CRIMINAL COSTS:
SUSPENDED SENTENCE:
PROBATION AND PAROLE:
LIMITATIONS OF CLAIMS AGAINST STATE:

(1) Where imposition of sentence is suspended, state is not liable for costs unless and until defendant is thereafter sentenced to penitentiary.
(2) Costs for which state is liable after final judgment include costs incident to revocation of probation granted when imposition of sentence is suspended.
(3) Liability of state accrues upon final judgment and sentence, even if sentence is imposed more than two years after conviction.

Opinion No. 396

December 13, 1962

FILED
396

Honorable Charles D. Trigg
Comptroller and Budget Director
State Capitol Building
Jefferson City, Missouri

Dear Mr. Trigg:

You have requested an opinion of this office as follows:

> "We respectfully request your official opinion in regard to three questions on parole cases where imposition of sentence is suspended.
>
> "Section 550.020 RSMo 1959 requires the state to pay certain costs in some cases. Court Rule 27.07, Section C, allows the court 'to place on probation any defendant eligible for judicial parole under the laws of this state and, to this end may suspend the imposition or execution of sentence of any such person,' Sec. 549.190.
>
> "Our first question is: If a person is convicted of a certain crime punishable solely by imprisonment in the penitentiary and the court suspends the imposition of sentence and places the defendant on probation, is the state liable for the costs?

> "Our second question is: If this defendant has his probation revoked and is sentenced to the penitentiary at the time his probation is terminated, is the state liable for the costs of the original trial (i.e. when the imposition of sentence was suspended), or the costs of the revocation hearing or both or neither? Section 33.120 requires persons having claims against the state to exhibit them within two years after such claims shall accrue, and not thereafter.
>
> "Our third question is: If this defendant is placed on probation and imposition of sentence is suspended then after two years have elapsed the probation is revoked and the defendant is sentenced to the penitentiary, does the state pay any of the costs of the trial or revocation hearing or both or neither?"

Section 550.020 RSMo provides in part that "in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary * * * the state shall pay the costs * * *."

The language of Section 550.020 is plain and unambiguous. There is no liability on the part of the State to pay any costs thereunder unless and until the defendant has actually been sentenced to imprisonment in the penitentiary. The fact that the sole punishment for the offense of which a defendant has been convicted is imprisonment in the penitentiary is immaterial in determining the liability of the State. It is only in those instances in which the defendant has been acquitted that the punishment for the offense charged is of consequence, and that is for the purpose of determining whether the State or the county is to be held liable for the costs. Section 550.040 RSMo. Hence, if the court suspends the imposition of sentence under the authority of Supreme Court Rule 27.07(c) [Section 549.190 RSMo], then the State cannot be liable for the costs unless thereafter sentence in the penitentiary is imposed.

Supreme Court Rule 27.07(c) authorizes the trial court to "place on probation any defendant eligible for judicial

parole under the laws of this state and, to this end, may suspend the imposition or execution of sentence of any such person." Section 549.080 RSMo provides in part that when a person of previously good character who has not been previously convicted of a felony shall be convicted of any felony (except certain designated felonies) "and sentence shall have been pronounced", the court before whom a conviction was had may parole such person. In our opinion, a defendant is eligible for judicial parole and therefore may be placed on probation and the imposition of his sentence suspended if: (1) he is of good character, (2) has not been previously convicted of a felony, and (3) has been convicted of a felony other than those expressly excepted by Section 549.080. The further requirement that "sentence shall have been pronounced" pertains only to the authority of the court to grant such parole and is not a condition of "eligibility" for judicial parole within the meaning of Supreme Court Rule 27.07(c). Any other conclusion would be self-defeating. Obviously, the imposition of sentence cannot be suspended if sentence has already been pronounced, and neither the Supreme Court in Rule 27.07(c) nor the Legislature in Section 549.190 could have intended to require the impossible (pronouncement of sentence) as a condition to suspending the imposition of such sentence.

There can be no question but that under Section 550.020 the State is liable for all of the costs of the original trial once sentence has been pronounced. The specific question posed by your letter involves the costs pertaining to revocation of probation with the imposition of sentence to the penitentiary following. On several occasions, our courts have held that the granting of a parole is no part of the trial of the cause and is not an incident to the conviction. See State ex rel. Browning v. Kelly, 309 Mo. 465, 274 SW 731, and State v. Merk, Mo. App., 281 SW2d 607. The basis of such rulings is that after the judgment and sentence, the case has been finally disposed of, and that the granting of the parole is a matter separate and apart from the case itself.

In State v. Gordon, 344 SW2d 69, 71, our Supreme Court stated:

> "A suspended sentence is 'a suspension of active proceedings in a criminal prosecution. It is not a final judgment * * *.'"

In the situation presented by your letter, the defendant has not been sentenced, and the case therefore has not been concluded

or finally disposed of. There is no "final determination of the cause" and the judgment is not final. Therefore, opinions of this office which hold that the State is not liable for costs incident to the revocation of a parole are not in point for the reason that in the situations there discussed, sentence was pronounced and the judgment was final.

Under the express language of Section 550.020, the State is liable for the costs of every case in which the defendant is convicted and sentenced to the penitentiary. It follows, therefore, that if the defendant is placed on probation prior to the imposition of sentence, and this probation is subsequently revoked, that all costs incident thereto are part of the costs of the case, and that the State is liable therefor. That is, all costs prior to final judgment are costs for which the State is liable within the meaning of Section 550.020.

The liability of the State for costs accrues when sentence is pronounced, so that in the situation presented in your letter, when probation is revoked and the defendant is sentenced to the penitentiary, the two year period for certifying the fee bill for payment would start to run at the time of final judgment and sentence. The mere fact that sentence is imposed more than two years after the defendant is placed on probation and the imposition of sentence suspended would not affect the liability of the State for all the costs in the case, including those of the original trial.

CONCLUSION.

It is the opinion of this office that the State is not liable for costs in a criminal case where the imposition of sentence is suspended and defendant placed on probation unless and until probation is revoked and the defendant has been sentenced to the penitentiary; that the liability of the State for such costs includes costs incident to the revocation of probation as well as the costs of the original trial; and that the fact that sentence is imposed more than two years after sentence was originally suspended does not affect the liability of the State for the payment of costs, so long as the fee bill is certified within two years after the imposition of sentence.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joseph Nessenfeld.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JN:sr