

OPINION NO. 78-004**Syllabus:**

Imprisonment of indigents is a prerequisite to the payment of criminal costs by the Ohio Public Defender Commission pursuant to R.C. 2949.12, et seq. and Am. Sub. H.B. No. 191.

To: J. Tullis Rogers, Ohio Public Defender Commission, Columbus, Ohio
By: William J. Brown, Attorney General, January 31, 1978

Your request for my opinion poses the question of whether imprisonment of convicted indigents is a prerequisite to payment of criminal costs by the state.

R.C. 2949.14 through 2949.19 concern the payment of costs incurred in criminal cases. R.C. 2949.14 requires the clerk of a court of common pleas to prepare a bill of costs of prosecution upon the sentence of a person following conviction for a felony. In the event the costs of prosecution are not paid, the

clerk, pursuant to R.C. 2949.15, must cause the sheriff to levy upon the property of the accused to collect such costs. If the sheriff has been unable to levy upon property of the convict, R.C. 2949.16 requires him to deliver a certified cost bill, upon which costs already paid are credited, to the person in charge of the penal institution where the convict is found.

R.C. 2949.18 provides in pertinent part as follows:

When the clerk of the court of common pleas certifies on a cost bill that execution was issued under 2949.15 of the Revised Code, and returned by the sheriff "no good, chattels, lands, or tenements found whereupon to levy", the person in charge of the penal institution to which the convicted felon was sentenced shall certify thereon the date on which the prisoner was received at the institution and the fees for transportation, whereupon the auditor of state shall audit such cost bill and the fees for transportation, and issue his warrant on the treasurer of state for such amounts as he finds to be correct. (Emphasis added)

R.C. 2949.19 mandates that:

Upon the return of the writ against a convict issued under section 2949.15 of the Revised Code, if an amount of money has not been made sufficient for the payment of costs of conviction and no additional property is found whereon to levy, the clerk of the court of common pleas shall so certify to the auditor of state, under the seal of the court, with a statement of the total amount of costs, the amount paid, and the amount remaining unpaid . . . Such unpaid amount as the auditor of state finds to be correct shall be paid by the state to the order of such clerk.

The above sections were altered by Am. Sub. H.B. 191 (eff. 6-30-77) which, in setting forth the appropriation for the Ohio Public Defender Commission for the current biennium, provided in §1 that:

Notwithstanding any provisions of law to the contrary, the Public Defender Commission shall assume the responsibilities of the Auditor of State with respect to the administration and distribution of the criminal costs subsidy, which has previously been appropriated to the Auditor of State. This provision shall not affect the continuing responsibility of the Auditor of State to exercise the audit function.

The effect of this provision is simply to substitute the Ohio Public Defender Commission for the Auditor of State as the issuer of the warrant for funds to reimburse the county for costs incurred in the prosecution of the convict.

In 1942 Op. Att'y Gen. No. 4702 one of my predecessors expressed the opinion that, while a sentence for a felony to imprisonment is condition precedent to the State's liability for costs under the above sections, the timing of such sentence was immaterial. Specifically, that opinion addressed a situation wherein a person was convicted and placed upon probation by the court. Later, he was found to have violated the terms of his probation and sentenced to prison. In such a situation, the State was found to be liable for costs of the prosecution, irrespective of the intervening period of probation. That opinion appeared to recognize, by implication, that the State is not liable for costs until the convicted felon is sentenced to a term of imprisonment.

This implication leads to the correct result. R.C. 2949.18 requires that the person in charge of a penal institution certify upon the cost bill prepared by the clerk of the court of common pleas the date that the convicted felon was received as a condition precedent to payment of costs by the state. From this language, it is apparent that imprisonment is required prior to state payment of criminal costs.

In passing, it should be noted that reimbursement for the expense of appointed counsel by the Ohio Public Defender Commission is not contingent upon imprisonment of an indigent defendant. Prior to the enactment of Am. Sub. H.B. No. 164 (effective January 13, 1976), R.C. 2949.19 and 2941.51 provided for state payment of the costs of court-appointed counsel. At that time, R.C. 2941.51 stated that such expenses were to be taxed as part of costs. R.C. 2949.19 provided the part of the costs remaining unpaid after execution against the property of one convicted and sentenced to the penitentiary were to be certified to the Auditor of State for payment. Am. Sub. H.B. No. 164 removed the counsel expense from those sections and mandated that the commission provide reimbursement for such expense regardless of the outcome of the trial.

Therefore, it is my opinion, and you are so advised, that:

Imprisonment of indigents is a prerequisite to the payment of criminal costs by the Ohio Public Defender Commission pursuant to R.C. 2949.12, et seq. and Am. Sub. H.B. No. 191.