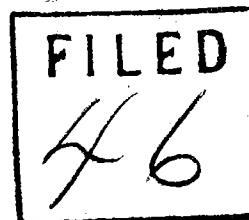


CRIMINAL PROCEEDINGS: Official court reporter not required to report preliminary hearings. Fee for such work should be 15¢ for 100 words.

September 27, 1945



10-2

Honorable Roy A. Jones
Prosecuting Attorney
Warrensburg, Missouri

Dear Sir:

Under date of September 17, 1945, you wrote the Attorney General making the following request for an opinion:

"In Re: Sec. 3870 R. S. Mo., 1939.

"The above Section provides that evidence in all cases of homicide shall be reduced to writing and signed by the witnesses respectively in connection with the preliminary examination. The statute does not state who will act as reporter, the amount of compensation to be paid, and who will pay the cost of same. In some counties of this state the official court reporter has been submitting his bill directly to the County Court for payment. Will you please advise me as follows:

"1. Is the official court reporter required to act in such cases as part of his official duties?

"In case he is not required to act, in some counties, it would be extremely difficult to get the work done at all. For example, in Johnson County there is not a reporter available who is competent to take the testimony in a murder case.

"2. Is there any limitation on the amount of pay and expenses?"

"3. Must the bill for such services be made a part of the transcript of costs in the case or can this bill be paid by the County Court?"

The section of the statute referred to in your letter is Section 3870, R. S. Mo. 1939, which is as follows:

"In all cases of homicide, but in no other, the evidence given by the several witnesses shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses respectively."

In connection with this section it is desired to call your attention to Section 3879, R. S. Mo. 1939, and the Supreme Court, in speaking of these two sections, in the case of State v. Banton, 342 Mo. 45, 111 S. W. (2d) 516, said the purpose of these sections was to secure a fair preliminary examination and the preservation of the testimony.

The official stenographer or reporter for the Circuit Court of the circuit is appointed under the provision of Section 13339, R. S. Mo. 1939, and the duties of this office are prescribed by Section 13340, R. S. Mo. 1939, which is as follows:

"It shall be the duty of the official court reporter so appointed to attend the sessions of the court, under the direction of the judge thereof; to take full stenographic notes of the oral evidence offered in every cause tried in said court, together with all objections to the admissibility of testimony, the rulings of the court thereon, and all exceptions taken to such rulings; to preserve all official notes taken in said court for future use or reference, and to furnish to any person or persons a transcript of all or any part of said evidence or oral proceedings upon the payment to him of the fee hereinafter provided."

You will note that there is no duty placed upon the reporter of the circuit court to take the evidence at the preliminary hearing in a homicide case. The statute requires the testimony to be taken by the magistrate or under his direction.

Section 3870, supra, does prescribe a fee which may be charged for the taking of the testimony in preliminary hearings where the defendant is charged with homicide. However, in Section 13400, R. S. Mo. 1939, which fixes the fees that may be charged by justices of the peace, is the following: "For writing depositions, when required to do so, for every 100 words15" Writing testimony in preliminary hearings is the same type of work as taking depositions. Further, by Section 13344, R. S. Mo. 1939, the fees of a stenographer or reporter for the circuit court are fixed at fifteen cents for one hundred words, each four figures to be counted as one word, for making transcripts of the testimony.

As the lawmakers have not definitely fixed the fee for taking testimony at preliminary hearings, it would seem reasonable that fifteen cents per hundred words, which has been fixed in two other statutes for this type of work, would be proper.

In regard to the matter of the liability for the fee of the person writing the evidence in the preliminary hearing in a homicide case, the liability for costs in criminal cases is fixed by statute. Sections 4221, 4222, 4223 and 4224, R. S. Mo. 1939. The party liable for the costs is determined by the result of the case, except in cases of conviction of an insolvent defendant, in which the costs, except those incurred by the defendant, are paid by the State or county according to whether the conviction was for a felony or a misdemeanor.

At this point it is considered pertinent to call attention to the recent case of Cramor v. Smith, Auditor, 168 S. W. (2d) 1039. This case involved an attempt to collect from the State the fees of the court reporter for making a transcript of the evidence in a criminal case to be used on an appeal by the insolvent defendant in accordance with the provisions of Section 13344, R. S. Mo. 1939, before the case had been finally determined. The court in ruling that the fee for this service could not be collected until a final determination of the case, spoke as follows at l. c. 1041:

"Referring to Section 4236, supra, it will be seen that it is the duty of the clerk to tax the costs and issue fee bills in criminal cases when the same 'shall have been determined or continued generally.' The verb determine 'has been variously defined, the three principal senses being to ascertain, to bound, and to terminate.' 26 C. J. S., Determine, pp. 1257, 1258. 'To put or set an end to; to bring to a close; to terminate.' (Webster's International Dict.) In Hanchett Bond Co. v. Glone, 208 Mo. App. 169, 232 S. W. 159, 160, it was said, 'The term "determination" may "properly, and according to legal use as well as according to its derivation, signify the coming to an end in any way whatever * * * more specifically the final result of a proceeding.'" 18 C.J. 983' (Italics, the present writer's.) We hold the term 'determined' was used in Section 4236, in the sense of terminated, or brought to an end, finished (26 C. J. S., Determine, p. 1259)--and this not merely insofar as the trial court might have been presently concerned, but as implying a finality. As thus construed, this provision harmonizes with the scheme of the statute for the certification, allowance and payment of criminal costs through the medium of a 'complete' fee bill. Only items omitted by oversight or mistake of the clerk may be certified in a supplemental bill, for which supplemental bill the clerk is expressly denied compensation. Section 4244, R. S. 1939, Mo. R.S.A. Sec. 4244. The criminal costs statutes hereinabove set out do not contemplate that the costs in a particular case shall be paid in part by the county, and in part by the state. * * *"

The item you inquire about is similar to the item under discussion by the court in the Cramer case, supra. It is

an item of costs, the liability for which will be determined by the outcome of the case under the statutes applying to the payment of costs in criminal cases.

The fees of a stenographer for writing evidence before a justice of the peace in a preliminary hearing on a charge of homicide, could not by any stretch of the imagination be considered an obligation of the county, unless, upon final determination, the costs should be adjudged against the county. This item is solely a matter of costs in the case.

Conclusion

- (1) It is not the duty of the official stenographer or reporter of the circuit court to write the evidence presented to a justice of the peace in the preliminary hearing upon a charge of homicide. If the reporter wishes to accept such employment there is no law which would prevent him from doing so.
- (2) The fee should be fifteen cents per one hundred words.
- (3) The bill for such service is an item of the costs of the case and should not be paid by the county prior to the determination of the case.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WOJ:EG