

CRIMINAL COSTS: State Highway Patrol Officer not liable for costs in a misdemeanor where the defendant is acquitted by a jury, without judgment of malicious prosecution, or is not liable for costs for arrest and conviction on a vagrancy charge, or acquittal in an arrest in a felony case before a jury.

August 22, 1938

Arthur C. Mueller
Prosecuting Attorney
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Hermann, Missouri



Dear Sir:

This is to acknowledge receipt of your letter of August 9, 1938, requesting an opinion from this department, which reads as follows:

"Will you kindly give this office your opinion on the following questions, to-wit:

"Is a member of the Missouri State Highway Patrol personally liable for costs, when he signs a complaint for a misdemeanor committed in his presence and the defendant is later acquitted by jury?

"Is a member of the Missouri State Highway Patrol personally liable for costs if he arrest a person on a vagrancy charge and the defendant enters a plea of guilty?

"Is a member of the Missouri State Highway Patrol personally liable for costs if he signs complaint in felony cases and is he competent witness to material facts in the case? Also would the Patrolman be personally liable for costs if defendant was acquitted by jury in circuit court."

Section 3444, R. S. Mo. 1929, reads as follows:

"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."

This section applies to proceedings before justices of the peace in misdemeanor cases. Under this section, it is mandatory to adjudge the costs against the prosecuting witness upon discharge of the defendant on a complaint filed by the injured party for (1) disturbance of the peace, (2) libel or slander, or (3) trespass against the person or property of another, not amounting to a felony, except for petit larceny. Under this section, in every other case of acquittal, if the court or jury find that the complaint was maliciously brought or without probable cause, the court or jury may assess the costs against the complaining witness,

but in no case shall the prosecuting attorney be liable for the costs. In all other cases, under this section, the county must pay the costs except where a complaint is filed and the prosecuting attorney refuses to file an information, and in that event the costs should be assessed against the complaining witness.

Section 3827, R. S. Mo. 1929, 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."

Under Section 3827, if the defendant is sentenced to the county jail, or to pay a fine, or both, and is unable to pay the costs, then the county must pay the costs.

Section 3828, R. S. Mo. 1929, reads 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."

Under this section, the state must pay the costs in case of an acquittal in capital cases and in cases where the sole punishment is imprisonment in the state penitentiary, but in other cases of acquittal the costs shall be paid by the county. Under this section, in an acquittal of a graded felony the liability for the costs is assessed against the county.

Section 3826, R. S. Mo. 1929, 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. * * *"

Section 3829, R. S. Mo. 1929, reads as follows:

"Every person who shall institute any prosecution to recover a fine, penalty or forfeiture shall be adjudged to pay all costs if the defendant is acquitted although he may not be entitled to any part of the same."

This section applies only to personal offenses and not public offenses. It was so held in *State v. Wood*, 128 Mo. App. 642.

As set out in your request concerning an arrest for vagrancy, vagrancy should be considered as a public offense and not a personal offense.

In the case of *City of Greenville v. Farmer*, 195 Mo. App. 209, l. c. 211, the court said:

"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 held

in the case of State ex rel. Clarke v. Wilder, 197 Mo. 27, 94 S. W. 499, that no costs can be taxed in any court except such as the statute in terms allows. In Ring v. Chas. Vogel Paint & Glass Co., 46 Mo. App. 1. c. 377, the following language is used: '. . . It may be stated that the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that the officer or other persons claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation.'

CONCLUSION

In view of the above authorities, it is the opinion of this department that if a state highway patrol officer signs a complaint for a misdemeanor committed in his presence and the defendant is acquitted by a jury, the state highway patrol officer is not liable for the costs unless it was one of the three offenses set out in Section 3444, supra, which makes it mandatory to adjudge the costs against the prosecutor, or unless the jury or justice of the peace, in accordance with Section 3444, supra, shall state in his or their verdict that the prosecution was malicious or without probable cause. In that case the justice should enter a judgment against the prosecutor or party at whose instance the information was filed, but in no case shall the prosecuting attorney be liable for the costs. In all other cases of acquittal or discharge, the county is liable under Section 3444, supra.

It is further the opinion of this department that if a member of the state highway patrol makes an arrest for vagrancy under Section 4333, R. S. Mo. 1929, and the defendant pleads guilty, the county is liable for the costs under Section 3827, supra, for the reason that vagrancy is only a misdemeanor. Of course, it goes without saying that in case the defendant is able to pay the costs, they

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should not be paid by the county in case of conviction, but if not paid by the defendant, the county must pay the costs except costs incurred on the part of the defendant.

It is further the opinion of this department that a member of the state highway patrol is not personally liable for the costs in a case where he signs a complaint in a felony case in which he is a material witness and the defendant is acquitted by a jury in the circuit court. Under Section 3828, supra, if the defendant is acquitted on a capital case or on a felony case, where the sole punishment is imprisonment in the penitentiary, the costs shall be paid by the state, and in all other trials on indictment or information, if the defendant is acquitted, the costs shall be paid by the county, except when the prosecutor shall be adjudged to pay them or it be otherwise provided by law.

Respectfully submitted

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APPROVED:

J. E. TAYLOR
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