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SPRINGFIELD

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FEES:
Assessment of State's Attorneys' Fee for Handling Petition to Revoke Probation or Conditional Discharge and Sheriff's Fees for Committing and Discharging Prisoners

Honorable William G. Sisler
State's Attorney
Stephenson County
Freeport, Illinois 61032

Dear Mr. Sisler:

I have your letter wherein you ask if section 8 of "AN ACT concerning fees and salaries, and to classify the several counties of the state with reference thereto" (Ill. Rev. Stat. 1975, ch. 53, par. 8) entitles the state's attorney to statutory fees for handling petitions to revoke probation or conditional discharge which allege violations

of the criminal statutes. You also request an opinion concerning section 19 of the same Act (Ill. Rev. Stat. 1975, ch. 53, par. 37). Your questions are as follows:

> 1. What event constitutes "committing a prisoner to jail"? Is the fee recognized for each occasion that the court issues a mittimus for the same prisoner on successive appearances before the court, or only upon the issuance of the first mittimus, pending the posting of bond by the prisoner or discharge by the court?
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> 2. Where a defendant is arrested on a warrant, is incarcerated and thereafter posts bond with the sheriff prior to appearance before the court, is the sheriff entitled to a fee for "committing" a prisoner and a fee for "discharging" the prisoner even though no mittimus or order of discharge was issued by the court concerning those events?
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> 3. Is the result different where arrest is without a warrant?
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> 4. When may the court assess the fee for "discharging" a prisoner? If a defendant is sentenced to a term in the county jail, may the court "anticipate" his eventual release, and assess the fee as costs at the time of judgment and sentence?

You first ask if the state's attorney is entitled to a statutory fee for handling a petition to revoke probation or conditional discharge which alleges violations of the criminal statutes. State's attorneys' fees are provided

for in section 8 of "AN ACT concerning fees and salaries, etc." which provides as follows:

> "
> * * *
> For each conviction in other cases tried before judges of the circuit court, $15; except that if the conviction is in a case which may be assigned to an associate judge, whether or not it is in fact assigned to an associate judge, the fee shall be $5.
> * * *
> For each day actually employed in the trial of a case, $10; in which case the court before whom the case is tried shall make an order specifying the number of days for which a per diem shall be allowed.
> * * * "
> (emphasis added.)

Procedure for revocation of probation and conditional discharge is determined by section 5-6-4 of the Unified Code of Corrections (Ill. Rev. Stat. 1975, ch. 38, par. 1005-6-4) which provides as follows:

> "
> * * *
> (b) The court shall conduct a hearing of the alleged violation. The court may admit the offender to bail pending the hearing.
> (c) The State has the burden of going forward with the evidence and proving the violation by the preponderance of the evidence. The evidence shall be presented in open court with the right of confrontation, cross-examination, and representation by counsel."

The procedure to determine whether to revoke probation or conditional discharge is statutorily termed a "hearing" rather than a trial. As the court noted in Menard v. Bowman Dairy Co., 296 Ill. App. 323, at 326, citing McArthur Bros. Co. v. Commonwealth, 83 N.E. 334, 335 (Mass., 1908):

> "'Hearing is technically applicable to chancery proceedings, and is used in contradiction to 'trial', which is properly applicable to law actions; but in modern usage the two words sometimes overlap in meaning * * *, 'hearing' is frequently used in a broader and more popular significance to describe whatever takes place before magistrates clothed with judicial functions and sitting without jury at any stage of the proceedings subsequent to its inception, * * *'."

The Court of Criminal Appeals of Texas has held that a hearing on a motion to revoke probation is not a trial. Gist v. State, 267 S.W. 2d 835 (Texas, 1954).

After the original sentence is entered, "the court has a continuing jurisdiction over those granted probation until the probation term has been completed". (People v. Hunt, 29 Ill. App. 3d 416, at 419.) Therefore, a separate conviction is not required to revoke probation or conditional

discharge. In fact, as the court stated in People v. Mosley, 2 Ill. App. 3d 375, at 377, "to revoke probation, guilt need merely be shown by a preponderance of the evidence. Consequently, a defendant need not be indicted, prosecuted or convicted of the offenses which are the basis for the revocation of his probation".

In Dunn v. State, 265 S.W. 2d 589 (Texas, 1954) the Court of Criminal Appeals of Texas found a Texas statute requiring the testimony of an accomplice to be corroborated in order for a conviction to be had to be inapplicable to proof of the violation of a penal statute upon a revocation of probation hearing. The court stated, at 590, "The result of such a hearing is not 'a conviction' but a finding upon which the trial judge may exercise his discretion by revoking or continuing probation".

In my opinion, therefore, the state's attorney is not entitled to a statutory fee for revoking an individual's probation or conditional discharge, since a revocation is not a conviction and a conviction is required by the statute in order for fees to be imposed. Neither is the state's

attorney entitled to a statutory fee for the hearing of a petition to revoke probation or conditional discharge, because a hearing does not constitute a trial of a case.

Your second set of questions refers to section 19 of "AN ACT concerning fees and salaries, etc." which provides for sheriff's fees as follows:

> " * * *
> For committing each prisoner to jail, in each county, $2 payable out of county treasury, unless paid by the defendant.
> For discharging each prisoner from jail, in each county, $2 payable out of the county treasury, unless paid by the defendant. * * *" (emphasis added.)

You first ask what event constitutes "committing a prisoner to jail". As stated in People v. Franzone, 359 Ill. 391, at 393, "the word 'commitment' signifies the act of sending an accused or convicted person to prison." In Thomas v. St. Louis Co., 61 Mo. 547, at 548 (1876) the court said:

> "When a prisoner is arrested under a capias, he is held thereunder until he is either bailed, committed, or discharged * * * and [this] is not a committing of such person to jail. * * * The words 'committing any person to jail' relate to the execution by the sheriff of an order or warrant of commitment made or issued by some officer exercising judicial functions."

You also ask if the sheriff is entitled to a fee for each occasion that the court issues a mittimus for the same prisoner on successive appearances before the court, or only upon the issuance of the first mittimus, pending the posting of bond by the prisoner or discharge by the court. Section 5-8-5 of the Unified Code of Corrections (Ill. Rev. Stat. 1975, ch. 38, par. 1005-8-5) provides:

> "Upon rendition of judgment after pronouncement of a sentence of periodic imprisonment, imprisonment, or death, the court shall commit the offender to the custody of the sheriff or to the Department of Corrections. A sheriff in executing a mittimus issuing upon a commitment to the Department of Corrections shall convey such offender to the nearest receiving station designated by the Department of Corrections. * * *" (emphasis added.)

Upon rendition of judgment after pronouncement of sentence, the sheriff is authorized to execute a mittimus issuing upon commitment. In other words, "the issuing of a mittimus is not a commitment, but a commitment is an incarceration under a mittimus or warrant". (People v. Franzone, supra.) In fact, as the court stated in People v. Kennay, 391 Ill. 572, at 576, "[I]t is the judgment and sentence of a court of competent jurisdiction which is the real authority

for the detention of a prisoner and not the mittimus or warrant of commitment".

In my opinion, therefore, the sheriff's fee for committing prisoners to jail is not recognized for each occasion that the court issues a mittimus for the same prisoner on successive court appearances. Instead, the sheriff is entitled to one commitment fee authorized by the judgment and sentence of the court rather than the mittimus.

Your next question is whether the sheriff is entitled to separate fees for committing and discharging a prisoner who is arrested on a warrant, incarcerated, and posts bond prior to court appearances even though no mittimus or order of discharge was issued by the court. As the court stated in Alverio v. Dowery, 104 Ill. App. 2d 125 at 131, "[I]t is clear that under our law persons who are arrested may not be detained without reasonable cause and shall be afforded the opportunity to be promptly released on bail". Therefore, in accord with my response to the previous question, a person who is arrested on a warrant, incarcerated and posts bond prior to court appearance is not commited to

jail. In my opinion, no fees for commitment or discharge may be assessed.

Your next question is whether the result is different where arrest is without a warrant. Section 107-2 of the "Code of Criminal Procedure of 1963" (Ill. Rev. Stat. 1975, ch. 38, par. 107-2) provides:

> "A peace officer may arrest a person when:
> (a) He has a warrant commanding that such person be arrested; or
> (b) He has reasonable grounds to believe that a warrant for the person's arrest has been issued in this State or in another jurisdiction; or
> (c) He has reasonable grounds to believe that the person is committing or has committed an offense."

As the court stated in People v. Johnson, 45 Ill. 2d 283, at 288, "[I]t is desirable for an arrest to be based upon a warrant when the circumstances permit. * * * However, we recognize that an arrest may be lawful when based upon probable cause, notwithstanding the absence of a warrant". In my opinion, therefore, the result is the same provided the arrest without warrant is lawful.

Your last question is when the court may assess the fee for 'discharging' a prisoner. Section 3-1-2 of the

Unified Code of Corrections (Ill. Rev. Stat. 1975, ch. 38, par. 1003-1-2) provides:

> "'Discharge' means the final termination of a commitment to the Department of Corrections."

The court in Lee v. County of Ionia, 36 N.W. 83, (Mich., 1888), interpreted a similar statute which allows "for every person discharged from jail, thirty-five cents. * * * [T]he supervisors allowed these rates * * * for every final discharge [which] refers only to * * * the end of the term of imprisonment". In my opinion, therefore, the fee for "discharging" a prisoner may not be anticipated, but rather is allowed only when the sentence of imprisonment is terminated.

Very truly yours,

ATTORNEY GENERAL