

SHERIFF FEES - County not liable for defense costs in subpoenaing  
COSTS - witness or serving writ of habeas corpus ad testi-  
ficandum when defendant is convicted.

5-22  
May 15, 1935.



Honorable Melvin Englehart  
Prosecuting Attorney  
Madison County  
Fredericktown, Missouri

Dear Sir:

We have your request of April 19, 1935 for an opinion, which request is as follows:

"Please give me your opinion to the following problems relating to payment of costs in criminal cases.

"Under Section 3825, R.S. of Mo. 1929, page 3332 Ann. St., it is provided that 'whenever any person is 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 is the county liable for services of the sheriff in subpoenaing witnesses for the defendant, when the defendant is convicted and unable to pay the costs and is committed to the county jail?

"Suppose that the defendant was being tried for second degree murder. He filed a petition for a Writ of Habeas Corpus Ad Testificandum to have a witness brought to court from the state penitentiary. The Writ is granted and the witness is produced in court by the sheriff of the county where the case is tried and the defendant is convicted. Under the above quoted section should the county

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pay the sheriff's fees for producing the witness under the Writ of Habeas Corpus? Thanking you, I remain,"

Your opinion presents two questions: (1) Where defendant is convicted, and is unable to pay the costs, is the county liable for fees earned by the sheriff in subpoenaing defense witnesses? (2) Where defendant is convicted, is the county liable for fees earned by the sheriff in serving a writ of habeas corpus ad testificandum on a defense witness?

I.

Liability of county for costs incurred by defendant, where defendant is subsequently convicted.

When passing upon this matter, it is well to bear in mind that costs were not recoverable at common law, and today are purely creatures of statute. State ex rel. v. Wilder, 197 Mo. 27, l.c. 37; City of Greenfield v. Farmer, 195 Mo. App. 209, l.c. 211.

The statutes relating to the taxation of costs showing a clear intention on the part of the Legislature to relieve the county or state of such costs, in Section 3825, R. S. Mo. 1929 provide:

"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 relating to costs in capital cases, or where the defendant is sentenced to imprisonment in the Penitentiary, specifically prohibits the

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payment of costs incurred by the defendant. Likewise, the same rule is found in Section 3827, dealing with cases where the defendant is sentenced to imprisonment in the county jail.

Giving heed to the doctrine that the "prime effort of all judicial interpretation is to ascertain what the Legislature really intended in using the particular language", this office is of the opinion that no costs are chargeable to the county for fees earned by the sheriff in subpoenaing defense witnesses where the defendant was convicted and unable to pay the costs.

## II.

### Taxation of costs for serving writ of habeas corpus ad testificandum on defense witness.

It appears from your letter that the defendant filed petition for writ of habeas corpus ad testificandum in a second degree murder case, and that the defendant was subsequently convicted. If the defendant had been acquitted, such fees of the sheriff in serving such writ would have been chargeable to the State or county under the provisions of Section 3828, R. S. Mo. 1929. But the defendant having been convicted, the sheriff must look to the defendant and no one else for the recovery of costs incurred in serving the writ. There is no provision in this State for the taxation of costs in habeas corpus matters at the conclusion of habeas corpus proceedings. It cannot be successfully urged that the costs herein must be paid by someone. Such would follow only if there were a statute authorizing the taxation of such costs.

Commenting upon the lack of statutory authority for taxing costs in a habeas corpus matter, the Supreme Court (1913) in Ex parte Nelson, 253 Mo. 627, l.c. 629, said:

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"There being a casus omissus in this State in regard to the taxation of costs in habeas corpus proceedings, this court cannot, except by the usurpation of power, tax the costs herein against the petitioner or make any order in regard thereto. \* \* \* "

It is, therefore, the opinion of this office that the costs of serving the writ of habeas corpus ad testificandum, under the facts outlined in your letter, cannot be paid by either the State or county.

Yours very truly,

FRANKLIN E. REAGAN  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General

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