

STATE AUDITOR--CRIMINAL COSTS--COURT REPORTERS' FEES;  
On Statutory certificate from the Prosecuting Attorney  
and Trial Judge the State Auditor may pay criminal  
costs in criminal cases charged against the State.

June 14, 1935.



Honorable Forrest Smith  
State Auditor  
Jefferson City, Missouri

Dear Sir:

We hereby acknowledge your request for an opinion,  
dated May 16, 1935, which reads as follows:

"This office is in receipt of a fee bill from the Circuit Clerk of Stone County, Missouri, wherein the costs of the bill of exceptions furnished the defendant is charged as costs against the state. The facts surrounding the appeal are as follows: The defendant was convicted of murder and sentenced to ten years in the State Penitentiary on the 14th day of October, 1933. Defendant filed his affidavit for appeal and appeal was granted to the Supreme Court of Missouri on the same date, being October 14th, 1933. Thereafter on the 23rd day of August, 1934, the following record was made in the Stone County Circuit Court in the above case:

'Now at this day it is ordered by the Court that T. E. Custer, the defendant in this cause be, and he is hereby permitted to perfect his appeal to the Supreme Court of the State of Missouri at the cost of the State.'

"On October 10th, 1934, the transcript proper with a copy of the bill of exceptions was filed with the Clerk of the Supreme Court of Missouri. Thereafter the case was reversed and remanded

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to the Stone County Circuit Court for a new trial, and thereafter at the March Term 1935 of said Stone County Circuit Court the defendant entered a plea of guilty to the charge of manslaughter and his punishment was assessed at the term of two years in the State Penitentiary.

"This office requests an opinion as to whether or not the state is liable for the bill of exceptions furnished defendant in view of the fact that the order was not made at the time the appeal was granted, but was made some ten months after.

"I am enclosing a copy of an opinion received by this office on January 17th, 1930, on the question of costs of a bill of exceptions, but this opinion does not cover this question as the opinion of January 17th, 1930, was given on a different state of facts in that the appeal had already been disposed of by the Supreme Court at the time the orders of the Circuit Court were made taxing the costs on the state."

We also acknowledge receipt of the copy of an opinion written by the Honorable Stratton Shartel, Attorney General, to Honorable L. D. Thompson, dated January 17, 1930, and referred to in the above letter.

The facts disclosed in your request show that the appeal was perfected within one year from judgment, which was within the time allowed by law for perfecting an appeal.

Section 11732 R.S. Mo. 1929, referred to in the Shartel opinion could be applicable only to counties and cities of over one hundred thousand (100,000) inhabitants, and provides that a transcript of the evidence in a criminal cause be furnished by the stenographer, and that when the Court is satisfied the defendant is unable to pay for the making of said transcript, the same is to be taxed as costs against the State or county, as may be proper. Said section reads as follows:

"All shorthand notes of examination in criminal matters, other than regular trials thereof, shall be turned over at once by said reporter to the prosecuting officer of the court. But all other shorthand notes taken by said reporter shall be filed by him in the clerk's office of said court, and shall become a part of the record of said court, and such reporter shall transcribe, in legible English, any of such notes, or any part thereof, whenever required by the clerk so to do; and such clerk shall make out certified copies of such transcript or longhand notes for any person upon the payment of legal fees allowed by law for copies of records and papers, except that whenever said reporter shall be required to take notes before the grand jury he shall be sworn to secrecy, and all such notes so taken shall also be turned over by said reporter to the prosecuting officer of said court; and provided, that in cases of appeal and on motions for new trial, the transcript of the evidence shall be furnished to the defendant upon the order of the court without cost to said defendant when it shall appear to the satisfaction of the court that the defendant is unable to pay the cost of such transcript for the purpose of making such appeal; and provided further, that the stenographer shall be allowed for making such transcript the sum of fifteen cents per folio of one hundred words for each transcript so furnished; and when the court shall be satisfied that the defendant is unable to pay for making such transcript, the same shall be taxed as costs in the case against the state or county, as may be proper."

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The population of Stone County at the last census was 11,614 inhabitants, hence section 11732, supra, has no application in Stone County, as suggested in your request for an opinion, but Court Reporters in Stone County hold their office, perform their duties, and are entitled to the fee as provided in Chapter 79 R. S. Mo. 1929.

Chapter 79, R. S. Mo. 1929, provides for the appointment of Court Reporters in Missouri as sworn officers of the Court, and Section 11719 R. S. Mo. 1929 sets out their duties as follows:

"It shall be the duty of the official court reporter so appointed to attend the sessions of the court, under the direction of the judge thereof; to take full stenographic notes of the oral evidence offered in every cause tried in said court, together with all objections to the admissibility of testimony, the rulings of the court thereon, and all exceptions taken to such rulings; to preserve all official notes taken in said court for future use or reference, and to furnish to any person or persons a transcript of all or any part of said evidence or oral proceedings upon the payment to him of the fee hereinafter provided."

Of the same chapter, Section 11722, R. S. Mo. 1929 sets out the amount and manner of taxing Court Reporters' fees and costs, and provides that the Reporters' fees be taxed against the State or County as may be proper. Said section reads as follows:

"Each court reporter shall also receive from any person or persons ordering transcripts of his notes the sum of fifteen cents per folio of one hundred words, each four figures to be counted as one word; and any judge may, in his discretion, order a transcript of all or any part of the evidence or oral proceedings for his own use, and the court reporter's fees for making the same shall be taxed in the same manner as other costs in the case:

Provided, that in criminal cases where an appeal is taken or a writ of error obtained by the defendant, and it shall appear to the satisfaction of the court that the defendant is unable to pay the costs of such transcript for the purpose of perfecting the appeal, the court shall order the same to be furnished and the court reporter's fees for making the same shall be taxed against the state or county as may be proper; and in such case the court reporter shall furnish two transcripts in duplication of his notes of the evidence, for one of which he shall receive fifteen cents per hundred words, and shall receive no compensation for the other."

Neither, under the provisions of Section 11732, *supra*, nor Section 11722, *supra*, is the Trial Court authorized, or has it jurisdiction, to arbitrarily fix the Court Reporters' fifteen cents per hundred words fee as a charge against the State. It is up to the Court to determine, under the law, whether the State be liable for said costs. The phrase, "as may be proper," as used in both sections allowing the Court Reporters' fees, means that the Criminal Court can allow fees for a transcript of the Bills of Exceptions, payable to the Court Reporter in the manner and in the amount as the Legislature has specifically provided for.

Costs allowable against the State are only proper, and can only be legally taxed as costs, when the Court taxing them can lay its finger on the Statute authorizing the item or items specified to be taxed as costs against the State. The mere taxing of the costs by the Court against the State does not make the claim proper and legal.

In the case of *Houts v. McCluney*, 102 Mo. 13, 1. c. 16; 14 S.W. 766, our Supreme Court said:

"In the first place, no costs are allowed by the common law. They are, with us, creatures of the

statute. They must be paid in the amounts and in the manner specified in the statute."

The primary liability to pay Court Reporters' fees, and all other costs in a criminal cause where the defendant is convicted and given a penitentiary sentence, as in the case under consideration, is upon the defendant and Section 3825 R. S. Mo. 1929, provides:

"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."

On conviction, when the defendant is unable to pay the costs, the State is liable to pay costs, except costs incurred on behalf of the defendant, as provided in Section 3826, R. S. Mo. 1929. Said section reads in part:

"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.  
\* \* \* \*"

The Court Reporter's fee for transcribing the Bill of Exceptions, to be used by this defendant in his behalf on appeal, can possibly be a legal charge against the State under the above statute. Defendant was sentenced to the penitentiary and the costs taxed as they were, after finding defendant unable to pay the costs, were charged against the State by the Court's order. The order itself does not create the State's liability, but it does lend sanction to the truth of the Prosecuting Attorney's and Trial Judge's statutory audit. There is a duty on the Prosecuting Attorney and the Trial Judge to audit fee bills prepared by

the Clerk as charges against the State and for them to be reasonably sure that the fees charged are expressly allowed by law for such service, and Section 3842 R. S. Mo. 1929, provides:

"It shall be the duty of the prosecuting attorney to strictly examine each bill of costs which shall be delivered to him, as provided in the next preceding section, for allowance against the state or county, and ascertain as far as possible whether the services have been rendered for which charges are made, and whether the fees charged are expressly given by law for such services, or whether greater charges are made than the law authorizes, and if said fee bill has been made out according to law, or if not, after correcting all errors therein, he shall report the same to the judge of said court, either in term or in vacation, and if the same appears to be formal and correct, the judge and prosecuting attorney shall certify to the state auditor, or clerk of the county court, accordingly as the state or county is liable, the amount of costs due by the state or county on the said fee bill, and deliver the same to the clerk who made it out, to be collected without delay, and paid over to those entitled to the fees allowed."

Section 3844 R. S. Mo. 1929, provides:

"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 allowed. 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 fact that the Trial Judge and Prosecuting Attorney, in compliance with Section 3842, supra, certify a charge against the State as a legal fee and part of the costs of a criminal case, as the statute requires in such matters, is not final and conclusive on the part of the State Auditor of the facts certified to. This exact point was raised in State ex rel. v. Wilder, 196 Mo. 418, 1. c. 425; 94 S. W. 396, and the Court said:

"An analysis of the sections of the statute in reference to bills of costs as herein pointed out, makes it manifest that the Legislature never intended that this section should be regarded as authority on the part of the judge and prosecuting attorney to finally audit, adjust and settle all costs bills in criminal cases. The very term of the statute negatives any such intention on the part of the law-making power. There are no such terms used in any of those sections which indicate that they are to audit, adjust and settle bills of costs, but it is apparent that this section means to impose the burden upon the judge and prosecuting attorney, who are presumed to be familiar with the legitimate costs that have accrued in the case, to strictly examine the fee bills and

certify them to the State Auditor, who finally adjusts and settles the same by the drawing of an auditor's warrant."

In the case of *Morgan v. Buffington*, 21 Mo. 549, which was a mandamus against the State Auditor, a case where the Speaker of the House of Representatives had, under the law, certified to an account for services rendered by one of the members, and the member was contending that the certification was conclusive of a legal obligation against the State, the Supreme Court said at l. c. 552.

"Under these circumstances, the question recurs, whether the auditor can inquire into the truth of the fact, or contest the legality of the conclusion stated by the speaker in his certificate granted to the petitioner.

"The auditor of public accounts is an important officer, entrusted with the management of the revenues of the state. Whilst the treasurer holds the iron or brazen key of the treasury, the auditor holds the legal key, and it is through his instrumentality alone that money can lawfully be drawn from it. The state looks to him as the protector of her treasure. The powers confided to him are necessarily large, and as by his mismanagement the state may at any time be rendered unable to fulfil her pecuniary engagements, so there should be a power in him to prevent such a state of things. No doubt there are cases in which the general assembly may make a voucher conclusive on the auditor, and require him, as a mere instrument of the law, to issue a warrant without any examination into the justice or legality of the claim. Whether the general assembly has, in any case, made a voucher conclusive on the auditor, is a question to be determined by the auditor, subject to the revision of the courts. We see nothing in the act fixing the pay of the members

of the general assembly which shows that it was designed to make the voucher of the speaker conclusive on the auditor."

CONCLUSION.

We are of the opinion that the rules of law announced in the cases and Statutes heretofore cited are applicable to the provisions set out in Sections 11732 and 11722, supra, giving the Trial Judge power in criminal cases to tax costs and issue cost bills against the State "as may be proper". We are of the opinion that the Trial Court's order set out in the request for this opinion, whereby he ordered "that T. E. Custer, the defendant in this cause be, and he is hereby permitted to perfect his appeal to the Supreme Court of the State of Missouri at the cost of the State," is of no legal force insofar as it being of any legal authority for the State Auditor to pay State money to a Court Reporter for a transcript of the evidence in said cause. The Court order would have no different legal effect if it had been made at the time the appeal was granted. It is up to the Court to determine that the defendant has no funds to pay the costs of a transcript for purposes of perfecting the appeal and when he so determines within the year allowed for perfecting an appeal, then he can tax the costs against the State or County as provided in Section 3826, supra.

Neither this Court order nor the statutory certificate of the Judge and Prosecuting Attorney to the auditor, as to the taxation of costs in criminal cases, is final and conclusive upon the State Auditor. Since by mistake the Prosecuting Attorney or Judge may charge to the State what the State is not bound to pay, it is the duty of the Auditor to reject so much of any criminal costs bill as is improperly charged to the State. In the present case we are of the opinion that the charge for court reporting is a proper charge within the provisions of Section 3826, supra, and should be allowed by the Auditor when the claim is properly certified to by the Prosecuting Attorney and

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Trial Judge, as provided in Sections 3842 and 3844, supra, showing that defendant was sentenced to two years in the penitentiary, that defendant was insolvent and that none of the costs were incurred in behalf of defendant. The action of the Trial Judge and Prosecuting Attorney is presumed to be according to law.

Respectfully submitted

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APPROVED:

JOHN W. HOFFMAN, Jr.  
(Acting) Attorney General.

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