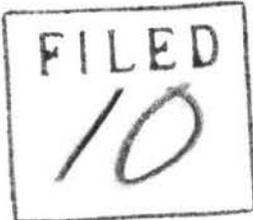


CRIMINAL LAW:
PRELIMINARY HEARING:

No authorization for payment for a copy of the transcript of the original examination in the preliminary hearing of a homicide case.



May 27, 1953

Honorable Joseph M. Bone
Prosecuting Attorney of
Audrain County
Mexico, Missouri

Dear Sir:

This will acknowledge the receipt of your letter of April 30th, 1953, in which you request an opinion of this department. Omitting caption and signatures, this request is as follows:

"Please advise if under the provisions of Sec. 544.390 it is necessary that a copy of the examination of the defendant and of the witnesses accompany the warrant of commitment? If not, must the original accompany the warrant of commitment, and if so, how does it finally reach the Circuit Court?

"If it is necessary that a copy accompany the warrant of commitment, what provision is made for the payment to the Reporter for such copy?

"It has been the custom locally in homicide cases, of course, to reduce the testimony to writing. The original is filed with the other papers in the cause in the Circuit Court and a copy is delivered to the defendant. Recently, following the taxing of costs of the original at fifteen cents per one hundred words, under the provisions of Sec. 485.150, Mo. R.S., and a copy at

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five cents per one hundred words, the State Auditor only allowed the amount charged for the original. If it is impossible to legally charge for a copy of the transcript where the same is required, then it is going to be impossible for the Magistrate Judge to obtain the services of a competent reporter for homicide preliminary examinations."

The statutory provision that you wish construed is Section 544.390, RSMo 1949, which provides as follows:

"All examinations and recognizances taken in pursuance of the provisions of this chapter shall be certified by the magistrate taking the same, and delivered to the clerk of the court in which the offense is cognizable, on or before the first day of the next term thereof, except that where the prisoner is committed to jail, the examination of himself and of the witnesses for or against him, duly certified, shall accompany the warrant of commitment, and be delivered therewith to the jailer."

You also cite Section 485.150, RSMo 1949, which prescribes the following:

"Each magistrate may appoint a competent stenographer or reporter to write and certify evidence of witnesses in cases of homicide and such stenographer shall be allowed a fee of fifteen cents for every one hundred words and figures. Such fee shall be taxed as costs and paid as other costs in the case."

We also wish to bring to your attention Section 544.370, RSMo 1949, which states the following:

"In all cases of homicide, but in no other, the evidence given by the several witnesses shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively."

You state in your request that it has been the custom in your locality to reduce the testimony to writing in homicide cases. Such

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practice is in keeping with Section 544.370. This section does not require that there be an original and a copy but only provides that the testimony be reduced to writing.

Section 544.390, likewise, fails to provide for an original and a copy of the testimony but only provides that a transcript of the testimony taken at the preliminary be delivered to the clerk of the court where the offense is cognizable on or before the first day of the next term of court. Further, that in case the defendant is committed to jail, the transcript or record shall accompany the warrant of commitment and be delivered to the jailer. In other words, if the defendant makes bond after the preliminary, the transcript of testimony reduced to writing at the preliminary, is filed in the office of the clerk of the court having jurisdiction of the offense. If he fails to make bond and is committed to jail, such transcript is delivered to the jailer. These provisions of the statute were passed to assure the defendant of having a record of the testimony taken at the preliminary hearing available to him.

Section 485.150, RSMo 1949, specifies that in homicide cases the stenographer appointed by the Magistrate to take the testimony shall receive a fee of fifteen cents for each one hundred words and figures. However, it makes no provision for a copy or the fee to be allowed in taking and transcribing same. So far as we could determine, there is no provision which provides that a copy of this type of testimony shall be made and no provision as to the cost or who shall pay for it.

Another question concerns the manner in which an original transcript of the examination taken at a preliminary is returned to the court when it has been attached to the warrant of commitment where the defendant was committed to jail. There have been no decisions along this line but it would appear that when the defendant is brought into court that the transcript is delivered at the same time to the clerk thereof.

CONCLUSION

It is therefore the opinion of this department that there is no authorization under the law for payment for a copy of the transcript of the original examination in the preliminary hearing of a homicide case. Under such premise, the State Auditor is correct in refusing to approve payment for such copy.

It is further the opinion of this department, that where a defendant has been committed to jail and the transcript of the

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examination of the witnesses at the preliminary hearing has been attached to the warrant of commitment and delivered to the jailer that such transcript can be delivered into the court or to the clerk thereof at the same time that the defendant is brought in for trial.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. John S. Phillips.

Very truly yours,

JOHN M. DALTON
Attorney General

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