To: Judges Aulgur, Hersey, Vatterott, and Kamp and Laura

We had received an inquiry about the latest Attorney General's opinion on municipal divisions assessing the sheriff's retirement fund and prepared the attached statement on the topic. For your information, we will be including this narrative in the next traffic disposition statistics letter/e-mail that will be sent to every municipal clerk and judge prior to the end of the month - that is an easy way for us to get the information to all municipal divisions without a separate mailing. However I thought your organizations may want to discuss the value of distributing to your membership or posting on your website as well. If you receive information from your membership that would be of value to us, please let us know.

Regarding the recent Attorney General opinion on municipal division assessment of the sheriff's retirement fee, in brief, our answer is that neither the statute nor the case law in question have changed in this regard since the time our current guidance to courts was originally put in place, therefore our guidance will not change. The Attorney General opinion discussed below may not concur with our guidance, but neither does it have the force and effect of law. Until the law, either by case law or statute, is changed, our guidance will remain in place and we will not recommend to courts that the Sheriff's Retirement Fund be assessed on municipal division cases.

As you know, on March 21, 2011, the Attorney General's Office issued revised opinion number 8 - 2010 regarding the assessment of the Sheriff's Retirement Fund on municipal division cases. Although some of the reasoning has been revised, the opinion reaches the same result as the original opinion, that the surcharge should be assessed in municipal division cases. However, the opinion itself says that the question is a very close one.

The Attorney General was asked to interpret section 57.955 RSMo as to whether the $3 sheriff's surcharge that is assessed in criminal cases should be assessed in municipal ordinance cases.

It is our belief that the AG Opinion is contrary to how the courts have interpreted that statute throughout the years. OSCA's guidance to courts on cost assessment has been to strictly construe costs, based on case law which states that costs are to be strictly construed.

We have attached several of those cases that address the assessment of court costs. These cases indicate that costs are of statutory origin and shall be strictly construed. Cramer v, Smith established the long standing premise that "at common law costs as such in a criminal case were unknown. As a consequence it is the rule as well in criminal as in civil cases that

the recovery and allowance of costs rests entirely on statutory provisions -- that no right to or liability for costs exists in the absence of statutory authorization. Such statutes are penal in their nature, and are to be strictly construed." [20 C. J. S. p. 677.]

It is interesting to note that in Webster Groves v. Erickson, the court goes on to say "ordinance provisions imposing penalties are to be strictly construed against the prosecuting authority and are not to be extended by implication." Levin v. Carpenter, 332 S.W.2d 862, 865 (Mo. 1960).

(See attached file: 1980_Mo__LEXIS_316.doc)(See attached file: 168_S_W_2d_1039__1040.doc)(See attached file: It_is_the_rule_as_well_in_cr.doc)(See attached file: 758_sw2d_500.doc)

We have also attached Kansas City v. Bott which discusses the nature or ordinance violations.

In addition, if you look as Chapter 488 as a whole, you will see how costs have been specifically addressed.

Clerk fee; 488.012.3) Prior to adjustment by the supreme court, the following fees, costs and charges shall be collected;
(6) Twelve dollars for municipal court costs,

CVC surcharge: 488.5339
A surcharge of seven dollars and fifty cents shall be assessed pursuant to section 595.045, RSMo, as costs in each court proceeding filed in any court in the state in all criminal cases including violations of any county ordinance or any violation of criminal or traffic laws of the state, including an infraction and violation of a municipal ordinance; except that no such fee shall be collected in any proceeding in any court when the proceeding or the defendant has been dismissed by the court.......

POST: 488.5336
A surcharge in the amount of one dollar shall be assessed as provided in this section, and shall be collected and disbursed as provided in sections 488.010 to 488.020. This section is for criminal cases involving violations of any county ordinance or a violation of any criminal or traffic laws of the state, including infractions, or violations of municipal ordinances.

Court Automation 488.056 and 488.027
In addition to all other court costs provided by law, in all civil cases filed in the circuit courts of this state and in all criminal cases including violations of any municipal or county ordinance heard by an associate circuit judge or any violation of criminal or traffic laws of this state, including an infraction, a fee in an amount determined pursuant to sections 488.015 to 488.020 shall be assessed as costs, except that, no

such fee shall be collected in any proceeding involving a violation of an ordinance or state law when a criminal proceeding or defendant has been dismissed by the court or when costs are waived or are to be paid by the state, county or municipality.

Law Enforcement Training 488.5336

1. A surcharge of two dollars may be assessed as costs in each criminal case involving violations of any county ordinance or a violation of any criminal or traffic laws of the state, including infractions, or violations of municipal ordinances, provided that no such fee shall be collected in any proceeding in any court when the proceeding or defendant has been dismissed by the court or when costs are to be paid by the state, county or municipality. For violations of the general criminal laws of the state or county ordinances, no such surcharge shall be collected unless it is authorized by the county government where the violation occurred. For violations of municipal ordinances, no such surcharge shall be collected unless it is authorized by the municipal government where the violation occurred. If imposed by a municipality, such surcharges shall be collected by the clerk of the municipal court responsible for collecting court costs and fines and shall be transmitted monthly to the treasurer of the municipality where the violation occurred in cases of violations of municipal ordinances. If imposed by a county, such surcharges shall be collected and disbursed as provided in sections 488.010 to 488.020. Such surcharges shall be payable to the treasurer of the county where the violation occurred in the case of violations of the general criminal laws of the state or county ordinances. Without regard to whether the aforementioned surcharge is assessed, a surcharge in the amount of one dollar shall be assessed as provided in this section, and shall be collected and disbursed as provided in sections 488.010 to 488.020 and payable to the state treasury to the credit of the peace officer standards and training commission fund created in section 590.178, RSMo. Such surcharges shall be in addition to the court costs and fees and limits on such court costs and fees established by section 66.110, RSMo, and section 479.260, RSMo.

The Sheriff's Retirement Surcharge does not contain that language.

Without changes to the statutory language to clarify the issue, OSCA remains with its original recommendation that costs are strictly construed. OSCA's recommendations for assessment of costs is based on costs and fees that are clearly provided in the legislation. Therefore, there will be no change in the Municipal Costs Card as published by OSCA until legislation is passed clarifying the application of the Sheriff's Retirement Fund to municipal division cases.

(See attached file: 2010 Municipal Costs Card.pdf)

Nancy Griggs
Division Director, Court Services
Office of State Courts Administrator
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(573) 526-8801 Fax: (573) 522-5961
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MUNICIPAL COURT COSTS

Effective 08-28-10

DESCRIPTION OF COST	CITATION RSMo/COR	COURT CLERK HANDBOOK	AMOUNT OF COST	DISBURSE TO STATE/COUNTY/ MUNICIPALITY
STANDARD MUNICIPAL COSTS				
Clerk fee - Case filed in Municipal Division	COR 21.01(a)(5)	4.2	$ 15.00/ $ 12.00	$12 Dept. of Revenue/$3 County $12 Municipality
Crime Victims' Compensation Fund surcharge	488.5339.1 & 595.045.6	4.2	$ 7.50	$7.13 Dept. of Rev/$0.37 City
Peace Officer Standards and Training (POST) Commission surcharge - State	488.5336.1	4.2	$ 1.00	Treas. St. of MO-POST Fund
Standard Costs for Municipal cases			**$ 23.50/ $ 20.50**	
OTHER MUNICIPAL COSTS				
Bad Check fee	570.120.6	4.2	Reasonable service charge	Municipality
Board Bill - Taxed as cost to the defendant	221.070	4.2	Set by the court	Municipality
Board Bill Medical Costs-DFT	221.070	4.2	Actual costs	Municipality
Clerk fee - Application for a Trial de Novo from Municipal Division	COR 21.01(a)(5)	4.2	$ 30.00	Associate Court
Copy fees - Judicial Records	COR 21.01(a)(22)	4.2	Reasonable fee per local court rule	Municipality
Court fee - St. Louis City municipal ordinance violations	488.2210	4.2	Up to $ 20.00	St. Louis City
Court Information and Records Management fee - KC and Springfield municipal ordinance violations	488.2220	4.2	Up to $ 5.00	City
Courthouse Operation surcharge - Greene, Cass & Jefferson Counties, if authorized by municipality	488.2275.1	4.2	$ 10.00	County
Courthouse Restoration fee - St. Louis City municipal ordinance violations	488.2215	4.2	Up to $ 5.00	St. Louis City
Domestic Violence Shelter surcharge - if authorized by governing body	488.607	4.2	$ 2.00	Municipality
Inmate Security Fund surcharge - if authorized by governing body	488.5026	4.2	$ 2.00	Municipality
Law Enforcement Arrest costs: Local	488.5334	4.2	Amount approved by Court	Municipality
Law Enforcement Training Fund surcharge - if authorized by municipality	488.5336.1	4.2	$ 2.00	Municipality
Non-Negotiable Payment Fee - Payment other than by cash or negotiable instrument, unless prohibited by local court rule	COR 21.01(a)(21)	4.2	$ 4.00	Municipality
Overpayment	488.014	4.2	Up to $ 5.00	County**
Postage	COR 21.01(a)(22)	4.2	Reasonable fee per local court rule	Municipality
Probation Fee	549.525 (KC), 559.607	4.2	varies	City or Contractor
Public Records Copy fee - Administrative Records	610.026.1(1)	4.2	Max. $0.10/page plus clerk time as established by governing body	Municipality
Time Payment fee	488.5025	4.2	$ 25.00	TPF Treasurer $10/ DOR-CAF $8/ DOR-GR $7
Witness Per Diem - In State * Mileage	491.280.1 33.095	4.2	$ 25.00/day $0.37/mile state rate for FY'11	Witness
Witness Per Diem - Out of State Mileage	488.035	4.2	$ 15.00/day $0.10/mile	Witness

** According to original legislation passed, overpayments are to be disbursed to the "county for the operation of the circuit court."

Please Note: Refer to the Missouri Revised Statutes and the Missouri Municipal Clerk's Manual for further cost details.

* Indicates change from prior year.

CIRCUIT CLERKS:
CIRCUIT COURT – CIRCUIT COURTS:
COURTS:
FEES:
JUDGMENTS:
MUNICIPALITIES:
ORDINANCES:
SHERIFFS' RETIREMENT SYSTEM:

Municipal courts are "courts of the state." All municipal ordinance violation actions are civil proceedings. Therefore, under § 57.955, RSMo, municipal court clerks must collect the $3 surcharge in municipal ordinance violation cases unless the costs are waived or must be paid by the municipality.

OPINION NO. 8-2010

June 23, 2010

The Honorable Kenny Jones
State Representative, District 117
State Capitol, Room 414
201 West Capitol Avenue
Jefferson City, MO 65101

Dear Representative Jones:

You asked whether § 57.955, RSMo,[1] relating to the Sheriffs' Retirement System, requires a municipality[2] to collect a $3 surcharge for municipal ordinance violations and remit the surcharge to the System.

WITHDRAWN

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[1]All statutory citations are to RSMo 2000, unless otherwise noted.

[2]There is some question whether the term "municipality" includes only cities, or may also include counties. For example, § 66.010, RSMo, distinguishes between "county municipal courts" and "municipal courts," and distinguishes between "county ordinances" and "municipal ordinances." Section 66.010, RSMo, allows charter counties to punish violations of county ordinances in the circuit court or a county municipal court, and allows a county municipal court to hear cases involving violations of county ordinances and cases involving violations of municipal ordinances. Another statute distinguishes counties from municipalities, defining municipalities as "any city, incorporated town or village in the state." Section 349.010, RSMo. Supreme Court Rule 110.04a(17), defines a "municipal ordinance" as "an ordinance duly adopted by any city, town, village *or county* of the state." (emphasis added). Because the issue presented only regards an interpretation of § 57.955, RSMo, which statute treats counties as separate from municipalities, this opinion also treats counties as separate from municipalities.

Section 57.955, RSMo, provides as follows:

> 1. There shall be assessed and collected a surcharge of three dollars in all civil actions filed in the courts of this state and in all criminal cases including violation of any county ordinance or any violation of criminal or traffic laws of this state, including infractions, but no such surcharge shall be assessed when the costs are waived or are to be paid by the state, county or municipality or when a criminal proceeding or the defendant has been dismissed by the court. For purposes of this section, the term "county ordinance" shall not include any ordinance of the city of St. Louis.[3] The clerk responsible for collecting court costs in civil and criminal cases, shall collect and disburse such amounts as provided by sections 488.010 to 488.020, RSMo. Such funds shall be payable to the sheriffs' retirement fund. Moneys credited to the sheriffs' retirement fund shall be used only for the purposes provided for in sections 57.949 to 57.997 and for no other purpose.
>
> 2. The board may accept gifts, donations, grants and bequests from public or private sources to the sheriffs' retirement fund.

WITHDRAWN

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[3]Unlike municipal ordinances, which are always civil, county ordinances can be criminal violations. *See, e.g., Doyle v. Crane*, 200 S.W.3d 581, 583 (Mo.App. W.D. 2006) (violation of county ordinance was class A misdemeanor); *Rose v. Bd. of Zoning Adjustment Platte County*, 68 S.W.3d 507, 516-17 (Mo.App. W.D. 2001) (prior jury acquittal in county ordinance violation was a criminal proceeding; later ordinance violation could have resulted in misdemeanor conviction); § 64.295, RSMo (violations of certain county orders or regulations are misdemeanors). St. Louis is both a city and a county. *State ex rel. Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471, 473 (Mo. banc 1992) ("The City of St. Louis is recognized as both a city and a county. Mo. Const. Art. VI, § 31."). The reference to St. Louis City in § 57.955, RSMo, seems to be intended to insure that all St. Louis ordinances are treated as city (municipal) ordinances, so this the exception in the statute regarding not collecting the fee in certain criminal proceedings would never apply to St. Louis.

Under this statute, the clerks of all courts "of this state" are required to collect the $3 surcharge and send it to the sheriffs' retirement fund.[4] The first question, therefore, is whether a municipal court is a court "of this state."[5]

The judicial power "of the state" of Missouri is "vested in a supreme court, a court of appeals . . . and circuit courts." Art. V, § 1, Mo. Const. Thus, circuit courts are courts of the state. The circuit courts "have original jurisdiction over all cases and matters, civil and criminal." Art. V, § 14, Mo. Const. Each circuit court "may have such municipal judges as provided by law" who "shall hear and determine violations of municipal ordinances." Art. V, § 23, Mo. Const. But if a municipality of under 400,000 persons has not been provided with a municipal judge, an associate circuit judge "shall hear and determine violations of municipal ordinances" in that municipality. All municipal courts are "divisions of the circuit court." Art. V, § 27.2(d), Mo. Const.; *see also* § 479.010, RSMo Cum. Supp. 2009 (violations of municipal ordinances shall be heard and determined only before divisions of the circuit court); § 479.020.5, RSMo Cum. Supp. 2009 (municipal judges are divisions of the circuit court); *City of Springfield v. Belt*, No. SC90324 (Mo. banc Mar. 2, 2010), slip op. at 5-7.

Because circuit courts are courts "of the state," and because municipal courts are merely divisions within the circuit courts, it would seem clear that municipal courts are also courts "of the state." However, in *Turner v. State*, 245 S.W.3d 826, 828 (Mo. banc 2008), the Supreme Court of Missouri examined a criminal statute, § 577.023, RSMo, that concerned using prior drunken driving offenses to enhance the punishment for new drunken driving offenses. The Court held that, in that statute, the term "state court" did not include municipal courts. *Id.* The Court did not explain why municipal courts were not state courts. *Id.*

In a subsequent case, *State v. Severe*, 2010 WL 97997, *3, note 6 (Mo. banc Jan. 12, 2010), the Court acknowledged in a footnote that municipal courts are divisions of the circuit court. *See City of Springfield v. Belt*, No. SC90324 (Mo. banc Mar. 2, 2010), slip op. at 5, note 6 (municipal courts are divisions of the circuit court). The Court stopped short of recognizing that municipal courts must therefore necessarily be state courts. *See State v.*

WITHDRAWN

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[4]The question asks if the "municipality" is required to collect the surcharge. The statute says that the court clerk is the one required to collect it.

[5]We do not address the constitutionality of collecting this surcharge at all. *See Harrison v. Monroe County*, 716 S.W.2d 263, 267, 270 (Mo. banc 1986) (Welliver, J., concurring).

Severe, 2010 WL 97997, *3, note 6 (Mo. banc Jan. 12, 2010). Instead, the Court said that the "common understanding" is that the term "state court" does not include municipal courts, without giving any support for this claim, and said the legislature is expected to only use common understanding when writing laws. *Id.*

Any "common understanding" that "state court" does not include municipal court could be based on the state of the judiciary before the 1976 amendments to the Missouri Constitution. "The 1976 amendments to the judicial article create a three tier court system consisting of the Supreme Court, Courts of Appeals, and the Circuit Courts. Probate, magistrate and municipal courts are abolished as separate entities and incorporated into the circuit system as divisions of the circuit courts." (citation omitted). *Gregory v. Corrigan*, 685 S.W.2d 840, 842 (Mo. banc 1985). Since 1976, municipal courts have been divisions of the circuit courts, and are therefore state courts.

Further, using the "common understanding" of a term in interpreting a statute is only allowed when the term itself is undefined in the law. *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895, 902 (Mo. banc 2006) ("When a term is undefined, the Court looks to its plain and ordinary meaning as found in the dictionary."). Because the Missouri Constitution itself makes municipal courts "divisions of the circuit court," no "common understanding" of the term "state court" can be used to circumvent this designation.

In neither *Turner* nor *Severe* did the Supreme Court of Missouri address the definitional question. That may be because in each, the Court was interpreting a criminal statute, and applying the rule of lenity to interpret what the Court saw as conflicting laws.[6] *State v. Severe*, 2010 WL 97997 at *2. Because § 57.955, RSMo, is a civil statute, the rule of lenity does not apply. *United Pharmacal Co. of Missouri, Inc. v. Missouri Bd. of*

WITHDRAWN

[6]The ambiguity the Court found may have only existed because of a unique complexity in the statutory language. In one phrase, the statute specifically declared that DWI convictions in municipal court counted as prior convictions. Section 573.023.14, RSMo. This was necessary because these "convictions" are technically civil. *City of Strafford v. Croxdale*, 272 S.W.3d 401, 404 (Mo.App. S.D. 2008). The next phrase provides that even if a finding of guilt does not result in a sentence or incarceration, it counts as a conviction. Section 573.023.14, RSMo. Having just explained that municipal court cases count as convictions, and knowing that municipal courts are state courts, the legislature used the umbrella term "state court" in the second phrase to make sure all these types of no-incarceration cases counted as prior convictions. Thus, an accurate understanding of the nature of municipal courts shows that there was no conflict between the two phrases used in the statute, and nothing to construe.

Pharmacy, 208 S.W.3d 907, 913 (Mo. banc 2006) (rule of lenity applies only in interpreting criminal statutes and civil statutes with penal consequences). *Turner* and *Severe* are distinguishable on that basis. Accordingly, the provisions of the Missouri Constitution control, and municipal courts are included in the term "courts of the state," as used in § 57.955, RSMo.

Section 57.955, RSMo, requires the court clerk to collect the $3 surcharge "in all civil actions filed in the courts of this state," the only exception being "when the costs are waived or are to be paid by the state, county or municipality." Section 57.955.1, RSMo. Having determined that, for purposes of § 57.955, RSMo, municipal courts are "courts of the state," it follows that the court clerk must collect the $3 surcharge in civil cases filed in municipal court.

This conclusion is confirmed by the historical development of the statute. The original version required the collection of the fee in all civil cases "filed in each circuit court and the divisions thereof, except the juvenile divisions . . . ." Section 57.955, RSMo Cum. Supp. 1983. Because municipal courts are divisions of the circuit court, the fee was required in municipal cases under that statute.

The following year this statute was amended to require the collection of the fee in all civil cases "filed in each circuit court and the divisions thereof, except the municipal and juvenile divisions . . . ." Section 57.955, RSMo Cum. Supp. 1984. This changed the law so that the municipal court division of the circuit court was exempted from collecting the fee.

Finally, in 1996, the statute was amended to read as is does today, requiring collection of the fee "in all civil actions filed in the courts of this state . . . ." Section 57.955, RSMo Cum. Supp. 1996. This change eliminated the exceptions for juvenile and municipal courts. For the change to have any meaning, municipal court divisions must now be required to collect the fee. *S.S. v. Mitchell*, 289 S.W.3d 797, 799 (Mo.App. E.D. 2009) (in interpreting statutes, courts "presume that the legislature intended an amendment to have some effect"). Therefore, the historical development of the statute confirms that municipal courts are "courts of the state," and the fee is required to be collected in cases before these courts.

The next phrase in § 57.955, RSMo, requires that the $3 surcharge also be collected "in all criminal cases including violation of any county ordinance or any violation of criminal or traffic laws of this state, including infractions." On its face, this part of the statute requires court clerks to collect the $3 surcharge in criminal cases—though the fee is never collected where the criminal proceeding is dismissed, or the defendant is dismissed by the court, or the costs are waived or paid by the government. Section 57.955, RSMo.

But even though violations of municipal ordinances can result in confinement, the law in Missouri is that violations of municipal ordinances are civil matters. *State ex rel. Estill v. Iannone*, 687 S.W.2d 172, 174, note 3 (Mo. banc 1985); *City of Kansas City v. Heather*, 273 S.W.3d 592, 595 (Mo.App. W.D. 2009); *City of Strafford v. Croxdale*, 272 S.W.3d 401, 404 (Mo.App. S.D. 2008); *City of Univ. City v. MAJ Inv. Corp.*, 884 S.W.2d 306, 307 (Mo.App. E.D. 1994). Due to the "quasi-criminal" nature of municipal ordinance violations, municipal ordinances are interpreted strictly against the municipality, the municipality must prove the case beyond a reasonable doubt, and municipal courts are required to apply rules of criminal procedure to the cases. *City of Strafford v. Croxdale*, 272 S.W.3d at 404; *City of Kansas City v. Heather*, 273 S.W.3d at 595. But, "a prosecution for the violation of a municipal ordinance is [still] a civil action . . . resembling a criminal action in its effects and consequences." *City of Webster Groves v. Erickson*, 789 S.W.2d 824, 826 (Mo.App. E.D. 1990) (quotation marks omitted). Accordingly, cases involving violations of municipal ordinances are not criminal matters, and the references in § 57.955, RSMo, regarding collection of the $3 surcharge in criminal cases and exceptions, do not apply to municipalities.

The final question is whether collection of the surcharge conflicts with § 479.260, RSMo. This section allows for the collection of certain fees and costs for municipal ordinance violations. *Id.* The section provides that certain fees may be set according to the provisions of §§ 488.010-.020, RSMo, and that costs may be assessed if the defendant is found guilty. *Id.* The statute provides that the "fees" are in addition to certain costs, but "in lieu of other court costs." *Id.* The statute further provides that, "[a]ny other court costs required in connection with such cases" shall be collected as provided in certain statutes. *Id.* No case has interpreted this statute.

WITHDRAWN

A prior version of § 479.260, RSMo, set a specific fee for municipal court cases, included the same language about the fees being in lieu of other courts costs, and did not include the language about other required court costs. Section 479.260, RSMo 1978. Two Attorney General Opinions address whether the language making the set fee "in lieu of other court costs" precludes the municipal court from collecting other surcharges. In Attorney General Opinion 159-1980, the opinion reached the conclusion that it was permissible for a municipal court to impose a $2 fee for peace officer training, in addition to the fee authorized by § 479.260, RSMo. The opinion reasoned that the statutes for the $2 peace officer training fee and § 479.260, RSMo, were passed in the same legislative session, and the legislative intent appeared to be to allow the $2 fee for peace officer training in addition to the limits imposed in § 479.260, RSMo.

In contrast, Attorney General Opinion 54-1984, addressed the $3 surcharge for the Sheriff's Retirement System, and reached the opposite conclusion. The opinion concluded that municipal courts are courts of the state, but also concluded that § 479.260, RSMo, precluded the collection of that surcharge. *Id.*

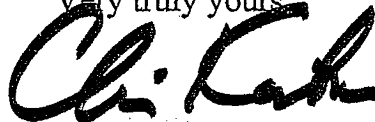
Because § 479.260, RSMo, was revised, and now includes language providing for the collection of "other court costs," it seems clear that the legislative intent in § 479.260, RSMo, is not to preclude the collection of other surcharges authorized by statute. Rather, the intent is to put municipal court fees on the same scale as all other court fees in the state. The section requires that municipalities that use the fee schedule in §§ 488.010-.020, RSMo, assess only those fees in the schedule for those cases—municipalities cannot essentially double the fees by using the fee schedule and then adding on their own fees for specific types of cases. That § 488.024, RSMo, in the same chapter, specifically references § 57.955, RSMo (the $3 fee for the Sheriffs' Retirement System), and requires the collection of that surcharge, shows that these other types of fees are not excluded from collection when municipalities use the fee schedule. Because the statutes have been amended, the conclusion in Attorney General Opinion 54-1984 does not apply in this situation.

CONCLUSION

Municipal courts are "courts of the state." All municipal ordinance violation actions are civil proceedings. Therefore, under § 57.955, RSMo, municipal court clerks must collect the $3 surcharge in municipal ordinance violation cases unless the costs are waived or must be paid by the municipality.

WITHDRAWN

Very truly yours,



CHRIS KOSTER
Attorney General

CIRCUIT CLERKS:
CIRCUIT COURT – CIRCUIT COURTS:
COURTS:
FEES:
JUDGMENTS:
MUNICIPALITIES:
ORDINANCES:
SHERIFFS' RETIREMENT SYSTEM:

Municipal courts are "courts of the state." All municipal ordinance violation actions are civil proceedings. Therefore, under § 57.955, RSMo, municipal court clerks must collect the $3 surcharge in municipal ordinance violation cases unless the costs are waived or must be paid by the municipality.

REVISED OPINION NO. 8-2010

March 21, 2011

Honorable Kenny Jones
Former State Representative, District 117
P.O. Box 6
California, MO 65018

Dear Former Representative Jones:

This opinion is replacing the original Opinion No. 8 that was issued June 23, 2010. You asked whether § 57.955, RSMo,[1] relating to the Sheriffs' Retirement System, requires a municipality[2] to collect a $3 surcharge for municipal ordinance violations and remit the

[1] All statutory citations are to RSMo 2000, unless otherwise noted.

[2] There is some question whether the term "municipality" includes only cities, or may also include counties. For example, § 66.010, RSMo, distinguishes between "county municipal courts" and "municipal courts," and distinguishes between "county ordinances" and "municipal ordinances." Section 66.010, RSMo, allows charter counties to punish violations of county ordinances in the circuit court or a county municipal court, and allows a county municipal court to hear cases involving violations of county ordinances and cases involving violations of municipal ordinances. Another statute distinguishes counties from municipalities, defining municipalities as "any city, incorporated town or village in the state." § 349.010, RSMo. Supreme Court Rule 110.04(a)(17), defines a "municipal ordinance" as "an ordinance duly adopted by any city, town, village *or county* of the state." (emphasis added). Because the issue presented only regards an interpretation of § 57.955, RSMo, which statute treats counties as separate from municipalities, this opinion also treats counties as separate from municipalities.

surcharge to the System. We are providing this revised opinion after taking into consideration matters raised by the Office of the State Courts Administrator. Although the question is a very close one, we adhere to our original conclusion.

Section 57.955, RSMo, provides as follows:

> 1. There shall be assessed and collected a surcharge of three dollars in all civil actions filed in the courts of this state and in all criminal cases including violation of any county ordinance or any violation of criminal or traffic laws of this state, including infractions, but no such surcharge shall be assessed when the costs are waived or are to be paid by the state, county or municipality or when a criminal proceeding or the defendant has been dismissed by the court. For purposes of this section, the term "county ordinance" shall not include any ordinance of the city of St. Louis.[3] The clerk responsible for collecting court costs in civil and criminal cases, shall collect and disburse such amounts as provided by sections 488.010 to 488.020, RSMo. Such funds shall be payable to the sheriffs' retirement fund. Moneys credited to the sheriffs' retirement fund shall be used only for the purposes provided for in sections 57.949 to 57.997 and for no other purpose.
>
> 2. The board may accept gifts, donations, grants and bequests from public or private sources to the sheriffs' retirement fund.

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[3] Unlike municipal ordinances, which are always civil, county ordinances can be criminal violations. *See, e.g., Doyle v. Crane*, 200 S.W.3d 581, 583 (Mo. App. W.D. 2006) (violation of county ordinance was class A misdemeanor); *Rose v. Bd. of Zoning Adjustment Platte County*, 68 S.W.3d 507, 516-17 (Mo. App. W.D. 2001) (prior jury acquittal in county ordinance violation was a criminal proceeding; later ordinance violation could have resulted in misdemeanor conviction); § 64.295, RSMo, (violations of certain county orders or regulations are misdemeanors). St. Louis is both a city and a county. *State ex rel. Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471, 473 (Mo. banc 1992) ("The City of St. Louis is recognized as both a city and a county. Mo. Const. Art. VI, § 31."). The reference to St. Louis City in § 57.955, RSMo, seems to be intended to insure that all St. Louis ordinances are treated as city (municipal) ordinances, so this the exception in the statute regarding not collecting the fee in certain criminal proceedings would never apply to St. Louis.

Under this statute, the clerks of all courts "of this state" are required to collect the $3 surcharge and send it to the sheriffs' retirement fund.[4] The first question, therefore, is whether a municipal court is a court "of this state."[5]

The judicial power "of the state" of Missouri is "vested in a supreme court, a court of appeals . . . and circuit courts." Art. V, § 1, Mo. Const. Thus, circuit courts are courts of the state. The circuit courts "have original jurisdiction over all cases and matters, civil and criminal." Art. V, § 14, Mo. Const. Each circuit court "may have such municipal judges as provided by law" who "shall hear and determine violations of municipal ordinances." Art. V, § 23, Mo. Const. But if a municipality of under 400,000 persons has not been provided with a municipal judge, an associate circuit judge "shall hear and determine violations of municipal ordinances" in that municipality." All municipal courts are "divisions of the circuit court." Art. V, § 27.2(d), Mo. Const.; *see also* § 479.010, RSMo Cum. Supp. 2009 (violations of municipal ordinances shall be heard and determined only before divisions of the circuit court); § 479.020.5, RSMo Cum. Supp. 2009 (municipal judges are divisions of the circuit court); *City of Springfield v. Belt*, No. SC90324 (Mo. banc March 2, 2010), slip op. at 5-7.

Because circuit courts are courts "of the state," and because municipal courts are merely divisions within the circuit courts, it would seem clear that municipal courts are also courts "of the state." However, in *Turner v. State*, 245 S.W.3d 826, 828 (Mo. banc 2008), the Supreme Court of Missouri examined a criminal statute, § 577.023, RSMo, that concerned using prior drunken driving offenses to enhance the punishment for new drunken driving offenses. The Court held that, in that statute, the term "state court" did not include municipal courts. *Id.* The Court did not explain why municipal courts were not state courts. *Id.*

In a subsequent case, *State v. Severe*, 2010 WL 97997, *3, note 6 (Mo. banc Jan. 12, 2010), the Court acknowledged in a footnote that municipal courts are divisions of the circuit court. *See City of Springfield v. Belt*, No. SC90324 (Mo. banc March 2, 2010), slip op. at 5, note 6 (municipal courts are divisions of the circuit court). The Court stopped short of recognizing that municipal courts must therefore necessarily be state courts. *See State v. Severe*, 2010 WL 97997, *3, note 6 (Mo. banc 2010). Instead, the Court said that the "common understanding" is that the term "state court" does not include municipal courts,

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[4] The question asks if the "municipality" is required to collect the surcharge. The statute says that the court clerk is the one required to collect it.

[5] We do not address the constitutionality of collecting this surcharge at all. *See Harrison v. Monroe County*, 716 S.W.2d 263, 267, 270 (Mo. banc 1986) (Welliver, J., concurring).

without giving any support for this claim, and said the legislature is expected to only use common understanding when writing laws. *Id; see* § 1.090, RSMo.

Any "common understanding" that "state court" does not include municipal court could be based on the state of the judiciary before the 1976 amendments to the Missouri Constitution.

> The 1976 amendments to the judicial article create a three tier court system consisting of the Supreme Court, Courts of Appeals, and the Circuit Courts. Probate, magistrate and municipal courts are abolished as separate entities and incorporated into the circuit system as divisions of the circuit courts.

Gregory v. Corrigan, 685 S.W.2d 840, 842 (Mo. banc 1985). Since 1976, municipal courts have been divisions of the circuit courts, and are therefore state courts.

Further, using the "common understanding" of a term in interpreting a statute is only allowed when the term itself is undefined in the law. *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895, 902 (Mo. banc 2006) ("When a term is undefined, the Court looks to its plain and ordinary meaning as found in the dictionary."). Because the Missouri Constitution itself makes municipal courts "divisions of the circuit court," no "common understanding" of the term "state court" can be used to circumvent this designation.

In neither *Turner* nor *Severe* did the Supreme Court of Missouri address the definitional question. That may be because in each, the court was interpreting a criminal statute, and applying the rule of lenity to interpret what the court saw as conflicting laws.[6] *State v. Severe*, 2010 WL 97997 at *2. Because § 57.955, RSMo, is a civil statute, the rule

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[6] The ambiguity the Court found may have only existed because of a unique complexity in the statutory language. In one phrase, the statute specifically declared that DWI convictions in municipal court counted as prior convictions. § 573.023.14, RSMo. This was necessary because these "convictions" are technically civil. *City of Strafford v. Croxdale*, 272 S.W.3d 401, 404 (Mo. App. S.D. 2008). The next phrase provides that even if a finding of guilt does not result in a sentence or incarceration, it counts as a conviction. § 573.023.14, RSMo. Having just explained that municipal court cases count as convictions, and knowing that municipal courts are state courts, the legislature used the umbrella term "state court" in the second phrase to make sure all these types of no-incarceration cases counted as prior convictions. Thus, an accurate understanding of the nature of municipal courts shows that there was no conflict between the two phrases used in the statute, and nothing to construe.

of lenity does not apply. *United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907, 913 (Mo. banc 2006) (rule of lenity applies only in interpreting criminal statutes and civil statutes with penal consequences). *Turner* and *Severe* are distinguishable on that basis. Accordingly, the provisions of the Missouri constitution control, and municipal courts are included in the term "courts of the state," as used in § 57.955, RSMo.

Section 57.955, RSMo, requires the court clerk to collect the $3 surcharge "in all civil actions filed in the courts of this state," the only exception being "when the costs are waived or are to be paid by the state, county or municipality." § 57.955.1, RSMo. Having determined that, for purposes of § 57.955, RSMo, municipal courts are "courts of the state," it follows that the court clerk must collect the $3 surcharge in civil cases filed in municipal court.

This conclusion is confirmed by the historical development of the statute. The original version required the collection of the fee in all civil cases "filed in each circuit court and the divisions thereof, except the juvenile divisions . . . ." § 57.955, RSMo Cum. Supp. 1983. Because municipal courts are divisions of the circuit court, the fee was required in municipal cases under that statute.

The following year this statute was amended to require the collection of the fee in all civil cases "filed in each circuit court and the divisions thereof, except the municipal and juvenile divisions . . . ." § 57.955, RSMo Cum. Supp. 1984. This changed the law so that the municipal court division of the circuit court was exempted from collecting the fee.

Finally, in 1996, the statute was amended to read as is does today, requiring collection of the fee "in all civil actions filed in the courts of this state . . . ." § 57.955, RSMo Cum. Supp. 1996. This change eliminated the exceptions for juvenile and municipal courts. For the change to have any meaning, municipal court divisions must now be required to collect the fee. *S.S. v. Mitchell*, 289 S.W.3d 797, 799 (Mo. App. E.D. 2009) (in interpreting statutes, courts "presume that the legislature intended an amendment to have some effect"). Therefore, the historical development of the statute confirms that municipal courts are "courts of the state," and the fee is required to be collected in cases before these courts.

The next phrase in § 57.955, RSMo, requires that the $3 surcharge also be collected "in all criminal cases including violation of any county ordinance or any violation of criminal or traffic laws of this state, including infractions." On its face, this part of the statute requires court clerks to collect the $3 surcharge in criminal cases—though the fee is never collected where the criminal proceeding is dismissed, or the defendant is dismissed by the court, or the costs are waived or paid by the government. § 57.955, RSMo.

But even though violations of municipal ordinances can result in confinement, the law in Missouri is that violations of municipal ordinances are civil matters. *State ex rel. Estill v.*

Iannone, 687 S.W.2d 172, 174, note 3 (Mo. banc 1985); *City of Kansas City v. Heather*, 273 S.W.3d 592, 595 (Mo. App. W.D. 2009); *City of Strafford v. Croxdale*, 272 S.W.3d 401, 404 (Mo. App. S.D. 2008); *City of Univ. City v. MAJ Invest. Corp.*, 884 S.W.2d 306, 307 (Mo. App. E.D. 1994). Due to the "quasi-criminal" nature of municipal ordinance violations, municipal ordinances are interpreted strictly against the municipality, the municipality must prove the case beyond a reasonable doubt, and municipal courts are required to apply rules of criminal procedure to the cases. *City of Strafford v. Croxdale*, 272 S.W.3d at 404; *City of Kansas City v. Heather*, 273 S.W.3d at 595. But, "a prosecution for the violation of a municipal ordinance is [still] a civil action . . . resembling a criminal action in its effects and consequences." *City of Webster Groves v. Erickson*, 789 S.W.2d 824, 826 (Mo. App. E.D. 1990), quotation marks omitted. Accordingly, cases involving violations of municipal ordinances are not criminal matters, and the references in § 57.955, RSMo, regarding collection of the $3 surcharge in criminal cases and exceptions, do not apply to municipalities.

The common law rule is that "all statutes concerning costs shall be construed strictly." *Gordons v. Maupin*, 10 Mo. 352, 1847 WL 3697, *1 (Mo. 1847). In this context, a "cost" is a "pecuniary allowance, made to the successful party (and recoverable from the losing party), for his expenses in prosecuting or defending an action." *In re C.M.C.*, 173 S.W.3d 695, 699 (Mo.App. W.D. 2005). "Strict construction of a statute requires that the scope of the statute not be extended beyond its literal meaning and that the statute not be unreasonably interpreted." *Snyder v. Consolidated Library Dist. No. 3*, 306 S.W.3d 133, 137 (Mo.App. W.D. 2010). Applying strict construction "does not require that the court ignore either common sense or evident statutory purpose." *Irvin v. Bd. of Probation and Parole*, 34 S.W.3d at 205. "Where a statute's terms are plain, it makes no difference "whether liberal or strict construction principles are applied." *Snyder v. Consolidated Library Dist. No. 3*, 306 S.W.3d at 137.

This "strictly construed" standard of review is not always applied in cost recovery cases. *See, e.g., Reed v. City of Springfield*, 841 S.W.2d 283, 284-86 (Mo.App. S.D. 1992). Nor is it always applied when interpreting statutes exempting parties from paying fees and court costs, *In re G.F.*, 276 S.W.3d 327, 328-29 (Mo.App. E.D. 2009), or when interpreting statutes involving paying fees to the court, *Deever v. Karsch & Sons, Inc.*, 144 S.W.3d 370, 372-73 (Mo.App. S.D. 2004).

The present issue regarding the $3 surcharge for the Sheriffs' Retirement Fund is not a "cost recoverable from the losing party," but is a surcharge collected by the court clerk. Therefore, although statutes concerning costs are strictly construed, and although court costs include surcharges such as the one at issue here, *Reed v. City of Springfield*, 841 S.W.2d at 285, there is some indication that courts would apply general principles of statutory construction in interpreting this statute, rather than strict scrutiny. But even though strictly construing this statute makes this a close and difficult question, giving

every phrase in the statute its plain meaning, reading the statute as a whole, and considering its history, this office concludes that § 57.955, RSMo, does require that the $3 surcharge be collected in municipal cases.

The final question is whether collection of the surcharge conflicts with § 479.260, RSMo. This section allows for the collection of certain fees and costs for municipal ordinance violations. *Id.* The section provides that certain fees may be set according to the provisions of §§ 488.010-.020, RSMo, and that costs may be assessed if the defendant is found guilty. *Id.* The statute provides that the "fees" are in addition to certain costs, but "in lieu of other court costs." *Id.* The statute further provides that, "[a]ny other court costs required in connection with such cases" shall be collected as provided in certain statutes. *Id.* No case has interpreted this statute.

A prior version of § 479.260, RSMo, set a specific fee for municipal court cases, included the same language about the fees being in lieu of other courts costs, and did not include the language about other required court costs. § 479.260, RSMo 1978. Two Attorney General Opinions address whether the language making the set fee "in lieu of other court costs" precludes the municipal court from collecting other surcharges. In Attorney General Opinion 159-1980, the opinion reached the conclusion that it was permissible for a municipal court to impose a $2 fee for peace officer training, in addition to the fee authorized by § 479.260, RSMo. The opinion reasoned that the statutes for the $2 peace officer training fee and § 479.260, RSMo, were passed in the same legislative session, and the legislative intent appeared to be to allow the $2 fee for peace officer training in addition to the limits imposed in § 479.260, RSMo.

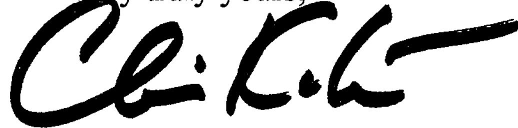
In contrast, Attorney General Opinion 54-1984, addressed the $3 surcharge for the Sheriff's Retirement System, and reached the opposite conclusion. The opinion concluded that municipal courts are courts of the state, but also concluded that § 479.260, RSMo, precluded the collection of that surcharge. *Id.*

Because § 479.260, RSMo, was revised, and now includes language providing for the collection of "other court costs," it seems clear that the legislative intent in § 479.260, RSMo, is not to preclude the collection of other surcharges authorized by statute. Rather, the intent is to put municipal court fees on the same scale as all other court fees in the state. The section requires that municipalities that use the fee schedule in §§ 488.010-.020, RSMo, assess only those fees in the schedule for those cases—municipalities cannot essentially double the fees by using the fee schedule and then adding on their own fees for specific types of cases. That § 488.024, RSMo, in the same chapter, specifically references § 57.955, RSMo, (the $3 fee for the sheriffs' retirement system), and requires the collection of that surcharge, shows that these other types of fees are not excluded from collection when municipalities use the fee schedule. Because the statutes have been amended, the conclusion in Attorney General Opinion 54-1984 does not apply in this situation.

CONCLUSION

Municipal courts are "courts of the state." All municipal ordinance violation actions are civil proceedings. Therefore, under § 57.955, RSMo, municipal court clerks must collect the $3 surcharge in municipal ordinance violation cases unless the costs are waived or must be paid by the municipality.

Very truly yours,



CHRIS KOSTER
Attorney General

LEXSEE 509 SW2D 42

City of Kansas City, Missouri, Plaintiff-Appellant, v. Joseph B. Bott, Defendant-Respondent

No. 58455

Supreme Court of Missouri

509 S.W.2d 42; 1974 Mo. LEXIS 755

May 13, 1974

PRIOR HISTORY: [**1] From the Circuit Court of Jackson County

Criminal Appeal From Municipal Court Conviction-Careless Driving

Judge Keith P. Bondurant

DISPOSITION: Affirmed

JUDGES: En Banc. Henley, J.

OPINION BY: HENLEY

OPINION

[*43] The respondent, Joseph B. Bott (hereinafter the defendant), was charged by information filed in the municipal court of the city of Kansas City (hereinafter the city), with careless driving in violation of a municipal ordinance. [1] He was tried in that court without a jury, found not guilty, and ordered discharged. The city appealed from that judgment to the circuit court of Jackson county. On motion of defendant, the city's appeal was dismissed for the reason that to try him again would be to twice put him in jeopardy for the same offense in violation of the double jeopardy clause of the federal and state constitutions. The city appealed from that judgment to the Missouri Court of Appeals, Kansas City district.

1 The ordinance, § 34.112(a) (b), Revised Ordinances of Kansas City, is, in pertinent part, as follows: "(a) *Violations*. Any person who drives any vehicle . . . upon a street carelessly and heedlessly, in disregard of the rights or safety of others; or without due caution and circumspection; or at a speed and in a manner so as to endanger any person or property, shall be guilty of careless driving. (b) *Penalties*. Every person who is convicted of careless driving shall be punished by imprisonment in the [Municipal Farm] for a period of not less than three (3) days nor more than ninety (90) days, or by a fine of not less than fifteen dollars ($15.00) nor more than five hundred dollars ($500.00), or by both such fine and imprisonment . . .."

[**2] That court determined that it did not have appellate jurisdiction, because the case involves construction of the constitution of the United States or of this state [2] and ordered it transferred to this court. [3]

2 Mo. Const. Art. V, § 3, V.A.M.S.
3 Mo. Const. Art. V, § 11, V.A.M.S.

As indicated, the basic issue presented is whether on appeal by the city from a judgment of acquittal of a defendant of violation of a municipal ordinance a trial de novo required in circuit court subjects a defendant to being twice put in jeopardy within the meaning and therefore in violation of the double jeopardy clause of the Fifth Amendment, U.S. Constitution, [4] or the double jeopardy clause of the Missouri constitution. [5]

4 The double jeopardy clause of the Fifth Amendment is: "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *."
5 The double jeopardy clause of Mo. Const. Art. I, § 19, is: "* * * nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury * * *."

[**3] [*44] The Charter of Kansas City, a constitutional charter city, its Ordinances, and Rules [6] of this court provide that either the defendant or the city may appeal to the circuit court from a judgment of the municipal court in cases involving alleged violations of municipal ordinances [7] and provide that upon such appeal the case shall be tried and determined de novo. [8]

6 References to Rules are to Missouri Supreme Court Rules and V.A.M.R.

7 Article XIII, § 396.5, Charter of Kansas City, provides that appeals may be taken from municipal court to the circuit court by either the defendant or the city "in the manner and upon the conditions prescribed by law and rules of the Missouri Supreme Court."

Rule 37.78 provides "A defendant and the municipality shall be entitled to appeal from a judgment to the circuit court of the county or such other court having jurisdiction of such appeals within the time and in the manner provided by law."

Section 22.18, Revised Ordinances of Kansas City, as amended in 1969, provides that "[within] ten (10) days from a judgment acquitting or discharging any defendant, the city counselor may appeal such case to the court having jurisdiction of the appeal * * *."

[**4]

8 Rule 37.84 provides that "[after] an appeal from a judgment rendered in a municipal court has been entered upon the docket of the circuit * * * court * * *, the case shall be heard, tried and determined de novo in such * * * court as though the prosecution had originated in such court."

The city contends that its appeal from the judgment of its municipal court acquitting defendant of the offense of careless driving and a trial de novo of that charge in circuit court are not prohibited by the double jeopardy clause of either constitution, because (1) a prosecution for an offense against a municipal ordinance is a civil case despite its resemblance to a criminal case; (2) the appeal had the effect of nullifying the judgment of acquittal and a trial de novo is not a second prosecution for the same offense but is only a continuation of the original prosecution; (3) the violation of a municipal ordinance is a mere "petty offense" to which the constitutional guarantee against double jeopardy is not applicable.

The city also contends, and defendant seems to agree, that the double jeopardy clause [**5] of Mo. Const. Art. I, § 19, does not afford defendant any protection, because his acquittal was by a judge and not by a jury, whereas that clause protects only against being put again in jeopardy after being acquitted "by a jury." The double jeopardy clause of the Missouri constitution does not prohibit a trial de novo in circuit court of a charge of violation of a municipal ordinance after an acquittal thereof in municipal court in a trial before the judge without a jury; it is only after being acquitted *by a jury* that the state double jeopardy clause is applicable. See and compare Ward v. State, 451 S.W.2d 79, 81[4] (Mo. 1970); Kansas City v. Henderson, 468 S.W.2d 48, 52[1] (Mo. 1971); Kepner v. United States, 195 U.S. 100, 128 and 133, 49 L. Ed. 114, 24 S. Ct. 797. Thus, the question is confined to whether such de novo trial on appeal after acquittal would violate the Fifth Amendment double jeopardy clause held by the Supreme Court of the United States in Benton v. Maryland, 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969) to be applicable to the states through the Fourteenth Amendment. To put this question another way, is Rule 37.84 (the only authority in this case [**6] for de novo trial in circuit court on appeal from an acquittal in municipal court) unconstitutional?

The courts of this state have said, as the city contends, that a prosecution for violation of a municipal ordinance is a civil action, despite its resemblance to a criminal action. [9] The city asserts that for this reason its appeal is permissible.

9 City of St. Louis v. Penrod, 332 S.W.2d 34, 35-36[2-4] (Mo. App. 1960); Kansas City v. Plumb, 419 S.W.2d 457, 460[7-10] (Mo. App. 1967); City of Clayton v. Nemours, 237 Mo. App. 167, 164 S.W.2d 935, 937-938[3-4] (1942); Stevens v. City of Kansas City, 146 Mo. 460, 48 S.W. 658, 659 (1898); City of St. Louis v. Ameln, 235 Mo. 669, 139 S.W. 429, 431[1-2] (1911); City of St. Louis v. Von Hoffmann, 312 Mo. 600, 280 S.W. 421, 423 (Banc 1926); State ex rel. Cole v. Nigro, 471 S.W.2d 933, 935 (Mo. banc 1971) and cases therein cited.

[*45] In Stevens v. City of Kansas City, supra (48 S.W. at 659), the court said: "A proceeding in a police court to punish a violation [**7] of a municipal ordinance by a fine or imprisonment is civil in form, and quasi criminal in character. * * * It is governed by the rules of pleading applicable to civil cases, but, if it was solely civil, no fine or imprisonment could be inflicted. It is, therefore, a quasi civil and criminal action. Partaking of some of the features of each, its similitude to either is not complete. In pleading it is more nearly like a civil action, but in its effects and consequences it more nearly resembles a criminal proceeding." Discussing the sufficiency of a complaint charging violation of a municipal ordinance, the court said in City of St. Louis v. Ameln, supra (139 S.W. at 431), that "[generally] it is sufficient to charge the offense in the language of the ordinance,

and with such certainty of time, place, and manner as to reasonably notify defendant of the charge preferred, thereby enabling him to prepare his defense and subsequently to plead res judicata, or, if criminal terminology is to be used, autrefois convict, or autrefois acquit." We might conclude from all that has been said by the courts on this subject that a prosecution for violation of a municipal ordinance is a legal [**8] hybrid, neither "civil" nor "criminal," and entitled to another designation, but we shall not quibble over a choice of labels; certainly, the resolution of whether or not, under the facts here, a second trial to determine guilt or innocence violates the Fifth Amendment double jeopardy clause may not be permitted to turn on whether the proper label is "civil" or "criminal" or another. The significant fact in the context of this case is that the possible effect and consequence of the action is a deprivation of liberty.

In North Carolina v. Pearce, 395 U.S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969), referred to by both the city and defendant, decided the same day as Benton v. Maryland, supra, the court was presented with questions regarding the results of a new trial which had been secured by and at the request of the defendant after a conviction. Therein lies a significant distinction between that case [10] and this; in this case the appeal which would result in another trial to again determine guilt or innocence was taken by the city after an acquittal of defendant.

> 10 Other cases referred to by the parties involving the double jeopardy clause where the first conviction was set aside at the behest of the defendant are: Colten v. Kentucky, 407 U.S. 104, 32 L. Ed. 2d 584, 92 S. Ct. 1953 (1972); Price v. Georgia, 398 U.S. 323, 26 L. Ed. 2d 300, 90 S. Ct. 1757 (1970); Benton v. Maryland, supra; Kansas City v. Henderson, supra; Green v. United States, 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957).

[**9] Discussing the problems presented in that case, the court pointed out "that the Fifth Amendment guarantee against double jeopardy * * * has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." 395 U.S. at 717.

We are concerned here with the first protection. In connection with that protection the court in Pearce, supra, referred to Green v. United States, supra, in which it had said at 187-188:

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. * * * Substantially the same view was taken by this Court in *Ex parte Lange*, 85 U.S. 163, 18 Wall. 163, at 169, 21 L. Ed. 872:
>
>> [*46] 'The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, [**10] and whether in the former trial he had been acquitted or convicted.'
>
> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.
>
> "In accordance with this philosophy it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offence.' United States v. Ball, 163 U.S. 662, 671, 41 L. Ed. 300, 16 S. Ct. 1192. Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous."

Here the defendant was tried and acquitted. His trial in municipal court for an offense against a city ordinance put him [**11] in jeopardy. To try him again would be to put him in jeopardy twice for the same offense. Un-

like the situation where there is a conviction in municipal court and an appeal by the defendant, as in Kansas City v. Henderson, supra, and State v. Fields, 487 S.W.2d 560, 561 (Mo. 1972), an appeal by the city does not have the effect of setting aside and nullifying a judgment of acquittal, a judgment in favor of an opponent who has a constitutional right to hold and stand on that determination. What was said in *Henderson* (468 S.W.2d at 50-51) and *Fields* (487 S.W.2d at 562), supra, to the effect that a de novo trial in circuit court is but a continuation of the original prosecution by the city and had the effect of setting aside and nullifying the municipal court judgment was said in comparing those cases with Waller v. Florida, 397 U.S. 387, 25 L. Ed. 2d 435, 90 S. Ct. 1184 (1970), and in the context of those cases where the defendant had *by his appeal* succeeded in getting his first conviction set aside. As stated by the court in North Carolina v. Pearce, supra, the Fifth Amendment guarantee against double jeopardy "imposes no limitations whatever upon the power to retry a [**12] defendant who has succeeded in getting his first conviction set aside." 395 U.S. at 720. It does not follow from that statement that no limitations are imposed by the Fifth Amendment on the power of the city to retry for the same offense a defendant who has been acquitted; that is exactly what the double jeopardy clause does. In the first instance no limitations are imposed, because by seeking and securing his retrial defendant voluntarily waives the protection of the constitutional guarantee. In the second instance there is no waiver by defendant of the protection of the Fifth Amendment right to stand on his acquittal, even though it be of a municipal offense and by a municipal court.

There is no substance to the city's contentions that the double jeopardy clause of the Fifth Amendment is not applicable to offenses proscribed by municipal ordinances for which the maximum penalty does not exceed imprisonment for six months, so-called "petty offenses," and that this constitutional guarantee is not applicable to "our two-tier court system."

We find nothing in this protection of the individual against double jeopardy which makes any distinction between offenses or court systems. In [**13] State ex rel. Cole v. Nigro, supra, the court discussed Duncan v. Louisiana, 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968) and Baldwin v. New [*47] York, 399 U.S. 66, 26 L. Ed. 2d 437, 90 S. Ct. 1886 (1970) and their effect on the Sixth Amendment right to trial by jury in criminal cases, some of which might be considered to be "petty" offenses. In *Baldwin*, the Supreme Court of the United States held that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." 399 U.S. at 69. In State ex rel. Cole v. Nigro, supra, we followed a long line of Missouri cases holding that there is no constitutional right to trial by jury in municipal ordinance prosecutions, but noted that the *Baldwin* decision required that a jury be provided upon demand in such prosecutions where the imprisonment authorized is more than six months.

Even though the offense with which defendant was charged in this case may be characterized as "petty" so that today the Sixth Amendment guarantee of trial by jury is not applicable, that does not affect or change the fact that defendant was in jeopardy at his trial in municipal [**14] court and would be put in jeopardy again if tried now for the same offense in circuit court.

Colten v. Kentucky, supra, relied on by the city in its argument that the guarantee against double jeopardy should not be applied to our two-tier court system for the disposition of municipal ordinance violations, is not applicable to the facts of this case. It involved a conviction of a misdemeanor in a lower court and an appeal *by Colten* to circuit court where he had a trial de novo, resulting in punishment greater than that imposed in the lower court. The only part of the decision in the Colten case which has even the remotest relation to this case is that the enhanced punishment which could be and was imposed in the circuit court on trial de novo in Kentucky's two-tier system, was held to be not prohibited by the double jeopardy clause, and, incidentally, that such punishment did not contravene the due process requirements of North Carolina v. Pearce, supra.

It necessarily follows from what we have said that Rule 37.84, insofar as it authorizes an appeal by the city and another trial to determine guilt or innocence after an acquittal, violates the Fifth Amendment double jeopardy [**15] clause and is unconstitutional.

The judgment of the trial court is affirmed.

All concur.

LEXSEE 350 MO 736

Fred W. Cramer v. Forrest Smith, as State Auditor, Appellant, Roy McKittrick, as Attorney General, Defendant, George S. Montgomery, Fred W. Klaber and Leslie I. George, as Judges of the County Court of Jackson County, Missouri, Appellants, and Bernard T. Flannery, as Circuit Clerk of Jackson County, Missouri, Defendant, and Jackson County, a Political Subdivision of the State of Missouri, Appellant

No. 38226

Supreme Court of Missouri

350 Mo. 736; 168 S.W.2d 1039; 1943 Mo. LEXIS 401

February 11, 1943

PRIOR HISTORY: [***1] Appeal from Jackson Circuit Court; *Hon. Ben Terte*, Judge.

DISPOSITION: Reversed and remanded (*with directions*).

HEADNOTES

COSTS: Criminal Law: Costs Are Statutory: Strict Construction. The recovery and allowance of costs rests entirely on statutory provisions. Such statutes are penal in their nature, and are to be strictly construed.

COSTS: Criminal Law: Costs When Defendant Acquitted. Where defendant is acquitted, liability for costs is imposed under the formula prescribed by Sec. 4223, R. S. 1939.

COSTS: Criminal Law: Reporter's Fee: When Taxed: Statutes Involved. Sec. 13344, R. S. 1939, provides that the court reporter's fee for making the transcript shall be taxed as costs, but this means in the same manner as other costs are taxed, but with the ultimate liability on the State or county as may be proper under the general statutes relating to criminal costs. This section, being a later statute, prevails over any contrary provisions of Secs. 4221 and 4222, R. S. 1939.

COSTS: Criminal Law: Costs to be Taxed Only When Case Finally Concluded. Under Sec. 4236, R. S. 1939, costs are to be taxed only when the case has been finally terminated. [***2] No costs are taxable when the case is pending awaiting a new trial after the prior conviction had been reversed on appeal.

COSTS: Criminal Law: Limitations of Actions. The Statute of Limitations on claims against the State for costs in criminal cases does not commence to run until the final determination of the case.

COUNSEL: *Floyd R. Gibson*, County Counselor, and *Virgil Yates*, Assistant County Counselor, for appellants, George S. Montgomery, Fred W. Klaber and Leslie I. George, Judges of Jackson County Court and Jackson County.

(1) The court erred in giving paragraphs (b) and (c) in Declaration of Law numbered I requested by respondent. (b) State ex rel. v. Hackman, 302 Mo. 273, 257 S. W. 457; (c) Joplin v. Jasper County, 161 S. W. (2d) 411. (2) The court erred in giving on behalf of Forrest Smith, as State Auditor and Roy McKittrick, as Attorney General, Declaration of Law No. 2. State v. Butts, 159 S. W. (2d) 790. (3) The court erred in refusing to give the Declaration of Law requested by these appellants, which said declaration was neither lettered nor numbered. (a) The nature of the charge is determined by the pleadings and not by the sentence and verdict. [***3] State ex rel. v. Hackman, 302 Mo. 273, 257 S. W. 457. (b) Under the facts of the instant case, Jackson County can never under any circumstances be liable for any of the costs in the James Butts case. State v. Butts, 159 S. W. (2d) 790. (4) No actual controversy exists between respondent and these appellants and the court had no juris-

diction over these appellants. Joplin v. Jasper County, 169 S. W. (2d) 411.

Roy McKittrick, Attorney General, and *William B. Teasdale*, Assistant Attorney General, for appellant, Forrest Smith.

(1) A court reporter is not entitled to costs of a transcript of a bill of exceptions in a criminal case on an appeal by a person unable to pay the costs, until the case is finally decided and determined without right of further appeal. Secs. 4222, 4236, 4244, 13344, 13354, R. S. 1939; State ex rel. Simms v. Carpenter, 51 Mo. 555; State ex rel. Lashley v. Ittner, 292 S. W. 707; State ex rel. Martin v. Wofford, 121 Mo. 61, 25 S. W. 851. (2) The State Auditor is the proper person to decide whether or not fees are due a court reporter and the auditor is not bound by the certificate of the circuit judge and the prosecuting attorney. State ex rel. v. [***4] Wilder, 196 Mo. 418; Sec. 13026, R. S. 1939; State ex rel. v. Thompson, 41 Mo. 14. (3) The law does not require the advancing of fees or costs in criminal cases in advance of the final determination of the case. State ex rel. Simms v. Carpenter, 51 Mo. 555. (4) The court erred in refusing to give Declaration of Law I(b) requested by the appellant, Forrest Smith. State v. Police Commissioners, 14 Mo. App. 297; State v. Wright, 194 S. W. 35; State v. Manring, 58 S. W. (2d) 269; State v. Bode, 113 S. W. (2d) 805. (5) Petitioner is not entitled to his costs claimed for said transcript in advance of other costs in the case unless he can point to a statute authorizing payment of same. State v. Ball, 158 S. W. (2d) 182; Sec. 13354, R. S. 1939; State v. Pieski, 248 Mo. 715; State ex rel. Simms v. Carpenter, 51 Mo. 555. Statute of Limitations does not run, until the claim against the State has accued. Sec. 13038, R. S. 1939.

Fred B. Mertsheimer and *John C. Grover* for respondent.

(1) This case is properly in this court. Constitution of Missouri, Sec. 12, Art. VI, and Sec. 5, Amendment of 1884; Cardwell v. Howard, 132 S. W. (2d) 960; St. Louis v. Delassus, 205 Mo. 578. (2) [***5] A declaratory judgment suit is the proper method to determine the construction of statutes and the powers and duties of governmental agencies. Declaratory Judgment Act, Chap. 6, Art. XIV, R. S. 1939; City of Joplin v. Jasper County, 161 S. W. (2d) 411. (3) In a criminal case when the trial court is satisfied that the defendant is unable to pay the costs of the transcript for appeal, the court may order the court reporter to prepare such transcript and the cost of such transcript shall be taxed as costs in the case. Sec. 13354, R. S. 1939. (a) In all cases in which the defendant (1) is convicted of a capital offense, (2) and in all cases in which the defendant is sentenced to imprisonment in the penitentiary, the State shall pay such costs. Sec. 4221, R. S. 1939. (b) In all cases in which the defendant is sentenced to imprisonment in the county jail, the county shall pay the costs. Sec. 4222, R. S. 1939; State ex rel. Simms v. Carpenter, 51 Mo. 555. (c) In all capital cases and (2) those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the State shall pay the costs, and (3) in all other cases, if the defendant is [***6] acquitted, the county shall pay the costs. Sec. 4223, R. S. 1939; State ex rel. Timberman v. Hackmann, 257 S. W. 457; State ex rel. Spurlock v. Holladay, 67 Mo. 299; State ex rel. Clarke v. Wilder, 197 Mo. 27; State ex rel. Tudor v. Platte County Court, 40 Mo. App. 503. (4) The limitations statute in all such cases on such claims is two years. Sec. 13038, R. S. 1939; State ex rel. Johnson v. Draper, 48 Mo. 56.

JUDGES: Leedy, J. All concur except *Gantt, J.*, absent.

OPINION BY: LEEDY

OPINION

[*738] [**1039] This is an appeal by defendants in a proceeding brought under the Declaratory Judgments Act to obtain a decree declaratory of the rights of plaintiff (respondent) with respect to the taxing and payment of an item of criminal costs. The facts are not in dispute, and the case turns on the construction to be given certain criminal costs statutes. The [**1040] parties will be referred to as they were styled in the trial court.

The facts are these: One Butts was convicted in Division #8 of the Jackson Circuit Court of a capital offense. He was sentenced to the extreme penalty, in accordance with the verdict, and appealed. Plaintiff, as the official reporter of said court, [***7] in obedience to an order made under Section 13344, [1] furnished Butts a transcript of [*739] the testimony for the purposes of said appeal. Division II of this court reversed said conviction, and remanded the case for new trial. [State v. Butts, 349 Mo. 213, 159 S. W. (2d) 790.] It remains undisposed of on docket of the trial court.

1 ". . . *Provided*, that in criminal cases where an appeal is taken or a writ of error obtained by the defendant, and it shall appear to the satisfaction of the court that the defendant is unable to pay the costs of such transcript for the purpose of perfecting the appeal, the court shall order the same to be furnished and the court reporter's fees for making the same shall be taxed against the

state or county as may be proper; . . ." [Sec. 13344 R. S. '39; Mo. S. A. sec. 13344.]

The circuit clerk taxed the costs of said transcript against the state, and issued a fee bill for said single item. It was examined by the prosecuting attorney and judge, found to be correct, [***8] and certified to the State Auditor for payment. The State Auditor refused to approve said fee bill, and to draw a warrant for the same for the reason said criminal case had not been determined within the meaning of Section 4236. [2] The trial court held, among other things that the state is liable for said transcript fee, and that it became the duty of the auditor, upon presentation of the fee bill, to forthwith draw a warrant for the payment of the same.

2 "The clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor." [Sec. 4236 R. S. '39; Mo. S. A. sec. 4236.]

[***9] "At common law costs as such in a criminal case were unknown. As a consequence it is the rule as well in criminal as in civil cases that the recovery and allowance of costs rests entirely on statutory provisions -- that no right to or liability for costs exists in the absence of statutory authorization. Such statutes are penal in their nature, and are to be strictly construed." [20 C. J. S. p. 677.]

Sections 4221 [3] and 4222 [4] impose liability for costs (except those incurred on the part of defendant) on the state or county, respectively, on *conviction* of an *indigent* defendant under the particular circumstances enumerated in said sections. Where the defendant is *acquitted*, liability for costs is imposed under the formula prescribed by Section 4223. [5]

3 Said section, insofar as pertinent to the present inquiry, reads: "In all capital cases in which the defendant shall be *convicted*, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary . . . the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. . . ." (Italics ours.) [Sec. 4221 R. S. '39; Mo. S. A. sec. 4221.]

[***10]

4 "When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county . . . shall pay the costs, except such as were incurred on the part of the defendant." [Sec. 4222 R. S. '39; Mo. S. A. sec. 4222.]

5 "In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law. [Sec. 4223 R. S. '39; Mo. S. A. sec. 4223.]

[*740] It is not contended that the provision of Section 13344, that the "court reporter's fee for making the same [transcript] *shall be taxed against the state or county as may be proper*," (Emphasis ours) which is found in Chapter 94 in relation to court reporters, authorizes a judgment, as for costs, [***11] against either the state or county *as of the time the order is made*. A fair construction requires us to hold that the [**1041] language means said fee is to be taxed *as costs*, in the same manner as other costs are taxed, but with ultimate liability for the same on the state or county as may be proper under the general statutes in relation to criminal costs. Being thus relegated to the general statutes, it is apparent the provision of Section 13344 casting liability for such transcript on "the state or county as may be proper" cannot be reconciled with Sections 4221 and 4222, both of which expressly provide that neither the state nor county shall pay such costs "as were incurred on the part of defendant." Section 13344, being the later enacted statute, must be held to have repealed, by necessary implication, the contrary provisions of Sections 4221 and 4222, to the extent noted.

This brings us to the primary contention of plaintiff, viz.: That notwithstanding Butts' appeal, the judgment of conviction and pronouncement of sentence by the trial court, "determined" said case, within the meaning of Section 4236, supra, so as to render the costs payable, and that by virtue [***12] of Sections 13344 and 4221 the state is liable therefor, because the conviction was for a capital offense. The trial court so held.

Referring to Section 4236, supra, it will be seen that it is the duty of the clerk to tax the costs and issue fee bills in criminal cases when the same "shall have been determined or continued generally." The verb determine "has been variously defined, the three principal senses being to ascertain, to bound, and to terminate." [26 C. J. S. pp. 1257-1258.] "To put or set an end to; to bring to a

close; to terminate." [Webster's International Dict.] In Hanchett Bond Co. v. Glore, 208 Mo. App. 169, 232 S. W. 159, it was said, "The term 'determination' may 'properly, and according to legal use as well as according to its derivation, signify the coming to an end in any way whatever . . . *more specifically, the final result of a proceeding*.' 18 C. J. 983." (Italics, the present writer's.) We hold the term "determined" was used in Section 4236, in the sense of terminated, or brought to an end, finished [26 C. J. S. p. 1259] -- and this not merely insofar as the trial court might have been presently concerned, but as implying a finality. As thus [***13] construed, this provision harmonizes with the scheme of the statute for the certification, allowance and payment of criminal costs through the medium of a "complete" fee bill. Only items omitted by oversight or mistake of the clerk may be certified in a supplemental bill, for which supplemental bill the clerk is expressly denied compensation. [Section 4244 R. S. '39.] The criminal costs statutes hereinabove [*741] set out do not contemplate that the costs in a particular case shall be paid in part by the county, and in part by the state. It frequently occurs that an indigent is convicted of such an offense as to cast the costs on the state, and upon retrial, following appeal, or the trial court's action in setting the conviction aside, he receives punishment which makes the county liable for the costs. This was precisely the situation in State ex rel. Simms v. Carpenter et al., 51 Mo. 555, where a statute substantially like our present Section 4221 was so construed.

Other questions are raised but in view of the disposition being made of the case they need not be decided, except this: The two-year statute of limitations [Section 13038 R. S. '39, providing, "Persons having [***14] claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled and allowed, within two years after such claims shall accrue, and not thereafter."] does not begin to run against criminal costs taxable against the state until such costs shall have accrued; and it is apparent they do not accrue, within the meaning of the statute, until the final determination of the case.

As the Butts case stands today, the defendant therein has not been convicted so as to make either the state or county liable for the costs under Sections 4221 and 4222, nor has he been acquitted so as to make Section 4223 apply. It follows that the decree must be reversed, and the cause remanded with directions to enter a decree in conformity with the views herein expressed. It is so ordered. All concur except *Gantt, J.*, absent.

LEXSEE 758 SW2D 500

STATE OF MISSOURI, Plaintiff, ADAIR COUNTY, MISSOURI, (Third Party Plaintiff), Respondent, v. LANA L. ANDERSON, Defendant, PETTIS COUNTY, MISSOURI, (Third Party Defendant), Appellant

No. WD40574

Court of Appeals of Missouri, Western District

758 S.W.2d 500; 1988 Mo. App. LEXIS 1409

October 11, 1988, Filed

PRIOR HISTORY: [**1] APPEAL FROM THE CIRCUIT COURT OF ADAIR COUNTY MISSOURI, The Honorable E. Richard Webber, Jr., Judge

COUNSEL: Jeff Mittelhauser, Sedalia, Missouri, for appellant.

Tom Hensley, Kirksville, Missouri, for respondent.

JUDGES: Ann K. Covington, Judge, Presiding, Nugent and Gaitan, JJ.

OPINION BY: COVINGTON

OPINION

[*501] Pettis County appeals from an order requiring the county to pay as costs a portion of sheriff's deputies' salaries incurred during a trial held in Adair County on a change of venue from Pettis County.

The facts are not in dispute. The underlying action was a first degree murder case tried by a jury in Adair County after having been sent to Adair County on a change of venue from Pettis County. The trial commenced January 11, 1988, and ended January 16, 1988. The defendant was found guilty of murder in the first degree, and the jury recommended life in prison without probation or parole, a sentence which the trial court subsequently imposed.

During the trial, the Adair County sheriff's department provided courtroom security. Special arrangements were made to assure appropriate security for all jurors during the time that they were sequestered. The defendant was in custody [**2] throughout the trial and courtroom security was enhanced to protect the interest of all parties. Regularly employed Adair County sheriff's deputies were required to work overtime, and other individuals were hired to work as special temporary deputies. The parties agree that the reasonable expense for the Adair County sheriff's deputies' salaries incurred as a result of the trial was $ 4,939.26.

Subsequent to the sentencing of the defendant, the prosecuting attorney of Adair County moved to have the deputies' salaries taxed as costs. The parties stipulated that the $ 4,939.26 was a necessary and reasonable expense. After written suggestions prepared by prosecuting attorneys of both counties, the trial court ordered that Pettis County pay all costs, including the charges made by the sheriff's department in the amount of $ 4,939.26.

The trial court's order indicated that it would not be fair to expect Adair County to bear the expense of the additional salaries of the deputies. Perhaps regrettably, however, there is no statutory authority for taxing of the salaries against Pettis County as costs, and the judgment must be reversed.

[*502] In taxing the deputies' salaries against [**3] Pettis County, the trial court relied upon § 550.120, RSMo 1986, [1] which states in pertinent part:

> In any criminal cause in which a change of venue is taken from one county to any other county, for any of the causes mentioned in existing laws, and whenever a prisoner shall, for any cause, be confined in the jail of one county for an offense committed in another county, and in

> which costs are liable to be paid out of a county treasury, such costs shall be paid by the county in which the indictment was originally found or the proceedings were originally instituted
>
> . . . .

1 All statutory references are to RSMo 1986.

Disposition of the issue presented turns upon the construction to be given "costs" in this context.

At common law, costs in a criminal case were unknown. *State v. Wilbur*, 450 S.W.2d 458, 459 (Mo. App. 1970). Consequently, recovery and allowance of costs depends exclusively upon statutes imposing liability. Statutes imposing costs are penal in nature and must be strictly construed. [**4] *Cramer v. Smith*, 350 Mo. 736, 739, 168 S.W.2d 1039, 1040 (1943).

Likewise at common law, counties are not liable to pay any costs. Where the common law is changed by statute, the county is liable only to the extent authorized. 20 C.J.S. *Costs* § 441(a) (1940).

The term "costs" generally includes only those items connected with the actual presentation of testimony and the fees of specified officers, and courts hesitate to expand the meaning of the term. *Id.* at § 453. Missouri statutes specifically provide, for example, for taxing as costs the following: deposition expense, § 492.590; court reporter fee, § 485.120; cost of witnesses, §§ 550.170, 550.280; fees due jurors, § 550.280; and sheriffs, county marshals or other officers' fees for services in criminal cases and for all proceedings for contempt or attachment, § 57.290.6.

Although the legislature has provided for certain fees of sheriffs' deputies to be taxed as costs, the legislature has not provided specific statutory authority allowing recovery of salaries as costs in a criminal case.

In its argument on appeal, Adair County relies almost exclusively upon § 545.620 which states that "the costs *and expenses* [**5] necessarily incurred in the removal of any such cause under the foregoing provisions shall be adjusted and allowed by the court wherein the cause is tried, and shall be taxed as other costs in such cause." (emphasis added) Adair County argues that the preceding language, when read in conjunction with § 550.120, provides for the salaries in question to be taxed as costs against Pettis County. This court cannot accept Adair County's reasoning that any expenses or charges which would be paid from the county treasury on a change of venue should be taxed as costs in the originating county. There are no applicable cases interpreting the relevant statutes in the context of the present case; however, in view of the numerous holdings which require that no item is taxable as costs unless specifically provided for by statute, Adair County's interpretation of § 545.620 is impermissibly broad. Further, without specifically construing the statute, it appears clear that the statute speaks to the costs and expenses related to the procedures of removal rather than the actual prosecution of the action itself, which lies at the heart of statutory allowances for costs. *See State v. Davis*, 645 S.W.2d [**6] 160 (Mo. App. 1982).

The legislature's own acknowledgment of the need for express authorization of fees charged is contained in § 550.210, which provides that the trial judge and the prosecutor must examine the fee bill and certify that the fees charged are expressly authorized by law.

The trial court's concern that the county to which venue is changed may bear an undue financial burden does not go unheeded. Absent the legislature's addressing [*503] the problem, however, the sheriff's deputies' salaries may not be taxed as costs to the originating county.

The judgment is reversed and remanded for entry of an order taxing costs to Pettis County, with such costs not to include Sheriff's deputies' salaries.

All concur.

JEREMIAH CONROY, Plaintiff; JAY L. TORREY, Appellant, v. R. GRAHAM FROST, Defendant; H. L. EDMUNDS, Respondent.

[NO NUMBER IN ORIGINAL]

COURT OF APPEALS OF MISSOURI, ST. LOUIS

38 Mo. App. 351; 1889 Mo. App. LEXIS 468

December 17, 1889, Decided

PRIOR HISTORY: [**1] Appeal from the St. Louis City Circuit Court.--HON. LEROY B. VALLIANT, Judge.

REVERSED AND REMANDED (with directions).

DISPOSITION: Judgment reversed and cause remanded.

HEADNOTES

1. **Judgment**: ENTIRETY OF ENTRY. A record entry of a final judgment with award of execution, and concluding with an allowance to a referee, is not necessarily an entirety, so as to make the allowance an inseparable part of the judgment; and a subsequent order setting aside the entry of judgment and entering judgment for another amount, but making no reference to the allowance, does not of itself affect the latter.

2. **Practice, Trial**: FEE BILL. A referee, in whose favor an allowance has been made and taxed as costs, is not entitled to a fee bill for the collection thereof prior to the final determination of the cause; and, if the cause is pending on appeal, no fee bill can issue, though no *supersedeas* bond was given by the appellant. (Revised Statutes, 1879, section 5595, *construed*.)

COUNSEL: Everett W. Pattison, for the appellant.

(1) There was no allowance in force in favor of the referee. The judgment wherein the allowance was made was set aside, and the new judgment contained no order as to the referee's fees. R. S., sec. 3626; Wall v. Covington, 76 N. C. 150; Bennett v. Kroth, 37 Kas. 235. (2) Plaintiff is not liable to the referee, even in a case where an allowance has been properly made, until the litigation is at an end. Carroll v. Hardy, 21 Mo. 66; Trail v. Somerville, 22 Mo. App. 308; Whitsett v. Blumenthal, 63 Mo. 480; Stone v. Locke, 48 Maine, 425; Adams v. Railroad, 18 Mo. App. 373; Inhabitants of Pelham v. Aldrich, 8 Gray, 515; Supervisors v. Briggs, 3 Denio, 173; Warfield v. Watkins, 30 Barb. 395. And then only as a part of the judgment. Cases above cited; also, Mfg. Co. v. Glenn, 50 Ala. 489. (3) A referee is not one of the officers named or referred to in section 5595 of Revised Statutes; hence, there is no authority for the issuance of a fee bill at the instance, or for the benefit, of [**2] a referee. See cases above cited; also, Steel v. Wear, 54 Mo. 534; Gordons v. Maupin, 10 Mo. 352; Shed v. Railroad, 67 Mo. 687; Thompson v. Elevator Co., 77 Mo. 520; Ford v. Railroad, 29 Mo. App. 616.

H. L. Edmunds, for the respondent.

(1) The allowances were made in favor of respondent November 19, 1888, and were ordered to be taxed as costs in the case. The first judgment was rendered the same day as the order was set aside, but the order is not a part of that judgment and was not set aside by the second judgment. Gamble v. Gibson, 83 Mo. 290; Hurck v. Erskine, 50 Mo. 116. (2) The fee bill issued in pursuance to section 5595, Revised Statutes. The referee is clearly one of the officers contemplated in that section. Trail v. Somerville, 22 Mo. App. 314.

JUDGES: ROMBAUER, P. J.

OPINION BY: ROMBAUER

OPINION

[*352] ROMBAUER, P. J., delivered the opinion of the court.

This is an appeal prosecuted by a surety upon a bond for costs, from a judgment overruling his motion to quash a fee bill, which had been issued against him and in favor of the respondent for an allowance made to the latter by the court for his services as referee in the case, and for expenses incurred by him in employing [**3] a stenographer. The facts upon which the points of law arise are as follows: In an action brought by the plaintiff against the defendant, the respondent Edmunds was appointed referee by the court, and filed his report recommending judgment in favor of the plaintiff for nineteen hundred and fifty-six dollars and twenty cents. Exceptions were filed to this report by the [*353] defendant; the court overruled these, and rendered judgment in conformity with the referee's report, November 19, 1888. The record entry of this judgment concludes as follows: "Therefore it is considered by the court that the plaintiff recover of the defendant the debt aforesaid as found, together with his costs and charges herein expended, and have execution therefor, and it is ordered by the court that Henry L. Edmunds, referee herein, be and he is allowed the sum of five hundred dollars as and for his services herein, and that he be allowed the sum of two hundred and one dollars and fifty cents as and for the stenographer's bill herein, and that said sums, so allowed, be taxed as costs in this cause." After judgment thus entered, the plaintiff filed his motion to vacate the order allowing the referee the [**4] above amounts, claiming that the order was improvidently made, and that the allowance was excessive. This motion, however, the plaintiff withdrew December 1, 1888. On the twenty-first of January, 1889, the court, upon a motion for rehearing made by the defendant, set aside the judgment entry of November 19, 1888, and entered a new judgment in favor of plaintiff, concluding as follows: "It is, therefore, considered by the court, that the plaintiff have and recover from the defendant the aforesaid sum of eleven hundred and seventeen dollars and sixty-four cents, together with his costs and charges herein expended, and have execution therefor." This judgment entry did not in any way mention the order of allowance theretofore made by the court in favor of the referee.

An execution was issued on this judgment in favor of the plaintiff and was returned *nulla bona*, although it does not appear that such execution was issued at plaintiff's request. The plaintiff, being dissatisfied with the judgment, took an appeal to the supreme court, and gave a *supersedeas* bond, prior to the return of this execution. In May, 1889, and subsequent to this [*354] appeal, a fee bill was issued [**5] by the circuit clerk in favor of the referee, being the fee bill sought to be quashed in this proceeding by the plaintiff's surety on the bond for costs.

The surety, appealing from the judgment of the court refusing to quash the fee bill, assigns the following errors: *First*. That the judgment entry, wherein the allowance was made, having been set aside, the allowance to the referee was vacated, because the subsequent judgment entry contained no order as to the referee's fees. *Second*. That the plaintiff is not liable to the referee until the litigation is at an end.

The first assignment must be ruled against the appellant. There is nothing in the record to indicate that the allowance to the referee has ever been vacated; on the contrary, it appears that all proceedings for that purpose were withdrawn by the plaintiff himself. The mere fact, that the order of allowance to the referee is contained in the same entry with the judgment in favor of the plaintiff, does not necessarily constitute it an inseparable part of the judgment entry. It follows the completed judgment entry after the clause awarding execution, and is in fact nothing else but an order of allowance of specific [**6] costs.

On the second assignment the law is clearly with the appellant. The allowance and taxing of costs is matter of statutory origin, and that all statutes touching costs and fees must be strictly construed against the party claiming them is the well-settled law. *Shed v. Railroad*, 67 Mo. 687; *Thompson v. Union Elevator Co.*, 77 Mo. 520; *Ford v. Railroad*, 29 Mo. App. 616. Section 5595 of the Revised Statutes of 1879, under which the issue of this fee bill is sought to be upheld, does not include referees in express terms, and, as in the nature of things, no person can claim to be within the equity of a statute, which the policy of the law requires to be construed strictly against him, the respondent's claim, that he is within the equity of the [*355] statute, is logically untenable. It has been held in *State ex rel. Fulkerson v. Emmerson*, 74 Mo. 607, that under section 5595, *supra*, the officers and persons named therein may have a fee bill issued for their fees against the persons liable for the same before the final determination of the controversy, and even though a *supersedeas* bond, suspending the [**7] execution of the judgment, has been given. In view of that decision the fact that a *supersedeas* bond was given by the plaintiff in this case is immaterial, and we rest our decision solely on the ground that the referee is not one of the persons within the purview of section 5595, and that, outside of that section, there is no statutory provision for issuing a fee bill in favor of any person before the final determination of the suit, except in cases where, as was said in *Trail v. Somerville*, 22 Mo. App. 308, interlocutory orders awarding costs to be paid at once, by one party, or the other, are made.

It results from the foregoing, that the appellant's motion to quash the fee bill should have been sustained by the court, and that its judgment must be reversed and the

cause remanded with directions to the trial court to sustain the surety's motion. So ordered. All the judges concur.

LEXSEE 168 S.W.2D 1039, 1040

Fred W. Cramer v. Forrest Smith, as State Auditor, Appellant, Roy McKittrick, as Attorney General, Defendant, George S. Montgomery, Fred W. Klaber and Leslie I. George, as Judges of the County Court of Jackson County, Missouri, Appellants, and Bernard T. Flannery, as Circuit Clerk of Jackson County, Missouri, Defendant, and Jackson County, a Political Subdivision of the State of Missouri, Appellant

No. 38226

Supreme Court of Missouri

350 Mo. 736; 168 S.W.2d 1039; 1943 Mo. LEXIS 401

February 11, 1943

PRIOR HISTORY: [***1] Appeal from Jackson Circuit Court; *Hon. Ben Terte*, Judge.

DISPOSITION: Reversed and remanded (*with directions*).

HEADNOTES

COSTS: Criminal Law: Costs Are Statutory: Strict Construction. The recovery and allowance of costs rests entirely on statutory provisions. Such statutes are penal in their nature, and are to be strictly construed.

COSTS: Criminal Law: Costs When Defendant Acquitted. Where defendant is acquitted, liability for costs is imposed under the formula prescribed by Sec. 4223, R. S. 1939.

COSTS: Criminal Law: Reporter's Fee: When Taxed: Statutes Involved. Sec. 13344, R. S. 1939, provides that the court reporter's fee for making the transcript shall be taxed as costs, but this means in the same manner as other costs are taxed, but with the ultimate liability on the State or county as may be proper under the general statutes relating to criminal costs. This section, being a later statute, prevails over any contrary provisions of Secs. 4221 and 4222, R. S. 1939.

COSTS: Criminal Law: Costs to be Taxed Only When Case Finally Concluded. Under Sec. 4236, R. S. 1939, costs are to be taxed only when the case has been finally terminated. [***2] No costs are taxable when the case is pending awaiting a new trial after the prior conviction had been reversed on appeal.

COSTS: Criminal Law: Limitations of Actions. The Statute of Limitations on claims against the State for costs in criminal cases does not commence to run until the final determination of the case.

COUNSEL: *Floyd R. Gibson*, County Counselor, and *Virgil Yates*, Assistant County Counselor, for appellants, George S. Montgomery, Fred W. Klaber and Leslie I. George, Judges of Jackson County Court and Jackson County.

(1) The court erred in giving paragraphs (b) and (c) in Declaration of Law numbered I requested by respondent. (b) State ex rel. v. Hackman, 302 Mo. 273, 257 S. W. 457; (c) Joplin v. Jasper County, 161 S. W. (2d) 411. (2) The court erred in giving on behalf of Forrest Smith, as State Auditor and Roy McKittrick, as Attorney General, Declaration of Law No. 2. State v. Butts, 159 S. W. (2d) 790. (3) The court erred in refusing to give the Declaration of Law requested by these appellants, which said declaration was neither lettered nor numbered. (a) The nature of the charge is determined by the pleadings and not by the sentence and verdict. [***3] State ex rel. v. Hackman, 302 Mo. 273, 257 S. W. 457. (b) Under the facts of the instant case, Jackson County can never under any circumstances be liable for any of the costs in the James Butts case. State v. Butts, 159 S. W. (2d) 790. (4) No actual controversy exists between respondent and these appellants and the court had no juris-

diction over these appellants. Joplin v. Jasper County, 169 S. W. (2d) 411.

Roy McKittrick, Attorney General, and *William B. Teasdale*, Assistant Attorney General, for appellant, Forrest Smith.

(1) A court reporter is not entitled to costs of a transcript of a bill of exceptions in a criminal case on an appeal by a person unable to pay the costs, until the case is finally decided and determined without right of further appeal. Secs. 4222, 4236, 4244, 13344, 13354, R. S. 1939; State ex rel. Simms v. Carpenter, 51 Mo. 555; State ex rel. Lashley v. Ittner, 292 S. W. 707; State ex rel. Martin v. Wofford, 121 Mo. 61, 25 S. W. 851. (2) The State Auditor is the proper person to decide whether or not fees are due a court reporter and the auditor is not bound by the certificate of the circuit judge and the prosecuting attorney. State ex rel. v. [***4] Wilder, 196 Mo. 418; Sec. 13026, R. S. 1939; State ex rel. v. Thompson, 41 Mo. 14. (3) The law does not require the advancing of fees or costs in criminal cases in advance of the final determination of the case. State ex rel. Simms v. Carpenter, 51 Mo. 555. (4) The court erred in refusing to give Declaration of Law I(b) requested by the appellant, Forrest Smith. State v. Police Commissioners, 14 Mo. App. 297; State v. Wright, 194 S. W. 35; State v. Manring, 58 S. W. (2d) 269; State v. Bode, 113 S. W. (2d) 805. (5) Petitioner is not entitled to his costs claimed for said transcript in advance of other costs in the case unless he can point to a statute authorizing payment of same. State v. Ball, 158 S. W. (2d) 182; Sec. 13354, R. S. 1939; State v. Pieski, 248 Mo. 715; State ex rel. Simms v. Carpenter, 51 Mo. 555. Statute of Limitations does not run, until the claim against the State has accued. Sec. 13038, R. S. 1939.

Fred B. Mertsheimer and *John C. Grover* for respondent.

(1) This case is properly in this court. Constitution of Missouri, Sec. 12, Art. VI, and Sec. 5, Amendment of 1884; Cardwell v. Howard, 132 S. W. (2d) 960; St. Louis v. Delassus, 205 Mo. 578. (2) [***5] A declaratory judgment suit is the proper method to determine the construction of statutes and the powers and duties of governmental agencies. Declaratory Judgment Act, Chap. 6, Art. XIV, R. S. 1939; City of Joplin v. Jasper County, 161 S. W. (2d) 411. (3) In a criminal case when the trial court is satisfied that the defendant is unable to pay the costs of the transcript for appeal, the court may order the court reporter to prepare such transcript and the cost of such transcript shall be taxed as costs in the case. Sec. 13354, R. S. 1939. (a) In all cases in which the defendant (1) is convicted of a capital offense, (2) and in all cases in which the defendant is sentenced to imprisonment in the penitentiary, the State shall pay such costs. Sec. 4221, R. S. 1939. (b) In all cases in which the defendant is sentenced to imprisonment in the county jail, the county shall pay the costs. Sec. 4222, R. S. 1939; State ex rel. Simms v. Carpenter, 51 Mo. 555. (c) In all capital cases and (2) those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the State shall pay the costs, and (3) in all other cases, if the defendant is [***6] acquitted, the county shall pay the costs. Sec. 4223, R. S. 1939; State ex rel. Timberman v. Hackmann, 257 S. W. 457; State ex rel. Spurlock v. Holladay, 67 Mo. 299; State ex rel. Clarke v. Wilder, 197 Mo. 27; State ex rel. Tudor v. Platte County Court, 40 Mo. App. 503. (4) The limitations statute in all such cases on such claims is two years. Sec. 13038, R. S. 1939; State ex rel. Johnson v. Draper, 48 Mo. 56.

JUDGES: Leedy, J. All concur except *Gantt, J.*, absent.

OPINION BY: LEEDY

OPINION

[*738] [**1039] This is an appeal by defendants in a proceeding brought under the Declaratory Judgments Act to obtain a decree declaratory of the rights of plaintiff (respondent) with respect to the taxing and payment of an item of criminal costs. The facts are not in dispute, and the case turns on the construction to be given certain criminal costs statutes. The [**1040] parties will be referred to as they were styled in the trial court.

The facts are these: One Butts was convicted in Division #8 of the Jackson Circuit Court of a capital offense. He was sentenced to the extreme penalty, in accordance with the verdict, and appealed. Plaintiff, as the official reporter of said court, [***7] in obedience to an order made under Section 13344, [1] furnished Butts a transcript of [*739] the testimony for the purposes of said appeal. Division II of this court reversed said conviction, and remanded the case for new trial. [State v. Butts, 349 Mo. 213, 159 S. W. (2d) 790.] It remains undisposed of on docket of the trial court.

1 ". . . *Provided*, that in criminal cases where an appeal is taken or a writ of error obtained by the defendant, and it shall appear to the satisfaction of the court that the defendant is unable to pay the costs of such transcript for the purpose of perfecting the appeal, the court shall order the same to be furnished and the court reporter's fees for making the same shall be taxed against the

state or county as may be proper; . . ." [Sec. 13344 R. S. '39; Mo. S. A. sec. 13344.]

The circuit clerk taxed the costs of said transcript against the state, and issued a fee bill for said single item. It was examined by the prosecuting attorney and judge, found to be correct, [***8] and certified to the State Auditor for payment. The State Auditor refused to approve said fee bill, and to draw a warrant for the same for the reason said criminal case had not been determined within the meaning of Section 4236. [2] The trial court held, among other things that the state is liable for said transcript fee, and that it became the duty of the auditor, upon presentation of the fee bill, to forthwith draw a warrant for the payment of the same.

2 "The clerk of the court in which any criminal cause shall have been determined or continued generally shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case; and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor." [Sec. 4236 R. S. '39; Mo. S. A. sec. 4236.]

[***9] "At common law costs as such in a criminal case were unknown. As a consequence it is the rule as well in criminal as in civil cases that the recovery and allowance of costs rests entirely on statutory provisions -- that no right to or liability for costs exists in the absence of statutory authorization. Such statutes are penal in their nature, and are to be strictly construed." [20 C. J. S. p. 677.]

Sections 4221 [3] and 4222 [4] impose liability for costs (except those incurred on the part of defendant) on the state or county, respectively, on *conviction* of an *indigent* defendant under the particular circumstances enumerated in said sections. Where the defendant is *acquitted*, liability for costs is imposed under the formula prescribed by Section 4223. [5]

3 Said section, insofar as pertinent to the present inquiry, reads: "In all capital cases in which the defendant shall be *convicted*, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary . . . the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. . . ." (Italics ours.) [Sec. 4221 R. S. '39; Mo. S. A. sec. 4221.]

[***10]

4 "When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county . . . shall pay the costs, except such as were incurred on the part of the defendant." [Sec. 4222 R. S. '39; Mo. S. A. sec. 4222.]

5 "In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law. [Sec. 4223 R. S. '39; Mo. S. A. sec. 4223.]

[*740] It is not contended that the provision of Section 13344, that the "court reporter's fee for making the same [transcript] *shall be taxed against the state or county as may be proper*," (Emphasis ours) which is found in Chapter 94 in relation to court reporters, authorizes a judgment, as for costs, [***11] against either the state or county *as of the time the order is made*. A fair construction requires us to hold that the [**1041] language means said fee is to be taxed *as costs*, in the same manner as other costs are taxed, but with ultimate liability for the same on the state or county as may be proper under the general statutes in relation to criminal costs. Being thus relegated to the general statutes, it is apparent the provision of Section 13344 casting liability for such transcript on "the state or county as may be proper" cannot be reconciled with Sections 4221 and 4222, both of which expressly provide that neither the state nor county shall pay such costs "as were incurred on the part of defendant." Section 13344, being the later enacted statute, must be held to have repealed, by necessary implication, the contrary provisions of Sections 4221 and 4222, to the extent noted.

This brings us to the primary contention of plaintiff, viz.: That notwithstanding Butts' appeal, the judgment of conviction and pronouncement of sentence by the trial court, "determined" said case, within the meaning of Section 4236, supra, so as to render the costs payable, and that by virtue [***12] of Sections 13344 and 4221 the state is liable therefor, because the conviction was for a capital offense. The trial court so held.

Referring to Section 4236, supra, it will be seen that it is the duty of the clerk to tax the costs and issue fee bills in criminal cases when the same "shall have been determined or continued generally." The verb determine "has been variously defined, the three principal senses being to ascertain, to bound, and to terminate." [26 C. J. S. pp. 1257-1258.] "To put or set an end to; to bring to a

close; to terminate." [Webster's International Dict.] In Hanchett Bond Co. v. Glore, 208 Mo. App. 169, 232 S. W. 159, it was said, "The term 'determination' may 'properly, and according to legal use as well as according to its derivation, signify the coming to an end in any way whatever . . . *more specifically, the final result of a proceeding*.' 18 C. J. 983." (Italics, the present writer's.) We hold the term "determined" was used in Section 4236, in the sense of terminated, or brought to an end, finished [26 C. J. S. p. 1259] -- and this not merely insofar as the trial court might have been presently concerned, but as implying a finality. As thus [***13] construed, this provision harmonizes with the scheme of the statute for the certification, allowance and payment of criminal costs through the medium of a "complete" fee bill. Only items omitted by oversight or mistake of the clerk may be certified in a supplemental bill, for which supplemental bill the clerk is expressly denied compensation. [Section 4244 R. S. '39.] The criminal costs statutes hereinabove [*741] set out do not contemplate that the costs in a particular case shall be paid in part by the county, and in part by the state. It frequently occurs that an indigent is convicted of such an offense as to cast the costs on the state, and upon retrial, following appeal, or the trial court's action in setting the conviction aside, he receives punishment which makes the county liable for the costs. This was precisely the situation in State ex rel. Simms v. Carpenter et al., 51 Mo. 555, where a statute substantially like our present Section 4221 was so construed.

Other questions are raised but in view of the disposition being made of the case they need not be decided, except this: The two-year statute of limitations [Section 13038 R. S. '39, providing, "Persons having [***14] claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled and allowed, within two years after such claims shall accrue, and not thereafter."] does not begin to run against criminal costs taxable against the state until such costs shall have accrued; and it is apparent they do not accrue, within the meaning of the statute, until the final determination of the case.

As the Butts case stands today, the defendant therein has not been convicted so as to make either the state or county liable for the costs under Sections 4221 and 4222, nor has he been acquitted so as to make Section 4223 apply. It follows that the decree must be reversed, and the cause remanded with directions to enter a decree in conformity with the views herein expressed. It is so ordered. All concur except *Gantt, J.*, absent.

LEXSEE

State of Missouri, Plaintiff-Respondent, v. D--S--, Defendant, Nicholas Bartulica, M.D., Third-Party Appellant. State of Missouri, Plaintiff-Respondent, v. M--W--, et al., Defendants, Beverley Wilson, M.D., Third-Party Appellant. State of Missouri, Plaintiff-Respondent, v. J--E--L--, Defendant, Beverley Wilson, M.D., Third-Party Appellant

No. 62260

Supreme Court of Missouri

606 S.W.2d 653; 1980 Mo. LEXIS 316

October 15, 1980

PRIOR HISTORY: [**1] From the Circuit Courts of Buchanan County and Cass County

Civil Appeals

Judge Frank D. Connett, Jr., and Judge Robert G. Russell

DISPOSITION: Affirmed.

COUNSEL: John Ashcroft, John M. Morris, Jefferson City, Missouri, Attorneys for Appellant.

Michael A. Insco, Hershel Shepherd, St. Joseph, Missouri, Attorneys for Respondent.

JUDGES: En Banc. Seiler, J.

OPINION BY: SEILER

OPINION

[*654] This consolidated case consists of three separate appeals from circuit court (juvenile division) judgments denying motions that the juvenile court "tax as costs" the expenses incurred in psychiatric evaluations of juveniles conducted by the Department of Mental Health at the order of the courts. The expenses of examining the seventeen juveniles involved in these cases totalled $53,674.72. The issue presented here is whether § 211.161, RSMo 1978 [1] calls for the above expenses to be taxed as costs to the counties which ordered the examinations.

1 All statutory references are to RSMo 1978.

This appeal was originally heard in the [**2] Western District of the Court of Appeals, but was transferred to this court under Mo. Const. art. V, § 10 and Rule 83.01 V.A.M.R. because a dissenting judge certified the majority opinion to be in conflict with *State v. Williams*, 473 S.W.2d 382 (Mo. 1971) in regard to the rules of statutory construction. Pursuant to Mo. Const. art. V, § 10 we may, and do, treat these cases as though here on original appeal. We decide these cases by holding that § 211.161 does not provide that psychiatric examinations of juveniles may be taxed as costs.

Section 211.161 reads in pertinent part as follows:

> "1. The court may cause any child within its jurisdiction to be examined by a physician, psychiatrist or psychologist appointed by the court in order that the condition of the child may be given consideration in the disposition of his case. The expenses of the examination when approved by the court shall be paid by the county.
>
> "2. The services of a state, county or municipally maintained hospital, institution, or psychiatric or health clinic may be used for the purpose of this examination and treatment."