

No. W.D. 81666

**IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**STATE OF MISSOURI,
RESPONDENT**

VS.

**JOHN WRIGHT,
APPELLANT**

**APPEAL FROM THE CIRCUIT COURT OF LAFAYETTE
COUNTY, MISSOURI
FIFTEENTH JUDICIAL CIRCUIT, DIVISION III
HONORABLE KELLY ROSE, JUDGE**

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

On July 27, 2016, Appellant, with counsel, pleaded guilty to the misdemeanor offenses of stealing and resisting arrest, and was sentenced to ninety days in the Lafayette County Jail, with credit for time served. (Appellant's Legal File, D13). The Court issued a show cause order for the appellant to re-appear on August 16, 2016, which the Court has continued to do in order to review payments made by Appellant; this order was signed by Appellant and contains an agreement to pay the costs of \$1,476.78. (Appellant's Legal File, D10). Appellant has made some payments toward costs, subsequent to his plea of guilty. (Appellant's Legal File, D1). Appellant has appeared under show cause orders, but has never been subjected to additional jail time for failing to pay the agreed upon costs. (Appellant's Legal File, D1). The underlying criminal case contains no affidavit for services. (See 16LF-CR00382).

POINTS RELIED ON AND AUTHORITY

I. THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT’S MOTION TO RE-TAX COSTS BECAUSE THERE IS STATUTORY AUTHORITY TO ASSESS THE COST OF INCARCERATION TO APPELLANT.

Riggs v. State Dept. Soc. Servs., 473 S.W.3d. 177 (Mo. App. W.D. 2015)

State v. Johns, 34 S.W. 3d. 93 (Mo. banc 2000)

State v. Riley, 236 S.W. 3d. 630 (Mo. banc 2007)

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Groves v. State Farm Mut. Auto Ins. Co., 540 S.W. 2d. 39, 44 (Mo. banc 1976)

Section 221.120, RSMo.

Section 221.122, RSMo.

Section 550.010, RSMo.

Section 550.020, RSMo.

Section 550.030, RSMo.

Section 221.070, RSMo.

Section 488.607, RSMo.

Section 488.024, RSMo.

Section 488. 5025, RSMo.

Section 488.5028, RSMo.

Rule of Civil Procedure 84.04 (e)

II. THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT’S MOTION TO RE-TAX COSTS, BECAUSE THE COSTS WERE INCURRED ON THE PART OF APPELLANT AND APPELLANT IS ABLE TO PAY.

State ex rel. Coats v. Lewis 689 S.W.2d. 800 (Mo. App. W.D. 1985)

Spencer v. Basinger, 562 S.W.2d. 350 (Mo. Banc 1978)

McFadden v. Kelly, 722 S.W. 2d. 110, 113, (Mo. App. W.D. 1986)

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Section 550.010, RSMo.

Section 550.030, RSMo.

Section 600.086, RSMo.

Rule of Civil Procedure 84.13(a)

Rule of Civil Procedure 84.13(c)

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT’S MOTION TO RE-TAX COSTS BECAUSE THERE IS STATUTORY AUTHORITY TO ASSESS THE COST OF INCARCERATION TO APPELLANT.

Statement of Preservation and Standard of Review

Appellant failed to object to the board bill being assessed as costs at sentencing, and as such did not properly preserve this issue and waived this issue. Appellant has not cited the applicable standard of review. For those two reasons, this point should be dismissed for lack of conformity with Rule 84.04(e). Respondent contends the applicable standard of review would be either plain error or abuse of discretion. See *Riggs v. State Dept. of Soc. Servs.*, 473 S.W. 3d 177 (Mo. App. W.D. 2015), *State v. Johns*, 34 S.W. 3d 93 (Mo. banc 2000), and *State v. Riley*, 236 S.W. 3d 630 (Mo banc 2007). Respondent continues in the event that the Court proceeds under a *de novo* standard.

Analysis

Costs can only be granted by express statutory authority. *State ex rel. Merrell v. Carter*, 518 S.W.3d 798, 800 (Mo. banc 2017). An item may be taxed as costs when authorized by statute, “or by agreement of the parties.” *Groves v. State Farm Mut. Auto. Ins. Co.*, 540 S.W.2d 39, 44 (Mo. banc 1976).

A. Missouri statutes authorize the expense of incarceration.

Section 221.070.1, RSMo, states a defendant “shall bear the expense of carrying him or her to the said jail, and also his or her support while in jail.”

Section 550.030, RSMo, states that the county is required to pay costs when a defendant is sentenced to imprisonment in the county jail or to pay a fine, *except such as were incurred on the part of the defendant* (emphasis added). This section is only addressing jail time, or a fine, or both. There are costs incurred solely due to the imprisonment of a defendant, such as food, clothing, laundry, and additional utilities. When a defendant is sentenced to the county jail, it is generally due to a guilty plea, or a finding of guilt, which are grounds for taxing the cost to a defendant because he or she is responsible for their conduct. This is also supported by the fact that no board bill is assessed when a defendant is found not guilty or a case is dismissed.

Section 550.010, RSMo, states that a person convicted of a misdemeanor shall pay the costs, and no costs incurred on his part, except fees for the cost of incarceration, including a reasonable sum to cover occupancy costs, shall be paid by the state or county. This means fees for the cost of incarceration include occupancy costs. Similar to section 550.030, it also means that the cost of incarceration is a fee that is incurred on the defendant's part. This is a fee that is not to be paid by the county. Sections 550.030 and 550.020 both carve out exceptions for who is responsible for costs incurred by the defendant. In certain situations, costs may be taxable to the county or state, except for costs incurred on behalf of a defendant. *State ex rel. Merrell v. Carter*, 518 S.W.3d 798 (Mo. banc 2017).

An example of such costs are the food the Appellant ate in the County Jail, the roof over his head, the clothing he wore, the laundry that was done, and the utility bills that were paid. Further, these were costs of incarceration for which Appellant is responsible. Sec. 550.030, RSMo. The county should not have to bear the costs incurred by Appellant while incarcerated.

Appellant cites to statutory authority for six out of the seven costs taxed against him. Contrary to Appellant's argument, sections 488.607 and 488.024 authorize a "surcharge," and section 488.5025 authorizes a "fee," but they do not expressly authorize those amounts to be assessed as "costs." There must be statutory authority for costs, but the authority does not have to state verbatim that an item can be taxed as a "cost."

There is statutory authority for the county to assess a board bill, also known as occupancy costs, against a defendant. As a result, the trial court did not err in overruling the motion to re-tax costs.

B. Appellant agreed to pay the costs.

In addition to statutory authority, Appellant agreed to pay the costs aggregating \$1,476.78 on July 27, 2016. (Appellant's Legal File, D10) An item may be taxed as costs when authorized by statute, "or by agreement of the parties." *Groves v. State Farm Mut. Auto. Ins. Co.*, 540 S.W.2d 39, 44 (Mo. banc 1976). Appellant agreed to pay the costs totaling \$1,476.78, but requested additional time to pay those costs. Appellant was represented by counsel on the date Appellant entered into this agreement. Appellant did not object to the costs at

sentencing, and proceeded to make partial payments, without objection, after this agreement.

By agreeing to pay the costs, with no record of paying them under protest, and making some partial payments, Appellant has either waived or failed to protect his right to appeal. Due to the agreement that the costs be taxed to Appellant, the trial court did not err in overruling the motion to re-tax costs.

C. Section 221.070 provides an alternative method of satisfying costs.

If a person has not paid all money owed to the county jail, section 221.070 allows alternative ways to collect the money owed. Property of such person may be levied on and sold. If the person failed to enter into an agreement or honor an agreement with the sheriff, the sheriff “may certify the amount” to the clerk of the court. Section 221.070.2 gives the sheriff discretion to certify the amount owed. If certified, the clerk “shall” report this amount owed to the office of state court administration. There is a condition precedent, which is not mandatory, before the clerk is required to report the amount owed further. That condition has not occurred.

Section 221.120 states that a prisoner in the county jail “shall be liable” for payment of medical attention. It also provides for an alternative method of satisfying the “costs of such medicine...” through levying assets. In section 488.5028, if a person “fails to pay court costs, fines, fees, or other sums ordered by a court, to be paid to the state or political subdivision,” a court may report this delinquency to the office of state courts administration for other alternative

methods of satisfying costs, such as a setoff of income tax refunds or lottery prize payouts. Section 221.122 requires a person released from a county jail, “shall upon request...repay the county” for items such as medicine or dental care.

The sections listed above use one or more of the following words: support, debt, costs, fines, fees, delinquencies, medical costs, repay. Section 488.5028 says “costs” can be set off pursuant to section 221.070. Section 221.070.2 then refers to money owed as “debt.” By Appellant’s definition, costs and fines are also monies “due by agreement or otherwise.” The term used does not change the fact that the costs are owed.

Appellant appears to concede that the costs were rightfully taxed. Appellant requests the amount owed, or “debt,” be sent to the office of state courts administration, per section 221.070.2. For 221.070.2 to apply, you must have already agreed that the person owes the “expense of carrying him...to...jail, and also his...support while in jail.”

In sum, Appellant’s motion was rightfully overruled, because there is statutory authority for the board bill to be taxed to Appellant, because Appellant agreed to the amount and to pay the costs, and because Appellant has to agree that he owes the cost of his support in order to assert the amount be reported further.

II. THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT’S MOTION TO RE-TAX COSTS, BECAUSE THE COSTS WERE INCURRED ON THE PART OF APPELLANT AND APPELLANT IS ABLE TO PAY.

Statement of Preservation and Standard of Review

Pursuant to Rule 84.13(a), an allegation not properly briefed shall not be considered. Appellant has failed to state a standard of review as to Point Two in his brief. Should the Court disagree, Rule 84.13(c) of the Rules of Civil Procedure states that, “though not raised or preserved” “plain errors affecting substantial rights may be considered on appeal.” If an error is deemed to have occurred, although not preserved, Appellant is not and has not been subjected to any loss of liberty for failure to pay the costs Appellant agreed to pay, and no substantial right has been affected.

Analysis

Section 550.030, RSMo, exempts the county from paying costs incurred on the part of a defendant. Section 550.010, RSMo, exempts the county from paying fees for the cost of incarceration, a cost incurred by the party incarcerated, including a reasonable sum to cover occupancy costs.

A. Appellant shall pay costs incurred on his part.

Section 550.030, RSMo, relieves a defendant from paying some costs if it is determined he or she is unable to pay. This section does not relieve a defendant from paying all costs. If the person imprisoned is unable to pay, the county pays the costs, except costs incurred on defendant’s part. The boarding costs would not

have been incurred if a defendant was never there to begin with, nor would they be taxed without a plea or finding of guilt.

Section 600.086, RSMo, requires anyone claiming indigency “shall file with the court an affidavit which shall contain the factual information” used in determining indigency. This statute “must be understood to mean any affidavit of indigency must be filed with the court....” *McFadden v. Kelly*, 722 S.W.2d 110, 113 (Mo. App. W.D. 1986). Appellant has filed no such affidavit with the court in the underlying case, and as such has not made a prima facie showing of indigency.

Unlike the defendant in *Spencer v. Basinger*, 562 S.W.2d. 350, 353, the Appellant herein has not filed an affidavit and inventory of his property, nor has he tendered non-exempt property to the Sheriff. In *Basinger*, the Court determined that the defendant be given an opportunity to make reasonable installments to pay his fine and costs. The record is lacking evidence as to Appellant’s actual indigent status.

B. There is evidence of Appellant’s ability to pay.

Appellant made partial payments toward the costs, and Appellant’s Supplemental Legal File, D24, Exhibit 1, states Appellant has a Conservator ad litem to manage Appellant’s “resources.” Appellant also mentioned his felony case 16LF-CR00735-01, where he is also represented by the public defender’s office. Appellant has received violation reports that have been filed in that case. In those reports, Appellant admits to using marijuana, and receiving disability

benefits, notwithstanding the fact that Appellant's Appendix, A46, lists no income at all.

Appellant cites *State ex rel. Coats v. Lewis*, 689 S.W. 2d 800 (Mo. App. W.D. 1985) in stating the court must inquire before costs can be assessed against an accused. The case further states, "Until the record reflects such an inquiry by the court to which the application [to proceed *in pauperis*] has been made, the court has not completed the performance of the duty Section 514.040 imposes on it." Additionally, the court in *Coats* stated "... where the trial judge... summarily denies leave to proceed without any further inquiry of any kind on the record." *Id.* at 807. The converse would also be true. Here, the trial judge made no inquiry into whether the defendant was actually a poor person. In the case before this Court, no such inquiry was made. Counsel for the Appellant asserts that the record is adequate by virtue of being represented by the office of the public defender. That is a conclusory statement for which there is not a basis in the record. Counsel's Certificate of Inability to Pay Costs, Fees and Expenses states that Appellant has a number of physical limitations and that he has a Guardian ad litem and Conservator ad litem appointed. Nowhere does it state that the Appellant has no income or assets. Someone is appointed to manage his resources but the record is barren of any evidence of Appellant's indigence.

The finding by the Circuit Court that Appellant is indigent is statutory in basis. Section 221.105, RSMo. Once the Appellant in that case was sentenced to

the Missouri Department of Corrections, the Circuit Clerk filed a Bill of Costs with the Department to obtain reimbursement for the Sheriff's Department.

Appellant has made no showing of indigency, other than unsupported assertions made by his counsel, and none in the underlying case file. Appellant should be required to pay his court costs, including the costs incurred on his behalf during his incarceration. Appellant has admittedly made some payments towards his costs in this matter and having resources, showing in fact he does have the ability to pay costs, even though Appellant was not forthright in his affidavit for services.

CONCLUSION

The trial court did not err in denying Appellant's Motion to Re-tax Costs, and the Appellant is responsible for such costs. WHEREFORE, Respondent prays this Court affirm the decision of the trial court, finding Appellant responsible for the costs accrued as a result of his incarceration in the county jail.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief complies with the information required by Rule 55.03, that it complies with the limitations contained in Rule 84.06(b), and that it contains 2,814 words in the brief determined by the word count of the word-processing system used to prepare the brief, excluding the cover, signature block and this certification.

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