

## **Opinion No. 60-149**

August 11, 1960

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

**TO:** Senator Fabian Chavez, Jr. Chairman, State Judicial System Study Committee 201 State Capitol Santa Fe, New Mexico

### **QUESTION**

#### **QUESTIONS**

1. When an accused is arrested and placed in confinement to await trial, may a justice of the peace, in addition to his statutory court costs tax as costs against the defendant:

(A) A constable's or sheriff's fee for the service of a warrant of arrest on the defendant in jail;

(B) Constable's or sheriff's fee for transportation of the defendant between the jail and the court for trial, and

(C) A constable's or sheriff's fee for service of commitment following trial of the defendant.

2. If such fees are proper, should that be charged against the county?

#### **CONCLUSIONS**

1. (A) No; (B) See analysis; (C) Yes.

2. Yes.

### **OPINION**

#### **{\*533} ANALYSIS**

Section 41-13-4, N.M.S.A., 1953 Comp., provides:

"In every case wherein there is a conviction, the costs shall be adjudged against the defendant."

Section 36-19-18, N.M.S.A., 1953 Comp. (PS), provides:

"Hereafter justices of the peace, who, at the instance of any county or state law enforcement agency, shall hold or try criminal proceedings, shall recover the costs

allowed by law from the funds of the county treasurers of their respective counties; provided, however, that said justices of the peace, shall, in the event the defendant is found guilty, attempt to recover said costs from said defendant and any costs so recovered shall be paid over to the county treasurer."

Section 36-19-2, N.M.S.A., 1953 Comp. (PS), provides:

{\*534} "Constables shall hereafter be allowed to demand and receive the following fees, to wit: The same fees as are allowed by law for service of process and mileage by sheriffs.

No fees other than those herein provided shall be charged and collected."

We have held in Attorney General's Opinion No. 6554 that the word "costs" in Section 41-13-4 means incidental costs, or those necessary costs spent by the State in the prosecution of the case. This includes witness fees, witness mileage, docket fees and justice of the peace fees, jury fees, jury mileage, jury meals, bailiff's mileage and sheriff's costs among others.

It must be kept in mind that the construction of the word "costs" limits itself to those **necessary and incidental costs**. Under no theory could we hold that a defendant may be assessed costs which are not necessary or incidental to the prosecution in a criminal case. As we have pointed out under Section 36-19-2, supra, a constable is paid on the same basis as is the sheriff.

A comprehensive fee schedule for sheriffs will be found in 15-40-18, N.M.S.A., 1953 Comp. (PS), and is self-explanatory. This section also provides in part that such fees "shall be paid sheriffs out of the general county funds of the county wherein the services were rendered . . ."

It is clear, therefore, that the constable shall be paid by the county in the same manner provided by statute for payment to sheriffs.

Proper items subject to the above reasoning may be charged against the Defendant, if convicted, as costs.

Applying the above reasoning to the questions presented by you, we are of the opinion that no cost may be assessed for the service of warrant of arrest on an individual who is already under arrest and held in jail. This cost is unnecessary and unreasonable and is not incidental to the prosecution. The transportation fee for carrying the defendant between the jail and the court for trial may be properly assessed against him, if convicted. There may be instances where the defendant is transported between the jail and the court for unnecessary and unreasonable purposes and in that event, the defendant could not be forced to pay the costs. This is a matter of fact and not subject to an unalterable rule. We further feel that the carrying out of the order of the court,

including a commitment order, is a fee which may properly be assessed against the convicted defendant.

Question 2 has already been answered in the affirmative. The justice of the peace should collect and turn over to the county all costs assessed against the defendant, and the county, in turn, must pay the constable for services performed which are compensable under the laws of this state.

It might be in order to point out that the manner of collecting for mileage costs generally is spelled out in Section 15-43-11, N.M.S.A., 1953 Comp., and that this section applies to both sheriffs, deputies and constables.

This section requires the submission of sworn itemized accounts filed in the county clerk's office and approved by the county commissioners **and** the district judge.