

CIRCUIT CLERK:
COURT REPORTER:

In criminal appeals it is the duty of the clerk and the court reporter to make out and certify to the proper appellate court a full transcript; the costs are not required to be advanced.



May 26, 1953

*See Rule 28.08 Rules
on Crim. Pro.*

Honorable Lawson Romjue
Prosecuting Attorney of
Macon County
Macon, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office which request reads in part as follows:

"This defendant was charged with tampering with a motor vehicle and convicted after a jury trial.

"After the conviction, he filed one or more motions to appeal as a poor person and also contended that because of the novelty of the charge in the information and the uncertainty of the law, he should be permitted to appeal at the expense of the State and after a hearing as to his financial circumstances, Judge Libby overruled this motion or motions. His attorney is now demanding that the Court Reporter and the Circuit Clerk prepare the transcript without paying or offering to pay for same. Both Judge Libby and I take the position that the Court Reporter and the Circuit Clerk are not required to so prepare the transcript.

"Under the facts outlined above, will you please furnish me with your opinion on the

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following question: Are the Court Reporter and the Circuit Clerk or either of them required to prepare and furnish a transcript of appeal to the defendant under Section 28.08 of the Rules of Criminal Procedure or Sections 547.110, 547.120 and 547.130, R. S. Mo. 1949, or any other applicable provisions of law, without being paid for such transcript in advance?"

Section 547.110 RSMo 1949, prescribes the duties of the clerk in regard to preparing a transcript and certifying the same to the proper appellate court where an appeal shall operate as a stay of proceedings and reads as follows:

"When any appeal shall be taken or writ of error issued, which shall operate as a stay of proceedings it shall be the duty of the clerk of the court in which the proceedings were had to make out a full transcript of the record in the cause including the bill of exceptions, judgment and sentence, and certify and transmit same to the office of the clerk of the proper appellate court without delay; provided, however, that any abbreviated or partial transcript of the evidence and oral proceedings, in narrative form or otherwise which the defendant or his attorney for the state may agree upon in writing as sufficiently presenting to the appellate court the issues involved on such appeal, shall be deemed and taken as sufficient on such appeal and shall by the clerk be incorporated in the transcript of the record certified and transmitted by him to the appellate court, instead of the bill of exceptions mentioned above."

Section 547.120 provides that in cases where the appeal does not operate as a stay of proceedings, a transcript shall be made out, certified and returned upon the application of the appellant and further provides that the costs of the transcript shall not be required in advance. Said section reads as follows:

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"When the appeal or writ of error does not operate as a stay of proceedings, such transcript shall be made out, certified and returned, on the application of the appellant or plaintiff in error, as in civil cases, except that the costs of the transcript shall not be required in advance."

The Supreme Court in several instances has had occasion to interpret these two provisions in regard to the duties of the clerk and court reporter. In the case of State ex rel. v. Daily, 45 Mo. 153, the court held that Section 547.110 was mandatory and that it was the duty of the clerk to make out and certify a transcript although no costs were advanced. The court in its opinion said:

"The duty, then, of sending up a proper transcript, upon supersedeas in a criminal prosecution, is imperative, and is personal to the clerk, without the application of the accused. It becomes essential to the further prosecution of the case, and to the execution of the judgment, in which the accused may have no interest; is a duty imposed after an order of supersedeas by the court or a judge, and is essential to the object of the order; and for the performance of this duty the law imposes upon no one the obligation of advancing the fees."

In the case of State ex rel. v. Ittner, 315 Mo. 68, the Supreme Court held that the duty of the clerk was mandatory in the following language:

"Aside from the points discussed it is the statutory duty of the clerk in cases of this character when an appeal is granted to make out and certify to this court a full transcript of the record including the bill of exceptions, judgment and sentence. This duty is mandatory, although no request is made therefor. * * *"

And further cited with approval the Daily case, supra, as follows:

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"In State ex rel. Miller v. Daily, Cir. Clerk, 45 Mo. 153, this court held that Section 4102, requiring the clerk to send up a proper transcript, was imperative and personal to the clerk and that this duty should be performed without the application of the accused and that the law imposes upon no one the obligation of advancing the fees. A like ruling was made in State v. Armstrong, 46 Mo. 588, in which Miller v. Daily was expressly affirmed."

In the case of State v. McCarver, 113 Mo. 602, the Supreme Court held that under Section 547.120 it was the duty of the clerk to make out, certify and return a full transcript and that he had no authority to require the costs of the transcript in advance. We note the following from the opinion of the court, l. c. 605:

"Under the provision of section 4294, Revised Statutes, 1889, the clerk was required on the application of the defendant to make out, certify and return a full transcript of the record, etc., in the cause, and he had no authority to require the costs of the transcript in advance. His excuse, therefore, in not making out the transcript, which excuse has been hereinbefore quoted respecting the poverty and inability of the defendant to pay for the much-needed transcript was not a legal excuse; * * *."

See also State v. Dempsey, 168 Mo. App. 298 and State v. Chilton, 200 S. W. 745, as to the duty of the clerk.

From the foregoing authority, we believe that it is clearly the duty of the clerk to make out and certify to the proper appellate court a full transcript where the appeal operates as a stay of proceedings and upon the application of the appellant in cases where the appeal does not operate as a stay of proceedings and that in either case he has no authority to require the costs of the transcript in advance. We note from the facts submitted that the appellant has, by and through his attorney, made application for a transcript.

You likewise inquire as to the duty of the reporter to prepare and furnish a transcript. In the Ittner case, supra, the

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court referred to the duty of the reporter after noting the mandatory duty of the clerk and said:

"This being true, it is the statutory duty of the stenographer to make a transcript of his notes taken in cases of this character when appealed, although not ordered and paid for by appellant. To hold otherwise would prevent the clerk from performing his statutory and mandatory duty, defeat the purpose of Section 4102, Revised Statutes 1919, and obstruct the orderly administration of justice; * * * while the duty imposed by it is, by its terms, personal to the clerk * * *, the clerk cannot, under our present system of making and preserving records of the trial of cases, perform the duty enjoined without the aid of a stenographer who, as well as the clerk, is an officer of the court. * * *"

In the case of State ex rel. v. Wofford, 121 Mo. 61, l. c. 74, the court said:

"* * *Certainly it will be no greater burden on the stenographer to perform his duty than on the clerk, and the clerk can not perform his duty until the stenographer transcribes the portion of his record, that is in the notes. * * *"

The reasoning in the Ittner and Wofford cases would, of course, be applicable to cases where the appeal taken does not operate as a stay of proceedings and where the appellant must make application for a transcript. For the clerk can no more perform his duty in such cases than in cases where he is required to certify a transcript without application. Of course, we do not mean to hold that the reporter must furnish a transcript directly to the appellant but rather that he must prepare a transcript to be certified by the clerk of the proper appellate court.

Having first examined the statutes bearing upon your question, what then is the effect of Rule 28.08 of the Rules of Criminal Procedure upon these provisions? This rule provides as follows:

"The distinction between the 'record proper' and the 'bill of exceptions' for the purpose of determining what

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may be submitted to the appellate court in a criminal case appealed from a trial court is abolished. The transcript on appeal shall be settled, prepared, served and filed in the manner provided for in civil cases; except that in those cases where the appellant has been sentenced to suffer death, it shall be the duty of the clerk of the trial court to prepare, serve and file the transcript on appeal in conformity with the requirements of this Rule; and except also that if the appellant does not print the transcript on appeal, it shall not be necessary for him to deliver to respondent a copy thereof after the date on which the appellant is required to file said transcript with the clerk of the appellate court as is provided in civil cases. The attorney-general may direct that the transcript shall include all of the evidence in any felony case."

This rule provides, in so far as we are concerned, that the transcript on appeal shall be settled, prepared, served and filed in the manner provided for in civil cases, except that where the appellant has been sentenced to suffer death, it shall be the duty of the clerk of the trial court to prepare, serve and file the transcript on appeal. It has always been the rule in regard to capital cases, under Section 547.110, that the duty of sending up the transcript was personal to the clerk. *State ex rel. v. Daily* and *State ex rel. Ittner*, supra. Likewise, it has been the rule that in non-capital cases the transcript was to be made out, certified and returned as in civil cases upon the application of the appellant. In other words, the duty devolved upon the appellant to see that a perfect transcript was filed and upon application of the appellant the clerk was to make out, certify and return the transcript as in civil cases. In the case of *State v. Dempsey*, 168 Mo. App. 298, l. c. 300, the court said:

"* * *But in the absence of such transcript we are constrained to ascertain upon whom the duty devolved of filing a perfect transcript. Section 5308, Revised Statutes 1909, imposes such duty on the clerk of the circuit court in criminal causes where the appeal operates as a stay of proceedings. Section 5309 puts the duty on the appellant where the appeal does not operate

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as a stay of proceedings and provides that on the application of the appellant, the clerk of the circuit court shall make out, certify and return the transcript 'as in civil cases except that the costs of the transcript shall not be required in advance.'

It is our view that Rule 28.08, in this regard, is consistent with the already noted statutory provisions, and that since Rule 28.08 does not make reference to the costs of the transcript on appeal, Section 547.120 is controlling and such costs would not be required in advance.

CONCLUSION

Therefore, it is the opinion of this office that when an appeal is taken from a criminal conviction it is the mandatory duty of the clerk of the court in which the proceedings were had to make out a full transcript of the record and certify the same to the office of the clerk of the proper appellate court, and for the performance of this duty the law imposes upon no one the obligation of advancing costs.

We are further of the opinion that it is the duty of the reporter to furnish the clerk a transcript of his notes taken in the cause, likewise without the costs being advanced.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON
Attorney General