CRIMINAL COSTS: Court reporter not entitled to costs of transcript of bill of exceptions on a pauper appeal until the case is finally decided and determined without right of further appeal.

July 8, 1941

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Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion from this department under date of June 19, 1941, which reads as follows:

> "This is a request for an official opinion in regard to the payment of a court reporter fee in a criminal case where the defendant is allowed to appeal as a poor person.
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> "There was certified to this department for payment what purported to be a supplemental cost bill. The fee bill in question could not be classed as a 'subsequent bill' under the provisions of Section 4244 R. S. Mo. 1939. The bill had listed no fee except that of Mr. Fred W. Cramer, Official Reporter, Jackson County, Missouri, for preparing the bill of exceptions, which claim amounts to $489.15.
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> "The defendant in this case was charged with murder and sentenced to ten years in the penitentiary. The defendant was allowed to appeal as a poor person. The court reporter's claim for preparing bill of exceptions was made up, approved by the judge of the court and certified to us on a fee bill marked 'supplemental'. Our Criminal Cost Department returned the cost bill to the circuit clerk citing that the costs in question

were not payable until the completion of the case and cited in support thereof, Section 4236 R. S. Mo. 1939, which among other things cites ' * * * in which any criminal cause shall have been determined * * *.' In other words, our Criminal Cost Department has interpreted the word 'determined,' as used in Section 4236 to mean final adjudication by the courts without right of further appeal of the cause. Mr. Cramer, the official reporter who has the claim does not agree with this interpretation and insists that he is entitled to his fee at this time. We have not questioned the validity of the claim submitted but we have questioned the right to pay this fee before the completion of the case and in advance of other costs payable by the state.

"We request your official opinion in regard to the proper time for certification and payment of cost bills. Do the existing statutes or construction placed upon said statutes permit a cost bill for the fee of a court reporter for preparing the Bill of Exceptions where a defendant is allowed to appeal as a poor person, to be made up and certified before the final completion of the case and in advance of the certificate and payment of other costs payable by the state. If certified, should they be paid by the state in advance of other costs?"

The fee bill described in your request is marked "supplemental." Supplemental fee bills are governed by Section 4244, R. S. Missouri 1939. This section is only applicable in this case whereby an oversight or mistake the clerk failed to include any costs properly chargeable against the state or county in any fee bill he had before presented. It is very noticeable under this section that it specifically states "costs properly chargeable against the state or county."

The only reference made to the payment of court reporters for transcripts furnished to defendants when they are unable to pay the costs of such transcript is partially set out in Section 13354, R. S. Missouri 1939, and reads as follows:

> "* * * and provided, that in cases of appeal and on motions for new trial, the transcript of the evidence shall be furnished to the defendant upon the order of the court without cost to said defendant when it shall appear to the satisfaction of the court that the defendant is unable to pay the cost of such transcript for the purpose of making such appeal; and provided further, that the stenographer shall be allowed for making such transcript the sum of fifteen cents per folio of one hundred words for each transcript so furnished; and when the court shall be satisfied that the defendant is unable to pay for making such transcript, the same shall be taxed as costs in the case against the state or county, as may be proper."

Under the above section it specifically states "* * the same shall be taxed as costs in the case against the state or county, as may be proper." In other words, the payment must be taxed as costs by the state or county for the furnishing of a transcript of the trial of the case when ordered by the trial court. The partial section does not say that it must be paid but merely says taxed.

The above Section 13354, supra, was passed upon in the case of State v. Pieski, 248 Mo. 715, l. c. 720, where the court said:

> "There is no express statutory authority in this State for prosecuting an appeal in a criminal case in forma pauperis. In the courts

nisi it is but stating a ridiculous truism to say that one being prosecuted for a felony, has no occasion to invoke the privilege. By the vaguest statutory inference alone can it be said that this court has the right, even in a proper case properly presented, to permit the prosecution of an appeal without the payment of costs. These inferences arise only from the provisions of our laws providing for the duties of official stenographers in the circuit courts of the State. (Secs 11257, 11263, and 11246, R. S. 1909.) By virtue of these sections the trial court in case of an appeal or suing out of a writ of error in a criminal case, if 'it shall appear to the satisfaction of the court that the defendant is unable to pay the costs of such transcript for the purpose of making the appeal, the court shall order the same to be furnished, and the stenographer's fee for making the same shall be taxed against the State or county, as may be proper.' But since orders permitting actions to be prosecuted in forma pauperis are not binding except in the court wherein such order is made (Collett v. Frazier, 3 Jones's Eq. (N.C.) 398; Oakes v. High, 32 N. Y. Supp. 289; 11 Cyc. 204), an order thus made by the trial court would not of itself bind this court on appeal and relieve the appellant of the duty of paying the costs of this court. It might be persuasive, upon a timely application made here for permission to prosecute an appeal in a criminal case as a poor person, but not binding. But application to prosecute as a poor person on appeal here ought to be made before the lapse of the one-year period limited by section 5313, supra."

In that case the court specifically held that the Supreme Court was not bound by the actions of the trial court in permitting a person to appeal as a poor person.

In construing different sections of the statutes all sections in reference to the same subject matter must be considered together. It was held in the case of Whalen v. Buchanan County, 111 S. W. (2d) 177, l. c. 180, where the court said:

> "* * * Statutes relating to the same subject are to be construed together and, if possible, harmonized and effect given to all provisions. * * "

Section 4221, R. S. Missouri 1939, 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. * * * * * * * * * * * "

The question as to whether the judgment was final was determined in the case of State of Missouri, ex rel., v. Carpenter, et al., 51 Mo. 555, l. c. 556, where the court said:

> "Although the indictment was for a capital crime, and under it the prisoner might also have been convicted of a felony, punishable by imprisonment in the penitentiary,

> yet it is also true, that it was competent to find him guilty of a less degree or grade of crime, by which the punishment would be reduced to imprisonment in the county jail, or by such imprisonment coupled with a fine. It is the conviction and sentence in such case which establishes the grade of the offense, for the purpose of fixing the liability for costs, and not the allegations contained in the indictment. This is the only question we are called upon to review."

Section 4222, R. S. Missouri 1939, 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 the above section the county, and not the state, is liable for the costs when a defendant is sentenced to the county jail or assessed a fine or both. This section is only applicable where the costs cannot be collected from the defendant.

Section 4223, R. S. Missouri 1939, 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 the above section, upon an acquittalof a defendant on a charge which is punishable solely in the penitentiary, the state is required to pay the costs when the defendant is unable to pay them and in cases where the punishment is not solely in the penitentiary upon an acquittal, the costs shall be paid by the county.

All of the above sections reading together and read with Section 13354, supra, specifically hold that under certain circumstances the state must pay the costs and other circumstances the county must pay the costs, goverened, of course, by the fact whether or not the costs can be collected from the defendant. Reading the above sections in reference to the clause under Section 13354, supra, which reads as follows: "* * the same shall be taxed as costs in the case against the state or county, as may be proper," the costs in any case may be taxed against the state or the county.

In the case of a graded felony, as carrying concealed weapons, upon a sentence to the penitentiary, where the defendant is unable to pay the costs, and the case is appealed and affirmed in the Supreme Court, the state would be liable for the costs. If the case is not affirmed by the Supreme Court but reversed and remanded for trial and the defendant, upon a retrial, is either sentenced to the county jail or assessed a fine, or both, the county, and not the state, would be liable for the costs providing the costs could not be collected from the defendant.

In the case covered by the supplemental fee bill attached to your request, which only sets out the costs allowed by the court to the court reporter for preparing a bill of exceptions for appeal to the Supreme Court, in which the death sentence was assessed, it is possible but not probable that the case may be reversed and remanded and the defendant convicted on the second trial on a charge of manslaughter and assessed a punishment or sentence to the county jail. In such a case the county would be liable for the costs in the case, including the bill of exceptions, provided the costs could not be collected from the defendant. This assessment of costs is governed by Sections 4221 and 4222, R. S. Missouri

1939, supra.

Section 4236, R. S. Missouri 1939, reads as follows:

> "The clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor."

Under the above section it specifically states that the clerk, after a case has been determined or continued generally, shall tax all costs which have accrued in the case and specifically states, "and if the state or county shall be liable under the provisions of this article * * *."

Under the above section the question to be determined, first, is whether or not the state or county is liable for the costs under Sections 4221 and 4222, supra. Section 4237, R. S. Missouri 1939, merely refers to Section 4236, supra.

In this state both the appellate and Supreme Courts have passed upon the word "determined." In the case of The State v. Police Commissioners, 14 Mo. App. 297, l. c. 303, the court, in defining the word "determine", said:

> "An idea that the statutory powers given to the commissioners are equivalent to a direct authority to terminate an official service at pleasure, seems to grow out of a misconception of the language employed. If it were the

> actual service which the board is empowered to 'determine,' there might be some propriety in attaching to the word used a signification of closing, concluding, or ending, instead of that one more commonly understood, which implies a fixing, settling, or deciding upon. But the time, which 'the board shall determine,' is coupled with the appointment, and not with the service. To determine this 'time' as directed, is to fix, settle, or decide what it shall be, as an addendum qualifying the effect of the appointment. * * * * * * * * * * "

Also, in the case of State v. Wright, 194 S. W. 35, par. 2, l. c. 37, the court said:

> "While the above language is all that the act contains as to the initial manner of 'determining' the boundaries, the context we think, shows that the word 'determine' is not used in its strict sense of 'ascertaining to a mathematical certainty,' but it means that the county superintendent shall 'settle upon and decide' where such boundaries shall be; * * * * * * * * * * * * * * * * * "

Also, in the case of State v. Manring, 58 S. W. (2d) 269, par. 6, l. c. 274, the court said:

> "* * * * This court ruled the objection against the relators. It held that the word 'determine' as used in section 11259, R. S. Mo. 1919, with reference to the duty of the school superintendent to fix the boundaries of a proposed consolidated district, is not to be used in its strict sense of 'ascertaining to a mathematical certainty,' but it means that the superintendent 'shall settle upon and decide' where such boundaries

shall be, * * * * * * * * * * * * "

Also, in the case of State v. Bode, 113 S. W. (2d) 805, pars. 3-6, the court said:

> "Relator does not contend that the paragraph presents an ambiguity, and it is admitted that the word 'determine,' as commonly used, means to conclude, settle, decide, and fix. If so, the paragraph, standing alone, authorizes the commission to settle the necessary qualifications of a director. We do not understand the relator to otherwise contend. He argues only that the paragraph should be harmonized with section 10, art. 8 (which requires a residence of one year), by interpolating after the word 'determine' in said paragraph the words 'subject to the provisions of section 10, art. VIII.' We are familiar with the rule that the provisions of the Constitution should be harmonized. However, if said paragraph is unambiguous and in direct conflict with section 10, 'the amendment must prevail because it is the latest expression of the will of the people.' * * * * * * * * "

CONCLUSION

In view of the above authorities it is the opinion of this department that a court reporter is not entitled to have made up and certified the costs for preparing a bill of exceptions where a defendant is allowed to appeal as a poor person before the case is finally completed.

It is further the opinion of this department that the court reporter is not entitled to a supplemental bill for costs in advance of the certificate and payment of other costs payable either by the state or county until

the case is finally determined by the courts without right for further appeal in the case.

Respectfully submitted

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APPROVED:

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