

CRIMINAL COSTS: Fees of state's witnesses should be paid by the state or county in a continuance where the costs are taxed against an insolvent defendant.

May 8, 1940

Honorable Jim Perrin  
Circuit Clerk  
Oregon County  
Alton, Missouri



Dear Sir:

We are in receipt of your request for an opinion, dated May 4, 1940, which is as follows:

"We have a criminal case in this County wherein the defendant was granted a continuance in Circuit Court at his own cost. Later this defendant was convicted and taxed with all the cost in the case. As he was unable to pay same, he was placed in jail. Now as the County will have to pay the cost in this case, will it be necessary for them to pay the cost of the witnesses on the part of the State that occurred during the term said cause was continued by the defendant and at his cost.

Your opinion on this matter will be appreciated.

Also we have another case wherein the defendant was discharged with the understanding that he pay the cost. He is not able to do so and the state witnesses have not been paid. Is it now the duty of the County to pay these costs? There was no bond given in this case for the cost."

We will first take up the question of the liability of the county for the costs due the state's witnesses where a continuance was granted at the instance of the defendant, and the costs were taxed against him.

Section 3653, R. S. Mo. 1929, is as follows:

"Continuances may be granted to either party in criminal cases for good cause shown, and the court may postpone the trial of any such case for good and sufficient reasons, of its own motion. When a continuance is allowed on the application of either party, it shall be at the costs of the party at whose instance it is granted, unless the court otherwise direct."

This section was interpreted by the Kansas City Court of Appeals in *State of Missouri v. Barker*, 63 Mo. App. 535, to authorize a final judgment against the party requesting a continuance and the issuance of an execution thereon.

In *State ex rel. v. Gordon*, 254 Mo. 471, the state was granted a continuance, and the costs of such continuance were taxed against it. The defendant was sentenced to the penitentiary, and the state attempted to charge the costs of the continuance, at its request, against the defendant. The court, in denying the right of the state to collect such costs from the defendant, stated, l. c. 474, 475:

"A somewhat opposite but very analogous situation to the one here involved was discussed in the case of *State of Missouri v. William A. Brigham*, 63 Mo. 258. In that case the defendant stood indicted for embezzlement and at one term of court, upon his application, the cause was continued at his costs and judgment rendered against him therefor, by virtue of the then existing statute that "Continuances, may be granted to either party in criminal cases for like causes and under

like circumstances as in civil cases.' At a subsequent term, defendant was tried and acquitted. Defendant then moved to set aside the judgment rendered against him for costs, at the prior term basing his contention upon the provision of Wagner's Statutes 1870, p. 349, sec. 4, which provided that '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.' (The same provision is now contained in section 5379, Revised Statutes 1909.) In refusing to allow defendant's contention the court, speaking through WAGNER, J., said:

'But this section only has reference to the costs that accrued at the trial which had not previously been specially adjudged against either party. If at a previous term there had been a judgment against the defendant for costs, they would not be comprehended within the intentment of the section. If there was any doubt about the legislative will in this regard, we think it is made perfectly plain by referring to the statute regulating criminal practice, which declares that, 'verdicts may be set aside and new trials awarded on the application of the defendant and continuances may be granted to either party, in criminal cases, for like causes and under like circumstances, as in civil cases. (Wagn. Stat. 1872, p. 1104, sec. 18.) This we think is decisive of the case and renders the question too plain to admit of or require argument.' (Id., l. c. 258-9.)"

However, the court in the same case indicated that where the costs of a continuance were taxed against an insolvent defendant, the state would be liable for the costs of its witnesses in the following language, l. c. 474:

"In discussing the question we shall make no distinction between the costs incurred upon the part of the State and those incurred upon the part of the defendant, for the reason that it is not claimed that defendant is unable to pay the costs, but the decision of the question here involved will turn upon the construction to be given the foregoing statutes and more particularly on the construction to be given section 5203, supra."  
(Italics ours.)

Section 3827, R. S. Mo. 1929, provides:

"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."

It will be noted that the only exceptions to the above provision for the payment of criminal costs, where the defendant is insolvent, are costs incurred on the part of the defendant. Where witnesses appear in obedience to a subpoena issued by the state, the cost of such appearance is incurred by the state, although such costs might be adjudged against a defendant.

We are of the opinion, therefore, that where the costs of a continuance are taxed against an insolvent defendant, even though such defendant be sentenced to imprisonment in the county jail, or to pay a fine, or

May 8, 1940

both, the county in which the indictment was found or information filed, should pay the costs of the state's witnesses for their attendance at the hearing where such continuance was granted.

Your second question was answered in an opinion rendered by this department to Mr. Elmer A. Strom, Prosecuting Attorney of Cape Girardeau County, at Jackson, Missouri, on January 26, 1939, a copy of which is enclosed herewith.

In a case where a dismissal is entered against a defendant, the costs are to be taxed as though there had been an acquittal, and a mere understanding with the defendant as to the payment of costs is not enforceable. The customary practice is to require the payment of costs by the defendant prior to dismissal.

Respectfully submitted,

ROBERT L. HYDER  
Assistant Attorney General

APPROVED:

COVELL R. HEWITT  
(Acting) Attorney General

RLH:VC  
Enc.