

Opinion No. 54-6035

November 8, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Honorable James C. Compton Assistant District Attorney Ninth Judicial District
Portales, New Mexico

{*502} Recently, you requested the opinion of this office with regard to whether or not the State of New Mexico is liable for the cost of service of subpoenas upon witnesses subpoenaed by an indigent defendant, represented by a court-appointed attorney, when such a defendant is found not guilty, and as to whether or not the fees of such witnesses should be paid by the State.

Article 2, Section 14 of the Constitution of New Mexico provides, in part:

{*503} "In all criminal prosecutions, the accused shall have the right . . . to have compulsory process to compel the attendance of necessary witnesses in his behalf . . ."

As you note in your letter, our State has no statute providing for the payment of the costs of service upon witnesses subpoenaed by an indigent defendant, nor for the payment of the fees of such witnesses, by the State.

It has been held, in the construction of constitutional provisions similar to Article 2, Section 14, that the serving of a subpoena upon a defendant's witness is a necessary part of "compulsory process", and that such service should be made without cost to the defendant. 2 Bishop's New Criminal Procedure, § 959b, p. 771.

In the case of *Hoskins vs. Commonwealth*, 216 Ky., 358, 287 SW 924, the contention was made that the defendant had been denied compulsory process for procuring witnesses in his behalf, for the reason that a subpoena which had been delivered by his counsel to the sheriff for service had never been served. In answer to his contention, it was argued that the sheriff was not bound to serve the subpoena for the reason that it was not accompanied by a deposit upon his fees, as required by statute. The court held that service of a subpoena to compel the attendance of a defendant's witness was an integral part of "compulsory process", and that the defendant was not required to pay any fees for such service, the statute relating to deposits with the sheriff necessarily having application only to civil matters.

It thus appears to us that an indigent defendant has the right to have subpoenas served upon his witnesses by a sheriff without paying to that sheriff a fee for such service, or mileage expenses.

The question now arises as to whether or not, where an indigent's counsel has already paid such fees to a sheriff, those fees may be paid back by the State from the Court fund.

In this connection, it is our opinion that mileage fees and fees of service connected with the service of a subpoena are part of a defendant's "costs".

It is well settled that a successful defendant's costs may not be collected from the state or from any state agency in the absence of an express statutory provision for such recovery. *Meton v. State*, 30 Ala., App., 136, 1 So. 2d 920; *Cramer v. Smith*, 350 Mo., 736, 168 NW 2d 1039.

The rules of civil procedure for the District Courts of our State provide, in § 19-101 (54) (d), N.M.S.A., 1941:

"COSTS. Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as to course to the prevailing party unless the court otherwise directs; **but costs against the state, its officers, and agencies shall be imposed only to the extent permitted by law. . .**" (Emphasis ours)

We believe that the rule in criminal cases is the same as that which is expressed for civil cases in the foregoing rule, in that a defendant's costs may be imposed against the State, its officers, or agencies, only to the extent permitted by law.

A District Court, of course, is an agency of the State of New Mexico. There is no statute which permits the recovery of a defendant's costs *{*504}* of service of subpoenas upon his witnesses from the State. Hence, we are of the opinion that if such costs are actually paid out by an indigent defendant's counsel, such counsel's act, in so doing, is a voluntary one, for which he cannot be compensated by the State.

We believe that where a sheriff serves a subpoena for an indigent defendant, without receiving any fees for so doing, he must look to his county for compensation for his mileage fees, as he must look to his county for compensation for all other mileage expenses necessarily incurred in the performance of his duties, for which he is not otherwise compensated. It is, therefore, our opinion that such a sheriff has no right to receive such compensation from a court fund.

It is our opinion that an indigent defendant is entitled, as an essential part of his "compulsory process", to have the statutory fees for witnesses subpoenaed by him paid for him.

It is our understanding that it has long been the practice of courts of this State to pay such witnesses' fees from the Court fund. We believe that that practice is proper.

While expenditures from the Court fund are discretionary with the District Court, it would appear to be proper for an attorney for an indigent defendant to apply to the Court for

reimbursement for expenditures made by him in payment of witnesses' fees. It should be noted that most States have imposed statutory limitations upon the right of an indigent defendant to have his witnesses' fees paid by the State. Such statutory limitations are directed at the possible misuse of the right by such a defendant, and require that affidavits be submitted relating to the necessity of the testimony sought to be elicited from witnesses proposed to be subpoenaed for a defendant at State expense. We believe that it would be advisable for the Legislature of New Mexico to make specific, by statute, the right of an indigent defendant to have witnesses subpoenaed at State expense, in such a statute to restrict the use of such right in a manner which would prevent its possible misuse.

Trusting that the foregoing will answer your question satisfactorily, I am

By: Henry A. Kiker, Jr.

Assist. Attorney General