

CRIMINAL COSTS: Upon a case being "continued generally" on either a capital case, penitentiary case or county jail sentence, or fine, the cost is taxed but not certified to either the State Auditor or Clerk of the County Court.

November 16, 1939

FILED: #83

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion, dated October 20, 1939, which reads as follows:

"We are in receipt of a letter from Mr. G. H. Summers, Circuit Clerk of Vernon County, Missouri requesting information in regard to a felony case which had been continued generally. Mr. Summers desires to know whether the State or County is liable for the payment of costs.

"We are enclosing herewith a copy of the letter from Mr. Summers. You will note that he mentions that the case was State vs. Vern Foley and was a felony case. He does not state, however, whether it was a capital case, a case punishable solely by imprisonment in the penitentiary, or whether it was a mixed felony, that is, one punishable either by penitentiary sentence or by jail sentence or fine. He recites, however, that the defendant, while awaiting trial in Vernon County, broke jail, and I presume that the case in question was on the charge of breaking jail before conviction, which charge would be punishable under Section 3916 R. S. Mo. 1929.

"Your office has heretofore, under date of January 22, 1934, rendered an opinion in regard to costs when a criminal case was continued generally. However, I presume that the opinion rendered at that time does not apply to cases where the punishment grades from penitentiary sentence down to jail sentence or fine.

"We would like to have your official opinion in regard to the payment of costs where a general continuance is had in criminal cases. We would appreciate it if you will advise us fully in regard to the payment of all costs, both state and defendant's costs, in capital cases or cases where penitentiary sentence is the sole punishment, and also in mixed felony cases where the punishment grades from penitentiary sentence down to jail sentence or fine."

In answer to the above request, will say that this office, on January 22, 1934, rendered you an opinion in reference to the liability of state for defendant's cost where case is "continued generally." You have mentioned this opinion in your request, and after reading the same I find that the opinion does not cover your present request. In that opinion, the point involved seemed to be whether or not the state, meaning the plaintiff, was liable for costs on a case "continued generally." This opinion involved mostly the question of whether the plaintiff or defendant was liable, when the continuance was made on either the application of the plaintiff or on the application of the defendant. I am enclosing a copy of this opinion.

The section to be construed is Section 3841 R. S. Missouri, 1929, and reads as follows:

"The clerk of the court in which (any criminal cause shall have been determined) or (continued generally) shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case (and if the state or county shall be liable under the provisions of this article for such costs or any part thereof,) he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor.
(Underscoring and parentheses ours)

This section specifically states "the clerk of the court in which any criminal cause shall have been determined * *." This phrase is a disjunctive of the following phrase, "or continued generally shall, * *." In other words, the clerk must tax all costs which have accrued in the case first where the cause shall have been determined, or second, continued generally. In other words, under either circum-

stances, that is, determined or continued generally, the clerk must tax the costs which have accrued in the case. This section further provides "and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete bill specifying each item of services and the fee therefor." In other words, the last quoted phrase only applies to the first quoted phrase, that is "shall have been determined", while the second quoted phrase, that is "contained generally" the clerk must tax the cost. When reading the same as to the above set out disjunctives, this section is not ambiguous, and in plain ordinary language it means that in cases where the cause shall have been determined the clerk shall not only tax the costs but should certify as to whether or not the state or county shall be liable under the provisions of this article for such costs or any part thereof.

In construing section 3841, supra, it must have been the intention of the legislature that when the cause is "continued generally" all that is necessary for the clerk to do is to tax the costs as costs against that particular case. The state can only be liable for costs specifically set out by the statute, and under section 3841, supra, it would be impossible for the clerk, the prosecuting attorney, or the circuit judge to state that the state would be liable for costs in which the cause has not been determined.

Under Section 3826 R. S. Missouri, 1929, it is provided that the state shall pay costs 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, where the defendant is unable to pay them. But, where a case is "continued generally" it cannot be pointed out by any statute that the defendant has been convicted and sent to the penitentiary for the reason that the case has not been finally determined.

Also, under Section 3827 R. S. Missouri, 1929, the statute specifically says that when the defendant is sentenced to imprisonment in the county jail, or to pay a fine 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. When a case is "continued generally" and not determined, the clerk, prosecuting attorney, or the trial judge cannot say that the county shall pay the costs for the reason that the

defendant when placed upon trial at a later date may be sentenced to the county jail, or may be sentenced to the state penitentiary on a graded felony.

Also, Section 3828 R. S. Missouri, 1929, provides that upon an acquittal on any case, either capital cases or those in which imprisonment in the penitentiary is the sole punishment for the offense, the cost shall be paid by the state and in all other trials on indictment or information, if the defendant is acquitted, the costs shall be paid by the county. Under this section, neither the clerk, the prosecuting attorney nor the circuit judge could say that the defendant had been acquitted on either an offense punishable solely in the penitentiary or that he had been acquitted on a graded felony.

The state can only be liable for costs specifically set out by the statute. It was so held in the case of State v. Wilder, 197 Mo. 27, l.c. 32, where the court said:

"The sole question arising from the facts alleged by the relator and admitted by the State Auditor, is whether the State is liable for the costs claimed by the relator. For many years this court, in obedience to strict statutory provisions, has sedulously maintained that no costs can be taxed except such as the law in terms allows. (Shed v. Railroad, 67 Mo. 687; Crouch v. Plummer, 17 Mo. 420; State ex rel. v. Hill, 72 Mo. 512; Williams v. Chariton County, 85 Mo. 646.)"

Also, in the case of State of Missouri, ex rel., v. Carpenter, et al, 51 Mo. 555, l.c. 556, the court said:

"The statute in relation to criminal costs, provides, that they shall be paid by the State in all capital cases in which the defendant shall be convicted, and shall be unable to pay them; and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and shall be unable to pay them. And the county in which the indictment is found, shall pay the costs in all cases where the defendant is sentenced to imprisonment in the county jail, and to pay a fine, or either of these modes of punishment, and is unable to pay them. (1 W. S., pp. 348-9, sections 1,2.)"

"Before the State can be made liable to pay costs in a criminal prosecution, it is necessary that the defendant should be convicted of a capital offense,

or that he should be sentenced to imprisonment in the penitentiary. Neither of these occurrences took place in this case. It is true the jury brought in a verdict in favor of punishing him by imprisonment in the penitentiary, but the court passed no sentence thereon; on the contrary, it set the same aside. There was then nothing final, either as to conviction or sentence.

"The operation and effect was the same as if there had been a mis-trial, and no liabilities or rights were determined thereby.

"But when the case was ultimately and finally disposed of, the result was a conviction and sentence to pay a fine, and be imprisoned in the county jail. This was the sentence that established the character of the offense, and made the costs a charge against the county.

"Although the indictment was for a capital crime, and under it the prisoner might also have been convicted of a felony, punishable by imprisonment in the penitentiary, yet it is also true, that it was competent to find him guilty of a less degree or grade of crime, by which the punishment would be reduced to imprisonment in the county jail, or by such imprisonment coupled with a fine. It is the conviction and sentence in such case which establishes the grade of the offense, for the purpose of fixing the liability for costs, and not the allegations contained in the indictment. This is the only question we are called upon to review.
* * *

Under the above case the court specifically said before the state can be made liable to pay costs in a criminal prosecution, it is necessary that the defendant should be sentenced to imprisonment in the penitentiary. This applies on conviction and under Section 3841, supra, when a cause is continued generally, especially so on a graded felony, the clerk, prosecuting attorney or the circuit judge, cannot certify that there has been a conviction on a capital case or that the defendant would be sentenced to imprisonment in the penitentiary when the cause has not finally been determined. The same holding could be had on an acquittal under Section 3828, supra.

CONCLUSION

In view of the foregoing authorities it is the opinion of this department that under Section 3841 R. S. Missouri, 1929, that when a cause is "continued generally" all that the clerk may do is tax all costs which have accrued in the case, and that the part of Section 3841, supra, which reads "and if the state or county shall be liable under the provisions of this article for such costs or any part thereof * * *" does not apply to causes "continued generally", but only to the disjunctive in the section which says "any criminal cause shall have been determined."

Therefore, it is the further opinion of this department that when a cause is "continued generally" whether the cause be a capital case or a case where a penitentiary sentence is the sole punishment, or in graded felonies the costs are only to be taxed against the cause by the clerk and not to be certified by the trial court or prosecuting attorney to the county or to the state.

Respectfully submitted,

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Assistant Attorney General

WJB:RW
1 Encl.

APPROVED:

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(Acting) Attorney General