Opinion No. 65-97

June 14, 1965

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

TO: Luis L. Fernandez, Chief, Local Government Division, Department of Finance and Administration, State Capitol Building, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Must testimony be taken in writing and a transcript prepared for filing with the district court in every preliminary hearing heard in justice of the peace court?

2. What is the responsibility of the county to pay for such transcripts?

3. If the district court has to appoint an attorney to represent an indigent defendant, may a copy of a transcript of the preliminary hearing be furnished the defendant at the cost of the county?

4. Must the county pay a reporter for work already performed in taking and transcribing the evidence presented in a preliminary hearing at the rate set by the reporter; or is the rate to be paid left to the discretion of the county officials?

5. Has a statewide percedure been established for handling preliminary examinations, with regard to the above? If not, may the Board of County Commissioners establish such a procedure under one or more of its general powers?

CONCLUSIONS

1. No, but see Analysis.

2. See Analysis.

3. Yes, and see Analysis.

4. See Analysis.

5. See Analysis.

OPINION

*{*163}* ANALYSIS

In answer to your Question No. 1 above, we first refer you to Article 3 of Chapter 41, New Mexico Statutes Annotated, 1953 Compilation, which relates to criminal procedure for preliminary examinations in this state. Section 41-3-8 N.M.S.A., 1953 Compilation, is pertinent; thus we quote certain portions thereof:

"41-3-8. PROCEEDINGS BEFORE MAGISTRATE AFTER ARREST -- EXAMINATION OF WITNESSES BY PROSECUTING ATTORNEY -- VIOLATION CONSTITUTES FELONY -- COMPLAINT BEFORE MAGISTRATE -- WARRANT -- NO PRELIMINARY EXAMINATION IN MISDEMEANOR CASES. -- First. The witnesses must be examined in the presence of the defendant, and may be cross-examined by him. **On the request of the prosecuting attorney, or of the defendant,** all the testimony must be reduced to writing in the form of questions and answers, and signed by the witnesses, or the same may be taken in shorthand and transcribed without signing, and in both cases filed with the clerk of the district court, except when a preliminary examination is waived by the examining magistrate and may be used for impeachment purposes and for use when the witness dies after said hearing and before the trial thereof in the district court. **In no case shall the county be liable for the expense in reducing such testimony to writing, unless ordered by the prosecuting attorney.** (Emphasis supplied.)

Section 41-3-10 N.M.S.A., 1953 Compilation, likewise relates to the reporting of testimony offered at preliminary examinations, under certain circumstances. Pertinent portions thereof read as follows:

"41-3-10. TESTIMONY AT PRELIMINARY EXAMINATION TO BE REPORTED -- PREPARING AND FILING TRANSCRIPT -- USE BY GRAND JURY -- WITNESSES BEFORE GRAND JURY. -- In all preliminary examinations before justices of the peace in this state, of the crimes of murder or other felonies, **whenever in the discretion and judgment of the district attorney of said county it is deemed advisable** for the perpetuation and preservation of testimony to be submitted to the grand jury of said county of said charge, the said district attorney is hereby authorized and empowered to employ an efficient and competent stenographer, whose duties shall be to take down the evidence and reduce the same to writing, given at such preliminary examination, and after the same shall have been reduced to writing, shall under oath, certify that such testimony was the testimony taken before such justice of the peace on the preliminary *{*164}* examination of such offense, and shall deliver the same, with his stenographic notes, to said district attorney, and the said evidence so written out shall, by said district attorney, be presented to the grand jury of the district court of said county, as soon as said grand jury shall have been convened for the transaction of business, for their examination and inspection, . . ." (Emphasis supplied.)

It is to be noted that the above quoted provisions do not make mandatory the reporting of testimony or the preparation of transcripts relating to preliminary examinations before justices of the peace. Clearly such is to be undertaken only upon the request of the defendant or the prosecuting attorney. Our opinion in reply to your first question therefore, must be in the negative. However, we might add that the recent developments relating to due process requirements which have resulted in an increase

of habeas corpus petitions make it almost imperative for prosecuting attorneys, as well as trial courts, to insure that proper record is made of all proceedings against an accused, from the time of his arrest. District attorneys are well apprised of such requirements and undoubtedly act accordingly when considering the necessity of recording testimony presented at preliminary examinations.

Your second question is answered in part by the above quoted Section 41-3-8, supra. It is in effect specifically stated therein that the county is to be liable for the expense in reducing the testimony to writing only when the prosecuting attorney orders the same. This means, in our opinion, that no one else, including a defendant, is permitted to direct that a transcript of such testimony be prepared at county expense.

Your third question asks whether the county may furnish to an indigent defendant, for whom an attorney has been appointed, a copy of the transcript of testimony at the preliminary hearing, at county expense. It has already been noted that a transcript of the proceedings before the justice of the peace is to be prepared only if the defendant or the prosecuting attorney request it, and that the county is to bear the expense in reducing such testimony to writing only if the prosecuting attorney directs that such transcript be prepared. In this regard we refer you to Attorney General Opinion No. 64-66, dated May 20, 1964, wherein it was concluded in effect that a clerk of a district court did not have to furnish transcripts of proceedings in criminal cases to an attorney appointed to represent an indigent petitioner in a habeas corpus proceeding, if the petitioner had previously been furnished one copy. But, in any case, at least one copy of such record must be furnished. These transcripts are, of course, granted without charge only if the district court orders free process to the petitioner. It must be noted that the foregoing opinion related exclusively to habeas corpus proceedings and in no manner attempted to answer the question presented here. The criterion however, for making available the record of all proceedings against an accused is the placing of an indigent defendant on a status equal, or as close as possible, to that held by a person who is able to defend himself without financial assistance. We feel that the same compelling reasons which require the furnishing of a record of proceedings to an indigent petitioning for release on habeas corpus apply to an indigent presenting his defense at his trial. To deny the latter a record of the preliminary examination for use by him in his defense could well be construed as a failure to provide equal protection of the law and to deny him due process, both of which could provide valid grounds for subsequent release of such defendant, in the event he is convicted, pursuant to writ of habeas corpus.

It is therefore our opinion, in reply to Question No. 3, that upon *{*165}* request a copy of the transcript of the preliminary hearing should be furnished to an indigent defendant at county expense. However, the demand for such transcript should be directed to the prosecuting attorney in the first instance, who in turn can order the preparation of such transcript, so that there is no conflict with the restriction contained in Section 41-3-8, supra, which we emphasized in our above quotation of that section.

Your Question No. 4 above asks in effect: Who is to set the rate to be paid to a stenographer taking and transcribing the testimony presented at a preliminary examination -- the Board of County Commissioners or the stenographer?

Section 41-3-11, N.M.S.A., 1953 Compilation, reads as follows:

"41-3-11. PAYMENT OF STENOGRAPHER'S COMPENSATION. -- Upon any stenographer performing said services as by this article provided, **it shall be the duty of the justice of the peace** before whom said examination may have been held, to issue to such stenographer a certificate under his seal, setting forth the fact of such examination being held before said justice and the attendance of said stenographer in taking down such testimony, and setting forth the number of days of service of such stenographer, **which certificate shall be endorsed and certified to by said district attorney** as to its correctness, and said certificate shall be presented to the board of county commissioners in such county in which such examination may have been held, **and the amount thereof shall be audited and allowed by the board of county commissioners** of such county, to be paid out of the county funds of such county upon the order of said board of county commissioners, as other claims against counties allowed by the board of county commissioners are paid." (Emphasis supplied.)

The words "this article" appearing in the above statute are said to include Section 41-3-10, supra, but not Section 41-3-8, supra. (See Compiler's not under Section 41-3-10, supra.) The main difference between the two provisions is that by Section 41-3-8, supra, either the defendant or the prosecuting attorney may request that the testimony be taken in writing. And, by Section 41-3-10, supra, this matter is left purely to the judgment and discretion of the district attorney. No provision is specifically made for payment of the stenographer pursuant to work done under Section 41-3-8, supra. But, we are not aware of any reason why the procedure prescribed by Section 41-3-11, supra, could not be followed in both instances. Neither this section, nor any other for that matter, specifies the rate of payment for such stenographic services. Until repealed and reenacted in 1963, Section 36-19-1 N.M.S.A., 1953 Compilation contained a provision for payment to a stenographer at the rate not to exceed the sum of seven ($ 7.00) dollars per day and ten ($ .10) cents for each one hundred words or fraction thereof for the preparation of a transcript. Absent any such specification by statute, as is now the situation, it is our opinion that the parties contracting should agree upon a reasonable rate for such stenographic and reporting services, that such rate along with the time employed, pages transcribed, etc., be certified to the Board of County Commissioners. Thereafter, said Board can order payment therefor in the same manner as "other claims against counties allowed by the board of county commissioners are paid." The answer to the fourth question above is that the rate is not to be set by the reporter alone, nor is it to be left entirely to the discretion of the Board of County Commissioners, but rather, it is to be a matter of contract between the parties involved. Further, the Board may, as concluded in Attorney *{*166}* General Opinion No. 62-128, dated October 15, 1962, limit by budgetary provision the amount to be spent on stenographic fees, for preliminary hearings in justice of the peace courts.

The last question inquires whether or not a statewide procedure has been established for handling preliminary examinations, with regard to the previous questions posed herein. Secondly, it is asked whether the Board of County Commissioners has the power to establish such a procedure.

To date, no such state wide procedure has been adopted; however, it is our opinion that no restriction exists to prevent any Board of County Commissioners from adopting a procedure outlining those matters which concern such Board or county directly, such as reports or certifications to be submitted, payments to be made, etc. It is certain, however, that no procedure could be established which would be unreasonable or which would conflict with statutory provisions relating to the subject, or which would invade the discretionary powers of either the court or the district attorney, conferred by law.