

CRIMINAL COST - State must pay the cost accruing on failure to convict on penitentiary charge.

March 7, 1933.



Hon. James H. Keith
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Mr. Keith:

Answering your letter of February 21st, in which you state information was filed charging that,

" * * * one Oscar Payne did then and there wilfully, unlawfully and feloniously use and operate a still and worm in the process of distilling and manufacturing for sale certain intoxicating liquor, to-wit, one half pint of corn whiskey, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State."

Then you stated the case was tried at said term and resulted in a mistrial; then after several continuances a nolle prosequi was entered. The question arises, "whether costs should be paid by the state or the county", and you further state that you thought it ought to be paid by the state.

The offense was committed under the first offense described in Section 4525 R. S. Mo. 1929, which says,

"If any person shall use in this state any still, worm, doubler, or other distilling, or brewing equipment or utensils whatsoever, in the process of distilling, brewing, or otherwise manufacturing any intoxicating liquor for sale or transportation for sale contrary to the provisions of this article,

he shall be deemed guilty of a felony, and, upon conviction thereof, punished by imprisonment in the state penitentiary for a term of two years, * * * * *

This offense that the defendant was charged with, of course, he pleaded not guilty, that made the issue plain and unequivocal. (The fact that another minor offense is mentioned in the latter part of that section is utterly immaterial.)

Section 3828, R. S. Mo. 1929, states that,

"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; * * * * *"

These two statutes are clear and unequivocal. Under one he was charged with a felony, or a penitentiary offense, and the other says if the defendant is acquitted, the costs shall be paid by the state. The dismissal of the case against the defendant was an acquittal and in the language of Judge Graves,

"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.'"

State ex rel v. Geo. Hackmann, State Auditor, 302 Mo. 273, l. c. 278 - 279.
Ring v. Vogel Paint Co., 46 Mo. Ap. 374 l. c. 377.

My opinion coincides with yours, and, it is my opinion that the state is undoubtedly liable for, and should pay, the costs in the case.

Very respectfully,

GEO. B. STROTHER
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.