

Opinion No. 61-128

December 8, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E. Payne, Assistant Attorney General

TO: Mr. Louis R. Lopez, Administrative Assistant to Court Administrator, Supreme Court Building, Santa Fe, New Mexico

QUESTION

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1. May a justice of the peace charge more than one five-dollar docket fee, if two or more charges are filed against a defendant in one criminal complaint?
2. When a defendant is arrested on a charge of driving while intoxicated, and consents to take a blood test, if he is subsequently convicted of the offense, can the justice of the peace assess an additional cost against the defendant to reimburse the county for the expense incurred in making the blood test?

CONCLUSIONS

1. No.
2. No.

OPINION

ANALYSIS

Section 36-19-1, N.M.S.A., 1953 Compilation (P.S.), provides that a justice of the peace is entitled to demand and receive five dollars "for each civil or criminal case docketed." No matter how many counts or charges are filed against a defendant in a single criminal complaint, there is still only one case docketed. Consequently the five-dollar docket fee is all that can be charged since Section 36-19-1, *supra*, also provides that "no fees, other than those herein provided, shall be charged or collected . . ."

There are two statutory enactments relevant to an answer to your question concerning assessment of the cost of a blood test against an individual who is subsequently convicted of driving while intoxicated. Section 41 - 13 - 4, N.M.S.A., 1953 Compilation, provides as follows:

"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 Compilation (P.S.) provides that:

"The county treasurer shall pay the court costs allowed by law to any justice of the peace in the county who docket a criminal case upon the complaint of a county or state law enforcement agency. If the defendant is found guilty, the justice of the peace shall attempt to recover the costs from him and any costs recovered shall be paid to the county treasurer."

At common law, costs, as such, were unknown in the criminal law. Consequently the liability for costs is a purely statutory matter. **State v. Faulkner**, Wyo., 292 P.2d 1045; **Cramer v. Smith**, 350 Mo. 736, 168 S.W. 2d 1039.

As can be noted from the above-quoted statutes, the "costs" to be assessed against a convicted defendant are not expressly enumerated. But the general rule is that the term costs ordinarily includes only items directly connected with the actual presentation of testimony and the fees of specified officers. **Ex parte Miller**, Okla. Cr., 263 P. 2d 522; 20 C.J.S., Costs, Section 453. See Attorney General Opinion No. 60-149. And while the results of a blood test will generally be presented during the trial of a driving while intoxicated case, still such tests are more in the nature of pre - trial investigatory work. Since cost statutes are penal in character and thus to be strictly construed (**State v. Faulkner**, supra; **Melton v. State**, 30 Ala. App. 136, 1 So. 2d 920), we do not believe our cost provisions should be interpreted as including such physical tests. The next logical step would be to assess all costs of any criminal investigation against a defendant who was subsequently convicted of the alleged offense. How such a broad definition of costs could snowball is readily to be observed.

In the case of **Commonwealth v. Sofka**, 30 Pa. Dist. & Co., 507, 26 North 88, the court did uphold the assessments of costs for an expert chemical analysis of certain liquor samples against a defendant convicted of a liquor law violation. But the Pennsylvania statutory cost provision was considerably broader than that in this jurisdiction. It specifically provided that the costs to be assessed against a convicted defendant were to include the necessary expenses incurred by the district attorney, his assistants or officers directed by him in a criminal investigation. In the absence of such an express provision, it is our opinion that the costs assessed against a convicted defendant should not include expenses incurred by the political subdivision in making an investigation of the alleged crime.