

Opinion No. 69-84

July 31, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Mark B. Thompson, III,
Assistant Attorney General

TO: Mr. E. T. Johnson, Court Administrator, Supreme Court Building, Santa Fe, N.M.
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QUESTIONS

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1. Does a magistrate have authority, on suspending sentence on a finding of guilty in a criminal case, to suspend costs?
2. Should the magistrate assume such authority, does he thereby become personally liable to the state general fund for the payment of those costs?

CONCLUSIONS

1. No.
2. Yes.

OPINION

{*134} ANALYSIS

1. In criminal cases heard before a magistrate court, the court is authorized to assess costs against a defendant upon a finding of guilty. Section 36-8-4 (B), N.M.S.A., 1953 Compilation, provides:

B. If the defendant is convicted in any criminal action in the magistrate court, and only if the defendant is convicted, the magistrate shall attempt to collect from the defendant the docket fee established by law as costs in criminal actions. Any costs so collected from the defendant shall be paid by the magistrate to the administrative office of the courts except that, if the complaining witness in the action paid such costs upon filing the complaint in the action, the magistrate shall refund the costs paid by the complaining witness. Before making the reimbursement, the magistrate shall require from the complaining witness a written itemized receipt on a form prescribed by the administrative office of the courts.

Before the creation of the magistrate court system, corresponding jurisdiction in criminal cases lay with the justice of the peace courts. Though the specific provision has been

repealed with the establishment of the magistrate system, the former statute governing costs declared, in Section 36-19-18, N.M.S.A., 1953 Compilation:

. . . If the defendant is found guilty, the justice of the peace shall attempt to recover the costs from him and any costs recovered shall be paid to the director (of the administrative office of the courts).

It was the stated position of this office, in Opinion No. 61-83 of the Attorney General, dated September 11, 1963 that the assessment of costs was mandatory:

Under the language of the . . . statutory provision, it is our opinion that the justice of the peace is **under an obligation to impose and attempt to collect court costs in each case** wherein (the defendant) has been found guilty of the offense charged. (Emphasis added.)

While this opinion was issued with reference to a statute no longer in effect, it would appear that the reasoning of the opinion remains valid. The present statute provides for the imposition of costs in similar language, and does not provide for the exercise of judicial discretion in either the amount of the costs or in the manner of their assessment. It would {^{*135}} therefore seem clear that magistrates are without authority to suspend costs after a conviction, regardless of the court's action in suspending or deferring sentence.

2. Since it is mandatory to assess and attempt to collect costs in criminal trials, the suspension or waiver of those costs must be regarded as an act of misfeasance on the part of the magistrate. The state protects itself against loss due to official misfeasance through the practice of requiring bonds of many state officers; the state magistrates are required by law to conduct their duties under bond. Section 36-9-8, N.M.S.A., 1953 Compilation (1968 Supp.), provides:

A. The administrative office of the courts shall procure an official bond for each magistrate and clerical assistant. The bond shall be executed by a corporate surety authorized to do business in this state in a sum prescribed by the administrative office equal to twenty per cent [20%] of the public money handled by the magistrate during the preceding fiscal year, but not to exceed ten thousand dollars (\$ 10,000). The official bond shall be payable to the state and conditioned for the faithful performance of duties during the magistrate's term of office and until his successor is elected or appointed and is qualified, and that the magistrate will pay all money received in his official capacity to the person entitled to receive it. The administrative office may elect to procure schedule or blanket corporate surety bond coverage in lieu of individual coverage Certified copies of the official bond are evidence in all courts and may be sued upon by the state or any person injured by any violation of its conditions.

The proper assessment and collection of costs would appear to be among those duties the performance of which is intended to be insured by the bond. Since any liability enforced against the surety would be ultimately enforced against the magistrate through

the process of subrogation, it may correctly be stated that magistrates are personally liable for trial costs, where the assessment of such costs is required by statute.