

COSTS.

PRELIMINARY HEARING - Neither state nor county liable for costs of preliminary hearing when defendant is discharged.

January 12, 1934.

Hon. T. J. Harper
Prosecuting Attorney
Stone County
Galena, Missouri



Dear Sir:

We have your request for an opinion as to whether the State of Missouri or Stone County is liable for the costs of a preliminary hearing of one Clayton charged with murder upon complaint made by the prosecuting attorney of Stone County, and who was discharged at the preliminary hearing.

In this case we call your attention to Section 3828 R. S. Mo. 1929, which provides that the state shall pay the costs in all criminal cases where the defendant is acquitted "in which imprisonment in the penitentiary is the sole punishment for the offense", and the county shall pay the costs in all other cases of acquittal. This section of the statute specifically deals with the trial of cases on indictments or informations, and is silent as to the disposition of costs of a preliminary hearing. This statute is to be strictly construed. State ex rel. v. Wilder, 197 Mo. 27 (1906).

It appears that the only section specifically dealing with the costs of a preliminary hearing wherein the defendant is discharged is Section 5832 R. S. Mo. 1929, which reads as follows:

"If a person, charged with a felony, shall be discharged by the officer taking his examination, the costs shall be paid by the prosecutor or person on whose oath the prosecution was instituted, and the officer taking such examination shall enter judgment against such person for the same,

and issue execution therefor immediately; and in no such case shall the state or county pay the costs."

From the above statute it might be made to appear that since the complaint was filed with the prosecuting attorney in his official capacity, that he is the "prosecutor, or person on whose oath the prosecution was instituted" within the meaning of the above statute and therefore would be personally liable for such costs. However, in this connection we call your attention to Section 3444 R. S. No. 1929 and Section 3510 R. S. No. 1929, which are as follows:

Section 3444:

"When the proceedings are prosecuted before any justice of the peace, at the instance of the injured party, for the disturbance of the peace of a person, or for libel or slander, or for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, the name of such injured party shall be entered by the justice on his docket as a prosecutor; and if the defendant shall be discharged or acquitted, such prosecutor shall be adjudged to pay the costs not otherwise adjudged; and in every other case of acquittal, if the justice or jury trying the case shall state in the finding that the prosecution was malicious or without probable cause, the justice shall enter judgment for costs against the prosecution or party at whose instance the information was filed, and shall issue execution therefor, but in no case shall the prosecuting attorney

be liable for costs. In other cases of discharge or acquittal the costs shall be paid by the county, except when the prosecution is commenced by complaint and the prosecuting attorney declines to file information thereon, in which case the proceedings shall be dismissed at the cost of the party filing the complaint."

Section 3510:

"When the information is based on an affidavit filed with the clerk or delivered to the prosecuting attorney, as provided for in section 3505, the person who made such affidavit shall be deemed the prosecuting witness, and in all cases in which by law an indictment is required to be indorsed by a prosecutor, the person who makes the affidavit upon which the information is based, or who verifies the information, shall be deemed the prosecutor; and in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecuting witness or prosecutor shall be liable for the costs in the case not otherwise adjudged by the court, but the prosecuting attorney shall not be liable for costs in any case."

The general rule as to the necessity for specific authority to tax costs is found in the quotations from the two following cases:

State ex rel. Wilder, 197 Mo. 27, l.c. 32 (1906):

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"For many years this court, in obedience to strict statutory provisions, has sedulously maintained that no costs can be taxed except such as the law in terms allows."

City of Greenville v. Farmer, 195 Mo. App. 209, 1. c. 211 (1917):

"It is the well settled law of this State and the country at large that the right to tax costs is purely made by statute; no such right existed at common law; and unless there is a statute authorizing the taxing of costs against the plaintiff, the order of the circuit court is erroneous."

It is, therefore, the opinion of this office that neither the state nor county is liable for the costs of the above preliminary hearing wherein the defendant was released.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

ROY McKIFFRICK
Attorney General