CRIMINAL COSTS: Services and attention by a dentist to a prisoner confined in a county jail--later convicted of a felony--are not lawful charges of criminal costs as medical expenditures against the State under Section 221.120 RSMo 1949.

October 20, 1952 10/24/52

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Honorable John E. Downs
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Mr. Downs:

This will be the opinion you requested from this office respecting the right of Buchanan County to be reimbursed in the sum of Nine ($9.00) Dollars for the payment of dental services and attention of a dentist for a prisoner confined in its county jail as an item of criminal costs as a medical expenditure to be paid by the State upon the conviction of said prisoner for a felony because the item in such amount, included in the cost bill required by law, was deducted by an official in the Department of Revenue. Your letter requesting the opinion reads as follows:

> "A situation has come up in our County, and I request an opinion of your department concerning it.
>
> "On October 4, 1951, one Don LeRoy Fanning (then in jail awaiting trial on a charge of First Degree Robbery) was treated by a private dentist at the request of the jailer, and a dental bill of Nine Dollars ($9.00)--Three Dollars of which was for treatment of a tooth, and Six Dollars of which was for its removal, was incurred. On November 6, 1951, the subject entered a plea of guilty as charged, and his punishment was assessed at fifteen years in the penitentiary. This Nine Dollars was included on the cost bill in the case of Don LeRoy Fanning, but a deduction was made by the Criminal Cost Clerk of the Department of Revenue.

Honorable John E. Downs:

> "It seems to me that Section 221.120, of the '49 Statutes, would cover this section, and the County is entitled to be reimbursed for this medical expenditure."

Your letter states that it appears to you that Section 221.120, RSMo 1949, applies, and that Buchanan County is entitled to be reimbursed for such item as and for a "medical expenditure". Said Section 221.120 states:

> "In case any prisoner confined in the jail be sick, and, in the judgment of the jailer, needs a physician or medicine, said jailer shall procure the necessary medicine or medical attention, the costs of which shall be taxed and paid as other costs in criminal cases; or the county court may, in their discretion, employ a physician by the year, to attend said prisoners, and make such reasonable charge for his service and medicine, when required, to be taxed and collected as aforesaid."

The question is whether the services and attention given to such prisoner, as detailed in your letter, were medical services under Section 221.120, and the payment therefor a medical expenditure.

Sub-section (2) of Section 195.010, RSMo 1949, defines "physician" as follows:

> "'Physician' means a person authorized by law to practice medicine in this state and any other person authorized by law to treat sick and injured human beings in this state and to use narcotic drugs in connection with such treatment;"

We do not find the phrase "medical attention" defined by any lexicographer, nor is it defined in our statutes defining and construing words or phrases.

"Words and Phrases" cites a California case defining the phrase in Travelers' Ins. Co. of Hartford, Conn. vs. Byers, 11 Pac. (2d) 444. The case was before the District Court of Appeal, Fourth District, California, on the question of whether

an insured in his application had truthfully or fraudulently answered in his application for insurance the question: Q. "Have you within the past 5 years received medical advice or attention?" A. "No." * * *. The Court on the facts in evidence held there was no fraud in the answer to the question, and, giving meaning to the phrase "medical advice or attention" contained in the question, the Court, l.c. 447, said:

> "The question as to the insured, Byers, having received medical advice or attention in the Stafford application, refers to medical advice or attention for some ailment which would affect the general soundness and healthfulness of his system, * * * ."

The word "medicine" is defined in Webster's New International Dictionary, Second Edition, page 1527, definition 1: "Any substance or preparation used in treating disease."

Reading the recital of facts in the request for this opinion, and reading the terms of Section 221.120, it appears that the prisoner was not "sick"; did not need a "physician" or "medicine"; that no medicine or medical attention was provided by the jailer or given the prisoner, nor did a physician attend him. In fact, none of the things required to exist and be administered to the prisoner by Section 221.120 in order to fix a financial obligation upon the State as costs did exist or were done for him.

The facts recited disclose that the prisoner needed dental treatment of a tooth and the extraction thereof. A dentist was called for the prisoner, treated the tooth, and subsequently extracted the same.

Section 221.120, RSMo 1949, makes no provision for providing treatment or services by a dentist to a prisoner confined in a county jail in need of dental attention. The statute thus, we believe, justifies the application of the rule of construction that express mention of one subject in a statute excludes all subjects not mentioned. 59 C.J. states the rule, page 984, as follows:

> "* * * where a statute enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned; * * * ."

Honorable John E. Downs:

We believe the statute must expressly include the extraction of a tooth and dental attention to a prisoner confined in a county jail in order that the cost thereof may be included lawfully in a cost bill rendering the State liable as and for criminal costs upon the conviction of any such prisoner. The statute does not so provide. The question of the distinction between the professions of medicine and dentistry was before our Supreme Court in the case of State ex rel. Flickinger vs. Fisher, 119 Mo. 344.

The case arose when the relator, a dentist, claimed that he was exempt from jury service under a statute--Section 6062, R.S. Mo. 1889--exempting from jury service a "'person exercising the functions of a * * * practitioner of medicine.'" The relator dentist claimed that because he had a diploma from a dental college and had a certificate from the city register, which certificate recited that relator's name had been entered on the roll of Dental Surgeons in the City Register's office, he was exercising the functions of a practitioner of medicine, and was exempt from jury duty. The Court held that he was not performing or exercising the functions of a practitioner of medicine, and, therefore, was not exempt from doing jury duty under the statute. In so holding the Court, l.c. 352, said:

> "Here, it can not be successfully claimed that relator finds any exemption in the terms of the statute, for certainly he is not a 'practitioner of medicine and surgery in any of their departments,' as defined in section 6871, nor does he exhibit the qualifications required by that section, to wit, a diploma from a legally chartered medical institution in good standing and a certificate from the board of health. * * *."

The Court, in its decision of the case, applied the rule of construction that the expression of one subject excludes other subjects not expressly mentioned in a statute. The case is not a lengthy one, but the discussion by the Court of the decisive principles and statutes relied upon in its decision are in separate paragraphs, and we quote above only the excerpt from the opinion, l.c. 352, which shows that a dentist is not a practitioner of medicine and surgery in any of its departments. We think the case is in point here because, if there was such a definite distinction as there held by the Court between the practice of dentistry and the practice of medicine, on the question of exemption from jury duty, the distinction becomes clearly applicable when related as here

to the question of paying out public money for the performance of dental services for a prisoner confined in jail under a statute fixing only medical services, medicines and the attention of a physician as the basis for including the costs thereof in a criminal cost bill.

If, therefore, the cost of treatment of a diseased tooth and the later extraction thereof by a dentist are not expressly authorized by the statute as are medicines and a physician's services for a prisoner confined in jail--and we hold they are not so authorized by any statute, including said Section 221.120--so that such charges may be included in a criminal cost bill as costs, and therefore are, as items of costs, unlawful, we believe the official who struck the item from the cost bill, was within the proper performance of his official duties in so doing. The official was no doubt familiar with the express terms of Section 221.120, RSMo 1949, providing for such costs to be taxed against the State only where the prisoner may be sick and needs the attention of a physician and medicines, or his attention may have been directed to Section 33.200, RSMo 1949, which, with a heavy penalty, prohibits the Comptroller from certifying claims for payment by the State Auditor not authorized by law. Said section reads as follows:

> "If the comptroller shall knowingly certify any claims or accounts for payment by the auditor, not authorized by law, he shall, upon conviction thereof, be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary for not less than two years nor more than five years."

Another case somewhat in point is City of Cherokee vs. Perkins, 118 Ia. 405, 92 N.W. 68. In that case there was an Iowa statute which gave the power to cities and towns to license and tax itinerant doctors, physicians and surgeons. The City of Cherokee enacted an ordinance making it unlawful for any itinerant physician, surgeon or doctor of dental surgery to practice within the city without first obtaining a license. A dentist had undertaken to practice dentistry in said city without obtaining such a license and prosecution was instituted against him under the city ordinance. The question which the Supreme Court of Iowa was considering in deciding the case was whether or not the State law authorized cities and towns, and particularly the City of Cherokee, to license and impose a tax

on itinerant dental surgeons. In ruling on the question the Court, at N.W. l.c. 69, said:

> "* * * By section 700 of the Code the power is given cities and towns to regulate, license, and tax 'itinerant doctors, itinerant physicians and surgeons,' etc. The only question for our determination is whether a practitioner of dental surgery comes within the definition of itinerant doctor or itinerant physicians and surgeons. It has been held that the terms 'dentist' and 'surgeon' are not interchangeable. People v. DeFrance (Mich.) 62 N.W. 709, 28 L.R.A. 139; State v. Fisher (Mo.) 24 S.W. 167, 22 L.R.A. 799. Certain it is that the professions are largely separate and distinct from each other. The practice of each is regulated by different chapters of the Code, and the legal rights, duties, and responsibilities of each are dissimilar in very many respects. If, therefore, the power to license and tax, given to municipalities by statute, is to be confined to 'physicians and surgeons,' then we note that the language cannot be extended to include 'dental surgeons.' * * * The majority of the court, * * * hold to the opinion that the provisions of the statute cannot be extended so as to include dental surgeons; that, if the legislature had intended to make them subject to the statutory provisions, it would have so said in terms; that the expression 'itinerant doctor,' as found in the statute, is to be classed with the succeeding expression, 'itinerant physician and surgeon'; and that both relate to those persons who in some form, or following some school practice either medicine or surgery, or both."

Considering the facts in the case and the statutes and authorities cited and quoted herein, we believe the official in the Department of Revenue was right in striking the Nine ($9.00) Dollars item discussed, from the cost bill, because the same was not authorized by law.

Honorable John E. Downs:

CONCLUSION.

It is, therefore, the opinion of this Department that under the facts herein, and under the authorities cited, quoted and discussed, Buchanan County is not entitled to be reimbursed for the dental services provided for the named prisoner confined in the jail of that county as an item of criminal costs under said Section 221.120 or any other statute of this State as a medical expenditure.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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