



OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Honorable Wayne Lefevre  
County Auditor  
Clay County  
Henrietta, Texas

Dear Sir:

Opinion No. 0-3279

Re: Sheriff may not hold defendant for costs in misdemeanor case where judgment does not provide for costs. Judgment may be entered nunc pro tunc to provide for costs in misdemeanor cases.

Your request for opinion has been received and carefully considered by this department. We are enclosing herewith a copy of opinion No. 0-3065 of this department which answers your first question. Your second question is as follows:

"(2) If a man charged with theft, enters a plea of guilty, and the County Judge, before and to whom the plea of guilty is entered accepts the plea of guilty and assesses the Punishment at 90 days in Jail, and so enters the judgment as that of 90 days, and no assessment is made for the costs, the punishment and Judgment being only for 90 days may the Sheriff, then without judgment or order from the County Judge, hold said person prisoner in the County Jail until such time as would be needed had the costs been assessed. The intent of the Court was that the full punishment and costs would be included in the 90 day sentence?"

Articles 783, 784, 785, 787, 788, 789, 792 and 793, Vernon's Annotated Texas Code of Criminal Procedure, read as follows:

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"Art. 783. When the defendant is only fined the judgment shall be that the State of Texas recover of the defendant the amount of such fine and all costs of the prosecution, and that the defendant, if present, be committed to jail until such fine and costs are paid; or if the defendant be not present, that a capias forthwith issue, commanding the sheriff to arrest the defendant and commit him to jail until such fine and costs are paid; also, that execution may issue against the property of such defendant for the amount of such fine and costs.

"Art. 784. If the punishment is any other than a fine, the judgment shall specify it, and order it enforced by the proper process. It shall also adjudge the costs against the defendant, and order the collection thereof as in other cases.

"Art. 785. When the judgment against a defendant is for a fine and costs he shall be discharged from the same;

"1. When the amount thereof has been fully paid.

"2. When remitted by the proper authority.

"3. When he has remained in custody for the time required by law to satisfy the amount thereof.

"Art. 787. When a judgment has been rendered against a defendant for a pecuniary fine, if he is present, he shall be imprisoned in jail until discharged as provided by law. A certified copy of such judgment shall be sufficient to authorize such imprisonment.

"Art. 788. When a pecuniary fine has been adjudged against a defendant not present, a capias shall forthwith be issued for his arrest.

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The sheriff shall execute the same by placing the defendant in jail.

"Art. 789. Where such capias issues, it shall state the rendition and amount of the judgment and the amount unpaid thereon, and command the sheriff to take the defendant and place him in jail until the amount due upon such judgment and the further costs of collecting the same are paid, or until the defendant is otherwise legally discharged.

"Art. 792. When a defendant has been committed to jail in default of the fine and costs adjudged against him, the further enforcement of such judgment shall be in accordance with the provisions of this Code.

"Art. 793. When a defendant is convicted of a misdemeanor and his punishment is assessed at a pecuniary fine, if he is unable to pay the fine and costs adjudged against him, he may for such time as will satisfy the judgment be put to work in the workhouse, or on the county farm, or public improvements of the county, as provided in the succeeding article, or if there be no such workhouse, farm or improvements, he shall be imprisoned in jail for a sufficient length of time to discharge the full amount of fine and costs adjudged against him; rating such labor or imprisonment at Three Dollars (\$3.00) for each day thereof." (Underlining ours)

Article 794, Vernon's Annotated Texas Code of Criminal Procedure, reads in part as follows:

"Art. 794. Where the punishment assessed in a conviction for misdemeanor is confinement in jail for more than one day, or where in such conviction the punishment is assessed only at a pecuniary fine and the party so convicted is unable to pay the fine and costs adjudged against him, those so convicted shall

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be required to do manual labor in accordance with the provisions of this article under the following rules and regulations:

". . . ."

Article 797, Vernon's Annotated Texas Code of Criminal Procedure, reads as follows:

"Art. 797. A defendant who has remained in jail the length of time required by the judgment shall be discharged. The sheriff shall return the copy of the judgment, or the capias under which the defendant was imprisoned, to the proper court, stating how it was executed." (Underscoring ours)

We quote from American Jurisprudence, Vol. 14, page 70, as follows:

"Where the statute requires that a judgment for costs be rendered against the defendant on conviction, it seems that no other judgment may be properly entered by the court; and it has been held that the court may amend a judgment of conviction nunc pro tunc, even after the close of the term, so as to charge the defendant with costs as required by statute." (Citing the case of Villines v. State, 105 Ark. 471, 151 S. W. 1023, 43 L. R. A. (N. S.) 207.)

We quote from 12 Texas Jurisprudence, pages 713-4-5-6, as follows:

"[ 352 - Nunc Pro Tunc Entry - In General

"If there is a failure from any cause whatever to enter judgment and pronounce sentence during the term, the judgment may be entered and sentence pronounced at any succeeding term of the court, unless a new trial has been granted, or the judgment arrested, or an appeal has been taken." (Art. 772, V.A.C.C.P.) (Brackets ours.)

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"The court also has power independent of the statute to enter judgment nunc pro tunc.

" . . . . The act applies and permits the entry of a nunc pro tunc judgment in cases where the judgment as originally entered does not in fact express the judgment rendered . . . (Underscoring ours.)

\*| 353 - Procedure - Effect

"To warrant the entry of a judgment or sentence nunc pro tunc there must be proof that the proposed judgment or sentence was theretofore actually rendered or pronounced; but this proof may be made as well by parol as by record evidence.

"Notice of the proposed entry must be given to the accused; and in a felony case he must be present when the entry is made. . . ."

It was the duty of the county judge to adjudge the costs against the defendant in the matter inquired about; however, this provision was apparently omitted from the judgment inadvertently. Nevertheless the sheriff who is required to execute the judgment must look to the provisions of the judgment and be guided thereby. The judgment could clearly be corrected by a nunc pro tunc entry upon proper motion and proper notice.

We think the proper procedure in this matter would be to correct the judgment nunc pro tunc by proper proceedings so as to add the provision in the judgment adjudging costs against the defendant. Until this nunc pro tunc judgment was entered the sheriff would have no authority to hold the defendant for costs.

Very truly yours

ATTORNEY GENERAL OF TEXAS

APPROVED MAR 28, 1941

*Gene L. Mann*

ATTORNEY GENERAL OF TEXAS

By

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WJF:CC

ENCLOSURE

