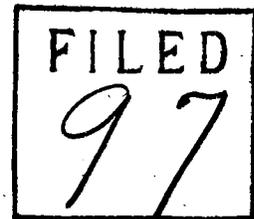


COUNTY: Liability for costs in prosecution of
CRIMINAL: driving motor vehicle while intoxicated
COSTS: upon acquittal.

May 23, 1945



Honorable Bryan A. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads:

"I would like to have an opinion as to the liability for criminal costs payable by the County:

"In a prosecution of a defendant for driving a motor vehicle while intoxicated - defendant acquitted:

"Is the County liable for defendant's witness fees and mileage attending Circuit Court and the preliminary examination?

"Is the Sheriff entitled to mileage and fees summoning defendant's witnesses?"

Section 8401, R.S. Mo. 1939, sub-section (g), makes it an offense for driving a motor vehicle while in an intoxicated condition or when under the influence of drugs. Said sub-section is as follows:

"Miscellaneous offenses. * * * * *

"(g) Driving in intoxicated condition:
No person shall operate a motor vehicle while in an intoxicated condition, or when under the influence of drugs."

Section 8404, R.S. Mo. 1939, provides a penalty for the above violation, under sub-section (c), making the offense a graduated felony. Sub-section (c) reads as follows:

"Any person who violates paragraph (a) of section 8396, paragraph (a) of section 8398 or paragraph (f) or (g) of section 8401 shall be deemed guilty of a felony and on conviction thereof shall be punished by imprisonment in the penitentiary for a term not exceeding five years or by confinement in the county jail for a term not exceeding one year, or by a fine not exceeding one hundred dollars (\$100.00) or by both such fine and imprisonment."

Section 4223, R.S. Mo. 1939, provides that in case of capital cases and those in which the sole penalty is imprisonment in the penitentiary, upon acquittal, the State shall pay the court costs; that all other trials on indictment or information, if the defendant be acquitted, the costs shall be paid by the county, except when the prosecutor shall be adjudged to pay them or otherwise provided by law. Said section 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."

Section 4226, R.S. Mo. 1939, provides that when any person shall be committed or recognized to answer for a felony, and no indictment against such person shall be found, the prosecutor, or person on whose oath the prosecution was commenced, shall be liable for all costs incurred and judgment shall be rendered against him. Said section is as follows:

"In all cases where any person shall be committed or recognized to answer for a felony, and no indictment shall be found

against such person, the prosecutor, or person on whose oath the prosecution was commenced, shall be liable for all the costs incurred in that behalf; and the court shall render judgment against such prosecutor for the same, and in no such case shall the estate or county pay such costs."

Under Section 3900, R.S. Mo. 1939, the prosecuting attorney is specifically exempt from liability for costs in any case. Said section reads as follows:

"When the information is based on an affidavit filed with the clerk or delivered to the prosecuting attorney, as provided for in section 3895, the person who made such affidavit shall be deemed the prosecuting witness, and in all cases in which by law an indictment is required to be indorsed by a prosecutor, the person who makes the affidavit upon which the information is based, or who verifies the information, shall be deemed the prosecutor; and in case the prosecution shall fail from any cause, or the defendant shall be acquitted, such prosecuting witness or prosecutor shall be liable for the costs in the case not otherwise adjudged by the court, but the prosecuting attorney shall not be liable for costs in any case."

In *City of Carterville v. Cardwell*, 152 Mo. App. 32, 132 S.W. 745, the court defines costs in criminal proceedings as charges fixed by law which have been necessarily incurred in the prosecution of one charged with a public offense as compensation to the officers for their services rendered.

In *re Thomasson*, 159 S.W. (2d) 626, l.c. 628, the court held that costs were unknown to the common law and the right to costs is wholly dependent on statutory provisions allowing same. In so holding the court said:

" * * * * The parties do not cite us to a statute or a case specifically covering a situation such as we have here. In the first place costs were unknown to the common law and one's right to costs is now wholly dependent on statutory provisions allowing them. And such statutes are

strictly construed. 7 R.C.L., sec. 2, p. 781; Van Trump v. Sanneman, 193 Mo. App. 617, 187 S.W. 124; Ex parte Nelson, 253 Mo. 627, 162 S.W. 167. There being no statute specifically allowing costs in such instances or under such circumstances or in such a manner is sufficient to exclude the claims of the appellant. * * * "

It was also held in Cramer v. Smith, 350 Mo. 736, 168 S.W. (2d) 1039, that in criminal cases as in civil cases the recovery and allowance of costs rests on statutory provisions, and in the absence of statutory authorization no right to or liability for costs exists.

Article 2, Chapter 99, R.S. Mo. 1939, provides for mileage and fees for summoning witnesses and this includes both witnesses for the state and defendant.

Section 4231, R.S. Mo. 1939, provides that the defendant shall be entitled to process for witnesses to be issued and directed to the sheriff, so unquestionably the fee and mileage caused in summoning witnesses for the defendant constitutes part of the court costs.

In view of the foregoing authorities and citations it is the opinion of this department that this offense constitutes a felony. However, the punishment prescribed by statutes makes it a graduated felony and the penalty provided by statutes does not require the person to be confined exclusively to the State Penitentiary, therefore the state is not required to pay the costs upon acquittal, but the county must assume said costs as provided in Section 4223, supra, except when the prosecutor shall be adjudged to pay said costs as provided under Section 4226, supra. It is the further opinion of this department that upon acquittal for the offense herein charged, the county is likewise subject to mileage and fees incurred by the sheriff in summoning defendant's witnesses.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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