1843

PERSON CONVICTED ON SIX SEPARATE INDICTMENTS, EACH CONTAINING ONE COUNT—SHERIFF OR POLICE OFFICER MAY CHARGE FEE FOR SERVICES FOR EACH INDICTMENT—§§311.17, 509.15, 1903.12, 2941.04, R.C.

SYLLABUS:

Where a person is charged and convicted on six separate indictments, each containing one count (three counts of grand larceny, two counts of burglary, and one count of breaking and entering), the sheriff may charge fees for his services under Section 311.17, Revised Code, for each indictment, and where a police officer has rendered services in connection with such indictments he may charge fees for his services under Sections 509.15 and 1903.12, Revised Code, for each indictment; in both instances regardless of the fact that under Section 2941.04, Revised Code, all six counts could have been consolidated in one indictment.

Columbus, Ohio, November 21, 1960

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

"W. B. was indicted by the grand jury of Warren County on 3 counts of grand larceny, 1 count of breaking and entering and, 2 counts of burglary in an uninhabited building; as a result of which he was convicted and sentenced to a term in the Ohio State Reformatory. The defendant was sentenced on each charge—sentences to run concurrently.

"The Clerk of Common Pleas Court has submitted to the Auditor of State 6 cost bills, assigning 6 different case number, on each of which fees have been charged by the Sheriff for the service and return of a copy of the indictment (Section 311.17 subsection (A) (16), together with mileage of 2 miles on each indictment. Likewise, a charge of $1.50 per day for a total of 2 days for bringing the prisoner before the court on each indictment, although actually the prisoner was brought before the court only once—all the cases being heard at the same time. Likewise, a $2.00 charge on each indictment for receiving, discharging or surrendering the prisoner on each charge and, likewise a charge of $1.50 on each of the 6 indictments for service and return of execution when money is paid without levy or no property found.

"Our question is:

May the Clerk of Courts tax as costs the above enumerated charges when a defendant is charged with more than one count and is before the court on all of the counts with which he is charged at the same time?

"Further, the Chief of Police or Sheriff (acting as the arresting officer in the Municipal Court) has charged $1.00 for each warrant to arrest, $1.00 for each case for committing to jail, and the 21 miles traveled to effect arrest and commit to jail is charged in each case even though *only* 21 miles were actually traveled and only one arrest was actually made.

"Our question is:

Can the arresting officer in Municipal Court charge these fees for each indictment (even though shown as individual cases), since the prisoner was apprehended only once?

"All six cases were tried in the May term of Court and certificate of execution was signed by the Clerk of Courts on May 18, delivered to the penal institution on May 23, 1960 and sentences are to run concurrently."

I also have copies of the six cost bills submitted to you by the clerk of the court of common pleas of Warren County. Each cost bill is for $19.75, representing a total of $118.50. The record clerk of the Ohio State Reformatory furnished me with copies of indictments returned by the grand jury in the instant question. There are six indictments, each containing one count. The accused was charged with grand larceny in three indictments, with burglary in two indictments, and with breaking and entering in one indictment. It appears in the light of items in the cost bills that the accused entered a plea of guilty to all offenses with which he had been charged.

It would appear that all of the offenses charged in the matter at hand could have been consolidated into one indictment (Section 2941.04, Revised Code). Since six indictments were returned, however, I must conclude that there were six separate cases and that the payment of costs must be viewed from this conclusion.

The answer to your question requires, basically, the interpretation of three sections of law, to wit: Sections 311.17, 509.15, and 2549.18, Revised Code.

The pertinent part of Section 311.17, Revised Code, reads:

"For the services specified in this section, the sheriff shall charge the following fees, which the court or clerk thereof shall

tax in the bill of costs against the judgment debtor or those legally liable therefor:

"(A) For the service and return of the following writs and orders:

"(1) Execution:

"(A) When money is paid without levy or when no property is found, one dollar and fifty cents;

"* * *

"(16) Copy of indictment, each defendant, one dollar.

"* * *

"(B) In addition to the fee for service and return the sheriff may charge:

"(1) On each summons, writ, order, or notice, a fee of ten cents per mile, going and returning, provided, that where more than one person is named in such writ, mileage shall be charged for the shortest distance necessary to be traveled;

"* * *

"(3) Jail fees, as follows:

"(a) For receiving a prisoner, one dollar, and for discharging or surrendering a prisoner, one dollar, to be charged but once in each case;

"(b) Taking a prisoner before a judge or court, per day, one dollar and fifty cents;

"(c) Calling action, twenty-five cents;

"* * *"

Section 509.15, Revised Code, which is by reference in Section 1903.12, Revised Code, made applicable to fees of a police chief or other police officer of a municipal corporation in respect to fees, reads in pertinent part:

"For services actually rendered and expenses incurred, regularly elected and qualified constables shall be entitled to receive fees and expenses, to be taxed as costs and collected from the judgment debtor, as follows:

"(A) Serving and making return of each of the following:

"(1) Search warrant, warrant to arrest, order to commit to jail, order on jailer for prisoner, order of attachment, order of ejectment, order of restitution, and writ of replevin, including copies to complete service, one dollar for each defendant named therein;

"* * *"

Section 2949.18, Revised Code, provides as follows:

> "When the clerk of the court of common pleas certifies on a cost bill that execution was issued under section 2949.15 of the Revised Code, and returned by the sheriff 'no goods, chattels, lands, or tenements found whereon to levy,' the person in charge of the penal institution to which the convicted felon was sentenced shall certify thereon the date on which the prisoner was received at the institution and the fees for transportation, whereupon the auditor of state shall audit such cost bill and the fees for transportation, and issue his warrant on the treasurer of state for such amount as he finds to be correct."

In Opinion No. 1728, Opinions of the Attorney General for 1920, Volume II, page 1199, the question was whether cost bills in criminal cases where a person convicted of several offenses was sentenced to the state reformatory should be allowed by the auditor of state on the same basis as they were allowed in cases where the convicted person was sentenced to the state penitentiary. Inasmuch as the prisoner involved in the present case was sent to serve his sentence in the state reformatory, although the question presented goes to the essence of what constitutes a proper cost bill under the described circumstances, the syllabus in said opinion is, by implication, squarely in point with the problem presented in the instant case. The syllabus in Opinion No. 1728, *supra*, reads:

> "Where a person has been convicted on two or more separate indictments charging different offenses, and has been sentenced on each to an indeterminate period of imprisonment in the Ohio State Reformatory, the costs in each case should be paid by the state in the manner provided by section 13722 G.C. et seq." (Present section 2949.10, Revised Code, *et seq.*)

The then Attorney General made the following observation, on page 1201 of the mentioned opinion:

> "Inasmuch as the payment of costs, in the case of a person sentenced on two more indictments to the Ohio penitentiary, rests on the basis of administrative practice, rather than upon any express statutory language, it would seem that the same practice should apply to the case of a person sentenced on two or more indictments to the Ohio state reformatory, both institutions relating to the same general class of offenders, to-wit, those convicted of felonies."

Also, in Opinion No. 820, Opinions of the Attorney General for 1959, the question dealt with one specific item in a sheriff's cost bill under Sec-

tion 311.17, Revised Code, covered in subdivision (B) (3) (a) of such section. I ruled in said opinion that a sheriff may charge jail fees for receiving a prisoner, and also for discharging a prisoner, once in each case against the prisoner.

It might be mentioned in this connection that a multiplication of cost bills in criminal cases, such as in the present situation, is barred in certain states. In Pennsylvania, for example, such multiplication was first outlawed by judicial determination. See *Commonwealth v. Rice*, 3 Dist., 259, and *Commonwealth v. Shull*, 28 Del. Co., 18. In 1905, the legislature of that state passed a law expressly prohibiting multiplication of cost bills "when one return, one complaint, one information, one warrant, one subpoena or one other writ can be legally made to serve and promote the due administration of justice." *Purdon's Penna. Statutes*, Title 19, Section 1293. See also *Commonwealth v. Smith*, 62 Pa. Super. Ct., 288. In *People v. Wallace*, 222 N.W. 698, the Supreme Court of Michigan ordered the reduction of the costs of prosecution on the theory that a court may take judicial notice of the excessive nature of such costs in view of the record, and declared that costs must bear "some reasonable relation to expenses actually incurred in the prosecution."

As stated in Opinion No. 1728, *supra*, the multiplication of cost bills, or to put it more precisely, the payment of such bills in cases where several offenses could be properly consolidated in one indictment, by the prosecutor or the court, as provided in Section 2941.04, Revised Code, is the result of administrative practice, and not of any express statutory authority. To this might be added that such practice is apparently based on the implied authority of Section 311.17, *supra*, and on previous statutes dealing with the same subject matter. It is noteworthy that these statutes have remained practically unchanged over the years, except that the fees for various services therein enumerated have been from time to time increased.

A close examination of Section 311.17, *supra*, defies a clear, unequivocal answer in regard to what is meant by most of the enumerated services. Subdivision (A) (16) provides for the service and return of "copy of indictment, each defendant," the fee of one dollar. In the present case, only one defendant is involved. It would seem from the practical standpoint that the words "each defendant" should be construed to mean that the fee for such service should be charged only once. As against this position, it can be argued with equal persuasion that since the defendant

was charged with six separate offenses, in six separate indictments, the words "each defendant" relate to the number of persons named in each indictment, and that therefore, the fee should be charged six times. The same argument can apparently be advanced in regard to all services included in Section 311.17, *supra*, this despite the fact that the language pertaining to many such services is less specific. The difficulty is increased when subdivisions (B) (3) (a) and (B) (3) (b), for example, are viewed together. Subdivision (B) (3) (a) provides:

> "For receiving a prisoner, one dollar, and for discharging or surrendering a prisoner, one dollar, to be charged but once in each case;"

Subdivision (B) (3) (b), on the other hand, provides:

> "Taking a prisoner before a judge or court, per day, one dollar and fifty cents;"

The answer to subdivision (B) (3) (a) was given in Opinion No. 820, *supra*. You will note that both subdivisions contain the term "a prisoner," however, the clause, "to be charged but once in each case," is found only in subdivision (B) (3) (a). Does this mean that only one fee can be properly charged under subdivision (B) (3) (b)? As already noted, the term "a prisoner" although standing alone, should apparently be construed together with the number of indictments returned against "a prisoner."

In view of what I have stated in regard to the provisions of Section 311.17, *supra*, a discussion of Section 509.15, *supra*, would be superfluous

It appears that multiplication of cost bills in situations like the present cannot be prevented without express legislation, such as was adopted by the state of Pennsylvania. The same result could apparently be obtained if the provisions of Section 2941.04, Revised Code, with regard to the consolidation of offenses, under circumstances therein specified, in one indictment, were made mandatory. Whether or not such departure from established practice is desirable, is a matter which can be decided only by the General Assembly. A judicial test of the question would be, I believe, inadvisable, inasmuch as there is a complete lack of precedent in Ohio case law in regard to such question.

Answering your specific questions, therefore, it is my opinion and you are advised that where a person is charged and convicted on six

separate indictments, each containing one count (three counts of grand larceny, two counts of burglary, and one count of breaking and entering), the sheriff may charge fees for his services under Section 311.17, Revised Code, for each indictment, and where a police officer has rendered services in connection with such indictments he may charge fees for his services under Sections 509.15 and 1903.12, Revised Code, for each indictment; in both instances regardless of the fact that under Section 2941.04, Revised Code, all six counts could have been consolidated in one indictment.

Respectfully,
MARK MCELROY
Attorney General