

Dated: September 14, 2011
The following is ORDERED:



Jennie D. Latta

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UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re TERRENCE L. FELTON, SR.
VERONICA L. FELTON.
Debtors.

Case No. 11-22916-L
Chapter 13

ORDER OVERRULING OBJECTION TO CLAIM OF CRIMINAL COURT CLERK

BEFORE THE COURT is the objection of the Debtors to Claim No. 11 filed by Kevin P. Key, Clerk of the Criminal Court for the Thirtieth Judicial District at Memphis, Tennessee (the "Clerk"). The Clerk filed a proof of claim in the amount of \$4,635.25, which was not provided for in the Debtors' plan. The Debtors object that the claim is time-barred. The Clerk disagrees and asserts that the claim should be treated as a special class unsecured claim to be paid in full. At the initial hearing on July 28, 2011, the court heard the arguments of counsel, but asked the parties to supplement the factual record. On August 11, the hearing was reconvened and counsel for the Clerk introduced two written exhibits. Exhibit 1 consists of the record from the Criminal Court, and Exhibit 2 is the Bill of Costs. Having fully considered the exhibits and applicable law, the court

makes the following findings of fact and conclusions of law. This is a core proceeding. 28 U.S.C. § 157(b)(2)(B).

The Debtors filed their voluntary petition under Chapter 13 of the Bankruptcy Code on March 22, 2011. The Clerk filed his proof of claim on April 9, 2011, within the deadline for filing proofs of claim. *See* Notice of Commencement of Case under Chapter 13 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates, Dkt. No. 8; and Claims Register, Doc. No. 11-1. The proof of claim contained no information about the source of the debt. It is not accompanied by any writing. Under “Type of Debt,” appears: “**{X} UNSECURED (SPECIAL CLASS @ 100%).**”

In their objection to the proof of claim, the Debtors state that the claim arises out of a matter more than ten years old, and thus that the collection of the debt is time-barred by reason of Tennessee Code Annotated § 28-3-110(2), which provides in pertinent part that, “actions on judgments and decrees of courts of record of this or any other state or government” must be commenced within ten years after the cause of action accrued.¹ The Debtors claim that by virtue of Tennessee Code Annotated § 40-25-134, the award of costs is a judgment. Section 40-25-134 provides that, “[t]he judgment for costs may be rendered at the time of conviction, or, upon motion, at any time subsequent to conviction, and execution awarded accordingly.” Thus, the Debtors argue that the debt owed to the Clerk is an obligation for costs, which has been reduced to judgment, and therefore no action may be brought to collect it after the passage of ten years.

In his response, the Clerk provided additional information concerning the makeup of his proof of claim in the form of a chart, which is reproduced below:

¹ The Clerk concedes that the Criminal Court is a court of record for purposes of this statute.

Indictment #	Disposition Date	Court Costs/Fine Total
95-09056	04-29-1996	\$1,059.75
01-10036	11-20-2001	\$2,276.25
01-13016	05-31-2002	\$1,299.25

The amount of the Clerk's proof of claim is the sum of these three debts, or \$4,635.25. At the hearing on July 28, the Debtors conceded that the second and third debts fall within ten years prior to the filing of their bankruptcy case. They assert that the Clerk's claim should be reduced to the amount of \$3,575.50, the sum of the second and third debts, but maintain their objection to allowance of the first claim in the amount of \$1,059.75. They argue that this debt results from a judgment, collection of which is time-barred as the result of section 28-3-110, and should be denied.

The Clerk responds that the Debtors' objection should fail for two reasons: (1) the debt owed to the Clerk is for a criminal fine, not for costs, and thus is not a "judgment" within the meaning of section 28-3-110; and (2) the limitation on actions on judgments for costs does not apply to actions brought by the state of Tennessee, and thus does not apply to the Clerk as an officer of the county.

The exhibits presented by the Clerk at the second hearing narrow the question before the court. The Negotiated Plea Agreement, which is part of Exhibit 1, indicates that the Debtor, Terrence L. Felton, Sr., proposed a one year period of incarceration and payment of a fine in the amount of \$2,000.00. This proposal was accepted and reduced to judgment on April 26, 1996. The Judgment includes under the heading, "Court Ordered Fees and Fines": \$26.50 "Criminal Injuries Compensation Fund," and \$2,000 "Fine Assessed." Exhibit 2, the Bill of Costs, indicates that as of August 5, 2011, costs in the amount of \$519.75 have been paid leaving a \$0.00 balance. As to the

criminal fine in the amount of \$2,000.00, the Bill of Costs reflects that \$940.25 has been paid leaving a balance of \$1,059.75. In other words, the Bill of Costs reflects that the only amount that remains to be paid to the Clerk is a portion of the original fine imposed as part of Mr. Felton's plea agreement. The Clerk asserts that the allocation of payments is in accord with section 40-24-105, which in pertinent part provides:

(a) The following shall be the allocation formula for moneys paid into court: the first moneys paid in any case shall first be credited toward payment of litigation taxes and once litigation taxes have been paid, the next moneys shall be credited toward payment of costs; then additional moneys shall be credited toward payment of the fine.

The Clerk is correct. It appears that payments made by Mr. Felton were properly credited, first to court costs, and then to the agreed upon fine. Thus, the only debt remaining to be paid to the Clerk is one for a criminal fine.

In their original objection, the Debtors maintained that the debt for court costs arising in connection with Mr. Felton's plea agreement is a "judgment" for purposes of the statute of limitations by virtue of section 40-25-134. That section, however, is limited to the "judgment for costs." The debt remaining to be paid to the Clerk is one for a criminal fine. The Debtors maintain that the debt is barred by the applicable statute of limitations, and thus should not be allowed as a claim in this bankruptcy case.

The allowance of claims against a bankruptcy estate is a matter of federal bankruptcy law. *See Stern v. Marshall*, ___ U.S. ___, 131 S. Ct. 2594, 2616 (2011); *Katchen v. Landy*, 382 U.S. 323, 329 (1966); *Pepper v. Litton*, 308 S. Ct. 295, 244-45 (1939). A "claim" is defined broadly by the Bankruptcy Code, to include any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed contingent, matured, unmatured, disputed, undisputed,

legal, equitable, secured, or unsecured.” 11 U.S.C. § 101(5). Clearly, a criminal fine represents a right to payment within this definition and thus represents a claim for purposes of the Bankruptcy Code. Liability on a claim defines a “debt” for purposes of the Bankruptcy Code. 11 U.S.C. § 101(12). A claim for a criminal fine is not entitled to priority under the Bankruptcy Code (*see* 11 U.S.C. § 507(2)), but the debt for a criminal fine is excepted from discharge. 11 U.S.C. § 523(a)(7). The Bankruptcy Code excepts all fines owed to a governmental unit from discharge, regardless of when they were incurred, except those that represent compensation for actual pecuniary loss. *Id.* There is no indication that the claim asserted by the Clerk results from pecuniary loss. Thus, if a debt is owed to the Clerk for the criminal fine arising out of Indictment No. 95-09056, it is a claim for purposes of the Bankruptcy Code and is not subject to discharge.

To determine whether the Clerk continues to hold a right to payment with respect to the fine imposed with respect to Indictment No. 95-09056, the court must look to state law. *Butner v. United States*, 440 U.S. 48, 55 (1979) (“Property interests are created and defined by state law.”). This federal bankruptcy court looks to the decisions of the courts of the state of Tennessee to determine whether debts for criminal fines lapse or become uncollectible after a period of years. The question of the application of the 10-year statute of limitations to a criminal fine was the subject of two recent decisions in the state courts, *Boruff v. State*, 2011 WL 846063 (Tenn. Crim. App., March 10, 2011), and *Hood v. State*, 2010 WL 3244877 (Tenn. Crim. App., August 18, 2010). In both cases, appeal was taken for a decision of the trial court to deny a motion to discharge fines resulting from a criminal conviction. In both cases, the appeal was dismissed pursuant to Rule 3(b) of the Tennessee Rules of Appellate Procedure, which does not provide an appeal of right from the denial of a motion to discharge fines. *Boruff* presented exactly the issue presented in this case: whether criminal fines

are subject to the 10-year statute of limitations for judgments from a court of record. Unfortunately, the appellate court did not reach the substantive issues because of Rule 3(b) and other irregularities in the appeal. This court must rely on other decisions to determine whether the statute of limitations applies to the claim asserted by the Clerk such that he no longer has a right to payment.

The Clerk relies upon the decision of the Tennessee Supreme Court in *Nelson v. Loudon County*, 176 Tenn. 632, 144 S.W.2d 791 (Tenn. 1940), in which the court held that the statute of limitations would not prevent execution upon a judgment entered on a workhouse bond, which was substituted for the debtor's obligation to the state for a fine and costs. The court said that the debtor could have worked off his debt in the county workhouse. Had he done so, the county would have been exercising the governmental functions of the state in collecting his fine through his labor. Instead, the debtor was bailed out of the workhouse upon the signature of two sureties. When neither the debtor nor the sureties paid the fine, the county confessed judgment against them. Over the objection of the sureties, the Tennessee Supreme Court held that the county was not prevented by the statute of limitations from pursuing execution on behalf of the government, because it was collecting for the benefit of the state. The outcome in *Nelson* depended upon the fact that the county was collecting the fine as revenue of the state to be paid over to the state treasurer. As such, the county was found to be exercising the governmental functions of the state, and therefore not subject to the applicable statute of limitation. *Id.* at 792. The court held that, “[t]he provisions contained in the Code for the limitation of actions do not apply to actions brought by the State of Tennessee, unless otherwise expressly provided. Code 8579.” *Id.*

Code section 8579 in *Nelson* now refers to Tennessee Code Annotated § 28-1-113, which provides: “The provisions of this title do not apply to actions brought by the state of Tennessee,

unless otherwise expressly provided.” The *Nelson* court did not concern itself with whether the obligation for costs was a “judgment” for purposes of the statute of limitations. Instead it assumed that the limitation would apply but for the fact that it was the state of Tennessee, acting through Loudon County, that was attempting to collect the judgment. In other words, whether or not the obligation to pay a criminal fine is a judgment, the statute of limitations does not apply to the state in the exercise of its governmental functions.

Thus, without answering the question whether the obligation to pay a criminal fine is a “judgment” for purposes of the statute of limitations, the court turns to the question of whether a statute of limitations ever runs with respect to actions by the Clerk. Section 28-1-113 codifies the common law doctrine *nullum tempus occurit regi* meaning “no time runs against the king.” It prevents an action brought by the state from being dismissed due to the expiration of a statutory period of limitations. *Hamilton County Board of Education v. Asbestospray, Inc.*, 909 S.W.2d 783, 785 (Tenn. 1995). The justification of the doctrine is that the state should not suffer as the result of the negligence of its agents. *Id.* The doctrine applies to a county when it is seeking to enforce a demand arising out of the exercise of its governmental functions as an arm of the state. *Id.* This was the justification for the court’s decision in *Nelson* even though it did not specifically refer to the common law doctrine. This rule is of long-standing application in the state of Tennessee. It has been applied with respect to collection of the reasonable value of services provided to an indigent patient by a county hospital in *Jennings v. Davidson County*, 344 S.W.2d 359, 362 (Tenn. 1961), and with respect to an action by a state hospital for the insane in *Central Hosp. for the Insane v. Adams*, 183 S.W. 1032 (Tenn. 1916). There the court explained that in cases in which a county or other local corporation “represents the whole people of the state, such as the use of streets, squares,

parks, etc., which have been dedicated to the public,” the statute of limitations will not apply. *Id.* at 1033. The court relied upon its still earlier decision in *City of Memphis v. Looney*, 68 Tenn. 130 (1877), in which the court held that the statute of limitations cannot prevent a municipality from collecting taxes: “It is not in the power of the [municipal] corporation to relieve one and impose upon another a public burden, and no laches on its part or that of its officers can defeat the right of the public to have collected and rightfully appropriated, the public taxes.” *Id.*

In *Nelson*, the fine that the county was attempting to collect was imposed in connection with a felony conviction. As a result, the court noted that the fine was included within the revenue of the state pursuant to 1932 Code § 1258. That section has been modified and renumbered as Tennessee Code Annotated § 40-24-106, which provides in pertinent part:

(A) Except as otherwise provided by law, fines, amercements, forfeitures and recoveries in criminal cases constitute a part of the revenue of the state, and shall be paid into the state treasury in the following cases:

(1) All fines and forfeitures that may be recovered in any case in which the defendant is indicted for a felony, whether convicted of a felony or of an offense that is less than a felony.

Mr. Felton was indicted for violation of Tennessee Code Annotated § 39-17-417[(g)(1)], “possess[ion] with intent to sell a controlled substance, to wit: MARIJUANA, in an amount in excess of fourteen point one seven five (14.175) grams,” a class E felony, which “in addition, may be fined not more than \$5,000.” As a result, the fine to which Mr. Felton agreed and was ordered to pay represents revenue of the state, which the Clerk is attempting to collect. As such, his act is that of the state, and is not amenable to the statute of limitation.

Although clearly there is a distinction drawn in the state statutes between the methods that may be used by the state to collect a criminal fine, and those that may be used to collect a judgment

for costs, the Court does not believe that distinction would result in a different result with respect to the question of the application of the statute of limitations. The criminal fine is imposed in addition to or in lieu of imprisonment. If a defendant fails or refuses to pay a criminal fine, he may be imprisoned until it is paid. Tenn. Code Ann. § 40-24-105(a). This is not true with respect to a judgment for costs. *Id.* Both a criminal fine and a judgment for costs may be collected as a civil judgment, however. Tenn. Code Ann. § 40-24-105(b). The use of these methods as opposed to imprisonment does not render the action of a criminal court clerk any less a governmental action, however. Under the test articulated by the Tennessee Supreme Court in *Central Hospital, Nelson, and Hamilton County*, statutes of limitation do not run against the state or any of its subdivisions when they exercise governmental functions on behalf of the public as a whole. The establishment and maintenance of courts of law is one of the most fundamental governmental functions, one that cannot be undertaken by private individuals or corporations. Judgments for costs issued in furtherance of that function therefore would seem to carry the same immunity from statutes of limitation as the imposition of criminal fines, but this conclusion is not necessary to the court's decision today.

The only question presently before this court is whether the Clerk holds a right to payment that may be pursued in this bankruptcy case arising from an indictment that is more than ten years old. The court concludes that he does. The Debtors have previously conceded that debts arising from two other indictments are properly asserted by the Clerk as claims against the bankruptcy estate, thus the court concludes that the objection of the Debtors is **OVERRULED**.

The court further notes that the Clerk seeks to have his claim treated as a “special class unsecured to be paid 100%.” In their arguments, counsel did not discuss the treatment to be afforded the claim of the Clerk if allowed. The confirmed plan provides for payment of the claim as a general unsecured claim (Dkt. No. 33), and this seems to be the appropriate treatment. The court noted

above that a debt for a criminal fine is not entitled to priority of distribution under the Bankruptcy Code. Unfair discrimination among similarly situated creditors is not permitted. *See* 11 U.S.C. § 1322(b)(1). The court has previously ruled that a plan may not discriminate unfairly in favor of the holder of a nondischargeable debt. *In re Williams*, 253 B.R. 220 (Bankr. W.D. Tenn. 2000).

cc: Debtors
Attorney for Debtors
Respondent Kevin P. Key, Criminal Court Clerk
Attorney for Respondent Kevin P. Key, Criminal Court Clerk
Chapter 13 Trustee