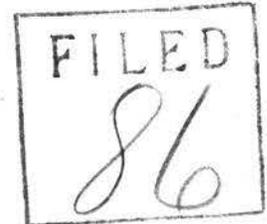


CRIMINAL COSTS:

A dismissal for nolle prosequi is the same as an acquittal in regard to payment of costs.

January 26, 1939



Mr. Elmer A. Strom  
Prosecuting Attorney  
Cape Girardeau County  
Jackson, Missouri

Dear Sir:

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

"In approving fee bills covering costs of criminal cases the matter has arisen relative to the construction of the Statutes involving the payment of costs by the County in cases where enforcement officers, such as constables, sheriff, highway patrolmen, have filed complaints which later resulted in the dismissal and nolle prosequi of the case and wherein criminal costs have been made.

"The question has arisen as to whether the State, in felony cases where the punishment is solely by imprisonment in the penitentiary, and the County, where the punishment is other than imprisonment in the penitentiary, are liable to pay the costs. The matters in which we make inquiry involve the violation of public laws such as traffic violations and other general violations rather than violations which we ordinarily consider as being personal to the party injured.

"The above inquiry does not include those cases which involve an acquittal but merely where the facts later warranted an outright dismissal."

Section 3826, R. S. Mo. 1929, reads as follows:

"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, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. 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."

Section 3827, R. S. Mo. 1929, reads as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, 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."

Section 3828, R. S. Mo. 1929, reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary

is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

It will be noticed that under Section 3838, supra, the statute sets out "acquitted". In the only case construing the word "acquitted", the Kansas City Court of Appeals in the case of The State ex rel. Tudor v. The Platte County Court, 40 Mo. App., l.c. 506, said:

"The controversy is whether the state or county is liable for relator's costs and the case depends upon a construction of the criminal costs statute; and in passing on the question we shall consider the case as though the defendant had been acquitted. The nolle prosequi amounted to an acquittal in the sense of the statute."

Under the ruling in this case nolle prosequi means acquitted as far as the costs are concerned. In the case of State v. Lonon, 56 S. W. (2d) 378, 381, par. 3, the court said:

"Considering the inherent power of a court over its judgments and orders, during the term at which such judgments and orders were entered, and the fact that a nolle or a dismissal of a criminal charge is not a bar to a subsequent prosecution, we announce the following rule of law on the point before us as consistent with well-established principles of law and not detrimental to defendant's rights. An order of dismissal or a nolle prosequi in a criminal case may be set aside

during the term at which the order is made; an alias capias ordered issued and defendant tried on the original information or indictment. There is nothing in this record tending to show that defendant's rights were in any way prejudiced by the order setting aside the dismissal. The point is, therefore, ruled against the defendant."

Under this ruling the court held that a dismissal and nolle prosequi had the same effect as to trial of defendant under original indictment and information. The same could be said as to dismissal, acquittal or nolle prosequi as to the payment of costs under Section 3828, supra.

For your information I am enclosing a copy of an opinion rendered to Honorable T. J. Harper, Prosecuting Attorney of Stone County, on January 12, 1934, which held that neither the state nor county is liable for costs of preliminary hearing when defendant is discharged.

I am also enclosing an opinion rendered to the Honorable Forrest Smith, State Auditor, on January 22, 1934, which held that where a case is "continued generally" without any statement as to whether or not it was continued upon the application and costs of the state, that the state would not be liable for the costs incurred by the defendant at the term in which the case was "continued generally", but that the court would have a right under Section 3653, R. S. Mo. 1929, to adjudge the costs against the state if the order "continued generally" was made upon the application of the state. In other words, the opinion held that the order "continued generally" should be construed the same as an acquittal and the costs, if assessable against the state, should be paid by the state.

#### CONCLUSION

In view of the above authorities it is the opinion

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of this department that in felony cases where the punishment is solely by imprisonment in the penitentiary and which cases are dismissed in the circuit court, the state is liable for the costs, but where the punishment is other than imprisonment in the penitentiary and the case is dismissed in the circuit court, the county must pay the costs. This, of course, does not apply in personal prosecutions where the party injured is attempting to recover a fine, penalty or forfeiture as set out in Section 3829, R. S. Mo. 1929.

It is further the opinion of this department that where the defendant is acquitted by a jury or dismissed or entry of nolle prosequi made by the prosecutor, it should be considered the same as an acquittal as set out in Section 3828, supra.

Respectfully submitted

W. J. BURKE  
Assistant Attorney General

APPROVED:

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COVELL R. HEWITT  
(Acting) Attorney General

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