

Opinion No. 70-62

July 10, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Mr. Howard Leach Secretary of Corrections Department of Corrections P.O. Box 2325 Santa Fe, New Mexico 87501

QUESTIONS

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Is there a statutory basis for a New Mexico County Sheriff to charge and bill the Department of Corrections for jail services provided for the confinement of adult parolees and probationers?

CONCLUSION

See Analysis.

OPINION

{*106} ANALYSIS

We presume the parolees referred to are persons who were committed to a state penal institution prior to being granted parole. We also presume that these men were incarcerated in a county jail pursuant to Section 41-17-28, N.M.S.A., 1953 Compilation.

In **Robinson v. Cox**, 77 N.M. 55, 419 P.2d 253 (1966) the court said, "one who is paroled is not thereby released from custody but is merely permitted to serve a portion of his sentence outside the walls of the penitentiary, under such conditions as the board may impose during the pleasure of the board. A parole prisoner is not discharged from the custody of the prison authorities . . ."

Citing this authority, this office said, in Attorney General Opinion No. 68-26, issued February 26, 1968, that the State Penitentiary was responsible for the expenses of medical treatment of a parolee taken into custody by a State Adult Probation Officer.

If the State Board of Probation and Parole or the Director of the Department of Probation and Parole (or any employee designated by him) issues a warrant for the arrest of a parolee pursuant to Section 41-17-28, **supra**, he is in the custody of the Department of Corrections and technically in the State Penitentiary, even though he may be temporarily in the confines of a jail maintained by a subdivision of the State. As this office said in its Opinion 68-26, **supra**, "when the retake warrant was issued

pursuant to Section 41-17-28 (A), **supra**, it was the State Penitentiary which declared that the freedom of the parolee should come to an end."

We are of the opinion that a parolee, arrested pursuant to Section 41-17-28, **supra**, is in the control and custody of the State Penitentiary and the Department of Corrections must bear the cost of such control and custody.

We now turn to your question as it concerns a probationer. **Robinson v. Cox, supra**, said: ". . . in the case of a suspension of a sentence, the person has never commenced service of the sentence and has, therefore, the right of personal liberty. He is not in custody as a parolee."

Return of a probation violator is governed by Section 41-17-28.1, N.M.S.A., 1953 Compilation, and it provides that the court or the Director of Probation and Parole (or any employee designated by him) may arrest a probationer for violation of the conditions attached to any court order suspending sentence as provided for in Sections 40A-29-15 and 40A-29-18, N.M.S.A., 1953 Compilation. When the arrest is made by the Director of Probation and Parole (or any employee designated by him), he is acting as an agent (either by direct order or pursuant to direction of a court order which directed supervision, guidance, or direction of probation authorities as permitted by Part E of Section 40A-29-18, **supra**.) of the court which issued the order suspending sentence. Unlike the parolee, a probationer has never been committed to, or incarcerated in, a state penal institution; and therefore he is not in the custody of the Department of Corrections. We must conclude that the Department of Corrections is not liable for the costs of services rendered by the jail of a subdivision of the State in detaining an arrested probationer.

Part D of Section 41-17-28.1, **supra**, provides:

"D. The Board shall budget funds to cover expenses of returning probationers to the court. The sheriff of the county in which the probationer was convicted is the court's agent in the transportation of the probationer but the director, with the consent of the court, may utilize other state agencies for this purpose when it is in the best interest of state."

This subsection of Section 41-17-28.1, **supra**, has not been interpreted by any appellate court in this {*107} state. However, it is the opinion of this office that the intent of the legislature was to provide that the Board of Probation and Parole is to pay the expenses of transportation of a probationer from the place of arrest. It does not appear that the phrase "expenses of returning probationers" was meant to include the cost of detention prior to the return.

Enforcing this position is a provision in the General Appropriations Act of 1970, Chapter 89, Laws of 1970. In Part H, \$ 50,000 was appropriated for transportation and extradition of prisoners. The legislature provided:

"The appropriation shall be paid in accordance with the provisions of Sections 15-43-11.1, N.M.S.A., 1953 Compilation, and 41-17-28.1, N.M.S.A., 1953 Compilation, and shall be used **only for** reimbursement of mileage and personal traveling expenses properly incurred by officers and employees and no part shall be used for reimbursement of mileage to any agency of state, county or municipal government; no reimbursement for mileage shall be made for the use of privately used vehicles when government owned vehicles are available for this purpose." (Emphasis ours.)

It is our opinion that the language in the General Appropriations Act limiting the expenditures of money appropriated in accordance with the provisions of 15-43-11.1 and 41-17-28.1 of the New Mexico Statutes prevails over any ambiguous language in the statutes. In addition, the fact that the legislature did not include Section 41-17-28, **supra.**, applying to the return of parole violators, within the above appropriations adds weight to our opinion as to the proper authority to bear the cost of maintaining parole violators and the proper authority to bear the cost of maintaining probation violators.

Therefore, it is the opinion of this office that your department should decline to pay the costs involved in detaining probationers who have been arrested and detained pursuant to Section 41-17-28.1; but that the Board must provide or pay for their transportation costs.

By: Gary O'Dowd

Deputy Attorney General