

- CRIMINAL COSTS: 1. Fees of witnesses for a defendant who has taken an appeal as a poor person are not paid by the state or county.
2. Fees of rebuttal witnesses used by the state, whose names have not been endorsed upon the information, are taxable against the state where the prosecuting attorney in writing orders subpoenas to be issued to them and when the prosecuting attorney shall file an affidavit that witnesses ordered by him are necessary to a complete adjudication of the case.



June 13, 1956

Honorable Alden S. Lance
Prosecuting Attorney
Andrew County
Savannah, Missouri

Dear Sir:

Your recent request for an official opinion reads:

"I should like very much to have an opinion from your office concerning the question of witness fees to be taxed as costs against the State of Missouri in a criminal case. The facts are as follows: A man has been charged with the felony of burglary and larceny and has been tried by a jury and found guilty and sentenced to ten years in the State Penitentiary. The defendant then files an Affidavit, alleging that he is without funds to pay his costs and expenses of Appealing his case to the Supreme Court and the Circuit Judge allows the defendant to prosecute his Appeal as a poor person. The Supreme Court then upholds the judgment and conviction of the Circuit Court.

"My question is this. Does the fact that the defendant has taken his Appeal as a poor person mean that the Circuit Clerk must certify the fees of defendant's witnesses as part of the costs to be paid by the State? It is my belief that only the fees of the witnesses who have been endorsed by the State may be taxed as costs against the State in a case where the defendant has been convicted and sentenced to the Penitentiary. In my fact situation defendant's witnesses are, of course, persons whose names were not endorsed upon the Information.

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"Would the fees of rebuttal witnesses used by the State, whose names had not been endorsed upon the Information, be taxable as costs against the State where the facts are as indicated above? "

In regard to your first question, whether or not the fact that a defendant has taken an appeal as a poor person means that the circuit clerk must certify the fees of defendant's witnesses as a part of the costs to be paid by the State is, we believe, answered in the negative by an opinion rendered by this department on June 2, 1943, to William E. Shirley, Prosecuting Attorney of Adair County. A copy of this opinion is enclosed.

Your second question is whether the fees of rebuttal witnesses used by the State, the names of whom have not been endorsed upon the information, would be taxable as costs against the State. Sections 550.150 and 545.320, RSMo 1949, read:

"The clerk shall attach to each fee bill a certified copy of the names of all witnesses endorsed on the indictment or information and all orders of the prosecuting attorney and affidavits of the prosecutor as provided for in Section 545.320, RSMo 1949 and no costs shall be paid any state witness not therein.

"No subpoena for a witness in any criminal case shall be issued on the part of the state, unless the name of such witness be endorsed on the indictment or information, or the prosecuting attorney shall order the same to be issued, in writing, or the prosecutor shall file an affidavit that other witnesses ordered by him are positively necessary for a complete adjudication of the case; and no subpoena shall issue for any witness unless the defendant is in custody or on bail, or the clerk or magistrate shall have good reason to believe that he will be apprehended. Sub-

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poenas may be issued to different counties at the same time, but all the witnesses ordered at one time, and living in the same county, shall be included in one subpoena."

It will be noted that the above sections set forth three situations in which witness fees will be paid, to wit, when the names are endorsed upon the indictment or information; where the prosecuting attorney orders in writing subpoenas to be issued; and when the prosecuting attorney shall file an affidavit that witnesses ordered by him are necessary to a complete adjudication of the cases. Therefore the costs of rebuttal witnesses used by the state would be paid by the state in the last two situations set forth above although the names of such witnesses were not endorsed upon the indictment or information.

CONCLUSION

It is the conclusion of this department that the fees of witnesses for a defendant who has taken his appeal as a poor person are not paid by the state or county.

It is the further opinion of this department that the fees of rebuttal witnesses used by the state, whose names have not been endorsed upon the information, are taxable against the state where the prosecuting attorney in writing orders subpoenas to be issued to them and when the prosecuting attorney shall file an affidavit that witnesses ordered by him are necessary to a complete adjudication of the case.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours

John M. Dalton
Attorney General

HPW:lc

1 enclosure