

CRIMINAL LAW-- : In criminal prosecutions instituted
: by Prosecuting Attorney, county is
COSTS. : liable for costs even though Prose-
: cuting Attorney does not file
: Information thereon.

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10/14
October 1, 1943



Honorable A. Moody Mansur
Assistant Prosecuting Attorney
Richmond, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following statement and request:

"The Circuit Clerk has requested an opinion from me in regard to payment of costs in criminal cases, where the Prosecuting Attorney files a complaint on his own information in a felony case and the defendant had a preliminary hearing by Justice Court and was bound over to Circuit Court for trial.

"However, the case was dismissed in Circuit Court by the Prosecuting Attorney without an information being filed. The defendant was charged under Section 4541 and 4542.

"I would also like to know, if your opinion 4225 applies only to Section 4224. I have understood that the State officials office has ruled that Section 4225 applies only to 4224. If that is correct, when the Prosecuting Attorney filed a complaint on a felony and the defendant discharged at the preliminary hearing, who would pay the costs in such action?"

In your request you indicate that the complaint in the case was made by the Prosecuting Attorney for a violation of Sections 4541 and 4542, R. S. 1939. The violation of Sec. 4541 constitutes a misdemeanor. The violation of Sec. 4542 constitutes a felony, but the punishment under the section ranges from a fine and jail sentence to imprisonment in the penitentiary.

If punishment under Sec. 4542 was only imprisonment in the penitentiary, then an acquittal of a charge under that section, the state would be liable for costs under section 4223.

Said section 4223 is 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 or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

It will be noted from the section that the county is liable for costs in all other trials on indictment or information in case of acquittal of defendant except when the prosecutor shall be adjudged to pay them, or it shall otherwise be provided by law.

Section 4224, provides that every person who shall institute any prosecution to recover a fine, penalty or forfeiture shall be liable for costs in case of acquittal.

Section 4225 provides that when such prosecutions are commenced by a public official that the county is liable for the costs in case of acquittal.

The case of State ex rel, Tudor v. Platte County Court, 40 Mo. App. 504 is somewhat in point on this question. In that case complaint for seduction, under promise of marriage of an unmarried person was signed by a private individual. The defendant was acquitted. The county was billed for the costs. The court held the county liable under Sec. 2095, R. S. 1879, which is now Sec. 4223, R. S. 1939. At l. c. 507, the court in ruling on the case said:

"***We find no other provision of the statute for paying them that that contained in the second division of section 2095, which we have quoted. No prosecutor has been adjudged to pay them; nor do we believe this

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to be a case where the prosecutor could be so adjudged, as it does not fall under either of sections 2096, 2098, 2099, 2100, or 2101, these being the only sections relating to a prosecutor's liability. Our opinion then, is, that the county should pay the relator's costs. ***"

Your question is some different from the Platte County case, supra, in that the Prosecuting Attorney filed the complaint here, but did not file an information after the defendant was bound over at the preliminary. Therefore we do not have the indictment or information mentioned in Sec. 4223, supra.

In the case of Ex Parte, Bedford, 106 No. 616, the Court held that the preliminary examination is a "criminal prosecution."

Applying that rule, then if the Prosecuting Attorney makes the complaint for a case for preliminary examination, we think such complaint would be in the same category as an indictment or information filed. Then if the Prosecuting Attorney fails to file information on the case in Circuit Court, and dismisses the case, we also think this is equivalent to an acquittal, in so far as the costs are concerned, under said Sec. 4223.

It might be contended that the Prosecuting Attorney is liable for the costs in a case where he files the complaint. However, we think this claim is definitely overcome by Sec. 3900, R. S. 1939, which is as follows:

"When the information is based on an affidavit filed with the clerk or delivered to the prosecuting attorney, as provided for in section 3895, 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

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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 last sentence clearly indicates that the Prosecuting Attorney is not liable for costs in any case.

From a review of all the statutes on costs in criminal cases it seems that the lawmakers have tried to provide for payment of such costs, either by the defendant, the prosecuting witness, the state or the county.

In your case we find that there is no prosecuting witness who would be liable for costs; that the defendant is not liable nor is the state liable. Then we think this case would come within the provisions of Sec. 4223, making the county liable for the costs.

In connection with the question of costs in criminal cases, we are enclosing three opinions which this department has written on the subject, as follows:

- Opinion, dated January 12, 1934, to Hon. T. J. Harper
- Opinion, dated June 24, 1938, to Mr. Richard C. Ashby.
- Opinion, dated Dec. 7, 1939 to Hon. C. Logan Marr.

C O N C L U S I O N .

From the foregoing, it is the opinion of this department that when a complaint is filed in Justice Court, by a Prosecuting Attorney, and the defendant

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is bound over to Circuit Court, and when the case is dismissed in Circuit Court by the Prosecuting Attorney without having filed an information, that the county is liable for the costs.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

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APPROVED:

ROY McKITTRICK
Attorney General