January 16, 1964

FILED
61

Opinion No. 61
Answered by Letter

Honorable Robert B. Paden
Prosecuting Attorney
DeKalb County
Mayaville, Missouri

Dear Mr. Paden:

This will acknowledge your letter dated January 8, 1964, in which you request the opinion or advice of this office concerning the liability of the State of Missouri for certain criminal costs.

We have inquired of the Comptroller with respect to the specific case to which you refer, State of Missouri v. Leo Harper. It appears that in that case the defendant was convicted and sentenced several years prior to the date of Mr. Trigg's form letter of January 10, 1962, so that in any event it could not be said that the circuit clerk of your county was misled by the letter of January 10, 1962.

Mr. Trigg's letters both had reference to the situation where a defendant has been convicted and sentenced and thereafter paroled. It does not pertain to the situation resulting from a suspension of sentence.

As Mr. Trigg pointed out in his letter of January 10, 1962, Section 549.150, RSMo makes it the duty of the court granting the parole to require the payment of the costs or security therefor unless the person paroled is insolvent. Moreover, the same sectionfurther provides that if the defendant at any time prior to final discharge becomes able to pay the costs, it is the duty of the court to require the costs to be paid before granting a discharge. It was for that reason that Mr. Trigg suggested that "whenever possible" the circuit clerk hold the bill of costs until the defendant is discharged or the parole revoked, so that the State

would pay only that portion of the costs which the court had been unable to obtain from the defendant in the discharge of the court's duty to require the costs be paid.

It is true that Mr. Trigg used the term "final disposition of the case", but the letter makes it clear that what he had in mind was not the technical meaning of that phrase at all. In his subsequent letter of July 23, 1962, Mr. Trigg clarified his earlier letter to make clear what he meant by the words "whenever possible". In his letter of July 23, 1962, Mr. Trigg cautioned the circuit clerks that under the provisions of Section 33.120 RSMo, any fee bill received more than two years after the date of judgment and sentence could not be paid by the State.

Reading the two letters together, it was obviously Mr. Trigg's intention to request the clerks that in the event the defendant is convicted and sentenced and thereafter placed on parole, the clerk should withhold sending the fee bill to the State for payment in order to enable the court in the meantime to comply with its duty to require the parolee to pay the costs, but that if the costs have not been paid by the defendant at the end of some reasonable period prior to the expiration of the 2-year period of limitations, the fee bill for any balance of costs then remaining for which the State would be liable should be sent to the Comptroller's office for payment. That is, it would be advisable to withhold sending the fee bill for a period of 18 to 20 months after the date of conviction and sentence, but in no event longer than two years. We believe that the Comptroller's request, as clarified by his letter of July 23, 1962, is a reasonable one, and accords with the law.

In your letter, you expressed the view that the letter of July 23 overruled the previous letter (but, as indicated above, we believe it merely clarified it) and also "apparently overruled the case of Cramer v. Smith, 168 S.W.2d 1039." In our view, the letter of July 23, 1962, is entirely consistent with the Cramer case. The Cramer case simply held that the 2-year statute of limitations with respect to filing claims against the State "does not begin to run against criminal costs taxable against the State until such costs shall have accrued," and that they do not accrue until "final determination of the case." The facts there involved were that the defendant had been convicted of a capital

offense and thereafter appealed. The conviction was reversed and the case remanded for a new trial. In this situation, the Court rightly held that the case had not been finally "determined" within the meaning of the statute making the State liable for costs. It was held that the term "determined" has reference to the termination of the case with finality.

Insofar as the defendant Leo Harper was concerned, the case against him was finally determined long ago. His judgment of conviction, unappealed from, brought the case to an end. 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. This was the holding in State ex rel. Browning v. Kelly, 309 Mo. 465, 274 S.W. 731 and State v. Merk, Mo. App., 281 S.W.2d 607.

In the Kelly case, the Court specifically stated that the granting of a parole has nothing to do with the ascertainment of guilt or innocence and that "an application for parole cannot be entertained until after a judgment of conviction has been rendered * * * and that judgment has become a finality." The Court there pointed out that the judgment of conviction entered upon the plea of guilty of the defendants constituted "a final determination of the cause." The basis of rulings of such nature is that after the judgment and sentence has been entered, the case has been finally disposed of and that the granting of the parole thereafter constitutes a proceeding separate and apart from the case itself. This is true whether or not the parole is thereafter revoked and the sentence executed.

By way of contrast, where the imposition of sentence is suspended and the defendant is placed on probation, the 2-year period of limitations does not commence to run, for the obvious reason that the judgment is not final and there is no "final determination of the cause". Of course, in that situation, the State is not liable for the costs unless and until there is a final determination of the cause. We enclose herewith copy of opinion of this office dated December 13, 1962, to Honorable Charles D. Trigg, Comptroller and Budget Director, which rules the latter situation.

Honorable Robert B. Paden

Legally, the circuit clerk has the right (as you indicated) to bill the State for the accrued costs at the time the defendant is granted a parole and the defendant is then insolvent. However, it would not be necessary to do so at such time in order to avoid the statute of limitations, for the reason that the statute of limitations would not expire for a period of two years after the date of judgment and sentence. Moreover, in view of the mandatory duty placed by the statute upon the court granting the parole to require the payment of costs if the defendant should become able to do so, we do not believe that either the court or the circuit clerks will fail to comply with their duties in effecting collection of costs.

As we see it, the basic misconception of your letter is the belief that the final determination of the case does not result until the parole is revoked and the sentence executed. On the contrary, when a defendant is paroled, the case is finally determined at the time the defendant is convicted and sentenced, inasmuch as parole is permissible only after a final determination of the case.

We trust that the views expressed herein will be of assistance to you.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JN:hm

Enclosure