

COUNTY COURT:) Court may pay board and lodging of jury
) kept together in misdemeanor case.
JURORS:)

February 21, 1939



Honorable Andrew Howard
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Sir:

This will acknowledge receipt of your letter of February 18, 1939, which is as follows:

"The sheriff of this county has put in a bill to the County Court for the board of jurors while deliberating on misdemeanor cases. The bill covers a number of misdemeanor cases which have been tried in this county during the past three years.

"Section 3826, R. S. Mo., 1929, makes provision for compensation to the sheriff for boarding jurors while they must be kept together on felony cases, but I do not find any statute making such provision in misdemeanor cases.

"Can the County Court properly allow the sheriff's above mentioned bill?"

Section 3682, R. S. Mo. 1929, provides that,

"With the consent of the prosecuting attorney and the defendant, the court may permit the jury to separate at any adjournment or recess of the court during the trial in all cases of felony, except in capital cases; and in misdemeanors the court may permit such separation of the jury of its own motion, * * *"

This section, as we read it, makes it mandatory to keep the jury together in a capital case, authorizes separation of the jury in other felony cases if done with the consent of the prosecuting attorney and the defendant, and permits the court to use his own discretion on whether the jury shall be kept together or permitted to separate in misdemeanor cases.

Section 3826, R. S. Mo., 1929, provides in part as follows:

"* * *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."

Thus it appears that while the court might, if it so desired, keep the jury in a misdemeanor case together, yet the above section makes no provision for the board and lodging of said jury. Our research has not disclosed any section which does attempt to provide board and lodging costs for the jury in misdemeanor cases, and we feel reasonably safe in asserting that there is no such statute.

However, such a situation as this is not without precedent. In the case of *State ex rel. v. Smith*, 5 Mo. App. 427, the proposition before the court was very similar to the instant question. In that case the Marshal of the Criminal Court in the City of St. Louis had presented a bill for board

of jurors kept together by the court. This bill had been incurred on order of the court directing the marshal to receive bids for that purpose. The City Auditor refused to audit said account and the suit was one to compel him to do so.

At that time there was a statute applicable, which authorized the payment of the board of jurors held together in murder trials. While the opinion is not clear on this point, we infer that the bill in question was not for the board of jurors in murder trials because, if otherwise, there could have been no question for the court to pass upon.

We quote from various parts of the opinion because of comments running throughout concerning the availability of mandamus. The court said at l. c. 429, 431, 432 and 433:

"It is the duty of the judge of the Criminal Court in many cases to direct that the jury shall be kept together until discharged by him at the close of the case. McLean v. The State, 8 Mo. 153; 33 Mo. 483. Whilst kept together, they must be fed, in common with the officer in whose custody they are. Whilst the court has the right to direct that the jurors shall not choose, each for himself, where he shall eat, it has no power whatever to compel each juror to pay for his own meals. The feeding of the jurors is, therefore, a necessary expense, without incurring which the business of the court could not be carried on, and the administration of criminal justice must come to an end.

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"To direct that a jury shall not be fed at the public expense, is to direct that it shall not be kept together during a protracted trial. This is a matter in the control of the judiciary department of the government; and will remain so, unless the

people, in their sovereign capacity, shall change the organic law of the State in that particular.

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"In *Watson v. Moniteau County*, 53 Mo. 133, the question came up as to which of two counties was liable for the board of a jury in a murder case. * * * The Supreme Court says that, though there is no express statutory provision for such an expense, there is no question of the power of the court to make an order keeping the jury together, and directing that they be provided with board and lodging, and cites *Commissioners v. Hall*, 7 Watts. 290, where Chief Justice Gibson held a county liable for the expense of boarding and lodging a jury, saying that such expenditures are, like light and fuel, incidental to the holding of a court, and raise an implied obligation on the part of the county to pay.

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"The Criminal Court could not empanel a jury in a capital cause if it had no means of feeding them during the progress of the trial; because it would be error to permit the jurors to separate, and it might be the grossest cruelty to keep them together."

This case goes on the theory that the court has inherent power to incur any expense necessary for it to exercise its functions as a court and that even though no statute expressly authorizes the payment of such expense the county is bound to do so.

The situation on the instant question is, that where the court deems it necessary to hold a jury in a misdemeanor case together, as it is authorized to do, that, even though there is no statute providing for the payment of the board and

lodging of said jury, the county is bound to pay said bill because refusal to do so would impair the functions of the court.

Conclusion.

Therefore, it is our opinion that the county court should audit and allow any account presented by the sheriff for the board and lodging of jurors kept together on misdemeanor cases under the orders of the circuit court.

Respectfully submitted

LAWRENCE L. BRADLEY
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APPROVED:

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