

Opinion No. [30-28]

September 6, 1930

TO: Office of the Attorney General of New Mexico

HABITUAL CRIMINALS -- State to pay expense of return for re-sentence.

OPINION

I have your favor of the 5th inst. in which you request an opinion as to whether or not it is legal for you to pay the expenses of a county sheriff in retransporting to the penitentiary a prisoner who was sent back to his county for re-sentence under the Habitual Criminal Act, in view of the fact that the sheriff's expenses for transporting said prisoner had already been paid in the first instance.

At first glance, it would seem that since the State has once paid the expenses of a sheriff in transporting a particular prisoner to the penitentiary, it should not be required to again pay for such expenses when, perhaps, the re-sentence of such prisoner should have been made before he was ever transported to the penitentiary in the first instance. However, § 35-4204 of the Code of 1929, provides that:

"If at any time, either after sentence or conviction, it shall appear that a person convicted of a felony has previously been convicted of crimes as hereinbefore set forth, it shall be the duty of the district attorney of the district in which such conviction was had, to file an information accusing the said person of such previous convictions. Whereupon the court, in which such conviction was had, shall cause the said person, whether confined in prison or otherwise, to be brought before it * * *,"

and, this throws a somewhat different light on the situation. You will note from the foregoing that the law provides for a re-sentence of a habitual criminal "at any time, either after sentence or conviction." This provision was undoubtedly meant to cover cases where previous convictions were not known at the time of the original sentence, but were discovered perhaps many months subsequent thereto.

Such being the case, it is obvious that where the prisoner has already been confined in the penitentiary on his original sentence, it is not only necessary, but in reality it becomes the duty of the court to cause such prisoner, "whether confined in prison or otherwise," to be brought before it for re-sentence in conformity with the procedure outlined in said § 35-4204 of the Code.

Therefore, in view of all of the foregoing, I am of the opinion that the State of New Mexico should stand the expense of a sheriff in retransporting a prisoner to the penitentiary who has been ordered back for re-sentence. Hence, your question must be answered in the affirmative.