

CRIMINAL COSTS

- Fees of sheriff in summoning a standing jury is audited by the county, but fees for summoning a special venire is audited by the State Auditor and not by county.

June 22, 1938

Hon. F. T. Jared
Associate Judge, First Dist.
Springfield, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion from this department under date of June 17th, which reads as follows:

"We have been having difficulty in our county in the matter of auditing the sheriff's accounts, with especial reference to summoning juries and boarding juries when retained in his custody over night.

"Since these fees or accounts are incident to the attendance of Circuit Court, and the judge of said court makes the orders for summoning juries and for retaining a jury and fixes the amount of compensation (not to exceed \$2.00 per day) that the sheriff may receive (Sec. 3826 and 3827 R. S. 1929). I am inclined to believe that said accounts should be audited and certified to the county court for payment in accordance with Sec. 1871 R. S. 29.

"The question as to whether the summoning a jury would be construed as a part of the 'Fee Bill' in the case is not entirely clear to me, but if it is, then Sec. 3841, 3842 and 3845 R. S. 1929

would apply. If not, it seems that Sec. 1871 might apply any way.

"Sec. 1840 makes it the duty of a judge to superintend the keeping of records of his court. I do not know just how the 'Summons Records' of our county are kept, but it appears that they might be so kept that the return on each summon of venire would show the name, address and actual miles traveled in summoning each juror supported by the affidavit of summoning officer. This it seems to me might be sufficient proof on which the Pros. Atty. and judge might base their audit and certification. At any rate it appears to me that the County Court should have some justifiable proof of service rendered on which to base payment. (We may not really know, otherwise, that a jury was ordered.)

"I am writing to ask that you please give me an opinion on this matter at your earliest convenience. * * * "

There are two theories upon which an opinion may be rendered in compliance with your request. The taxing of costs and fees in the summoning of a regular panel of jurors is governed by different sections of the statute other than the costs and fees in the summoning of a special venire. I am also presuming that your request is only as to fees and costs in criminal cases.

For summoning a regular panel or standing jury, the sheriff is allowed Eight Dollars and Forty Cents (\$8.40) and mileage as set out in Section 11789, R. S. Mo. 1929. Also, under the same section, the sheriff is allowed only Two Dollars (\$2.00) for executing and returning a special venire facias. By the term "standing jury", we think the law means that which is drawn by the county court and summoned by the circuit clerk on the certification of such list by the county clerk. This is the jury which, in ordinary terms, is standing, when the term of court opens and re-

ardless of the number summoned, the statute provides for a fee of only Eight Dollars and Forty Cents (\$8.40).

The payment for summoning a regular panel or standing panel is chargeable to and must be audited solely by the county. The payment for summoning a special venire is chargeable as provided in cost in all criminal cases. Section 3826 R. S. Mo. 1929 reads 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, 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. 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."

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."

Section 3828 R. S. Mo. 1929 reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments 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."

As stated before, the fees for summoning a special venire follow the case and under the above sections may be charged to and audited either by the state or county. The state is liable for the costs in cases of conviction and sentence to the penitentiary or acquittal where the offense is solely punishable by imprisonment in the penitentiary and the costs are certified to the State Auditor and not the county court. In other cases where the defendant is sentenced to the county jail or assessed a fine, the costs must be paid by the county and audited by the county. All of the sections as set out providing payment of costs make the exception that if the defendant can pay the costs, neither the state nor the county shall pay them. There is also an exception as to the payment of costs accrued by the defendant. Section 3844 R. S. Mo. 1929 reads as follows:

"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."

Section 3845 R. S. Mo. 1929 reads as follows:

"Each and every bill of costs presented to any county court for allowance shall be examined and certified to by the judge and prosecuting attorney in the same manner, all necessary charges excepted, as provided for certifying bills of costs to the state auditor for payment; and any county judge who shall pay, or vote to pay, any cost incurred in any criminal case or proceeding, unless the same is so certified to, shall be adjudged guilty of a misdemeanor."

The certification of costs by the judge and prosecuting attorney is conclusive upon the county court and payment of same

can be compelled by mandamus, if properly certified. It was so held in *The State ex rel. Vaughan et al. v. Appleby* 136 Mo. 408, l.c. 411 where the court said:

"Certain criminal costs are payable by the county, and, when bills of such costs, duly certified, are presented to the county court, a warrant for the payment of the amount thereof should be drawn upon the treasurer. R. S., secs. 4397, 4400 and 4415."

Also in the case of *The State ex rel. Jacobi & Bennett v. Heege* 40 Mo. App. 650, l.c. 652:

"The defendants' first position is that they, as county judges, in auditing fee bills for criminal costs, exercise judicial powers, and that their judgment in such matters can only be reviewed on appeal or writ of error. All of the authorities in this state are opposed to this idea, and favor the remedy by mandamus. When a bill of costs is properly certified by the judge of the circuit court and the prosecuting attorney, the duty of the county court in reference to its payment is purely ministerial, and, if the county court for any cause declines to act, the circuit court of the county has authority to compel the performance of the duty by mandamus. *Boone County v. Todd*, 3 Mo. 140; *St. Louis County v. Ruland*, 5 Mo. 268; *State ex rel. v. County Court*, 41 Mo. 254; *State ex rel. v. Smith*, 15 Mo. App. 412; *State ex rel. v. Hill*, 72 Mo. 512; *Sheridan v. Fleming*, 93 Mo. 321."

It was also held in the case of *State ex rel. Baker v. Fraker et al.*, 166 Mo. 130.

According to the United States census of 1930, Greene County had a population of 22,929 and the summoning of a special venire is governed by Section 8785, R. S. Mo. 1929. This section was held to apply in Greene County under the ruling of State vs. Perno 23 S. W. (2nd) 87. This Section 8785 supra applied to counties with a population of not less than 60,000 nor more than 200,000. Section 8785 supra reads as follows:

"When a jury for the trial of a cause cannot be made up from the regular panel, the judge of the court, before whom the cause is pending, may make out and deliver to the proper officers a list of jurors, sufficient to complete the panel, but such extra jurors shall be summoned only for the trial of that particular cause."

In that event, the sheriff is only entitled to Two Dollars (\$2.00) for summoning a special venire and mileage as set out in Section 11789 supra and the fees should be audited as set out in Sections 3826, 3827 and 3828 supra. Where the costs under these three sections are to be paid by the county, Section 1871 R. S. Mo. 1929 would apply but only as to accounts payable by the county. Section 1871 supra reads as follows:

"The court shall audit and adjust the accounts of the officer attending it, made pursuant to this chapter, and certify the same for payment."

In reference to the "Summons Record" as set out in your request, the certification by the Judge and prosecuting attorney is sufficient as a record as same must be filed with the county clerk where the county is liable for the costs after approval by the county court. As said before, the fees of summoning a special venire would be assessed in each individual case and the fee of the sheriff would include the mileage and service. This is governed by Section 3842, which reads as follows:

"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."

As to the payment and auditing of allowance for payment of board and lodging of jurors during the time they are required by the court to be kept together, the same sections would apply as governs the fees of a sheriff when assessed in a particular and certain case. This is governed by the latter part of Section 3826 supra, wherein it says:

" * * * 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 juryman 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."

CONCLUSION

In view of the above authorities, it is the opinion of this department that the fees allowed the sheriff for summoning a standing jury or regular panel are payable by the county and should be audited by the county, but the fees payable to the sheriff for the summoning and returning of execution of a special venire facias must follow the case for which the special venire was summoned and the costs should be assessed against each individual case. Where, under the authorities above set out, the county is liable for the costs in the case, it is then the duty of the county to audit and pay the costs, but where the conviction results in a verdict of a penitentiary sentence, the state must pay the costs and the State Auditor is the proper party to audit the fee of cost bill. This also applies where an acquittal has been obtained where the sole punishment in the case would be imprisonment in the state penitentiary.

It is also the opinion of this department that Section 1871 only applies to the auditing of accounts payable by the county and not to accounts payable by the state for the reason that where the costs are payable by the state, the circuit clerk or criminal clerk certifies the cost bill to the State Auditor's office and not to the office of the county clerk.

It is further the opinion of this department that the board and lodging of the jury who are required by the court to be kept together are costs that follow the certain or particular case and are paid according to the authorities

Judge F. T. Jared

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June 22, 1938

above set out.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:RT