CRIMINAL COSTS: On plea of guilty to a felony and parole after sentence State is liable for costs.

June 2, 1942

FILE 27

Hon. Sam T. Evans
Prosecuting Attorney
Daviess County
Gallatin, Missouri

Dear Sir:

We are in receipt of your letter of May 28, 1942, in which you request an official opinion as follows:

> "I should like to have your opinion on the following matter:
>
> "Where accused pleads guilty to burglary and grand larceny and is given a suspended sentence as provided by law is the State liable to pay fee bill, which includes State's witnesses and sheriff's mileage?
>
> "Thanking you for this favor, I am."

Section 9156 R. S. Missouri, 1939, reads as follows:

> "The circuit and criminal courts of this State, the court of criminal correction of the City of St. Louis, and boards of parole created to serve any such court or courts, may place on probation any defendant eligible for judicial parole under Sections

> 4199 to 4211, inclusive, of Article 18, Chapter 30, Revised Statutes of Missouri, 1939. After a conviction, or a plea of guilty, the courts and boards of parole named in this Section may suspend the imposition or execution of sentence of any person legally eligible for judicial parole under said Sections 4199 to 4211, inclusive, and may also place the defendant on probation."

This section was enacted, and first appears in the Laws of Missouri, 1939, page 400.

The cost statutes applicable to your request are Sections 4221 and 4222, R. S. Missouri, 1939. Section 4221, supra, reads as follows:

> "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 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. And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge

> of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed two dollars per day for each juryman and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."

Section 4222, supra, reads as follows:

> "When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

Under Section 4221, supra, upon the conviction, or plea of guilty, the State is liable for the costs, and, under Section 4222, supra, upon conviction or plea of guilty the county is liable for the costs. Section 4221, supra, specifically states:

> " * * * shall be sentenced to imprisonment in the penitentiary, * * * * * ."

Section 4222, supra, specifically states:

> "* * * sentenced to imprisonment in the county jail, or to pay a fine, or both, * * * * * ."

Unless the defendant is sentenced neither the State nor the county is liable for costs until sentence is pronounced. It was so held in State of Missouri, ex rel., v. Carpenter, et al, 51 Mo. 555, l. c. 556, where the court said:

> "The statute in relation to criminal costs, provides, that they shall be paid by the State in all capital cases in which the defendant shall be convicted, and shall be unable to pay them; and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and shall be unable to pay them. And the county in which the indictment is found, shall pay the costs in all cases where the defendant is sentenced to imprisonment in the county jail, and to pay a fine, or either of these modes of punishment, and is unable to pay them. (1 W. S., pp. 348-9, secs. 1, 2.)
>
> "Before the State can be made liable to pay costs in a criminal prosecution, it is necessary that the defendant should be convicted of a capital offense, or that he should be sentenced to imprisonment in the penitentiary. Neither of these occurrences took place in this case. It is true the jury brought in a verdict in favor of punishing him by imprisonment in the penetentiary, but the court passed no sentence thereon; on the contrary, it set the same aside. There was then nothing final, either as to conviction or sentence.
>
> "The operation and effect was the same as if there had been a mis-trial, and no liabilities or rights were determined thereby.

> "But when the case was ultimately and finally disposed of, the result was a conviction and sentence to pay a fine, and be imprisoned in the county jail. This was the sentence that established the character of the offense, and made the costs a charge against the county.
>
> "Although the indictment was for a capital crime, and under it the prisoner might also have been convicted of a felony, punishable by imprisonment in the penitentiary, yet it is also true, that it was competent to find him guilty of a less degree or grade of crime, by which the punishment would be reduced to imprisonment in the county jail, or by such imprisonment coupled with a fine. It is the conviction and sentence in such case which establishes the grade of the offense, for the purpose of fixing the liability for costs, and not the allegations contained in the indictment. This is the only question we are called upon to review."

Although the opinion in the above case was handed down in the February Term, 1873, it is the last and latest opinion on this subject.

A judgment, that is a verdict or plea of guilty, is not final until sentence is pronounced. It was so held in the case of Ex parte Hartley, 49 S. W. (2d) 119, l. c. 120, where the court said:

> "* * * In State v. Watson, 95 Mo. 411, 414, 415, 8 S. W. 383, and in State v. Schierhoff, 103 Mo. 47, 50, 15 S. W. 151, we have definitely ruled otherwise, on the theory that there is no

> final disposition of a cause until there is a final judgment, and a court does not lose jurisdiction of a case until final judgment is entered, though such be not done until a subsequent term. This is generally recognized in criminal cases. Where on appeal it appears that the defendant was convicted but not sentenced, the appeal is treated as premature, and the cause remanded to the trial court, with directions to pronounce sentence and enter up judgment against the defendant on the verdict of the jury returned in the cause, though the conviction was had at a previous term. State v. George, 207 Mo. 16, 105 S. W. 598."

Also in the case of State v. Seats, 21 S. W. (2d) 758, the court held that:

> "* * * No sentence was pronounced nor any judgment entered by the court. The appeal was premature. No judgment having been rendered, there was nothing from which to appeal. * * * * "

Of course, if sentence is pronounced and execution is suspended, as set out in Section 9156, supra, either the State or county would be liable for the costs in accordance with Section 4221 and 4222, supra. The suspension of execution is not a part of the case proper so as to effect the sentence. It was so held in the case of Lee v. Gilvan, 229 S. W. 1045, where the court said:

> "By section 12543, R. S., the Governor is authorized to grant commutations, paroles, and pardons. Certain it is that while the petitioner was at large under a parole granted as an act of executive clemency, he was still under sentence within the meaning of section 2292, and, having been charged, tried, and convicted of another offense while so at large, 'the sentence of such convict shall not commence to run until the expiration of the sentence under which he is held.' In other words, the sentences are cumulative."

Section 9156, supra, has not been passed upon by the Appellate Courts of this State, but the Supreme Court of the State of Kentucky in distinguishing between the "suspension of sentence" and "suspension of execution" held the courts have an inherent power for many reasons to suspend the sentence, and, for some reasons, to suspend execution of judgment. "Suspension of sentence" contemplates postponement of the rendition of judgment, while "suspension of judgment", or "suspension of execution of judgment" withholds the time of performance by defendant of an already rendered judgment. (Higgins v. Caldwell, 3 S. W. 1101, 1102, 223 Ky. 468.)

The court can withhold sentence of the term in which the defendant plead guilty or was convicted by jury. It was so held in the case of State v. Turpin, 61 S. W. (2d) 945, l. c. 948, where the court said:

> "* * * True enough it is the general rule that a court is powerless to modify, amend, or revise judgment and sentence after the lapse of the term at which the same were pronounced. 16 C. J. sec. 3099, p. 1315. But this is on the theory that with respect to such final orders the court's juris-

> diction is exhausted with the expiration of the term. In the instant case, however, by the entry made at the August term, the court expressly continued the cause, thereby retaining jurisdiction of it. As is said in Aetna Insurance Co. v. Hyde, 327 Mo. 115, 118, 34 S. W. (2d) 85, 87: '"So far as the correction or amendment of the judgment or decree itself is concerned, at least in matters of substance, the power ceases with the end of the term, unless otherwise provided by statute." * * * Of course, this general rule is subject to the well-recognized qualification that, if a court has retained and continued its jurisdiction in a particular cause by a reservation or other act, through a motion or other proceeding during the term, its power and control over its final judgment or decree survive(s) the end of the term at which it was rendered or granted.'"

CONCLUSION

In view of the above authorities, it is the opinion of this department that where a defendant pleads guilty to burglary and grand larceny, and is given a suspended sentence, neither the State nor the county is liable for the fee bill.

It is further the opinion of this department that where the defendant pleads guilty to burglary and larceny and is sentenced to the penitentiary, and is then paroled

the State is liable for the costs which includes State's witnesses and sheriff's mileage.

Respectfully submitted

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APPROVED:

ROY McKITTRICK
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WJB:RW