CRIMINAL PROCEDURE - Prosecuting Attorney certifying cost bill that defendant is insolvent is not liable in any manner unless wilfully and corruptly done.

December 8, 1942

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Hon. W. Oliver Rasch
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of December 2, 1942, which reads as follows:

> "Norville W. Brickey was charged in the circuit court of Jefferson County with obtaining money under false pretenses. After a change of venue he was convicted in the circuit court of Audrain County, Missouri. Two executions for the costs were issued, directed to the sheriff of Jefferson County. On both of these executions said sheriff made nulla bona returns stating that he failed to find any property of the within named Norville W. Brickey on which to levy.
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> "The costs in this case should be paid, but when the fee bills are certified to the state auditor, the prosecuting attorney must certify that the defendant is insolvent.
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> "Some people think that Brickey is solvent, while others do not. Personally I do not know if he is solvent

or insolvent.

"Should I sign the fee bill, certifying that the defendant is insolvent; and if I do, is there liability, of any kind, on my part?"

Section 4239 R. S. Missouri, 1939, reads, partially, as follows:

" * * * In cases in which the defendant is convicted, the judge and prosecuting attorney shall certify, in addition to the foregoing facts, that the defendant is insolvent, and that no costs charged in the fee bill, fees for board excepted, were incurred on the part of the defendant."

Under the above partial section the judge and prosecuting attorney shall certify that the defendant is insolvent and for that reason the State shall pay the costs, but the State Auditor is not bound by that certification and may refuse to pay the costs, for the reason that the defendant is solvent. I mention this becase the judge and prosecuting attorney are not the sole judges of the solvency of the defendant. That the State Auditor may refuse to audit claims certified under this section was held in the case of State ex rel Suter et al. v. Wilder, State Auditor, 196 Mo. 418, l. c. 428, where the court said:

> "We are of the opinion that the rules of law announced in the cases heretofore cited are applicable to the provisions of the statute in relation to cost bills in criminal cases as they now exist, and we are of the opinion that the certificate of the judge and prosecuting attorney as to the taxation of costs in criminal cases is not conclusive upon the State Auditor, nor do we mean to say that the conclusion or disallowance by the State Auditor of a fee bill is conclusive upon the parties claiming the fees. The auditor is subject to the supervision of the Supreme Court, and if he refuses to audit, adjust and settle costs which have been properly taxed and certified by the judge and prosecuting attorney, the court will not hesitate by its process to compel him to perform his duty in that regard." (Underscoring ours.)

Under Section 4239, supra, the judge and prosecuting attorney are acting in both a judicial and ministerial duty. The proper manner in which to determine whether or not a defendant is solvent, or is unable to pay the cost, is to have an execution issued by the circuit clerk to the sheriff, who shall make his return. Under the facts in your request the sheriff of Jefferson County has attempted to serve two separate executions, and has made a nulla bona return on both executions. That this was the proper procedure by which to determine the solvency of the convicted defendant, was held in the case of State ex rel F. G. Hopkins v. Justices of Buchanan County Court, 41 Mo. 254, l. c. 257, where the court said:

> " * * * What difference can it make to the county whether he is tried and convicted of the offense charged against him, or voluntarily confesses the charge to be true? In either case he would be

> required by the judgment of the court to suffer the penalty imposed by law. In this case the judgment of the court entered upon his own voluntary assumption to pay the costs was sufficient to bind him for that purpose. In other words, he has by his own act fixed his liability to pay the costs, and if unable to pay them, the penalty is just as much bound as if his liability had been fixed by law. We can perceive no reason why the services rendered in issuing the execution were not as necessary as any others charged for. It was perhaps the most satisfactory way in which the ability of the defendant to pay costs could be determined. * * * "
> (Underscoring ours.)

In your request you ask, that if you should sign the fee bill and it should develop that the defendant is not insolvent, would you, in any way, be liable. It has been held that where a judge is acting in a ministerial capacity, or a prosecuting attorney who, as a ministerial officer is acting in the capacity which is in itself judicial, that in order to hold either officer liable for a mistake he must have acted in a spirit of wilfullness, corruption and malice. It was so held in the case of State ex rel v. Diemer, 255 Mo. 336, l.c., 354, where the court said:

> "The question, one of public concern, in some of its phases, is by no means new. Pike v. Megoun, 44 Mo. l. c. 496

et seq., followed Reed v. Conway, 20 Mo. 22, in holding to the general doctrine announced above. In the Pike case it was ruled:

"'When duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct. (Wilson v. The Mayor, 1 Den. 599; Rochester White Lead Co. v. City of Rochester, 3 Comst. 463.) And the same rule obtains where judicial functions are cast upon a ministerial officer. But to render a judge acting in a ministerial capacity, or a ministerial officer acting in a capacity in its nature judicial, liable, it must be shown that his decisions were not merely erroneous, but that he acted from a spirit of willfulness, corruption, and malice; in other words, that his action was knowingly wrongful, and not according to his honest convictions in respect to his duty.'

"The Reed-Conway case, supra, quoted with approval from Jenkins v. Waldron, 11 Johns. Rep. 1. c. 121. In that case inspectors of election were sued for denying a voter the right to vote. In denying recovery the eminent bench, presided over by no less an authority in the law than Kent, closed its judgment with these words:

> "'It would, in our opinion, be opposed to all the principles of law, justice and sound policy, to hold that officers called upon to exercise their deliberative judgments, are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice.'
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> "To the same effect is Schoettgen v. Wilson, 48 Mo. 253.
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> "These defendants were acting within the scope of their express statutory authority in allowing or disallowing claims. They were not guilty of arbitrarily, wantonly, oppressively or fraudulently conducting themselves and, under such circumstances, they are not personally liable for acting in accordance with their honest convictions of duty. (McCutcheon v. Windsor, 55 Mo. l. c. 153.) The reasoning of Washington County v. Boyd, 64 Mo. 179, sustains the judgment below; and so does that of Edwards v. Ferguson, 73 Mo. 686, and Knox County v. Hunolt, 110 Mo. l. c. 75, and Albers v. Merchants' Exchange, 138 Mo. l. c. 164, and Williams v. Elliott, 76 Mo. App. l. c. 12 (a case on its facts nearly in point), and so Schooler v. Arrington, 106 Mo. App. 607."

Also, in the case of Knox County v. Hunolt, 110 Mo. 67, l. c. 75, the court said:

> "But where the public officer is by law vested with discretionary ministerial powers, and he acts within the scope of his authority, he is not liable in damages for an error in judgment, unless guilty of corruption or a wilful violation of the law. He is not liable for an honest mistake. This principle has been asserted by this court under a variety of circumstances. Reed v. Conway, 20 Mo. 23; Pike v. Megoun, 44 Mo. 492; McCutchen v. Windsor, 55 Mo. 149; 48 Mo. 254; Edwards v. Ferguson, 73 Mo. 686; Washington Co. v. Boyd, 64 Mo. 179."

CONCLUSION

In view of the above authorities, it is the opinion of this department that where an execution was issued by the circuit clerk for criminal costs, and was returned nulla bona by the sheriff, and the prosecuting attorney certifies to the state auditor on the cost bill that the convicted defendant is insolvent, and it later develops that the convicted defendant is solvent, the prosecuting attorney is not liable in any manner, unless he acted corruptly, or wilfully violated the law.

Respectfully submitted

APPROVED:

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WJB:RW