

CRIMINAL COSTS: In conviction for manslaughter under murder indictment the county is liable for the costs and not the state.

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February 21, 1940

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Hon. Paul J. Dillard  
Prosecuting Attorney  
Laclede County  
Lebanon, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated February 19th, 1940, which reads as follows:

"The above named was charged in Laclede County, Missouri, with Murder in the First Degree and he entered his plea of not guilty to that charge.

"Matthews was first tried in Laclede County and the result was a hung jury. The second time he was tried was in Phelps County and the jury found him guilty and assessed his punishment as Five Years in the State Penitentiary. This was appealed and reversed on an instruction from the Court. The above named, in the third trial, was again found guilty, but of manslaughter and his punishment was assessed at \$100.00 fine and three months in jail.

"This cost bill was certified to the state auditor's office and that office refused to pay under the decision of State ex rel v. Carpenter, 51 Mo. 555.

"It is my contention that the Auditor's Office is wrong and that the costs should be paid by the state under and by authority of State V. Hackmann, 257 SW 457; wherein the Court held that who should pay the costs was determined by the indictment and the plea to that indictment."

Section 3826 R. S. Missouri, 1929, partially 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. \* \* \* \*"

Under the above section the state is only liable where the defendant has been convicted in a capital case or where the defendant shall be sentenced to imprisonment to the penitentiary, except in cases where the person convicted is under the age of eighteen years. The last and final case construing the above section was the case of State ex rel v. Carpenter, 51 Mo. 555, the court, in that case said:

"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. \* \* \* "

Although the above case was passed upon in the February Term of 1873 it is the last case in point and has not been overruled. This case specifically holds that the sentence establishes the grade of the offense for the purpose of fixing the liability for costs and specifically holds that in such a case which is similar to your case the county and not the state must pay the cost.

In citing the case of State ex rel v. Hackmann, 302 Mo. 273, 257 SW 457 section 3826, supra, is not construed, but said case construes section 3828 R. S. Missouri, 1929, which 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."

The holding in State ex rel v. Hackmann, supra, was to the effect that although the court had given instructions on manslaughter, nevertheless the defendant was subject to a conviction of murder in the first degree, which is a capital offense. The court in holding that the state was liable on an acquittal wherein the instructions contained an instruction on manslaughter, yet the facts were such that the question of manslaughter was not pertinent to the case and the defendant was thereby acquitted of a capital case and not of manslaughter.

Section 3827 R. S. Missouri, 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."

The above section must be referred to as to the payment of costs when the facts are not covered by section 3826, supra. Under section 3827 it is mandatory that the county shall pay the costs when the defendant is sentenced to imprisonment in the county jail or to pay a fine under any indictment. Of course neither the state nor the county is liable for the costs where the defendant is able to pay the costs.

Hon. Paul J. Dillard

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CONCLUSION

In view of the above authorities, it is the opinion of this department that where a defendant is found guilty under indictment charging murder in the first degree, and is sentenced on an instruction of manslaughter to three months in jail and a One Hundred Dollar fine, the cost in such a case must be paid by the county and not by the state.

Respectfully submitted,

W. J. BURKE  
Assistant Attorney General

APPROVED:

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TYRE W. BURTON  
(Acting) Attorney General

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