

CRIMINAL COSTS: When defendant is insolvent and continuance is granted at his instance and defendant is later acquitted, the State is liable for costs; when state receives continuance at its cost and defendant is convicted and unable to pay costs, State is only liable for costs incurred by it.

April 30, 1936. 5-14



Honorable Forrest Smith,  
State Auditor,  
Jefferson City, Mo.

Dear Sir:

This department is in receipt of your letter of April 16, wherein you make the following request for an opinion:

"Re: State v. Jason Arnett  
and John Landers.

Witnesses in the above entitled case having been duly subpoenaed by a sheriff appear in the Circuit Court in obedience to said subpoena and at that term of court an application is filed on behalf of the defendants for a continuance. A continuance is granted by the court upon the application and at the request of the defendants to the next term of court, the court failing to enter any judgment in regard to the cost of the continuance. At the next term of Circuit Court the defendants are tried, convicted and sentenced to the penitentiary. The Clerk makes out a cost bill for the costs in the case, including all costs incurred on behalf of the State at the term in which the continuance was granted upon the application of the defendant. The cost bill includes the affidavit and certificate of the Judge and Prosecuting Attorney that the defendants are insolvent and unable to pay the costs in the case.

This office desires an opinion as to whether or not the State is liable for the costs incurred on behalf of the State at the term when the case was continued upon the application of the defendant."

The facts as contained in your letter were submitted to this department on January 13, 1936, and in the opinion rendered to you on January 17, it was held that a defendant is liable for the costs in a case wherein a continuance is had at his request, regardless of the fact that he was later acquitted of the charge. This opinion was rendered in accordance with the decision in the case of State ex rel. v. Gordon, 254 Mo. 471.

Your request now involves the further question as to who is liable for the costs when the defendant is insolvent. This point has never been directly passed upon by the courts of this state. Doubtless, in the past you have paid all the costs in a continuance had at the instance of the defendant when said defendant was insolvent under the provisions of Section 3826, R.S. Mo. 1929, wherein it states: "\* \* \* and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."

Assuming that the court granted the continuance in conformity with Section 3653, R.S. Mo. 1929, which provides:

"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,"

and that the court directed the defendant should pay the costs, we deem the same to be final judgment for costs. However, it is possible that it is separate and distinct from the rest of the costs, regardless of the outcome of the case, as was stated in the case of State ex rel. v. Gordon, 254 Mo. l.c. 474, but if the defendant is insolvent, who pays the costs - are they lost to everyone entitled to the same?

The decision in the Gordon Case infers that Section 3653, supra, is wholly independent of the general sections, now Sections 3826, 3827 and 3828, when it uses this language: "The taxation of costs when the cause is continued upon the application of either party, and in that sense provides an exception or special rule concerning the costs therein mentioned. The other sections are announcements more in the nature of a general rule for the taxation of costs when the defendant is convicted and do not undertake to retax costs that have been previously adjudged."

The defendant is liable for costs for continuance taken at the adjourned term. State v. Butler, 118 Mo. App. l.c. 590.

In the case of State ex rel. v. Carpenter, 51 Mo. 555, a decision relating to the liability of the county for costs, in which it was contended that the county was only liable for costs subsequent to the plea of guilty by defendant, the State being liable for the costs prior to the plea of guilty, the Court, in referring to the insolvency of a defendant, said (l.c. 555-556):

"Strickland being insolvent, the judge and Circuit Attorney examined and certified the bill of costs, which had accrued in the case, to be paid by the county. The County Court ordered the payment of all the costs which were made subsequent to the plea of guilty by the prisoner, and refused the payment of the costs which accrued previous thereto. The relator then applied for a mandamus to compel payment which the court awarded, and the defendant appealed.

"It is now insisted that all the costs of the proceeding which were made prior to the time the prisoner pleaded guilty and was sentenced to a fine and imprisonment in the county jail, were properly chargeable to the State, and not to the county.

"The statute in relation to criminal costs, provides, that they shall be paid by the State in all capital cases in which the defendant shall be convicted, and shall be unable to pay them; and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and shall be unable to pay them. And the county in which the indictment is found, shall pay the costs in all cases where the defendant is sentenced to imprisonment in the county jail, and to pay a fine, or either of these modes of punishment, and is unable to pay them.

"Before the State can be made liable to pay costs in a criminal prosecution, it is necessary that the defendant should be convicted of a capital offense, or that he should be sentenced to imprisonment in the penitentiary. Neither of these occurrences took place in this case. It is

true the jury brought in a verdict in favor of punishing him by imprisonment in the penitentiary, but the court passed no sentence thereon; on the contrary, it set the same aside. There was then nothing final, either as to conviction or sentence."

A decision which by analogy we believe could be made applicable to the instant case is that of State v. Parker, 63 Mo. App. l.c. 537, wherein the Court said:

"It is provided by section 4180, Revised Statutes, 1889, relating to criminal procedure: 'Continuances may be granted to either party in criminal cases for good cause shown, and the court may postpone the trial of any such cause 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 directs.' In our opinion, that section is sufficient statutory authority for the rendition of a judgment for costs against a defendant in a criminal case. Sections 4265 and 4395 provide that, upon the conviction of a defendant, he shall be adjudged to pay the costs, and that it shall be the duty of the clerk of the court, at the end of each term, to issue executions for the costs of conviction. It is true that neither of these sections refer in terms to the costs of a continuance, but from that fact we are not authorized to assume the legislature did not intend that an execution should issue on a judgment for costs arising on a continuance. A fair and reasonable construction of section 4180 is that the Legislature, by authorizing a continuance at the costs of defendant, meant that there should be a judgment rendered against him and necessarily an execution upon such judgment."

Bearing in mind that the original premise was to the effect that the costs of a continuance were independent of the final outcome of the case, yet by the same argument and logic as used in the Parker Case, in our opinion, the statutes relating to when the state and county shall pay the costs, i.e., Sections 3828, 3827 and 3826, are applicable to the instant point.

A case in which the facts are almost identical with the instant case is that of State ex rel. Spurlock v. Holladay, 67 Mo. 299. The writ in this case was denied for the reason that the defendant was not charged with a crime for which a term in the penitentiary was the sole punishment. The court does not determine the question as to whether the State Auditor would have been compelled to audit the costs for the continuance if the crime charged had been punishable solely by imprisonment in the penitentiary.

#### CONCLUSION

When a continuance is granted a defendant at his cost, it may be true that this constitutes a judgment for the cost of the continuance for which the defendant is liable, irrespective of the final outcome of the case, yet if the defendant be insolvent and unable to pay, are the officers, witnesses, and others to lose their costs? We think not.

Although the Legislature has not dealt specifically with this question, nor have the decisions of the Supreme Court related directly to the same, it is the opinion of this department that Sections 3826, 3827 and 3828, R.S. Mo. 1929 are to be read in conjunction with Section 3653. Therefore, when a continuance is granted at the instance of a defendant, and the defendant is later acquitted, the State is liable for all of the costs of the continuance when the defendant is insolvent; when the State receives a continuance at its cost and the defendant is later convicted and is unable to pay the costs, we think the State is liable only for the costs incurred by it.

Respectfully submitted,

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Assistant Attorney General.

APPROVED:

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

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