CRIMINAL COSTS: State is not liable for costs in apprehending a parolee sentenced to the penitentiary by a Circuit Judge upon revocation of the parole. Parole is not part of case proper.

August 10, 1939

FILED
83

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

The following opinion is in answer to your letter of July 26th, 1939, for an official opinion in regard to payment by the state of costs relative to persons convicted of felonies and sentenced to the penitentiary, where said defendants are paroled by the court. The request also includes a bill of costs rendered by the Clerk of the Circuit Court of Johnson County, State of Missouri, in the case of State of Missouri v. Joseph Ament, on a charge of burglary and larceny, under section 4056 R. S. Missouri, 1929. The charge of burglary and larceny is subject solely to imprisonment in the penitentiary, or to another institution on account of age of the defendant, and upon conviction the State of Missouri must pay the costs. Your request specifically asks an opinion as to whether or not the state is liable for the fees due the probation officer who apprehended the defendant on a revocation of parole. Under the statement of the fee bill, the court and prosecuting attorney certify that the defendant entered a plea of guilty, and was sentenced to four years at Boonville, Missouri, and paroled October 27th, 1938. The statement further sets out that the court ordered the probation officer to apprehend the defendant because of information he is violating parole orders and ordered that the probation officer bring him before the court for sentence. After the parolee had been apprehended and brought back to Johnson County at an expense of $143.05, the court granted a stay on the parole which amounted to an order of probation.

Section 3826 R. S. Missouri, 1929, partially 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. * * * "

It will be noted under the above section that it reads specifically "shall be convicted". The word "convicted" means final conviction, that is, that the defendant was sentenced to either the penitentiary on a felony or was sentenced to imprisonment in the county jail, workhouse, or reform school because such person is under the age of eighteen years. Before sentence, the court, under the law, must give the defendant allocution and then sentence him, which sentence at the same time commits the defendant to the penitentiary. A commitment is then ordered for the sheriff to take the defendant to the penitentiary in conformity with the order of sentence of the court.

The population of Johnson County, according to the last decennial federal census, was 22,413. Under that bracket of population the Circuit Court of Johnson County has the power to parole a defendant who has been convicted by reason of section 3809 R. S. Missouri, 1929, which reads as follows:

> "The circuit and criminal courts of this state, and the court of criminal correction of the city of St. Louis, shall have power, as hereinafter provided, to parole persons convicted of a violation of the criminal laws of this state."

Section 3811 R. S. Missouri, 1929, reads as follows:

> "When any person of previous good character and who shall not have been previously convicted of a felony, shall be convicted of any felony except murder, rape (where the rape charged and the proof shows said rape to have been committed by means of force, violence or by putting the female in fear of immediate injury to her person), arson or robbery, and imprisonment in the penitentiary shall be assessed as the punishment therefor, and sentence shall have been pronounced, the court before whom the conviction was had, if satisfied that such person, if permitted to go at large, would not again violate the law, may in his discretion, by order of record, parole such person and permit him to go and remain at large until such parole be terminated as hereinafter provided: Provided, that the court shall have no power to parole any person after he has been delivered to the warden of the penitentiary."

It will be noted under the above section that the parole can only be granted after sentence is pronounced, which occurs immediately after allocution. A commitment is then issued which orders the sheriff to take the prisoner to the penitentiary. Up to this point the state is liable for the costs, but after the commitment to the penitentiary the state is not liable for any further costs, except the costs of transporting the prisoner to the penitentiary. It was so held in the case of State v. Kelly, 274 S. W. 731, par. 4,5, where the court said:

> "Of course, the special judge may pass on the motion for a new trial, grant an appeal, settle the bill of exceptions, etc. This because such matters, being but procedural steps to be taken in arriving at the ultimate

> determination of defendant's guilt or innocence, are so related to the trial of the cause as to be deemed incident thereto. But the granting of a parole has naught to do with the ascertainment of guilt of innocence. It presupposes the defendant's guilt. An application for parole cannot be entertained until after a judgment of conviction has been rendered (sections 4156 and 4157, R. S. 1919) and that judgment has become a finality (section 4167, R. S. 1919). The granting of a parole, therefore, whether it be deemed a conditional suspension of sentence or a conditional pardon is no part of the trial of a cause which culminates in a judgment of conviction, nor is it in any way incident thereto. No appeal lay from the judgment entered on the pleas of guilty of defendants Morgan and Burnett. It was a final determination of the cause. When Judge Ing rendered that judgment, his powers and duties as special judge came to an end. Consequently he was not the judge of the Cape Girardeau county circuit court on the 31st day of August, 1923, for any purpose whatever."

In this opinion, as set out above, the court not only passed upon the authority of the special judge in granting a parole, but also ruled that the parole was not an incident to the conviction, and was not part of the trial of the cause, and could not be given until after judgment of conviction had been rendered and that judgment had become a finality. This holding means that after the judgment and sentence the cause was finally disposed of and that the parole was a matter separate and apart from the case itself, and in view of this holding judgment for costs adjudged against the defendant could not be paid by the state after the judgment and sentence except the transportation fees which accrue in favor of the sheriff in taking the defendant to the penitentiary. The parole, when granted before the defendant is taken to the penitentiary may be revoked by virtue of section 3812 R. S. Missouri, 1929, which reads as follows:

> "When any person shall be paroled under the provisions of section 3811 of this article the court granting said parole or the judge thereof in vacation may terminate said parole at any time without notice to such person by merely directing the clerk of the court to make out and deliver to the sheriff or other proper officer a certified copy of the sentence, together with a certificate that such person has been paroled and his parole has been terminated, and it shall be the duty of such officer, upon receipt of such certified copy of sentence, to immediately arrest such person and transport and deliver him to the warden of the penitentiary in the same manner as if no parole had been granted, and the time such person shall have been at large upon parole shall not be counted as a part of the term of his sentence, but the time of his sentence shall count from the date of his delivery to the warden of the penitentiary."

Under the above section it will be noticed that the court may revoke the parole without notice to the defendant, by merely directing the clerk of the court to make out and deliver to the sheriff or other proper officer a certified copy of the sentence, together with a certificate that such person has been paroled and has been terminated. It shall then be the duty of such officer to immediately arrest the defendant and take him to the penitentiary. This order or revocation, as set out in section 3812, supra, does not provide for the taking of the defendant before the court, but provides only that he be taken and delivered to the warden of the penitentiary in the same manner as if no parole had been granted. In case of a parole being revoked, the order of the court to the sheriff that he transmit the defendant to the penitentiary is still a part of the record proper in the case, and even if two years had elapsed from the time of the sentence of the defendant the transportation fees of the sheriff in taking the defendant to the penitentiary would not be barred and would not violate section 11416, R. S. Missouri, 1929, which reads as follows:

> "Persons having claims against the state

> shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled and allowed, within two years after such claims shall accrue, and not thereafter."

The reason why it would not be barred is that the transportation fees would not accrue until the prisoner was transported to the penitentiary. According to the case of State v. Kelly, supra, the parole is not an incident nor is it part of the record proper of the case, and therefore parole costs should not be paid by the state in any event. We find no authority which provides that the state should pay any costs of the proceedings of a parole. In the case of Ring v. The Chas. Vogel Paint & Glass Co., 46 Mo. App. 374, l.c. 377, the court said:

> "Preliminary to the discussion of the items of cost here in controversy, 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. Miller v. Muegge, 27 Mo. App. 670; Shed v. Railroad, 67 Mo. 687; Gordons v. Maupin, 10 Mo. 352; Ford v. Railroad, 29 Mo. App. 616."

Under the holding in the above case one must point out the statute authorizing the taxation of costs in connection with this case. We have pointed out section 11791, R. S. Missouri, 1929, supra, which is too lengthy to set out in this opinion. Under this section which specifically sets out fees of sheriffs we find no authority for the sheriff to receive any costs involved in a parole proceeding.

As we have said before the state is only liable for the costs up to the time of the final allocution and sentence of defendant subject to the further costs of transportation as ordered by the sentence and commitment of the court.

CONCLUSION.

In view of the above authorities it is the opinion of this department that the state is only liable for the payment of costs in the case proper where a defendant is convicted on a felony charge.

We are further of the opinion that where a defendant is convicted and sentenced the commitment may be held up by parole, and probation, and if later on the parole or probation is revoked or set aside, the state will be liable for the transportation of the prisoner to the penitentiary. The state will be liable, even if more than two years had elapsed from the time of the original sentence, for the reason that the costs of transportation of the parolee on revocation to the penitentiary did not accrue until after the prisoner was confined in the penitentiary.

In view of the fact that we have held that the state is not liable for costs involved in the granting and enforcement of paroles, it would not be necessary for this department to state under which appropriation such costs should be paid. The appropriation for that department, which appears in House Bill No. 586, Sixtieth General Assembly, - Appropriations for Costs in Criminal Cases, and Appropriations for Costs in Criminal Cases Transportation, are of course for two different purposes. The appropriation for transportation does not mean transportation in cases of apprehension of parole violators, but only means the transportation of prisoners from their place of conviction to the state penitentiary.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:RW