

CRIMINAL COSTS: State remains primarily liable for fees of its own witnesses even though judgment may be rendered against defendant for costs.

May 15, 1945

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Honorable G. Logan Marr
Prosecuting Attorney
Versailles, Missouri

Dear Mr. Marr:

Recently you wrote this office requesting that an opinion rendered January 17, 1936, to Honorable Forrest Smith, State Auditor, on the subject of criminal costs, be revised. For convenience, your letter is herein set out:

"The criminal cost clerk, Mr. Peters, of the State Auditor's Department, sent me a copy of an opinion that you gave the State Auditor on Jan. 17, 1936, concerning the payment of the witness fees of State witnesses, by the State, when a continuance is granted on the application of the defendant, and the defendant is convicted of the charge. I am urgently requesting at this time that you revise that old opinion at this time, especially the last part that states that even if there was no judgment for costs against the defendant for the costs made, at the time the case was continued on the application of the defendant.

"In this cause, \$173.00 was knocked out of a fee bill to the State in the case of State vs. Orville Purl, because costs for the state witnesses were made at a term at which term the defendant was granted a continuance on the application of the defendant. The defendant is a

pauper, and is now confined in the pen on a 20 year sentence. The witnesses for the state are doomed to lose their witness fees unless the State pays them.

"According to sections 4220, 4221, 4224 and 4225, R. S. Mo. 1939, and other criminal cost section provide that if the defendant is unable to pay, then in certain instances the state or the county or the complaining witness shall pay. And in every case possible judgment for cost is taken against the defendant, if he is convicted; so as to be sure and make the costs out of him if he is worth it. But, if the defendant is a pauper and unable to pay, then the state or county pays the costs, as the case may be. It seems to me that it has always been the rule of the thumb that the defendant was penalized with the costs, if he was convicted, but he was not worth the costs, then the state or county paid.

"Now as my second proposition, I want to say that the opinion quotes State vs. Brigham, 63 Mo. 258 and State ex rel. Gordon, 254 Mo. 471, 162 S. W. 629, and in those cases there was a judgment for costs against the defendant or the state, and the judgment for costs was entered of record. To the same effect see State ex rel. v. Buchanan, 41 Mo. 254 and also 63 Mo. App. 535. In those cases the Court took time out and actually assessed the costs against the party at whose instances the continuance was granted. In most every cause, in order to enforce any kind of rights either pro or con, there must be a judgment, a formal judgment of record, entered of record, and with the essential parts of a judgment.

"In this case of State vs. Orville Purl, from Morgan County, there was no judgment for costs of any kind assessed and set

up in the record against the defendant, because of the continuance granted to him in a criminal action, in which case he was convicted of a felony and sentenced to the State Penitentiary.

"And even if there was a judgment for costs, as I stated, he is not worth a judgment. But the point I am making and urging now is that in the absence of a judgment against him for costs, the costs of the witnesses for the State could not be collected if the defendant was worth a judgment for costs.

"For instance, there must be an adjudication for the costs, and the same a matter of a judgment in the record, if the witnesses are to prevail. In 118 Mo. App. 15, 93 S. W. 295, the facts show that a prosecution was dropped, and the costs that had accrued were taxed up against a complaining witness. In an effort to revive a purported judgment, he fought the case, because the judgment was just a memorandum that the complaining witness should pay the costs of the prosecution when there were no charges filed, but no formal judgment, with all its essential parts in the record. The alleged judgment was not allowed. So this shows that there can be no judgment for costs, unless the record is a formal judgment in favor of some party, and against some party, and for some amount.

"And in support of a change of this opinion, I want to urge that it was no fault of the State, the officers of the State, the prosecuting attorneys, or the witnesses for the State, that they came long miles and long distances for a trial, and then a continuance was granted to the defendant. It should be no fault of the witnesses for the state, that they lost their time, mileage and expenses, just because the

defendant was able to force through a continuance. It just adds another handicap to the state. It just makes it even harder to get witnesses for the state to come to court."

As pointed out by you, the cases of State ex rel. v. Gordon, 254 Mo. 471 and State v. Brigham, 63 Mo. 258, treat situations where a judgment had been entered for costs.

Originally each party to a suit was liable for his own costs, regardless of the result of the litigation. By judgment and statute the costs of the winning party may be charged to the losing party. The sections of the statutes pertinent to your questions are here set out.

Section 4220, R. S. Mo. 1939:

"Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county."

Section 4221, R. S. Mo. 1939:

"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 4042, R. S. Mo. 1939;

"Continuances may be granted to either party in criminal cases for good cause shown, and the court may postpone the trial of any such case for good and sufficient reasons, of its own motion. When a continuance is allowed on the application of either party, it shall be at the costs of the party at whose instance it is granted, unless the court otherwise direct."

As pointed out in the case of State ex rel. v. Gordon, 254 Mo. 471, Sections 4220 and 4221, supra, are general and apply when there is no special section governing. Section 4042, supra, contains a special provision relating to the charge of costs against the party applying for a continuance.

The case of State v. French et al., 118 Mo. App. 15, cited by you, is of no assistance for the substance of that holding is that a docket entry is not a judgment and cannot be enforced.

What you say about the danger of the state's witnesses losing their fees is regrettable if the opinion is correct but that should not affect our interpretation of the law, neither should the fact that the state's officers did not occasion the delay. If the interpretation of the law produces this result, then the law should be amended.

As previously pointed out, each party to a suit is primarily liable for his own costs and this liability remains although the prevailing party secures judgment for costs against the losing party. C. J. S., Vol. 20, Sec. 109, page 352.

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Section 4221, supra, requires the State to pay the costs when the defendant is convicted and sentenced to the Penitentiary, if the costs cannot be recovered from the defendant, except costs incurred on behalf of the defendant. Section 4042, supra, provides authority for charging the cost of a continuance to the party asking the continuance unless otherwise directed by the court. However, this section does not relieve the State from the duty to pay the costs of its own witnesses if such costs cannot be recovered from the defendant.

Conclusion

It is, therefore, the conclusion of this office that the costs of a continuance granted upon the application of a defendant should be charged to the defendant. However, this does not relieve the State of the duty to pay the fees of its own witnesses for being present in court when the continuance was granted, when such fees cannot be recovered from the defendant who applied for the continuance.

It is the further opinion of this department that the conclusion of the opinion written January 17, 1936, directed to Honorable Forrest Smith, State Auditor, is erroneous in so far as it undertakes to hold that the State is relieved from paying the fees of its own witnesses which have been charged to a defendant by reason of his applying for a continuance, but which cannot be recovered from the defendant due to his insolvency; and it is the further opinion that such previous opinion should be overruled to that extent and withdrawn.

It is further the opinion of this office that upon a proper showing that fees of state's witnesses, charged to defendant by reason of a continuance granted upon his application, cannot be recovered from the defendant, that the State should pay such fees.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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