

OPINION NO. 69-058

Syllabus:

1. The costs of prosecution, including jury fees, arising out of a mistrial and subsequent trial and conviction, must be assessed against the defendant pursuant to Section 2947.23, Revised Code.

2. Where, in the subsequent trial, the defendant pleads "guilty" before the jury is impanelled, the fees of that jury may not properly be included in the costs of prosecution.

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3. The court has no discretion in the taxing of jury fees in the case where a mistrial is declared resulting in a subsequent trial and conviction.

To: Dean E. Curl, Morrow County Pros. Atty., Mt. Gilead, Ohio
By: Paul W. Brown, Attorney General, June 9, 1969

I have before me your request for my opinion regarding the taxability of jury fees arising out of a mistrial and a subsequent retrial where the defendant enters a plea of "guilty" prior to the impanelling of the jury, and whether the court has any discretion in the taxing of said fees.

Section 2947.23, Revised Code, provides 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."

It is generally conceded that where a mistrial results in no conviction, it is as though no proceeding had ever been brought. A review of case law in other jurisdictions as well as in Ohio establishes authority to include the costs of the original trial. Hill v. State, 21 Ala. App. 310 (1926), 107 So. 789; United States v. Hoxie, 8 Alaska 210 (1920); Nicholson v. State, 24 Wyo. 347 (1916), 157 P. 1013.

In Nicholson v. State, *supra*, the court interpreted "costs of prosecution" in the Wyoming statute as commencing with the filing of the information and ending with final judgment in the subsequent trial. Thus, both proceedings were considered as one entire case. My predecessor in Opinion No. 28, Opinions of the Attorney General for 1959, in interpreting Section 2949.14, Revised Code, recognized that a retrial is "a part of the continued judicial process to determine the guilt or innocence of the accused party." And the court in Harris v. Protection Ins. Co., Wright 548, imposed the costs on the defendant where he had requested a new trial on account of newly discovered evidence.

Lacking Ohio authority to the contrary, I must concur with the Nicholson holding and the opinion of the Attorney General, *supra*, and conclude that the costs of prosecution, including jury fees, arising out of a mistrial and subsequent trial and conviction, must be assessed against the defendant pursuant to Section 2947.23, *supra*.

Concerning the subsequent trial where the defendant pleads "guilty" before the jury is impanelled, Section 2947.23, *supra*, is particularly clear in requiring that the jury be sworn before their fees can be included in the "costs of prosecution." Your example indicated that the jury had not been sworn when the "guilty" plea was made. Therefore, the jury fees in that instance may not properly be included in the "costs of prosecution."

And finally, you ask whether the court has any discretion in the taxing of said jury fees. It appears that it does not. Section 2947.23, supra, reads in pertinent 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. * * *"

(Emphasis added)

The word "shall" is usually given a mandatory interpretation, particularly where used repetitiously and unless the provision expressed in its entirety indicates a contrary intent. Anderson v. Hancock County Bd. of Ed., 137 Ohio St. 578, 19 Ohio Op. 344, 31 N.E. 2d 850; Dennison v. Dennison, 165 Ohio St. 146, 59 Ohio Op. 210, 134 N.E. 2d 574; Cleveland R. Co. v. Brescia, 100 Ohio St. 267, 126 N.E. 51; State use of Ashland County v. Snyder, 2 Ohio N.P. (n.s.) 261, 14 O.D. 568.

Inasmuch as the word "shall" is repeated in the statute in question, and no contrary intent appearing, I must conclude that the court has no discretion in the taxing of jury fees in the case where a mistrial is declared resulting in a subsequent trial and conviction.

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

1. The costs of prosecution, including jury fees, arising out of a mistrial and subsequent trial and conviction, must be assessed against the defendant pursuant to Section 2947.23, Revised Code.
2. Where, in the subsequent trial, the defendant pleads "guilty" before the jury is impanelled, the fees of that jury may not properly be included in the costs of prosecution.
3. The court has no discretion in the taxing of jury fees in the case where a mistrial is declared resulting in a subsequent trial and conviction.