

CRIMINAL COSTS -

PROSECUTING ATTORNEY -

Prosecuting Attorney not allowed fee where punishment was not assessed in the penitentiary, county jail or by fine.

September 23, 1942

Hon. Forrest Smith  
State Auditor  
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of September 18, 1942, which reads as follows:

"We hand you herewith cost bill #2091, Oregon County in the case of State vs. Charley Baird Turner et al, wherein the cost bill shows that one defendant on a plea of guilty to the crime of burglary was sentenced to two years in the Industrial School for Boys (Missouri Training School) at Boonville, Mo. The two other defendants on pleas of guilty were sentenced to two years each in the Industrial School for Girls at Chillicothe, Mo.

"We call your attention to the Prosecuting Attorney fee of \$37.50 charged at item 102 on this cost bill. This amount represents a charge of \$12.50 for convicting each of these defendants of the crime of burglary. We request your official opinion as to whether or not this is a proper charge against the State. In other words, is the State liable for a \$12.50 fee for conviction of burglary where a defendant is sentenced to either of the above mentioned institutions. If not, what is the proper amount chargeable."

Section 9676 R. S. Missouri, 1939, partially reads as follows:

" \* \* \* On the return of the summons or other process, or as soon thereafter as may be, the court shall proceed to hear the case in a summary manner, and if it shall determine that the child is a 'neglected child' within the definition thereof contained herein, shall enter its order or judgment accordingly under the provisions of this article; and the cost of the proceedings may, in the discretion of the court, be adjudged against the petitioner, or any person or persons summoned, or appearing as the case may be, and collected as provided by the law in civil cases. All costs not so collected shall be paid by the county. \* \* \* "

The above partial section is contained in Article 9, of Chapter 56, of the Revised Statutes of Missouri, 1939, which applies to procedure of juvenile courts in counties of fifty thousand inhabitants and over. It is also provided in this partial section that where a petition is filed against the child as a delinquent, and the child is declared a delinquent by the court, the costs, not collected as provided by law in civil cases, or assessed against the petitioner, must be paid by the County.

Section 9703 R. S. Missouri, 1939, provides a similar procedure for the collection of costs. Section 9703, supra, applies to counties having a population of less than fifty thousand inhabitants. Under Section 9704 R. S. Missouri, 1939, a delinquent child, if a boy, may be committed by the court to the Missouri Train-

ing School for Boys, at Boonville, Missouri, if a girl, to the State Industrial Home for Girls, at Chillicothe, Missouri, and if a colored girl, to the State Industrial Home for Negro Girls, at Tipton, Missouri.

Under the delinquency procedure, and under Section 9702 R. S. Missouri, 1939, thereof, a notice must be issued requiring the parents, or the person having custody and control of the child, to appear with the child at the place, and at the time set, in the summons. This procedure of summoning the parents, or person having control and custody of the child, only appears in the delinquency proceeding, and not in a proceeding under the general criminal law.

Under Section 9700 R. S. Missouri, 1939, in the discretion of the judge, of any court having jurisdiction of delinquent children, under the provisions of Articles 9, or 10, Chapter 56 R. S. Missouri, 1939, any petition alleging a child to be delinquent may be dismissed and such child prosecuted under the general criminal law.

When a child is prosecuted under the general criminal law, the question as to how the costs shall be paid is set out in Sections 4220 to 4225 R. S. Missouri, 1939, inclusive. Under Section 4237 R. S. Missouri, 1939, it is the duty of the prosecuting attorney to strictly examine each bill of costs which is presented to him by the clerk of the court, under Section 4236 R. S. Missouri, 1939, and it is the duty of the judge and prosecuting attorney to certify the bill of costs to the state auditor if the State is liable for the costs, or to the clerk of the county court if the county is liable for the costs. This certificate is not binding on the state auditor. (State ex rel v. Wilder, 196 Mo. 418, 95 S. W. 396.)

Section 13405 R. S. Missouri, 1939, partially reads as follows:

" \* \* \* for the conviction of every defendant in the circuit court, upon indictment or information, or before a justice of the peace, upon information, when the punishment assessed by the court or jury or justice shall be fine or imprisonment in the county jail, or by both such fine and imprisonment, five dollars; for the conviction of every defendant in any case where the punishment assessed shall be by confinement in the penitentiary, except in cases of rape, arson, burglary, robbery, forgery or counterfeiting, ten dollars; for the conviction of every defendant of homicide, other than capital, or for offenses excepted in the last clause, twelve dollars and fifty cents; for the conviction of every defendant in a capital case, twenty-five dollars; for his services in all actions which it is or shall be made his duty by law to prosecute or defend, five dollars. \* \* \* \* \* "

Under the above partial section fees are allowed prosecuting attorneys wherein they obtain a conviction in which the punishment assessed is confinement in the penitentiary, in the county jail, or a fine, or by both such fine and imprisonment in the county jail. We find no provision for the payment of a fee to the prosecuting attorney wherein the defendant is sentenced to the Missouri Training School for Boys, the State Industrial Home for Girls, or the State Industrial Home for Negro Girls. All fee statutes should be strictly construed against the officer and where no fee is allowed by statute the officer in performing his duty acts gratuitously. It was so held in the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, Par. 8, where the court said:

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645."

Under Section 8998 R. S. Missouri, 1939, the court may commute sentence of any person under the age of seventeen years who has been convicted under the general criminal law of this State, so that the person can be sentenced and committed to the Missouri Training School for Boys, and the same applies also to the State Industrial Home for Girls and the State Industrial Home for Negro Girls.

In reading the bill of costs in the case of State v. Charley Baird Turner, Dorothy Finney and Elmina Finney, we find the following fees set out: First, "Issuing two notices to parents . . . . . \$2.00"; which the clerk claimed. Under the general law we find no such fee allowed the clerk, but evidently the case was on a petition filed for delinquency, although it states "burglary." Many charges of delinquency are founded upon general law such as burglary, larceny, robbery etc., but his charge is merely evidence in determining whether the defendant is guilty of delinquency or not. Also, in reading the bill of costs, we find the prosecuting attorney claiming \$37.50, as a fee for the convicting of three of the defendants set out in the bill of costs. We find nothing, however, which mentioned a sentence to the penitentiary, county jail, or assessment of a fine or a commutation directing that the defendants be confined in the Missouri Training School for Boys, and in the Industrial

Home for Girls. On its face, the bill of costs appears to be the costs of the delinquency case for which the State is not liable.

CONCLUSION

It is therefore, the conclusion of this department that the fee of Thirty-seven Dollars and Fifty Cents (\$37.50), charged as "Item 102" on the within described cost bill should not be paid by the State or by the county, for the reason that we find no statute authorizing such payment.

It is further the opinion of this department that the bill of costs herein described, on its face, shows that the defendants were convicted of delinquency and not burglary.

It is also the opinion of this department that before the State is liable for the costs in such actions, where the defendants are sent to the Missouri Training School for Boys, at Boonville, Missouri, the State Industrial Home for Girls, at Chillicothe, Missouri, and the State Industrial Home for Negro Girls, at Tipton, Missouri, the conviction first must be had under the general law and the sentence then commuted to the above mentioned Industrial Homes.

We would suggest that in the payment of such cost bills the State Auditor should require a certified copy of the information, so that he may determine whether the conviction was had under the general criminal law, or under the Delinquency Act. The fact that the bill of costs

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states that an information was filed is not conclusive,  
for the reason that an information is filed both under  
the Delinquency Act and under the general criminal law.

Respectfully submitted

W. J. BURKE  
Assistant Attorney General

APPROVED:

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ROY McKITTRICK  
Attorney General of Missouri

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