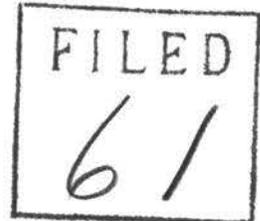


CRIMINAL COSTS: Upon acquittal, even though an instruction on manslaughter is given on a murder in the second degree, the State is liable for the costs.

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March 25, 1943



Honorable L. E. Merrill  
Prosecuting Attorney  
Chariton County  
Keytesville, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of March 23, 1943, in reference to the payment of criminal costs.

The facts stated in your request are as follows:

A charge of first degree murder was filed in one county in the State of Missouri, and was sent to an adjoining county on a change of venue, where three trials were had. At the first trial a conviction was had, which was reversed and remanded by the Supreme Court of this State; the second trial was a mistrial; and on the third trial the defendant was acquitted. The first two trials were had upon an information charging murder in the first degree, and the third trial, (in which, the acquittal was had) was on an information charging murder in the second degree.

Your question is whether the State of Missouri, the county where the case was tried, or the county where the case originated, should pay the costs.

Section 4223 R. S. Missouri, 1939, 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

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."

It will be specifically noticed in this section, that it declares that the State shall pay the costs upon an acquittal in a case in which imprisonment in the penitentiary is the sole punishment for the offense.

Section 4378 R. S. Missouri, 1939, reads as follows:

"Upon the trial of an indictment for murder in the first degree, the jury must inquire, and by their verdict ascertain, under the instructions of the court, whether the defendant be guilty of murder in the first or second degree; and persons convicted of murder in the first degree shall suffer death, or be punished by imprisonment in the penitentiary during their natural lives; those convicted of murder in the second degree shall be punished by imprisonment in the penitentiary not less than ten years."

Under the above section the sole punishment that can be had upon a charge of murder in the second degree is not less than ten years nor more than life in the State Penitentiary. The language of the two statutes are unambiguous and need no construction. It was so held in *Berry-Kofron Dental Laboratory Company v. Smith*, 137 S. W. (2d) 452, 345 Mo. 344.

Under the two above sections 4223 and 4378, the sole punishment upon conviction in the case described in the request, and described in the information, would be imprisonment in the penitentiary.

It is true that the court may instruct on manslaughter, or even as low as common assault, but the "measuring rule" as to who shall pay the costs is set out in the in-

formation upon which the defendant is tried. It was so held in the case of State ex rel. Timberman, Sheriff, v. Hackmann, State Auditor, 257 S. W. 457, l. c. 458, 302 Mo. 273, where the court said:

" \* \* \* From the record, in the case before us, it can be determined whether the jury ever reached the question of manslaughter at all. They may have found that there was no manslaughter in the case, and yet returned the verdict which was returned. To our mind the statute itself is clear and plain. In fixing the cases for which the state shall be liable for costs, in that it says:

"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.'

"Note the italicized language 'if the defendant is acquitted.' In such a case it cannot be well said that the charge in the information is not the basis for fixing the liability of the state. The statute is speaking of certain offenses, and says, if the defendant is acquitted of such offenses, then the state shall pay the costs. It (the statute) says nothing about what might occur during the trial. It is dealing with the issues made by the pleadings. In this case the pleading upon the part of the state makes the issue that defendant is guilty of murder in the first degree. His plea of not guilty puts that charge in issue. Upon such issue it cannot be said that the state can refuse to pay the costs. \* \* \* \* \*"

Honorable L. E. Merrill

(4) March 25, 1943

The above is the last and ruling case upon the payment of costs under the facts set out in your request, and under the facts set out in the above case.

CONCLUSION

It is, therefore, the opinion of this department, that where a defendant is acquitted on an information charging murder in the second degree, that, even though instructions on lesser charges, which may result in imprisonment in the county jail, are given, the State is liable for the costs and not the county.

Respectfully submitted

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APPROVED BY:

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ROY MCKITTRICK  
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