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FOREIGN WITNESS—CALIFORNIA—SUBPOENAED BY DEFENDANT IN CRIMINAL PROSECUTION—AUTOMOBILE ACCIDENT—AFTER WITNESS REACHED COURT HOUSE—ENTITLED TO PER DIEM FEES UNTIL DISCHARGED BY COURT—NOT ENTITLED TO MILEAGE TO AND FROM PLACE OF RESIDENCE.

SYLLABUS:

A foreign witness subpoenaed by the defendant in a criminal prosecution after such witness had reached the court house, is entitled to his per diem fees until discharged by the court, but not to mileage to and from his place of residence.

Columbus, Ohio, December 2, 1954

Hon. Randall Metcalf, Prosecuting Attorney
Washington County, Marietta, Ohio

Dear Sir:

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

"An indictment is returned by the Grand Jury of Washington County against A. A was involved in a fatal traffic violation in Marietta en route to his home in California.

"A continues on to California, having properly posted bond and returns to Washington County for trial. At the request of his counsel, his wife, B accompanies him. A subpoena was issued for the wife, B, with orders to the Clerk of Courts that B would pick the subpoena up at the court house upon her arrival. Such subpoena was on behalf of the defendant only. A was acquitted. The following questions now arise:

'1. Does the Clerk of Courts pay the wife, B a witness fee and mileage?

'2. If the answer to the first question is yes, is the mileage computed from her home in California and return, or from the borders of the State of Ohio and return, or from where her temporary residence is, in Marietta, during the trial and return?"

The question I am to consider is the right of a foreign witness, subpoenaed by the defendant in a criminal prosecution after his arrival at the place of trial, to witness fees and mileage. There seems to be no doubt that such witness is entitled to his per diem until discharged by the court, but there is a conflict of opinion as to his right to mileage for the entire distance traveled, some courts taking an affirmative view and others denying the right. See 42 Ohio Jurisprudence, p. 29, Sec. 11; American Jurisprudence, p. 503, Sec. 878. However, I shall be guided by the provisions of the Ohio statutes bearing on the question and the construction placed upon them by our courts and the opinions of this office.

Section 2317.18, Revised Code, provides that a witness may demand his traveling fee and fees for one day's attendance when a subpoena is served upon him, and if not paid, he is not obliged to obey the writ.

As relating to witnesses subpoenaed in a criminal prosecution, Section 2335.08, Revised Code, provides:

"Each witness attending, under recognizance or subpoena issued by order of the prosecuting attorney or defendant, before the grand jury or any court of record, in criminal causes, shall be allowed the same fees as provided by Section 2335.06 of the Revised Code, in civil causes, to be taxed in only one cause when such a witness is 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 court, such fees shall be paid from the county treasury. * * *"

Section 2335.06, referred to in the above section provides that, "Each witness * * * shall receive * * * Three dollars for each day's attendance * * * five cents for each mile necessarily traveled to and from his place of residence to the place of giving his testimony to be taxed in the bill of costs; on demand a witness shall be paid one dollar by the party at whose instance he is subpoenaed before being required to answer said subpoena which shall be considered a part of any fees to which said witness is entitled; * * *"

By specific statutory provision subpoenas in civil actions are inoperative beyond the boundaries of an adjoining county. Section 2317.16, Revised Code, provides:

"A witness shall not be compelled to go out of the county where he resides, or is subpoenaed, except to an adjoining county, to testify in a civil action, except where the case has been removed from the county in which such witness resides by change of venue. No witness shall be required to go out of the county in which he resides or is subpoenaed to so testify in the trial of a civil action, unless the party subpoenaing him, upon demand, pays him at the time he is subpoenaed his legal mileage and per diem fees. * * *"

A different rule applies to the service of subpoenas in criminal cases on witnesses residing within the state. Sections 2945.45 and 2945.46, Revised Code, provide that *in all criminal cases* the clerk of the court of common pleas, upon a praecipe being filed, shall issue writs of subpoena for the witnesses named therein, directed to the sheriff of such county or the county where such witnesses reside or are found, which shall be served and returned as in other cases; that the civil procedure relative to compelling the attendance and testimony of witnesses and proceedings for contempt to enforce the remedies and protect the rights of the parties, extend to criminal cases, as far as applicable. Hence, while witnesses beyond the limits of an adjoining county cannot be compelled to testify in civil actions, they are subject to compulsory attendance in any county of the state, when their testimony is needed in criminal cases, and when so subpoenaed are entitled to their per diem and mileage to and from their places of residence.

A special fund is also provided for the prosecuting attorney under the provisions of Section 325.12, Revised Code, G. C. 3004, in an amount equal to one-half of his official salary, for "expenses which may be incurred

by him in the performance of his official duties and in the furtherance of justice." This provision is evidently intended to enable the prosecuting attorney to meet the traveling expenses of foreign witnesses whose testimony is needed in the interest of the state. Accordingly, it was hld in an opinion of this office that attendance and mileage of a foreign witness, from the state line, may be taxed as costs in a criminal case and any deficiency in actual mileage from the place of residence of the foreign witness may be made up out of such prosecuting attorney's fund. See Opinion No. 260, Opinions of Attorney General for 1915, p. 491.

The conflicting views on the question of mileage are reflected in the Missouri case of *State v. Wilder*, 196 Mo. 418; 95 S. W., 396, where foreign witnesses responding to subpoenas served upon them at their place of residence were held not entitled to mileage because of the ineffectiveness of such process; but the court further intimated that when such witnesses are served with process upon their arrival at the place of trial, they thereby subject themselves to the jurisdiction of the trial court and are entitled to mileage for coming from and returning to their place of residence.

I am inclined to follow the opinion of Judge Dillon in *Wylie v. Duffy*, 1 N. P. (N.S.) 353, in which he held that since there is no jurisdiction to compel the attendance of a witness beyond the limits of an adjoining county, a witness residing beyond the limits of a county adjoining the county of trial, who reports voluntarily at the place of trial and is there subpoenaed, is only entitled to his witness fees and nothing more. He said:

"The argument that such a witness should be allowed at least the mileage as to a resident of the farther limits of the adjoining county, cannot be supported by the law, nor by the reasons and objects of the statutes which bar all the world from mileage except those resident of certain confines."

While the *Wylie* case *supra* involved a civil action the Attorney General has applied the principle to a criminal prosecution. He similarly held that since the court had no jurisdiction to compel a foreign witness to appear in a court of this state to testify in a criminal case, such witness, who voluntarily reports to the court at the request of the prosecuting attorney and is there subpoenaed, is entitled to a witness fee and nothing more. But he further observed that by virtue of Section 325.12, Revised

Code, G. C. 3004, which vests in the prosecuting attorney the discretion to incur expense in the furtherance of justice, he may allow mileage to such witness out of the funds in his hands for such purpose. See Opinion No. 127, Opinions of the Attorney General for 1927, p. 212. However, such mileage allowance does not apply to foreign witnesses who volunteer to testify and are subpoenaed at the place of trial on behalf of the defendant.

The fact that the restriction of subpoena under the provisions of Section 2317.16 is made applicable to civil actions, or that the decision in the Wylie case also involved a civil action will not affect the applicability of the general rule that subpoenas are ineffective upon witnesses residing in another state, and where such witnesses volunteer to testify, they are not entitled to mileage. The rule applicable here, is stated in 11 Ohio Jurisprudence, p. 717, Sec. 73:

“It is a general principle that the jurisdiction of the courts of a state is limited by state lines. * * * It is said that one state cannot extend its sovereignty into another; it cannot, in an action in personam, compel a citizen of another state to respond to the process of its courts, served in the other state. No sovereignty can extend its process beyond its territorial limits to subject either person or property to its judicial decisions.”

Hence, where a foreign witness is served with a subpoena at the place of trial, he thereby submits himself to the jurisdiction of the trial court and his right to mileage begins and ends at the place where he is served with the process. Such subpoena would be ineffective had it been served upon such witness at his place of residence. *Daniels v. Stevens*, 19 Ohio, 222.

Accordingly, in specific answer to your question, it is my opinion that a foreign witness subpoenaed by the defendant in a criminal prosecution after such witness had reached the court house, is entitled to his per diem fees until discharged by the court but not to mileage to and from his place of residence.

Respectfully,

C. WILLIAM O'NEILL
Attorney General