associated with the sampling of drums other than drums D, G, and E.

The Commonwealth's claim that the pretrial investigative expenses of case agent Paul Zimmerer for time spent beyond and eight (8) hour day (\$2,919.16), the case agent expenses during the trial for overtime spent on the case (\$2,547.31), and trial expenses of the prosecuting attorney, Richard Tomsho, Esquire, for his expenses for meals, milage and hotel costs (\$718.10) should be assessed against the defendant as a cost of prosecution raises difficult legal issues.

16 P.S. Section 1403 sets forth in broad language the Commonwealth's ability to collect costs in a criminal case upon the obtaining of a conviction. That section states:

All necessary expenses incurred by the district attorney or his assistants or any officer directed by him in the investigation of crime and the apprehension and prosecution of persons

charged with or suspected of the commission of crime, upon approval thereof by the district attorney and the court, shall be paid by the county from the general funds of the county. In any case where a defendant is convicted and sentence to pay the costs of prosecution and trial, the expenses of the district attorney in connection with such prosecution shall be considered a part of the costs of the case and be paid by the defendant.

However, the Pennsylvania Superior Court in the case of Commonwealth v. Cutillo, 294 Pa.Super. 560, 440 A.2d 607 (1982), significantly limited the broad scope of 16 P.S. Section 1403. The Court stated as follows:

We are not, however, giving leave to the lower courts to assess any and all possible costs against a convicted defendant. In determining the taxability of specific costs of prosecution, the trial courts must carefully examine each case in toto. Assessible costs are those which are necessary for prosecution when considered in light of the peculiar facts and circumstances of each case as done herein on review. Those costs which fall within the ambit of usual services provided may not be taxed against a convicted defendant absent extraordinary circumstances. Of course, costs which have traditionally been assessed subsequent to conviction remain untouched by our decision in the instant case.

Id. at 564, 440 A.2d at 609. It would appear to the Court that the case agent's pretrial and trial expenses are usual expenses in a complex case such as this. The Commonwealth, in its memo to the Court of April 7, 1999, agrees with this conclusion. See Commonwealth's memo, p. 2. Further, Agent Zimmerer testified that his position regularly requires him to work in excess of eight (8) hours per day. Therefore, the Court finds these expenses are not unusual or extraordinary and are not recoverable pursuant to the Cutillo decision. See 294 Pa.Super. at 564, 440 A.2d at 609. Moreover, in this Court's experience, the Lycoming County District Attorney's office and police agencies, including the state police,

have not submitted police investigative expenses such as overtime and meals as part of the bill of costs. Therefore, there is no Lycoming County precedent that would support the Attorney General's claim.

The Court finds the trial expenses of the prosecuting, Richard Tomsho, Esquire totaling \$718.10, may be considered as unusual or extraordinary costs. If our local district attorney traveled to another county to prosecute a case due to a change in venue, the Court believes his meals, motel and milage would be collected as a cost. See Commonwealth v. Coder, 490 Pa. 194, 415 A.2d 406 (1980). Likewise, Attorney Tomsho traveled to Lycoming County and stayed overnight in a motel to prosecute this case. Therefore, while acknowledging and accepting the limitations of the decision in Cutillo, the Court finds that such travel costs of the prosecuting attorney would be assessible against the defendant pursuant to 16 P.S. 1403 and Coder, supra. Accordingly, the Court will award the prosecuting attorney's costs in the amount of \$718.10, but will DENY the investigative agent's costs requested by the Commonwealth.¹

¹The Court notes that at the hearing on the costs, the Commonwealth claimed additional case agent and prosecuting attorney expenses; however, because the Commonwealth did not inform the defendants of these additional charges prior to the hearing and, therefore, the defense was not prepared to address these additional charges, the Court declines to award them.

In light of the Court's ruling on the defendant's Petition for Relief, the Court finds that the defendants are responsible for costs which total \$5,916.68.

By The Court,

Kenneth D. Brown, J.

cc: Richard Tomsho, Esquire
Gregory Abeln, Esquire
Work file
Cost Clerk