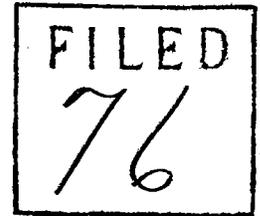


CRIMINAL COSTS: Payment of Prosecuting Attorney's fees on dismissal of cause.

June 8, 1945



Mr. Horace T. Robinson
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Mr. Robinson:

Under date of June 5, you requested an opinion from this department, which reads:

"It is my understanding that under the decisions of the Courts, payment of fees of Prosecuting Attorneys cannot be enforced unless there is a conviction of the crime charged.

"Based upon these decisions, it seems that in this County it has been a custom, where cases are dismissed in Justice Courts that only fees of the Justice and Constable, or Sheriff, are charged, and no Prosecuting Attorney fee is fixed.

"I understand that this is probably correct, insofar as enforcement of payment is concerned. However, I fail to see where a voluntary payment of costs, including a Prosecuting Attorney fee, would be objectionable. In many instances, it seems desirable to dismiss cases, upon payment of costs, and I deem it my duty to collect as many fees for my office, for credit to the County Treasury, as are legitimate. With this in mind, I have insisted that where the defendant agrees to pay costs, upon dismissal, that a Prosecutor's fee be in-

cluded. I fail to see that this is objectionable, where, as stated, it is a voluntary payment by the defendant.

"So that we may not have some question arise with the Auditors at some time in the future, I would be glad to have your office consider this matter, and advise."

As to the enforced collection of fees of prosecuting attorneys, I call your attention to State ex rel. Tudor v. Platte County, 40 Mo. 503; State ex rel. Alfred Gensel v. Thompson, 39 Mo. 427; State ex rel. Woods v. Narramore, et al., 52 Mo. 27. These cases hold that a prosecuting attorney is not entitled to charge, as costs, his statutory fees unless he has obtained a conviction in the case. These are old cases, but they have never been overruled and are still the law as far as we can determine.

As to whether or not the voluntary payment by the defendant of a prosecuting attorney's fee would be objectionable, I again call your attention to the case of State ex rel. Woods v. Narramore, supra, l.c. 30, wherein the court said:

"As against the defendant in criminal cases, costs are only the incident of conviction - resulting either from a confession of guilt or the verdict of a jury, and the County Justices, were clearly right when they made return that the demand of the relator for fees in cases of dismissal by agreement 'was illegal, and against public policy.'

"The law neither recognizes nor sanctions any such agreement between the Circuit Attorney and the defendant.

"And yet by means of collusive arrangements of this character costs have accrued, and a great number of counties been saddled with their payment.

"The prosecuting officer, if he be so minded, has so many facilities for making

illegal compacts with those who are indicted, that it illy becomes courts to increase those opportunities by giving the stamp of legality to iniquitous agreements, and thus widen by judicial construction the avenues to corruption."

The court went further, however, in their opinion and stated:

"But conceding that a defendant might by such an agreement bind himself, still it would by no means follow that the county would be bound thereby."

You will notice that the court said the defendant might bind himself, which leaves the proposition more or less undecided.

In your request you stated that you have insisted that a prosecutor's fee be included when a cause has been dismissed. In that connection we wish to call your attention to Section 4342, R.S. Mo. 1939, which is as follows:

"Every officer who shall, by color of his office, unlawfully and willfully exact or demand or receive any fee or reward to execute or do his duty, or for any official act done or to be done, that is not due, or more than is due, or before it is due, shall upon conviction be adjudged guilty of a misdemeanor."

In construing that statute the court said in the case of State v. Sanders, 62 Mo. App. 35, l.c., 34:

" * * * * While the indictment is verbose and contains a mass of unnecessary repetition, it sufficiently enumerates the fees which the defendant illegally exacted. We take judicial notice of the fact that the fees thus exacted are not such as the prosecuting attorney is by law authorized to demand."

Mr. Horace T. Robinson

-4-

June 8, 1945

From the above language used by the court it would seem that a prosecuting attorney would be guilty of violating this section of the statutes when he demands fees that he is not authorized by law to demand.

Conclusion.

It is the opinion of this department that to insist or demand the payment of a prosecuting attorney's fee from the defendant, without obtaining a conviction against him, is not contemplated by the statutes and is illegal.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WBD:ml