

1264.

APPROVAL—BONDS OF CITY OF CLEVELAND, CUYAHOGA COUNTY, OHIO, \$4,000.00 (Limited).

COLUMBUS, OHIO, October 2, 1937.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

GENTLEMEN:

RE: Bonds of City of Cleveland, Cuyahoga County, Ohio, \$4,000.00 (Limited).

I have examined the transcript relative to the above bonds purchased by you. These bonds comprise part of an issue of city portion sewer bonds in the aggregate amount of \$400,000, dated March 1, 1923, bearing interest at the rate of $4\frac{1}{2}\%$ per annum.

From this examination, in the light of the law under authority of which these bonds have been authorized, I am of the opinion that bonds issued under these proceedings constitute a valid and legal obligation of said city.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1265.

JUSTICE OF THE PEACE—FEES AS COST OF PROSECUTION
—GRAND JURY—PLEA OF GUILTY—PROBATION—FEES
NOT COLLECTIBLE FROM COUNTY OR STATE—FEES
OF JURORS AND WITNESSES—STENOGRAPHER, ETC.

SYLLABUS:

The personal fees of a justice of the peace, as costs of prosecution in a case where the defendant was bound over to the grand jury, who plead guilty, who was put on probation by the common pleas court, and who served his period of probation, are not collectible from the treasury of the county nor from the State.

Other fees and costs, such as witness, psychiatrists, stenographers and jurors fees, as are specifically provided for by statute, are payable

out of the treasury of the county by the clerk of courts to the proper person entitled thereto.

COLUMBUS, OHIO, October 4, 1937.

HON. H. LLOYD JONES, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR: This will acknowledge receipt of your recent request for my opinion, which reads as follows:

“Where an accused pleads guilty to a felony, is put on probation and the costs have not been collected, and are not collectible from the defendant what procedure, if any, should be followed by the justice of the peace that bound the accused over to the grand jury, to collect the fees due the justice on said case?

Where an indigent defendant has plead guilty to a felony and is put on probation, what procedure should be followed by the Clerk of Courts in connection with the costs in said case?

Your suggestions in connection with these matters will be greatly appreciated.”

Your question concerns the collectibility of costs, including the fees of various public officers in a felony case from a defendant who is indigent or insolvent, who has been bound over to the grand jury by a justice of the peace and plead guilty to the offense as charged in the indictment, and who was subsequently put on probation by the judge of the common pleas court.

Costs in criminal cases, as well as in civil cases, were not recoverable *eo nomine* from a defendant at common law, and hence any recovery against a criminal defendant depends wholly upon statutory provision therefor.

I will take up first the matter of where a person is put on probation by a judge of a common pleas court when the defendant pleads guilty to the charge as he was indicted. As was stated, *supra*, costs are not recoverable unless there is a statutory provisions therefore, and referring to the section of the General Code pertaining to the probation of a prisoner, I will quote the only section which might have reference to the imposition of costs against a defendant.

Sec. 13452-1. “In prosecutions for crime, except as mentioned in G. C. Section 6212-17, and as hereinafter provided, where the defendant has pleaded, or been found guilty and it appears to the satisfaction of the judge or magistrate that the

character of the defendant and the circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and the public good does not demand or require that he be immediately sentenced, such judge or magistrate may suspend the imposition of the sentence and place the defendant on probation in the manner provided by law, and upon such terms and conditions as such judge or magistrate may determine; provided, that juvenile delinquents shall not be included within this provision."

This section provides that the judge may "suspend the imposition of the sentence and place the defendant on probation * * * upon such *terms and conditions* as the judge or magistrate may determine".

Your request is silent as to the terms and conditions of the probation, whether it included the payment of the costs of prosecution. I must assume that the probation did not include the costs as one of its terms and conditions; otherwise, possibly the probation would have been revoked and the defendant brought into court and sentenced.

The judge in such a case is vested with discretion in the matter of placing a defendant on probation and suspending the imposition of the sentence. It is up to the judge to determine whether or not the character of the defendant and the nature of the case are such that he is not likely again to engage in an offensive course of conduct. By a reading of this section it is clear that when a defendant is put on probation there is no sentence imposed, and a sentence is imposed only when the terms and conditions of the probation are breached by the defendant.

A reading of the sections of the General Code with reference to the probation of a defendant reveals that there is no express provision for the payment of the costs of prosecution by the defendant. It is my interpretation of this statute that the phrase "terms and conditions" could be made to include the payment of the costs of prosecution by the defendant, and if the costs were not paid, the defendant would be breaching the terms of the probation and could be immediately sentenced.

In misdemeanor cases it is provided that a defendant upon conviction should pay the costs of prosecution, and if he is unable to pay the costs of prosecution and his fine, he should be placed in jail and credited with the amount of \$1.50 per day for work until the amount of the fine and costs are credited. I find no statutory provisions, however, for the detention in jail of a defendant who has plead guilty to a felony and the crediting of any amount on the costs of prosecution.

It is provided by Section 3016, General Code, that in felonies when the defendant is *convicted*, the fees of the various magistrates and their officers, witness fees, etc., shall be inserted in the judgment of conviction

and when collected shall be disbursed by the clerk to the persons entitled thereto.

It is provided by Section 3019, General Code, that in felonies wherein the State *fails* the county commissioners shall make an allowance to the justices of the peace of an amount, the aggregate of which shall not exceed all the fees legally taxed in such cases, and in no event to exceed \$100.00 per year.

It is mandatory by Section 13451-18, General Code, that in criminal prosecutions upon *conviction and sentence* the defendant is liable for the costs thereof, and the judge or magistrate shall include therein, and render a judgment against the defendant for the costs of prosecution by virtue of Section 13455-5, General Code. If the costs are not collected from the defendant the same will be paid by the State upon a certified cost bill being presented to the State Auditor, and in such event the State Auditor shall issue his warrant on the Treasurer of State for the amount of the costs. This latter section, of course, pertains to state cases when a prisoner is sentenced to the reformatory or the penitentiary and is not credited with any amount for work performed in such institution.

The term "costs" includes the term "fees" when used in the sense that the fees of various officers shall be taxed as costs. In other words, fees are included and taxed the same as costs and distributed in the same way to the persons entitled thereto. That there is a difference between the terms "fees" and "costs" is shown in Opinions of the Attorney General for 1927, Vol. II, Page 1229. The second branch of the syllabus of this opinion is as follows:

"There is no authority of law for the payment from the county treasury of fees of the mayor and marshal of a municipal corporation, incurred in any state case, whether the defendant be convicted or acquitted. By the terms of Section 3016, General Code, in felonies, and in minor state cases which have come to the Court of Common Pleas through a mayor's court, where the defendant is convicted, the fees of such mayor and his officers should be inserted in the judgment of conviction and when collected should be disbursed by the clerk of courts to the persons entitled thereto."

There are special sections in the General Code providing for the payment of various fees such as witness, stenographers, psychiatrists fees, etc., from a municipal or county treasury, which sections are too numerous to set forth here, but suffice it to say that the above mentioned fees have to be paid immediately after rendition of services and cannot wait until the costs are collected from a defendant personally or by

execution upon any property which the execution officer might find.

However, there is no provision for the payment of fees of the justices of the peace other than by the judgment against the criminal defendant, which would include a state case when the costs are paid by the State of Ohio, inasmuch as a defendant in such case would be not only convicted but sentenced.

Inasmuch as the fees of the justice of the peace have not been paid, and are not collectible from a defendant, it is my opinion that there is no way in which the justice of the peace may collect the fees due him from the treasury of the county. Other costs of prosecution are likewise uncollectible from the defendant because of the terms and conditions of the probation, and also due to the fact that the defendant is indigent or insolvent. Other costs such as witnesses, psychiatrist, jury and stenographer's fees as are specifically provided by law to be paid from the county or municipal treasury, as the case may be, are paid to the proper person by the clerk of courts.

In specific answer to your inquiry, it is therefore my opinion that a justice of the peace is unable to collect the fees due him in a case where a person is bound over to the grand jury who plead guilty and was put on probation by a judge of the common pleas court and who satisfactorily terminated the period of probation.

It is further my opinion that other fees and costs, such as are specifically provided by statute to be paid out of the county treasury, can be paid by the clerk of courts to the proper persons entitled thereto.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1266.

APPROVAL—GRANTS OF EASEMENT EXECUTED TO THE
STATE OF OHIO BY CHESTER N. KOHLER OF GERMAN-
TOWN, CLARK COUNTY, OHIO.

COLUMBUS, OHIO, October 4, 1937.

HON. L. WOODDELL, *Conservation Commissioner, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval two grants of easement, Numbers 1105 and 1106, executed to the State of Ohio by Chester N. Kohler of German Township, Clark County, Ohio.