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FEEES FOR SERVICES RENDERED IN CONNECTION WITH MOTIONS, NOTICES AND SUBPOENAS FILED AFTER JULY 17, 1959 IN CASES INVOLVING ALIMONY OR SUPPORT SHOULD BE CHARGED AT RATE APPLICABLE AT TIME CASES FILED UNDER §311.17, 2303.20, R.C. FEES FOR WARRANTS ISSUED FOR VIOLATION OF TERMS OF PROBATION SUBSEQUENT TO JULY 17, 1959 SHALL BE CHARGED AT RATE APPLICABLE AT TIME SUCH DETERMINATION MADE UNDER §331.17. §§311.17, 2303.20 R.C., AM. H.B. No. 9, 103 G.A.

SYLLABUS:

1. Fees for services rendered in connection with motions, notices and subpoenas relative to modification of court orders filed after July 17, 1959 in cases involving alimony or support for children in divorce actions and in other cases which were filed before July 17, 1959 should be charged at the rates which were applicable under Sections 311.17 and 2303.20, Revised Code, at the time such cases were filed, and not at the rates applicable under Sections 311.17 and 2303.20, Revised Code, as amended by Amended House Bill No. 9 of the 103rd General Assembly.

2. The fee for warrants to convey to state institutions persons indicted before July 17, 1959 but sentenced after July 17, 1959 should be charged at the rate which was applicable under Section 311.17, Revised Code, at the time such persons were indicted, and not at the rate applicable under Section 311.17, Revised Code, as amended by Amended House Bill No. 9 of the 103rd General Assembly.

3. The fee for warrants in felony cases issued before July 17, 1959 in which the accused is not arrested until after July 17, 1959 should be charged at the rate which was applicable under Section 311.17, Revised Code, at the time the accused was indicted; whereas the fee for warrants in misdemeanor cases issued before July 17, 1959 in which the accused is not arrested until after July 17, 1959 should be charged at the rate which was applicable under Section 311.17, Revised Code at the time such warrant was issued, and not at the rate applicable under Section 311.17, Revised Code, as amended by Amended House Bill No. 9 of the 103rd General Assembly.

4. The fee for warrants issued for violation of the terms of probation subsequent to July 17, 1959 in cases determined prior to July 17, 1959 shall be charged at the rate applicable under Section 311.17, Revised Code, at the time such determination was made, and not at the rate applicable under Section 311.17, Revised Code, as amended by Amended House Bill No. 9 of the 103rd General Assembly.

Columbus, Ohio, December 24, 1959

Hon. Everett Burton, Prosecuting Attorney
Scioto County, Portsmouth, Ohio

Dear Sir:

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

"A question has arisen in connection with the interpretation of your Opinion Number 707 of July 21st, 1959, construing Revised Code Sections 311.10 to 311.17. The first paragraph of the Syllabus of that Opinion is as follows:

" '1. Pursuant to the provisions of Section 1.20, Revised Code, in cases in the court of common pleas which have been filed before July 17, 1959, and which are terminated after such date, the sheriff shall enter costs on his records and render such statements for costs for all services in said cases at the rates which were applicable under Sections 311.10 and 311.17, Revised Code, at the time such cases were filed, and not at the rates applicable under Sections 311.10 and 311.17, Revised Code, as amended by Amended House Bill No. 9 of the 103rd General Assembly.'

"This office respectfully requests the clarification of that opinion as applied to the following:

1. Costs and fees in connection with Motions, Notices and Subpoenas issued in connection with the modification of Court orders filed subsequent to July 17, 1959 in Divorce and Alimony cases and other cases which were filed prior to July 17, 1959.

2. Warrants to convey to State Institutions of persons indicted before July 17, 1959 but not sentenced until after July 17, 1959.

3. Costs on Warrants issued prior to July 17, 1959 but the subject not arrested until after July 17, 1959.

4. Warrants issued on cases for violation of Probation subsequent to July 17, 1959 in cases determined prior to July 17, 1959.

"It would appear from the language of Opinion 707 that costs and fees in these types of cases, if the cases were filed prior to July 17, 1959, should be charged at the rates in effect at that time. Since these cases are ones of continuing jurisdiction, however, in which activity might last for years after the date of their filing, it is believed that the matter should be clarified and a rule adopted for uniform application throughout the State.

The questions posed in your letter call for the construction of Section 1.20, Revised Code, which was invoked and applied in Opinions No. 692 and No. 707, Opinions of the Attorney General for 1959, relative to the amendments of certain sections of the Revised Code contained in Amended House Bill No. 9, passed by the 103rd General Assembly, which became effective July 17, 1959. Said section reads:

“When a statute is repealed or amended, such repeal or amendment does not affect pending actions, prosecutions, or proceedings, civil or criminal. When the repeal or amendment relates to the remedy, it does not affect pending actions, prosecutions, or proceedings, unless so expressed, nor does any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act.”

Your first question deals with costs and fees to be charged in connection with motions, notices, and subpoenas relative to applications for the modification of court orders filed subsequent to July 17, 1959 in divorce, alimony, and other cases which had been filed prior to July 17, 1959. Your second question deals with the fee to be charged for the issuance of warrants for the conveying to state institutions of persons who have been indicted before July 17, 1959 but were sentenced after July 17, 1959. The third question deals with the fee to be charged for the issuance of warrants for the arrest of persons charged with an offense before July 17, 1959 but arrested after July 17, 1959. The fourth and final question deals with the fee to be charged for the issuance of warrants in cases where a person convicted of an offense and placed on probation before July 17, 1959 violates the terms of such probation and the warrant for such violation is issued after July 17, 1959.

It appears that your questions pertain to Sections 311.17 and 2303.20, Revised Code, as amended by the Amended House Bill No. 9 of the 103rd General Assembly, to-wit: to fees to be charged by the sheriff and to fees to be charged by the clerk of the court of common pleas.

Divorce and alimony cases and such other cases as have been filed and orders rendered thereon before July 17, 1959, apparently retain their identity as long as the possibility of modification of such orders exist. As to actions for divorce, such possibility is, of course, terminated with the issuance of the final decree, while as to orders relative to alimony and support for children the court has continuing jurisdiction and such orders

remain subject to modification. It follows that the provisions of Section 1.20, *supra*, are applicable to such orders and that, therefore, the fees for services in connection with such motions, notices and subpoenas shall be charged at the rates applicable under Sections 317.12 and 2303.20, Revised Code, at the time such cases were filed, and not at the rates applicable under such sections as amended by Amended House Bill No. 9 of the 103rd General Assembly.

In order to answer your second question, I must first determine when a criminal prosecution is considered as pending. In *15 Ohio Jurisprudence* (2d), Criminal Law, Section 9, page 246, it is stated:

“When a person is arrested and duly committed for a crime for which he is thereafter *indicted*, the prosecution for that crime is pending. It has been said also, that the prosecution is pending the instant *the indictment* is returned into the court.

“* * *

(Emphasis added)

It is clear from this statement that an indictment is the necessary first step in a criminal proceeding before it can be said that such a proceeding has been commenced; having been commenced, it is pending and, therefore, comes within the provisions of Section 1.20, *supra*, in connection with the problem posed in your second question. Spelling out such provisions relative to the question at hand, I arrive at the conclusion that fees for warrants for the conveyance to state institutions of persons indicted before July 17, 1959 but not sentenced until after July 17, 1959 shall be charged at the rate which was applicable under Section 311.17, Revised Code, at the time such persons were indicted, and not at the rate applicable under Section 311.17, Revised Code, as amended by Amended House Bill No. 9 of the 103rd General Assembly.

The answer to your third question regarding the fee for warrants issued prior to July 17, 1959 where the accused has not been arrested until after July 17, 1959 appears to be implied in my answer to your second question. Since a criminal action may not be considered as being pending until an indictment has been returned, the time of a person's arrest may have no bearing on your question concerning the time of such person's arrest. This is no doubt true with respect to prosecutions for felonies. The question, however, arises whether or not it is also true with respect to prosecutions for misdemeanors, which are usually instituted by the filing

of an affidavit, followed by the issuance of a warrant. In the case of *Cleveland v. Strom*, 32 Ohio Opinions, 481, 67 N.E. (2d) 353, where Section 12381, General Code (now Section 1.18, Revised Code), providing a three-year limitation of prosecutions for misdemeanors, was being construed, it is stated in the headnote:

“A criminal prosecution has been commenced within the meaning of Section 12381, General Code, when there has been filed with the clerk of court, or magistrate, an affidavit in due form, charging the accused with the commission of an offense *and a warrant is issued thereon.*” (Emphasis added)

Accordingly, the provisions of Section 1.20, *supra*, are applicable to warrants issued in misdemeanor cases under the circumstances set forth in your third question. This in turn means that the fee for warrants under such circumstances are to be charged at the rate provided in Sections 311.17, Revised Code, at the time the warrant was issued and not at the time the accused was arrested.

Your fourth question pertaining to the fee for warrants issued for the violation of the terms of probation after July 17, 1959 in cases determined before July 17, 1959, also present a situation, as your first question, in which the jurisdiction of the court continues. Such cases were clearly pending within the meaning of Section 1.20, *supra*, at the time of their determination and are to be considered as pending until the period of probation has expired, or the sentence has been executed because of the violation of the terms of such probation by the accused. This being clear, the fees for such warrants are to be charged at the rate in effect before July 17, 1959, and not at the rate applicable under Section 311.17, Revised Code, as amended by Amended House Bill No. 9 of the 103rd General Assembly.

Answering your specific questions, it is therefore my opinion and you are advised:

1. Fees for services rendered in connection with motions, notices and subpoenas relative to modification of court orders filed after July 17, 1959 in cases involving alimony or support for children in divorce actions and in other cases which were filed before July 17, 1959 should be charged at the rates which were applicable under Sections 311.17 and 2303.20, Revised Code, at the time such cases were filed, and not at the rates applicable under Sections 311.17 and 2303.20, Revised Code, as amended by Amended House Bill No. 9 of the 103rd General Assembly.

2. The fee for warrants to convey to state institutions persons indicted before July 17, 1959 but sentenced after July 17, 1959 should be charged at the rate which was applicable under Section 311.17, Revised Code, at the time such persons were indicted, and not at the rate applicable under Section 311.17, Revised Code, as amended by Amended House Bill No. 9 of the 103rd General Assembly.

3. The fee for warrants in felony cases issued before July 17, 1959 in which the accused is not arrested until after July 17, 1959 should be charged at the rate which was applicable under Section 311.17, Revised Code, at the time the accused was indicted; whereas the fee for warrants in misdemeanor cases issued before July 17, 1959 in which the accused is not arrested until after July 17, 1959 should be charged at the rate which was applicable under Section 311.17, Revised Code at the time such warrant was issued, and not at the rate applicable under Section 311.17, Revised Code, as amended by Amended House Bill No. 9 of the 103rd General Assembly.

4. The fee for warrants issued for violation of the terms of probation subsequent to July 17, 1959 in cases determined prior to July 17, 1959 shall be charged at the rate applicable under Section 311.17, Revised Code, at the time such determination was made, and not at the rate applicable under Section 311.17, Revised Code, as amended by Amended House Bill No. 9 of the 103rd General Assembly.

Respectfully,

MARK McELROY
Attorney General