

CRIMINAL PROCEDURE:
COST BILLS:
SIGNING AND CERTIFYING:

The trial judge is the proper party
to certify a criminal cost bill.

May 25, 1939

5.29



Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of the 23rd wherein you submit a question which was submitted to you by Judge Barton of the Nineteenth Judicial Circuit. The question was submitted with the following statement of facts:

"We are in receipt of a letter from Honorable W. E. Barton, Judge of the 19th Judicial Circuit, in which he desires to know whether the Trial Judge or the Judge of the circuit in which the case originated and was tried should sign the cost bill in the Robert Kenyon murder case which originated in Howell County. I quote in part from the letter of Judge Barton, to-wit:

"The case of State v. Robert Kenyon originated in Howell County outside of my circuit. Judge Green being disqualified, called me to act as special judge in that case. I granted a change of venue to Oregon County, also outside of my circuit. There I tried the man and he was given the death penalty. The case was appealed and affirmed, but sent back to change the method of inflicting the death penalty from hanging to lethal gas. Now the fee bill has been made and signed by the Prosecuting Attorney of Howell County

and has been submitted to me. I am under the impression that this fee bill should be audited and approved by the regular Judge of that circuit. Will you kindly give me the benefits of the practice in other places.'

"You will note that this case originated in Howell County, was transferred on change of venue to Oregon County and that Judge Barton was called in to try the case. We request your official opinion as to whether Judge Barton as Trial Judge, or the Judge of the circuit in which the cause was originated and was tried, should certify his approval to the cost bill."

It appears from the statement which Judge Barton submitted that he was called in to try a criminal case by virtue of the provisions of Sections 3648 and 3651, R. S. Missouri 1929. After Judge Barton was called in to try the criminal case of State v. Kenyon, we think a portion of Section 3651, supra, will shed some light on the question as to who should sign the fee bill in the case which the judge tried. It is as follows:

"* * * * * and he shall, during the trial of said case, possess all the powers and perform all the duties of the judge at a regular term of said court, and may adjourn the case from day to day, or to some other time, as the exigencies of the case may require, and may grant a change of venue in said case to the circuit court of another county in the same circuit, or to another circuit or criminal court; * * * * *"

It will be noted by the foregoing provisions that the judge who is called to try a case shall possess all the powers and perform all of the duties of the judge, that is, the regular judge of such circuit as such regular judge would perform.

The sections of the statute which pertain to the making up of and certifying fee bills are 3842 and 3844, which are as follows:

"It shall be the duty of the prosecuting attorney to strictly examine each bill of costs which shall be delivered to him, as provided in the next preceding section, for allowance against the state or county, and ascertain as far as possible whether the services have been rendered for which charges are made, and whether the fees charged are expressly given by law for such services, or whether greater charges are made than the law authorizes, and if said fee bill has been made out according to law, or if not, after correcting all errors therein, he shall report the same to the judge of said court, either in term or in vacation, and if the same appears to be formal and correct, the judge and prosecuting attorney shall certify to the state auditor, or clerk of the county court, accordingly as the state or county is liable, the amount of costs due by the state or county on the said fee bill, and deliver the same to the clerk who made it out, to be collected without delay, and paid over to those entitled to the fees allowed."

"When a fee bill shall be certified to the state auditor for payment, the certificate of the judge and prosecuting attorney shall contain a statement of the following facts: That they have strictly examined the bill of costs; that the defendant was convicted or acquitted, and if convicted, the nature and extent of punishment assessed, or the cause continued generally, as the case may be; that the offense charged is a capital one, or punishable solely by imprisonment in the penitentiary, as the case may be; that the services were rendered for which charges are made, and that the fees charged are expressly authorized by law, and that they are properly taxed against the proper party, and that the fees of no more than three witnesses to prove any one fact are allowed. 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."

It seems from Section 3842, supra, that after the prosecuting attorney has examined and corrected a bill he shall report it to the judge of said court. The question here is whether he shall report the bill to the regular judge or the special judge who tried the case.

Referring to Section 3844, supra, we note that the certificate of the judge and prosecuting attorney which is attached to the fee bill must state that they have strictly examined the bill; that the defendant was

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convicted or acquitted * * *; that the services rendered for which the charges are made, and that the fees charged are expressly authorized by law, * * * and that the fees of no more than three witnesses to prove any one fact are allowed.

While the regular judge of a court might be able to make a certificate covering some of the requirements set out in this section, yet there are some parts of the certificate which would be peculiarly within the knowledge and information of the judge who tried the case. We particularly refer to the part of the certificate which requires the judge to certify that no more than three witnesses were used to prove any one fact are allowed in a fee bill. The prosecuting attorney, of course, would be able to make this certificate and the regular judge who did not hear the case might make such certificate basing his statement on the statement of the prosecuting attorney, however, it seems that if the certificate is to be based on the judge's own knowledge that the judge who tried the case would be the proper one to make the certificate.

We do not find wherein this question has been directly before our courts, however, we find some cases in which the court announced a reasoning why the judge who tried the case would be the proper one to sign the criminal fee bill. We refer to the case of State ex rel. v. Wilder, 196 Mo. 418 at 425:

"* * * An analysis of the sections of the statute in reference to bills of costs as herein pointed out, makes it manifest that the Legislature never intended that this section should be regarded as authority on the part of the judge and prosecuting attorney to finally audit, adjust and settle all costs bills in criminal cases. The very terms of the statute negatives any such intention on the part of the law-making power. There are no such terms used in any of those sections

which indicate that they are to audit, adjust and settle bills of costs, but it is apparent that this section means to impose the burden upon the judge and prosecuting attorney, who are presumed to be familiar with the legitimate costs that have accrued in the case, to strictly examine the fee bills and certify them to the State Auditor, who finally adjusts and settles the same by the drawing of an auditor's warrant. Under this section the judge and prosecuting attorney by no means audit and settle finally the bill of costs, but they are simply required to make an examination and certify it to the State Auditor."

In State v. Oliver, 116 Mo. 188 at 194, the court, in speaking of the duties of the judge in making the certificate to the criminal cost bill, said:

"* * * * * There must be a determination of what issues of fact were involved in the trial and the number of witnesses necessary, not exceeding three, to each fact to properly present those issues to the jury. The statute does not mean that the number of independent facts must be ascertained and three witnesses allowed to each fact, though one or more witnesses might testify to a number of them. The judge and prosecuting attorney are present throughout the trial, hear the testimony of all the witnesses, know what issues were tried, and are especially qualified to judge of the witnesses who showed a knowledge of the various facts and in doing so they must exercise judgment."

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It will be noted from the foregoing statement in the Oliver case, supra, that the court said that the judge and prosecuting attorney being present throughout the trial, hearing all the testimony of the witnesses and knowing what issues were tried, were especially qualified to make this certificate.

While the certificate of the regular judge who did not try the case, if he were willing to make it, might be sufficient to authorize the auditor to audit and allow the bill, yet under the suggestions in the foregoing cases it seems that the judge who tried the case would be the proper one to make the certificate.

CONCLUSION.

From the foregoing it is the opinion of this department that the judge who tries a criminal case would be the proper one to approve and certify the criminal cost bill which is issued for the payment of costs in the case.

Respectfully submitted

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Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

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