



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

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ATTORNEY GENERAL

*changed by law
See H-107*

Honorable R. E. Beasley
County Auditor
Collin County
McKinney, Texas

Dear Sir:

Opinion No. 0-1594
Re: Witness fees and mileage in a felony case for a second appearance in a case during the same term of court

Your request for an opinion on the question as herein stated has been received by this department. Your letter reads in part as follows:

"I would appreciate very much your giving me an opinion in connection with the allowance of mileage to witnesses in criminal cases.

"Not infrequently a criminal case, on call, may be passed and reset for a day some weeks later in the same term of our court. In such circumstances it is obviously more convenient and less expensive for non-resident witnesses to return to their home counties, and to return for the trial at the later date in the term.

"The question arises as to whether an out of county witness in a felony case, obeying subpoena in each instance, and not commanded to appear from day to day, is entitled to his mileage for a second trip to court in the same term, when he has been released from his first subpoena and has been served with a second subpoena for the second appearance."

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We restate your question as follows: Is an out-of-county witness in a felony case entitled to his mileage and per diem for a second trip to court in the same case during the same term?

Article 103 of the Penal Code reads as follows:

"Before the clerk or his deputy shall be required or permitted to issue a subpoena in any felony case pending in any district or criminal district court of this State of which he is clerk or deputy, the defendant or his attorney or the State's attorney shall make written sworn application to such clerk of each witness desired. Such application shall state the name of each witness desired, the location and avocation, if known, and that the testimony of said witness is believed to be material to the State or the defense. As far as practicable such clerk shall include in one subpoena the names of all witnesses for the State and the defendant and such process shall show that the witnesses are summoned for the State or defendant. If any such clerk or his deputy shall issue any subpoena for any witness in a felony case without complying with this article, or shall issue an attachment without an order of court, he shall be fined not less than twenty-five nor more than two hundred dollars."

Article 463 of the Code of Criminal Procedure reads as follows:

"Before the clerk or his deputy shall be required or permitted to issue a subpoena in any felony case pending in any District or Criminal District Court of this State of which he is clerk or deputy, the defendant or his attorney or the State's attorney shall make written, sworn application to such clerk for each witness desired. Such application shall state the name of each witness desired, the location and vocation, if known, and that the testimony

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of said witness is material to the State or to the defense. As far as is practical such clerk shall include in one subpoena the names of all witnesses for the State and for defendant, and such process shall show that the witnesses are summoned for the State or for the defendant. When a witness has been served with a subpoena, attached or placed under recognizance at the instance of either party in a particular case, such execution of process shall inure to the benefit of the opposite party in such case in the event such opposite party desires to use such witness on the trial of the case, provided that when a witness has once been served with a subpoena, no further subpoena shall be issued for said witness."

Article 1036, Code of Criminal Procedure, provides that:

"1. Any witness who may have been recognized, subpoenaed or attached, and given bond for his appearance before any court, or before any grand jury, out of the county of his residence to testify in a felony case, and who appears in compliance with the obligations of such recognizance or bond, shall be allowed his actual traveling expenses, not exceeding four cents per mile going to and returning from the court or grand jury, by the nearest practical conveyance, and two dollars per day for each day he may necessarily be absent from home as a witness in such case.

"Witnesses shall receive from the State, for attendance upon district courts and grand juries in counties other than that of their residence, in obedience to subpoenas issued under the provisions of law their actual traveling expenses, not exceeding four cents per mile, going to

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and returning from the court or grand jury, by the nearest practical conveyance, and two dollars per day for each day they may necessarily be absent from home as a witness, to be paid as now provided by law; and the foreman of the grand jury, or the district clerk, shall issue to such witness certificates therefor, after deducting therefrom the amounts advanced by the officers serving said subpoenas, as shown by the returns on said subpoenas; which certificates shall be approved by the district judge, and recorded by the clerk in a well-bound book kept for that purpose; provided, that when an indictment can be found from the evidence taken before an inquest or examining trial, no subpoena or attachment shall issue for a witness who resides out of the county in which the prosecution is pending to appear before a grand jury. When the grand jury shall certify to the district judge that sufficient evidence cannot be secured upon which to find an indictment, except upon testimony of nonresident witnesses, the district judge may have subpoenas issued as provided for by law to other counties for witnesses to testify before the grand jury, not to exceed one witness to any one fact, nor more than three witnesses to any one case pending before the grand jury.

"Sec. 2. Witness fees shall be allowed only to such witnesses as may have been summoned on the sworn written application of the State's attorney or the defendant or his attorney as provided in Article 463, Code of Criminal Procedure, which sworn application must be made at the time of the procuring of the subpoena, attachment for, or recognizance of, the witness. The judge to whom an application for attachment is made, may, in his discretion, grant or refuse such application, when presented in term time.

"Sec. 3. Before the close of each term of District Court, the witness shall make an

affidavit stating the number of miles he will have traveled going to and returning from the court, by the nearest practical conveyance, and the number of days he will have been necessarily absent in going to and returning from the place of trial; which affidavit shall be filed with the papers of this case. No witness shall receive pay for his services as a witness in more than one case at any one term of the court. Fees shall not be allowed to more than two witnesses to the same fact, unless the judge before whom the cause is tried shall, after such case has been tried, continued, or otherwise disposed of, certify that such witnesses were necessary in the cause.* * *

The Supreme Court of Texas, in the case of *Burttschell v. Sheppard*, 69 S. W. (2d) 402, among other things, held in effect that: The district court is authorized to excuse witnesses previously subpoenaed, and has power thereafter to order issuance of additional subpoenas for the same witnesses in the same case. However, after the court has excused such witnesses under subpoena, the court could not resubpoena the witnesses except under circumstances creating the necessity therefor.

We quote from the above case as follows:

"A careful reading of the statutes, both criminal and civil, fails to disclose any express prohibition against the issuing of a second subpoena for the same witness in the same case. By article 3707, Revised Civil Statutes, the authority of the court to discharge witnesses is affirmatively recognized, and, after his discharge, the witness is under no further compulsion to attend the sitting of the court. The article provides:

"Every witness summoned in any suit shall attend the court from day to day, and from term to term, until discharged by the

court or party summoning him. If any witness, after being duly summoned, shall fail to attend, he may be fined by the court as for a contempt of court, and an attachment may issue against the body of such witness to compel his attendance.'

"It is true that a witness may be compelled to attend the court from day to day and from term to term after he has been summoned, and the writ of attachment is available to compel such attendance; but if the court has discharged the witness and he is under no further compulsion, the writ of attachment would not lie.

"We will not assume that a district judge would have a witness, or witnesses, unnecessarily or wantonly resummoned. He is acting as a court and in his judicial capacity. The resummoning of witnesses should occur only in exceptional cases, and under circumstances which in the mind of the court would create a necessity therefor. The better practice from the standpoint of economy and efficiency would be for the court to refrain from discharging a witness before the end of the case, and to compel his attendance under the one subpoena; but where the judge has seen fit to discharge a witness, in the exercise of a sound discretion, or even arbitrarily and wrongly, and later such witness is needed to give testimony, it must be held that the court has the power to have the witness resummoned. Authority so essential to the operation of courts will not be denied. The possibility of abuse of authority is no argument against its existence."

The above mentioned case does not discuss or pass upon Section 2 of Article 1036, Code of Criminal Procedure, which reads as follows:

"Witness fees shall be allowed only to such witnesses as may have been summoned on the sworn written application of the State's attorney or the defendant or his attorney as

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provided in Article 463, Code of Criminal Procedure, which sworn application must be made at the time of the procuring of the subpoena, attachment for, or recognizance of, the witness. The judge to whom an application or attachment is made, may, in his discretion, grant or refuse such application, when presented in term time."

Therefore, it is to be understood that we are not passing upon the question as to whether or not the witness would be entitled to his per diem and mileage when such witness is excused by the court and re-subpoenaed by the court where a sworn written application of the State's attorney or the defendant or his attorney as provided in Article 463, Code of Criminal Procedure has not been complied with.

In the opinion rendered by this department on February 21, 1935, written by Hon. Leon O. Moses, Assistant Attorney General, addressed to the District Clerk, Sweetwater, Texas, it was held that no witness shall receive pay for his services as a witness in more than one case at any one term of court; however, in the event the witness is instructed by the judge to return at the same term of the district court at which he was summoned, and on the same case, the witness would be entitled to his fee and mileage for a second trip.

In view of the foregoing authorities, you are respectfully advised that it is the opinion of this department that an out-of-county witness in a felony case is entitled to two dollars and his actual traveling expenses not exceeding four cents per mile going to and returning from the court for a second trip to the court during the same term and in the same case. It is immaterial whether the witness has been re-subpoenaed or is attending the court under the original subpoena, provided the witness has been subpoenaed as provided by Article 463, Code of Criminal Procedure.

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Trusting that the foregoing fully answers your inquiry, we are

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Ardell Williams*

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Assistant

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APPROVED NOV 8, 1939

George C. Mann

ATTORNEY GENERAL OF TEXAS

