

Note from the Attorney General's Office:

1968 Op. Att'y Gen. No. 68-098 was overruled in part by
1980 Op. Att'y Gen. No. 80-099.

OPINION NO. 68-098**Syllabus:**

1. Section 2949.19, Revised Code, requires that the State of Ohio must bear the costs as provided in Section 2953.03, Revised Code, and counsel fees as provided in Section 2941.51, Revised Code, of an indigent defendant on appeal whether or not he has been committed prior to his appeal.

2. Section 2941.51 (C), Revised Code, requires the State of Ohio to pay as costs, in addition to the counsel fees received for representation at the trial as provided in Section 2941.51 (B), Revised Code, any counsel fees up to three-hundred dollars resulting from an appeal as approved by the court of appeals.

To: Roger Cloud, Auditor of State, Columbus, Ohio
By: William B. Saxbe, Attorney General, June 12, 1968

I have received your request for my opinion which states, in essence, as follows:

1. When a defendant is convicted of a felony, but not committed to a penal institution, and the auditor of state did not receive a cost bill pursuant to Section 2949.19, Revised Code, for the original trial, how are the costs and counsel fees to be paid if the defendant subsequently prevails on appeal? How shall the costs be paid if the defendant loses?

2. When an indigent defendant convicted of a felony has been committed to a penal institution, and subsequently loses an appeal shall the costs and counsel fees of the appeal be considered part of the original costs?

3. If counsel fees were paid in accordance with Section 2941.51 (B), Revised Code, is the state obligated to pay counsel fees again when presented with an additional cost bill for costs and counsel fees in case of appeal?

Your first question must be answered by considering the

interrelation of several statutes of the Revised Code, particularly in light of a recent Ohio Supreme Court decision, State ex rel. Clifford v. Cloud, 7 Ohio St. 2d 55.

Section 2949.19, Revised Code, 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. Only one statement of costs shall be certified to the auditor of state in each case, and such statement of costs shall include all of the counts contained in a single indictment and payment requested for one count only and no additional costs shall be allowed where there are additional counts contained in the same indictment. 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 2949.20, Revised Code, provides:

"In any case of final judgment of reversal as provided in section 2953.07 of the Revised Code, whenever the state of Ohio is defendant on appeal, the clerk of the court of common pleas of the county in which sentence was imposed shall certify to the auditor of state the amount of all costs incurred by the plaintiff in error to secure such reversal, including the costs of bills of exception and transcripts as certified by the clerk. The auditor of state shall audit such cost bill and issue his warrant on the treasurer of state, payable to the order of the plaintiff in error, for such amount as the auditor of state finds to be correct."

Section 2941.51, Revised Code, provides:

"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;

"(C) In a case where counsel have been assigned to conduct an appeal under section 2941.50 of the Revised Code, such compensation shall be fixed by the court of appeals or the supreme court as provided in divisions (A) and (B) of this section.

"The fee 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 2953.03, Revised Code, provides in part:

"The judge of the trial court in a felony case may, because of the poverty of the defendant, in the interest of justice, order the bill of exceptions and transcript, or either paid from the county treasury in the manner provided in section 2301.24 of the Revised Code, and order the amount in money so paid charged as costs in the case. In cases where the court grants a motion to prepare a bill of exceptions for the defendant at the expense of the state, as provided in this section, and there is not sufficient time to file it, as provided by section 2945.65 of the Revised Code, the court shall extend such time not exceeding thirty days from granting such motion."

(Emphasis added)

Section 2949.20, Revised Code, makes it obligatory upon the state to bear the costs of transcripts and bills of exception in all criminal cases where the original defendant initiates and prevails upon such appeal. This would be without regard to whether or not the defendant was indigent. If defendant were an indigent, counsel fees and other costs would be taxed as costs to the state pursuant to Section 2941.51, *supra*, and Section 2953.03, *supra*, respectively. Authority for the proposition that Section 2949.19, *supra*, requires that such costs will finally be borne by the state is found in the syllabus of State ex rel. Clifford v. Cloud, *supra*, at page 55:

"The Auditor of State is required upon certification to him of the statement of costs of a criminal conviction pursuant to Section 2949.19, Revised Code, to pay an amount equal to the moneys expended for fees and expenses of court-appointed counsel, approved and taxed as a part of the costs under Section 2941.51, Revised Code, provided there are sufficient funds in the state treasury appropriated for that purpose."

A similar rationale would also require that the costs of an in-

digent's appeal be taxed as costs to the state, after the money is originally paid from the county treasury as provided in Section 2301.24, Revised Code. The result that these costs would be reimbursable by the state to the county was reached in dictum State ex rel. Clifford, supra, at page 57:

" * * * * * * * * "

"If respondent's argument is extended to its logical conclusion, not only would juror fees not be reimbursable by the state, but neither would such items as transcripts of evidence (Section 2301.24, Revised Code, 'paid from the county treasury, and taxed and collected as costs'), * * *. We are firmly of the opinion that that result was never intended by the General Assembly."

The fact that an indigent defendant would win or lose his appeal would have no significance in light of the above Ohio Supreme Court decision. Also the liability of the state for such costs is not altered by the fact that a convicted defendant is placed on probation (or given suspended sentence), Opinion Nos. 285 and 820, Opinions of the Attorney General for 1959. Thus, in response to your first question, a defendant, who initiates an appeal and subsequently prevails upon it will be reimbursed by the state for costs of appeal. In the case of appeal of an indigent defendant, however, the state will bear the costs of appeal and counsel fees, whether the indigent defendant prevails or not on appeal. Whether or not the defendant has been committed to a penal institution prior to appeal has no bearing upon the state's burden of being taxed for costs and counsel fees on appeal. Also the fact that a cost bill had not been received by the auditor of the state for the original trial would not prevent the costs of appeal from being considered costs of the original bill.

Your second question is disposed of by the above discussion since the costs and counsel fees of an indigent having been committed to a penal institution and then appealing are original costs as provided for by Section 2949.19, supra.

Your third question can be answered by reference to Section 2941.51 (C), supra. This section vests the court of appeals with the power to fix compensation of counsel on appeal in the manner provided in the two preceding paragraphs by the trial court. The next paragraph of that section provides that all the fees of such section shall be taxed, as costs. Although a three-hundred dollar limitation on compensation to counsel in counsel in Section 2941.51 (B), supra, mentions only the trial court, an interpretation of the two provisions together would require that an additional amount be granted to counsel on appeal with a three-hundred dollar maximum limitation.

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

1. Section 2949.19, Revised Code, requires that the State of Ohio must bear the costs as provided in Section 2953.03, Revised Code, and counsel fees as provided in Section 2941.51,

Revised Code, of an indigent defendant on appeal whether or not he has been committed prior to his appeal.

2. Section 2941.51 (C), Revised Code, requires the State of Ohio to pay as costs, in addition to the counsel fees received for representation at the trial as provided in Section 2941.51 (B), Revised Code, any counsel fees up to three-hundred dollars resulting from an appeal as approved by the court of appeals.