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Supreme Court Building
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Opinion Committee

ATTENTION: Ms. Madeleine B. Johnson
Opinion Committee

Re: Assessment and collection of fees for services rendered by
peace officers for executing or processing an arrest
warrant or *capias*.

Ladies and Gentlemen:

The Justices of the Peace and the Auditor of Harris County have
requested advice regarding the circumstances under which a court may
assess and collect fees for services rendered by peace officers for
executing or processing an arrest warrant or *capias*. They have
asked, in substance, the following questions:

1. When may a court impose a fee for executing or processing
an arrest warrant or *capias*?
2. In the event that the amount of the fees due were
miscalculated, may the defendant obtain a refund?

Please furnish us with your opinion on the questions presented.
A memorandum brief is enclosed.

Sincerely,

MIKE DRISCOLL
County Attorney

Rosalinda Garcia
By Rosalinda Garcia
Assistant County Attorney

ACCOMPANIED BY ENCLOSURES —
FILED SEPARATELY

Enc.

First Assistant: Marsha L. Floyd • Bureau Chiefs: James E. McKnight, Admin. Services, Jerry B. Schank,
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Donald W. Jackson, Rock W. A. Owens, Frank E. Sanders, Richard S. Hill

MEMORANDUM BRIEF

1. When may a court impose a fee for executing or processing an arrest warrant or capias?
2. In the event that the amount of the fees due were miscalculated, may the defendant obtain a refund?

In Harris County, hundreds of thousands of Class C misdemeanor cases are filed in the justice courts each year. In those cases where the peace officer issues a written notice to appear in court or for making an arrest without a warrant, the courts impose a fee of \$5 when the defendant is convicted. At issue is when an "arrest" fee may be imposed by the court. For example, in which of the following scenarios may the court impose this fee:

1. The court issues the arrest warrant, but before the constable or other peace officer can process or execute the warrant, the defendant voluntarily appears in court, enters a plea, and disposes of his case. The warrant is recalled. [Should the defendant pay a "processing" fee?]
2. The court issues an arrest warrant. The constable processes the warrant by (1) calling the defendant or (2) inputting the information into a pending arrest warrant database. The defendant posts bond. The court recalls the warrant. The defendant subsequently appears in court, enters a plea, and disposes of his case prior to the execution of the warrant. [Should the defendant pay a "processing" fee?]
3. The court issues an arrest warrant. The constable processes the warrant by (1) calling the defendant or (2) inputting the information into a pending arrest warrant database. The court recalls the arrest warrant or capias because of a technical defect, i.e. lack of an adequate affidavit of probable cause or to change the wording in the command to the officer in a capias pro fine [i.e., to require the officer to bring the defendant before the court to show cause why the defendant has not paid the fine rather than taking him directly to jail]. No warrant is re-issued. The defendant is not arrested but subsequently does appear in court, enters a plea, and disposes of his case. [Should the defendant pay a "processing" fee for the warrant which was issued by the court and processed by the constable?]
4. The court issues an arrest warrant. The constable processes the warrant by (1) calling the defendant or (2) inputting the information into a pending arrest warrant database. The court recalls the arrest warrant or capias because of a technical defect. An alias warrant or capias is issued later. The defendant is arrested, appears in court, enters a plea, and disposes of his case. [Should

the defendant pay one "processing" fee and one "arrest" fee?]

5. The court issues an arrest warrant and the constable executes the warrant. The defendant posts bond but fails to appear in court and is re-arrested. He subsequently appears in court and disposes of his case. [Should the defendant pay two "arrest" fees?]

When may a court impose a fee for executing or processing an arrest warrant or capias?

TEX. CODE CRIM. PROC. ANN. art. 102.011 (Vernon Supp. 1991), providing for fees for certain services rendered by peace officers, states, in part, as follows:

(a) A defendant convicted of a misdemeanor shall pay the following fees for services performed in the case by a peace officer:

(1) \$5 for issuing a written notice to appear in court following the defendant's violation of a traffic law, municipal ordinance, or penal law of this state, or for making an arrest without a warrant;

(2) \$35 for executing or processing an issued arrest warrant or capias;

* * *

(e) A fee under Subsection (a)(1) or (a)(2) of this article shall be assessed on conviction, regardless of whether the defendant was also arrested at the same time for another offense, and shall be assessed for each arrest made of a defendant arising out of the offense for which the defendant has been convicted. (Emphasis added.)

Clearly, fees imposed pursuant to article 102.011 are payable only upon conviction. Op. Tex. Att'y Gen. No. JM-1172 (1990). Note that effective September 1, 1991, article 102.011(a)(2) will read as follows:

(2) \$35 for executing or processing an issued arrest warrant or capias, with the fee imposed for the services of:

(A) the law enforcement agency that executed the arrest warrant or capias, if the agency requests of the court, not later than the 15th day after the date of the execution of the arrest warrant or capias, the imposition of the fee on conviction; or

(B) the law enforcement agency that processed the arrest warrant or capias, if the executing law enforcement agency failed to request the fee within the period required by Paragraph A of this subdivision.

Tex. S.B. 355, 72nd Leg. R. S. (1991).¹ Based upon the language used in this amendment, it appears that the legislature intended to impose a fee only if the peace officer actually executes an arrest warrant or capias. However, what is unresolved is whether an "arrest" fee may be imposed when a defendant is not arrested by a peace officer prior to the effective date of this amendment. In addition, should the fee be imposed for executing and/or processing each arrest warrant or capias which was issued by the court?

When construing statutes, TEX. GOV'T CODE ANN. §311.011 (Vernon 1988) requires that:

(a) Words and phrases shall be read in context and construed according to the rules of grammar and common usage.

(b) Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

Section 311.021 concerns the intention of the legislature in enacting the statutes and reads as follows:

In enacting a statute, it is presumed that:

- (1) compliance with the constitutions of this state and the United States is intended;
- (2) the entire statute is intended to be effective;
- (3) a just and reasonable result is intended;
- (4) a result feasible of execution is intended; and
- (5) public interest is favored over any private interest.

Since neither the legislature nor the courts have given a particular meaning to "executing" or "processing" in article 102.011, the "rules of grammar and common usage" shall be the main guide to interpreting these terms. Black's Law Dictionary, 6th ed., 1990, provides the following definition for "execution":

¹ Section 2 of S.B. 355 states as follows:

Section 2. The change in law made by this Act applies only to the disposition of a service performed on or after the effective date of this Act. The disposition of a fee imposed before the effective date of this Act is covered by the law in effect on the date the fee was imposed, and the former law is continued in effect for this purpose.

Carrying out some act or course of conduct to its completion. The completion, fulfillment, or perfecting of anything, or carrying it into operation and effect.

"Executing" under this definition of "execution" must encompass the peace officer's act of actually serving the warrant and arresting the defendant since the issuance of an arrest warrant is but one part of a course of conduct initiated to lead to the arrest of a particular defendant.

"Processing," on the other hand, is defined in such a way as to be included within the act of "executing." Webster's Third New International Dictionary, 1976, defines "process" as follows:

1) to proceed against by law; 2) to subject to a particular method, system, or technique of preparation, handling, or other treatment designed to effect a particular result.

The "processing" of the arrest warrant is "designed to effect a particular result," i.e., the arrest of the subject of the warrant. However, "processing" does not seem to contemplate that an actual arrest be made but only that the warrant be prepared or handled.

In support of the argument that "executing" is distinguishable from "processing," the legislature chose the disjunctive conjunction "or" to separate "executing" and "processing." The word "or" in ordinary and natural use has a disjunctive meaning. Burnett v. State, 514 S.W.2d 939, 940 (Tex. Crim. App. 1974). See also Board of Ins. Comm'rs v. Guardian Life Ins. Co., 180 S.W.2d 906, 908 (Tex. 1944); Op. Tex. Att'y Gen. No. JM-875 (1988). In Burnett, the Court of Criminal Appeals defined the use of "or" in the Penal Code's definition of "prisoner," which read as "any person who has been formally charged with or convicted of a felony." (Emphasis added.) Consequently, the Court found that the code's definition created two categories of prisoners.

Following the Court of Criminal Appeals approach, the use of "or" in article 102.011 [prior to 9/1/91] seems to create two categories for which a fee may be collected: executing OR processing. Before a fee can be charged for "executing" a warrant, it appears that the peace officer claiming the fee must arrest the defendant. Short of arrest, a fee for "processing" seems to be allowable in cases where the peace officer has performed some services short of execution of the arrest warrant even if the defendant voluntarily appears before the court. In such a case, the "processing" may be said to include the delivery of an issued arrest warrant to a peace officer and its subsequent recall upon the appearance and conviction of the defendant.

Section (e) of article 102.011 appears to further define the conditions under which these fees apply. Basically, section (e) seems to say that the fees under subsections (a)(1) and (a)(2) will apply even if the arrest was triggered by an offense different from

that which the defendant has been convicted. In addition, he should be assessed a fee for each arrest arising out of the offense charged, i.e. arrest warrant based upon the charge of issuance of a bad check and arrest warrant based upon the defendant's bond forfeiture arising out of the same charge. To be sure, if the court issues two warrants of arrest in a single case and the defendant is arrested twice by a peace officer, the defendant should be required to pay two "arrest" fees.

The propriety of imposing a "processing" fee when a warrant is recalled by the court for any reason, including a technical defect also needs to be addressed. In the case where an arrest warrant has been issued and subsequently recalled by the court for any reason, including, the acceptance of a plea and disposition of the case, the posting of a bond, or the lack of an affidavit of probable cause, it may be argued that no peace officer is entitled to a fee.

First, "an officer may not impose a cost for a service not performed or for a service for which a cost is not expressly provided by law." TEX. CODE CRIM. PROC. ANN. art. 103.002 (Vernon Supp. 1991). On the other hand, it may be argued that the officer performed a service by "processing" the warrant or *capias*. Second, article 102.011(a)(2) requires an "issued" arrest warrant or *capias*. "Issuance" has been defined to mean "something more than mere clerical preparation and includes unconditional delivery to an officer for enforcement in the manner provided by law." Ross v. American Radiator & Standard Sanitary Corp., 507 S.W.2d 806, 809 (Tex. Civ. App.--Dallas 1974, writ ref'd n.r.e.) quoting Harrison v. Orr, 296 S.W. 871, 875 (Tex. Comm'n App. 1927, judgm't adopted). When an arrest warrant has been recalled for any reason [i.e. posting of bond or lack of probable cause affidavit], it is no longer available for "enforcement in the manner provided by law." See also Sharp v. State, 677 S.W.2d 513, 518 (Tex. Crim. App. 1984, en banc). Therefore, if an arrest warrant is recalled by the court prior to its execution, it may be argued that a peace officer is not entitled to receive any fee, particularly if there was no probable cause finding prior to the issuance of the warrant in the first instance.

In summary, based upon the plain language of Article 102.011, it appears that a defendant may be required to pay and the peace officer is entitled to receive an "arrest" fee for the "processing" or "execution" of each arrest warrant or *capias* issued by the court prior to September 1, 1991. In the alternative, it may be argued that Article 102.011 only authorizes the imposition of an "arrest" fee for the actual execution of a warrant and that no fee should be imposed for each warrant which may be issued by a court and processed by a peace officer. After September 1, 1991, it appears that this fee may only be imposed if a peace officer actually executes an arrest warrant or *capias*.

In the event that the amount of the fees due were miscalculated, may the defendant obtain a refund?

Tex. Code Crim. Proc. Ann. art. 103.008 (Vernon Supp. 1991) does provide a mechanism for the correction of costs if the defendant files a motion not later than one year after the date of the final disposition of the case in which the costs were imposed. However, based upon prior authorities, it may be argued that if a defendant "voluntarily" pays a fee, he may not be entitled to a refund. For example, in Op. Tex. Att'y Gen. No. V-109 (1947), the Attorney General concluded that where the arrest warrant had been recalled due to failure to fulfill a statutory or constitutional requisite and a person had been convicted and paid the arrest warrant fee, the county was not be liable for the return of the fee. This opinion quotes the following from 26 A.L.R., p. 1124:

Ordinarily, the question of whether one who has paid a fine illegally or improperly imposed upon him can recover back the amount so paid may be said to depend upon certain factors, chief of which is that of voluntary or involuntary payment. If the payment is made under circumstances which amount to coercion or duress so that it must be regarded as an involuntary one, the fine may generally be recovered; otherwise not. The cases in which it has been held that the payment was under duress are usually those in which the accused was imprisoned or was threatened with imprisonment and payment of the fine was necessary to avoid or secure release from such imprisonment.

The "voluntary payment" rationale has been most fully developed in cases where the plaintiff seeks recovery of an illegal tax. In these cases, the courts have consistently held that the voluntary payment of an illegal tax will not support a claim for recovery. State v. Connecticut General Life Ins. Co., 382 S.W.2d 745, 746 (Tex. 1964). Accordingly, based upon this opinion, it appears that if a defendant "voluntarily" pays a fee and fails to file a timely motion in accordance with article 103.008, the defendant may not be entitled to a refund.

CONCLUSION

After September 1, 1991, it is clear that a defendant must pay an "arrest fee" each time that he is actually "arrested" by a peace officer. However, it does not appear that an arrest fee should be imposed for "processing" if the warrant is not actually executed. Arguably, the law in effect prior to the amendment of article 102.011 may authorize the imposition of a fee for executing or processing an arrest warrant or *capias*. Since processing is a separate category for which a charge may be made, an arrest need not necessarily occur before the warrant fee may be imposed for processing the arrest warrant or *capias* prior to September 1, 1991. In the event that the costs assessed against a defendant are miscalculated, a defendant may file a motion to correct this within one year after the date of the final disposition of the case in which the costs were imposed.