CRIMINAL COSTS: Seven questions on fees allowed non-resident witnesses and to sheriffs.

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Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: Mr. R. K. Nutter

Dear Sir:

This will acknowledge receipt of your recent request for an official opinion.

Paragraph "(a)" of your first question reads as follows:

> "(a) Where a subpoena is issued for a witness who resides in some other county in the state, but not in the county where proceedings are bing held, and a subpoena is sent by mail to the party for whom it is issued and the said party writes on the back thereof that he accepts service; is the witness entitled to fee for mileage from his place of residence to the place of trial and return? We are sending you copies of four subpoenas from Audrain County and two from Benton County which will explain the procedure referred to and upon which this question is bases."

The statutes applicable to the question of fees for witnesses, are Sections 13420 and 13421. We are not setting out these sections on account of the length of both of them. In the above question the main inquiry is whether or not acceptance of service of a subpoena in writing is sufficient to allow the witness mileage and fees per diem. The last and very early case upon this subject is the case of Wilson v. The St. Louis, K. & N. W. Ry. Co., 53 Mo. App. 342, in which the court first said:

> "* * * There was a trial, which resulted in a verdict and judgment for the defendant. The clerk of the court allowed and taxed as costs mileage in favor of certain witnesses, who had in writing accepted service of the subpoenas. The subpoenas were regularly issued, and the witnesses attended the trial. They lived more than forty miles from the place of trial, and their fees were not tendered. Upon this state of facts the circuit court ruled that the action of the clerk in allowing the witnesses mileage was proper. The plaintiff has appealed."

And the Court, in arriving at its opinion, said, at l. c. 344:

> "The question is, did the witnesses attend the trial in obedience to a subpoena? If so, they are entitled to mileage. While the statute does not provide for acceptance of service of a subpoena, we know of no good reason why a witness could not dispense with the legal forms of service. In Pennsylvania it was expressly decided that he could. Feree v. Strome, 1 Yeater (Pa.) 303. A subpoena is not directed to an officer, but to the witness himself.
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> "In the case of Herson v. Railroad, 18 Mo. App. 439, subpoenas were not issued. The witnesses attended the trial at the request of the defendant. The Kansas City Court of Appeals held, and we think properly, that the attendance of the witnesses in that case was purely voluntary, and that they were not entitled to claim mileage. But this cannot be said of wit-

> nesses who have accepted service of subpoenas. Attendance by them should be regarded as in obedience to or 'under subpoena.' And we think this is true, although the witnesses live more than forty miles from the place of trial, and the legal fees have not been tendered or paid. The right to have fees paid in advance may also be waived."

Under the holding in the above case there is no question but that the witness is entitled to fees and mileage, even though the lawfully issued subpoena was not served by a sheriff.

CONCLUSION

It is, therefore, the opinion of this department that a witness who resides in some other county in this State is entitled to mileage and fees per diem when the witness accepts the service of the subpoena in writing.

Paragraph "(b)" as set out in your request reads as follows:

> "(b) Would such witnesses be entitled to per diem fee if no further subpoena were issued or other return made on said subpoena?"

This paragraph is answered by the above case, but, in a case where the subpoena was not lawfully issued the courts have held that the witness is entitled to fees per diem while testifying.

It has also been held that in order for the witness to obtain mileage and fees the subpoena must be lawfully issued by the circuit clerk. It was so held in the case of James R. Lucas v. Lucy M. Brown, 127 Mo. App. 645, l. c. 651, where

the subpoena is not lawfully issued the witness is still entitled to his fee only for attendance while testifying. It was so held in Knight v. Donnelly, 135 Mo. App. 105, l. c. 106, where the court said:

> "It was shown that plaintiffs' attorney had in his office a printed, blank subpoena, having the name of the clerk printed thereon, but not having the signature of the clerk or any of his deputies. The attorney filled in the blank spaces, name of witness, title of the cause, date for attendance, party on whose behalf she should attend, dated and mailed it to her at Detroit. Before mailing it, the attorney wrote on the back these words, 'I hereby accept service of the within subpoena.' The paper when introduced in evidence read as follows: 'I hereby accept service of the within subpoena at St. Louis, Mo., Mrs. D. D. Lewis.' Mrs. Lewis entered the State on her route at St. Louis and there accepted service of the subpoena by writing said acceptance.
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> "As no instructions were asked or given, strictly speaking, there is nothing before the court to review. On the merits of the case, it may be said however, that the action of the court should be approved. The attendance of the witness was purely voluntary. 'A subpoena is a process of court and must be issued in the manner prescribed by the statute. It must contain the names of the witnesses to whom it is directed and be signed by the clerk and attested by the seal of his office.' (Lucas v. Brown, 127 Mo. App. 645.) The so-called subpoena was not such because it was not signed by the clerk or one of his deputies, which is an absolute re-

> quirement of the statute; therefore, the witness' attendance was voluntary and she was entitled to a fee only for attendance while testifying. * * * "

CONCLUSION

It is, therefore, the conclusion of this department that the witness is entitled to per diem fee even if no further subpoena were issued or other return made on said subpoena, other than the acceptance of the service by the witness in writing.

II

Your second question reads as follows:

> "(a) If a witness resides in a county other than where proceedings are being held and he or she is notified by phone or mail to appear at the trial and the witness does appear and is served with a subpoena at the place of trial on the trial date; is said witness entitled to fee for mileage either in going to or returning from the place of trial?"

The method and procedure of the service of subpoenas are set out in Section 1908 R. S. Missouri, 1939, which reads as follows:

> "The service of a subpoena to testify shall be by reading the same or delivering a copy thereof to the person to be summoned: Provided, that in all cases

> where the witness shall refuse to hear such subpoena read or to receive a copy thereof, the offer of the officer or other person to read the same or to deliver a copy thereof, and such refusal, shall be a sufficient service of such subpoena. The return shall show the manner of service; and in civil cases, if the witness reside at a greater distance than forty miles from the place of trial, it shall be so stated in the return, and also whether his legal fees have been tendered or paid, and if served by an officer his return shall be conclusive of the facts therein stated; if served by a private person, the return shall be verified by affidavit, which shall be received as evidence, and such affidavit may be made before the sheriff of the county where such service is made."

Under the above section the subpoena must be served specifically as set out in that section and not by telephone. If the service of a subpoena is not made in accordance with Section 1908, supra, the witness is only entitled to fee per diem, and not for mileage in accordance with the holding of Knight v. Donnelly, 135 Mo. App. 105, as set out in the above quotation in that case.

CONCLUSION

It is, therefore, the conclusion of this department that a witness residing in a county other than where the proceedings are being held, who is notified by phone or mail, is a voluntary witness and is not entitled to mileage either way.

III

Your third question reads as follows:

> "(a) If a witness lives outisde of the county where proceedings are being held and an officer calls said witness by phone and recites the terms of a subpoena and asks if the witness will accept service and the witness advises in the affirmative; would this be proper service whereby the officer could make return on a subpoena showing he had served same by reading to the witness?"

In answer to part "(a)" we believe that it is covered by the authorities set out in paragraph two.

CONCLUSION

It is, therefore, the conclusion of this department that service by phone does not comply with Section 1908 R. S. Missouri, 1939.

Paragraph "(b)" of your third question reads as follows:

> "(b) Would the witness be bound to attend in obedience to this service and would he be entitled to a per diem or mileage fee for attendance or travel in relation thereto?"

This inquiry is answered by the authorities set out in paragraph two.

CONCLUSION

According to the authorities set out in paragraph two of this opinion, the witness would not be bound to attend the trial on service by telephone.

It is further the opinion of this department that the witness would be a voluntary witness and would not be entitled to per diem fee.

Paragraph "(c)" of your third question reads as follows:

> "(c) Would the officer be entitled to mileage or per diem fee for serving this subpoena?"

CONCLUSION

In view of the above authorities set out, it is the opinion of this department that the officer reading a subpoena over the telephone would not be allowed mileage or per diem fee for serving this subpoena.

IV

Your fourth question reads as follows:

> "(a) Is actual travel necessary before a witness is entitled to fee for mileage;

for example, a witness who resides in some county other than where proceedings are being held is subpoenaed at the place of trial two or three days or more prior to trial, and on account of distance or for other reasons the witness remains at the place of trial after being subpoenaed until he is used, then returns to his place of residence; is he entitled to mileage fee?"

Section 13420 R. S. Missouri, 1939, reads as follows:

"Witnesses shall be allowed fees for their services as follows: For attending any court of record, reference, arbitrators, commissioner, clerk or coroner, at any inquest or inquiry of damages, within the county where the witness resides, each day, $1.50. For like attendance out of the county where witness resides, each day, $2.00. For traveling each mile in going to and returning from the place of trial, .05. For attending before a justice of the peace, each day, $1.00. For traveling each mile in going to and returning from the place of trial before a justice of the peace, .05. For attending under the law to perpetuate testimony, the same fees as are allowed for attending a court of record in like cases; but witnesses attending in more than one case on the same day and at the same place shall only be allowed fees in one case; and any witness who shall claim fees for attendance in two or more cases on the same day and at the same place shall not be allowed any fees that day. Each witness shall be examined on oath by

> the court, or by the clerk when the court shall so order, or by the justice as the case may be, as to the number of days of his actual necessary attendance, under subpoena or recognizance, and the number of miles necessarily traveled; and in every case where a witness shall not, as such, actually and necessarily attend such court, or before such justice, and withdrawn himself from his business during the full time for which pay is claimed, he shall not be allowed for more than one day's attendance."

Under the above section it should be specifically noticed that the witness should be examined under oath and state the actual number of miles necessarily traveled. Under the facts of your fourth question the witness has not actually traveled any necessary miles. The language in the above section is unambiguous and is not open to construction. (St. Louis Amusement Company v. St. Louis County, 147 S. W. (2d) 1667.)

Also, under Section 13421, supra, it is provided that the court shall make a record and shall swear the witness to the facts contained in said entry. Unless the witness swears to the truth of the entry of the clerk, as to the actual number of miles necessarily traveled by reason of the subpoena, he is not entitled to mileage. It was so held in the case of Veidt v. Railroad, 109 Mo. App. 102, l. c. 103, where the court said:

> " * * * While it was made to appear from the fee book that the clerk made the entry therein required by the statute, it stands in effect admitted that he did not swear the witnesses to the truth of the facts contained in said entry as further required by it; or, in other words, the allowance of the fees claimed by the several witnesses was not made under oath, but without it.
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> "The question thus arising is, whether or not the fees of the witness so allowed were taxable against the defendant as costs in the case. At common law no recovery of

> costs was allowable, and when statutes were passed authorizing their allowance they -- the statutes -- were always strictly construed. State ex rel. v. Seibert, 130 Mo. l. c. 213, and cases there cited. And this rule of statutory construction obtains in this State. Steele v. Wear, 54 Mo. 531; Shed v. Railroad, 67 Mo. 687; Sinclair v. Railroad, 74 Mo. App. 500; Houts v. McCluney, 102 Mo. 13; Thompson v. Elevator Co., 77 Mo. 520; St. Louis v. Meintz, 107 Mo. 611; Hoover v. Railroad, 115 Mo. 77; State ex rel. v. Oliver, 116 Mo. 188; State ex rel. v. Seibert, 130 Mo. 202.
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> "Applying this rule to the case before us, and we must conclude that as the witnesses were not first sworn to the truth of the fee-book entry by the clerk, he was neither authorized to allow the fees for which they applied, nor to tax the amount thereof as costs in the case. * * * * * *."

It is very noticeable in this opinion that most of the authorities cited are Missouri Appeal cases which is necessary for the reason that the decisions are founded mostly on motions to retax costs.

CONCLUSION

It is, therefore, the opinion of this department that in order that a witness be allowed mileage it is necessary that he actually travel the miles which he claims under the subpoena.

Part "(a)" of your fifth question reads as follows:

> "(a) Would the State Auditor be justified in refusing payment of witness fees for state witness whose names were not indorsed on the indictment or information if there was not a written order or written affidavit by the Prosecuting Attorney for said witnesses to be subpoenaed?"

Section 4229 R. S. Missouri, 1939, reads as follows:

> "No subpoena for a witness in any criminal case shall be issued on the part of the state, unless the name of such witness be indorsed on the indictment or information, or the prosecuting attorney shall order the same to be issued, in writing, or the prosecutor shall file an affidavit that other witnesses ordered by him are positively necessary for a complete adjudication of the case; and no subpoena shall issue for any witness unless the defendant is in custody or on bail, or the clerk or justice shall have good reason to believe that he will be apprehended. Subpoenas may be issued to different counties at the same time, but all the witnesses ordered at one time, and living in the same county, shall be included in one subpoena."

Section 4230 R. S. Missouri, 1939, reads as follows:

> "The clerk shall attach to each fee bill a certified copy of the names of all witnesses indorsed on the indictment or information and all orders of the prose-

> cuting attorney and affidavits of the prosecutor as provided for in the next preceding section and no costs shall be paid any state witness not therein."

Section 4229, supra, was solely enacted with regard to the question of costs, (State v. Rasco, 239 Mo. 535); and, in construing Section 4229, supra, one must take into consideration Section 4230, supra. In Section 4230 it is specifically stated that unless the witnesses are indorsed on the indictment or information and the orders of the prosecuting attorney, and the affidavits of the prosecutor, are ~~are~~ not attached to the fee bills, no cost shall be paid any state witness. Both Sections 4229 and 4230, supra, are plain, common language and are unambiguous, therefore they need no construction.

CONCLUSION

It is, therefore, the conclusion of this department that the State Auditor would be justified in refusing payment of witness fees for state witnesses whose names were not indorsed on the indictment, information, or the fee bill, or did not have attached the written order, or written affidavit, of the prosecuting attorney for said witnesses to be subpoenaed.

Part "(b)" of your fifth question reads as follows:

> "(b) Would the State Auditor be justified in refusing payment of fees for defendant witnesses whose names were not on the original subpoena issued for witnesses in any certain county, but who were listed on a subsequent subpoena, if the court records did not show that same was ordered by the Judge or if no affidavit by the defendant was on file showing the request?"

Section 4231 R. S. Missouri, reads as follows:

> "The defendant shall be entitled to process for witnesses to be issued and directed to the sheriff of the county in which such witnesses may be; but all the witnesses in the same county shall be included in one subpoena, and no subsequent subpoena shall be issued for any witness, unless the court in which the cause is pending or the judge or justice, shall for good cause shown, order a subpoena for another witness; or if, in absence of the judge, the defendant shall file with the clerk his affidavit that other witnesses ordered by him are material and positively necessary in his behalf, to a full and complete adjudication of the case, the clerk shall issue subpoenas for such witnesses."

This section is plain ordinary language, and is unambiguous and needs no construction.

CONCLUSION

It is, therefore, the opinion of this department that the state auditor would be justified in refusing payment of fees for defendant witnesses whose names were not on the original subpoena issued for the witnesses in any one county, and who are not listed on a subsequent subpoena which is ordered by the judge and no affidavit is attached to the fee bill by the defendant, showing the request.

VI

Your sixth question reads as follows:

> "(a) We understand that where a witness has once been legally subpoenaed within the state or recognized to appear for the trial within the state and subsequently attends court from his residence in a foreign state, he is entitled to a fee for mileage from his place of residence in the foreign state to the place of trial in this state and return. There have been instances where it was not clear that a witness was a bonefide resident of another state, perhaps on a visit or on a temporary residence, for instance, a witness who was a resident of this state was legally subpoenaed to attend a trial in the county where he resides, the cause was continued and subsequent to that date and prior to the next term of court, the witness claimed that he had moved to another state and he was a resident thereof and claimed attendance from the foreign state and return. What would constitute residence in a foreign state and would such witness be entitled to mileage fee?"

The main authority on the above question is fully decided in the case of State ex rel v. Wilder, 196 Mo. App. 418, where the court first said, at page 430:

> "It will not be seriously contended that the subpoenas in this cause which are alleged to have been served upon the witnesses at their places of residence in a foreign State were of any force or vitality. A subpoena issued from the courts of this State cannot have any extraterritorial operation, hence the service of the sub-

> poenas of the witnesses whose claims for mileage are involved in this proceeding in another State were mere nullities and of no obligatory force upon the witnesses to obey the command contained in the subpoena. The rules of law applicable to this subject were fully discussed and announced in State ex rel. v. Seibert, 130 Mo. 202, by the Court in Banc. There were two opinions in that case, but upon the proposition that process served beyond the limits of this State were of no force and effect, there was no division of opinion.
> * * * * * * * * * * * * "

And, later, at page 432, said:

> "There is a marked distinction between a witness who has been duly subpoenaed or recognized in this State and one upon whom the process was served at his place of residence in a foreign State. In the first place, the service of the subpoena in the foreign State is of no force and effect, and is just the same as if no process at all had been served, and the witness under that sort of service might return to this State and would not by reason of it be subject to the compulsory process of attachment. But on the other hand, a non-resident witness who is duly and legally served with a subpoena in this State, while no compulsory process could be issued for him to his place of residence in a foreign State, yet if he should return to this State he would be subject to such compulsory process the same as any other witness residing in the State, hence it may very well be ar-

gued that the non-resident witness who has been duly served in this State with process, attends the trial of a cause in obedience to the commands of such subpoena, for the very reason that the moment he visits this State, it matters not how far distant from the place of trial, he could be compelled to obey the process so served upon him. By service of the process in this State, while the court was powerless to compel obedience to it, as long as the witness remained in a foreign State, yet the court did acquire such jurisdiction over the person of the witness as to enable it to compel obedience to the commands of such process in any county of this State where the witness may be found, hence the witness who has been served with process in this State, though a resident of a foreign State, who attends the trial, may very appropriately say to the court that he did not care to be deprived of his liberty in visiting the State when occasion required in order to avoid the issuance and service of compulsory process, therefore, I am here and have traveled from my residence in a foreign State in obedience to the process which was properly and legally served upon me in this State. It follows under such circumstances as was ruled in State ex rel. v. Seibert, supra, the State could not be heard to complain that a witness, though living in another State, had obeyed the commands of its process and submitted to the jurisdiction of the court by reason of the proper and legal service of it in this State. However, that is not this case. The claim for mileage by the witnesses in this proceeding is based upon the service of process at their places of residence in another State. As before stated, this process and the service of it was without any force or effect, hence it must logically follow, there being no process served, their mileage traveled and attendance upon court

> was voluntary, and not in obedience to the commands of any process issued by the court.
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> "This court has uniformly held that no costs can be taxed except such as the law in terms allows, and it being essential that the witnesses actually and necessarily travel the mileage in consequence of a subpoena legally served upon them, and there being no legal service of process upon the witnesses claiming fees in this case, it must be ruled that the auditor was warranted in refusing to allow the fees for such witnesses as certified by the judge and prosecuting attorney."

In your sixth question you further ask what would constitute residence in a foreign state and would such witness be entitled to mileage fee. That question is a question of fact, and not of law. But, in view of the holding, in the case of State ex rel v. Seibert, 130 Mo. 202, as set out in the majority dissenting opinion on that question, we believe that if the witness would swear under oath, as set out in Section 13421, supra, he should be entitled to his mileage. In the above cited case the court, at page 224, said:

> "I recognize the rule that no fees are allowed unless expressly given by statute but I think the nonresident witness who regards the obligation into which he has entered with the state and attends and testifies is entitled to his mileage from his place of residence both by letter and spirit of an express statute, and I find nothing in the statute upon which to base the distinction that his mileage should be restricted to our state lines.

"Sound policy and justice alike dictate that the state should render some just compensation to a witness who attends our courts from our sister states in the same manner that we reward our own citizens for a similar service. I regard it as a matter of prime importance in the enforcement of the criminal law that the statute should continue to be construed so as to place the nonresident witness on the same footing in regard to his fees and mileage as a resident witness. * *"

CONCLUSION

Therefore, it is the opinion of this department that a witness served with a subpoena in this state, who removes to another state, with the intention of being a resident of that state, should be entitled to mileage from the foreign state, the same as if he was under recognizance in this state.

VII

Your seventh question reads as follows:

"(a) Section 1907 R. S. Mo. 1939 provides that:

'Subpoenas shall be directed to the person to be summoned to testify, and may be served by the sheriff, coroner, marshall or any constable in any county in which the witness to be summoned resided or may be found, or by any disinterested person who would be competent witness in the cause and the sheriff, coroner, marshall or constable in any county may serve any subpoena issued out of any court of their county, in term time, in any county adjoining that in which the court is held.'

"There have been some instances where a sheriff or other officer has served subpoenas on witnesses in counties far removed from the place or proceedings, but not within own county or adjoining county. Would a subpoena served in this manner be legal service and would the sheriff or other officer be entitled to fee for mileage in going to and returning from the place of service if such service was not within his own county or in an adjoining county?"

It will be specifically noticed under the above section that it is stated that service of a subpoena may be had out of the court in "term time" in an adjoining county. This language is unambiguous and the only time that a subpoena can be served in an adjoining county is "term time." When special powers are conferred, or special methods are prescribed for exercise of power, the exercise of such power is within the maxim that - the expression of one thing is the exclusion of another, and the doing of the specified, except in particular way pointed out is nugatory. (Kroger Grocery & Baking Co., v. City of St. Louis, 106 S. W. (2d) 435, 341 Mo. 62, 111 A. L. R. 589.) In view of the above case service of a subpoena under no circumstances can be had by a sheriff in any county except the county where the cause is pending, and during "term time" in an adjoining county.

CONCLUSION

It is, therefore, the conclusion of this department that a subpoena served by a sheriff in another county, other than in the county where the cause is pending, or during "term time" in an adjoining county is void.

It is further the opinion of this department that since the subpoena is void, the sheriff is not entitled to mileage, for the reason that in the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, Pars. 5-7, the court said:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. * * * * * (Cases Cited)."

Respectfully submitted

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APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW