

CRIMINAL COSTS:  
COMPTROLLER:

An information which alleges that the defendant did: "willfully, unlawfully, feloniously and with malice aforethought", but does not

contain the phrase "on purpose" is insufficient to charge a violation of Section 559.180 RSMo 1959 and the State of Missouri is not liable for payment of the costs in such a case.

OPINION NO. 331

May 26, 1970

Honorable G. William Weier  
Prosecuting Attorney  
Jefferson County  
P. O. Box 246  
Hillsboro, Missouri 63050



Dear Mr. Weier:

This is in response to your letter of May 6, 1970, asking for an opinion on a question which was presented in your letter as follows:

"The question we have is whether the term 'on purpose' is necessary in order that the State pay the cost, even though the terms 'willfully, unlawfully, feloniously and with malice aforethought' were used in the Information; and further, that the Statute referred to in the Information was Section 559.180, which range of punishment for said Statute is not less than 2 years in the Department of Corrections. Under Section 550.040, it would appear that the State of Missouri, rather than the County of Jefferson, should pay the cost in this case."

Section 559.180, RSMo 1959, provides:

"Every person who shall, on purpose and of malice aforethought, shoot at or stab another, or assault or beat another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm, with intent to kill, maim, ravish or rob such person, . . . shall be punished by imprisonment in the penitentiary not less than two years."

Honorable G. William Weier

You further advised us that the fee bill, properly executed, was transmitted to the Office of the Comptroller and was rejected by that Office on the grounds that the phrase "on purpose" was not contained in the Information and in support of that position, the Comptroller's Office relied upon the opinion of this Office addressed to the Honorable Forest Smith, March 8, 1940, Opinion No. 83, (a copy of which is enclosed). The 1940 opinion dealt with the distinction between Section 4014, RSMo 1929 (predecessor to Section 559.180) and Section 4015, RSMo 1929 (predecessor to 559.190).

The present 559.190, RSMo 1959, provides:

"Every person who shall be convicted of an assault with intent to kill, or to do great bodily harm, or to commit any robbery, . . . the punishment for which assault is not hereinbefore prescribed, shall be punished by imprisonment in the penitentiary not exceeding five years, or in the county jail not less than six months, or by a fine not less than one hundred dollars and imprisonment in the county jail not less than three months, or by a fine of not less than one hundred dollars."

The author of the 1940 opinion describes the relationship between Sections 559.180 and 559.190 as follows:

"The distinction between Section 4014, supra, and Section 4015, supra, is the fact that Section 4015 does not include the words 'on purpose and of malice aforethought' and the punishment in Section 4015 can be as low as a fine of one hundred dollars. Under Section 4014, supra, according to our previous opinions rendered to you, the state would be liable for the costs. Also, under Section 4015, supra, according to our previous opinions rendered to you, in case of an acquittal of the defendant, the county would be liable for the costs."

In the conclusion, the writer of that opinion stated:

". . . it is the opinion of this department that the information under Section 4014 RSMo 1929, should contain the words 'on purpose and of malice aforethought' . . ."

Honorable G. William Weier

The question here, is whether the terms "willfully, unlawfully, feloniously and with malice aforethought" are the equivalent to the phrase: ". . . on purpose and of malice aforethought".

The precise question raised by the opinion request was presented in State v. McDonald, 67 Mo. 13 (1877). The court stated that it was evidently the intention of the pleader to frame the indictment under Section 29, Vol. 1, Wag. Mo. Stat., 1872 (predecessor to Section 559.180). Section 29 provided:

"Every person who shall on purpose, and of malice aforethought. . . ."

The court stated:

". . . he omitted to charge that the assault was made 'on purpose' and it has so often been held by the court that an indictment is not good under that section if those words are omitted, that it must be regarded as definitely settled. . . ." loc. cit. 67 Mo. 13, 16.

In discussing the indictment the court stated:

". . . The indictment charged 'that Henry McDonald, . . . did willfully, unlawfully, feloniously and of his malice aforethought, . . . ."

The court concluded that the defendant was properly charged under the predecessor to 559.190.

Although the necessity of the phrase "on purpose" has not been specifically raised subsequent to the McDonald case, that case has been cited with approval on a number of occasions. State v. Sevier, 83 S.W.2d 581 (Mo. S.Ct., in Banc, 1935); State v. Foster, 220 S.W. 958, 959 (Mo. S.Ct. 1920) and State v. Ostman, 126 S.W. 961 (St.L.Ct.App., 1910).

It is the conclusion of this office that the phrase "on purpose" is necessary to charge an assault under 559.180.

In determining whether the state is liable for costs under Section 550.040, the allegations contained in the indictment are controlling. In State ex rel. Timberman, Sheriff v. Hackman, State Auditor, 257 S.W. 457, 458 (Mo.S.Ct., in Banc, 1924) the court stated:

Honorable G. William Weier

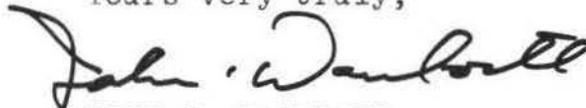
". . . In such a case it cannot be well said that the charge in the information is not the basis for fixing the liability of the state. The statute [Section 550.040] is speaking of certain offenses, and says, if the defendant is acquitted of such offenses, then the state shall pay the costs. It (the statute) says nothing about what might occur during the trial. It is dealing with the issues made by the pleadings. . . ." loc. cit. 257 S.W. 457, 458.

CONCLUSION

It is the opinion of this office that an information which alleges that the defendant did: "willfully, unlawfully, feloniously and with malice aforethought", but does not contain the phrase "on purpose" is insufficient to charge a violation of Section 559.180 RSMo 1959 and the State of Missouri is not liable for payment of the costs in such a case.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Craft.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 83  
3-8-40, Smith