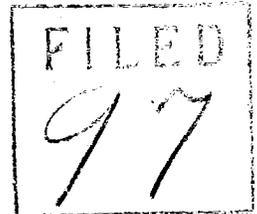


MAGISTRATE COURTS: When felony charge dismissed before preliminary
CRIMINAL COSTS: hearing, neither the state nor county, nor the
prosecuting attorney are liable for costs.
When misdemeanor charge dismissed before trial,
county is liable for costs..

November 12, 1947



Honorable Mark Wilson
Judge of the Magistrate Court
Henry County
Clinton, Missouri

Dear Judge Wilson:

This is in reply to your letter of October 17, 1947, in which you request an opinion from this department, reading as follows:

"Several criminal cases, both felonies and misdemeanors, have been filed in this Court based upon the Prosecuting Attorney's own information and belief and have by him been dismissed before trial.

"If a felony case is filed by the Prosecuting Attorney upon his own information and belief and is dismissed by the Prosecuting Attorney before preliminary hearing who, if anyone, is responsible for the costs of the Sheriff and the Magistrate fees?

"Also if a misdemeanor is filed based upon the information of Prosecuting Attorney and is dismissed by him before hearing who, if anyone, is responsible for the Sheriff's fees and Magistrate fee?"

With reference to the first question presented, your attention is directed to an opinion of this department rendered to you as Prosecuting Attorney of Henry County under date of June 11, 1937, holding that when a person charged with a felony on complaint of the prosecuting attorney is dismissed from said charge at the request of the prosecuting attorney before a preliminary hearing, neither the state nor county, nor the prosecuting attorney are liable for the costs

which have accrued in said case, and, further, that the officers concerned are not entitled to collect any costs in said case. A copy of the opinion is enclosed herewith for your use.

A further question presented concerns the liability for criminal costs in a case where a person is charged with a misdemeanor on information by the prosecuting attorney but said charge is dismissed by the prosecuting attorney before trial.

Prosecutions before magistrates for misdemeanors are by informations made by the prosecuting attorney of the county in which the offense may be prosecuted. Upon the filing of an information by the prosecuting attorney it is the duty of the magistrate to forthwith issue a warrant for the arrest of the defendant. The filing of such an information has the effect of instigating a criminal prosecution. This was recognized by the Supreme Court in *Ex Parte Bedard*, 106 Mo. 616, l.c. 622:

" * * * The determination of the question here hinges upon the scope and meaning of the words 'criminal prosecution,' as used in section 4174, *supra*. We have no doubt they include a criminal information for a misdemeanor, * * *"

If, after the prosecution has commenced, the prosecuting attorney wishes to dismiss the charges brought against the defendant, he must enter a *nolle prosequi*. For the purpose of criminal costs statutes, a *nolle prosequi* is considered the same as if the defendant had been acquitted. We find this rule set out in the case of *The State ex rel. Tudor v. The Platte County Court*, 40 Mo. App. 503, at page 506:

"The sole question that was tried below, and is for trial here, is whether the county of Platte is liable for the costs arising under the above-mentioned indictment.

"The controversy is whether the state or county is liable for relator's costs and the case depends upon a construction of the criminal costs statute; and in passing on the question we shall consider the case as though the defendant had been acquitted. The nolle prosequi amounted to an acquittal in the sense of the statute."

In all misdemeanor cases on information of the prosecuting attorney, where the defendant is acquitted, the costs are paid by the county in which the information was filed, except when they are paid by the prosecutor or as otherwise provided by law. Section 4223, R.S. No. 1939, provides:

"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."

The word "prosecutor," as used in the above statute, has reference only to those persons contemplated in Section 3895, R.S. No. 1939, and has no reference to the prosecuting attorney. A reading of Section 3900, R.S. No. 1939, makes this quite clear. Said section provides 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."

(underscoring ours.)

The last sentence of said Section 3900 clearly indicates that the prosecuting attorney is not liable for the costs in any case. //

Conclusion.

It is the opinion of this department that when a person charged with a felony or complaint of the prosecuting attorney is dismissed from said charge at the request of the prosecuting attorney before preliminary hearing, neither the state nor county, nor the prosecuting attorney are liable for the costs which have accrued in said case, and that the officers concerned are not entitled to collect any costs in said case. It is further the opinion of this department that when a person charged with a misdemeanor on information of the prosecuting attorney is dismissed before trial from said charge by a nolle prosequi, the county is liable for the costs which have accrued in said case.

Respectfully submitted,

DAVID DOHERTY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DD:ml
Enc.