

CRIMINAL COSTS: Liability of state for defendant's costs where case "continued generally".

1-24
January 22, 1934.



Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This Department is in receipt of your letter of recent date with request for an opinion, which letter is as follows:

"We would be pleased to have the opinion of the Attorney General upon the following question:

Where a criminal case is continued generally, is the state liable for costs incurred on behalf of the defendant, and if so, would the state be liable for all the costs which had accrued since the beginning of the case, or only those of the term at which the order of general continuance was made?

The statutes apparently most applicable to this matter are as follows: Secs. 3653, 3655, 3828, and 3841.

The case of State ex rel v. Gordon, 254 Mo. 471, 162 S. W. 629, which touches somewhat on this question, holds that the state must pay costs of continuance when had upon its application, though defendant is later convicted.

I understand that, under Auditor L. D. Thompson, defendant's costs were disallowed in cases where there was a general continuance, but prior to that time, under Auditor Gordon, such costs were allowed, if the general continuance was taken on motion of the prosecuting attorney.

In order that the Attorney General may see the immediate practical application of the above question, we are enclosing cost bill from Ozark County, which was just recently presented for payment, in which defendant's costs total more than \$1200.00, most of which was incurred at the term just prior to that at which the order of general continuance was made. Attached, also, is a copy of the judge's docket entry, showing continuances, as furnished by the circuit clerk of Ozark County."

There are very few cases in Missouri construing the statutes in regard to costs in criminal cases.

Section 3825 R. S. Mo. 1929, provides 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."

Section 3826 R. S. Mo. 1929, provides 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, work-house 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 jurymen 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."

By Section 3828, R. S. Mo. 1929, it is provided that, in the event of an acquittal, in capital cases and those in which imprisonment in the Penitentiary is the sole punishment for the offense, the costs shall be paid by the state.

The particular question involved in the first part of your letter is whether in a criminal case, where the case is "continued generally", the state is liable for the costs incurred on behalf of the defendant.

The only section of the statute in which the words "continued generally" are used, so far as we are able to find, is Section 3841 R. S. Mo. 1929, which is as follows:

"The clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the

prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor."

This section directs the clerk, before the next succeeding term, to tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, to make out and deliver an itemized statement forthwith to the prosecuting attorney of the proper county. This section does not adjudge the payment of the costs on either the state or the county, or on the defendant, but is merely a direction to the clerk to make out the fee bills in criminal cases after each term of court.

Section 3653 R. S. Mo. 1929, provides as follows:

"Continuances may be granted to either party in criminal cases for good cause shown, and the court may postpone the trial of any such case for good and sufficient reasons, of its own motion. When a continuance is allowed on the application of either party, it shall be at the costs of the party at whose instance it is granted, unless the court otherwise direct."

This section was construed by the Supreme Court in the case of State ex rel. Selleck v. Gordon, 254 Mo. 471, in which the court held that where, on the application of the state, the case was continued, and under this section of the statute, i. e. Section 3653, supra, the costs were properly adjudged against the state at that term of court, and although the defendant was later convicted and also able to pay the costs incurred upon his behalf, yet the judgment for costs against the state was valid and fixed the payment of the same against the state.

And, in the case of State v. Barker, 63 Mo. App. 535, where the defendant in a criminal case had been granted two continuances at his costs, notwithstanding the case was afterwards dismissed by the state, the costs of the terms of court at which the case was continued by the defendant were chargeable

to him and not to the state..

It is the opinion of this Department that where the case is "continued generally" without any statement as to whether or not it was continued upon the application and cost of the state, that the state would not be liable for the costs incurred by the defendant at the term in which the case was "continued generally," but, if the case was "continued generally" upon the application of the state, the court would have a right to adjudge the costs against the state under Section 3653, supra. Inasmuch as it is our opinion that the state is not liable for the costs incurred by the defendant at the term in which the case was "continued generally," unless the court adjudged the costs against the state, it would necessarily follow that the state would not be liable for the costs incurred by the defendant since the beginning of the case, unless specifically adjudged against the state previously thereto by the court.

Very truly yours,

COVELL R. HEWITT
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

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