

Note from the Attorney General's Office:

1960 Op. Att'y Gen. No. 60-1150 was overruled by 1965
Op. Att'y Gen. No. 65-219.

1150

FEES AND EXPENSES OF COURT APPOINTED COUNSEL CONSIDERED AS COSTS—WHEN SUCH COSTS CERTIFIED AS UNPAID BY CLERK TO AUDITOR OF STATE, UNPAID AMOUNT SHOULD BE PAID BY STATE—§§2941.51, 2949.19, RC, AM. SB NO. 52, 103 GA, 1583 AG, 1930 OVERRULED.

SYLLABUS:

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.

Columbus, Ohio, February 10, 1960

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

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

“Paragraph 2 of the Syllabus of Attorney General’s Opinion No. 1583, issued under date of March 4, 1930, provides as follows:

“‘Compensation of an attorney for services rendered under the provisions of Section 13439-3, General Code (2941.51, Revised Code) is not costs that the statutes authorize to be paid out of the state treasury.’

“Effective November 9, 1959, Amended Senate Bill No. 52 changed the provisions of Section 2941.51, Revised Code, to include the additional provision, as follows:

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

“Prior to the amendment of Section 2941.51, Revised Code, the payment of cost bills required under the provisions of Sections 2949.18 and 2949.19 of the Revised Code have excluded as costs the fees of the attorneys assigned as counsel by the court on the basis of the aforesaid Opinion of the Attorney General No. 1583 of 1930.

“In view of the fact that Section 2941.51, Revised Code, as amended and effective November 9, 1959, includes a statement that attorney fees of assigned counsel shall be included as costs, a statement which was not contained as a part of Section 13439-3, General Code (2941.51, Revised Code) at the time of the former Attorney General’s ruling, may we have your opinion on the following question.

“1. Shall attorney fees of counsel assigned by the court, as provided by Section 2941.51, Revised Code, as amended, be considered and included as a part of the cost bill for reimbursement from the state treasury under the provisions of Sections 2949.18 and 2949.19 of the Revised Code?”

Section 2941.51, Revised Code, as amended by Amended Senate Bill No. 52 of the 103rd General Assembly, effective November 9, 1959, reads :

“Counsel assigned in a case of felony under Section 2941.50 of the Revised Code shall be paid for their services by the county, and shall receive therefor :

“(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.

“(B) In other cases of felony, such compensation as the trial court may approve, not exceeding three hundred dollars and expenses as the trial court may approve.

“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.” (Emphasis added)

Section 2941.50, Revised Code, provides :

“After a copy of an indictment has been served or opportunity had for receiving it, the accused shall be brought into court, and if he is without and unable to employ counsel, *the court shall assign him counsel*, not exceeding two, who shall have access to such accused at all reasonable hours. Such counsel shall not be a partner in the practice of law of the attorney having charge of the prosecution. A partner of the attorney having charge of the prosecution shall not be employed by or conduct the defense of a person so prosecuted.” (Emphasis added)

In the case of *In re Burson*, 152 Ohio St., 375, it was held that Section 13439-2, General Code, which is now Section 2941.50, Revised Code, is mandatory. The second paragraph of the syllabus reads :

“By virtue of Section 13439-2, General Code, where an accused has been indicted and a copy of the indictment has been served upon him or he has had an opportunity to receive it, he shall be brought into court, and if he is without and unable to employ counsel the court shall assign him counsel, not exceeding two.”

Speaking of the quoted section, the court stated in the course of its opinion on page 380 as follows :

“ * * *

“In the opinion of this court, the section of the statute just quoted, *mandatory in terms*, must be complied with unless compliance is waived by a defendant, which we hold may be done. (Emphasis added)

“* * *”

In Opinion No. 1583, Opinions of the Attorney General for 1930, page 353, which is mentioned in your letter, the case of *State ex rel. Commissioners of Franklin County vs. Guilbert, Auditor*, 77 Ohio St., 333, was cited as authority for the conclusion reached, namely, that compensation of an attorney under circumstances here under consideration, is not such costs as the statutes authorize to be paid out of the state treasury.

It must be noted, however, that Section 13439-3, General Code, although it dealt with such compensation, did not state that it should be taxed as costs but merely provided for the payment by the county treasurer. On the other hand, Section 2941.51, Revised Code, as it now stands, expressly states that the fees and expenses approved by the court under such section shall be taxed as part of the costs. It follows therefore, that Section 2941.51, *supra*, as amended by the 103rd General Assembly requires a different conclusion than that arrived at by my predecessor in Opinion No. 1583, *supra*.

Your inquiry mentions Sections 2949.18 and 2949.19, Revised Code, as possibly having a bearing on the question being here considered. Section 2949.18, *supra*, provides for the payment of fees by the state for the transportation of a convicted felon to a state penal institution in the event a writ of execution for the payment of “the fines and costs of prosecution” is returned unsatisfied. Section 2949.19, *supra*, provides :

“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." (Emphasis added)

I note that while Section 2949.18, *supra*, speaks of costs of "prosecution" Section 2949.19, *supra*, uses the words "costs of conviction." When, however, these two terms are viewed in the context of all provisions of such sections, the use of mentioned terms apparently creates no problem, or ambiguity, that needs to be here considered. Aside from that, the provisions of Section 2949.19, *supra*, are clearly applicable to the situation presented in your inquiry. Such conclusion is fortified by *In re Burson*, *supra*, to the effect that the provisions of Section 2941.50, *supra*, regarding the appointment of counsel for an indigent person charged with a felony who does not waive such counsel are mandatory; which apparently means that a conviction obtained contrary to the provisions of such section is open to attack and would be set aside as prejudicial to the rights of the accused.

Accordingly, as to your specific question, it is my opinion and you are advised 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.

Respectfully,

MARK McELROY

Attorney General