

CRIMINAL COSTS: A mental examination granted a defendant under
INSANE PERSONS: the provisions of Section 552.030, RSMo. Supp.
CRIMINAL INSANE: 1965, by a physician of his own choosing and
MENTAL ILLNESS: subsequent to the examination of the physician
appointed by the court, is an examination in-
curred on behalf of the defendant and neither
such examination nor subsequent testimony in
the case may be taxed as costs against the State.

OPINION NO. 56 (1966)
Opinion No. 417 (1965)

January 27, 1966

Honorable Claude E. Curtis
Circuit Judge, 19th Judicial District
Lebanon, Missouri



Dear Judge Curtis:

This is in response to your opinion request relative to the taxation of costs of psychiatric examination and testimony under the provisions of Section 552.080, RSMo. Supp. 1965, and the psychiatric evaluation provisions of Section 552.030, RSMo. Supp. 1965, for determination of the question of whether the accused suffered a mental disease or defect excluding criminal responsibility. More specifically, you inquire whether the fee for the examination and testimony of a physician of an indigent defendant's own choosing, may, after conviction in a capital case, be taxed against the State although there has already been a previous examination of the same defendant to determine the same issue by examining doctors, appointed by the court, who found that said defendant was not suffering from any disease or defect as defined in Section 552.010, RSMo. Supp. 1965.

You note in your letter the provisions of Section 550.020, RSMo., which requires the State to pay certain costs if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. This Section states as follows:

"1. In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary and is sentenced to imprisonment in the county jail, workhouse or reform

Honorable Claude E. Curtis, Judge

school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant."

The provisions contained within Chapter 552, relative to examination by physicians, are unique in that they were not contained in the repealed legislation regarding criminal proceedings involving the insane. The analysis of the intent of the legislature appears to be adequately reflected by the article entitled "A Consensus" printed in the December 1963, issue of the Missouri Bar Journal at page 666, and purporting to be a consensus of opinion of some members of the Missouri Division of Mental Diseases and State hospital staff psychiatrists in Missouri. The article states:

"The really tremendous advance is that we have abandoned the adversary system in the presentation of psychiatric testimony, placed the witness in a position of neutrality, have removed any semblance of partisan profit motive for the expert, and in fact have allowed him in his own words, thoughtfully and deliberately to set down without hampering or heckling objection, his best and fullest report to the court regarding the truth of the matter of psychiatric concern. All this, without depriving either side of the necessary right of cross-examination, if thought necessary or desirable."

Even though this language is couched in laymen's terms and might be subject to some practical qualification, nevertheless it appears that the point is well taken that the Act contemplates a complete and impartial examination.

Section 552.030, states in part as follows:

"4. Whenever the defendant has pleaded mental disease or defect excluding responsibility or has given the written notice provided in subsection 2, and such defense has not been accepted as therein provided, the court shall, after notice and upon motion of either the state or the defendant, appoint one or more physicians to examine and report upon the mental condition

Honorable Claude E. Curtis, Judge

of the defendant. No physician shall be appointed unless he has consented to act. Examinations ordered hereunder shall be made at such time and place and under such conditions, including confinement to a hospital or other suitable facility and the interview of witnesses or other physicians, as the court deems proper. Copies of the reports of the examinations made by the physician or physicians appointed by the court shall be delivered to both the state and the defendant. Within five days after receiving a copy of such report, both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a physician of their own choosing. If such examination is requested, a report of the examination made by the examining physician shall be furnished to the court and to the opposing party. * * *

We note that when the defendant relies upon the defense of mental disease or defect excluding responsibility, the court shall, after notice and upon motion of either the State or the defendant, appoint one or more physicians to examine and report upon the mental condition of the defendant. We do not interpret this language to indicate that the appointment of such a physician would be of an adversary nature or comparable to the position of an expert witness normally called upon to testify on behalf of either party to the case. Although the motion may be made by either the State or the defendant it appears that the appointment of the physician is within the control of the court as well as the time, the place and other conditions, including confinement, as the court deems proper. We therefore do not think that the appointment made pursuant to this provision is made either on behalf of the State or of the defendant and if made on the motion of the defendant is not such as to fall within the category of costs incurred on his behalf. To interpret this provision otherwise or as in conflict with Section 550.020 would create an inequity in the administration of justice in that the possibility would arise whereby an indigent defendant may not have the examination facilities available to him inasmuch as no physician shall be appointed unless he consents to act. This result would frustrate the purpose of the legislation and the intent of the legislature.

Honorable Claude E. Curtis, Judge

On the other hand, the question you raise specifically concerns whether the court may tax as costs against the State the examination made by a physician of the defendant's choice after an examination by a physician appointed by the court.

Section 552.030 provides that the accused will be entitled to an order granting him an examination by a physician of his own choice within five days after receipt of the copy of the report by the court-appointed physician.

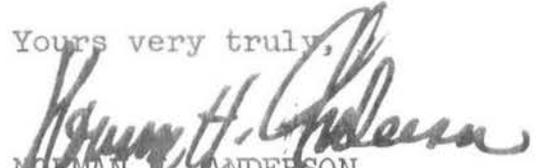
In this instance it is presumed that the initial examination, whether made by the court on the motion of the accused or the State, was sufficiently clear and complete to provide the court and the jury with substantial evidence of the mental condition of the accused. There is no doubt that the court could order further examinations if it was felt to be necessary to clarify or elaborate or make material psychiatric findings not initially determined. The order granting the defendant an examination by a physician of his own choosing after the filing of the report of the initial examination is an order made on his behalf. Therefore, the costs of examination and testimony so incurred are within the prohibition of Section 550.020 and cannot be taxed against the State.

CONCLUSION

It is therefore the opinion of this office that a mental examination granted a defendant under the provisions of Section 552.030, RSMo. Supp. 1965, by a physician of his own choosing and subsequent to the examination of the physician appointed by the court, is an examination incurred on behalf of the defendant and neither such examination nor subsequent testimony in the case may be taxed as costs against the State.

The foregoing opinion which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,


NORMAN L. ANDERSON
Attorney General