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SENTENCE TO PENITENTIARY OR REFORMATORY — PERSON CONVICTED OF FELONY — WHERE PLACED ON PROBATION BY COURT — WHERE COURT TERMINATED PROBATION AND PASSED SENTENCE, STATE LIABLE FOR CRIMINAL COSTS — SECTION 13455-5 ET SEQ., GENERAL CODE.

SYLLABUS:

The liability of the state for criminal costs, under the provisions of Section 13455-5, and cognate sections of the General Code, is not altered by the fact that a court, after having placed a person convicted of a felony on probation, terminates such probation before the expiration thereof and sentences such person to the penitentiary or reformatory.

Columbus, Ohio, January 9, 1942.

Hon. Rodney R. Blake, Prosecuting Attorney,  
Sidney, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion on the following:

“Is the county entitled to reimbursement from the State of Ohio for criminal costs in the event the defendant, after pleading guilty or after having been convicted of a felony, is placed on probation under certain conditions and later sentenced to imprisonment for violation of such conditions, one condition of the suspension being that the defendant pay the costs of prosecution, assuming that all other requisites for reimbursement have been fulfilled, and assuming that the defendant paid no costs or only a part of those incurred.”

Provisions for the payment of costs in certain criminal cases by the state are contained in the following sections:

Section 13455-5, General Code:

“If the convict is sentenced for felony to imprisonment in the penitentiary or reformatory, or to death, and no property has been levied upon, the sheriff shall deliver such certified cost bill, having accredited thereon the amount paid on costs, with the convict to the warden of the penitentiary or superintendent of such reformatory. When property has been levied upon and remains unsold, the clerk shall not certify to the sheriff the costs

of such conviction or part thereof, for payment from the state treasury, but the convict shall be delivered to such warden or superintendent in pursuance of his sentence, upon the payment of the costs of transportation.”

Section 13455-7, General Code:

“When the clerk of courts certifies on the cost bill that execution was issued according to the provisions of this chapter, and returned by the sheriff ‘no goods, chattels, lands or tenements found whereon to levy,’ the warden of the penitentiary or superintendent of such reformatory shall certify thereon, the date on which said prisoner was received at the institution and the fees for transportation, whereupon the auditor of the state shall audit such cost bill and the fees for transportation, and issue his warrant on the treasurer of the state for such amount as he finds to be correct.”

Section 13455-8, General Code:

“Upon the return of the writ against the convict, 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 shall so certify to the auditor of state, under his seal, with a statement of the total amount of costs, the amount paid and the amount remaining unpaid. Such amount so unpaid as the auditor finds to be correct, shall be paid by the state to the order of such clerk.”

By these sections the state’s liability is limited to those cases wherein a defendant is sentenced for a felony to imprisonment in the penitentiary or reformatory or to death. The amount of the liability is dependent upon a number of factors which, for the purposes of this opinion, need not be considered. We are concerned only with whether or not the state’s liability for criminal costs includes a case where a defendant who has been placed upon probation is sentenced for a felony to imprisonment by the court before the expiration of the probationary period.

Section 13452-1, General Code, contains authority for the probation of criminals as follows:

“In prosecutions for crime, except as mentioned in Section 6212-17 of the General Code, and as hereinafter provided, where the defendant has pleaded, or been found guilty and it appears to the satisfaction of the judge or magistrate that the character of the defendant and the circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and the public good does not demand or require that he be immediately sentenced, such judge or magistrate may suspend the imposition of the sentence and place the defendant on probation in the manner provided by law, and

upon such terms and conditions as such judge or magistrate may determine; provided, that juvenile delinquents shall not be included within this provision."

It will be noted that if a judge or magistrate is satisfied as to the matters referred to in this section he may suspend the imposition of sentence and place the defendant at bar on probation, subject to the control and supervision of the county probation authorities and under the terms and conditions of the order of probation (see Sections 13452-3 and 13452-4, General Code).

Under the provisions of Section 13452-6, General Code, one who has been placed on probation may be arrested without a warrant during the probationary period and brought before the judge or magistrate before whom the cause was pending. Such judge or magistrate is then authorized to proceed in accordance with Section 13452-7, supra, as follows:

"When the defendant is brought before the judge or magistrate, such judge or magistrate shall immediately inquire into the conduct of the defendant, and may terminate the probation, and impose any sentence which might originally have been imposed or continue the probation and remand the defendant to the custody of the probation authority, at any time during the probationary period fixed as herein provided, when the ends of justice will be served and the good conduct of the person so held shall warrant it, the judge or magistrate may terminate the period of probation. \* \* \*"

By force of this section, the court may terminate the probation and at that time impose any sentence which might originally have been imposed. From the foregoing, it appears that during the period of probation the court does not relinquish jurisdiction to impose sentence. The effect of probation is to hold in abeyance the imposition of sentence of a defendant until such time as the court is satisfied such person is no longer worthy of probation. Having come to such conclusion, the court may then impose any sentence which might have been imposed at the time probation was ordered.

Such being the case, I fail to see how the time of imposition of sentence affects the liability of the state for criminal costs. In your case it must be conceded that had the court sentenced the defendant to imprisonment at the time a plea of guilty was entered or upon conviction the state would be liable for costs. In my opinion the fact that im-

position of sentence was suspended until after termination for cause of a probationary period does not relieve the liability of the state for costs.

Specifically answering your inquiry, it is my opinion that the liability of the state for criminal costs, under the provisions of Section 13455-5, and cognate sections of the General Code, is not altered by the fact that a court, after having placed a person convicted of a felony on probation, terminates such probation before the expiration thereof and sentences such person to the penitentiary or reformatory.

Respectfully,

THOMAS J. HERBERT  
Attorney General.