

PROSECUTING ATTORNEY'S
FEES:

In criminal cases prosecuting attorney's
fee shall not be charged as costs unless
conviction be obtained.

February 9, 1951

2-9-51

Mr. Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri

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Dear Mr. Wallach:

We are in receipt of your recent request for an official
opinion, which request is as follows:

"Where the Prosecuting Attorney files
information and prosecutes a misdemeanor
case before a Magistrate, and the Magistrate
after hearing same dismisses the case on pay-
ment of costs, should the Prosecuting Attor-
ney's fee be taxed as Court costs?"

It appears that your question is based upon a certain clause
in Section 56.310, RSMo 1949, which allows the prosecuting attorney
a fee of five dollars "for the conviction of every defendant in the
circuit court, upon indictment or information, or before a magistrate
court, upon information, when the punishment assessed by the court
or jury or magistrate shall be fine or imprisonment in the county
jail, or by both such fine and imprisonment."

The Supreme Court of Missouri in 1860 handed down a decision
on this point in State v. Beard, 31 Mo. 34. In that case the court
held that where the prosecution of an indictment was dismissed, on
motion of the circuit attorney, at the costs of the defendant, the
attorney's fee could not be taxed as costs against the defendant.

This question was adjudicated in another case in 1873, State
v. Foss, 52 Mo. 416. In the course of that opinion the court said:

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"The only question in the case is, whether the Circuit Attorney was entitled to a fee. The section of the statute which controls and determines this case, (1 Wag. St., p. 619, Section 2) declares that for conviction upon indictment, when the punishment assessed by the court or jury shall be a fine or imprisonment in the county jail, or both such fine and imprisonment, the Circuit Attorney shall be allowed a fee of five dollars.

"The reading of the statute is plain and divested entirely of ambiguity. A pre-requisite to receiving the fee, is a conviction upon the indictment and an assessment by the court of a punishment, either by fine or imprisonment, or both. Was there any conviction or punishment assessed in this case? There was no arraignment or plea, of either guilty or not guilty. There was no determination of guilt or innocence by the court, and no judgment or assessment of a fine or imprisonment. The judgment was founded upon an agreement, by which a conviction, fine and imprisonment were waived if the defendant would simply pay the costs. It is true, costs naturally follow and are incident to a judgment of conviction, but here we see there was no conviction within the meaning of the law. The criminal statutes fully designate what is intended by a conviction. It is clearly where, by a trial or confession the defendant is assessed to pay a fine or be imprisoned, or is punished by both these modes. But there is no conviction for costs only, to entitle the Circuit Attorney to his fee. A case similar to this was recently passed upon at the February Term, and decided in accordance with these views."

The cases cited above seem to be almost identical with your problem. It appears that no conviction is obtained in your case. It is the law in Missouri, according to the decisions of the Supreme Court, that the prosecuting attorney's fee cannot be charged unless a conviction be obtained. The conviction is a pre-requisite for the fee.

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CONCLUSION

It is the opinion of this department that, where the prosecuting attorney files information and prosecutes a misdemeanor before a magistrate, and the magistrate, after hearing the case, dismisses the action at the cost of the defendant, the prosecuting attorney's fees should not be taxed as court costs.

Respectfully submitted,

B. A. TAYLOR,
Assistant Attorney General

APPROVED:

OK

J. E. TAYLOR
Attorney General

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