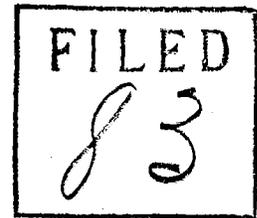


CRIMINAL COSTS: Costs accrued after remand of convict by the Circuit Court of Cole County to the county in which criminal charges are pending against him.

December 11, 1945



12/20

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This department is in receipt of your request for an opinion, based on the following facts:

"This Department desires an opinion from your Office with respect to payment of criminal costs as set out in Cost Bill hereto attached.

"For your information and convenience we also attach a copy of the information and copy of the Sheriff's amended Return on the Writ."

(Note: The items of cost and the information contained on the Cost Bill are copied on a separate sheet and attached hereto.)

The payment of costs in criminal cases by the State, in the event the defendant is acquitted, is based on Section 4223, R. S. Mo. 1939, which provides in part:

"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; * * * *"

The defendant was charged in the Circuit Court of Cape Girardeau County with the crime of grand larceny in connection with the stealing of hogs, for which the penalty, as set by

Section 4457, R. S. Mo. 1939, is "imprisonment in the penitentiary not exceeding seven years," which brings this cost bill generally under Section 4223, supra.

The fees charged by officers of Cape Girardeau County are fees enumerated and authorized by statute as costs in criminal cases. These charges were incidental to and accrued by action taken on a criminal charge pending against the defendant in Cape Girardeau County by officers of said county.

Section 13409, R. S. Mo. 1939, provides that clerks of Criminal Courts shall be allowed, among other fees, the following:

"For entering any judgment or <u>nolle prosequi</u>	\$.50
For a copy of a bill of costs in each case, and certificate of the judge and prosecuting attorney, including certificate and seal50
For every order in a case not herein provided for15
For filing any paper in a cause05
For copying bill of costs, after allowance, including certificate and seal, for every hundred words10"

Section 13413, R. S. Mo. 1939, provides that sheriffs shall be allowed in criminal cases, among other fees, the sum of \$1.00 for committing any person to jail.

Section 13416, R. S. Mo. 1939, authorizes the charge of 75¢ per day for board of prisoners, and is 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: Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

The fees charged by officers of Cape Girardeau County conform with the sections of the statutes quoted.

In considering the legality of the fees accrued and charged in favor of Dave C. Jobe, Sheriff of Cole County, for keeping and returning the prisoner to Cape Girardeau County after he had been ordered returned by a judgment of the Circuit Court of Cole County, your attention is called to Section 13413, R. S. Mo. 1939, which reads in part:

"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: * * * * *
The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed, or who may remove a prisoner from one county to another for any cause authorized by law, * * * * *
for transporting, safe-keeping and maintaining any such person, shall be allowed by the court, having cognizance of the offense, one dollar and twenty-five cents per day for every day he may have such person under his charge, when the number of days shall exceed one, and five cents per mile for every mile necessarily traveled in going to and returning from one county to another, and the guard employed, who shall in no event exceed the number allowed the sheriff, marshal or other officer in transporting convicts to the penitentiary, shall be allowed the same compensation as the officer. One dollar and twenty-five cents per day, mileage same as of-ficers, shall be allowed for board and all other expenses of each prisoner. * * * * *"

You will note the above section authorizes these fees for the removal from one county to another for any cause authorized by law. The removal of this prisoner was authorized by Section 1632, R. S. Mo. 1939, which deals with the custody of a prisoner after he is ordered remanded in a habeas corpus proceeding to the county in which criminal charges are pending against him. This section provides:

"If a prisoner be not entitled to his discharge, and be not bailed, the court or magistrate before whom the proceedings are had shall remand him to the custody or place him under the restraint from which he was taken, if the person under whose custody or restraint he was be entitled thereto; if not so entitled, then he shall be committed to the custody of such officer or person as by law is entitled thereto."

In the case of State ex rel. Gentry, Atty. Gen., et al. v. Westhues, Judge, et al., 286 S.W. 396, l.c. 399, 315 Mo. 672, in ruling upon the question of a remand where the pleadings showed on their face that the prisoner was charged with the crime in another county, the court said:

"From the applicant's pleaded admission, therefore, regardless of what evidence may have been adduced at the habeas corpus hearing, he had been charged with and entered a plea of guilty to a crime punishable by imprisonment in the state penitentiary. His parole, its revocation, and his rearrest all presuppose a judgment and sentence; but if such was not rendered, as he contended, and as the Cole county circuit court evidently found, he was still not entitled to go at large, but should have been committed to the sheriff of Pulaski county for the judgment and sentence of the Pulaski county circuit court. Such a situation is expressly provided for by our habeas corpus act * * * * *

"Although the Cole county circuit court had jurisdiction to determine upon the merits of the evidence, either rightly or erroneously, that the acting warden of the state penitentiary was not entitled to detain Overby, yet upon the face of the record the sheriff of Pulaski county was entitled to detain him until he could receive judgment and sentence from the circuit court of that

county. The circuit court of Cole County proceeded without jurisdiction in ordering the absolute discharge of Ezra Overby, and its judgment rendered therein is quashed."

In the case of LaGore v. Ramsey, 126 S.W. (2d) 1153, 1.c. 1156, in a habeas corpus proceeding filed directly in the Supreme Court that court said:

"It is therefore considered, ordered and adjudged by the court that the petitioner, Donald Orville LaGore, by which name he was indicted and convicted, be released from his imprisonment in the state penitentiary and delivered to the marshal of this court; that said marshal be and is hereby ordered to deliver said petitioner to the sheriff of Jackson County, Missouri, who shall present him to the court of said county having jurisdiction in felony cases; and that said court be and is hereby ordered to sentence said petitioner to imprisonment in the state penitentiary, on the charge of which he was convicted, for a term of fifteen years from and after April 20, 1937, the date of his conviction."

It will be noted further that Section 13413, supra, provides that "the sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed" is entitled to charge the fees provided therefor. We cannot find a case directly in point, but the taking charge of the prisoner by the sheriff after the order of remand by the Circuit Court of Cole County could logically be said to be a constructive apprehension of a person, charged with a criminal offense, by legal process; the order of the Circuit Court being the legal process.

The court, defining the word "apprehension," said in the case of Cummings v. Clinton County, 181 Mo. 162, 1.c. 171, 79 S.W. 1127:

"It is true that the words used in the statute are 'apprehension and arrest,' while in the reward paper, the word 'apprehension' alone is used, but their meaning is substantially the same

and it is generally so understood.

"One of the definitions of 'apprehension' given in Webster's International Dictionary is: 'to take or seize (a person) by legal process; to arrest; as, to apprehend a criminal.' Arrest is defined in the same work as, 'The taking or apprehending of a person by authority of law; legal restraint; custody.' It will be seen that the one is comprehensive of the other."

More nearly in point is a California case, *People v. Martin*, 205 P. 121, 123, 188 Calif. 281. In this case the defendant had been arrested in one county and taken to another county where he was in jail awaiting extradition to another state for embezzlement, and while in the jail was charged in that county with bigamy. The California penal code fixes venue for the trial of bigamy cases in either the county of apprehension or in the county where the offense was committed. The defendant challenged the venue and contended that he was not apprehended in the county in which he was charged. The court held that he was apprehended on the bigamy charge in the county in which he was in jail awaiting extradition when the charge was filed.

Considering the facts of the case, upon which you base your request for an opinion, there seems to be no doubt that the removal of this prisoner to the county in which he was charged with the criminal offense would be authorized by either or both of the provisions of Section 13413, supra, as being a removal "for any cause authorized by law," or under "The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed."

The amounts of the fees charged by the sheriff of Cole County, as shown on the Cost Bill, do not conform with the statute or with the return made by the sheriff after he had delivered the prisoner to Cape Girardeau County. These items should be corrected to conform with Section 13413, supra.

Conclusion.

It is the opinion of this department that the fees

Honorable Forrest Smith

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enumerated in this Cost Bill should be paid after the amounts of the fees charged by Dave C. Jobe, Sheriff of Cole County, have been corrected to comply with Section 13413, supra.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WBD:ml
Enc.