

Sheriffs Mileage, Warrant Not Served.

Under Section 4634, Political Code, the sheriff is only entitled to mileage where he actually serves the warrant of arrest, or other writ, process, order, etc. Where he travels in search of a person, either with or without a warrant, and fails to find such person he cannot collect mileage for the distance so traveled.

Helena, Montana, August 30, 1905.

J. P. Regan, Esq., Deputy County Attorney, Great Falls, Montana.

Dear Sir:—Your letter of the 21st instant, requesting an opinion of this office, received. The facts, as we understand them from your letter, and upon which you desire an opinion, are that on different dates between July 6 and July 20, 1905, the sheriff or his deputies made four separate trips looking for a man by the name of George W. Recketts, for whom a warrant of arrest had been issued, the several distances traveled varying from 100 to 168 miles. The deputies at the time they made their trips looking for said person did not have any warrant of arrest in their possession. The person they were looking for was not found, and therefore no warrant was served.

Are these deputies entitled to mileage for the distance they traveled in looking for this man, where they had no warrant for his arrest in their possession and did not find the man?

As to what the sheriff may charge, under our statutes, for traveling in search of a person for whom a warrant has been issued, where he fails to find and arrest the party, has never been decided by the courts of this state. Subdivision 8, of Section 4381, Political Code, provides that the sheriff must "serve all process or notices in manner prescribed by law." Section 4634, Political Code, Division 2, provides that the sheriff shall receive for serving an order of arrest \$1.00 and mileage, and division 16 of the same section provides that the sheriff shall receive "for each mile actually traveled in serving every writ, process, order, notice or other paper, going and coming, fifteen cents." Section 4590, Political Code, providing that county officers "who may be entitled to mileage shall be entitled to collect mileage at the rate of ten cents per mile for the distance actually traveled and no more," and Section 4604, as amended by Chapter 86, laws of 1905, providing that "while in the discharge of his duties, both civil and criminal, except as hereinbefore provided, the sheriff shall receive ten cents per mile for each and every mile actually and necessarily traveled" being later enactments than said Section 4634 therefore amend said section to the extent of allowing ten cents per mile instead of fifteen cents for the performances by the sheriff of duties for which mileage is allowed him. The phrase "while in the discharge of his duties, both civil and criminal," as used in said Section 4604, as amended, does not mean that the sheriff shall receive ten cents per mile in the performance of every duty imposed upon him, but simply that in the performance of the duties for which by other sections of the statute he is entitled to mileage the same shall be at the rate of ten cents per mile.

In the case of *Broughton v. County of Santa Barbara*, 65 Cal. 257, s. c.,

3 Pac. 877, the supreme court of California, in construing a statute on mileage similar to ours, said:

"The clause in the section, 'or for mileage in any criminal case or proceeding,' does not authorize the sheriff to charge mileage for other traveling than that which is expressly mentioned in the statute, but simply fixes the rate which may be charged when mileage is allowed by any other law or statute. * * *

Certainly, the intent of the legislature, after having carefully stated that the sheriff shall receive mileage at a certain rate 'in going only,' when a warrant is executed, to allow mileage for traveling in different directions in looking for one charged with crime who is not arrested, should be very clearly expressed."

Also, to the same effect, see *Overall v. Tulare Co.* 100 Cal. 65, s. c. 34 Pac. (Cal.) 520, wherein the court said:

"It follows that the plaintiff was not entitled to recover for the miles traveled in his unsuccessful hunt, though possibly he might have rightly claimed pay for his necessary expenses. That question, however, does not arise here, as no such claim was presented for allowance."

We must, therefore, determine in what cases the sheriff in the performance of his duties is entitled to mileage. We find by said Section 4634 that the sheriff is entitled to mileage "for service of attachment on the body or order of arrest on each defendant," or, as stated by division 16 of the same section, "for each mile actually traveled in serving every writ, process, order, notice or other paper, going or coming." As stated in *Broughton v. County of Santa Barbara*, supra, if the legislature intended to allow mileage to the sheriff where the defendant was not arrested and therefore no service made it "should be very clearly expressed." It would seem from the language used in said Section 4634 that it is only where the sheriff actually serves the warrant or other process that he is entitled to mileage.

Section 3318, laws of Arkansas, is very similar to said Section 4634 of this state, and provides, among other things, that the sheriff in "serving each writ, process, notice, subpoena, or rule, except county matters" shall receive five cents for each mile traveled.

The supreme court of Arkansas, in *McHenry v. Hot Springs County*, 22 S. W. 175, said:

"5. For arresting Spice Hill without a warrant the sheriff is entitled to no fee from the county for mileage, because the statute allows none except for miles traveled 'in serving each writ, process, notice, subpoena, or rule, except in county matters.' The sheriff displayed commendable zeal in arresting him, but that alone does not make the county liable for the fee charged."

The supreme court of New York, in *Ex parte Wyles*, 1 Denio's Reports, 658, in discussing this question, said:

"The statute gives certain fees to a constable for serving a warrant, and for traveling to make such service. (2 R. S. 750, Sec. 4.) But no fees are to be paid unless the warrant is actually served. The rule is probably without exception, that no fees are allowed to any officer for

travelling in order to serve process unless the service is actually made. I think the principle is entirely settled, and it is moreover one of sound policy. It excites to vigilance and fidelity, whereas the opposite rule would afford a strong temptation to remissness and fraud."

The supreme court of Minnesota, in the case of *Davis v. Board of County Commissioners*, 35 N. W. 364, has held to the contrary however, but their decision was based upon a particular section of the Minnesota statute, tending to authorize such charge, not found in the laws of this state.

Under our statute, and in the light of the above authorities, we must hold that the sheriff cannot collect mileage in such cases; and, of course, it follows that a deputy, who did not even have a warrant to serve in case that he had found the person he was looking for, would not be entitled to mileage for the distance traveled in looking for such person.

Yours very truly,

ALBERT J. GALEN,

Attorney General.