Opinion No. 37-1700

July 3, 1937

BY: FRANK H. PATTON, Attorney General,

TO: Hon. Verdan Doggett District Attorney Raton, New Mexico

*{*134}* The letter by Mr. Montoya, of your office, requesting an opinion as to whether or not the stenographer to the district attorney is entitled to receive the fees provided by statute for the taking of testimony at preliminary hearings when such testimony is taken by him at the request of the district attorney. We are convinced that he is.

Clearly the meager salary provided for district attorneys' stenographers was not intended to compensate them for office work and for the taking of testimony for which other fees are specifically provided. That a district attorney can have a stenographer at the salary provided competent to take and accurately transcribe testimony is fortunate; and when the three statutes which we have on the subject are construed together, I do not think there is any doubt that the district attorney has the right to select his own stenographer and employ him to take and transcribe such testimony in cases where he deems it wise to preserve such testimony.

Sections 79-802 and 79-803, 1929 Compilation, were originally passed in 1891 when indictments by grand juries were necessary for the prosecution of all felony cases. The first of those two sections authorizes the district attorney to employ a stenographer who transcribes the testimony and delivers it to the district attorney, certified to by such stenographer. The second section provides that the county shall pay such stenographer upon the certificate of the justice of the peace and the approval of the district attorney.

*{*135}* The last proviso in the first of these two sections also required the justice of the peace to have reduced to writing testimony taken in all preliminary hearings, and to have the same filed with his certificate as to its correctness with the clerk of the district court, for use to the same effect as "in cases to be taken under the direction of the district attorney by a stenographer," No authority is given to the justice of the peace in that statute, and it is evident from that statute that the justice of the peace was required to give a summary of the testimony for use before the grand jury only. This is what Judge Rocque Reeder of Harding county used to call his "field notes".

In 1909 the legislature passed what is now Section 79-1301, 1929 Compilation, as amended. (See Ch. 29, Sec. 1, L. 1909; Sec. 3282, 1915 Code). By it authority was given the justice of the peace "a stenographer to take down the evidence at any inquisition and in felony cases". This act was an amendment of Section 1774, C. L. 1897, with reference to fees, which had been the law since 1889, (L. 1889, Ch. 22), and which did not contain this particular paragraph. Under it payment is also to be made by the county commissioners upon the certificate of the justice.

The 1889 law above referred to (Sec. 79-802, 1929 Comp.), was not repealed. Since repeals by implication are not favored, the district attorneys in that district at least have in the past considered it in force and under it make their own selection of stenographer to take the evidence. The act however made it possible for a justice of the peace to certify to a verbatim record of the testimony. Since grand juries may still be called, no doubt such testimony can be read to the grand jury under the authority of the 1889 law, and I saw it done in one district only a year ago.

After the Constitution was amended permitting prosecutions for felony by information, a statute was passed in 1925 with respect to preliminary hearings, now shown as Sec. 35-4508, 1929 Compilation, providing that at the request of the District Attorney, the testimony may be taken in shorthand, transcribed, and filed in the district court. It further provides that the county shall not be liable for the expense "unless ordered by the prosecuting attorney".

It is quite apparent, therefore, that excepting only "inquisitions" the district attorney has in all cases the sole right to order the employment of a stenographer to be paid by the county. I think, however, that the justice should certify as to fact that the services were rendered before presenting the claim, but this being obviously for purposes of auditing only on the part of the Commissioners, where such certificate cannot be procured, there is no reason why the claim should not be allowed if the Commissioners are satisfied from the endorsement of the District Attorney showing that he ordered the taking of the testimony and that the services were rendered. No court would hold that the services cannot be paid because the justice failed to sign such a certificate and has since died or removed from the country.

Such services are payable, of course, out of the general county fund. However, I recall that when Mr. Whelan was district attorney, Judge Kiker had the account paid out of the court fund in two important cases, (a murder case and a $ 30,000 robbery case), because the county of Taos had no money and the transcripts amounted to quite a little sum. That can only be done, of course, by order of the district judge who has complete control of the court fund.

One other question is whether the transcript must be filed in the district court. The last act passed and above referred to seems to so require -- none of the others did except when *{*136}* certified to by the judge in the absence of the district attorney, in which cases the justice usually transmitted such testimony along with his other papers to the Clerk. I do know, however, that it has not been the practice in that district in the past. A filing with the clerk of the district court would probably be required if an attempt is made to use it in cases where the witness has died, though we often used such transcript for impeachment purposes without such filing.

I trust I have answered all of the questions which your office wanted us to consider, and that I may have been of some assistance in the matter.

By A. M. FERNANDEZ,

Asst. Atty. Gen.