

CRIMINAL COSTS:

The insolvency act must be strictly followed in order to obtain a release on a punishment of a fine and costs.

January 25, 1939



Mr. A. L. Gates
Prosecuting Attorney
Moniteau County
California, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"As prosecuting attorney of Moniteau County, Missouri I would like to have an official written opinion on the following subject matter.

"Section 3859 R. S. 1929 Provides:
'Any person detained in prison for the nonpayment of any fine or costs on account of any criminal proceeding may be ordered to be discharged from such imprisonment, by the court or by the judge of the court having criminal jurisdiction for the county in which he may be, or by the clerk of said court in vacation, after being imprisoned one day for every two dollars of such fine and costs, or after having endured twenty days' actual imprisonment for the nonpayment of costs, if he be unable to pay the same.

"An individual is brought into justice court and he is fined, upon a plea of guilty to the commission of a misdemeanor, and the defendant is unable

to pay said fine and costs whereupon the justice commits him to jail. Is it mandatory that the justice give the defendant one day for every two dollars of said fine and costs? Or is it mandatory that the defendant be imprisoned twenty days for costs regardless of the amount of costs? Should this section be construed to mean that defendant be imprisoned twenty days for costs and fine regardless how small the fine and costs be?

"If a defendant is unable to pay fine and costs both but is able to pay either the fine or the costs which should he be permitted to pay first, the fine or the costs. If the fine is paid should he be required to endure twenty days actual imprisonment for the costs? If he pays the costs should he be permitted to serve one day for every two dollars of the fine?"

In the latest decision construing the payment of a fine and costs for serving of a jail sentence against a defendant who has been assessed a fine, costs or jail imprisonment, the Supreme Court en banc in the case of *ex Parte Secrest*, 32 S. W. (2d) 1087, said:

"The statute authorizing petitioner's commitment is section 4070, R. S. 1919, as follows: 'Whenever any defendant shall, on a conviction, be sentenced to imprisonment in a county jail, or to pay a fine, he shall be imprisoned until the sentence is fully complied with and all costs paid, unless he be sooner discharged in the manner hereinafter provided.'

"This statute, within its scope, applies alike to misdemeanors and felonies. It

is a part and parcel of every sentence to a fine (Ex parte Parker, 106 Mo. 551, 555, 17 S. W. 658), and the judgment was in substantial compliance therewith. The manner in which defendant could 'be sooner discharged' is thus set forth in the sections immediately following:

"Section 4071: 'When any person is held in custody or imprisoned for a fine imposed for a criminal offense, as specified in the last section, the court in which the cause was tried, or the judge thereof in vacation, on the petition of the prisoner for that purpose, shall sentence him to imprisonment for a limited time, in lieu of the fine; and at the expiration of such time, the prisoner shall be discharged on the payment of costs, or obtaining his discharge in the manner in the next sections provided.'

"Section 4072: 'Whenever any person shall be detained for the costs of a criminal prosecution, he shall, after having endured twenty days' imprisonment in the county jail for the nonpayment of such costs, be permitted to take the benefit of the laws for the relief of insolvent persons confined on criminal process, on making application for that purpose, and conforming to the provisions of such law.'

"Section 4071, supra, provides a method, and we are advised of no other, by which a defendant so committed may discharge the fine apart from the costs assessed against him by the same judgment. He may petition the court in which the cause was tried, or the judge thereof in vacation, to 'sentence him to imprisonment for a

limited time, in lieu of the fine.' When such prison sentence is served, he is entitled to be discharged on payment of costs or obtaining his discharge under section 4072 and the act for the relief of insolvents confined on criminal process. To authorize a discharge, there must be a strict compliance with the statutes prescribing the methods by which it may be obtained. 15 C. J. Section 861, p. 344; Ex parte Parker, 106 Mo. 551, 17 S. W. 658; In re Curley, 34 Iowa, 184; In re Dobson, 37 Neb. 449, 55 N. W. 1071. Having followed a way of his own choosing not authorized by statute, petitioner is not entitled to be discharged.

"It is ordered that petitioner be remanded."

As above set out

Section 4070 R. S. Mo. 1919 is now
Section 3726 R. S. Mo. 1929;
Section 4071 R. S. Mo. 1919 is now
Section 3727 R. S. Mo. 1929;
Section 4072 R. S. Mo. 1919 is now
Section 3728 R. S. Mo. 1929.

Section 3727, R. S. Mo. 1929, set out as Section 4071, R. S. Mo. 1919, in the case of ex Parte Secretst, supra, is governed by Section 3859, R. S. Mo. 1929, which reads as follows:

"Any person detained in prison for the nonpayment of any fine or costs on account of any criminal proceeding may be ordered to be discharged from such imprisonment, by the court or by the judge of the court having criminal jurisdiction for the county in which he may be, or by the clerk of said court in vacation, after being im-

prisoned one day for every two dollars of such fine and costs, or after having endured twenty days' actual imprisonment for the nonpayment of costs if he be unable to pay the same."

This section sets out the manner of complying with the specific time and amount of service on the fine or punishment as provided by Section 3727, R. S. Mo. 1929.

As stated in *ex Parte Secrest, supra*, the statute, in regard to relief of insolvent defendants, must be strictly complied with. The article on insolvent defendants is Article 20, Chapter 29, R. S. Mo. 1929, and is too lengthy to set out verbatim in this opinion.

Under the holding of *ex Parte Secrest, supra*, the court does not see fit to separate the fine or jail sentence from the costs. In other words, the court held that the prisoner should petition in accordance with the insolvency act that he be allowed to serve the judgment of sentence and costs in accordance with Section 3859, R. S. Mo. 1929, and that the costs cannot be separated from the fine or imprisonment if the defendant should take advantage of the insolvency act.

CONCLUSION

In view of the above authorities it is the opinion of this department that if an individual is brought into the justice court and he is fined upon a plea of guilty to the commission of a misdemeanor and the defendant is unable to pay said fine and costs, the justice upon the application of the defendant in writing in accordance with Article 20, which is the insolvency act, must commit the defendant under Section 3727, R. S. Mo. 1929, which provides that the judge shall sentence him to imprisonment for a limited time. In sentencing the defendant to a limited time as set out in Section 3727, R. S. Mo. 1929, the court, in estimating the time, must take into consideration Section 3859, R. S. Mo. 1929, which provides for

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imprisonment for one day for every two dollars (\$2.00) of such fine and costs, or after having endured twenty days' actual imprisonment for the nonpayment of costs if he be able to pay the same.

It is further the opinion of this department that if the defendant has served his time at the rate of one day for every two dollars (\$2.00), then the defendant may be relieved of the costs by twenty days' actual imprisonment and the amount of the costs does not determine this period of actual imprisonment.

It is further the opinion of this department that the defendant, under the ruling of *ex Parte Secret*, supra, cannot follow a way of his own choosing not authorized by statute for his release and if he chooses to file the petition under the insolvency act, he should be required to endure twenty days' actual imprisonment for the costs which is provided in the insolvency act.

It is further the opinion of this department that the defendant cannot pay the costs and be permitted to serve one day for every two dollars (\$2.00) of the fine but the statute, on the insolvency act, must be strictly followed which provides the petition to be filed and the court to sentence the defendant and the fine and costs be paid in accordance with the insolvency act.

Respectfully submitted

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APPROVED:

COVELL R. HEWITT
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