

BARRY S. GREEN

TEXAS ATTORNEY GENERAL

97 AUG -6 AM 11:16
DISTRICT ATTORNEY
JACK & WISE COUNTIES
271ST JUDICIAL DISTRICT
COURT OF TEXAS

FILE # ML-39700-97

I.D.# 39700

RA-962

RECEIVED

AUG 06 1997

Opinion Committee

August 4, 1997

Hon. Dan Morales
Attorney General of the State of Texas
P.O. Box 12548
Austin, TX

Re: Request for an opinion

Dear General Morales:

I respectfully ask for your opinion in connection with the following question.

QUESTION PRESENTED

If a bail bondsman has written a bond for a defendant charged with an offense greater than a Class C misdemeanor and subsequently wishes to file an affidavit to surrender his principal pursuant to art. 17.19 of the Texas Code of Criminal Procedure, with which magistrate should the affidavit be filed: (1) the judge who will ultimately have jurisdiction of the criminal case, (2) the magistrate who provided the defendant the "magistrate's warnings" after his arrest pursuant to art. 15.17, or (3) the magistrate who issued the arrest warrant after a "complaint" was properly presented to him? Finally, if the answer is the latter of the three choices, where should the affidavit be filed if the defendant was arrested without a warrant thereby eliminating the filing of the pre-arrest complaint?

HYPOTHETICAL

The situation can best be explained by the use of the following example:

A detective with the sheriff's office has been investigating an individual for the offense of aggravated assault, a second degree felony. He prepares an arrest warrant affidavit (called a "complaint" in art. 15.04) and presents same to a Magistrate # 1 (a justice of the peace) for review. The magistrate reviews the

affidavit, determines that probable cause exists, and issues an arrest warrant.

The defendant is subsequently arrested and taken "without unnecessary delay" to a magistrate (a municipal judge) who performs his duties pursuant to art. 15.17 including the setting of bail. This process is technically called having the defendant "magistratized". See Watson v. State, 762 S.W.2d 591, 594 n.4 (Tex.Crim.App. 1988).

The defendant is then jailed but contacts a bonding company who accepts him as a customer, issues a bond, and has the defendant released from custody.

One week passes and the case is referred to the district attorney for review. The D.A. requests additional investigation before making a decision as to whether the case will be referred to the grand jury.

During this time frame, the bondsman formulates the belief that the defendant is a flight risk. Consequently, he wishes to surrender the defendant/principal by utilizing the procedure set forth in art. 17.19, and he prepares an affidavit setting forth the reasons he believes constitutes just "cause". Since the statute reads the affidavit should be filed "before the court or magistrate before which the prosecution is pending", he calls the district clerk who informs him that no indictment has been filed against the defendant. Consequently, the bondsman needs to make a determination of where the "prosecution is pending" in order to file the affidavit.

DISCUSSION

The options, as set forth above, seem to be three-fold. The least likely choice would appear to be the presentation of the affidavit to surrender the principal to the district judge even though the judge would ultimately have jurisdiction over the case upon return of an indictment. In Ex Parte Clear, 573 S.W.2d 224 (Tex.Crim.App. 1978) the Court of Criminal Appeals held that a district court had no authority to increase a bond amount previously set by a justice of the peace because the justice court "had sole jurisdiction over [the] complaint against relator, to the exclusion of all other courts, until such time that the complaint was either dismissed by the court or superseded by the action of the grand jury, or until the time [the right to indictment was waived]." Id. at 229. This reasoning would support the conclusion that the prosecution was not "pending" before the district court in the above hypothetical. Additionally, a different conclusion would be impractical in a multi-district court county since it would be impossible to predict which court the indictment would ultimately be filed in.

With the district court eliminated, the remaining choices would be

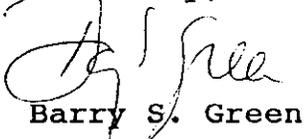
Magistrate # 1 (who issued the warrant) and Magistrate # 2 (who "magistratized" the defendant). Before which of these magistrates is the case pending as that term is defined in article 17.19 of the Texas Code of Criminal Procedure? *This question is respectfully submitted for your review.*

The appropriate location to file the affidavit, it would appear, would be with Magistrate # 1 especially when considering the language of Clear, supra. From a practical standpoint, however, there might be some difficulty in the bondman identifying the correct magistrate in such a scenerio especially in light of the number of officials who are designated as magistrates. See Code of Criminal Procedure art. 2.09. Nevertheless, such difficulties, I concede, have no place in statutory interpretation.

However that question may ultimately be answered, does the result change if the arrest was made without the benefit of a warrant? I would opine that the magistrate which "magistratized" the defendant would be the only individual who could receive the affidavit. Although the Code of Criminal Procedure is silent on the subject, there is no question that an affidavit prepared by the arresting officer should be filed with a magistrate after the arrest which the judge should review to determine whether probable cause exists to hold the defendant pursuant to Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct 854, 43 L.Ed.2d 54 (1975). See also, Cantu v. State, 842 S.W.2d 667, 680 n.10 (Tex.Crim.App. 1992).¹ This document could be characterized as the equivalent of a pre-arrest "complaint".² Therefore, the reasoning would be consistent with that set forth above in arrest warrant situations.

Thank you for your assistance in this matter.

Sincerely,


Barry S. Green

cc: Sheriff Phil Ryan
All Justices of the Peace

¹ This is typically filed with the magistrate who will magistratize the defendant, but there appears to be no requirement for same.

² Although the process is not uniform around the state, some officers will file a very short complaint form in addition to the probable cause affidavit. The form is described in Rule v. State, 890 S.W.2d 158, 166 (Tex.App. - Texarkana 1994, pet. ref'd) wherein it was improperly used as a complaint under article 15.04.

A summary of our historical financial support the Ellis County Center for 9/30/97 and projected for 9/30/98 are as follows:

NAVARRO SBDC

ELLIS COUNTY CENTER

| Expenses: | Estimated <u>Ending 9/30/97</u> |
|--------------------------------|------------------------------------|
| Salary & Benefits | \$23,462 |
| Travel | 546 |
| Operating Supplies | 2,800 |
| Publications | 287 |
| Telephone - Internet | 360 |
| Postage | <u>1,264</u> |
| | \$28,719 ===== |
| Funding Sources: | |
| Federal | \$15,000 |
| State | 6,219 |
| Local | <u>7,500</u> |
| | \$28,719 ===== |
| Leverage of local contribution | 2.83 times |

Failure to match Federal and State Funds will make our share available for use by other communities in the region, leaving Ellis County with a minimal organized effort relating to business counseling and training by the Navarro SBDC.

Of particular note, our training program is deleted without the financial assistance requested. A review of last years performance commitments are listed under the following benefits section.

BENEFITS

The Ellis County Small Business Resource Center, accomplished the following objectives during FY '98:

- 1) We staffed the office with a Training Director.
- 2) We conducted a minimum of 18 Training/Workshops in the county, either on campus or at the appropriate Chamber's meeting room;
- 3) We provided experienced counselors, either through local volunteers as an "in-kind" contribution or from SBDC staff, to effectively conduct one-on-one sessions for all who request this service;
- 4) We provided non-financial support to the County's industrial development efforts, representing those educational facilities and training capabilities through Navarro College, the SBA, and related State Agencies;
- 5) We promoted the Ellis County Center as a Satellite office

on all local and national correspondence which call for office locations and capabilities;

6) We listed the Ellis County Center as a co-sponsor on all appropriate publications relating to hosting, housing or presenting related workshops and counseling sessions;

7) We provided Internet capabilities for marketing and research for National and State addresses;

8) We did not create, an Ellis County SCORE Chapter with the Ellis County Center as it's home base. We have no plans to do so at this date.

RQ-913

KRISTEN KLEIN
GUADALUPE COUNTY AUDITOR
307 W. Court, Suite 205 Seguin, Texas 78155
(210) 303-4188 Fax (210) 379-1083

August 15, 1997

FILE # ML-39491-97
I.D. # 39733

RECEIVED

AUG 20 1997

Opinion Committee

Opinion Committee
Office of the Attorney General
Post Office Box 12548
Austin, Texas 78711-2548

Re: Opinion Request ID # 39491 - Management and financial decisions regarding Juvenile Probation, Detention and grant funds.

Dear Sir or Madam:

I would like to request that the new legislation, referenced below, be taken into account when you render your opinion on my request for clarification on management and financial decisions regarding juvenile probation. My request was dated March 31, 1997 and ID#39491 was assigned. A copy of my original request is attached for your convenience. I would also appreciate your assistance on the questions addressed below.

Senate Bill 1395, SECTION 9, added Local Government Code §111.094 which states "The commissioners court in preparing the county budget shall determine the amount of county funds to be spent for the juvenile probation department in the county budget."

Human Resources Code §152.1001(d) states "The commissioners court shall provide the necessary funds to pay the salary and expenses of the juvenile probation officer."

The new changes to the Local Government Code appear to give the commissioners court the authority to set the juvenile budget (county funds portion). The existing law in the Human Resources Code appears to give this same authority to the Juvenile Board.

With both laws using the word "shall", who has the ultimate authority to set the funding level, for county funds, for the juvenile probation department?

I would appreciate your help in determining how these laws apply to the juvenile probation department, juvenile board, and county commissioners court, and how it relates to my previous opinion request.

Thank you for your help with this matter. Please do not hesitate to contact me if I can clarify any of the above issues or be of assistance.

Please note that the Guadalupe County Attorney's Office has not responded to any of my several written requests for legal opinions. At this time those questions remain unanswered. He has told the Commissioners' Court that he is a prosecuting attorney for the county not a legal advisor for the county.

Additionally, an opinion regarding this juvenile matter was submitted to the District Attorney. I received a written response requesting that this be directly submitted to the Attorney General's Office. This letter is attached.

Respectfully,

A handwritten signature in black ink, appearing to read "Kristen Klein". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Kristen Klein
County Auditor

Enclosures

KRISTEN KLEIN
GUADALUPE COUNTY AUDITOR
307 W. Court, Suite 205 Seguin, Texas 78155
(210) 303-4188 Fax (210) 379-1083

March 31, 1997

Opinion Committee
Office of the Attorney General
Post Office Box 12548
Austin, Texas 78711-2548

Re: Management and financial decisions regarding Juvenile Probation, Detention and grant funds.

Dear Sir or Madam:

Based on the following facts and circumstances, I would like to request an Attorney General's Opinion under section 402.042 of the Texas Government Code.

Section 152.1001 of Human Resources Code created the Guadalupe County Juvenile Board. Paragraph (d) provides that the Chairman shall certify "all claims for expenses of the juvenile probation officer as necessary in the performance of the officer's duties".

Questions:

- (1) (a) *What is meant by the "expenses of the juvenile probation officer"?*
 - (b) *Is it reimbursement to the officer for his out-of-pocket expenses (mileage, meals, etc.), any expenses directly related to that officer regardless of who is paid (business cards, registration, etc.), or is it all bills paid by the county for the operation of the probation department?*
- (2) *Is it necessary for the Juvenile Board to meet and approve the "expenses of the probation officer" prior to the Chairman certifying these expenses or can the Chairman, as chief administrative officer, certify the expenses without board action?*
- (3) *Is it necessary for the Juvenile Board and/or the Commissioners' Court to meet and approve the "expenses of the juvenile probation officer" prior to paying the claims for the juvenile probation department?*

The law does not mention the rest of the expenditures relating to juvenile probation, juvenile detention and grant funds.

The probation department is overseen by the Juvenile Board and is funded by the Commissioners' Court and grant funds from the Texas Juvenile Probation Commission.

- (4) *Is it necessary for the Juvenile Board and/or the Commissioners' Court to meet and approve the expenses prior to paying the claims for the juvenile probation department?*

Guadalupe County has a pre-adjudication detention facility which the Juvenile Board oversees and is funded in total by the Commissioners' Court.

- (5) *Is it necessary for the Juvenile Board and/or the Commissioners' Court to meet and approve the expenses prior to paying the claims for the juvenile detention department?*

The Juvenile Board receives grant funds from the Texas Juvenile Probation Commission.

- (6) *Is it necessary for the Juvenile Board to meet and approve the expenses prior to paying the claims for the grant funds?*

The juvenile probation and detention departments set their budget in compliance with Local Government Code §140.004 (Budgets of Certain Juvenile Boards and Community Supervision and Corrections Departments).

- (7) *Do budget amendments, for either the juvenile probation or detention departments, which do not require additional funds from fund balance, need to be approved by the Juvenile Board and/or the Commissioners' Court?*

Grant funds are required to have approval from the Texas Juvenile Probation Commission (TJPC) for any budget amendment that is over 25% in any one category.

- (8) *Do budget amendments, regardless of whether over or under the 25% , require approval by the Juvenile Board?*

During February 1997 the Juvenile Board and the Commissioners' Court jointly decided to close the Guadalupe County Detention Facility. (This facility is funded wholly through county funds).

At a later meeting, the Juvenile Board voted to keep two of the detention officers to assist with residential placement of juveniles through September 30, 1997. Their motion included a raise for one officer. Subsequently, the Commissioners' Court voted only to keep these two employees until May 7, 1997 with no raise in pay.

- (9) *Which entity, the Juvenile Board or the Commissioners' Court, has the authority to employ, set policies (such as travel) for employees, authorize raises, and make management and financial decisions regarding the operation of the juvenile probation department, juvenile detention department and juvenile detention facility?*

- (a) *Who determines whether the two detention employees referred to above continue their employment?*

- (b) *Who determines whether the detention employee referred to above receives a raise in pay and/or change in job description/ job duties?*
- (c) *Who determines what policies, such as travel, are followed by the juvenile probation department or juvenile detention department?*
- (d) *Are the juvenile probation department and juvenile detention department required to follow personnel policies of the county or do they follow a policy set by the Juvenile Board?*

Thank you for your help with this matter. Please do not hesitate to contact me if I can clarify any of the above issues or be of assistance.

Please note that the Guadalupe County Attorney's Office has not responded to any of my several written requests for legal opinions. At this time those questions remain unanswered. He has told the Commissioners' Court that he is a prosecuting attorney for the county not a legal advisor for the county.

Additionally, an opinion regarding this juvenile matter was submitted to the District Attorney. I received a written response requesting that this be directly submitted to the Attorney General's Office. This letter is attached.

Respectfully,



Kristen Klein
County Auditor



District Attorney

113 SOUTH RIVER, SUITE 205 • SEGUIN, TEXAS 78155
(210) 372-3540 • FAX: (210) 372-2137

25TH JUDICIAL DISTRICT OF TEXAS
COLORADO, GONZALES, GUADALUPE
AND LAVACA COUNTIES

W. C. KIRKENDALL

DISTRICT ATTORNEY

FRANK FOLLIS

FIRST ASSISTANT DISTRICT ATTORNEY
BOARD CERTIFIED CRIMINAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION
CRIMINAL TRIAL SPECIALIST
NATIONAL BOARD OF TRIAL ADVOCACY

ALLISON LANTY

ASSISTANT DISTRICT ATTORNEY
BOARD CERTIFIED CRIMINAL LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

TED CROW

CHIEF INVESTIGATOR

DIANA BROADNAX

VICTIM-WITNESS COORDINATOR

February 17, 1997

Ms. Kristen Klein
Guadalupe County Auditor
307 West Court St., Suite 205
Seguin, Texas 78155

Dear Ms. Klein:

We received your request for an opinion regarding approval of expenditures and budget amendments for the juvenile probation, detention, and grant funds in Guadalupe County, Texas. Because of budget limitations and work load, we are unable to address this issue or to provide you an opinion.

It is my understanding that you may request an opinion directly from the Attorney General.

Thank you for your cooperation.

Sincerely yours,

A handwritten signature in black ink, appearing to read "W.C. Kirkendall", written over a horizontal line.

W.C. Kirkendall
25th Judicial District Attorney

WCK/sr