

OPINION NO. 69-081

Syllabus:

A defendant acquitted by a jury of a charge is entitled to the return of costs posted by him before the trial.

To: James K. Nichols, Morgan County Pros. Atty., McConnelsville, Ohio
By: Paul W. Brown, Attorney General, July 3, 1969

I am in receipt of your opinion request which reads as follows:

"I have been contacted concerning the legality of an individual serving at the same time as clerk of the township and clerk of the village.

"The individual serving in this capacity is an elector within the village and within the township. I cannot find any statute specifically prohibiting a person from serving in the mentioned offices. It would appear that these offices are compatible. However, I would appreciate your opinion.

"My second inquiry is in regard to court costs filed in a criminal action in a county court. Specifically, the individual was charged with assault and battery. He requested a jury trial (6 man) and posted \$30 in costs. He was acquitted of the charge. However, the court is of the opinion that the posted costs of \$30 were forfeited and should not be returned to the individual. I do not share this opinion. Your comments would be appreciated. I might add that the court is aware of this inquiry and will not take exception should your opinion agree with mine."

To answer your first inquiry, I direct your attention to Opinion No. 1075, Opinions of the Attorney General for 1915, which opinion controls the matter in question.

As to your second inquiry, it is necessary to consider Section 2947.23, Revised Code, which reads as follows:

"In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs. If a jury has been sworn at the trial of a case, the fees of the jurors

shall be included in the costs, which shall be paid to the public treasury from which the jurors were paid."

Under this section, jurors' fees where a jury has been sworn are to be included in the sentence upon a defendant. Thereby, in order for the defendant to be responsible for the cost of the jury, he must be found guilty. The converse of this is that if he is innocent or acquitted, then he is not to be charged for the cost.

This is in holding with Opinion No. 4961, Opinions of the Attorney General for 1955. Syllabus number one of that opinion states as follows:

"Under the provisions of Section 2947.23, Revised Code, the per diem fees of jurors in a criminal case, including the per diem fee of an alternate juror chosen pursuant to Section 2313.37, Revised Code, constitute a part of the costs of prosecution for which judgment shall be rendered against a convicted defendant, and in the event the county is not able to realize such costs on execution against the defendant, they may be certified to the state auditor for payment by the state, pursuant to the provisions of Section 2949.19, Revised Code."

Note that judgment shall be rendered for costs of prosecution "against a convicted defendant." An acquitted or an innocent defendant is not required to pay juror fees.

This is to be distinguished from Opinion No. 69-058, Opinions of the Attorney General for 1969, the syllabus of which reads as follows:

"1. The costs of prosecution, including jury fees, arising out of a mistrial and subsequent trial and conviction, must be assessed against the defendant pursuant to Section 2947.23, Revised Code.

"2. Where, in the subsequent trial, the defendant pleads 'guilty' before the jury is impanelled, the fees of that jury may not properly be included in the costs of prosecution.

"3. The court has no discretion in the taxing of jury fees in the case where a mistrial is declared resulting in a subsequent trial and conviction."

The present inquiry involves only one trial and no prior trial.

It is, therefore, my opinion, and you are hereby advised that a defendant acquitted by a jury of a charge is entitled to the return of costs posted by him before the trial.