

CRIMINAL COSTS: Where two defendants are tried jointly on murder and one was convicted and one acquitted the state must pay witness fees of defense witness on acquittal but not on a conviction.

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Honorable Paul Boone
Prosecuting Attorney
Ozark County
Gainesville, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated June 28, 1941, which reads as follows:

"I would appreciate your opinion on the following questions relative to criminal costs.

"First: A murder case was tried and disposed of in this county in January, 1940, resulting in the conviction of one defendant of first degree murder, and a directed verdict of not guilty as to the other defendant, they being charged jointly in the information. Upon appeal to the Supreme Court the conviction was affirmed. The fee bill has not yet been made, but when completed should it be signed by my predecessor in office who prosecuted the case to final disposition, or should I sign the fee bill as the present Prosecuting Attorney?

"Second: In the above mentioned case, one defendant being convicted and the other being acquitted, for what part of the cost incurred on part of the defendants is the State liable, the subpoenas showing the witnesses were directed to appear in behalf of both of the defendants?

"The fee bill is now being made and I would appreciate your opinion as soon as conveniently possible."

Section 4220, R. S. Missouri 1939, reads as follows:

"Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county."

Under this section when a person is convicted of any crime or misdemeanor, he must pay the costs and neither the state nor county is compelled to pay the costs incurred on his part except fees for board. Under this section witnesses subpoenaed by the defendant must look to the defendant to receive their witness fees where the defendant has been convicted either of a felony or misdemeanor.

Section 4221, R. S. Missouri 1939, reads as follows:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed two dollars per day for each

juryman and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."

Under the above section where the defendant has been convicted in a capital case, or has been sentenced to imprisonment in the penitentiary, or in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary but has been confined elsewhere on account of his age, the state must pay the costs, except costs incurred by the defendant and in cases where the defendant is insolvent. Under this section the state is not required to pay witness fees to defense witnesses. Witnesses for the defendant must look to the defendant for their fees.

Section 4222, R. S. Missouri 1939, reads as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

Under this section the county must pay the costs where the punishment is imprisonment in the county jail or a fine and not imprisonment in the penitentiary.

Section 4223, R. S. Missouri 1939, reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by

the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

Under this section in case a defendant is acquitted on a charge in which the punishment is solely in the penitentiary, the costs must be paid by the state. In all other cases, such as graded felonies upon an acquittal, the costs shall be paid by the county unless the prosecutor or prosecuting witness is adjudged to pay the costs. Under this section the state and county must pay the witness fees of both the state and the defendant, and in case the county is liable, the county must pay both the state and defense witness fees. The above section was construed in the case of State v. Hackmann, 257 S. W. 457, par. 3, where the court said:

"* * * From the record, in the case before us, it can be determined whether the jury ever reached the question of manslaughter at all. They may have found that there was no manslaughter in the case, and yet returned the verdict which was returned. To our mind the statute itself is clear and plain. In fixing the cases for which the state shall be liable for costs, in that it says:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state."

"Note the italicized language 'if the defendant is acquitted.' In such a case it cannot be well said that the charge in the information is not the basis for fixing the liability of the state. The statute is speaking of certain offenses, and says, if the defendant is acquitted of such offenses, then the state shall

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pay the costs. It (the statute) says nothing about what might occur during the trial. It is dealing with the issues made by the pleadings. In this case the pleading upon the part of the state makes the issue that defendant is guilty of murder in the first degree. His plea of not guilty puts that charge in issue. Upon such issue it cannot be said that the state can refuse to pay the costs. Let the writ be made absolute. It is so ruled.

"All concur."

Under the above opinion the question as to the payment of the costs between the state and county depends upon the charge upon which the defendant is acquitted, and even though a manslaughter instruction was given in the trial of the case, the acquittal is construed to be an acquittal of the charge contained in the indictment or information which was in the above opinion murder in the first degree.

Section 13420, R. S. Missouri 1939, partially reads as follows:

"Witnesses shall be allowed fees for their services as follows:
For attending any court of record, reference, arbitrators, commissioner, clerk or coroner, at any inquest or inquiry of damages, within the county where the witness resides, each day, \$1.50. For like attendance out of the county where witness resides, each day, \$2.00. For traveling each mile in going to and returning from the place of trial, .05. For attending before a justice of the peace, each day, \$1.00. For traveling each mile in going to and returning from the place of trial before a justice of the peace, .05. * * * "

The Supreme Court of this state in construing the mileage as set out in the above section in the case of State ex rel. v. Wilder, 196 Mo. 418, l. c. 430, said:

"It will not be seriously contended that the subpoenas in this cause which are alleged to have been served upon the witnesses at their places of residence in a foreign State were of any force or vitality. A subpoena issued from the courts of this State cannot have any extraterritorial operation, hence the service of the subpoenas of the witnesses whose claims for mileage are involved in this proceeding in another State were mere nullities and of no obligatory force upon the witnesses to obey the command contained in the subpoena. The rules of law applicable to this subject were fully discussed and announced in State ex rel. v. Seibert, 130 Mo. 202, by the Court in Banc. There were two opinions in that case, but upon the proposition that process served beyond the limits of this State were of no force and effect, there was no division of opinion. SHERWOOD, J., in that case, in treating of process, thus announced the law: 'When the Legislature treats of process and its service and recognizances, it will be intended that such process can only be served within this State and that such recognizances only possess obligatory force within its borders. Neither process nor recognizances can have any extraterritorial operation. * * "

Also, at page 432, the court said:

"There is a marked distinction between a witness who has been duly subpoenaed or recognized in this State and one upon whom the process was served at his place of residence in a foreign State. In the first

place, the service of the subpoena in the foreign State is of no force and effect, and is just the same as if no process at all had been served, and the witness under that sort of service might return to this State and would not by reason of it be subject to the compulsory process of attachment. But on the other hand, a non-resident witness who is duly and legally served with a subpoena in this State, while no compulsory process could be issued for him to his place of residence in a foreign State, yet if he should return to this State he would be subject to such compulsory process the same as any other witness residing in the State, hence it may very well be argued that the non-resident witness who has been duly served in this State with process, attends the trial of a cause in obedience to the commands of such subpoena, for the very reason that the moment he visits this State, it matters not how far distant from the place of trial, he could be compelled to obey the process so served upon him. By service of the process in this State, while the court was powerless to compel obedience to it, as long as the witness remained in a foreign State, yet the court did acquire such jurisdiction over the person of the witness as to enable it to compel obedience to the commands of such process in any county of this State where the witness may be found, hence the witness who has been served with process in this State, though a resident of a foreign State, who attends the trial, may very appropriately say to the court that he did not care to be deprived of his liberty in visiting the State when occasion required in order to avoid the issuance and service of compulsory process, therefore, I am here and have traveled from my

residence in a foreign State in obedience to the process which was properly and legally served upon me in this State. It follows under such circumstances as was ruled in State ex rel. v. Seibert, supra, the State could not be heard to complain that a witness, though living in another State, had obeyed the commands of its process and submitted to the jurisdiction of the court by reason of the proper and legal service of it in this State.
 * * * * *

Under the holding in the above case it was to the effect that service of a subpoena outside of the state was a nullity, but if the witness had been served inside the state and later appeared at the trial of the case from his place of residence in a foreign state, he should be entitled to his mileage. The latter holding followed the case of State ex rel. v. Seibert, 130 Mo. 202.

Section 4239, R. S. Missouri 1939, reads as follows:

"When a fee bill shall be certified to the state auditor for payment, the certificate of the judge and prosecuting attorney shall contain a statement of the following facts: That they have strictly examined the bill of costs; that the defendant was convicted or acquitted, and if convicted, the nature and extent of punishment assessed, or the cause continued generally, as the case may be; that the offense charged is a capital one, or punishable solely by imprisonment in the penitentiary, as the case may be; that the services were rendered for which charges are made, and that the fees charged are expressly authorized by law, and that they are properly taxed against the proper party, and that the fees of no more than three witnesses to prove any one fact are al-

lowed. In cases in which the defendant is convicted, the judge and prosecuting attorney shall certify, in addition to the foregoing facts, that the defendant is insolvent, and that no costs charged in the fee bill, fees for board excepted, were incurred on the part of the defendant."

The wording in this section is plain and unambiguous and is not subject to construction. It plainly states, "* * the certificate of the judge and prosecuting attorney * * *." If it had been the intention of the Legislature that the prosecuting attorney who tried the case should make the certificate, it would have been so written in the section, but it plainly says in ordinary words, "prosecuting attorney" and does not say "ex-prosecuting attorney."

The Supreme Court of this state in the case of Artophone Corporation v. Coale, 133 S. W. (2d) 343, pars. 2-4, said:

"* * * Of course 'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object and "the manifest purpose of the statute, considered historically," is properly given consideration.' Cummins v. Kansas City Public Service Co., 334 Mo. 672, 684, 66 S. W. 2d 920, 925 (7-10). * * * * *"

In the above section it clearly shows the intention of the Legislature that the present judge at the time of the certificate and the present prosecutor at the time of the certificate should examine and certify the fee bill. The above section also specifically states "that the fees charged are expressly authorized by law," which would be the fees of witnesses for the defendant when there is an acquittal as set out in Section 4223, supra.

In your request you state that two defendants were charged jointly in the information and that one was finally convicted and one was acquitted on a directed verdict. We are assuming that both defendants were tried in the same case. In cases where a witness is summoned to appear in more than one case at the same time and same place he would only be entitled to witness fees in one case under Section 13420, supra, and if he shall claim fees for attending in two or more cases on the same day at the same place, he shall not be allowed any fees that day. According to Section 13420, supra, which partially reads as follows:

"* * * but witnesses attending in more than one case on the same day and at the same place shall only be allowed fees in one case; and any witness who shall claim fees for attendance in two or more cases on the same day and at the same place shall not be allowed any fees that day. * * * * *"

CONCLUSION

In view of the above authorities it is the opinion of this department that where one defendant was convicted in a murder case, the state should pay all costs, but the state should not pay any of the costs incurred by the defendant with the exception of board. Therefore, under Sections 4220 and 4221, supra, defense witnesses, in a murder case in which there is a conviction by the state, must look to the defendant for their fees. Of course, if the defendant is solvent upon a conviction, the state must not pay the costs, but the costs must be paid by the person convicted.

It is further the opinion of this department that where one of the defendants was acquitted upon a charge of murder by way of a directed verdict as set out in your request, the state is liable for all costs, both witnesses for the state and for fees allowed witnesses for the defense except, in cases where the prosecutor shall be adjudged to pay them. Therefore, the state is only liable for defendant's witness fees in the case of acquittal on a charge of murder and is only liable for the witness fees of state witnesses in case of a conviction on a charge of murder where the defendant is

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insolvent.

It is further the opinion of this department that the fee bill, when examined and certified, should be signed by the present judge of the court and the present prosecuting attorney of the county and not by an ex-judge or ex-prosecuting attorney who participated in the recent trial of the cause.

It is further the opinion of this department that when a witness has been subpoenaed on two or more cases at the same place and at the same time he is only entitled to fees for attendance as a witness for one day's attendance and if he claims witness fees on more than one case for the same day at the same place he is not entitled to any witness fees whatsoever.

Respectfully submitted

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APPROVED:

VANE C. THURLO
(Acting) Attorney General

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