CRIMINAL LAW - AND COSTS: State or county not liable for costs until sentence has been pronounced.

May 14, 1942

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Honorable G. Logan Marr
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Dear Sir:

We are in receipt of your letter of May 12, 1942, in which you request an official opinion, as follows:

> "Section 9156 R. S. Mo 1939, provides that after a conviction by a jury or a plea of guilty, the circuit judge has power to either suspend sentence or put the defendant on probation. Now suppose a defendant is given a suspended sentence, what happens to the costs? Suppose the defendant comes up term after term, and his suspended sentence is continued, and he pays only a few dollars on his fine and costs between terms, who is supposed to finally pay the costs? The sheriff, the officers, the witnesses, for both sides, make life miserable for the prosecuting attorney, and the circuit clerk, when they continually ask for their fees that they have earned. Can I get out a fee bill either against the state or against the county to pay these costs, when and while this sentence is suspended? After a defendant has been paroled and put on probation, very often, a criminal cost bill is issued and the costs paid either by the state and/or county while the defendant is out on probation. Under this new

> law in sec 9156 supra, is the law such that under a suspended sentence, the officers can get their fees and costs?

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 first appeared in Laws of Missouri, 1939, page 400. This section specifically grants the courts and boards of parole the right not only to suspend the imposition of the sentence, but also to suspend execution after sentence is imposed.

The cost statutes applicable to your request are, Section 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."

In both of the above sections which require the state and county respectively to pay costs upon conviction, the word "sentence" is used. Unless the defendant is sentenced neither the state nor county is liable for cost until sentence has been pronounced. It was so held in the case of State ex rel. v. Carpenter, et al, 51 Mo.555, l. c. 556, where the court said:

> "The atatute 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.)
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> "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 penitentiary, 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.
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> "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."

This is a very old case, but is the latest case on the subject.

A judgment, that is a verdict or plea of guilty, is not final until sentence is pronounced. It was so held in 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 the county would be liable for costs, in accordance with Sections 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 a parole 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."

This section 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 that Courts have inherent power for many reasons to suspend sentence, and for some reasons at least to suspend execution of judgment; "suspension of sentence" contemplates only postponement of rendition of judgment, while "suspension of judgment" or "suspension of execution of judgment" contemplate withholding for time of performance by defendant of an already rendered judgment. (Huggins v. Caldwell, 3 S. W. 1101, 1102, 223 Ky. 468.)

The court can withhold sentence over the term in which a defendant plead guilty or was convicted by a jury. It was so held in the case of State v. Turpin, 61 S. W. (2d) 945, 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 jurisdiction 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 after a defendant has been paroled and put on probation a criminal cost bill may be issued and the cost paid either by the State or by the County, as set out in Sections 4221 and 4222 R. S. Missouri, 1939.

It is further the opinion of this department that neither the State nor the County is liable for the payment

of a criminal cost bill where sentence has not been pronounced, and has been suspended by the court or board of paroles, as set out in Section 9156 R. S. Missouri, 1939. In no event can a cost bill be issued until sentence has been pronounced.

Respectfully submitted

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APPROVED:

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