

Opinion No. [30-68]

May 2, 1930

TO: Office of the Attorney General of New Mexico

PRISONERS -- Charges for the expenses incurred in the maintenance of prisoners removed from a county to the penitentiary.

OPINION

Replying to your request for an opinion on the question of charges incident to the care and maintenance of two prisoners sentenced to death from Hidalgo County and removed to the penitentiary where they are to be cared for pending the outcome of their appeal to the Supreme Court, I beg to advise that in considering the question here presented we have examined several statutes:

Section 47, chapter 43, Laws of 1917, provides that all appeals in criminal cases shall have the effect of stay of execution of the sentence until the decision of the Supreme Court upon such appeal. Section 49 of the same act is as follows:

"If the defendant in the judgment so ordered to be stayed shall be in custody, it shall be the duty of the sheriff to keep the defendant in custody without executing the sentence which may have been passed to abide such judgment as may be rendered upon appeal."

Section 3049 of the Codification of 1915 charges the sheriff with the confinement and safe-keeping of persons so situated and provides authority for the sheriff to remove such persons to another county jail or other place of safety under certain conditions.

The Supreme Court of the State in the case, *Parks v. Hughes*, 24 N.M. 421, held that the power of removal in such cases was in the hands of the sheriff at his discretion and not in the district court. A later statute, that is, chapter 92 of the Session Laws of 1919, section 75-118, Codification of 1929, vests the district judge with authority to order removal when in his judgment the public welfare or the safe custody of a prisoner may require and the section provides that in such case the expense for the maintenance of such prisoner shall be borne by the county from which the prisoner has been ordered and said bill of expense made a preferential bill to be paid in full before any bill, fees, or salaries of such county are paid. Construing that section, the Supreme Court in the case, *State v. County Commissioners of Colfax County*, 33 N.M. 340, held:

"Where, pending appeal from conviction of felony, a prisoner is confined in the penitentiary, the county is liable for the expense of maintenance, under Laws 1919, c. 92, though the district court inadvertently committed the prisoner under the sentence appealed from instead of ordering his removal for safe-keeping, and though the prisoner was required to perform labor as a convict."

The legislature, in enacting section 1, chapter 69, Laws of 1929, section 35-321, Codification of 1929, no longer left it to the discretion of the sheriff or the judge to determine the advisability and necessity for removal of a prisoner upon whom the death sentence is pronounced by directing that the warrant filed by the judge and attested by the clerk, under seal of the court, and delivered to the sheriff, must direct the sheriff to deliver the defendant at a time specified in said order not more than ten days from the date of judgment to the warden of the State Penitentiary. We are unable to see that this in any way effects or changes the statute relative to the payment of the expenses of maintenance and are yet of the opinion that such expense should be paid by the county from which the prisoner is delivered.