

Opinion No. 59-200

December 11, 1959

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Mr. Robert D. Castner State Auditor Capitol Building Santa Fe, New Mexico

QUESTION

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1. May a justice of the peace assess a fine and costs out of the amount of cash put up for an appearance bond by a criminal defendant when such appearance bond is forfeited for failure to appear at a hearing?
2. If the answer to question No. 1 is no, what steps must the justice of the peace take in disposing of the forfeited cash bond and how may he recover costs?

CONCLUSIONS

1. No.
2. See analysis.

OPINION

{*310} ANALYSIS

The sections of the statutes relating to appearance bonds in cases over which the justices of the peace have jurisdiction are §§ 36-15-1 et seq., N.M.S.A., 1953 Compilation. Section 36-15-1 reads as follows:

"When any party or witness shall have executed a bail bond, or entered into a recognizance, in any criminal cause, or in any civil cause wherein [a] capias may have issued before any justice of the peace, and the said party, or witness, is required to appear before said justice, at his office, within the proper precinct, at the time fixed by the terms of said bail bond or recognizance, upon the failure of said party or witness to appear aforesaid, it shall be the duty of the justice before whom the cause is pending, to declare said bail bond, or recognizance, forfeited, and he shall enter such judgment of forfeiture on his docket."

It is obvious from a reading of the statute that the amount posted for an appearance bond when the defendant fails to appear becomes forfeited and, therefore, constitutes a forfeiture which the defendant may not recover even if he later appears and defends the case on its merits. Such amount is clearly not a fine. A fine is a sum of money extracted

of a person guilty of an offense as a pecuniary punishment, the amount of which may be fixed by law or left to the discretion of the court. 15 Am. Jur., Criminal Law, § 541. When an appearance bond is forfeited, there has been no appearance of the defendant and, therefore, there can be no fine extracted since the defendant not being present, he cannot legally be found guilty of an offense. Article II, § 14, New Mexico Constitution.

Article XII, § 4 of the New Mexico Constitution provides that all fines and forfeitures collected under the general laws must be paid into the current school fund of the State. Therefore, the forfeited appearance bond, being a forfeiture, must be paid into such fund in its entirety and costs cannot be deducted therefrom.

Section 36-19-24 requires that justices of the peace pay to the county treasurer on or before the fifth day of each month all fines collected the previous month. While this section does not speak of forfeitures specifically, it is reasonable to assume that forfeitures should be paid in the same manner.

In summary, it is our opinion that a forfeited appearance bond must be in its entirety paid to the {311} county treasurer for credit to the current school fund of the state and a justice of the peace cannot legally assess a fine from this forfeited bond or recover costs therefrom.

In answer to your question No. 2, it is clear that a justice of the peace may collect \$ 5.00 in costs for each criminal case docketed. Section 36-19-1, N.M.S.A., 1953 Compilation (P.S.). However, this section must be read in conjunction with § 36-19-18, N.M.S.A., 1953 Compilation (P.S.), which allows the recovery of costs from the funds of the county treasurers of the counties in which the justice of the peace is sitting. This section also requires that the justice shall, in the event the defendant is found guilty, attempt to recover said costs from said defendant and any cost so recovered shall be paid over to the county treasurer. In our opinion, a fair construction of this statute is that where the defendant fails to appear and forfeits his appearance bond, the justice of the peace has at that time a right to collect the \$ 5.00 costs from the county treasurer. However, he also has the duty to make a reasonable attempt to bring the nonappearing defendant before him for an adjudication of the case on its merits, and if the defendant is found guilty, to make diligent attempt to recover the costs from him and return such costs to the county treasurer.

By: Philip R. Ashby

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