

CRIMINAL LAW:
MOTOR VEHICLES:

Prosecution for theft of tires *of the* value of more than Thirty Dollars *must* be brought under the grand larceny section and not under the tampering section and upon acquittal the state must pay the costs.

April 25, 1941



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion from this department under date of April 2, 1941, which reads as follows:

"We are enclosing herewith a letter from Mr. Jas. L. Paul, Prosecuting Attorney of McDonald County, in regard to liability for costs in case of State vs. Carl Mayfield No. 2482. We are also sending you the cost bill and information filed by the Prosecuting Attorney in this case.

"The cost bill in question was returned by us to the Circuit Clerk with the notation that the State was not liable for costs, reciting Sections 4475, 8404 and 4223 R. S. Mo. 1939 as authority.

"The property alleged by the information to have been bought and received by the defendant and to have been previously stolen, was five automobile tires. This department was relying on the assumption that the penalty for stealing property of this nature was not punishable solely by imprisonment in the penitentiary but could also be punished by jail sentence or fine, basing this on the provisions of Section 8404 R. S. Mo. 1939 and your opinion dated June 3, 1940, in regard to property of this nature. Also, (since the defendant was acquitted) we held that the costs were payable by the county under the provisions of Section 4223 R. S. Mo. 1939.

"You will note the exceptions taken by Mr. Paul. Please advise us in regard to this matter."

Section 4456, R. S. Missouri 1939 reads as follows:

"Every person who shall be convicted of feloniously stealing, taking and carrying away any money, goods, rights in action, or other personal property, or valuable thing whatsoever of the value of thirty dollars or more, or any horse, mare, gelding, colt, filly, ass, mule, sheep, goat, hog or neat cattle, belonging to another, shall be deemed guilty of grand larceny; and dogs shall for all purposes of this chapter be considered personal property."

Section 4457, R. S. Missouri 1939 reads as follows:

"Persons convicted of grand larceny shall be punished in the following cases as follows: First, for stealing an automobile or other motor vehicle, by imprisonment in the penitentiary not exceeding ten years; second, for stealing a horse, mare, gelding, colt, filly, mule or ass, by imprisonment in the penitentiary not exceeding seven years; third, in all other cases of grand larceny, by like imprisonment in the penitentiary not exceeding five years."

Section 4475, R. S. Missouri 1939 reads as follows:

"Every person who shall buy, or in any way receive, any goods, money, right in action, personal property, or any valuable security or effects whatsoever, that shall have been embezzled, converted, taken or secreted contrary to the provisions of the last four sections, or that

shall have been stolen from another, knowing the same to have been so embezzled, taken or secreted, or stolen, shall, upon conviction, be punished in the same manner and to the same extent as for the stealing of money, property or other thing so bought or received."

Section 8404, par. (a), R. S. Missouri 1939, reads as follows:

"Any person who shall be convicted of feloniously stealing, taking or carrying away any motor vehicle, or any part, tire or equipment of a motor vehicle of a value of \$30.00 or more, or any person who shall be convicted of attempting to feloniously steal, take or carry away any such motor vehicle, part, tire or equipment, shall be guilty of a felony and shall be punished by imprisonment in the penitentiary for a term not exceeding twenty-five years or by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars (\$1,000) or by both such fine and imprisonment."

Under this paragraph it will be noticed that the penalty set out is a fine and a maximum of twenty-five years in the penitentiary. It will also be noticed that this penalty is included not only for the stealing, taking or carrying away of a motor vehicle, but also for the stealing, taking or carrying away of any part, tire or equipment of a motor vehicle of the value of thirty dollars or more.

The two penalties have been construed in the case of State v. Mangiaracina, 125 S. W. (2d) 58, pars. 1-4, where the court said:

"However, appellants are insisting that in the circumstances here involved they

may not be charged in the same count with the larceny of the automobile and the larceny of the fur coats, although both were consummated by the same act. Sec. 7786 is a later enactment than Secs. 4064 and 4065; and said Sec. 7786 deals with the subject matter of the larceny and attempted larceny of automobiles, whereas Secs. 4064 and 4065 deal with the common subject matter of grand larceny. We adopt a quotation from State v. Harris, 337 Mo. 1052, 1058, 87 S. W. 2d 1026, 1029 (6), citing additional authority, as applicable to the general effect of Sec. 7786 upon said Secs. 4064 and 4065: "Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one * * *." Our General Assembly in the enactment of Sec. 7786 expressly provided that 'all laws or parts of laws contrary to, inconsistent or in conflict with any of the provisions of this act are hereby repealed * * *.' Laws 1st Ex. Sess. 1921, p. 106, Sec. 31. Thus a clear legislative intent to take the larceny or attempted larceny of the automobile here involved out from under the general provisions of Secs. 4064 and 4065 and to treat such larceny as an offense separate and apart from the offense denounced and punishable under the comprehensive terms of Secs. 4064 and 4065 is manifested. It follows

that the instant information, charging in one count the larceny of the automobile and the larceny of the fur coats, charges offenses denounced by separate provisions of our statutes, calling for separate and distinct punishments, with Sec. 7786 permitting of a lighter punishment than that prescribed by Sec. 4065."

It will be noticed under Section 8404, supra, that it specifically states "any part, tire or equipment of a motor vehicle."

CONCLUSION.

In view of the above authorities it is the opinion of this department that when the parts, tires or equipment that are a part of a motor vehicle are stolen the prosecution must be based upon Section 8404, supra, but when the parts, tires or equipment are separate and apart from the car, and are stolen the prosecution must be based upon Section 4456, supra. It is further the opinion of this department that when a prosecution based upon Section 8404, supra, is dismissed by the State, or the defendant is acquitted, the county must pay the costs, but when the prosecution is based upon Section 4456, supra, and the State dismisses the charge or the defendant is acquitted, the State must pay the costs. The reason for the above distinction is that the State is not liable on the dismissal or the acquittal of a defendant charged under a graduated felony. In cases where the punishment is solely imprisonment in the penitentiary, as under Section 4456 the dismissal by the State or the acquittal by a jury results in the State paying the costs. If the tires are separate and not a part of the motor vehicle, as described in the letter received by you from James L. Paul, Prosecuting Attorney of McDonald County, the information should be brought under Section 4456, supra, which provides

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for a punishment of imprisonment solely in the penitentiary. Under Section 4475, supra, an information charging receiving stolen property, upon a conviction results in the same punishment as of larceny under Section 4456.

Since the information was brought under Section 4475, supra, and the punishment is the same as under Section 4456, supra, a dismissal by the State renders the State liable for the costs under Section 4223, R. S. Mo. 1939.

It is further the opinion of this department that the punishment for receiving stolen property, consisting of automobile tires not a part of a motor vehicle, if over Thirty Dollars, is imprisonment solely in the penitentiary and should not be charged under Section 8404, supra. It was our intention and still our contention, that under the opinion rendered your department on June 3rd, 1940, we then held and are still holding, that by the acquittal or dismissal of a case charging larceny of an automobile, tires or parts of an automobile, which are not separate and apart from an automobile, the costs must be paid by the county and not the State. It is further the opinion of this department that prosecuting attorneys filing informations charging the theft of automobile tires or parts and equipment of an automobile should specifically state whether the parts, tires or equipment are separate from an automobile or should state in the information that the parts, tires or equipment were taken from an automobile. In that way it would show specifically under which section the State is prosecuting and would be a great help to the Criminal Cost Clerk of the State of Missouri and the Clerk of the Circuit Court in the county where the costs should be paid.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

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