

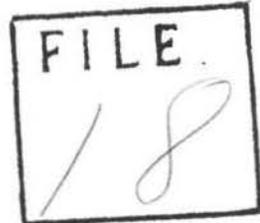
CRIMINAL COSTS:  
and

Prosecutor not entitled to fee  
for conviction upon a plea of  
guilty when plea was set aside  
and case dismissed.

PROSECUTING ATTORNEYS:

June 3, 1942

2/122  
Hon. Joe W. Collins  
Prosecuting Attorney  
Cedar County  
Stockton, Missouri



Dear Sir:

We are in receipt of your letter of May 26, 1942,  
in which you request an official opinion, as follows:

"In the Cedar County Circuit Court,  
March Term, 1942, one Johnnie Wallace  
entered plea of guilty to a charge  
of burglary and larceny under Section  
4448, R. S., 1939.

"On April 30 the same being an adjourned  
day of said Term of Court the defendant  
by leave of Court withdrew his plea of  
guilty and Prosecuting Attorney entered  
nolle prosequere.

"In bill of costs to State should the  
following fees be presented:

"To Circuit Clerk, taking and entering  
plea.....0.15

"To Sheriff, trial or confession,  
.....1.00

"To Prosecuting Attorney, to  
convicting defendant of bur-  
glary and larceny.....12.50

June 3, 1942

"The defendant in the above case was not sentenced on his plea of guilty."

Under Section 13409 R. S. Missouri, 1939, the clerk of the circuit court, acting as criminal clerk, is entitled to a fee for the services in recording " \* \* \* every order in a case not herein provided for .....15 ." The fee, as set out in your request, is an order and the clerk should be entitled to the amount as set out by the above section.

There is no provision in this Section that the defendant be convicted and sentenced to either the penitentiary or county jail. The question as to whether or not the State or the county should pay the fee is set out in Article 20, Chapter 30, Sections 4221, 4222 and 4223 R. S. Missouri, 1939. Under the facts set out in your request the State would have been liable for the costs, unless payment of same could be obtained from the defendant, either upon the plea of guilty by a sentence to the penitentiary, or by a dismissal. Upon the dismissal the State was liable by reason of Section 4223 R. S. Missouri, 1939, and upon a plea of guilty and sentence to the penitentiary the State would have been liable under Section 4221, supra.

You also state in your request that you intend to include in the cost bill a fee due the sheriff in the amount of one dollar for trial or conviction. Section 13413 R. S. Missouri, 1939, allows the sheriff as fees for services in criminal cases, one dollar, for every trial in a criminal case or conviction. In view of that section we are holding that the sheriff is entitled to one dollar as a fee on the plea of guilty. This section does not provide that in order for the sheriff to be entitled to the fee that the defendant be sentenced to the penitentiary.

Also, you state in your request, that you intend to include a fee to the prosecuting attorney, for convicting the defendant of burglary and larceny, in the amount of Twelve Dollars and Fifty Cents.

Hon. Joe W. Collins

(3)

June 3, 1942

According to the last decennial census (1940), the population of Cedar County is 11,697. Under Section 12939, R. S. Missouri, 1939, the prosecuting attorney of Cedar County shall receive for his services per annum, to be paid out of the county treasury, the sum of Twelve Hundred (\$1200.00) Dollars.

Section 13405, R. S. Missouri, 1939, in reference to the allowance of fees, provides, partially, as follows:

" \* \* \* 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; \* \* \*."

This section specifically provides:

"\* \* \* where the punishment assessed shall be by confinement in the penitentiary, \* \* \* ."

Under the facts in your request there was no sentence upon the plea of guilty and the same was set aside and the prosecuting attorney entered a nolle prosequi. Since the defendant had not been sentenced under the plea of guilty the prosecuting attorney should not be allowed the fee of Twelve Dollars and Fifty Cents.

Of course, under Section 12941 R. S. Missouri, 1939, the fee, if paid by the State, should be paid into the county treasurer.

It has been held in this State that a prosecuting attorney is entitled to the fee for a conviction where the conviction has not been set aside, and by stipulation the defendant should pay the costs.

The court, in the case of State Bar Committee v. Stumbaugh, 123 S. W. (2d) 51, 1. c. 53, indicated that if the sentence had been set aside the prosecuting attorney would not have been entitled to the fee allowed for the conviction of the defendant. The court, in that regard said:

"As to count five, the evidence disclosed that appellant represented a Mr. Salmon in a justice court. A trial resulted in a conviction of Salmon, and a fine of \$50 and costs was assessed against him. Included in the costs, which amounted to \$21.85, was a prosecuting attorney's fee, which, under the law, was payable to the county treasurer. In March, 1934, appellant appealed the case to the circuit court. At the September term, 1934, of the circuit court of Madison county, appellant and the prosecuting attorney reached a settlement to the effect that Salmon was to pay all the costs, the appeal was to be dismissed, the fine stayed and Salmon was to agree not to again violate the law. Appellant collected the costs from Salmon and paid the same to the justice, except the \$5.00 assessed as a prosecuting attorney's fee. This he retained under the pretense it was not due the county under such circumstances. He did not return the \$5.00 to his client or pay it to the county treasurer. He charged his client a fee which was paid. The conviction of Salmon was not set aside and therefore the fee of \$5.00 was due as costs. See sec. 11783, R. S. Mo. 1929, Mo. St. Ann. Sec. 11783, p. 7003. But, be that as it may, the \$5.00 did not belong to appellant. He had not paid it to his client nor to the county at the time of the trial in this case."

The Supreme Court of this State has held that the State is not liable for costs in criminal prosecution, unless the defendant should be convicted of a capital offense or should be sentenced to imprisonment in the penitentiary.

In the case of State of Missouri, ex rel., v. Carpenter, et al., 51 Mo. 555, l. c. 556, the court said:

"Before the State can be made liable to pay costs in a criminal prosecution, it is necessary that the defendant should be convicted of a capital offense, or that he should be sentenced to imprisonment in the penitentiary. Neither of these occurrences took place in this case. It is true the jury brought in a verdict in favor of punishing him by imprisonment in the penitentiary, but the court passed no sentence thereon; on the contrary, it set the same aside. There was then nothing final, either as to conviction or sentence.

"The operation and effect was the same as if there had been a mis-trial, and no liabilities or rights were determined thereby.

"But when the case was ultimately and finally disposed of, the result was a conviction and sentence to pay a fine, and be imprisoned in the county jail. This was the sentence that established the character of the offense, and made the costs a charge against the county.

"Although the indictment was for 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."

Also in the case of State v. Clifford, 124 Mo. 492, l. c. 497, the Supreme Court holding that a circuit attorney cannot be allowed a fee where an indictment has been dismissed at the defendant's cost said:

"This court in at least four cases has ruled that where a prosecution of an indictment is dismissed at the defendant's costs a fee for the circuit attorney can not be properly taxed either against a defendant, the state or the county. State v. Beard, 31 Mo. 34; State ex rel. v. Thompson, 39 Mo. 427; State v. Foss, 52 Mo. 416; State ex rel. v. Ray County Court, 52 Mo. 27. \* \* \* \*"

Also, in the case of State v. Foss, 52 Mo. 416, l. c. 417, the court said:

"For the purposes of that case it may be conceded to be correct, as the agreement of the defendant fixed his

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liability for the costs, but for the costs only that were taxed and authorized by law. But in the present case, the fee of five dollars to the Circuit Attorney was not authorized, as that officer had not prosecuted the indictment to a conviction, which was essentially necessary before an allowance could be made to him.

"The case of the State vs. Beard, (31 Mo., 34) decides the very point here presented for review, and holds that where the prosecution of an indictment is dismissed at defendant's costs, a fee for the Circuit Attorney cannot be properly taxed against the defendant."

#### CONCLUSION

In view of the above authorities, it is the opinion of this department, that a circuit clerk is entitled to a fee of fifteen cents for the taking and entering of a plea, and that a sheriff is entitled to a fee of One Dollar for a trial or confession, for the reason that the payment of the fee to the clerk or sheriff does not depend upon a sentence to the penitentiary.

It is further the opinion of this department that the prosecuting attorney is not entitled to a fee of Twelve Dollars and Fifty Cents for the conviction of a defendant until the defendant has been sentenced.

APPROVED:

Respectfully submitted,

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ROY McKITTRICK  
Attorney General of Missouri

W. J. BURKE  
Assistant Attorney General

WJB:RW