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1. JURORS IN CRIMINAL CASE—PER DIEM FEES—ALTERNATE JUROR—PART OF COSTS OF PROSECUTION—JUDGMENT SHALL BE AGAINST CONVICTED DEFENDANT—COSTS NOT REALIZED ON EXECUTION AGAINST DEFENDANT MAY BE CERTIFIED TO STATE AUDITOR FOR PAYMENT—SECTIONS 2313.37, 2947.23, 2949.19 RC.
2. MILEAGE ALLOWED JURORS—SECTION 2313.34 RC—NOT PART OF COSTS—MAY NOT BE CERTIFIED BY COUNTY TO STATE AUDITOR.

## SYLLABUS:

1. Under the provisions of Section 2947.23, Revised Code, the per diem fees of jurors in a criminal case, including the per diem fee of an alternate juror chosen pursuant to Section 2313.37, Revised Code, constitute a part of the costs of prosecution for which judgment shall be rendered against a convicted defendant, and in the event the county is not able to realize such costs on execution against the defendant, they may be certified to the state auditor for payment by the state, pursuant to the provisions of Section 2949.19, Revised Code.

2. The mileage allowed jurors by Section 2313.34, Revised Code, does not constitute a part of the costs which under Section 2947.23, Revised Code, may be adjudged against the defendant in a criminal case, and accordingly may not be certified by the county to the state auditor for reimbursement under the provisions of Section 2949.19, Revised Code.

Columbus, Ohio, March 14, 1955

Hon. Frank T. Cullitan, Prosecuting Attorney  
Cuyahoga County, Cleveland, Ohio

Dear Sir:

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

“The Clerk of Courts of Cuyahoga County has directed my attention to the fact that the State Auditor’s office has disallowed on cost bills certain items presented by our Clerk of Courts. Specifically, for example, the Penitentiary Cost Bills submitted for costs of prosecution of felons in Cuyahoga County transported to state penal institutions in the first quarter of 1954 have not been paid in full. These cost bills are submitted by the County Clerk to the State Auditor under RC. 2949.19, and the State Auditor disallowed on such Penitentiary Cost Bills the items for

mileage paid to the jurors under the requirements of R. C. 2313.34, and the State Auditor also did not pay the daily fee as well as the mileage paid to alternate jurors.

“In our opinion the law requires the State to reimburse the County Clerk for the mileage paid to jurors and likewise to reimburse the County Clerk for the fee of \$5.00 per day and the mileage paid to alternate jurors in cases where a conviction has been obtained and a prison sentence imposed. Of course, in all such cases there has been a return of the sheriff showing no or insufficient monies made to pay the costs of conviction.

“Will you kindly, therefore, advise with the Auditor of State to the end that the law shall be followed in auditing cost bills and advise this office of your conclusion. I enclose a memorandum which is the basis of our opinion that the juror’s mileage and alternate juror’s fees and mileage should be paid.”

The compensation of jurors is set out in Section 2313.34 of the Revised Code, 11419-43, General Code, as follows:

“\* \* \* The *compensation* of each juror shall be fixed by order of the court of common pleas, *not to exceed five dollars* for each day’s attendance, and *in addition thereto*, said juror shall be *allowed* five cents a mile for each mile traveled by said juror by the nearest route from said juror’s place of residence to the county seat and return to home once per day, *payable out of the county treasury*. \* \* \*”  
(Emphasis added.)

Section 2947.23, Revised Code, reads 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. If a jury has been sworn at the trial of a case, *the fees of the jurors shall be included in the costs*, which shall be paid to the public treasury from which the jurors were paid.”  
(Emphasis added.)

Section 2949.15, Revised Code, authorizes a levy of execution on the property of one convicted of a felony, in the amount of the “costs” and a sale to satisfy the same. That section provides:

“The clerk of the court of common pleas in which a person was convicted of a felony shall forthwith issue to the sheriff of the county in which the indictment was found, and to the sheriff of any other county in which the convict has property, executions against his property for fines and the costs of prosecution, which shall be served and returned within ten days, with the proceedings

of such sheriff or the want of property upon which to levy, indorsed thereon.

“When a levy is made upon property under such execution, a writ shall forthwith be issued by the clerk for the sale thereof, and such sheriff shall sell the property and make return thereof, and after paying the costs of conviction, execution, and sale, pay the balance to the person authorized to receive it.”

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. 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 am informed by the state auditor that in the cost bills rendered to him by the counties for costs in criminal cases which the county is not able to recover from the convicted defendant, it has not for many years been the practice to include *mileage* of jurors, and such mileage has not to his knowledge been paid as part of the costs for which the state appears to be responsible under Section 2949.19 *supra*.

The question to be decided, therefore, appears to be whether the mileage which the law allows to jurors is a part of the “costs of conviction” which the court is authorized and required to adjudge against one who is convicted of a felony. If that item of expense is a part of such cost, then it appears clear that the county being unable to collect the same from the defendant, has a clear right to call upon the state for reimbursement.

If, on the contrary such mileage expense is not a part of the “costs of conviction” which is to be adjudged against the defendant, then the county has no right to demand reimbursement from the state for that item of expense.

Again referring to Section 2313.34, Revised Code, I note that the “compensation” of each juror shall be fixed by the court at not to exceed five dollars for each day’s attendance, “and in addition thereto,” such juror shall be allowed five cents per mile for each mile traveled. This statute is found in Chapter 2313, relating to the selection and compensation

of jurors, both in civil and criminal cases. The provision as to compensation and mileage relates only to the juror and his right to be recompensed for his time and reimbursed for his expense in serving on the jury. It has no relationship whatsoever to the liability of the defendant convicted of a felony.

Section 2947.23 *supra*, on the contrary, is a part of the criminal code, and it is to be observed that that section says nothing about the "compensation" of jurors, but specifically provides that the "fees" of the jurors shall be included in the costs. Manifestly, "compensation" is a broader term than "fees." Compensation, as defined by Webster, means "reward, indemnification, requital, satisfaction." In the statutes of Ohio, however, the word is very frequently used to mean "salary." For example Chapter 325 of the Revised Code, is entitled "Compensation," and deals with the salaries of the various county officers. Section 325.03 provides in part, "each county auditor shall receive the following annual compensation \* \* \*". The succeeding sections dealing with the various county officers, all contain the same phraseology.

The word "fees" is used throughout the statutes in setting out certain specific amounts which may be allowed for a specific service or for the issuance of a specific permit or license, and is not used to describe the expenses incurred by an officer or other person.

The word "compensation" as used in Section 2313.34 *supra*, may appear to be somewhat vague. It might be considered either as limited to the maximum allowance of five dollars per day or as including the reimbursement to the juror for his traveling expenses. In my opinion it would make no difference which construction we put upon that word. Certainly the per diem allowance for services is the "fee" of the juror, and he may also be compensated for his traveling expenses by the allowance of five cents per mile; but I find it impossible to construe the word "fees" used in Section 2947.23 *supra*, stipulating what shall be included in the "costs" to be adjudged against the convicted felon, as embracing anything more than the fees allowed the jurors in compensation for their services. If the legislature had intended to include in the judgment against the convicted party the traveling expense incurred by a juror, they certainly would have used definite language to express that intent.

We will keep in mind also the well recognized rule of law that a penal statute is to be construed strictly, in favor of the accused. Sutherland, *Statutory Construction*, Section 5604.

Accordingly, it appears to me quite clear that there is no authority in law for including in the judgment against a person convicted of a felony the traveling expense of jurors and that the only amount that could be so adjudged would be the per diem fee which the statute allows to each juror for his service. Since the amount which the county can demand of the state is governed by the cost which may be adjudged against the defendant, it follows that mileage allowances must be excluded from such demand.

The recovery from the defendant in a criminal case is solely dependent upon the provisions in the statutes. It is said in 11 Ohio Jurisprudence, p. 137:

“ \* \* \* At common law, costs were not recoverable *eo nomine*, either in civil actions or criminal prosecutions; hence, their recovery in any criminal case depends wholly upon statutory provision therefor. \* \* \*.”

Citing *State ex rel. Gallia County v. Meigs County*, 14 Oh. C. C., 26.

I find little assistance in any adjudicated cases. However, I note rather by way of contrast, the case of *Railroad Company v. County Commissioners of Lawrence County*, 71 Ohio St., 454. The first branch of the syllabus in that case is as follows:

“The provision that ‘the whole costs so taxed shall be adjudged against and paid by the corporation,’ found in the section of the Revised Statutes (6451), which directs how costs shall be taxed and paid in appropriation cases, requires that the fees and mileage of jurors shall be so taxed and paid.”

It will be noted that that case arose under the laws relating to the appropriation of property by a railroad company. The court stated at the outset of its opinion:

“But one question is presented by the record, and that is whether jury fees in such cases should be paid by the corporation or out of the county treasury.”

The court referred to the provision of Section 5182 of the Revised Statutes, allowing grand and petit jurors in civil cases two dollars per day and five cents mileage. The court also quoted Section 6451 of the Revised Statutes relating to appropriation proceedings, where it was expressly provided that *witness fees and mileage* of witnesses in such a case were to be taxed as costs, and that “the whole costs so taxed shall be adjudged against and paid by the corporation except as provided in the next section.”

It is plain, therefore, that that case cannot have the effect of casting any doubt upon the conclusion which I have indicated, since the decision turned upon the plain language of the statute which is wholly different from the statutes with which we are here concerned relating to criminal prosecution.

As to the right of an alternate juror appointed under the provisions of Section 2313.37, Revised Code, to receive the same compensation as regular jurors in a criminal case, and as to the right of the county in case of conviction and inability to collect that expense from the defendant, to claim reimbursement from the state it appears to me that there can be no serious question. An examination of said Section 2313.37 shows that such juror is to be sworn, and seated, with the other jurors and if the jury is kept together, he is to be kept with them. The section further provides:

“Such additional or alternate juror shall be liable as a regular juror for failure to attend the trial or to obey any order or admonition of the court to the jury, *shall receive the same compensation* as other jurors, and except as provided in this section shall be discharged upon the final submission of the case to the jury.”

(Emphasis added.)

It would, therefore, follow that when the fees of jurors are charged as costs against a convicted defendant, and the county is unable to collect such costs from the defendant, the amount certified to the State Auditor for reimbursement should include the per diem fee of an alternate juror.

It is accordingly my conclusion:

1. Under the provisions of Section 2947.23, Revised Code, the per diem fees of jurors in a criminal case, including the per diem fee of an alternate juror chosen pursuant to Section 2313.37, Revised Code, constitute a part of the costs of prosecution for which judgment shall be rendered against a convicted defendant, and in the event the county is not able to realize such costs on execution against the defendant, they may be certified to the state auditor for payment by the state, pursuant to the provisions of Section 2949.19, Revised Code.

2. The mileage allowed jurors by Section 2313.34, Revised Code, does not constitute a part of the costs which under Section 2947.23, Revised Code, may be adjudged against the defendant in a criminal case,

and accordingly may not be certified by the county to the state auditor for reimbursement under the provisions of Section 2949.19, Revised Code.

Respectfully,

C. WILLIAM O'NEILL

Attorney General