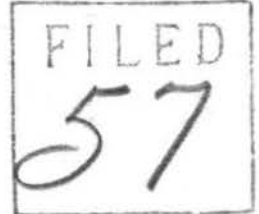


CRIMINAL COSTS:

County court liable for costs accruing as a result of a criminal complaint filed by individuals other than officer where accused is not arrested.

May 17, 1948



Honorable G. Logan Marr •
Prosecuting Attorney
Morgan County
Versailles, Missouri

5-19

Dear Mr. Marr:

This will acknowledge receipt of your letter of recent date, requesting an opinion of this Department, which letter, after omitting caption and signature, provides as follows:

"The facts disclose that felonious affidavits were filed in the magistrate court of Morgan County, Mo. for bogus checks. The sheriff or his deputies made several attempts to serve these warrants and ran up some mileage on the search for these defendants charged with crime. The defendants were not found because they could not be found and several had left the state and their whereabouts were unknown, and are still unknown.

"After about a year the magistrate disposed of these old cases pending on his docket by dismissing them, for the want of prosecution. The warrants not served were on file and contained charges for mileages incurred by the sheriff in his searches for these defendants. Most of the dismissals were not charged up against the complaining witness. The magistrate holding that it was not the fault of the complaining witness that the sheriff did not find the defendant and the defendant is still a fugitive.

"In the past if the sheriff ran up a lot of mileage on a warrant and then

failed to serve warrant on the defendant, the state did not pay the sheriff for looking for the defendant.

"The deputy sheriff in this county went back through last year and found quite a bill of warrants that he tried to serve but was unable to locate the defendant and bring him in. The County court raised the question as to whether, the county was liable for this service, this mileage.

"The deputy sheriff claimed that under Section 5, Laws of 1945 he was entitled to his mileage on these warrants. The County court read the section and could not agree that the deputy sheriff served the warrant when he ran up mileage looking for the defendant.

"Frankly I do not know and I am asking the attorney general for an opinion on whether the county court should pay the mileage on these warrants not served."

In your opinion request you did not state the classification of Morgan County, but from the best information which we can obtain, it is designated as a county of the fourth class. The provision of the Laws of Missouri for 1945, referring to the salary and compensation of a sheriff of fourth class counties is found on page 1547 of the Laws of Missouri for 1945, and the particular section of such law pertaining to the question at issue is Section 5, page 1549 of such volume. This section of the Statute provides the following:

"Section 5. Allowance for serving warrants.--In addition to the salary provided in Section 1 of this act, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed five cents per mile."

At common law there was no liability on counties to pay such costs, neither is there any such liability now, in the absence of statutes, making the county liable for such costs. We think that it naturally follows that the same rule is applicable in cases of prosecutors and individual complainants. Volume 20, C.J.S., page 685, Section 441(a) lays down the general principle hereinabove enunciated with regard to liability of a county:

"At common law counties are never liable to pay any costs. If liable at all, such liability depends solely on statutes imposing it. * * *".

Also, in the same Volume, Section 439(b), page 681, we find the following:

"Inasmuch as the prosecutor's liability is dependent solely on statute, the payment of costs cannot be imposed on him except in such proceedings or prosecutions as are designated by statute. * * *".

See also, Volume 15, C.J., page 320, Sections 797 and 798.

It is well established that when there are no statutory or constitutional provisions, authorizing the payment of compensation for duties required to be performed by public officers, such services shall be performed gratuitously. Volume 43, Am. Jur., Section 340, page 134, reads, in part:

"* * * Whatever salary or emoluments may be attached by law to a public office do not belong to the incumbent because of any supposed legal duty resting upon the public to pay for the services rendered by him. In fact, it is sometimes expressly provided that certain officers shall receive no compensation, and a law creating an office without any provision for compensation may carry with it the implication that the services are to be rendered gratuitously. * * *".

Section 341, 43 Am. Jur., page 340, reads, in part:

"Any right which a public officer may have to a salary or compensation must generally be found in some provision of the law, for whatever may be the character of the compensation, whether an annual salary, a per diem allowance, or fees for particular services, it must depend upon the will of the people speaking through their Constitution, statutes, or ordinances. * * *".

In State ex rel. Buder vs. Hackmann, 305 Mo. 342, l.c. 351, the Court in so holding, said:

"The argument of hardship and that an officer should not be compelled to incur a financial loss, in performing the duties incident to his office, cannot be considered by the courts in passing upon the rights of relator, as fixed by the statute. Failure to provide a salary or fee for a duty imposed upon an officer by law does not excuse his performance of such duty. (State ex rel. v. Brown, 146 Mo. l.c. 406.) It may be that an assessor actually sustains a financial loss in the performance of his duties under our State Income Tax Law. But such fact is for consideration by the Legislature, and not by the courts."

See also: Ward vs. Christian County, 111 S.W. (2d) 182, l.c. 183, 341 Mo. 1115. We find statutes providing who shall pay costs in felony cases under most every conceivable circumstance. (Section 3900, R.S. Mo. 1939; Sections 4221-4228, inclusive, R.S. Mo. 1939). However, we fail to find any statutory provision as to who shall pay costs when a complaint has been filed by an individual prior to the filing of an information, and the person complained against cannot be found. No one has been committed, no recognizance

has been entered into, and no one acquitted or convicted, unless in such case such costs shall be paid out of the county treasury, as provided in Section 5, Laws of Missouri, 1945, page 1549.

It might be argued that a non est return as referred to in your letter, does not amount to serving a warrant or criminal process as provided in Section 5, supra. However, we believe that it does, in view of the statutes authorizing fees and mileage for making non est returns by sheriffs, such as under Section 13411, R.S. Mo. 1939, which provided a fee for every return of non est on a writ original of judicial, and further provided mileage for serving certain specified kinds of writs, also, Section 13413, R.S. Mo. 1939, allowing a fee for entering a return of non est on capias or attachments, also, for non est of subpoenas.

In view of the foregoing statutes, it is quite apparent that sheriffs have heretofore been compensated for making non est returns.

CONCLUSION.

Therefore, it is the opinion of this Department that the county is liable under Section 5, Laws of Missouri, 1945, page 1549, for costs accruing in a case where a felonious complaint has been made by an individual other than a public official, and where the sheriff or his deputy has been unable to find the party named in said warrant, and has made a non est return.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARR:ir