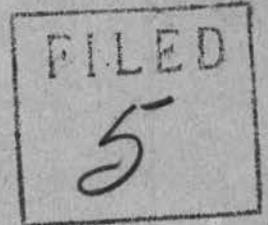


CRIMINAL COSTS: Magistrate fee of \$2.50 (Laws, 1947, Vol. 1, page 488) is a proper charge against the state, county or other person liable therefor.

MAGISTRATES: Duty imposed on magistrate to charge, collect and/or account for magistrate fee of \$2.50 provided by Laws 1947, Vol. 1, page 488.

February 9, 1949



2-28

Honorable J. T. Baty
Clerk of the Magistrate Court
Scott County
Benton, Missouri

Dear Sir:

This will acknowledge your request of recent date for an official opinion which reads as follows:

Have quite a lot of criminal cases filed by individual and the Prosecuting Attorney and same are placed on the docket and warrant issued for their arrest. Some of the cases have been on file for some time and none have been apprehended as in most cases they have left the State. The Prosecuting Attorney has dismissed them. Please advise me by return mail if I am supposed to charge the \$2.50 Magistrate fee to the County Court where they have not been apprehended and have been dismissed by the State."

A \$2.50 fee, referred to in your request for an opinion, was specifically provided for by an act passed by the 64th General Assembly of Missouri, in Senate Bill No. 108, Laws 1947, Vol. 1, page 488, with an emergency clause, which was approved by the Governor on June 2, 1947, and became effective on that date. Section 1, sub-section (3) of said law provides as follows:

"All such fees shall be charged on behalf of the State or county paying salary of such clerk or magistrate and shall be paid and accounted for in the same manner as magistrate fees."

The law above quoted constitutes a positive directive to the magistrate to charge and collect and/or account for such fee as criminal costs are charged and collected under the applicable statutes. In determining the liability for such criminal costs attention must be directed to the general law of Missouri covering

costs in criminal cases, such law being found in Article 20, Chapter 30, R. S. Mo. 1939, and to related statutes having special application to the fact situations outlined in your inquiry.

In an opinion rendered by this office to Honorable Mark Wilson, Judge of the Magistrate Court of Henry County, Missouri, on November 12, 1947, the following was stated relative to dismissals by the Prosecuting Attorney:

"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.
* * *."

For the purpose of disposing of your request, this department must consider that the cases dismissed in the Magistrate Court of Scott County were dismissed by the Prosecuting Attorney entering a nolle prosequi as to each of such cases. Consequently, all defendants named in those cases are considered to have been acquitted.

Reviewing all sections bearing on our inquiry, contained in Article 20, page 30, R. S. Mo. 1939, such article being entitled "Costs in Criminal Cases", we can at once disregard Sections 4220, 4221 and 4222, as being applicable only in those instances where the defendant has been convicted and sentenced. Section 4223, R. S. Mo. 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 above quoted statute must be looked to for the general rule to be followed in determining liability for costs in the event of acquittals in (1) all capital cases, and in (2) those cases in which imprisonment in the penitentiary is the sole punishment for the offense and in (3) all other criminal proceedings on indictment or information. Cases falling within the first two classifications

result in the costs being a charge against the state, and the third classification makes the charge upon the county in which the indictment was found or the information filed. Having clarified the general rule set out in the statute we find that such rule is modified by the exception stated therein which provides that the rule stated shall apply "except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

The word "prosecutor" as used in our criminal costs statutes, whether such statutes be of general or special application, has reference to an individual, other than the prosecuting official, whose action initiates the complaint resulting in the prosecution. A reading of Section 3900, R. S. Mo. 1939, supports this view. This 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.)

Section 3900, R. S. Mo. 1939, supra, not only discloses who is to be deemed the prosecuting witness when an information is based on an affidavit, but also designates such person as the "prosecutor" in those cases in which by law an indictment is required to be endorsed by a prosecutor, and further provides that in such cases if 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.

Consideration must now be given to that class of cases wherein an indictment must be endorsed by the prosecutor. Section 3931, R. S. Mo. 1939, provides:

"No indictment for any trespass against the person or property of another, not amounting to a felony, except for petit larceny, and no indictment for

the disturbance of the peace of a person, or for libel or slander, shall be preferred unless the name of a prosecutor is indorsed as such thereon, thus: 'A B, prosecutor,' except where the same is preferred upon the information and testimony of one or more grand jurors, or of some public officer in the necessary discharge of his duty. If the defendant be acquitted or the prosecution fails, judgment shall be entered against such prosecutor for the costs."

Although the rule stated in Section 3931, R. S. Mo. 1939, supra, refers only to indictments by grand juries, we point it out to draw a parallel between such rule and the rule now found at Section 3856.27, Article 4, Chapter 30, Mo.R.S.A. (Laws 1945, p. 750) which must be followed in proceedings before magistrates in misdemeanor cases. Section 3856.27, Mo. R.S.A. provides:

"When the proceedings are prosecuted before any magistrate, 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 magistrate on his record 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 magistrate or jury trying the case shall state in the finding that the prosecution was malicious or without probable cause, the magistrate 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 4224, R. S. Mo. 1939, places liability for costs on the "prosecutor" where a prosecution is instituted to recover a fine, penalty or forfeiture, in those cases when the defendant is acquitted. This section has application to offenses personal, and where the informant is the person injured.

Section 4225, R. S. Mo. 1939, has reference to the type of prosecutions mentioned in Section 4224, R. S. Mo. 1939, when instituted by a public officer whose duty it is to institute the same. In cases of acquittal under this section, the county pays the costs; or, if the defendant is convicted and unable to pay the costs the county shall pay all costs, except such as were incurred by defendant.

Section 4226, R. S. Mo. 1939, provides:

"In all cases where any person shall be committed or recognized to answer for a felony, and no indictment shall be found against such person, the prosecutor, or person on whose oath the prosecution was commenced, shall be liable for all the costs incurred in that behalf; and the court shall render judgment against such prosecutor for the same, and in no such case shall the state or county pay such costs."

The reason behind the rule set forth in Section 4226, R. S. Mo. 1939, supra, is readily evident. Prosecutions instituted by individuals bearing malice toward defendants would become burdensome if the rule were not in effect. Section 4227 and Section 4228, R. S. Mo. 1939, are additional safeguards against malicious and baseless prosecutions.

In the preceding paragraphs we have pointed out that prosecutions properly dismissed by the prosecuting attorney in the magistrate court are to be deemed acquittals within the criminal costs statute of Missouri, and have further pointed out and discussed the general and special statutes to be considered in determining liability for costs in those cases, whether they be felonies or misdemeanors, which have been properly dismissed by the prosecuting attorney before the defendant has been examined in the magistrate court. The application of these rules would be as varied as the circumstances bringing them into play. Without being cited a specific instance wherein costs are to be taxed, it is not feasible to suggest applications of the rules outlined.

CONCLUSION

It is, therefore, the opinion of this department that when prosecutions have been properly dismissed in the Magistrate Court of Scott County, Missouri, by the Prosecuting Attorney of said county, due to failure to apprehend the defendants, the magistrate fee of \$2.50 provided for by the enactment of Senate Bill No. 108 by the 64th General Assembly of Missouri, Laws 1947, Volume 1, page 488, must be made a proper charge against the State, county or party liable therefor, and so appear in the cost bill to be certified to the Clerk of the Circuit Court under the provisions of Section 4246, R. S. Mo. 1939, and all of said fees are to be paid and accounted for in the same manner as other magistrate fees.

Respectfully submitted,

JULIAN L. O'MALLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JLO'M:mw