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FILE NO. S-826

**FEEES AND SALARIES:
Sheriff's Fee for Committing
Prisoners to Jail**

Honorable Dayton L. Thomas
State's Attorney, Gallatin County
P. O. Box 412
Shawneetown, Illinois 62984

Dear Mr. Thomas:

I have your letter wherein you state:

"The Sheriff of Gallatin County and Sheriffs of adjoining counties have been charging a \$2.00 fee for each prisoner who makes bail in their county under the appropriate paragraphs in Section 37, Chapter 53, which reads as follows:

'for committing each prisoner to jail, in each county, \$2.00 payable out of county treasury, unless paid by the defendant.'

1. Can this section be construed to allow the charge of the \$2.00 to be made by the Sheriff at the time the prisoner is committed to jail

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and released on bond or must the fee be assessed by the court after a plea of guilty or a finding of guilty?

2. Regardless of how the fee is assessed, is the Sheriff to report the fees on his quarterly report to the Board?"

In regard to your first question, section 19 of "AN ACT concerning fees and salaries and to classify the several counties of this state with reference thereto" (Ill. Rev. Stat. 1973, ch. 53, par. 37), provides in pertinent part:

"§ 19. The fees of sheriffs in counties of the first and second class shall be as follows:

* * *

For committing each prisoner to jail, in each county, \$2 payable out of county treasury, unless paid by the defendant.

* * * "

Section 51 of "AN ACT concerning fees and salaries and to classify the several counties of this state with reference thereto" (Ill. Rev. Stat. 1973, ch. 53, par. 69), provides in pertinent part:

"* * *

Said county boards, in counties of the first and second class, shall carefully audit and examine every such report, and ascertain the exact balance of such fees, if any, held by any such

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officer, after such expenses as the said board may approve and allow, and such salary and unpaid balance of salary from previous return shall have been deducted from the gross amount shown by such reports to have been paid unto or collected by such officer, and shall order that such officer shall pay over such balance to the county treasurer, whose receipt therefor shall be evidence of the settlement, by such officer of such report. But, if there shall appear to be a balance of salary due to such officer at the time of making such report, and such officer shall have previously paid into the county treasury any fees collected by him, the board shall make an order on the county treasurer in favor of such officer for the balance so found due to him: Provided, the amount of such order shall not exceed the amount of fees previously paid into the treasury by such officer.

* * * "

Section 9(a) of article VII of the Illinois Constitution of 1970 provides:

"(a) Compensation of officers and employees and the office expenses of units of local government shall not be paid from fees collected. Fees may be collected as provided by law and by ordinance and shall be deposited upon receipt with the treasurer of the unit. Fees shall not be based upon funds disbursed or collected, nor upon the levy or extension of taxes."

Thus, an initial question arises as to the effect of the above constitutional provision on sections 19 and 51 of "AN ACT

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concerning fees and salaries and to classify the several counties of this state with reference thereto", supra.

While it is clear that the compensation of officers and employees of units of local government cannot be paid from fees collected, it is also equally clear, from the express constitutional language, that fees may still be collected as provided by law or ordinance. Indeed, such was the intention of the Constitutional Convention of 1970. (IV Record of Proceedings 3404, 3405.) Consequently, section 19 of "AN ACT concerning fees and salaries and to classify the several counties of this state with reference thereto", supra, still has validity in so far as it provides for the collection of fees.

In answer to your first question, it is my opinion that the sheriff's fee for committing prisoners to jail must be assessed by the court as part of costs. While section 19 of "AN ACT concerning fees and salaries and to classify the several counties of this state with reference thereto", supra, is explicit as to whom is liable for the fee, it is silent as to how and when the fee shall be assessed. However, there is a statutory scheme for the taxing of costs in criminal cases.

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Section 16 of "AN ACT to revise the law in relation to clerks of courts" (Ill. Rev. Stat. 1973, ch. 25, par. 16), provides in pertinent part:

"Unless otherwise provided by rule or administrative order of the Supreme Court, the respective clerks of the circuit courts shall keep in their offices the following books, to wit:

* * *

Fifth--A fee book, in which shall be distinctly set down, in items, the proper title of the cause and heads, the cost of each suit, including clerk's, sheriff's and witness' fees, * * *

Section 25 of "AN ACT to revise the law in relation to costs" (Ill. Rev. Stat. 1973, ch. 33, par. 25), provides in part:

"§ 25. The clerk of any court in this state is hereby authorized and required to tax and subscribe all bills of costs arising in any cause or proceeding instituted in which he is clerk, agreeably to the rates which shall, for the time being, be allowed or specified by law; * * * "

When any person is convicted of an offense under any statute, or the common law, the offender is required to pay the costs of prosecution. (Ill. Rev. Stat. 1973, ch. 38, par. 180-3.) A judgment for costs is incidental to a judgment of conviction. (Moody v. People, 20 Ill. 315; Kitchell v. Madison County, 5 Ill.

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163.) When a person is convicted, his real and personal property is subject to a lien for the fine and costs of prosecution and is also subject to execution and levy. (Ill. Rev. Stat. 1973, ch. 38, par. 180-4.) However, where a defendant is acquitted, he is absolved from the payment of costs. Wells v. McCulloch, 13 Ill. 606; Heist v. People, 56 Ill. App. 391.

Thus, if the defendant is acquitted or, even if convicted, he is unable to pay costs, the cost and fees, in the absence of a statutory provision to the contrary, would not be paid. However, section 19 of "AN ACT concerning fees and salaries and to classify the several counties of this state with reference thereto", supra, specifically provides that, if the defendant does not pay the sheriff's fee for commitment, the fee shall be paid out of the county treasury. Section 19 of the Act further provides in pertinent part:

"In all criminal cases where the defendant shall be acquitted or otherwise legally discharged, without payment of costs, the sheriff shall be paid such fees from the county treasury."

The specific statutory provision for the payment of the sheriff's fee out of the county treasury unless paid by the

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defendant indicates that the General Assembly was cognizant of the statutory procedures for the assessment of fees and costs in criminal cases and intended that such procedures operate in regard to the sheriff's fee for the committing of prisoners to jail.

While there have been no Illinois cases interpreting the statutory language at issue here, an analogous case from another jurisdiction has considered the question. In Thomas v. St. Louis Co., 61 Mo. 547, a sheriff, who had arrested a prisoner, sought to charge a fee of one dollar for committing him to jail pending his preliminary examination. The applicable statute provided that a sheriff shall be allowed the sum of one dollar "for committing any person to jail." The court held that the sheriff was not entitled to the one dollar fee because such fee only applied to commitments to jail by an order of court. The court stated at page 548:

"When a prisoner is arrested under a capias, he is held thereunder until he is either bailed, committed, or discharged; and until such prisoner is either bailed, committed, or discharged any imprisonment of him in the county jail is at the discretion and for the protection of the officer executing the writ,

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as well as to secure the body of such prisoner, and is not a committing of such person to jail, within the meaning of the statute; and for the safe-keeping of any person in his custody undergoing an examination preparatory to commitment he is entitled to a per diem allowance where the number of days such person is so held exceeds one. Wag. St. 626, § 14. 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."

In regard to your second question, it is my opinion that the sheriff is required to report the fee for committing prisoners in his report to the county board. Section 51 of "AN ACT concerning fees and salaries and to classify the several counties of this state with reference thereto" (Ill. Rev. Stat. 1973, ch. 53, par. 69), provides in pertinent part:

"§ 51. Every county officer of counties of the first and second classes who shall be paid in whole or in part by fees, shall, in a book to be kept for that purpose, * * * keep a full, true and minute account of all the fees and emoluments of his office, * * *

Every such officer of counties of the first and second classes, who shall be paid in whole or in part by fees, shall, on the first day of December, in the Year of Our Lord, One Thousand Nine Hundred and Seven (1907), and on the first day of June and December of each year following, make to

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the chairman of the county boards, a return
in writing of all the fees and emoluments of
his office, of every name and character, * * *

As noted above, section 9(a) of article VII of the
Illinois Constitution of 1970 specifically prohibits the com-
pensating of officers of local units of government from fees
collected. By not changing the above cited language of sec-
tion 51 of "AN ACT concerning fees and salaries and to classify
the several counties of this state with reference thereto,"
supra, in the face of the express constitutional prohibition,
the General Assembly apparently intended to retain the report-
ing requirement.

As the statutory language clearly indicates, the
sheriff is required to report all fees. It has been speci-
fically held that the fee for committing and discharging pri-
soners from jail must be reported and accounted for in the same
manner as other fees received by the sheriff. People v. Foster,
133 Ill. 496; 1942 Op. Atty Gen. 125.

Thus, in answer to your first question, it is my
opinion that the two dollar sheriff's fee for the committing
of each prisoner to jail must be assessed by the court as part

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of the costs of a given case. In answer to your second question, it is my opinion that said fee must be included in the sheriff's report to the county board.

Very truly yours,

ATTORNEY GENERAL