

Opinion No. 65-36

February 25, 1965

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

TO: Lowell C. Green, Director, Administrative Office of the Courts, Supreme Court Building, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. When a defendant in a criminal case demands a jury trial, under Section 36-12-3, N.M.S.A., 1953 Compilation, is he required to pay the amount of jury fees in advance?
2. If such defendant is found "not guilty" of the charge, should jury fees advanced prior to trial be returned to him?
3. If such defendant is found "guilty" and subsequently appeals the case to the district court, where he is found "not guilty," is the amount advanced returned to him or is he assessed with jury costs anyway?

CONCLUSIONS

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

OPINION

{*61} ANALYSIS

In Attorney General Opinion No. 64-37, dated March 24, 1964, this office held that "In criminal cases over which a justice of the peace has jurisdiction, a defendant is entitled to a jury trial by a six man jury, if demand is timely made." This right is derived from Article II, Section 12, New Mexico Constitution, implemented by Section 36-12-3, N.M.S.A., 1953 Compilation, in the following language:

"36-12-3. Trial by Jury. -- In all trials before justices of the peace for offenses within their jurisdiction the defendant may demand a jury, which shall consist of six (6) jurors, to be summoned in the same manner as jurors in civil cases in justice courts, and said jury shall be empaneled and sworn, but nothing herein shall be held to authorize a jury in

justice court on preliminary examinations, nor in prosecutions under municipal ordinances."

Your first question above asks whether jury fees should be paid in advance by a defendant in a criminal case, upon his demand for a jury trial. By Laws of 1959, Ch. 163, § 1, now compiled as Section 36-5-17.1, N.M.S.A., 1953 Compilation, our legislature has directed as follows:

"36-5-17.1. JURY FEES -- TAXING AS COSTS. -- In all cases wherein a jury trial is demanded including including inquests, each juror summoned and empaneled shall be paid at the rate of one dollar fifty cents (\$ 1.50) a day. **The jury fee shall be taxed as a part of the court costs in the case against the losing party.**" (Emphasis supplied).

There is absolutely no indication that the above section was not intended to be applicable to criminal cases. This statute appears to confirm the right to trial by jury provided for in Section 36-12.3, supra, by setting forth the amount to be paid to each juror. Further, it must be presumed that the legislature was aware of all existing laws at the time of the enactment of Section 36-5-17.1, supra, without expressing a limitation.

Justices of the peace are required, by Section 36-19-18, N.M.S.A., 1953 Compilation, to attempt to recover the costs from a defendant who is found guilty. Any costs recovered are then to be paid to the director of the administrative office of the courts. The question then arises whether jury fees are properly included within the term "costs." Attorney General Opinion No. 6554, dated December 3, 1956, answers this question for us. It was there concluded that the word "costs" as employed in Section 41-13-4, N.M.S.A., 1953 Compilation, was broad enough to cover jury fees. This section is a part of our criminal procedure law and is, we believe, correlative to Section 36-19-18, supra.

While it is clear that jury fees as costs should be collected by a justice of the peace for a defendant adjudged "guilty," it is doubtful whether such jury fees could be collectible in advance of a trial. Certainly no grave injustice would be perpetrated upon a defendant who was able and willing to deposit the amount of the jury fees with the court, to be held pending the outcome of the case against him. The problem would arise where a defendant was not able, financially, or was unwilling to pay such fees but still demanded a jury trial. It is our feeling that his demand for a jury trial would have to be honored notwithstanding his inability or unwillingness to pay the costs for such in advance.

{*62} It is thus our opinion that the answer to your Question No. 1 above must be in the negative; however, this does not preclude the justice of the peace from accepting the amount of jury fees from a defendant who offers to deposit the same with the court pending a determination of his trial.

Your question No. 2 requires an answer only because there is the possibility that some defendants will wish to deposit the amount of the jury fees with the court pending determination of the trial, although, we might hazard a guess that there will be few, if any, of such instances. Neither reason nor authority would uphold an imposition of costs

of prosecution against one who was found "not guilty" of the charge lodged against him. The same principle would apply to the refund of costs deposited by a defendant in advance of his trial, and would require that the justice of the peace return the same to a defendant found "not guilty."

Your third question is essentially the same as No. 2 above, except that in question No. 3 the defendant is found "guilty" in the justice of the peace court and upon appeal to the district court is found "not guilty." The effect, however, appears to be the same and should require a refund of the costs deposited by the defendant in the justice of the peace court to cover the jury fees, although, again such advance payment would probably not occur too often, if at all.

While not the rule, it is sometimes the practice that a defendant who is found guilty in the justice of the peace court will pay all costs imposed upon him and only subsequently will he appeal the decision to the district court. It has been our previous advice to justices of the peace to remit all papers plus all monies collected in a case which is appealed, to the district court clerk's office pending disposition of the appeal. In the event of an affirmance of the justice of the peace judgment, Section 36-18-12, N.M.S.A., 1953 Compilation requires the clerk of the district court to collect the costs due the justice of the peace and to transmit the amount of such costs to the court from whose judgment the appeal was taken. This same procedure regarding transmittal can be followed where the costs have already been paid, and sent to the district court clerk's office pending appeal. It is our feeling that where the defendant is ultimately found not guilty any costs paid by such defendant in justice of the peace court, and not transmitted to district court, can be refunded to him, **if such are still available** in the justice of the peace court.

Another common occurrence bears upon and may effectively prevent a refund of any monies paid by a defendant in advance of his trial. Assume that payment of all costs, etc., imposed by the justice of the peace court, is effected after conviction. Subsequently, but prior to the filing of an appeal, the justice of the peace remits all costs collected, fines or forfeitures imposed, to the Administrative Office of the Court pursuant to the requirements of Section 36-19-24, N.M.S.A., 1953 Compilation; the Administrative Office of the Court in turn remits all monies collected from justices of the peace to the State Treasurer in accordance with the mandate in Sections 36-19-20 and 36-19-24, N.M.S.A., 1953 Compilation. After this stage in the prescribed procedural operation, a refund of monies from the State Treasury, even though paid erroneously, may not be made in the absence of an appropriation therefor as directed in Article IV, Section 30, New Mexico Constitution, as follows:

"[Appropriations - Requirements.]

Except interest or other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the legislature. No money shall be paid therefrom except upon warrant {*63} drawn by the proper officer. Every law making an

appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied."

It is thus our opinion in answer to Question No. 3, that a refund of jury costs paid by a defendant to a justice of the peace may be effected, if he is found not guilty by the district court upon appeal; provided that such costs have not yet been remitted to the Administrative Office of the Courts.