

COSTS: CRIMINAL CASES: Prosecuting Witness liable in certain cases for costs on acquittal of defendants. Court must make order taxing same against prosecutor.

June 7th, 1939.

Hon. Arkley Frieze,  
Prosecuting Attorney,  
Dade County,  
Greenfield, Missouri.

Dear Sir:

We have your request for an opinion, which in part is as follows:

"The Prosecuting Attorney (my predecessor) filed an information against a defendant, charging him with disturbing the peace, the information was based upon an affidavit made by the complainant. After three trials of this case the State through the Prosecuting Attorney entered a Nolle. No judgment was rendered against the complaining witness for the costs.

"My questions are as follows:  
Is the complaining witness liable for these costs under the above conditions without a judgment having been rendered against him? If he is not liable, for what part, if any is the county liable? If he, the complaining witness, is liable, what is the most advisable method to employ for the collection of the same?"



In the case outlined by you, the answer to your first question is that the complaining witness is not liable for the costs in the absence of a judgment against him. In the case of State v. Leidy, 115 Mo. App. page 62, the court held that an execution could not issue for costs unless there had been a judgment for costs rendered.

As to your second question, Section 3828 R. S. Mo., 1929, reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found of information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

You will see, therefore, that the county is liable for costs in all cases in which the defendant may be discharged, except when the prosecutor shall be adjudged to pay them, or it shall be otherwise provided by law.

As to your third question, Sections 3444, 3510 and 3833 R. S. Mo., 1929, provide for the liability of the prosecuting witness for costs in the event the prosecution fails. Also the case of State v. Jablousky 169 Mo. App. page 238, construes this provision as making it the duty of the court to tax the costs against the prosecuting witness. The case of State v. Hobbs, 279 S. W. page 200, provides that a Justice of the Peace cannot make a nunc pro tunc entry. If, therefore, the matter which you set out was before a Justice of the Peace, he cannot now enter a judgment for costs against the prosecuting witness.

Hon. Arkley Frieze

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If the matter was in the Circuit Court, it appears that the proper procedure would be to file a motion to tax costs, serving the prosecuting witness with a notice that same is to be filed. The case of Cairo Brewing Co. v. Hogg, 125 S. W. page 831, states that a motion to tax costs may be filed after the term at which the case was disposed of.

Respectfully submitted,

ROBERT L. HYDER,  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
(Acting) Attorney General

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