



OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable E.S. Foreman
County Auditor
Jefferson County
Beaumont, Texas

Dear Sir:

Opinion No. 0-2987

Re: Liability of a defendant, convicted in the county court in a misdemeanor case, for costs incurred upon a former trial of the same case where he was found guilty, but a new trial was granted.

Your request for an opinion of this department has been received and carefully considered. We quote from your request as follows:

"There has been tried in the County Court at Law of Jefferson County a case styled State of Texas vs. Milton Stanley, in which the defendant was found guilty by a jury and assessed a fine of \$25.00, thirty days in jail and costs; the total fine and costs amounting to \$60.50.

"This defendant made motion for a new trial which was granted, and in the new trial pled guilty before the Court and was assessed a fine of \$25.00 and costs, the total fine and costs in this new trial amounting to \$47.95.

"In the first trial it was necessary for us to issue subpoenas, use a jury, and file papers, causing the cost in the previous trial to run higher than the one tried by the Court on the plea of guilty. My question is, should we collect the amount of costs in the new trial, plus the fee of the issuance of subpoenas, the jury fee, etc. in the former trial, or should we collect only the fees earned in the latter trial? Attorneys for the defendant are contending that when the new trial is granted, all the costs in the former trial are lost and the only fees due are the fees incurred in the new trial."

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As in civil cases, so in criminal prosecutions, costs are unknown at common law and are only given by virtue of statute. 7 R.C.L., p. 798.

Article 783, Texas Code of Criminal Procedure, 1925, reads in part as follows:

"When the defendant is only fined the judgment shall be that the State of Texas recover of the defendant the amount of such fine and all costs of the prosecution,...."

We quote from the case of Overstreet vs. State (Court of Criminal Appeals of Texas) 15 SW (2d) 1039, (rehearing denied) as follows:

"Chapter 4, Title 15 of the C.C.P., prescribes the costs to be taxed against a defendant in misdemeanor cases...."

"....We are satisfied that in this case appellant was convicted of a misdemeanor, in which case no costs of this trial are payable to any officer, out of State funds; nor do we find any provision in Chapter 3, Title 15, C.C.P., relating to costs, which would warrant holding the costs in a case like this payable out of county funds. Chapter 4 of said title, however, sets out in substance and at length that all costs in misdemeanor cases shall be taxed against the defendant...."

In taxing costs in a case in which the appellant has been convicted, items of expense which accrued in another case against appellant, pending in the same court, which has been dismissed should not be made a charge against him. *McArthur vs. State*, 41 Tex. Crim. Rep. 635, 57 SW 847; *Texas Juris.*, Vol. 11, p. 392. Nor, in case of a conviction under a second information, should the appellant be taxed with the costs of the proceeding under the first information, this proceeding (under the first information) having been reversed on appeal. *McKinney vs. State*, 41 Tex. Crim. Rep. 413, 55 SW 337; *Texas Juris.*, Vol. 11, p. 392.

In the case of *McKinney vs. State*, supra, the defendant at a former trial was convicted of a misdemeanor, and, on

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appeal, the judgment was reversed, on account of a variance between the information and complaint, and the county attorney was ordered to file a new information. A new information was filed, the trial was had under the new pleading and the defendant again convicted. We quote from the opinion of the Court in the case of McKinney vs. State, supra, on the subsequent appeal, as follows:

"Motion was made to retax costs. The cost bill includes all items accruing in the former prosecution, including the costs of this court on appeal. Under the Turner case, (Turner vs. State, 21 Tex. App. 198, 18 S.W. 96) supra, the filing of the new information was the commencement of a new proceeding, and all items of costs accruing prior to the filing of the second information should have been excluded...."

On the same principle, it has been held that, if an indictment is quashed or dismissed for defects therein, and on the trial of a second indictment for the same offense defendant is ordered to pay the costs, the costs of the first indictment cannot be included. 20 C.S.S., Costs, Sec. 454d.

However, where a subsequent trial is had after a mistrial, or failure of the jury to agree, or the grant of a new trial, the defendant upon conviction is properly chargeable with the costs of both trials. See Hill vs. State, 107 So. 789, 21 Ala. App. 310; Nicholson vs. State, 187 P. 1013, 24 Wyo. 347; State vs. Birch, 49 P. 2nd 921, 183 Wash. 670; 20 C.S.S., Costs, Sec. 454d.

We wish to call your particular attention to the case of Nicholson vs. State, supra, where the court based its holding on a Wyoming statute, substantially the same as Article 783, Texas Code of Criminal Procedure, 1925, supra. In the Nicholson case, supra, the defendant was convicted of criminal libel and sentenced to pay a fine and costs of prosecution. There had been a mistrial of the case, the jury on the former trial having failed to agree. In the judgment appealed from, the costs of both trials were taxed against the defendant. The defendant's motion to retax the costs of the mistrial as being erroneously taxed against him was denied, from which ruling he appealed. The Wyoming Supreme Court held the ruling to be correct, basing it on the following statute:

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"In all cases of a conviction of an offense, the court shall render judgment against the defendant for the costs of prosecution." Sec. 6034, (Wyo.) Comp. Stat. 1910.

We quote from the court's opinion, as follows:

"The prosecution was commenced by the filing of the information and did not end until final judgment was pronounced. Until then it was the same prosecution, the same case, and the costs of prosecution included all costs of such prosecution in the trial court. It is the general rule that when judgment is rendered against a party to an action after he has secured a new trial on appeal he should be taxed with the costs of the trial court on the first trial as well as on the second trial. Williams vs. Hughes, 139 N.C. 17, 51 S.E. 790."

In the case of State vs. Birch, supra, the defendant was convicted of a misdemeanor, after which he moved for, and was granted, a new trial, and was again convicted upon the second trial. By the judgment of the trial court, the appellant was required to pay all costs of prosecution for both the first and second trials. In holding that the appellant was correctly assessed with the costs of both trials, the Supreme Court of Washington observed in its opinion as follows:

"It is proper that the costs should abide the ultimate outcome of the prosecution."

You are respectfully advised that under the facts stated in your request, it is the opinion of this department that both trials of Milton Stanley, being based on the same information, were parts of the same proceeding or prosecution, and that the defendant, being liable for "all costs of the prosecution," is properly chargeable with the costs of both trials. You should, therefore, collect the amount of costs in the new trial, plus the fee of the issuance of subpoenas, the jury fee, etc., in the former trial.

We respectfully wish to point out, however, that the foregoing opinion is based on the assumption, from your request

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letter, that both trials were based on the original information. However, if after the motion for new trial was granted, the case was dismissed, a new information filed and the second trial had upon the new information, the second trial would constitute a separate and distinct proceeding or prosecution and, in such case, the defendant would be properly chargeable with only the costs of the second trial.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By *Edgar Pfeil*

Edgar Pfeil
Assistant

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APPROVED JAN 14, 1941

Gerardo Mann

ATTORNEY GENERAL OF TEXAS

