

## OPINION NO. 74-101

## Syllabus:

The reasonable costs of transporting an out-of-state prisoner into the State of Ohio as a necessary witness in a criminal prosecution for violation of state law is taxable as a criminal cost and payable by the Auditor of State under the Criminal Cost Subsidy Program.

To: Joseph T. Ferguson, Auditor of State, Columbus, Ohio  
By: William J. Brown, Attorney General, November 27, 1974

I have before me your request for an opinion on whether the cost of transporting an out-of-state prisoner into the State of Ohio as a material witness in a criminal prosecution for violation of state law is taxable as a criminal cost, and whether such a cost can be paid by the Auditor of State under the Criminal Cost Subsidy Program.

The Uniform Attendance of Witnesses Act (R.C. 2939.25, et seq.) provides, through the voluntary cooperation of courts of other states having similar legislation, for securing the attendance of witnesses to give testimony in criminal proceedings. R.C. 2939.27 provides that a witness may be paid ten cents per mile for travel plus five dollars per day, after a hearing before a court of record in the county in which such person is found; or the witness may be taken into custody before the hearing, and afterward turned over to an officer of the requesting state for delivery. Although there is no specific reference to a person who is already in custody, the Uniform Act may be reasonably implied to extend to such a situation in which case the state would bear the expenses of transportation the same as when non-convicts are taken into custody.

Another method which could properly be used is the writ of habeas corpus ad testificandum. According to 39 Am. Jur. 2d. Habeas Corpus Section 2, this writ is issued when it is necessary for a prisoner to bear testimony in any court. See also Barber v. Page, 390 U.S. 719 (1968), which suggests in footnote 4 at 724:

"\* \* \* For witnesses in prison, quite probably many state courts would utilize the common-law writ of habeas corpus ad testificandum at the request of prosecutorial authorities of a sister State upon a showing that adequate safeguards to keep the prisoner in custody would be maintained."

However, it is within the sound discretion of the court to refuse to issue the writ if it is probable that the witness, after being brought into court, will be incompetent to testify. In Re Thaw, 166 F. 71 (3rd Cir. 1908). See also 13 Am. Jur. Pl. & Pr. Forms (Rev.), Habeas Corpus Form 151.

While there is no specific legislative authority for the issuance of a writ of habeas corpus ad testificandum in Ohio, it is clear that the common law is a part of the law of this state and that the General Assembly will not be presumed to have repealed or modified its rules unless statutory language clearly expresses such an intention. State, ex rel. Hunt v. Fronizer, 77 Ohio St. 7 (1907); State, ex rel. Morris v. Sullivan, 81 Ohio St. 79 (1909); Schwindt v. Graeff, 109 Ohio St. 404 (1924). In addition, I have been informed that the writ has been used without challenge in some Ohio jurisdictions for an extended period of time.

The expenses incurred in transporting an out-of-state convict for whom a writ of habeas corpus ad testificandum has been issued to and from a criminal proceeding in this state would be paid by the clerk of courts, as with other writs, pursuant to R.C. 2303.22, which provides:

"The clerk of the court of common pleas shall receive from the sheriff, or other officer of the court, all costs taxed upon any writ or order issued from the court, such as appraisers' fees, printers' fees, or any other fees necessarily incurred in the execution of such writ or order, and on demand pay them to the persons entitled thereto. The sheriff, or other officer of the court, shall tax such costs and collect and pay them to the clerk of the court from which the writ or order issued, giving the name of each individual, and the amount which each is entitled to receive."

(Emphasis added.)

R.C. 2303.22 authorizes the clerk to pay all costs taxed upon "any writ or order issued from the court". Thus, any fees necessarily incurred in the transportation of an out-of-state prisoner into this state pursuant to a writ of habeas corpus ad testificandum issued by the court would be properly payable by the clerk.

The expenses of transportation whether under a writ of habeas corpus ad testificandum or pursuant to the Uniform Attendance of Witnesses Act would then appear upon the cost bill prepared and certified in accordance with R.C. 2949.14, which provides:

"Upon sentence of a person for a felony, the clerk of the court of common pleas shall make and certify under his hand and seal of the court, a complete itemized bill of the costs made in such prosecution, including the sum paid by the board of county commissioners, certified by the county auditor, for the arrest and return of the convict on the requisition of the governor, or on the request of the governor to the president of the United States, or on the return of the fugitive by a designated agent pursuant to a waiver of extradition except in cases of parole violation. Such bill of costs shall be presented by such clerk to the prosecuting attorney, who shall examine each item therein charged and certify to it if correct and legal."

(Emphasis added.)

R.C. 2947.23 provides in part as follows:

"In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs. \* \* \*."

Amended Substitute House Bill No. 86, effective June 29, 1973, the appropriation act for the 1973-75 biennium, states that the criminal costs subsidy appropriation shall be distributed on warrants of the Auditor of State in accordance with R.C. 2949.17 to 2949.20 to those counties entitled thereto. The aforementioned sections detail provisions for the preparation and collection of a bill of costs upon the sentence of a person for a felony. R.C. 2949.19 provides for reimbursement by the state to the county in which the felon was convicted in an amount equal to that portion of the prosecution cost bill which is not collectible against the convicted felon. R.C. 2949.19 reads as follows:

"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.)

R.C. 2949.19 limits the liability of the state for the payment of costs to such unpaid amount as the auditor of state finds to be correct. Thus, the auditor of state is not required to issue a warrant for the full amount appearing on the cost bill as certified by the clerk and prosecuting attorney pursuant to R.C. 2949.14. Opinion No. 6906, Opinions of the Attorney General for 1956. The court in State, ex rel. v. Guilbert, 77 Ohio St. 333 (1907) stated at 342:

"\* \* \* These provisions, that the clerk shall make up and certify the cost bill, that the prosecuting attorney shall examine into the correctness and legality of each item, and that the warden shall only certify what he finds correct, and that the auditor of state shall not draw a warrant unless he finds the claim legal, are cumulative safeguards of the public funds. And being such, the auditor of state is not concluded by the determination of the prosecuting attorney, \* \* \*."

(Emphasis added.)

Therefore, the auditor of state is required to allow reimbursement for a cost bill submitted under the provisions of R.C. 2949.19, but only in such amount as he finds reasonable and necessary. See Opinion No. 6906, supra. If an out-of-state convict is a necessary witness in a criminal prosecution for violation of state law and is made available for testifying by a sister state pursuant to a writ of habeas corpus ad testificandum or under the Uniform Attendance of Witnesses Act, the reasonable expenses of safely transporting the prisoner are properly includable in the bill of costs and payable by the auditor of state.

In specific answer to your questions, it is my opinion and you are so advised that the reasonable costs of transporting an out-of-state prisoner into the State of Ohio as a necessary witness in a criminal prosecution for violation of state law is taxable as a criminal cost and payable by the Auditor of State under the Criminal Cost Subsidy Program.