Opinion No. 47-5094

November 3, 1947

BY: C. C. McCULLOH, Attorney General

TO: Mr. Howell Gage, Warden, The Penitentiary of New Mexico, Santa Fe, New Mexico.

*{*102}* We wish to acknowledge receipt of your inquiry of several days ago pertaining to the right of your institution to recover from the county for feeding and caring for a prisoner pending an appeal.

As l understand, the facts are as follows, to-wit:

The prisoner in question was sentenced on Sept. 28, 1946 by the Hon. Chas. H. Fowler sitting in and for the Bernalillo County District Court, State of New Mexico, and was thereupon confined in the State Penitentiary under Bernalillo County Commitment No. 9081.

It is quite evident the prisoner in this case was committed to the State Penitentiary as a convict and that the District Court at no time entered an order removing the said prisoner to the penitentiary for safe-keeping.

Thereafter, the case of the prisoner was appealed to the Supreme Court of New Mexico, whereupon the judgment and sentence of the District Court was affirmed; that the Supreme Court issued its commitment in said case on Sept. 18, 1947.

The Penitentiary thereupon presented the County of Bernalillo with *{*103}* a bill for $ 355.33 for the safe- keeping of said prisoner, but said county refused to pay same, contending they were not liable for such charge.

The controlling statute in said case is Section 45-213 of the New Mexico 1941 Compilation (Section 1, Chapter 92, Laws of 1919) which provides as follows:

"Sec. 1. Whenever the public welfare or the safe custody of a prisoner shall require, any district judge in the state of New Mexico in his discretion may order any person charged with the commission of a crime, or any person in the custody of the sheriff of any county in the district of the said judge to be removed to another county jail, or to the state penitentiary, or to any other place of safety, when, in the opinion of the said district judge, it is advisable that such person or persons shall be removed for any purpose whatsoever.

That where a person, on the order of any district judge has been placed in the state penitentiary or a county jail for safe keeping, the expense incurred by said penitentiary or the sheriff of any county for the maintenance of said prisoner, shall be borne by the

county from which said prisoner has been ordered, and said bill of expense shall be made a preferential bill of expense and shall be paid in full before any bill, fees or salaries of such county are paid; provided, however, that the said state penitentiary or sheriff shall only charge for the maintenance of said prisoner the legal rate now allowed by law."

The facts of the instant case are quite similar to the facts presented in the case of State v. Bd. of Co. Comm. of Colfax County, 33 N.W. 340; 276 P. 72, from which I herewith quote, to-wit:

"* * * it appears that these prisoners had been convicted of felonies, and had appealed. By fair inference, therefore, they were in the custody of the sheriff pending appeal. It will not be assumed that a court would have committed them if they had given bond, nor that they would have submitted to such commitment. In such case, the statute authorizes the district judge to order the prisoners removed to the penitentiary for safe-keeping, and requires the expense of maintenance to be borne by the county. It also appears that the penitentiary has been to an expense which the law casts upon the county. The only doubt of the county's liability is raised by the fact that the prisoners were committed as convicts instead of having been removed for safe-keeping, and the further fact that, during their confinement, they were treated as convicts, and performed labor as such.

The most reasonable explanation of this unusual occurrence is, as it seems to us, that the issuance of a commitment instead of an order of removal was an inadvertence of some court official. The district court of Colfax county is clearly chargeable with notice of the taking of the appeals, and, with that knowledge would not have proceeded to the execution of judgment. It must have been the intent of the court to remove the prisoners for safe-keeping. The penitentiary was clearly under the duty of receiving and maintaining them, they having been delivered, with commitments, by the sheriff of Colfax County. The penitentiary has, therefore, under competent authority, performed a duty which it was for the county to perform or pay for. * *"

It is therefore our opinion that the County of Bernalillo is liable to the Penitentiary for the safe-keeping of this prisoner for the *{*104}* period in question when his appeal to the Supreme Court was pending.

Trusting the aforementioned satisfies your inquiry, I am

By ROBERT V. WOLLARD,

Asst. Atty. General