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CRIMINAL LAW—COSTS OF PROSECUTION RECOVERABLE BY COUNTY FROM STATE—§2949.13 R.C.—COSTS OF FIRST TRIAL RECOVERABLE UPON SUBSEQUENT CONVICTION OF FELONY, FIRST SENTENCE SUSPENDED BUT REIMPOSED UPON CONVICTION OF SECOND FELONY—§2949.14 R.C.

SYLLABUS :

1. Where there has been a trial and a retrial under the same indictment, and a conviction is had upon such retrial, the costs of the first trial may properly be included in the cost bill prepared pursuant to Section 2949.14, Revised Code.

2. Where a party is convicted of a felony, placed on probation, and subsequently is convicted of a second felony, at which time the probation on the first felony conviction is revoked, and said party is sentenced to the penitentiary on both convictions, the costs of both cases are recoverable from the state by the county under authority of Section 2949.18, Revised Code.

Columbus, Ohio, April 1, 1959

Hon. John S. Ballard, Prosecuting Attorney
Summit Court, Akron, Ohio

Dear Sir :

I have before me your request for my opinion which raises two questions, to-wit :

(1) Where there has been a retrial under the same indictment and a conviction upon the retrial, are the costs of the first trial properly included in the cost bill under Section 2949.14, Revised Code, so that the county may be reimbursed by the state in conformity with Section 2949.18, Revised Code?

(2) Where an individual is indicted, tried, convicted and placed on probation, for a felony and subsequently is indicted, tried and convicted for a second felony, at which time the probation for the first felony is revoked, and he is sentenced to the penitentiary on both convictions, are the costs of both cases, less any probationary costs, reimbursable to the county by the state under Sections 2949.14 and 2949.18, Revised Code?

With regard to the first question raised, I direct your attention to Section 2949.14, Revised Code, which provides:

“Upon sentence of a person for a felony, the clerk of the court of common pleas shall make and certify under his hand and seal of the court, a complete itemized bill of the costs made *in such prosecution*, including the sum paid by the board of county commissioners, certified by the county auditor, for the arrest and return of the convict on the requisition of the governor, or on the request of the governor to the president of the United States. Such bill of costs shall be presented by such clerk to the prosecuting attorney, who shall examine each item therein charged and certify to it if correct and legal.” (Emphasis added)

One of my predecessors in office, in Opinion No. 3949, Opinions of the Attorney General for 1935, p 156, held in the first paragraph of syllabus:

“Where a person is indicted for a felony and is tried but the jury disagrees and such person is re-indicted and convicted on the later indictment, the cost accruing in the first trial may not be legally assessed against the defendant.”

In the course of this opinion my predecessor said, “It would appear that any costs which do not have a direct relationship to the conviction in Fairfield County should not be taxed as costs against the defendants.”

In harmony with the rule thus stated it would seem that your first question may be answered by ascertaining whether the costs incurred in the first trial are directly related to the subsequent conviction upon retrial, or, in other words, whether the costs incurred at first trial are costs relating to the prosecution of the accused in which he is sentenced.

Prosecution is defined in Webster’s New International Dictionary, second edition, as follows:

“To follow to the end; to press to execution or completion; to pursue until finished.”

Prosecution is defined in Black's Law Dictionary, fourth edition, as follows:

"A criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime. The continuous following up, through instrumentalities created by law, of a person accused of a public offense with a steady and fixed purpose of reaching a judicial determination of the guilt or innocence of the accused." (Citations omitted)

In accordance with these definitions it is clear that a retrial under the same indictment would be a part of the continued judicial process to determine the guilt or innocence of the accused party. Accordingly, in view of the language of Section 2949.14, *supra*, it is clear that the costs of the first trial as well as those of the retrial, may be included in the cost bill so that the county may be reimbursed by the state under Section 2949.18, Revised Code, since all such costs relate directly to the prosecution of the accused under the single indictment.

With regard to your second question, I invite your attention to Opinion No. 1728, Opinions of the Attorney General for 1920, p. 1199. In the syllabus of this opinion it was held:

"Where a person has been convicted on two or more separate indictments charging different offenses, and has been sentenced on each to an indeterminate period of imprisonment in the Ohio State Reformatory, the costs in each case should be paid by the state in the manner provided by Section 13722, General Code, *et seq.*"

During the course of his opinion my predecessor said, at page 1201:

"Your statement to the effect that it has been the practice for the state to allow the costs in each case where a person is sentenced to the *penitentiary* for two or more separate felonies is, as I am informed, correct, although there appears to be no statute giving *express* authority for that to be done. It will be observed that that part of section 2166 G. C. which speaks of a sentence 'for two or more separate felonies' has to do merely with the length of the term of imprisonment, and says nothing at all about the payment of costs.

"Inasmuch as the payment of costs, in the case of a person sentenced on two or more indictments to the Ohio penitentiary, rests on the basis of administrative practice, rather than upon any express statutory language, it would seem that the same practice should apply to the case of a person sentenced on two or more

indictments to the Ohio state reformatory, both institutions relating to the same general class of offenders, to-wit, those convicted of felonies.” (Emphasis added)

Although the facts presented by your inquiry differ somewhat from the facts upon which Opinion No. 1728, *supra*, was rendered, it is my opinion that the difference is of no consequence. I can see no logical reason why the period of probation, followed by revocation of the probation, after which there was sentencing on the conviction, would in any way affect the operation of Section 2949.18, *supra*. The costs in each case were chargeable against the accused and in both cases remain unpaid. Therefore, the county is entitled to reimbursement from the state in accordance with the provisions of Section 2941.18, *supra*.

Accordingly, it is my opinion :

(1) Where there has been a trial and a retrial under the same indictment, and a conviction is had upon such retrial, the costs of the first trial may properly be included in the cost bill prepared pursuant to Section 2949.14, Revised Code.

(2) Where a party is convicted of a felony, placed on probation, and subsequently is convicted of a second felony, at which time the probation on the first felony conviction is revoked, and said party is sentenced to the penitentiary on both convictions, the costs of both cases are recoverable from the state by the county under authority of Section 2949.18, Revised Code.

Respectfully,

MARK McELROY
Attorney General