

Opinion No. 45-4748

July 11, 1945

BY: C. C. McCULLOH, Attorney General

TO: Mr. Richard F. Rowley Acting District Attorney Ninth Judicial District Clovis, New Mexico

{*101} We are in receipt of your letter of July 6, 1945, in which you state that the constable in Precinct 9 has left Clovis, that during the month of June the Justice of the Peace in the precinct designated another person to act as constable upon the assumption that Section 38-406 of the 1941 Compilation gave him that authority, but that the necessary affidavits were not filed. You now state that the person so appointed has presented to the County Commissioners a claim in the sum of \$ 42.00 for fees and mileage. In view of this situation you ask the following two questions:

"I would like to have your opinion as to whether or not section mentioned authorizes the Justice of the Peace to designate a person to serve criminal process, and also whether under the circumstances of this case the claim of a person who is not the qualified constable may legally be approved and paid by the Commissioners."

In answer to your first question, your attention is directed to that part of Section 38-406 authorizing a Justice of the Peace to designate the constable which provides in part as follows:

"And the person so empowered shall possess all the authority of a constable in relation to the execution of such process."

Inasmuch as a constable has the power to serve criminal processes, and since the person empowered to act as constable is given all the powers of a constable with respect to the execution of such processes, it is my opinion that the person so authorized would have the power to execute criminal processes.

I observe that by the proviso the Justice of the Peace is not authorized to deputize a private person upon the filing of an affidavit by the **plaintiff**. While it might be argued that the word "plaintiff" is not a suitable designation for the state in criminal matters, yet you will observe that as originally enacted this statute did not contain the proviso and that it was not until 1889 that it was added. Thus, since the deputized person undoubtedly had authority to execute criminal process before the amendment, and since the sections {*102} granting him this power have not been changed, it appears to me that the foregoing is correct.

In answer to your second question, your attention is directed to the case of State v. Blancet, 24 N.M. 433 in which the court discusses de facto officers. There the court recognized three requisites to constitute one an officer de facto. These are:

"(1) The office held by him must have a de jure existence, or at least one recognized by law;

"(2) He must be in actual possession thereof; and

"(3) His holding must be under color of title or authority."

In the case presented by you, the office of constable is recognized by law. The person involved was in fact in possession of the constable's office and was holding the same under color of title, his color of title being the purported designation by the Justice of the Peace. Inasmuch as he was a de facto officer and as no one else claims the fees, it is my opinion that the County Commissioners may legally pay him all fees properly substantiated.

In passing, your attention is directed to Section 10-301 of the 1941 Compilation and Chapter 123 of the Laws of 1943, providing for vacancies and the filling thereof under certain circumstances. Trusting the foregoing sufficiently answers your inquiry, I am

By ROBERT W. WARD,

Asst. Atty. General