

Opinion No. 65-177

September 9, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Frank Bachicha, Jr., Assistant Attorney General

TO: Mr. Salomon Vallejos, Clerk of the District Court, Second Judicial District, P.O. Box 488, Albuquerque, New Mexico

QUESTION

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What is the correct amount of docket fee which should be charged by the clerk of the district court upon the filing of a Petition for Delayed Appeal from justice of the peace court pursuant to Section 36-18-13 New Mexico Statutes Annotated, 1953 Compilation.

CONCLUSION

Six dollars and twenty-five cents (\$ 6.25), for an appeal from civil cause and two dollars and fifty cents (\$ 2.50) for an appeal from a justice of the peace criminal cause.

OPINION

{*291} ANALYSIS

In Attorney General Opinion No. 64-50 dated April 10, 1964, this office concluded that the docket fees chargeable for appeals of civil and criminal cases from justice of the peace courts were respectively \$ 6.25 and \$ 2.50.

Section 36-18-13 New Mexico Statutes Annotated, 1953 Compilation provides for a delayed appeal in the following language:

"36-18-13. DELAYED APPEAL -- PETITION TO DISTRICT COURT -- APPROVAL BY JUDGE -- CERTIORARI TO JUSTICE -- NOTICE TO APPELLEE. -- Whenever judgment shall be rendered by a justice of the peace, and from any cause whatever, either party shall be prevented or shall be unable to appeal within ten (10) days, and he shall believe that injustice has been done him in the trial, if any was had, and in the judgment, he shall make out his petition in writing to the district judge, within thirty (30) days from the rendition of the judgment setting forth the circumstances of the trial, as much as shall be necessary, and the reasons why he was unable, or was prevented from appealing in the ordinary way, and that the judgment is unjust, and setting forth the facts upon which such injustice shall be charged, and upon said petition being sworn to by the party, his agent, or attorney, it may be presented to the district judge, and if the judge shall be of the opinion that it sufficiently conforms to the provisions of this section,

he shall endorse his order thereon, that the clerk take from the petitioner, his agent, or attorney, such bond to the adverse party, with security, as the judge shall deem proper, {*292} and that upon such bond being made, the clerk issue certiorari to the justice to forthwith send up the full transcript, together with the papers in the cause. The clerk shall also issue a notice, notifying the adverse party that an appeal has been taken."

We understand that the situation which has prompted the present inquiry concerns the issuance of certiorari to a justice of the peace, heretofore considered an original civil case filed in district court, which results in the transmittal of the full transcript in a criminal justice of the peace cause to the district court, and which then requires a transfer from the district court civil docket to the criminal docket. It appears that it is improper to consider the petition used in a delayed appeal as a case separate from and independent of the appeal. In other words, it would not seem to be proper to collect the normal docket fee as in other original civil actions in district court when the petition for delayed appeal is filed and subsequently, when certiorari issues, to charge another docket fee for filing the appeal. This would, in fact, impose a financial penalty upon the person who was required to utilize the procedure for delayed appeal, for reasons possibly beyond his control. We do not believe it could have been the intent of the legislature to treat differently the members of this class, i.e., appellants from justice of the peace courts. We are not convinced, either that the use of the term "certiorari" in Section 36-18-13, supra, contemplates an independent proceeding.

The case of **Lea County State Bank v. McCaskey Register Co.**, 39 N.M. 454, 49 P.2d 577 (1935) explains clearly the function of the Writ of Certiorari provided for in the above mentioned Section 36-18-13. In that instance a delayed appeal had been taken from a justice of the peace court to district court. A petition was presented to the district judge who proceeded to order the issuance of a Writ of Certiorari. The clerk of the court inadvertently failed to issue the Writ. Upon motion to dismiss by the plaintiff the district court ruled that it had not acquired jurisdiction since no transcript of the proceedings had been filed by the justice of the peace. In reversing the district court, the Supreme Court discussed the purpose of the Writ of Certiorari. It said in pertinent part at pages 461 and 462:

"As indicating that section 79-515 (36-18-13) provides for an 'appeal' and does not provide for a review by certiorari, **but that the certiorari to be issued by the clerk is merely ancillary process as a means of bringing up a record from the lower court, in aid of the jurisdiction of the district court, which has theretofore attached by the allowance of the appeal**, we call attention to the following considerations: An appeal is of a broader scope than certiorari. Review by certiorari does not provide for a trial de novo in the higher court, whereas both the Constitution and statute relate to 'appeals' from justice courts and require that the trial be de novo. Under section 79-516 (36-18-15) the trial is to be de novo where the case is 'appealed' **'in the ordinary mode'** and also in all cases **'appealed** by petition or certiorari.' Section 76-515 (36-8-13) . . . also recites that the clerk shall issue a summons notifying the adverse party 'that an **appeal** has been taken.' It will be noted that it is not said that the summons is to notify the adverse party that a writ of certiorari has been issued . . . It seems to us that

the filing of the petition for appeal, if it in the opinion of the judge 'conforms to the provisions of this section,' followed by the filing of appeal bond is sufficient to vest jurisdiction of the subject-matter in the district court, and that his order upon the clerk to issue certiorari is {*293} in aid of the jurisdiction which has thus attached. It would seem to be anomalous to say that a court may order certiorari to be issued and that he has no jurisdiction of the subject-matter until the writ of certiorari is issued. . . ." (First emphasis ours.)

It can thus be seen that the procedure for effecting a delayed appeal is, for all practical purposes, the same as that employed for a regular appeal, with the exception that one is a matter of right (regular appeal), while the other rests upon the sound discretion of the district court (delayed appeal). In both instances, however, the proceeding in the district court is "de novo". See Section 36-18-15 New Mexico Statutes Annotated, 1953 Compilation. Thus it is clear that the Writ of Certiorari employed in the present situation is not an independent proceeding but rather is ancillary to the appeal commenced as prescribed by Section 36-18-13, supra, by the filing of the petition with the district court.

It is the opinion of this office, therefore, based upon the foregoing analysis that the correct amount to be collected by the district court clerk upon the filing of the petition for delayed appeal is six dollars and twenty-five cents (\$ 6.25) for an appeal from a justice of the peace civil case and two dollars and fifty cents (\$ 2.50) for an appeal from a justice of the peace criminal case.