

Opinion No. 65-132

July 15, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Frank Bachicha, Jr., Assistant Attorney General

TO: Lowell C. Green, Director, Administrative Office of the Courts, Supreme Court Building, Santa Fe, New Mexico

QUESTION

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May a justice of the peace require an appearance bond from an accused after the justice has been disqualified?

CONCLUSION

No, but see analysis.

OPINION

{*222} ANALYSIS

Section 36-3-14, N.M.S.A., 1953 Compilation provides, in part and in effect, that an affidavit of disqualification (directed to a justice of the peace) "shall be filed at any time after the service of process and before the trial in such cause. . . ." Section 36-3-11, N.M.S.A., 1953 Compilation then directs as follows:

"36-3-11. Justice not to proceed after filing of affidavit of disqualification. -- Whenever a party to any action or proceeding of any kind, civil or criminal, in the justice court shall make and file an affidavit that the justice before whom the action or proceeding is to be tried or heard cannot, according to the belief of the party to said cause making such affidavit, preside over said cause with impartiality, **such justice shall proceed no further therein and all** of said justice's acts thereafter in said cause shall be void." (Emphasis supplied).

In Attorney General Opinion No. 63-156 dated November 18, 1963, this Office concluded that an affidavit of disqualification, filed after the judicial discretion of the court has been exercised **in response to a request by the party** for the Court to set the amount of an appearance bond, was not thereafter timely. We hereby reaffirm that opinion.

The emphasized language in the above quoted statute is unequivocal in its meaning. A justice of the peace who has been disqualified may not perform any act relating to that

cause, and, in our opinion, this includes setting the amount of an appearance bond. Further confirmation of this conclusion and legislative intent is evident upon reference to Section 36-3-16, N.M.S.A., 1953 Compilation, which reads as follows:

"36-3-16. Penalty for violating Sections 36-3-11, 36-3-13. -- Any justice of the peace **who willfully attempts or presumes to act as justice in a cause after disqualification** or who willfully fails or refuses to pay over to the designated alternate after disqualification all costs received by him as herein required shall be guilty of a misdemeanor and upon conviction shall be fined not less than \$ 25.00 nor more than \$ 250 for each offense." (Emphasis supplied).

It is undoubted that in setting the amount of an appearance bond, a justice of the peace would be performing a judicial act. See Attorney General Opinions Nos. 63-156, supra, and 61-56 dated June 30, 1961.

We are not unaware of the practical problem which is brought to light as the result of our conclusion herein, viz., that if a justice of the peace after disqualification cannot set the amount of appearance bond, how is the appearance of the accused before an alternate justice to be accomplished?

The procedure for choosing an alternate justice to hear the cause after disqualification is specified in Section 36-3-12, N.M.S.A., 1953 Compilation. The problem of course is the possible lapse of time between the disqualification of one justice and the designation of the alternate, who would immediately proceed to set the appearance bond, but only after his designation. We are further burdened by the additional fact that only the justice of the peace may set bail for appearance in criminal cases in his court. See Attorney General Opinion No. 61-56., supra.

On the surface, it would appear that where a person disqualifies a justice of the peace, he must remain in the custody of the police in the event that the parties are unable to agree upon an alternate justice immediately. We feel, however, that there is a simple and more reasonable method of handling at least certain of these cases.

The untimeliness of an affidavit of disqualification after the court has exercised judicial discretion is premised upon the request of the accused for such exercise of judicial discretion, as set forth clearly in the aforementioned Attorney General Opinion 63-156. So that, it is our opinion that where the court is presented an affidavit of disqualification he may, on his own motion, set the amount of bond prior to acceptance of the affidavit without affecting the defendant's right of disqualification. This, however, is all he can do prior to accepting the affidavit of disqualification.

By employing this procedure the prohibition contained in Section 36-3-11, supra, would not be offended; the accused would not have to remain in custody of the police; if he could post bond; and, his appearance in court when required would presumably be insured. In a situation, however, when the defendant directly or impliedly requests the court to exercise his discretion in setting the amount of appearance bond and only

subsequently files an affidavit of disqualification the rules expressed in Opinion 63-156 would be invoked and such disqualification would no longer be timely.