

5548

1. WITNESS FEES—WHEN SUBPOENAED TO APPEAR IN COURT IN CRIMINAL CASE—SUPERINTENDENT OF BUREAU OF CRIMINAL IDENTIFICATION AND INVESTIGATION AND ASSISTANTS AND EMPLOYEES MAY LEGALLY COLLECT WITNESS FEES.
2. COUNTY IN WHICH COURT ISSUES SUBPOENA LIABLE ONLY FOR WITNESS FEE AND MILEAGE PROVIDED IN SECTION 3014 G.C.
3. EXPERT WITNESS—COUNTY COMMISSIONERS MAY ALLOW AND PAY SUCH COMPENSATION THEY DEEM JUST AND PROPER WHICH THE COURT APPROVES—SECTION 2494 G.C.
4. WHERE WITNESS TESTIFIES IN COURT PURSUANT TO SUBPOENA, EXPENSE INCURRED MAY NOT BE PAID FROM FUNDS APPROPRIATED TO SUCH BUREAU FOR TRAVELING EXPENSE.

**SYLLABUS:**

1. The Superintendent of the Bureau of Criminal Identification and Investigation and the assistants and employes thereof may legally collect witness fees when subpoenaed to appear in court in a criminal case.

2. Where the Superintendent of the Bureau of Criminal Identification and Investigation or one of the assistants or employes thereof is subpoenaed as a witness in a criminal case, the county in which the court issuing such subpoena is located is not responsible for the payment of hotel bills, meals and transportation expense incident to appearance as a witness pursuant to such subpoena, and such county is liable only for the witness fee and mileage provided in Section 3014, General Code.

3. Where the Superintendent of the Bureau of Criminal Identification and Investigation or one of the assistants or employes thereof appears in court to testify as an expert witness in a criminal case and the prosecuting attorney or one of his assistants certifies that the services or testimony of any of such persons is necessary to the proper administration of justice, the county commissioners, pursuant to the provisions of Section 2494, General Code, may allow and pay to any of such persons such compensation as they deem just and proper and the court approves.

4. Where the Superintendent of the Bureau of Criminal Identification and Investigation or an assistant or employe thereof testifies as a witness in court pursuant to subpoena, the expense incurred on account of such appearance as a witness may not be paid from funds appropriated to such bureau for traveling expense.

Columbus, Ohio, October 17, 1942.

Hon. Charles L. Sherwood, Director of Public Welfare,  
Columbus, Ohio.

Dear Sir:

You have requested my opinion as follows:

“The state operates as a division of the Department of Public Welfare a Bureau of Criminal Identification and Investigation (Sections 1841-13 to 1841-21 G.C.). In addition to its work of maintaining an identification system, it has been the custom of the Bureau when called upon to assist local officers in making investigations in criminal cases. The expense accounts of the investigators in such work, transportation, hotel, meals, etc., are paid from funds appropriated to the Bureau.

The Chief of the Bureau and the investigators are frequently subpoenaed to appear in court as witnesses. We are advised by the Chief of the Bureau that when a subpoena is issued to a member of the Bureau's staff to appear in court as a witness it has been the custom to collect mileage and witness fees from the court, and to pay any expenses for food and lodging from the Bureau's expense account.

Will you please advise us on the following questions:

1. May employes of the Bureau of Criminal Identification and Investigation collect witness fees when subpoenaed to appear in court?

2. Is the county issuing the subpoena responsible for the payment of the expense of transportation, hotel and meals. Shall any part of the expense of an employe of the Bureau of Criminal Identification and Investigation serving as a witness in court upon subpoena be paid from the funds of the Bureau?”

Section 1841-13, General Code, created the Bureau of Criminal Identification and Investigation in the Department of Public Welfare and provided for the appointment of the superintendent of such bureau and such other assistants as might be necessary from time to time.

Section 1841-15, General Code, provides:

“The superintendent shall procure and file for record

photographs, pictures, descriptions, finger prints, measurements and such other information as may be pertinent, of all persons who have been or may hereafter be convicted of felony within the state, and of all well-known and habitual criminals from wherever procurable, and it shall be the duty of the person in charge of any state institution to furnish any such material to the superintendent of the state bureau of criminal identification upon the request of the superintendent. The superintendent shall co-operate with and assist sheriffs, chiefs of police and other law officers in the establishment of a complete state system of criminal identification and in obtaining finger prints and other means of identification of all persons arrested on charge of felony. He shall also file for record the finger print impressions of all persons confined in any workhouse, jail, reformatory, penitentiary, for the violation of state laws, and such other information as he may receive from law enforcement officials of the state and its subdivisions."

Section 1841-16, General Code, provides that the superintendent of the bureau shall prepare standard impression sheets on which to make finger prints and which may provide for such other descriptive matter as the superintendent may prescribe, and requires that such sheets be furnished to each sheriff, chief of police and to the person in charge of every workhouse, reformatory and penitentiary within the state.

Section 1841-17, General Code, requires the sheriff, chief of police or other person in charge of each prison, workhouse, reformatory or penitentiary to send finger print impressions and such other descriptive measurements as the superintendent may require, to the bureau to be filed, classified and preserved.

Section 1841-18, General Code, makes it the duty of sheriffs, chiefs of police and marshals immediately upon the arrest of any person for any felony to take his finger prints and forward the same, together with such other description as may be required and with the history of the offense committed, to the bureau. This section further provides that the superintendent shall report any dereliction in the performance of this duty by any sheriff, chief of police or marshal or any person having charge of a state institution, to the Governor who shall make immediate investigation thereof, and upon the order of the Governor the disbursing officer shall not issue any salary voucher or pay voucher to any such officer found by the Governor to be derelict in the performance of such duties until such dereliction has been corrected. The section also requires the superintendent to compare the description received with those already on file in the bureau, and if he finds that the person arrested

has a criminal record or is a fugitive from justice, he shall at once inform the arresting officer of such fact.

Section 1841-19, General Code, imposes further duties upon sheriffs and chiefs of police with respect to furnishing the bureau with descriptions, finger prints, photographs and measurements of certain persons.

Section 1841-20, General Code, requires the superintendent to cooperate with bureaus in other states and with the National Bureau in the Department of Justice in Washington.

Section 1841-21, General Code, provides:

"It shall be the duty of the superintendent to afford assistance and, when practicable, instruction to sheriffs, chiefs of police and other law officers in the establishment of efficient local bureaus of identification in their districts and in making them proficient in procuring finger print records."

At no place in the act do I find any provision requiring the superintendent of the bureau or any of his assistants to attend trials in their official capacities. In 42 O. Jur., 26, 27, it is said:

"If it is the legal duty of a public officer to be in attendance upon the trial of a case in his official capacity, he is not entitled to witness fees. This right is often regulated by statutes which are generally sustained, even though the right to fees is entirely withdrawn. \* \* \* *If, however, a public officer is not required, in the performance of the duties of his office, to be present in person upon the trial of a particular cause, he is entitled to the same fees as any private person, if he is called as a witness therein.*" (Emphasis mine.)

Since there is no statute requiring the superintendent or his assistants to be in attendance upon any particular trial, I am of the opinion that your first question should be answered in the affirmative.

Each of the sentences comprising your second question is a separate question in itself and will be so treated. You desire to know whether a county is liable for hotel bills, meals and the expenses of transportation of an employe of the bureau who appears as a witness in such county pursuant to subpoena issued out of the common pleas court thereof.

Section 3012, General Code, provides that each witness subpoenaed

in a civil case shall receive one dollar for each day's attendance in court and five cents for each mile necessarily traveled from his place of residence to the place of giving testimony and return, provided the distance be more than one mile.

Section 3014, General Code, provides in part:

"Each witness attending under recognizance or subpoena, issued by order of the prosecuting attorney or defendant, before the court of common pleas, or grand jury, or other court of record, in criminal causes, shall be allowed the same fees as in civil causes, to be taxed in only one cause, when attending in more causes than one on the same days, unless otherwise directed by special order of the court. When certified to the county auditor by the clerk of the court, such fees shall be paid from the county treasury, and, except as to the grand jury, taxed in the bill of costs. \* \* \*"

A witness in a criminal case is therefore entitled to one dollar for each day's attendance and five cents per mile for each mile necessarily traveled from his residence to the place of giving testimony and return. There is no law authorizing the payment of hotel bills, meals and transportation as such, and the only allowances for which the law makes provision are those contained in Section 3014, General Code. These are, pursuant to the provisions of such section, payable out of the county treasury and the county is liable therefor.

Since the law has made no provision for any further payments, a county is not liable for meals, hotel bills and expenses of transportation. In 42 O.Jur, 28, it is said:

"A witness may be allowed only the fees authorized by statute. Such fees are usually fixed by the statute without regard to class, calling, countenance, or profession. The fact that it may be a hardship to a person whose time is more valuable than the sum of money allowed by the statute as a fee for the attendance and testimony of a witness does not justify payment of extra compensation, since all persons, as good citizens, have an interest in the pursuit of justice, and, as such citizens, are required to sacrifice their pecuniary interests to some extent in the administration of justice."

I am therefore constrained to answer the first part of your second question in the negative. However, your attention is directed to Section 2494, General Code, which reads:

"Upon the certificate of the prosecuting attorney or his

assistant that the services of an expert or the testimony of expert witnesses in the examination or trial of a person accused of the commission of crime, or before the grand jury, were or will be necessary to the proper administration of justice, the county commissioners may allow and pay such expert such compensation as they deem just and proper and the court approves.”

Where the superintendent or his assistants testify as experts in the trial of a criminal case, upon proper certificate of the prosecuting attorney or his assistant and due allowance by the county commissioners and approval by the court, compensation can be made pursuant to the provisions of this section.

You also desire to know whether any part of the expense of an employe of the bureau incurred by reason of his being a witness in a court of record upon subpoena may be paid from funds appropriated to the bureau. In considering this question, it must be remembered that public officers and employes have only such powers as are expressly granted to them by law and such additional implied powers as may be necessary to carry out those expressly granted. Especially is this true with respect to the expenditure of public moneys. In case of doubt as to the power to expend public moneys, the doubt must be resolved against such power. See *Peter v. Parkinson*, 83 O.S., 36; *State, ex rel. Locher, v. Manning*, 95 O.S., 97; *State, ex rel. Bentley & Sons Company, v. Pierce*, 96 O.S., 44; *Schwing v. McClure*, 120 O.S., 335.

I find no provision of law which requires employes of the bureau to appear in court and testify as witnesses. Hence, I believe that such appearances are not part of their official duties. The appropriation made to the bureau for traveling expense was made by the General Assembly in order that the duties imposed upon the bureau by law might properly be carried out. Testifying as a witness in court is not one of such duties and therefore the funds appropriated to the bureau for traveling expense may not be used to pay the expenses incurred by one of the employes of the bureau occasioned by his appearing as a witness in court pursuant to subpoena. The second part of your second question is therefore answered in the negative.

Respectfully,

THOMAS J. HERBERT  
Attorney General.