ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* STATE.

Opinion delivered April 20, 1931.

1. COSTS—FEES FOR PROSECUTING ATTORNEY.—The prosecuting attorney is entitled to a fee of $10 for services on appeal in the circuit court from a judgment of a justice's court assessing a fine in each of 200 misdemeanor cases, although the cases were regularly consolidated.
2. COSTS—FEES OF PROSECUTING ATTORNEY.—The prosecuting attorney is entitled only to a single fee of $20, where the circuit court ordered 200 cases consolidated and but one case was appealed and one transcript filed and one judgment of affirmance rendered in the Supreme Court.
3. PROSECUTING ATTORNEYS—CRIMINAL APPEALS.—Prosecuting attorneys are not required to follow up appeals in criminal cases; the Attorney General being required to represent the State in such cases.

Appeal from Lawrence Circuit Court, Eastern District; *S. M. Bone,* Judge; judgment modified.

STATEMENT BY THE COURT.

This appeal is prosecuted from an adverse decision denying appellant's motion to retax the costs in the case of *St. L. S. F. R. Co.* v. *State,* 179 Ark. 1128, 20 S. W. (2d) 878, recently affirmed by the Supreme Court.

On January 30, 1929, Hon. Hugh Williamson, prosecuting attorney for the third judicial district of Arkansas, filed before a justice of the peace in Lawrence County 200 informations against appellant company, charging it with the violation of an order of the Arkansas Railroad Commission requiring appellant to construct umbrella sheds over its tracks at Hoxie. A separate writ was issued by the justice upon each information, and the 200 cases were continued once or twice, the last time by consent and set for trial April 5, 1929. The cases

were consolidated for convenience and tried together, resulting in a finding against the appellant company with a fine adjudged against it in each of the cases of $25, each day's violation of the order being a separate offense, and judgment entered as follows:

"And the court after hearing the evidence and argument of counsel, finds the defendant guilty as charged and should be fined in the sum of $25 in each case together with the cost of same; it is therefore by the court considered, ordered and adjudged that the State of Arkansas do have and recover of and from the defendant, St. Louis-San Francisco Railway Company, the sum of $25 in each of the 200 cases, making a total fine of $5,000, together with the cost of each action."

From this judgment appellant took an appeal to the circuit court, the justice directing: "That one bond and one transcript would be sufficient to lodge these causes of action in said circuit court." Notwithstanding this order, the clerk of the circuit court docketed each of the 200 cases, beginning with No. 257 and consecutively for 200 cases, stating that separate transcripts were filed in each. Before the trial there, the circuit court made the following order of consolidation directing that the causes proceed under cause No. 257:

"It is ordered by the court that all the causes instituted in the court of W. Storey, a justice of the peace of Campbell Township, and appealed to this court against St. Louis-San Francisco Railway Company numbered 257 to 456 consecutively and inclusively * * * be and the same are consolidated for the purposes of the trial only and to facilitate the trial and to save expense of record into cause No. 257 and to be tried as one cause; all other causes hereinabove named to be governed in all respects accordingly."

Upon the trial there, the judgment recites: "This cause came on for a hearing, and by agreement of the parties the cause was consolidated with 199 other causes identical with it and tried under case No. 257." The case

was tried before the court by agreement, the jury being waived, and the court found appellant guilty as charged in the first count of each information filed against it and fixed the punishment at a fine of $25 with costs on each of the 200 informations filed against it and adjudged that the plaintiff "the State of Arkansas do have and recover of and from the defendant, St. Louis-San Francisco Railway Company, the sum of $25 and costs in each of the 200 cases or a total of $5,000 with all costs herein," to which judgment the appellant excepted.

The case was appealed and affirmed by the Supreme Court as stated above. After the affirmance and filing of the mandate with the clerk of the circuit court, a fee bill was issued taxing among other costs the following:

"Hugh Williamson, prosecuting attorney, costs in justice court	$10	$2,000
Hugh Williamson, prosecuting attorney, costs in circuit court	$10	$2,000
Hugh Williamson, prosecuting attorney, costs in Supreme Court	$20	$4,000
Total	$40	$8,000"

The motion to retax the costs challenges the correctness of the charging any fee by the prosecuting attorney in the circuit court on appeal of the cause there and of more than one fee of $20 for the prosecuting attorney upon the appeal to the Supreme Court, and from the judgment denying the motion this appeal is prosecuted.

E. T. Miller, E. L. Westbrooke, Jr., and *E. L. Westbrooke,* for appellant.

Hal L. Norwood, Attorney General, *Pat Mehaffy,* Assistant, *Hugh U. Williamson, Pace & Davis,* and *Tom W. Campbell,* for appellee.

KIRBY, J., (after stating the facts). The statutes providing fees for prosecuting attorneys in misdemeanor cases read as follows:

"Prosecuting attorneys, when present and prosecuting cases, either in person, or by his deputy in justice court:

For each judgment obtained on complaint, information or otherwise, in the name of the State or any county.....$ 5

For each conviction on indictment, presentment or information for misdemeanor or breach of the peace $10

* * * Prosecuting attorney shall be entitled to the same fees for prosecuting in cases of misdemeanors before justices of the peace as in the circuit court." Section 4571, Crawford & Moses' Digest.

"Upon the affirmance of a judgment on the appeal of the defendant, an attorney's fee of twenty dollars to be paid to the prosecuting attorney shall be taxed as part of the costs of the appeal." Section 3429, Crawford & Moses' Digest.

The statutes also provide for consolidation of causes of action, rules concerning the proceedings therein and the costs to be recovered. Sections 1080-81 and -82, Crawford & Moses' Digest.

It is conceded that the prosecuting attorney is entitled to a fee of $10 in each of the two hundred cases filed in the justice court, although they were consolidated and disposed of at one hearing. It is insisted, however, that on appeal to the circuit court the cases were regularly consolidated, and that the prosecuting attorney, if entitled to any fee for the prosecution at all, was only entitled to a fee of $10 as for the prosecution of one case. The circuit court found, however, that the appeals had been taken and transcripts in each of the 200 cases filed and separately docketed in the circuit court, and the majority is of opinion that within the authority of *Goad* v. *State,* 73 Ark. 458, 84 S. W. 638, the prosecuting attorney was entitled to a fee of $10 for his services in each of such cases there. It is true that in that case the prosecution was begun by the deputy in filing information in

the justice court, but necessarily he was acting as the representative of and for the prosecuting attorney, and the court in affirming that case held that the double fee allowed the prosecuting officers in such cases was designed and operated as a part of the punishment. No error was therefore committed in overruling the motion to retax the costs in the circuit court.

Appellant's contention that the court erred in taxing any but one fee of $20 for the prosecuting attorney upon the affirmance of the judgment upon the appeal of the case to the Supreme Court must be sustained. The cases in the circuit court could be consolidated for trial under the statute, and this was done, as appears from the judgment therein, which recites that the defendant prayed an appeal to the Supreme Court, which was granted, and "this cause having been heard with like causes, all of which are identical with the informations filed in this case, it is by the court further ordered that but one bill of exceptions be prepared, presented and filed herein." In accordance with this direction, but one case was appealed, and one transcript filed in the Supreme Court and one judgment of affirmance upon the appeal made in *St. Louis-San Francisco Railway Co.* v. *State, supra.* The statute only authorized the taxation of one fee of $20 to be paid to the prosecuting attorney as part of the costs upon the affirmance of such judgment on appeal. The statutes have been so construed in the *per curiam* opinion by our own court in *Ashcraft* v. *State,* 141 Ark. 361, 222 S. W. 326, where the prosecuting attorney was held entitled to a single fee upon the affirmance of a judgment in the Supreme Court, and not to a separate fee for each of the convictions in the judgment affirmed.

It is strongly urged that the construction of the statute by the court in said opinion was wrong, and the case should be overruled; but, as said there, the prosecuting attorney is not required to follow up appeals in criminal cases and services performed in that regard are

voluntary, the Attorney General alone being required to represent the State in causes pending in the Supreme Court; and the statute only allows the prosecuting attorneys a docket fee on each judgment of affirmance of misdemeanor cases in the Supreme Court not for services performed, however, since none are required of that officer.

We do not review cases cited from other jurisdictions construing similar statutes, our own court having construed the statute under consideration, without regard to whether another or different construction should have been placed upon it, and we decline to reconsider the matter, finding no sufficient justification therefor.

It follows that the court erred in not granting the motion to retax the costs to the allowance of only one fee of $20 for the prosecuting attorney for the judgment of affirmance in the Supreme Court, and its erroneous judgment allowing a fee of $20 in 200 cases must be modified accordingly and as modified will be affirmed. It is so ordered.

Justices HUMPHREYS, MEHAFFY and MCHANEY dissent as to modification.