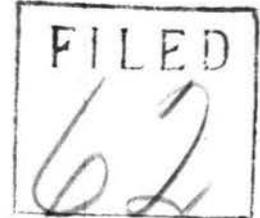


PROSECUTING ATTORNEY FEES: When dismissal is at cost of defendant such fee is not taxable as a part of the cost.

March 31, 1939.

Honorable Stephen J. Millet
Prosecuting Attorney
Caldwell County
Kingston, Missouri



Dear Mr. Millet:

We desire to acknowledge your request for an opinion on March 27, 1939, which is as follows:

"Would you be kind enough to give me an opinion of your office as to whether or not the office of Prosecuting Attorney is entitled to charge and collect the sum of \$5.00 in criminal cases where his office has filed charges or a complaint and later wishes to dismiss the same at the cost of the defendant?"

"The section 11783 of the R. S. of Missouri 1929, says in part, ---
"for his services in all actions which it is or shall be made his duty by law to prosecute or defend, five dollars".

"We had lots of cases where information is filed for uttering and passing a worthless check where the payee of the check would rather have the check paid and the costs paid by the drawer of the check with the suit dismissed than have the case stand for trial. I want to charge and collect the sum of \$5.00 in such cases as fees due

this office from the defendant. Is that right? I understand that the state can only be charged for convictions.

"Your opinion of this matter will be appreciated and I suggest that a copy be sent to the State Auditor's office for their reference when checking our offices."

Section 11783 R. S. Mo. 1929 is, in part, as follows:

"Prosecuting Attorneys shall be allowed fees as follows, * * * for the conviction of every defendant in the circuit court, upon indictment or information, or before a justice of the peace, upon information, when the punishment assessed by the court or jury or justice shall be fine or imprisonment in the county jail, or by both such fine and imprisonment, five dollars; * * * "

The question of a fee of a circuit attorney to be taxed as cost, in a case where it was dismissed at the cost of the defendant, is construed in State vs. Foss, 52 Mo. 416, 417, as follows:

" * * * The judgment was founded upon an agreement, by which a conviction, fine and imprisonment were waived if the defendant would simply pay the costs. It is true, costs naturally follow and are incident to a judgment of conviction, but here we see there was no conviction within the meaning of the law. The criminal statutes fully designate what is intended by a conviction. It is clearly where, by a trial or confession the defendant

is assessed to pay a fine or be imprisoned, or is punished by both these modes. But there is no conviction for costs only, to entitle the Circuit Attorney to his fee. A case similar to this was recently passed upon at the February Term, and decided in accordance with these views. (See State, ex rel., Wood vs. Ray County Court, ante p. 27.)

"The reasoning in the case of the State ex rel., Hopkins vs. Buchanan County Court, (41 Mo., 254) is not very satisfactory as regards a judgment of dismissal with costs by agreement, being equivalent to a conviction.

"For the purposes of that case it may be conceded to be correct, as the agreement of the defendant fixed his liability for the costs, but for the costs only that were taxed and authorized by law. But in the present case, the fee of five dollars to the Circuit Attorney was not authorized, as that officer had not prosecuted the indictment to a conviction, which was essentially necessary before an allowance could be made to him.

"The case of the State vs. Beard, (31 Mo., 34) decides the very point here presented for review, and holds that where the prosecution of an indictment is dismissed at defendant's costs, a fee for the Circuit Attorney cannot be properly taxed against the defendant."

The same question was passed on by the Supreme Court in State vs. Clifford, 124 Mo. 492, 497, in the

following language:

"This court in at least four cases has ruled that where a prosecution of an indictment is dismissed at the defendant's costs a fee for the circuit attorney can not be properly taxed either against a defendant, the state or the county. State v. Beard, 31 Mo. 34; State ex rel. v. Thompson, 39 Mo. 427; State v. Foss, 52 Mo. 416; State ex rel. v. Ray County Court, 52 Mo. 27. And the principle is equally applicable here. In the one case the fee is allowed only for a conviction. * * * "

CONCLUSION

Therefore, it is the conclusion of this department that when a prosecution of an indictment or information is dismissed at the defendant's cost, a fee for the circuit attorney can not be properly taxed against either the defendant, state or county.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

SVM:LB