

OPINION 65-219

Syllabus:

Pursuant to the provisions of Section 2941.51, Revised Code, fees and expenses of counsel assigned by the court to an accused under Section 2941.50, Revised Code, are required to be paid by the county and should not be paid by the state. Opinion No. 1150, Opinions of the Attorney General for 1960, page 90, is overruled.

To: Roger Cloud, Auditor of State, Columbus, Ohio
By: William B. Saxbe, Attorney General, December 14, 1965

I have your request for my opinion which reads in pertinent part as follows:

"In 1960 the Attorney General in

Opinion No. 1150, page 90, held that:

"Pursuant to the provisions of Section 2941.51, Revised Code, as amended by Amended Senate Bill No. 52 of the 103rd General Assembly, effective November 9, 1959, fees and expenses of counsel appointed by the court are to be considered as costs, and when any of such costs are certified as unpaid by the clerk of the court of common pleas to the auditor of state, pursuant to Section 2949.19, Revised Code, the unpaid amount should be paid by the state to the order of such clerk."

"Section (A) of 2941.51, of the Revised Code, provides that:

"(A) In a case of murder in the first or second degree, and manslaughter in the first and second degree, such compensation and expenses as the trial court may approve."

"It is further provided in this statute that 'the fees and expenses approved by the court under this section shall be taxed as part of the costs' which may be paid by the county.

* * * * *

"1. Must the counsel fees established by a trial court under Section 2941.51, Revised Code, be considered and included as part of the cost for reimbursement from the state treasury as provided for under Section 2949.19, Revised Code?

"2. If your answer to the first question is yes, must the state pay the fees established by the trial court, or may the state determine what a reasonable amount would be?"

A consideration of your request requires a review of an opinion of my predecessor, Opinion No. 1150, Opinions of the Attorney General for 1960, page 90, referred to in your request. The syllabus of that opinion is as follows:

"Pursuant to the provisions of Section 2941.51, Revised Code, as amended by Amended Senate Bill No. 52 of the 103rd General Assembly, effective November 9, 1959, fees and expenses of counsel appointed by the court are to be considered as costs, and when any of such costs are certified as unpaid by the clerk of the court of common pleas to the

auditor of state, pursuant to Section 2949.19, Revised Code, the unpaid amount should be paid by the state to the order of such clerk."

Section 2949.19, Revised Code, provides in part:

"Upon the return of a writ against a convict, * * * if an amount of money has not been made sufficient for the payment of costs of conviction * * * the clerk of the court of common pleas shall so certify to the auditor of state, * * * 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."

(Emphasis added)

Section 2941.51, Revised Code, provides, in part:

"Counsel assigned in a case of felony under section 2941.50 of the Revised Code shall be paid for their services by the county, * * *.

" * * * * * * * * * * * * * * *

"The fees and expenses approved by the court under this section shall be taxed as part of the costs.

"The county auditor shall draw his order on the county treasurer for the payment of such counsel in the amount fixed by the court, plus expenses as the court may fix, and certified by the court to the auditor."

It is noted that Section 2949.15, Revised Code, requires the clerk of court to issue to the sheriff execution only against the property of a person convicted of a felony for fines and the costs of prosecution. Similarly, Section 2949.19, Revised Code, requires only the costs of conviction to be paid by the state. Whereas, Section 2941.51, Revised Code, requires that all fees and expenses of counsel assigned to represent an accused who is without and unable to employ counsel shall be taxed as part of the costs. Opinion No. 1150, supra, states the requirement that fees and expenses of counsel assigned by authority of Section 2941.50, Revised Code, be paid by the state regardless of whether conviction or acquittal resulted from the prosecution. I believe the opinion of my predecessor to be incorrect insofar as it would require the state to pay the fees and expenses of counsel representing an accused who is acquitted. There is no authority for the county to execute against the property of one acquitted of a felony, nor is there authority for the state to pay the costs of a prosecution resulting in

an acquittal. Sections 2949.15 and 2949.19, Revised Code, are applicable only to costs of conviction. The question arises: is that opinion correct insofar as it requires the state to pay the fees and expenses of counsel assigned to represent one convicted of a felony?

The procedure by which such fees and expenses shall be established, by which the county is apprised of such fees and expenses, and by which the county shall pay them is provided by Section 2941.51:

"The county auditor shall draw his order on the county treasurer for the payment of such counsel in the amount fixed by the court, plus expenses as the court may fix, and certified by the court to the auditor."

There is no distinction made by that section between the fees and expenses of counsel resulting in acquittal and those resulting in conviction. The legislature must be considered to have intended that all fees and expenses of assigned counsel, regardless of the outcome of the prosecution, be treated in the same manner.

There is no ambiguity in Section 2941.51, Revised Code, as to the source of payment of these fees and expenses. That section is definite: "Counsel assigned in the case of felony * * * shall be paid for their services by the county.* * *" The primary rule of statutory construction is that when the words of a statute are clear and not ambiguous resort should not be had to statutory interpretation. Opinion No. 1150, Opinions of the Attorney General for 1960, is incorrect in the determination that fees and expenses of assigned counsel should be paid by the state, whether such prosecution resulted in acquittal or conviction. As that opinion applies to acquittal it is without any authority and clearly incorrect. As it applies to conviction it requires a different treatment for such fees and expenses depending upon the outcome of the prosecution, a result which was not intended by Section 2941.51, Revised Code. For these reasons, I am constrained to, and hereby, overrule Opinion No. 1150, Opinions of the Attorney General for 1960, page 90.

Accordingly, as to your specific questions, it is my opinion and you are advised that pursuant to the provisions of Section 2941.51, Revised Code, fees and expenses of counsel assigned by the court to an accused under Section 2941.50, Revised Code, are not costs of conviction within the purview of Section 2949.19, Revised Code, and should not be paid by the state. Inasmuch as this answers your first question negatively, your second question does not require answer.