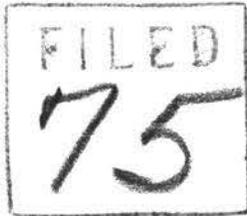


COSTS: County liable for costs of prosecution
CRIMINAL COSTS: for failure to report accident under
CRIMINAL LAW: Safety Responsibility law if defendant
SAFETY RESPONSIBILITY LAW: is tried and acquitted, but no costs
MOTOR VEHICLES: chargeable if prosecution based upon
DIRECTOR OF REVENUE: affidavit of Director of Revenue fails
OFFICERS: from any other cause.



January 21, 1957

Honorable James T. Riley
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Mr. Riley:

This is in response to your request for opinion dated October 26, 1956, which reads as follows:

"Section 483.610, R.S. Mo. 1949, as amended, provides that in each criminal proceeding before a magistrate, a fee of \$5.00 shall be charged as part of the court costs. This fee is then remitted to the Director of Revenue of the State of Missouri in accordance with Section 483.615.

"Section 545.280, R.S. Mo. 1949, provides that the prosecuting witnesses shall be liable for the costs in case the prosecution shall fail from any cause or the defendant be acquitted.

"Section 550.050, provides that the county pay all the costs when the prosecution is commenced by a public officer and the defendant is acquitted.

"The Legislature has placed the 'Safety Responsibility Act' under the supervision and direction of the Director of Revenue. Your office previously ruled that Cole County is the only venue for criminal prosecutions arising under that Act. These prosecutions are instituted upon receipt of an affidavit from the Supervisor of the Safety Responsibility Unit under the direction of the Director of Revenue. We find

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that a number of the defendants can not be found in the State of Missouri, and therefore, the prosecutions must be dismissed.

"In those cases where the prosecution is dismissed or the defendant acquitted, who is liable for the costs? Since the State of Missouri is the complainant and the state does not pay court costs, would these cases be excepted from the provisions of Sections 483.610-615?"

At common law, costs, as such, in a criminal case were unknown. The basis for this is said to be that the King should neither pay nor receive costs; the first being his prerogative and the latter beneath his dignity. *State v. Henley*, 98 Tenn. 665, 41 SW 352, 357, 39 L.R.A. 126. As a consequence, it is the rule, as well in criminal as in civil cases, that the recovery and allowance of costs rest 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. *Cramer v. Smith*, 350 Mo. 736, 168 SW2d 1039, 1040; 20 C.J.S., Costs, Section 435, page 677.

The question of the liability for costs in a prosecution for failure to file a report under the Motor Vehicle Safety Responsibility Act, where the prosecution is dismissed or the defendant acquitted, is governed by Sections 545.050, 545.280 and 550.040 or 550.050, RSMo 1949. The reason we say Sections 550.040 or 550.050, is that Section 550.040 is applicable to felonies and misdemeanors, while Section 550.050 is applicable to prosecutions for the recovery of fines, penalties and forfeitures. For reference convenience, we now quote those sections:

Sec. 550.040. "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."

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Sec. 550.050. "1. Every person who shall institute any prosecution to recover a fine, penalty or forfeiture shall be adjudged to pay all costs if the defendant is acquitted although he may not be entitled to any part of the same.

"2. When such prosecutions are commenced by a public officer whose duty it is to institute the same, and the defendant is acquitted, the county shall pay the costs; if he is convicted, and unable to pay the costs, the county shall pay all the costs, except such as were incurred on the part of the defendant."

Inasmuch as the failure to report an accident is made punishable by a fine not in excess of five hundred dollars by the provisions of Section 303.370, RSMo Cum. Supp. 1955, the determination of whether this constitutes a "fine" within the meaning of Section 550.050 or a misdemeanor so as to fall within the purview of Section 550.040 would be difficult. There is language in State ex rel. Howell County v. West Plains Telephone Co., 232 Mo. 579, 584, 135 SW 20, which would indicate that if the statute makes an offense punishable by fine it constitutes a criminal offense, but if the remedy is a proceeding to recover a fine it is civil in nature. In either event, it may be initiated by information or indictment. Sections 545.010 and 545.020, RSMo 1949. For further cases on this problem, see State v. Huiatt, 31 Mo. App. 302; State v. Flick, 167 Mo. App. 6, 150 SW 1119.

For the purposes of this opinion it is not necessary to determine which of these statutes is governing because under either the ultimate conclusion is the same.

Under both of these sections, absent a conviction, the only instance in which the county is liable for the costs is if the defendant is acquitted. Neither of these sections contains the clause, "in case the prosecution shall fail from any cause," as is found in Section 545.280, RSMo 1949, but fastens the liability for costs on the county only if the defendant is acquitted. Consequently, if the defendant is apprehended, prosecuted for failure to file the accident report required by the Motor Vehicle Safety Responsibility law, tried and acquitted, the county is liable for the costs. However, under the rule of strict construction, if the prosecution fails from any other cause, the county is not liable for the costs.

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If Section 550.050 is applicable, the one commencing the prosecution, i.e., the Director of Revenue, is not liable in any event because he is a public officer whose duty it is to institute the same. Section 305.290, RSMo Cum. Supp. 1955. Consequently, if Section 550.050 governs and the prosecution fails from any cause other than acquittal, no one is liable for the costs.

If Section 550.040 is applicable and the prosecution fails from any cause other than acquittal, it is necessary to examine the other statutes to see whether a prosecutor is liable or it is otherwise provided by law.

Section 545.280, RSMo 1949, reads as follows:

"When the information is based on an affidavit filed with the clerk or delivered to the prosecuting attorney, as provided for in section 545.250, the person who made such affidavit shall be deemed the prosecuting witness, and in all cases in which by law an indictment is required to be endorsed by a prosecutor, the person who makes the affidavit upon which the information is based, or who verifies the information, shall be deemed the prosecutor; and in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecuting witness or prosecutor shall be liable for the costs in the case not otherwise adjudged by the court, but the prosecuting attorney shall not be liable for costs in any case."

It is necessary to read this section in connection with Section 545.050, RSMo 1949, which provides the cases in which an indictment is required to be endorsed by a prosecutor. The latter section provides that:

"1. No indictment for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, and no indictment for the disturbance of the peace of a person, or for libel or slander, shall be preferred unless the name of a prosecutor is endorsed as such thereon, thus: 'A B, prosecutor,' except where the same is preferred upon the

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information and testimony of one or more grand jurors, or of some public officer in the necessary discharge of his duty.

"2. If the defendant be acquitted or the prosecution fails, judgment shall be entered against such prosecutor for the costs."

Section 545.240, RSMo 1949, also makes the terms and restrictions as to endorsement of witnesses in cases of indictments applicable to an information.

Anyone having knowledge of the commission of a crime may make his affidavit and file the same with the clerk of the court or the prosecuting attorney, but he will not be liable for the costs unless he is deemed the prosecuting witness as defined in Section 545.280, supra. If failure to file the report required by Section 303.040, RSMo Cum. Supp. 1955, is made a misdemeanor by Section 303.370, RSMo Cum. Supp. 1955, it is still not one of the classes of cases wherein an indictment is required to be endorsed by a prosecutor. Consequently, under this section, the one making the affidavit upon which the prosecution is based would not be liable for the costs, whether there was an acquittal or the prosecution failed for any other cause, because he is not deemed a prosecuting witness for the purpose of affixing costs. See State v. Huiatt and State v. Flick, supra.

In summation, if the question of costs in a prosecution under Section 303.370(1), RSMo Cum. Supp. 1955, is governed by Section 550.040, supra, the county would be liable for the costs if the defendant is tried and acquitted, because the one making the affidavit is not deemed the prosecuting witness under Section 545.280, supra, for the purpose of affixing costs. If under Section 550.050, supra, and the defendant is tried and acquitted, the county would be liable for the costs because the Director of Revenue is a public officer whose duty it is to institute the prosecution and, consequently, not liable for the costs. Since liability for costs is not presumed, if the prosecution fails from any cause other than acquittal, neither the county nor any person is made liable therefor. Consequently, in that event, no costs are chargeable.

CONCLUSION

It is the opinion of this office that the county is liable for the costs of a prosecution for failure to report a motor vehicle accident commenced under Section 303.370, RSMo Cum. Supp.

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1955, if the defendant is tried and acquitted, but there are no costs chargeable where the prosecution is based upon the affidavit of the Director of Revenue and fails from any cause other than acquittal.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. English.

Yours very truly,

JOHN M. DALTON
Attorney General

JWI:ml