

VOLUME NO. 38

OPINION NO. 96

BAIL AND RECOGNIZANCE - Crediting forfeitures;
COUNTY OFFICERS AND EMPLOYEES - Treasurer, crediting forfeitures;
FINES - Crediting forfeitures;
RESTITUTION - Use of forfeitures;
MONTANA CODE ANNOTATED - Sections 2-7-501, et seq., 20-7-504, 20-9-331(2)(d), 46-9-401, et seq., 46-9-504, 46-18-201, 46-18-603, 53-9-109.

- HELD: 1. Forfeited appearance bonds should be credited by the county treasurer to the equalization of the county elementary school district foundation programs, in the same manner as fines are credited under section 20-9-331(2)(d), MCA.
2. A judge is without the authority to order restitution to be made from a forfeited appearance bond.

8 August 1980

John T. Flynn, Esq.
Broadwater County Attorney
Broadwater County Courthouse
Townsend, Montana 59644

Dear Mr. Flynn:

You have requested my opinion on the following questions:

1. To what account should the county treasurer credit forfeited appearance bonds?
2. May a judge order restitution to be made from a forfeited appearance bond?

From the situation you describe I assume your question concerns criminal appearance bonds, dealt with under the bail statutes set out in Title 46, chapter 9 of the Montana Code Annotated (MCA). The first question arises through the interplay of two MCA sections. Section 46-18-603, MCA, provides that all fines and forfeitures collected by courts, with the exception of city courts, be applied first to defray the costs of the case in which the fine or forfeiture arose and then deposited in the county treasury "credited as provided by law." Section 20-9-331(2)(d), MCA, provides that all money in the county treasury resulting from "fines for violations of law" and whose use is not otherwise specified by law be used for the equalization of the county elementary school district foundation programs. Section 46-9-504, MCA, a bail statute dealing with forfeited appearance bonds, provides in part:

If judgment be rendered or the forfeiture not discharged and the defendant has deposited money as bail, the court with whom it is deposited must, immediately after receiving notice of said judgment or order of forfeiture, pay over the money deposited to the treasury of the city or county wherein the bail was taken.

These sections indicate that while fines are credited to the equalization of the elementary school district foundation programs, forfeitures are not credited to any specific account. However, in statutes concerning non-criminal offenses, fines and forfeitures are generally required to be credited to the same account. See, e.g., §§ 20-7-504 and 53-9-109, MCA. Since forfeitures for criminal appearance bonds are not otherwise credited, these statutes would indicate that forfeitures be credited to the same account as fines collected for the same offenses. In criminal cases, therefore, forfeited appearance bonds should be credited by the county treasurer to the equalization of the county elementary school district foundation programs, in the same manner as fines are credited under section 20-9-331(2)(d), MCA.

Additional support for this method comes from the general practice of the Department of Community Affairs (DCA). One of the branches of DCA is the Local Government Services Division which conducts financial, budgetary, and legal compliance audits of local units of government. See § 2-7-501 et seq., MCA. In conducting county audits DCA practice is to ensure forfeited appearance bonds, and for-

feitures in general, are credited to the elementary district foundation program. While such a practice does not have the force of law, it does provide a standard when there is no statute on point. The Montana Supreme Court has said that "[c]ommon usage and practice is persuasive as to statutory interpretation." Holt v. Sather, 81 Mont. 442, 456, 264 P. 108 (1928). That rationale is applicable to the situation here for DCA monitors all 56 counties and the practice, therefore, is widespread. If there is dispute or disagreement regarding this practice the proper forum in which to seek clarification is the legislature.

Your second question concerns a judge's authority to order restitution to be made from the forfeited bond money. While a judge can order a convicted defendant to make restitution under section 46-18-201, MCA, such a sentence is not a "cost" of the case to be defrayed under section 46-18-603, MCA. That statute refers specifically to "costs incurred by the county," not by the victim. Furthermore, in many situations it is not the defendant who posts the bond but an insurance company or some other surety. See §§ 46-9-401, et seq., MCA. Thus, even though restitution may be a desirable result, it may not be the defendant who pays, but a third party. Since there is no authority for this type of restitution the judge cannot order payments from forfeitures. The money is authorized by law to be paid to the county treasurer.

THEREFORE, IT IS MY OPINION:

1. Forfeited appearance bonds should be credited by the county treasurer to the equalization of the county elementary school district foundation programs, in the same manner as fines are credited under section 20-9-331(2)(d), MCA.
2. A judge is without the authority to order restitution to be made from a forfeited appearance bond.

Very truly yours,

MIKE GREELY
Attorney General