

Opinion No. 61-83

September 11, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A. Donnelly, Assistant Attorney General

TO: Mr. Philip T. Manly, Attorney, State Judicial System, Study Committee, 201 State Capitol Building, Santa Fe, New Mexico

QUESTION

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1. Must a justice of the peace collect court costs from persons signing a complaint if they are other than officers of the law?
2. If a defendant is apprehended and appears before the justice of the peace and is found guilty of the charge against him and fined therefor, should court costs be assessed?
3. If court costs are assessed and collected against such defendant, what disposition should be made of the original courts costs which have been formerly collected?
4. If court costs have been collected from plaintiff on July 20, 1961, and remitted to the county treasurer, then six months hence subject is brought before the court, and fined the court costs assessed and collected, what disposition is to be made with the court costs?
5. If a person without means is attacked and beaten and his attackers are known to him, are the culprits to go free if the plaintiff does not have funds to pay the court costs?

CONCLUSIONS

1. See analysis.
2. Yes.
3. See analysis.
4. See analysis.
5. No.

OPINION

ANALYSIS

1. In answer to the first question presented by you, a justice of the peace may demand and is entitled to receive, payment in advance for the amount of the statutory docket fee allowable by law, prior to the docketing of a criminal complaint in his court by a private citizen filing a case therein as a complaining witness. However, it is not mandatory that a justice of the peace demand such fee as costs in advance of the docketing of such criminal case, and whether or not the docket fee is required to be payable in advance is subject to the discretion of the individual justice of the peace in each particular case.

Under the pertinent provisions of Section 36-19-1, N.M.S.A., 1953 Compilation, it is provided that:

"Justices of the peace in the State of New Mexico shall hereafter be allowed and entitled to demand and receive fees hereinafter stated, to-wit: For each civil or criminal case docketed . . . \$ 5.00".

As stated in the above section, a justice of the peace is "allowed and entitled to demand and receive fees hereinafter stated." We interpret this language to vest in each individual justice of the peace the discretion of whether or not he will require the payment in advance of the docket fee to which he is entitled by statute for criminal cases.

The justice of the peace may elect in the alternative not to require the payment of the docket fee in criminal cases in advance, and may await the final outcome of the case and attempt to recover such cost from the defendant if he is found guilty. If the defendant is acquitted, the justice of the peace may recover such fee from the private individual who filed the case as a complaining witness. In the latter situation, where a justice of the peace failed to require prepayment of fees for docketing a criminal case, and the defendant has been cleared of the charge against him, the justice may if necessary maintain a civil action against the complaining witness to recover such costs.

The right of a justice to collect such fee by a separate civil action is stated in 51 C.J.S., "Justices of the Peace," Section 17, at Page 35:

"A justice may maintain an action for recovery of his fees against the person liable for them, even in the absence of express statutory provision for such action, and his failure to exact prepayment, as under the statute he might do, will not defeat his right."

In the case of **State ex rel., Kane et al., v. Dobler, Justice of the Peace**, (1938), 81 P 2nd 300, 53 Wyo., 252, The Supreme Court of Wyoming held that a justice of the peace may in his discretion either require the payment of fees allowable by statute to him in advance, or assess such costs at a subsequent stage of the proceeding, but that it was not required by statute that such fees be collected in advance of docketing the case. The Court in this case stated:

"We also find 22 Ruling Case Law 529, Section 222, saying:

"Where there is no statutory provision fixing the time when the fees of an officer are due and demandable but it clearly appears that it was the intention of the lawmakers that he should receive a reasonable compensation, he may charge reasonable fees and may demand their payment in advance before rendering his services."

The Court in the above case also held:

". . . we have no doubt that the clear policy of the law was intended to be that the fees so provided for should be payable in advance if the justice should see fit so to demand them. A different rule would jeopardize the receipt of his legal fees by such an officer, and would in all likelihood cause him at times personal loss in the performance of his official duty."

The term "court costs" is often used very loosely. Reference is made to former Attorney General's Opinion No. 60-149, August 11, 1960, wherein it was stated:

"We have held in Attorney General's Opinion No. 6554 that the word "costs" in Section 41-13-4 means incidental 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 a defendant may be assessed costs which are not necessary or incidental to the prosecution in a criminal case."

In 51 C.J.S., "Justice of the Peace" Section 17, at Page 35, it is similarly provided:

"A justice of the peace has the right, sometimes by express provision of statute, to demand in advance the payment of his fees for every official service rendered by him; but he may not require prepayment for services probably, but not necessarily, to be rendered in the further conduct of the cause."

Thus, under the language of Section 36-19-1, N.M.S.A., 1953 Compilation, and the rationale of the above authorities, it is our opinion that a justice of the peace may in his discretion require the advance payment of the docket fee prior to docketing a criminal case, where the person signing the complaint is other than a Representative of a County of State Law enforcement agency. However, such advance collection of the docket fee is not mandatory on the part of a justice of the peace in such instance, either from a private person or an individual as prescribed in Section 36-19-1, N.M.S.A., 1953 Compilation.

2. The answer to your second question is governed by the provisions of Sections 41-13-4, N.M.S.A., 1953 Compilation, and Section 36-19-18, N.M.S.A., 1953 Compilation (being Laws 1961, Chapter 105, Section 1).

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 (being Laws, 1961, Chapter 105, Section 1) provides:

"The county treasurer shall pay 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 cost's from him and any costs recovered shall be paid to the county treasurer."

Under the language of the above two statutory provisions, it is our opinion that the justice of the peace is under an obligation to impose and attempt to collect court costs from the defendant in each case wherein he has been found guilty of the offense charged.

3. In answer to your third question, regarding the disposition of costs when the Court costs have been previously collected in advance by the justice of the peace from either a private individual docketing a criminal case as a complaining witness, or from the county treasurer, where the case has been docketed by a county or state law enforcement agency, and subsequently court costs have been assessed and collected from the defendant after he has been found guilty, then in such situation, it is our opinion that the justice of the peace may retain the prior docket fee collected by him, and should remit such subsequently collected court costs to the county or private individual docketing the case, whichever the case may be. This question was partially dealt with in our previous Attorney General's Opinion No. 61-66, dated July 24, 1961.

4. In respect to your fourth and fifth questions, a distinction should be drawn between the term "plaintiff" and "complaining witness." In criminal cases wherein a complaint is filed by a private person, such individual is termed the "complaining witness", and in civil cases the person initiating the action is termed the "plaintiff."

In answer to the problem posed by your fourth question, the justice of the peace should in such case upon the recovery of the amount of court costs from the defendant, remit the amount of such costs out of the cost monies last collected, to the private individual who prepaid such costs in advance.

5. In response to your last question, the answer is no. If the complaining witness in a criminal case is indigent and unable to pay the amount of the docket fee in advance, the

justice of the peace may in his discretion docket the case and attempt to recover the amount of the docket fee from the defendant as costs in the event the accused is convicted.

The better practice in such cases, however, would be for the justice of the peace to refer the complaining witness to the appropriate county or state law enforcement agency which agency may in their discretion file the case without expense to the complaining witness, under the provisions of Section 36-19-18, N.M.S.A., 1953 Compilation. In such cases, Section 17-1-13, N.M.S.A., 1953 Compilation provides that the district attorney may appear before the justice of the peace in any matter arising before the courts of justices of the peace, when in his opinion the interests of the people demand his services.