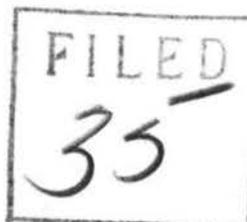


CRIMINAL COSTS: State not liable for costs of hospitalization of person charged with graded felony who is injured breaking from jail and attempting to escape from county jail

October 26, 1949

11/8/49

Honorable Percy W. Gullie
Prosecuting Attorney
Oregon County
Alton, Missouri



Dear Sir:

We hereby reply to your request for an opinion of this office on the following question and facts as stated in your recent letter:

"Re: Section 9223, R. S. Mo. 1939

"Will you please advise the application of the above statute or any other pertaining to the same subject, to the following facts?

"One Henry Herbold was committed to our jail under charge of mixed felony, awaiting arraignment and preliminary examination. While so confined he forced his way out of the jail by breaking the bars thereof, then proceeding to tie blankets together in an effort to make a rope on which to descend from the jail to the ground (Our jail being on the third floor) upon climbing out of the jail and starting to descend the improvised rope, the same broke with him, letting him fall to the ground thereby breaking both legs (compound fractures) above the knees. The jailer immediately called an ambulance for the purpose of getting him to some proper place for attention, and also immediately notified his son, and they together took him to Springfield, Missouri to a hospital where he died some time later from the injuries. The day before this happening in conversation with his son the question arose as to the Mental condition of the deceased, and the son informed us that he did not want to make bond for him,

but thought it best to try to get him in one of the mental hospitals of the State.

"We feel that the officers had taken every reasonable precaution at hand to keep the deceased properly confined.

"The question now is, who is liable for the expense incurred and if the County or State should be liable, then should it be handled under the above section?"

II.

We believe that the following statutory provisions apply in this case. Section 9223, R. S. Mo. 1939, provides:

"In case any prisoner confined in the jail be sick, and, in the judgment of the jailer, needs a physician or medicine, said jailer shall procure the necessary medicine or medical attention, the costs of which shall be taxed and paid as other costs in criminal cases; or the county court may, in their discretion, employ a physician by the year, to attend said prisoners, and make such reasonable charge for his service and medicine, when required, to be taxed and collected as aforesaid."

Section 9202, R. S. Mo. 1939, provides:

"Whenever any person, committed to jail upon any criminal process, under any law of this state, shall declare, on oath, that he is unable to buy or procure necessary food, the sheriff or jailer shall provide such prisoner with food, for which he shall be allowed a reasonable compensation, to be fixed by law; and if, from the inclemency of the season, the sickness of the prisoner, or other cause, the sheriff shall be of the opinion that fuel, additional clothes or bedding, medicine and medical attention are necessary for such prisoner, he shall furnish the same, for which he shall be allowed a reasonable compensation."

Section 9203, R. S. Mo. 1939, provides:

"The expenses of imprisonment of any criminal prisoner, such as accrue before conviction, shall be paid in the same manner as other costs of prosecution are directed to be paid; and those which accrue after conviction shall be paid as is directed by the law regulating criminal proceedings."

Section 4221, R. S. Mo. 1939, as amended by Laws of Missouri 1945, page 844, Section 1, provides in part:

"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. * * * *"
(Underscoring ours.)

Section 4223, R. S. Mo. 1939, provides:

"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; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

Your statement of the facts shows that the defendant was being confined in your county jail on a mixed felony charge pending preliminary examination. We assume that you mean by a mixed felony that the crime was punishable by either imprisonment in the State Penitentiary or in the county jail, or by both fine and imprisonment in the county jail. If this assumption of your use of the term mixed felony be correct, then, if the defendant was not convicted upon the charge, Section 4223, R. S. Mo. 1939, quoted above, would apply and the county would be liable for the costs.

The Supreme Court of Missouri, in the case of Cramer vs. Forrest Smith, et al., (1943) 350 Mo. 736, 168 S.W.(2d) 1039, considered the question of taxing payment of a transcript as an item of criminal costs and said, l.c. 739, 740:

"(1) 'At common law costs as such in a criminal case were unknown. As a consequence it is the rule as well in criminal as in civil cases that the recovery and allowance of costs rests entirely on statutory provisions-- that no right to or liability for costs exists in the absence of statutory authorization. Such statutes are penal in their nature, and are to be strictly construed.' (20 C.J.S. p. 677.)

"(2) Sections 4221 and 4222 impose liability for costs (except those incurred on the part of defendant) on the state or county, respectively, on conviction of an indigent defendant under the particular circumstances enumerated in said sections. Where the defendant is acquitted, liability for costs is imposed under the formula prescribed by Section 4223.

"(3) It is not contended that the provision of Section 13344, that the 'court reporter's fee for making the same (transcript) shall be taxed against the state or county as may be proper,' (Emphasis ours) which is found in Chapter 94 in relation to court reporters, authorizes a judgment, as for costs, against either the state or county as of the time the order is made. A fair construction requires us to hold that the language means said fee is to be taxed as costs, in the same manner as other costs are taxed, but with ultimate liability for the same on the state or county as may be proper under the general statutes in relation to criminal costs. Being thus relegated to the general statutes, it is apparent the provision of Section 13344 casting liability for such transcript on 'the state or county as may be proper' cannot be reconciled with Sections 4221 and 4222, both of which expressly provide that neither the state nor county shall pay such costs 'as were incurred on the part of defendant.' Section 13344, being the later enacted statute, must be held to have repealed, by necessary implication, the contrary provisions of Sections 4221 and 4222, to the extent noted."

"* * *The criminal costs statutes hereinabove set out do not contemplate that the costs in a particular case shall be paid in part by the county, and in part by the state. * * *"

The clause "except such as were incurred on the part of the defendant" in Sections 4221 and 4222, R. S. Mo. 1939, would cover and include the expense or cost of hospitalization required to treat injuries received as a result of an attempt to escape from jail by the defendant because such expense or cost was incurred or caused by the act of the defendant.

The St. Louis Court of Appeals, in State vs. Ball, 158 S.W.(2d) 182, held that an abstract printed by the defendant in his appeal was not required in a criminal case and was an expense incurred on his part voluntarily, and when this is done, the defendant cannot, if the appeal be successful, have the cost of printing such abstract taxed against the state. The court said, l.c. 183:

"The entire subject of costs is a matter of statutory enactment. It has been said that a person claiming costs is not entitled thereto unless he can point to a statute authorizing the taxation of the same. Appellant has not pointed to any statute authorizing the taxing of the costs of printing an abstract in a criminal case against the State, for the simple reason there is no such statute."

If the defendant in the above case could not have the expense of printing of an abstract that he incurred on his part taxed as costs when he was acquitted, then we believe that the expense of hospitalization caused or incurred by the attempt of Henry Herbold to escape from jail could not be taxed as costs, because there is no statutory provision for the payment or taxing of hospital expenses.

Section 9223, R. S. Mo. 1939, as quoted above, provides for the taxing of necessary medicine or medical attention as costs for any prisoner confined in the jail. This clause "confined in the jail" and the provisions of Sections 9202 and 9203 quoted above were considered in an opinion rendered to the Honorable Richard Chamier, Prosecuting Attorney of Randolph County, on October 12, 1938, in which this office held on pages 4 and 5 of the opinion as follows:

"We believe it is manifest that by reason of

the terms used in these respective statutes, to-wit, in the first one, "whenever any person committed to jail upon any criminal process," and in the second one, "the expenses of imprisonment of any criminal prisoner," and in the third one, "in case of any prisoner confined in any jail," together with the fact that all three sections appear in an article of the statutes confined to "Jails and Jailers", that the medical attention mentioned in each of the three sections refers and is confined to a person or prisoner when and while confined in jail. It is obvious that there is nothing said in the statute with reference to the right of the sheriff to obtain hospitalization for any such prisoner, nor is there any mention in such sections that the expense of room, board and nurse attendance can be procured for a prisoner in a hospital and the expense of such room, board and nurse hire charged up to the State as costs in a criminal case.

* * * * *

"In other words, such statutes are strictly construed against the allowance of costs against the State, and it is not permitted by intendment or liberalization to read into such statutes something that is not plainly provided for therein. Hence, we do not believe that there is sufficient justification for saying that the sheriff has the right to obtain hospitalization for anyone whom he might have lawfully in his custody, and we are constrained to the belief that the medical attention mentioned in the statutes means such medical attention as is the usual and customary attention provided for a prisoner while and when in the county jail."

Said opinion continues to be the official opinion of this office and applies to your situation.

Since your prisoner died from the injuries received in his attempt to escape, we assume that the case will be allowed to pass off the docket or will be dismissed by reason of the death of the defendant, and in either event, the defendant will not be convicted, and under Section 4223, supra, the costs would be payable by the county in the case of a mixed felony or in the case of a misdemeanor. But from what we have said heretofore, it is our opinion that the Legislature did not contemplate the expense of hospitalization as the necessary medicine and medical attention to be given to a prisoner

as provided in Section 9223, supra, and that Section 9223, R. S. Mo. 1939, could not be construed to include hospitalization as an expense that could be taxed as costs in a criminal case against the county.

The estate of Henry Herbold would be primarily liable for the hospital expenses and his son would be liable for such expenses if he took his father into the hospital at Springfield, Missouri.

Section 4235, R. S. Mo. 1939, provides:

"The county court of any county in which a prisoner may be confined, whenever satisfied of the necessity of so doing, may make an allowance for ironing such prisoner, and may allow a moderate compensation for medical services, and extra bedding or menial attendance furnished any sick prisoner, which shall be paid out of the treasury of the county in which the cause originated."

This statute does not limit or prescribe the particular place of confinement and could be used for authority of the county court of your county to pay a moderate bill for hospitalization of any prisoner. In an emergency, the sheriff or jailer would not have time to secure authority from the county court for such expenses, but they should consider that the prisoner is entitled to humane treatment, and Section 9206, R. S. Mo. 1939, makes it the special duty of the court having criminal jurisdiction at each term to inquire and see that all prisoners are humanely treated. Therefore, a county court would be authorized if they see fit, to allow the expense of hospitalization to be paid under this Section 4235.

III.

CONCLUSION

It is the opinion of this office, in view of the reasons hereinabove stated, that hospital expenses incurred in the treatment of injuries received by a prisoner after he escapes from jail cannot be taxed as costs in the case in which the prisoner is the defendant even though he is apprehended, and that the prisoner is primarily liable for the cost of any hospitalization required to

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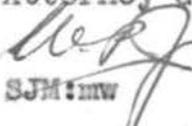
treat injuries he receives during the period of his freedom. In the event that he dies from such injuries then his estate is primarily liable for the cost of such hospitalization. If the hospital makes an affidavit that it is unable to recover its charges from the estate of the deceased prisoner, then the cost of the hospitalization may be paid by the county court of the county in which the prisoner was confined at the time of the escape and the injuries were received, by virtue of the provisions of Section 4235, R. S. Mo. 1939.

Respectfully submitted,

STEPHEN J. MILLETT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General


SJM:mw