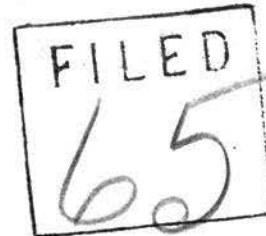


COURT COSTS:

In a proceeding to preserve the peace, either the complainant or defendant may be adjudged to pay the costs and in no event shall the county be liable for costs. Prosecuting attorney need not appear for complainant in such cases.

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Mr. Arthur C. Mueller,
Prosecuting Attorney,
Gasconade County,
Hermann, Missouri.

Dear Sir:

This will acknowledge receipt of your request for an official opinion from this department which request is as follows:

"Will you kindly let me know who is liable for costs in peace bond proceedings as specified in section 3401 to 3413, R.S. Mo. 29? Is it mandatory upon the prosecuting attorney to appear for the complainant in such cases?"

Section 3402, R.S. Mo. 1929 provides as follows:

"Whenever complaint shall be made in writing, and upon oath, to any such magistrate, that any person has threatened or is about to commit any offense against the person or property of another, specifying the offense and person complained against, it shall be the duty of the magistrate to issue a warrant, under his hand, reciting the complaint, and commanding the officer to whom it is

directed forthwith to apprehend the person so complained of, and bring him before such magistrate."

Under this section only a complaint under oath is required and it is not necessary to file an information.

In the case of State ex rel. v. Brooks, 167 Mo. App. 619, a mandamus action was brought to compel a judge to vacate and annul an order dismissing an action for a peace bond where the judge dismissed the action on the ground that the complaint was insufficient to state a cause of action. The court in holding that the duty of the judge to hear the cause was a ministerial act and said:

"We are of the opinion that, on the facts so stated, the trial court erred in quashing the alternative writ. The complaint was undoubtedly sufficient, for it was in writing and upon oath, and stated that the defendant had threatened the person of the complainant, which was all the statute required. That being so, it was the duty of the justice to proceed and perform the duties enjoined upon him by the statute, among which was the duty to 'cause the matters charged in the complaint to be inquired into by a jury.' These duties are prescribed and defined by the statutory provisions above set forth with such precision and certainty as to leave nothing to the exercise of discretion or judgment. They are specific duties, clearly, unmistakably and imperatively enjoined by law. They are mere ministerial duties, and mandamus is a proper remedy to compel performance."

Section 3403, R.S. Mo. 1929 provides as follows:

"Upon such person being brought before such magistrate, it shall be the duty of the magistrate to summon all witnesses which either party may require, and cause the matters charged in the complaint to be inquired into by a jury, of six competent men. If the jury find that there is good reason to fear the commission of the offense charged, then they shall render a verdict of guilty against the defendant, and the magistrate shall thereupon require the defendant to enter into a recognizance, in such sum, not exceeding one thousand dollars, as he shall direct, with one or more sufficient sureties conditioned that said defendant will keep the peace toward the people of the state, and particularly toward the complainant, for such time as shall be specified in said recognizance, which shall not be less than three months nor more than one year from the date thereof; and the defendant shall be liable for costs, as in other cases of conviction."

Also in this section no mention is made as to requiring an information and the whole proceeding is inquired into on the facts set out in the complaint. Although this section provides that where a bond to preserve the peace is required, the defendant shall be liable for the costs as in other cases of conviction. The authorities, nevertheless, say that although the defendant in such a procedure on a finding of guilty is liable for the costs as in other cases of conviction, yet it is not a criminal procedure.

In the case of State ex rel. Shockley v. Chambers, 278 S.W. 817, the Springfield Court of Appeals affirmed the requiring of a peace bond and said:

"It is insisted by appellant that, in a proceeding of this character, the criminal procedure should prevail, and hence the refusal of the court to instruct that, unless defendant should be found guilty beyond a reasonable doubt, he should be acquitted, was error. As far as we are advised, this question has not been passed upon by the Supreme or appellate courts in this state. The rule elsewhere seems to be that such a proceeding is not, strictly speaking, a criminal prosecution. § R. C. L. 283; 9 C. J. 393. It is not based upon the commission of a crime, but is a prohibitive remedy. Its purpose is to prevent crime and not to punish for a crime committed. Our statute (section 3747, Stat. 1919) provides that a warrant may issue upon complaint in writing under oath that 'any person has threatened or is about to commit any offense against the person or property of another.' It will be observed that the statute does not apply to all threatened violations of the law, but is restricted to offenses against the person or property of another. The protection offered is, to some extent at least, if not altogether, a personal protection.* * * * *

While this proceeding is not strictly a criminal proceeding, yet it partakes to some extent of that nature, and it seems to us unreasonable to give the prosecution a greater advantage in this proceeding than the plaintiff would have

in an ordinary civil action. It is our conclusion, however, that, since the statute only requires the jury to find that there is 'good reason to fear the commission of the offense charged,' they can, very appropriately, find that fact upon a preponderance of the evidence only, and should not be required to find it beyond a reasonable doubt."

In the case of *Ex parte Chambers*, 290 S.W. 103, a writ of habeas corpus was issued against the sheriff of Pulaski County, Missouri, for the release of Chambers who was required to give bond in the case of *State ex rel. Shockley v. Chambers*, supra. The sheriff had attempted to imprison Chambers for the nonpayment of costs in the above proceeding to preserve peace as in other criminal cases, but the court of appeals said:

"* * * * In fact our search, and that of able counsel on both sides, has unearthed but two decisions from other states, hereinafter referred to, dealing directly with the point in hand. This court held in *State ex rel. v. Chambers*, 278 S.W. 817, that a proceeding to require the giving of a peace bond is not, strictly speaking, a criminal proceeding. It is a proceeding to prevent the commission of a crime and to afford protection personal to the individual complaining. The whole proceeding is governed by statute to which we must look for guidance. Section 3748 provides that, upon conviction, 'the defendant shall be liable for costs, as in other cases of conviction.' Section 3756 authorizes appeal from the justice. Section 3757 provides that, if the judgment is affirmed, the court shall require a new recognizance

'and render judgment against the defendant for all costs in the case.'

These proceedings, to require petitioner to give a peace bond, were commenced in the justice court, affirmed on appeal to the circuit court, and again affirmed on appeal to this court. We are of the opinion, therefore, that the payment of costs in this case is governed by the provisions of section 3757, which simply directs judgment for costs against defendant upon affirmance of the conviction. But, even though section 3748 applies, as assumed by respondent, it is our opinion that section is no different in its meaning and intent from section 3757, and cannot be construed as authorizing the issuance of a *capias* execution. Unless it does so authorize, there is no law under which the payment of costs in such cases can be enforced by imprisonment. The words 'defendant shall be liable for costs, as in other cases of conviction,' while authorizing a judgment against defendant for costs, does not, except possibly by inference, authorize the collection of costs by imprisonment, as in criminal cases. Such an inference, in our opinion, should not be indulged in, especially when construing a statute of this character. The costs for which defendant may be liable is one thing, and the manner in which the collection thereof may be enforced is another. The intent of the Legislature to authorize imprisonment for costs in a proceeding not strictly criminal should clearly appear."

Section 3748, R.S. Mo. 1919 referred to in the above case is now Section 3403, R.S. Mo. 1929. Therefore, if the costs should be adjudged against the defendant and he is held liable for the costs, it would be necessary to issue executions as in a civil case and not by the issuance of a *capias* execution. Since the procedure is not a strictly criminal proceedings, the county is not liable for the costs of the proceeding in any event. Statutes requiring the county to pay costs in criminal proceedings must be strictly construed and the county is only required to pay costs in certain cases where the proceedings are strictly criminal. In the case of a proceeding to preserve the peace, the county is not in any way a party in interest, and the proceeding is a personal controversy between the person who files the complaint and the defendant. In adjudging who shall pay the costs in such a proceeding the civil rules of the payment of the costs must prevail.

Section 2203, R.S. Mo. 1929 provides as follows:

"If the plaintiff is a non-resident of the county, or shall become a non-resident after the commencement of a suit, or if from any cause the justice shall be satisfied that he is unable to pay the costs, the justice shall rule the plaintiff, on or before the day in the rule named, to give security for the payment of costs in such suit; and if the plaintiff fail on or before the day in such rule named to file the obligation of a responsible person of the county whereby he shall bind himself to pay all costs that have or may accrue in such action, or to deposit a sum of money equal to the costs that have accrued and will probably accrue in the same, the justice of the peace, on motion, shall dismiss the suit unless security is given before the motion is determined."

This section is a provision for the security for costs in civil cases in justice courts and is a provision that the justice of the peace may require after the complaint is filed and before trial. In view of the decision in the case of State ex rel. Brooks, supra, which holds that a justice may be forced to file a proceeding to preserve the peace by means of mandamus it would be necessary for the complaint to be filed and then the justice of the peace can require a security for costs.

Section 11316, R.S. Mo. 1929, in describing the duties of a prosecuting attorney, reads as follows:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses."
* * * * *

This section, among other things, provides that:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned," * * * * *

Under the holding in the case of Ex parte Chambers, supra, this is not a criminal proceeding and the county is not interested in the prosecution of such a proceeding. It is not necessary for the prosecuting attorney to appear

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in the case except when a recognizance to keep the peace has been broken. It then becomes the duty of the prosecuting attorney to proceed upon the recognizance in accordance to the terms set out in Section 3409, R.S. Mo. 1929. Section 3409, supra, reads as follows:

"Whenever evidence of such conviction shall be produced to the court in which the recognizance is filed or taken, it shall be the duty of the court to order such recognizance to be prosecuted, and the prosecuting attorney shall proceed thereon accordingly."

CONCLUSION

In view of the above authorities, it is the opinion of this department that in proceedings to preserve the peace if a conviction is had the defendant shall be liable for costs as in other cases of convictions.

It is also the opinion of this department that if the defendant is not convicted upon the complaint issued according to Section 3402, supra, and is acquitted, the party who filed the complaint will be responsible for the costs as in civil cases under the procedure prescribed in justice of the peace courts.

It is further the opinion of this department that it is not mandatory for the prosecuting attorney to appear for the complainant in proceedings to preserve the peace but must appear and bring action upon a recognizance where such recognizance has been deemed broken under all of the sections of Article III, chapter 29, R.S. Mo. 1929.

Respectfully submitted

APPROVED:

W. J. BURKE
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

WJB:DA