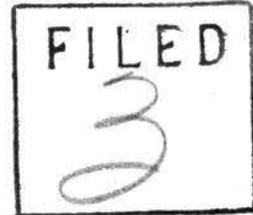


CRIMINAL COSTS:

State, county or prosecuting attorney not liable for costs of dismissal of a felony charge in a preliminary either by prosecuting attorney or justice of the peace.

June 24, 1938



Mr. Richard C. Ashby,
Prosecuting Attorney,
Livingston County,
Chillicothe, Missouri.

Dear Sir:

This will acknowledge receipt of your request dated June 21 for an official opinion from this department which request is as follows:

"I would appreciate your construction of the Sections under Article 19 of Chapter 29, pertaining to the costs of criminal cases in the following circumstances:

Upon a case being filed by myself, as prosecuting attorney, and a warrant issued thereon, and thereafter, the defendant is discharged, either by a nolle or by the justice at the preliminary hearing, who is liable for the costs? It is understood in the above premises that the charges filed was a felony charge and punishment solely by imprisonment in the penitentiary."

In this request you refer to the sections under Article XIX of chapter 29 of the Revised Statutes of Missouri, 1929, and I believe that you are only interested in Sections 3828 and 3830. Section 3828, R.S. Mo. 1929

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 3830, R.S. Mo. 1929 reads as follows:

"When such prosecutions are commenced by a public officer whose duty it is to institute the same, and the defendant is acquitted, the county shall pay the costs; if he is convicted, and unable to pay the costs, the county shall pay all the costs, except such as were incurred on the part of the defendant."

In construing the statutes one must read the sections that are *pari materia* and in reading Section 3826, R.S. Mo. 1929, the section refers to the following:

"In all capital cases in which the defendant shall be convicted,"* * * * *

Also in Section 3827, R.S. Mo. 1929 in reference to when the county should pay the costs, it reads as follows:

"* * * in which the indictment was found or information filed"* * *

Also in Section 3828, *supra*, it sets out:

"* * * and in all other trials on
indictments or information,"* * *

Under these sections it shows on its face that it applies only to specific trials on informations or indictments and does not mention anything concerning preliminary hearings.

Of course, as a matter of fact if the defendant should be bound over to the criminal court in a preliminary hearing, the costs of the hearing would run with the case and be taxed as costs in other criminal proceedings.

Section 3830, supra, in reference to when the county shall pay, provides as follows:

"When such prosecutions are commenced by a public officer whose duty it is to institute the same, and the defendant is acquitted, the county shall pay the costs; if he is convicted, and unable to pay the costs, the county shall pay all the costs, except such as were incurred on the part of the defendant."

This section applies only as to prosecutions commenced under the preceding section which is Section 3829 R.S. Mo. 1929. All of the sections in Article XIX, chapter 29 of Revised Statutes of Missouri, 1929, only refer to costs in which a trial is had in the circuit court and not to trials or preliminaries in the justice courts.

Section 3832, R.S. Mo. 1929 specifically states the method of assessing costs in preliminary hearings. This section reads as follows:

"If a person, charged with a felony, shall be discharged by the officer taking his examination, the costs shall be paid by the prosecutor or person on whose oath the prosecution

was instituted, and the officer taking such examination shall enter judgment against such person for the same, and issue execution therefor immediately; and in no such case shall the state or county pay the costs."

As stated in your request you only refer to preliminaries had where you personally file the complaint and it is not filed by an individual. Your request also inquires only as to the method of payment of costs in a preliminary where you have filed a nolle or the justice has found insufficient grounds to bind the defendant over to the circuit court for trial. Section 3832, supra, provides that the prosecuting witness shall pay the costs on a discharge of the defendant in the preliminary, but under Section 3444, R.S. Mo. 1929 and Section 3510, R.S. Mo. 1929, both sections provide:

"* * * but in no case shall the prosecuting attorney be liable for costs."* * * * *

and

"* * * but the prosecuting attorney shall not be liable for costs in any case."

Section 3444, R.S. Mo. 1929 reads as follows:

"When the proceedings are prosecuted before any justice of the peace, at the instance of the injured party, for the disturbance of the peace of a person, or for libel or slander, or for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, the name of such injured party shall

be entered by the justice on his docket as a prosecutor; and if the defendant shall be discharged or acquitted, such prosecutor shall be adjudged to pay the costs not otherwise adjudged; and in every other case of acquittal, if the justice or jury trying the case shall state in the finding that the prosecution was malicious or without probable cause, the justice shall enter judgment for costs against the prosecution or party at whose instance the information was filed, and shall issue execution therefor; but in no case shall the prosecuting attorney be liable for costs. In other cases of discharge or acquittal the costs shall be paid by the county, except when the prosecution is commenced by complaint and the prosecuting attorney declines to file information thereon, in which case the proceedings shall be dismissed at the cost of the party filing the complaint."

Section 3510, R.S. Mo. 1929 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 3505, 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."

Sections of the statute regarding to fees and costs should be strictly construed and in the case of State ex rel. v. Wilder, 197 Mo. 27, l.c. 32, the court said:

"For many years this court, in obedience to strict statutory provisions, has sedulously maintained that no costs can be taxed except such as the law in terms allows."

Also in the case of City of Greenville v. Farmer, 195 Mo. App. 209, l.c. 211 (1917) the court held:

"It is the well settled law of this State and the country at large that the right to tax costs is purely made by statute; no such right existed at common law; and unless there is a statute authorizing the taxing of costs against the plaintiff, the order of the circuit court is erroneous."* * * *

CONCLUSION

In view of the above authorities, it is the opinion of this office that the sections under Article XIX of chapter 29, Revised Statutes of Missouri, 1929, apply only to costs in a case where a trial, plea or dismissal was had in the criminal court.

It is also the opinion of this department that

Mr. Richard C. Ashby

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where a prosecuting attorney files a complaint upon his own information on a felony upon the conviction of which the penalty is solely imprisonment in the state penitentiary and the case is dismissed or the justice of the peace does not find sufficient evidence to bind the defendant over to the circuit court, neither the state, the county nor the prosecuting attorney is liable for the costs.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB DA