

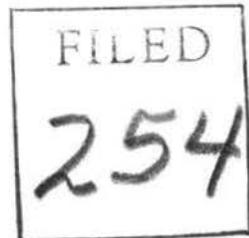
CIRCUIT JUDGES:
COURT REPORTERS:
TRANSCRIPTS:

(1) Under Supreme Court Rule 27.26, effective September 1, 1967, post-conviction transcripts are transcripts in civil cases and when ordered by the court under provisions of Section 485.100 RSMo Supp. 1965, the cost of such transcripts shall be paid for by the county, providing the appeal is duly perfected. (2). Unless the circuit court orders the transcript for an indigent under provisions of Section 485.100 the court reporter must furnish the transcript without fee as an officer of the court.

August 10, 1967

OPINION NO. 254

Honorable Byron L. Kinder
Prosecuting Attorney
Cole County Courthouse
Jefferson City, Missouri



Dear Mr. Kinder:

This opinion responds to your request for a determination of the financial responsibility, if any, of the state or a county to pay the reporter fees based on the costs of the transcriptions of the testimony before circuit courts for purposes of appeal by an indigent from an adverse ruling under Supreme Court Rules 27.25 and 27.26.

Inasmuch as a new rule (Supreme Court Rule 27.26) has been promulgated by the Supreme Court which goes into effect September 1, 1967, we assume your question submitted by your letter is prospective in application after that date. We also assume that the appeal would be duly perfected. See Opinion No. 70, dated September 16, 1953, to the Honorable Richard K. Phelps (which is attached).

Your inquiry, no doubt, has its genesis in the new Rule 27.26 subsection (k) which reads as follows:

"(k) COSTS. If the trial court finds that a prisoner desiring to appeal is an indigent person, it shall authorize an appeal in forma pauperis and furnish without cost the transcript of such proceeding for appellate review. The trial court, when the appeal is taken, shall order the official court reporter to prepare the transcript promptly. If the trial court

Honorable Byron L. Kinder

finds adversely to a prisoner on the issue of indigency, it shall certify and transmit to the appellate court a transcript of the evidence on that issue only so as to permit review of that issue by the appellate court."

You refer to Section 485.100 RSMo 1959. This section was amended in 1965 and is currently cited as Section 485.100 RSMo. Supp. 1965, which we quote here for purposes of clarity and convenience.

"For all transcripts of testimony given or proceedings had in any circuit court, court of common pleas or court of criminal correction, the court reporter shall receive the sum of forty-five cents per twenty-five line page for the original of said transcript, and the sum of fifteen cents per twenty-five line page for each carbon copy thereof; the page to be approximately eight and one-half inches by eleven inches in size, with left-hand margins of approximately one and one-half inches and the right-hand margin of approximately one-half inch; answer to follow question on same line when feasible; such page to be designated as a legal page. Any judge, in his discretion, may order a transcript of all or any part of the evidence or oral proceedings, and the court reporter's fees for making the same shall be paid by the county upon a voucher approved by the court, and taxed against the state or county as may be proper. In criminal cases where an appeal is taken by the defendant, and it appears to the satisfaction of the court that the defendant is unable to pay the costs of the transcript for the purpose of perfecting the appeal, the court shall order the same to be furnished, and the court reporter's fees for making the same shall be paid by the county, upon a voucher approved by the court, and taxed against the state or county as may be proper; and in such case the court reporter shall furnish three transcripts in duplication of the notes of the evidence, for the original of which he shall receive forty-five cents per legal page and for the copies fifteen cents per page."

Honorable Byron L. Kinder

Proceedings under Supreme Court Rule 27.26 have been held to be "civil" proceedings (although quasi-criminal in nature) and are governed by civil rules on appeal. Our Supreme Court in *State v. Gullett*, 411 S.W.2d 227, 228 had this to say:

"[1-5] An order overruling a motion to vacate a sentence and judgment, filed under Criminal Rule 27.26, is deemed a final judgment for the purpose of appeal. Criminal Rule 27.26; *State v. Warren*, Mo. Sup., 344 S.W.2d 85 [3]. The rules applicable to appeals in civil proceedings govern, since a proceeding under Criminal Rule 27.26 is regarded as a civil proceeding. *State v. Floyd*, Mo. Sup., 403 S.W.2d 613. Civil Rule 82.04, governing the time and manner in which appeals shall be taken, provides that no appeal shall be effective unless the notice of appeal shall be filed not later than 10 days after the order appealed from becomes final."

Section 514.040 RSMo 1959 (which is referred to in the case of *State ex rel v. Hitchcock* (infra) provides:

"If any court shall, before or after the commencement of any suit pending before it, be satisfied that the plaintiff is a poor person, and unable to prosecute his or her suit, and pay the costs and expenses thereof, such court may, in its discretion, permit him or her to commence and prosecute his or her action as a poor person, and thereupon such poor person shall have all necessary process and proceedings as in other cases, without fees, tax or charge; and the court may assign to such person counsel, who, as well as all other officers of the court, shall perform their duties in such suit without fee or reward; but if judgment is entered for the plaintiff, costs shall be recovered, which shall be collected for the use of the officers of the court."

In a case in point, the St. Louis Court of Appeals in *State ex rel LaRue v. Hitchcock*, 171 Mo. App. 109, 122, in interpreting Section 2261, RSMo 1909 (now Section 514.040, RSMo 1959) held that court reporters must furnish transcripts on appeal in civil cases for poor persons without payment of any fee or charge by such poor persons.

Honorable Byron L. Kinder

The court said l.c. 122:

"* * * * This is a venerable as well as humane provision of our law. Before the organization of our State government, while we were the Louisiana Territory, the Territorial Legislature by an Act of November 7, 1808, recognized the right of a person to sue as a poor person. [See 1 Territorial Laws Missouri (Ed. 1842) chap. 68, p.223]. One of the first laws passed after the admission of the State and the organization of the State government was an act approved January 11, 1822. [see 1 Territorial Laws Missouri, supra, p. 841]. The fourth section of this act is almost word for word what is now section 2261 of the revision of 1909. It appeared practically in that form in the revision of 1825 (see vol. 1, R.S. 1825, sec. 2, p. 226), and with slight amendments in the several revisions as it finally appears as section 2261, Revised Statutes 1909. This section of the statutes finds firm support, in fact is merely carrying out the provisions of our Bill of Rights (section 10, article 2, of the Constitution), which ordains that 'the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay.' That principle is older than any of our Constitutions, older even than Magna Charta. That but compelled the King to give formal recognition of a right that had always been claimed by those of the Anglo-Saxon race."

The court said l.c. 123:

"The court stenographer, as we have seen, is an officer of the court. That he is as completely included in section 2261 as is any other officer, is clear. Nothing in that section exempts him in terms. Discussing the status of court stenographers under the provisions of what was section 8256, Revised Statutes 1889, now section 11263, R. S. 1909, Judge Gantt, in State ex rel. v. Wofford, before referred to, says, at page 73, after holding that the court stenographer is an officer of the court, that 'he is not better than the other officers of the court. By section 4293 (now 2712, R.S. 1909), it is provided that "when any appeal shall be taken or

Honorable Byron L. Kinder

writ of error filed, which shall operate as a stay of proceedings, it shall be the duty of the clerk of the court in which the proceedings were had to make out a full transcript of the record in the cause, including the bill of exceptions, judgment and sentence, and certify and return the same to the office of the clerk of the Supreme Court without delay." This of course applies when a cause is taken upon a full transcript. Referring to State ex rel. Miller v. Daily, 45 Mo. 153, and to State v. Armstrong, 46 Mo. 588, the latter overruled in State v. Davidson, 73 Mo. 428, but not on this point, as holding that statute was imperative and personal to the clerk for the performance of the duty imposed upon him by law, Judge Gantt says (l.c. 74): 'Certainly it will be no greater burden on the stenographer to perform his duty than on the clerk, and the clerk cannot perform his duty until the stenographer transcribes the portion of the record that is in the notes. Attorneys are appointed to defend poor persons and give their services. Witnesses and jurors give their time and services for mere nominal fees often at great loss and inconvenience to themselves. The clerk of this court in the course of a year files a large number of transcripts for which he receives no docket fee.' The same may be said with reference to the clerk of our court, it being specifically provided by section 10697, Revised Statutes, 1909, that no docket or other fee shall be required in our court of persons permitted to sue as poor persons. It is also to be said that the court stenographer, being an officer of the court, is in the public service. He is paid for his time and his services in general out of public funds. It is further said by Judge Gantt in the above case (l.c. 73) that the legislation regarding court stenographers being in keeping with the spirit and humanity of the enlightened age in which we live and in harmony with the Constitution, emphasizes the rule of law and of the Constitution 'that when a right exists all the means essential and necessary to the enforcement of that right are implied.'"

Honorable Byron L. Kinder

The court said L.C. 126:

"It is impossible, when we consider the long settled policy of our State with reference to opening our courts to those unable to pay, and placing the service of its officers at their disposal without fee or price, to believe that the legislative branch of our government intended to keep from them the services of the most important, in many respects, of all those officers, the court stenographer, when an appeal is to be taken.

"Through all this period of change, from the Act of 1822 before referred to, indeed from the territorial law of 1808, our lawmakers have scrupulously endeavored to provide against the misfortune of poverty and to see to it that poverty was not only not a crime but should not because of that, close the doors of our courts of justice to anyone seeking entrance."

It is clear that court reporter must under the provisions of Section 514.040 prepare a transcript on appeal for an indigent person without receiving any compensation for such preparation.

However, this office has previously held that Section 485.100, RSMo 1949 as amended in 1955 permitted the judge to allow a poor defendant in a civil case a transcript for appeal, the cost of which transcript shall be paid by the county. See Opinion Attorney General, No. 226, dated July 31, 1964, to the Honorable Paul D. Hess, Jr., (which is attached). This office affirmed that position in Opinion 346, dated December 21, 1965, addressed to the Honorable Dan Bollow (opinion attached). The statute (Section 485.100 as amended in 1955) reads as follows:

"For all transcripts of testimony given or proceedings had in any circuit court, court of common pleas and court of criminal correction the court reporter shall receive the sum of forty-five cents per twenty-five line page for the original of said transcript, and the sum of fifteen cents per twenty-five line page for each carbon copy thereof; the page to be approximately eight and one-half inches by eleven inches in size, with left-hand margin of approximately one and one-half inches and the right-hand margin of approximately one-half inch; answer to follow question on same line when feasible; such page to be designated as a legal page. Any judge, in his discretion, may order a transcript of all or any part of the evidence

Honorable Byron L. Kinder

or oral proceedings, and the court reporter's fees for making the same shall be paid by the county, upon a voucher approved by the court, and taxed against the state or county as may be proper. In Criminal cases where an appeal is taken by the defendant, and it appears to the satisfaction of the court that the defendant is unable to pay the costs of the transcript for the purpose of perfecting the appeal, the court shall order the same to be furnished, and the court reporter's fees for making the same shall be paid by the county, upon a voucher approved by the court, and taxed against the state or county as may be proper; and in such case the court reporter shall furnish three transcripts in duplication of the notes of the evidence, for the original of which he shall receive forty-five cents per legal page and for the copy fifteen cents per page."

Comparison of the former Section 485.100 (which is set out immediately above) and the section as amended in 1965 by Senate Bill 135 establishes that the only change is from the word "two" to the word "three" in the last sentence of said section with the result that the reporter must now furnish three transcripts (in criminal cases) under the present law. This is the only change. Accordingly, there is no reason for this office to change its view. Therefore, if a circuit judge orders a transcript in a civil case under Section 485.100 for use by an indigent appellant the cost of such transcript must be paid by the county.

We find no statutory provision for the payment of costs by the state in these proceedings such as the provisions for payment of costs by the state in certain criminal cases provided for in Chapter 550 RSMo. We are enclosing an opinion issued by the Attorney General under date of February 1, 1954 to John P. Peters, holding that in the absence of a statute specifically providing that costs shall be taxed against the state no costs are recoverable from the state.

It is apparent that the General Assembly has taken the view that there is no authorization for taxing costs in these cases against the state. This is shown by the fact that the General Assembly has made no appropriation for payment of costs in these cases.

Honorable Byron L. Kinder

CONCLUSION

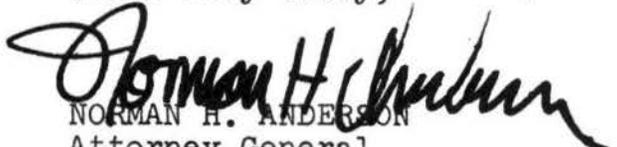
It is the opinion of this office that:

(1). Under Supreme Court Rule 27.26, effective September 1, 1967, post-conviction transcripts are transcripts in civil cases and when ordered by the court under provisions of Section 485.100 RSMo Supp. 1965 the cost of such transcripts shall be paid by the county providing the appeal is duly perfected.

(2). Unless the circuit court orders the transcript for an indigent under provisions of Section 485.100 the court reporter must furnish the transcript without fee as an officer of the court.

The foregoing opinion which I hereby approve was prepared by my assistant, Richard C. Ashby.

Yours very truly,


NORMAN H. ANDERSON
Attorney General

Attachments