

**Opinion No. 256.****Criminal Prosecutions—Assessments of  
Costs in Criminal Prosecutions—  
Justice Court Costs—Costs—Fees—  
Penalties and Fines.**

Held: If the statute designating the punishment for any particular crime or infraction of the law of Montana does not specifically authorize the assessment of costs upon conviction the defendant may not be assessed with costs.

November 10, 1944.

Mr. Milton G. Anderson  
County Attorney  
Richland County  
Sidney, Montana

Dear Mr. Anderson:

You have requested an opinion of this office asking if a defendant convicted in a justice court may be assessed with jury fees and other costs in addition to his penalty or fine.

Section 11611, Revised Codes of Montana, 1935, reads in part as follows:

"In all criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury . . ."

Section 12312, Revised Codes of Montana, 1935, provides as follows:

"The defendant is entitled to a jury of six qualified persons but may consent to a less number."

Section 12313, Revised Codes of Montana, 1935, provides in part as follows:

"A trial by jury may be waived by the consent of both parties expressed in open court and entered in the docket . . ."

Thus it may be seen from the above quoted statutes the defendant in a criminal action has a right to a jury trial and such right must be expressly waived if a jury is not desired.

Section 4935, Revised Codes of Montana, 1935, provides in part as follows:

"Jurors in courts not of record, in both civil and criminal actions, shall receive one dollar and fifty cents per day, but in civil actions the jury must be paid by the party demanding the jury, and must be taxed as costs against the losing party . . ."

The above section intimates at least that only in civil actions shall the defendant or losing party have to pay the jury fees and only in such actions shall the jury fee be included in the costs.

Generally costs are not assessable in criminal actions unless made so especially by the statute relating to the specific offense. See in this respect, 14 American Jurisprudence, Volume 14, page 69, as follows:

"Costs in criminal prosecutions are unknown at common law; their recovery in any criminal case depends wholly upon statutory provisions therefor."

Our Supreme Court in the case of State v. Stone, 40 Mont. 88, 105 Pac. 89, at page 92 thereof, holds as follows:

"Contention is made that the judgment is erroneous in that it includes, as a part of the penalty, the payment of the costs incident to the prosecution. At common law costs, as such were unknown. (Citations.) The recovery of them depends upon the provisions of the statute upon the subject. If they are not expressly allowed, they cannot be recovered. The rule applies as well to criminal cases. While it is competent for the legislature to make the costs a part of the penalty, as such, or to provide generally that a defendant upon conviction of any crime, shall be adjudged civilly liable for them,

in the absence of such a statute courts have no power to include them in the judgment. There is no general provision in the Revised Codes upon the subject; nor does the section supra, fixing the penalty for the offense here involved, grant the power to impose costs. The judgment is therefore erroneous insofar as it includes them . . ."

You have not specified whether the punishment for the statutory infraction for which the defendant was convicted carries the penalty of costs or not; therefore it is to be presumed that it does not.

It is my opinion that if the statute designating the punishment for any particular crime or infraction of the law of Montana does not specifically authorize the assessment of costs upon conviction that the defendant may not be assessed with costs upon such conviction. This holding applies both to district and justice courts.

Sincerely yours,  
R. V. BOTTOMLY  
Attorney General