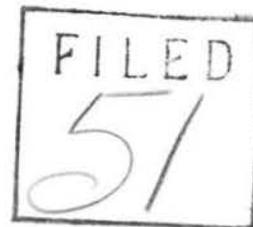


CRIMINAL COSTS: County must pay costs where defendant has been sentenced to a county jail sentence or by fine even when paroled.

December 16, 1937

Mr. Hubert E. Lay,  
Prosecuting Attorney,  
Texas County,  
Houston, Mo.



Dear Sir:

This is to acknowledge receipt of your letter of December 10, 1937, with reference to costs in a criminal case. Your letter reads as follows:

"I would like to have an opinion on whether the County would be liable for costs in a criminal case where the following proceedings were had?

In February, 1930, Defendant was convicted of felonious assault without malice and his punishment was assessed at \$200.00. At the same term of court, the court made the following order; 'Now on this day it is ordered by the court that stay of execution be granted to the first Saturday in June, 1931, in this cause, it is further ordered, adjudged and decreed by the court that the defendant be paroled to Harry Kelly on fine only, on condition that he will not again violate the law, and pay costs in this case and report to the court on the first day of each term of this court and from day to day during the term and not depart without leave until discharged.' No bond was given and nothing further was done until in February, 1933. At this time a capias execution was issued by the Clerk and delivered to the Sheriff and under such writ the Sheriff took the defendant in custody. The defendant then filed petition for Writ of Habeas Corpus. The writ was granted and in February, 1932, the Court discharged the defendant on the ground that since no bond was given the defendant has served his time. The defendant never did pay the costs in this case and now the Clerk has made out a fee bill against the County.

Thanking you for this opinion at your earliest convenience."

Will state that Section 3827 R.S. Mo. 1929 reads as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

In Section 3828 R.S. Mo. 1929, you will notice that when the defendant is charged with a capital case and the only punishment is punishment under a capital case or punishment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; but in all other trials on indictment or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law. In *State v. Hackman*, 257 S.W. 457, the sheriff filed a suit of mandamus against the State Auditor who had refused to honor a fee bill in a murder case, for the reason that an instruction had been given upon fourth degree manslaughter. The court in that case held that the instruction was merely an incident in the trial of the case and the fact that the case was a capital case, it became the duty of the state to pay the costs under Section 3828 R.S. Mo. 1929.

The Circuit Courts of this state have the authority to grant a parole for persons convicted under the criminal laws of the state in accordance with Section 3809 Revised Statutes of Missouri 1929. This section reads as follows:

"The circuit and criminal courts of this state, and the court of criminal correction of the city of St. Louis, shall have power, as hereinafter provided, to parole persons convicted of a violation of the criminal laws of this state."

Section 3809 is restricted by Section 3811 of the Revised Statutes of Missouri 1929 in reference to certain crimes for which the defendant cannot be paroled. Section 3811 reads as follows:

"When any person of previous good character

and who shall not have been previously convicted of a felony, shall be convicted of any felony except murder, rape (where the rape charged and the proof shows said rape to have been committed by means of force, violence or by putting the female in fear of immediate injury to her person), arson or robbery, and imprisonment in the penitentiary shall be assessed as the punishment therefor, and sentence shall have been pronounced, the court before whom the conviction was had, if satisfied that such person, if permitted to go at large, would not again violate the law, may in his discretion, by order of record, parole such person and permit him to go and remain at large until such parole be terminated as hereinafter provided: Provided, that the court shall have no power to parole any person after he has been delivered to the warden of the penitentiary."

As you notice under Section 3811 the court is only given jurisdiction under that section to crimes in which the defendant has been punished by imprisonment in the penitentiary only.

Section 3813 Revised Statutes of Missouri 1929 also restricts Section 3809 and sets out the method of the parole. Section 3813 reads as follows:

"When any person shall be paroled under the provisions of section 3811 of this article, it shall be the duty of the court, before or at the time of the granting such parole, to require such person, with one or more sureties, to enter into bond to the state of Missouri in a sum to be fixed by the court, conditioned that he will appear in court on the first day of each regular term of court and during each and every day of such term of court during the continuance of such parole, and not depart without leave of court. Such bond shall be approved by the court, and forfeiture may be taken and prosecuted to final judgment on such bond in the same manner as now provided by law in cases of bonds taken for appearance of persons awaiting

trial upon information or indictment."

You will notice that under Section 3813 of the Revised Statutes of Missouri 1929, the reference to Section 3811, which covers a punishment by imprisonment in the state penitentiary only. In setting out the procedure of parole in this section 3813, it provides that before granting such parole, to require such person, with one or more sureties, to enter into bond to the state of Missouri in a sum to be fixed by the court, etc. Under Section 3810 Revised Statutes of Missouri 1929, this section sets out the procedure for the paroling of a person who has been sentenced by a jail sentence or by an imposed fine only, either by the Circuit Court of a Justice of the Peace. As you notice by this Section 3810, there is no requirement as to making bond before parole as is set out in Section 3813 of the Revised Statutes of Missouri 1929.

Under Section 3817 of the Revised Statutes of Missouri 1929, this section provides that no person under the provisions of Section 3810 shall be granted an absolute discharge at an earlier period than six months after the date of his parole, nor shall such parole be continued for a longer period than two years from date of parole, as set out above 3810 is the section where the conviction imposed a sentence to the county jail or imposed a fine only. Section 3817 further provides that under the provisions of Section 3813 no person shall be granted an absolute discharge at an earlier period than two years from the date of his parole, nor shall such parole continue for a longer period than ten years. Under this latter part of Section 3817, it refers to Section 3813 where the punishment imposed by imprisonment in the state penitentiary.

Your case mentioned in your letter, although it was originally filed on a charge of felonious assault with malice and his punishment was assessed at two hundred dollars (\$200.00), the minimum of the duration of the parole would be not before six months and not more than two years before the defendant should be given an absolute parole.

Section 3818 reads as follows:

"It shall be the duty of the court granting the parole to require the person paroled to pay or give security for the payment of all costs that may have accrued in the cause, unless the person paroled

shall be insolvent and unable to either pay said costs or furnish security for the same. In the latter case the costs shall be paid by the state or county as in other cases without such persons being required to serve any time in jail for non-payment of fine or costs. Such payment of costs by the state or county shall not relieve such person from liability for the same, but if at any time before his final discharge he shall become able to pay said costs, it shall be the duty of the court to require said costs to be paid before granting a discharge, and said costs when so paid shall be turned into the state or county treasury, as the case may require."

As you notice in Section 3818 it specifically sets out to require the person paroled to pay or give security for the payment of all costs that may have accrued in the cause, unless the person paroled shall be insolvent and unable to either pay said costs or furnish security for the same. In the latter case the costs shall be paid by the state or county as in other cases without such person being required to serve any time in jail for non-payment of fine or costs. It also further says that the payment of the costs by the state or county shall not relieve such person from liability for the same, but if at any time before his final discharge he shall become able to pay said costs it shall be the duty of the court to require said costs to be paid before the granting of a discharge. Under this Section 3818 the payment of the costs in this case is mandatory upon the county for the reason that the punishment assessed was only a fine which is covered by Section 3810.

As to the time of the granting of an absolute discharge, the court in your case was governed by Section 3817 wherein the section set out that if no absolute discharge was granted nor the parole terminated within two years and failed to make such an order. Such failure to act should operate as a discharge of the person paroled at the end of two years. The two years limits governing the automatic absolute discharge is set out according to the method of parole in Section 3810 to which Section 3817 refers as the limitation.

You have not asked an opinion of this office as to the collection of this costs, but under Section 3730 Revised Statutes of Missouri 1929, the Clerk of the Court having criminal jurisdiction for the county must issue execution for the costs of convictions in criminal cases. After the execution the parolee

may avail himself of the insolvency act described in Article 20, Chapter 29 of the Revised Statutes of Missouri 1929.

The execution for the costs would only be in the nature of a civil execution and not for the imprisonment for non-payment of the costs for the reason that under the parole act he has been lawfully discharged from the conviction. In 15 Corpus Juris, page 346, Section 868, it is said:

"Costs made in a criminal prosecution are remitted by a pardon before conviction or before judgment and sentence, although after conviction. On the other hand, it is very generally held that, after sentence, the costs have vested and a pardon cannot operate to extinguish the right to them, whether costs of the prosecution or costs incurred by defendant. Nor can the means for collection of these costs be abridged or lessened by a pardon. While the question has usually arisen in cases where the right to the costs was in private persons, yet the rule has been held to apply in respect of costs due the state or the county. It has been held, however, that, although the liability for costs is not extinguished by pardon, there can be no right in the officers or other persons entitled to the costs to imprison him for nonpayment thereof."

"Ryan v. State. 176 Ind. 281. 95 NE 561; Angela v. Com., 10 Gratt, (51 Va.) 696. But see Libby v. Nicola, 21 Oh. St. 414 (dictum to the effect that the pardoning power may release uncollected costs that may be coming to the state).

(a) REASONS FOR RULE.--(1) 'Under existing laws, the costs, which were formerly taxed and adjudged on conviction in favor of such officers, are now taxed and adjudged in favor of the county and State, and such officers are paid for their services by the State or the county out of its own treasury. The costs are the property of the state or the county the same as they were the property of the officers under former laws, and are intended to reimburse, in part at least, the

State and county for the salaries paid to such officers,' Ryan v. State, 176 Ind. 281, 283, 95 NE 561. (2) 'The fine is imposed for the purpose of punishment \*\*\*\*\* But with regard to costs it is different. They are exacted simply for the purpose of reimbursing to the public treasury the precise amount which the conduct of the defendant has rendered it necessary should be expended for the vindication of the public justice of the state and its violated laws. It is the money paid, laid out and expended for the purpose of repairing the consequences of the defendant's wrong. It is demanded of him for a good and sufficient consideration, and constitutes an item of debt from him to the commonwealth\*\*\*\*\* The right to enforce payment of them is a mere incident to the conviction, and thereby vested in the commonwealth for the sole purpose of replacing in the treasury the amount which the defendant himself has caused to be withdrawn from it. And it can make no substantial difference whether the money is going directly to the witnesses and others who are entitled to be paid for their services in the prosecution, or the commonwealth having paid them stands by substitution in their place.' Angela v. Com., 10 Gratt. (51 Va.) 696, 701.

Ryan v. State, 176 Ind. 281, 95 NE 561."

The law of this case is governed primarily by the statute and must be followed directly as set out by the sections therein under the parole act. The sections referred to in this opinion are not conflicting in any respect nor are they ambiguous. In State ex rel. Cobb v. Thompson, State Auditor, 5 S. W. (2d) page 57, the court held as follows:

"A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is

no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself."

CONCLUSION

In conclusion it is the opinion of this office that under Section 3818 R.S. Mo. 1929, which section provides for the parole of the defendant who has been convicted of either a felony or misdemeanor, the county is liable for the costs where the defendant has been paroled on a misdemeanor, except costs incurred on the part of the defendant.

It is also the opinion of this office that under Section 3818 R.S. Mo. 1929 that where the person paroled shall be insolvent and unable to either pay said costs or furnish security for the same, in the case of a conviction on a misdemeanor, the costs shall be paid by the county as in other cases without such person being required to serve any time in jail for non-payment of fine or costs.

It is also the opinion of this department that the payment of the costs by the county shall not relieve such person from liability for the same, but that under Section 3730 R.S. Mo. 1929, the clerk of the court, having criminal jurisdiction for the county, must issue execution for the costs of convictions in criminal cases, but after the execution, the parolee may avail himself of the insolvency act described in Article 20, chapter 29 of the Revised Statutes of Missouri, 1929.

Respectfully submitted,

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APPROVED:

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