

SHERIFFS: Section 11791 R.S. Missouri 1929, construed as to when a person is in custody of sheriff undergoing examination preparatory to his commitment; Sheriff entitled to \$1.25 per day for his services and \$1.25 per day for the board of such persons, provided the number of days shall exceed one.

September 9, 1938

Mr. A.H. Lock
Circuit Clerk
Osage County
Linn, Missouri

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Dear Sir:

This will acknowledge receipt of your request for an opinion from this Department, which request is as follows:

"In preparing criminal cost bills for submission to the County Court of Osage County and to the State Auditors Office, the following proposition arises:

An affidavit is filed before a Justice of the Peace and a State Warrant issued to the Sheriff. The Sheriff goes out and arrests the defendant and brings him to the County Jail and locks him up and then forthwith goes to the Justice of the Peace and informs him that the defendant has been arrested and is in jail. The Justice of the Peace says that he will see the Prosecuting Attorney and arrange for a day for a preliminary hearing. The Prosecuting Attorney is not at hand and when he comes around the Justice of the Peace is not at hand and so in one way and another several days drag by before any action whatever is taken in the case. Then a date is set for the hearing and the Sheriff continues to keep the prisoner in jail until the date of hearing. After the hearing a commitment is issued and the prisoner thereafter held by virtue of the commitment. Prior to the preliminary examination no commitment is issued and the prisoner is held by the sheriff by virtue of the State Warrant pending the preliminary examination.

September 9, 1938

The sheriff claims that he is entitled to the fee of \$1.25 per day for custody of prisoner during the time that he is required to hold the prisoner under the warrant and prior to the time the commitment is issued. We would like to know whether or not this is a proper charge. If the Sheriff is entitled to it we would like to see him have it and at the same time if he is not entitled to it, we do not want to certify an item of cost that is not proper.

No doubt the proper procedure would be for the magistrate to determine at once, when the prisoner is brought in just what day the preliminary examination can be held and thereupon to issue a commitment to the sheriff committing the prisoner to jail until that date to await examination. But that is not done and through no fault of the Sheriff no commitment is issued and the prisoner is retained by the Sheriff under the warrant until the date of the preliminary.

The statute under which the Sheriff claims that he is entitled to \$1.25 per day for custody of the prisoner is Section 11791, R.S. 1929.

The case of State ex rel. vs. Allen, 187 Mo. 560, supports the proposition that the Sheriff should be allowed this fee. See also State ex rel. vs. Dickmann, 170 Mo. 67; State vs. Wofford, 116 Mo. 220; Thomas vs. St. Louis County, 61 Mo. 547. From these cases we are under the impression that the charge is a proper one, but we would like to have the question passed on by your department before certifying the fee bills.

In this case, after the warrant was issued and the defendant arrested no entry was made in the docket of the Justice of the Peace committing the prisoner, nor was any commitment issued. The prisoner was held by virtue of the warrant until the day of the preliminary.

Also, if the Sheriff is entitled to the sum of \$1.25 per day for custody of the prisoner during that period is he also entitled to collect from the County the sum of 75 cents per day for board of the prisoner during the same days."

I.

The portion of Section 11791 R.S. Missouri 1929, which applies to your first question reads as follows:

"The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed, or who may remove a prisoner from one county to another for any cause authorized by law, or who shall have in custody or under his charge any person undergoing an examination preparatory to his commitment more than one day for transporting, safe-keeping and maintaining any such person, shall be allowed by the court, having cognizance of the offense, one dollar and twenty-five cents per day for every day he may have such person under his charge, when the number of days shall exceed one, and five cents

per mile for every mile necessarily traveled in going to and returning from one county to another, and the guard employed, who shall in no event exceed the number allowed the sheriff, marshal or other officer in transporting convicts to the penitentiary, shall be allowed the same compensation as the officer."

Your first question requires an answer to this question, "When is a person, against whom a complaint charging him with a felony has been filed, in the custody or under the charge of the Sheriff undergoing an examination preparatory to his commitment?"

Section 3467 R.S. Missouri 1929, reads as follows:

"Whenever complaint shall be made, in writing and upon oath, to any magistrate hereinbefore mentioned, setting forth that a felony has been committed, and the name of the person accused thereof, it shall be the duty of such magistrate to issue a warrant reciting the accusation, and commanding the officer to whom it shall be directed forthwith to take the accused and bring him before such magistrate, to be dealt with according to law." (Underscoring ours)

Section 3468 R.S. Missouri 1929, reads as follows:

"If the offense charged is a bailable one, the magistrate who issued the warrant shall, at the request of the person arrested, take from him a recognizance in such sum as may seem to be sufficient and proper, with sufficient sureties for his appearance at the next term of the court having jurisdiction of the offense."

Section 3473 R.S. Missouri 1929, reads as follows:

"The magistrate before whom any such person shall be brought shall proceed, as soon as may be, to examine the complainant and witnesses produced in support of the prosecution, on oath, in the presence of the prisoner, in regard to the offense charged, and other matters connected with such charge which such magistrate may deem pertinent."

Section 3474 R.S. Missouri 1929, reads as follows:

"A magistrate may adjourn an examination of a prisoner pending before himself, from time to time as occasion requires, not exceeding ten days at one time, and to the same or any different place in the county, as he deems necessary; and for the purpose of enabling the prisoner to procure the attendance of witnesses, or for other good and sufficient cause shown by said prisoner, said magistrate shall allow such an adjournment on the motion of the prisoner. In the meantime, if the party is charged with an offense not bailable, he shall be committed; otherwise he may be recognized, in a sum and with sureties to the satisfaction of the magistrate, for his appearance for such further examination, and not to depart without leave of said court, and for want of such recognizance he shall be committed."

Section 3476 R.S. Missouri 1929, reads as follows:

"When such person fails to recognize, he may be committed to prison by an order under the hand of the magistrate, stating concisely that he is committed for further examination on a future day, to be named in the order, and on the day appointed he may be brought before the magistrate, by his verbal order to the officer who made the commitment, or by his order in writing to a different person."

We have set forth the foregoing statutes to show what the procedure is in a case such as you outline in your letter of inquiry. It will be seen that the warrant delivered to the sheriff upon the filing of a complaint charging a person with a felony commands the sheriff forthwith to take the accused and bring him before the justice. The sheriff's duties are clear. When the accused is brought before the justice, the justice should proceed with the examination forthwith or should set a date for the examination, and at the same time the justice should, if the offense is bailable, take a recognizance from the accused for his appearance at the time of such examination. If the offense is not bailable or if the accused fails to furnish proper sureties, the justice should commit the accused to jail to await the examination. Of course, if the accused is willing that the examination proceed upon his being arrested and brought before the justice, the justice would proceed with the examination and either discharge the accused or order him held to answer charges in the court having jurisdiction to hear and determine the offense charged. Likewise, in the latter case, if the offense is bailable, the justice should take a recognizance from the accused in accordance with Section 3486 R.S. Missouri 1929. If the offense is not bailable, or if sufficient bail is not offered, the accused should be committed to jail to await trial in the Court having jurisdiction to try the case.

The question therefore is "during what part of the foregoing proceedings is the accused in the custody of and under the charge of the sheriff within the meaning of Section 11791?"

That part of Section 11791 under discussion has been before the Court several times but in each case the facts were different from the other cases, and in all of the cases the facts were different from the facts submitted in your letter.

In the case of Thomas vs. County of St. Louis, 61 Mo. 547, the marshal of St. Louis County was claiming that where he arrested a person under a capias and that person failed to give bail and he placed him in jail he was entitled to One Dollar for committing the person to jail in addition to the fees for arrest. In the course of the opinion the Court said, l. c. 548:

"It is the duty of a sheriff acting under a capias to arrest and safely keep the person therein named, and to have the body of such person when and where he shall be commanded by such writ; and the statute makes it the duty of all jailors to receive from the sheriff or other officers all persons who shall be apprehended by them for offences against this State. When a prisoner is arrested under a capias, he is held thereunder until he has been either bailed, committed or discharged; and until such prisoner is either bailed, committed or discharged, any imprisonment of him in the county jail is at the discretion and for the protection of the officer executing the writ, as well as to secure the body of such prisoner, and is not a committing of such person to jail, within the meaning of the statute; and for the safe-keeping of any person in his custody undergoing an examination preparatory to commitment, he is entitled to a per diem allowance, where the number of days such person is so held exceeds one. (Wagn. Stat. 626, Sec. 14.)"

It is to be noted that in the foregoing case the Court said "When a prisoner is arrested under a *capias*, he is held thereunder until he has been either bailed, committed or discharged; and until such prisoner is either bailed, committed or discharged, any imprisonment of him in the county jail is at the discretion and for the protection of the officer executing the writ, as well as to secure the body." At first blush this might appear to mean that the prisoner is held under the warrant until the preliminary is over, and during all that time he is held in the custody of the sheriff. However, the statutes heretofore quoted require that the sheriff take the prisoner forthwith to the magistrate who issued the warrant and that the magistrate should either hold the examination then or continue same to a future day and either commit the prisoner to jail to await the hearing or take his recognizance for his appearance at such future examination. Therefore, if the proper steps are taken after the arrest of a person charged with a felony he would be bailed, committed or discharged, upon his being brought before the magistrate who issued the warrant.

In view of the procedure just outlined we do not think the language in the foregoing case can be construed to mean that the prisoner is in the custody of the sheriff under the *capias* from the time he is arrested until the preliminary examination is over with in cases where the preliminary is set over to future dates, and especially is this true when that point was not being definitely passed upon by the Court in the foregoing case.

In the case of *State vs. Wofford*, 116 Mo. 220, a person against whom a complaint had been filed was arrested and brought before the justice who had issued the warrant. When he was brought before the justice his examination was set over to a future date and he was committed to jail to await trial. The examination was continued from time to time thereafter and the charge was finally dismissed. The marshal and jailer of Jackson County undertook to charge \$1.25 per day from the time the prisoner

was arrested until the case was dismissed on the theory that the accused was in his custody and under his charge undergoing an examination preparatory to his commitment during all that time. In the course of the opinion the Court said, l. c. 224:

"After this order was made and the cause continued, the prisoner was not undergoing an examination within the meaning of that provision of the statute which allows to sheriffs, marshals and other officers \$1.25 per day, for every day he may have a prisoner under his charge undergoing an examination. If the order of commitment was complied with the prisoner was then within the prison walls, and the statute has no application to such case."

And again, l. c. 226, the Court said:

"It is difficult to perceive how the prisoner could have been undergoing an examination, while confined in jail during the intermission of the continuances of the case. To entitle the relator to the fee claimed he must have had the prisoner under his charge as marshal while undergoing examination, and the mere fact that he was in his custody as jailor does not entitle him to it, for during such time it is impossible that he could have been undergoing an examination which required his presence in court."

In the case of State ex rel. vs. Clark, 170 Mo. 67, the fees in question were again before the court. In that case the Sheriff of St. Louis had arrested a man under a warrant on October 30th, after the Court out of which the warrant had issued had adjourned for the day. On the following

day, October 31st, the Sheriff produced the prisoner before the Court and he was then committed to await trial. The sheriff claimed \$1.25 for each of the two days he held the prisoner before he was committed. The only defense to the claim was that the sheriff had kept the prisoner, during the time he had him in his custody, in a jail furnished by the City of St. Louis, and that police paid by the City guarded the jail. The Court allowed the fees for the two days. In the discussion of the case the Court referred to the case of State vs. Wofford, supra, and said, l. c. 78:

"The relator in that case clearly failed to bring himself within the terms of the statute relied on and, therefore, was properly denied the fees claimed. This case is, therefore, in perfect harmony with Thomas vs. County of St. Louis, supra, and is essentially different from the case at bar, in this, that in this case the officer executed the capias on October 30, 1901, the court had adjourned for the day and the judge had gone, so the prisoner could not be brought before the court on that day. The relator was, therefore, charged with the duty and responsibility of safely keeping the prisoner until the next day, October 31st, when he was produced in court, his examination proceeded with and completed, and he was then by the court committed to jail to await trial, and was afterwards tried and found guilty. Thus the prisoner was in the custody of the relator, as sheriff of the city of St. Louis, on October 30th and 31st, 'while undergoing an examination preparatory to his commitment.' The relator is, therefore, clearly within the provisions of the statute and is entitled to the fees

claimed, two dollars and a half, unless he has lost or been deprived of those statutory fees, by reason of the city paying for the police, and furnishing a calaboose for the police, one part of which is set apart for the sheriff's prisoners, who while in such calaboose are guarded and kept by the police."

It will be noted that in the foregoing case the Court said that the court which issued the warrant had adjourned on the 30th, at the time of the arrest, so that the prisoner could not be brought in court on that day, and that the sheriff was therefore bound to hold him until the next day. We think that this case clearly implies that the sheriff must take the prisoner to the court issuing the warrant just as soon as he can, and that from the time he arrests the prisoner to the time the prisoner is produced before the magistrate, the prisoner is "in his custody and under his charge while undergoing an examination preparatory to his commitment."

In the latter case of State ex rel. vs. Allen, 187 Mo. 560, the Court in passing upon what the holding was in the case of State ex rel. vs. Clark, supra, said, l. c. 563:

"It was held in that case that until the court ordered the prisoner committed to jail to await an examination by the committing magistrate or to await the action of the grand jury, the prisoner was in the sheriff's custody, and therefore, the sheriff's claim for the fees charged fell within the letter of the statute allowing one dollar and twenty-five cents per day to the sheriff for keeping the prisoner 'while undergoing an examination preparatory to his commitment.' (Sec. 3248 R.S. 1899.)"

We believe that the holding as gleaned from all the above cases is as stated in State ex rel. vs. Allen, supra, which in effect is that between the time of an arrest upon a warrant issued by a magistrate upon a complaint charging a felony, and the time the prisoner is produced before such magistrate, such prisoner is in the custody of and under the charge of the officer while undergoing an examination preparatory to his commitment.

The foregoing rule is based upon the assumption, however, that the statutes governing such cases are complied with. In the case you inquire about, the sheriff clearly did not do what the law and the warrant directed him to do. Had he taken the prisoner directly to the justice as he should have done, the prisoner would have been either bailed, committed or discharged forthwith. Up to that time he would have been entitled to \$1.25 per day if more than one day necessarily elapsed. However, we do not think that the sheriff by not following the law can extend the time during which the fee of \$1.25 applies. If such were the case, it would be to the advantage of the sheriff to delay producing the prisoner before the justice. You say in your letter that through no fault of the sheriff the preliminary trial was delayed. However, if the sheriff produces the prisoner before the justice forthwith, upon his arrest, the justice will either hold the examination, admit the prisoner to bail or commit him for further examination. Compensation allowed public officers is for performance of their duties and not for failure to perform such duties.

The fee being considered is evidently provided for the safekeeping of the prisoner between the time of his arrest and the time the justice either disposes of him upon an immediate examination or commits him to jail or recognizes him to appear at a further examination. For instance, if an arrest is made late on Saturday the sheriff cannot produce the prisoner before the justice before the Monday following and during that time he would be charged with the safekeeping of the prisoner for which he would be entitled to \$1.25 per day. It might then occur that on Monday the examination would be started and that would last a day or so, in which case the fee of \$1.25 would be due the sheriff from the time of the arrest up to the time the examination was concluded.

CONCLUSION

It is therefore the opinion of this Department that the sheriff who arrested a person under a warrant issued by the justice of the peace upon a complaint charging such person with a felony should take such prisoner forthwith before the magistrate who issued the warrant to be there dealt with according to law. If the magistrate proceeds at once with the examination then the sheriff is entitled to \$1.25 per day for the safekeeping of the prisoner for the time intervening between the arrest and the time the examination is concluded, provided more than one day intervenes. If the magistrate does not proceed at once with the examination but continues same to a future date, then, of course, the prisoner will either be committed or recognized to await the examination at a future time, in which event the sheriff would be entitled to \$1.25 per day for the safekeeping of the prisoner from the time of the arrest to the time of the order committing him to jail or admitting him to bail, provided more than one day elapsed between said times.

II.

The second part of your question seeks an opinion as to what is the proper allowance for board of a prisoner during the time the sheriff is entitled to the One dollar and twenty-five cents per day as set forth in the first part of this opinion. In other words, what is the proper amount to be allowed for the board of a prisoner in custody of the sheriff while undergoing an examination preparatory to commitment.

Section 11794 R.S. Missouri 1929, reads as follows:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state: Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

The foregoing section is a general statute providing for allowance for board of prisoners. However, that part of Section 11791, supra, which pertains to the particular class of prisoners being considered in this opinion, to-wit, prisoners in custody of an officer while undergoing an examination preparatory to their commitment, provides as follows:

"The sheriff or other officer who shall * * * have in custody or under his charge any person undergoing an examination preparatory to his commitment more than one day for transporting, safe-keeping and maintaining any such person, shall be allowed* * * one dollar and twenty-five cents per day for every day he may have such person under his charge, when the number of days shall exceed one,* * *. One dollar and twenty-five cents per day, mileage same as officer, shall be allowed for board and all other expenses of each prisoner."

The compensation allowed the sheriff for "transporting, safekeeping and maintaining" the accused is One dollar and twenty-five cents for every day he may have such person under his charge, when the number of days exceeds one. This compensation is for the sheriff for his services. On a casual reading the word "maintaining" might be taken to mean "provide support for", and therefore the fee of One dollar and twenty-five cents mentioned would thereby include pay for the sheriff's services and the board of the prisoner. However, the word "maintain" has several meanings. For instance, Webster's New International Dictionary gives one definition of "maintain" as follows:

"To keep possession of; to hold and defend; not to surrender or relinquish."

The meaning of the word "maintain" depends upon the context where it is used. After providing for the compensation of the sheriff in such cases, Section 11791, supra, provides:

"One dollar and twenty-five cents per day, * * * shall be allowed for board and all other expenses of each prisoner."

Here then is a special provision for board of the particular prisoners undergoing examination preparatory to commitment. It is separate from the compensation allowed the sheriff for his services in safekeeping the prisoners. The Supreme Court has held that the compensation of \$1.25 provided for the sheriff in such cases is separate from the allowance for mileage and board of the prisoners. In the case of State ex rel. vs. Clark, 170 Mo. 1. c. 76, 77, the Court said:

"The rule there announced that an officer is entitled to the statutory allowance per diem for the safe-keeping of any person in his custody while undergoing an examination preparatory to commitment, where the number of days such person is so held exceeds one, has ever since been regarded as the correct interpretation of the statute. This is wholly separate from the statutory allowance for the mileage and sum allowed for the board of the prisoner. It is the compensation allowed the sheriff for the care, expense and risk incident to the safe-keeping of the prisoner."

It will be seen therefore that in the case of the particular prisoners under discussion there is a special provision for their board and other expense of \$1.25 per day. Section 11791 is a special statute insofar as the board of these particular prisoners is concerned, and therefore is to be construed as prevailing over the general statute governing board of prisoners, under the well known rule of construction that where special and general statutes relate to the same subject matter, the special statute will prevail as far as the particular subject matter comes within its provisions. (State ex rel. vs. Smith, 67 S.W. (2) 50).

CONCLUSION

It is therefore the opinion of this office that a sheriff who has in his custody a person undergoing an examination preparatory to his commitment more than one day, is entitled to One dollar and twenty-five cents per day for the board and other expenses of such person, in addition to the fee of One dollar and twenty-five cents allowed the sheriff for the safe-keeping of such person.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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