

HABEAS CORPUS: Effect of discharge on habeas corpus upon costs to be paid by state in subsequent proceedings against the same defendant.

August 22, 1945



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: Mr. O. L. Peters
Criminal Cost Clerk

Dear Sir:

Reference is made to your letter, dated June 18, 1945, requesting an official opinion of this office, and reading as follows:

"This Department desires an opinion from your Office with respect to the payment of Criminal Cost Bill, under the following circumstances.

"On June 11, 1940, this Department received from the Circuit Clerk of Iron County, Missouri, a duly certified Criminal Cost Bill in the Case, State of Missouri vs. Chas. Williams, No. 6655, showing the defendant charged with crime of robbery with deadly weapon. This Cost Bill was audited, allowed and paid July 9, 1940.

"Again on June 16, 1945 this Department received from the Circuit Clerk of Iron County another certified Cost Bill in this same styled and numbered case and on which is listed a number of the items of costs that were allowed and paid in the Cost Bill certified to this Department in June, 1940.

"We therefore kindly request an opinion from your Office as to what items of costs, if any,

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shown in this last Cost Bill should be allowed and paid. We attach hereto for your convenience and information a copy of each of the Cost Bills certified to this Department in this case.

"Inasmuch as there will in all probability be other and similar Cost Bills submitted to this Department by reason of habeas corpus proceedings either in the Supreme Court or the Circuit Court of Cole County we further request an opinion from your Office as to what items of costs, if any, should be allowed and paid by the State in such cases."

The answer to the question you have proposed must be determined by giving due regard to the effect of the discharge on habeas corpus of the defendant. The general rule with respect to the effect of such proceedings is set forth in 22 C. J. S., Criminal Law, Para. 266, which reads as follows:

"A discharge on habeas corpus being merely from custody and not from the penalty, does not operate as an acquittal and is not a bar to a subsequent indictment whether accused has undergone any part of the punishment imposed or not."

To the same effect is State v. Schierhoff, 103 Mo. 47, 1. c. 50, 51, from which we quote:

"Defendant's second contention is, that having been discharged on writ of habeas corpus from imprisonment by virtue of an execution issued on the original judgment in this case, he cannot be confined again for the same offense, and in support of this contention he relies upon section 2670, Revised Statutes, 1879, being section 5398, Revised Statutes, 1889, and Ex parte Jilz, 64 Mo. 205. We do not think the Jilz case in point. There de-

defendant was released on habeas corpus, and he was again arrested and held for the same offense, on the same judgment. Here the defendant was released on habeas corpus from imprisonment by virtue of an execution issued in February, 1887, on the original sentence, entered December 23, 1885, upon the ground chiefly, that the court could not sentence him while the motion for new trial remained undisposed of.

"The court, after his release, however, proceeded in a very short time, to have him brought before the court and sentenced again, the motion for new trial having been previously overruled. This cured the defect, if there was any defect in entering the sentence originally, and any subsequent process issued under this final sentence would be for the same offense, it is true, but not on the same judgment, and such process is especially excepted in section 2670, supra. In order for a discharge under habeas corpus to operate as res adjudicata, the process must be for the same offense, and issued under the same judgment. Res judicata in such case cannot be pleaded 'when the discharge in any case has been ordered on account of the non-observance of any of the forms required by law, and the party is again arrested for imprisonment by legal process for sufficient cause and according to the forms required by law.' Sec. 2670, supra.

"The forms of law were not complied with in entering judgment against defendant, December 23, 1885, while his motion for new trial was pending, and he was rightly released from custody; but the next time he was imprisoned it was for the same offense, but on legal process issued on a new judgment rendered after such release. This very point is covered by the portion of section 2670 above quoted. This point is ruled against defendant."

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That such is the rule in all jurisdictions further appears from the annotations in 97 A.L.R. 162N, in which State v. Schierhoff, supra, is analyzed. The effect of the rule is simply to declare that the custody of the defendant is void resulting from inherent defects in the trial proceedings.

The liability for the payment of criminal costs by the state is predicated upon the provisions of Section 4221, R. S. Mo. 1939, reading, in part, 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, * * * the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. * * * "

We note from the copy of the fee bill enclosed with your letter of inquiry that the defendant was convicted of the crime of robbery with a deadly weapon. Under the provisions of an act appearing in Laws of 1943, page 518, this crime is made a capital offense. Such act reads, in part, as follows:

"Every person convicted of robbery in the first degree by means of a dangerous and deadly weapon shall suffer death, or be punished by imprisonment in the penitentiary for not less than five years, * * *."

Section 13405, R. S. Mo. 1939, relates to fees to be allowed to prosecuting attorneys, It reads, in part, as follows:

"Prosecuting attorneys shall be allowed fees as follows, unless in cases where it is otherwise directed by law: * * * for the conviction of every defendant in any case where the punishment assessed shall be by confinement in the penitentiary, except in cases of rape, arson, burglary, robbery, forgery or counterfeiting, ten dollars; for

the conviction of every defendant of homicide, other than capital, or for offenses excepted in the last clause, twelve dollars and fifty cents; * * *."

From the foregoing, it appears that the charge of \$12.50 as fees of the Prosecuting Attorney, J. H. Keith, is proper.

Section 15415, R. S. Mo. 1939, relates to fees to be allowed sheriffs for their services in criminal cases. It reads, in part, as follows:

"Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases and for all proceedings for contempt or attachment as follows:

* * * *

"For committing any person to jail..... 1.00

* * * *

"For every trial in a criminal case or confession 1.00

* * * *"

Further, Section 15416, R. S. Mo. 1939, makes provision for the allowance to sheriffs for the board of prisoners. Such section reads, in part, as follows:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state: * * * "

Examination of the fee bill discloses that the fees claimed thereon on behalf of Ogie Selinger, Sheriff, are in accord with

the above statutes.

Section 13409, R. S. Mo. 1939, relates to the fees to be allowed clerks of circuit courts, and reads, in part, as follows:

"The clerks of the several courts of this state possessing criminal jurisdiction shall be entitled to the following fees for their services in criminal proceedings, and no fee in such proceedings shall be allowed by virtue of any other provision in this chapter contained:

* * * * *

- "For entering any judgment * *50
* * * * *
- "For copies of records and papers,
for every hundred words..... .10
* * * * *
- "For each certificate and seal authenticating a copy of a record.. .50
* * * * *
- "For a copy of a bill of costs in each case, and certificate of the judge and prosecuting attorney, including certificate and seal... .50
- "For every order in a case not herein provided for15
* * * * *
- "For copying bill of costs, after allowance, including certificate and seal, for every hundred words..... .10
* * * * *
- "For certificate to an affidavit..... .15

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Examination of the charges appearing on the fee bill on behalf of R. C. Jones, Clerk of the Circuit Court, discloses that the fees claimed thereon are in accord with the provisions of the statute quoted.

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CONCLUSION

In the premises, we are of the opinion that all items of cost appearing on the fee bill attached to your letter of inquiry are in accord with the statutes relating thereto and should be allowed and paid.

Respectfully submitted,

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WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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