



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

GERALD C. MANN
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ATTORNEY GENERAL

Hon. George H. Sheppard
Comptroller of Public Accounts
Austin, Texas

Dear Sir:

Opinion No. 0-1713

Re: Would the county attorney and justice of the peace under the facts set forth be entitled to regular examining trial fees in the four cases?

Your request for an opinion on the above stated question has been received by this Department.

Your letter reads in part as follows:

"A defendant is charged with four burglaries in Wise County, and when complaints were filed in the Justice Court it was found that the defendant was in jail at Fort Worth. The defendant's attorney appeared before the Justice Court at Decatur and arranged a bond. The defendant was not present and no Examining Trial was held. The attorney, however, took statement from the officer regarding each case. Would the County Attorney and Justice of the Peace be entitled to regular Examining Trial Fees in these four cases?"

Article 1020, Code of Criminal Procedure, reads as follows:

"In each case where a County Judge or a Justice of the Peace shall sit as an examining court in a felony case, they shall be entitled to the same fees allowed by law for similar services in misdemeanor cases to Justices of the Peace, and ten cents for each one hundred words for writing down the testimony, to be paid by the State, not to exceed Three and No/100 (\$3.00) Dollars, for all his services in any one case.

"Sheriffs and Constables serving process and

attending any examining court in the examination of any felony case, shall be entitled to such fees as are fixed by law for similar services in misdemeanor cases in County Court to be paid by the State, not to exceed Four and No/100 (\$4.00) Dollars in any one case, and mileage actually and necessarily traveled in going to the place of arrest, and for conveying the prisoner or prisoners to jail as provided in Articles 1029 and 1030, Code of Criminal Procedure, as the facts may be, but no mileage whatever shall be paid for summoning or attaching witnesses in the county where case is pending. Provided no sheriff or constable shall receive from the State any additional mileage for any subsequent arrest of a defendant in the same case, or in any other case in an examining court or in any district court based upon the same charge or upon the same criminal act, or growing out of the same criminal transaction, whether the arrest is made with or without a warrant, or before or after indictment, and in no event shall he be allowed to duplicate his fees for mileage for making arrests, with or without warrant, or when two or more warrants of arrest or capiases are served or could have been served on the same defendant on any one day.

"District and County Attorneys, for attending and prosecuting any felony case before an examining court, shall be entitled to a fee of Five and no/100 (\$5.00) Dollars, to be paid by the State for each case prosecuted by him before such court. Such fee shall not be paid except in cases where the testimony of the material witnesses to the transaction shall be reduced to writing, subscribed and sworn to by said witnesses; and provided further that such written testimony of all material witnesses to the transaction shall be delivered to the District Clerk under seal, who shall deliver the same to the foreman of the grand jury and take his receipt therefor. Such foreman shall, on or before the adjournment of the grand jury, return the same to the clerk who shall receipt him and shall keep said testimony in the files of his office for a period of five years.

"The fees mentioned in this Article shall become due and payable only after the indictment

of the defendant for an offense based upon or growing out of the charge filed in the examining court and upon an itemized account, sworn to by the officers claiming such fees, approved by the Judge of the District Court, and said County or District Attorney shall present to the District Judge the testimony transcribed in the examining trial, who shall examine the same and certify that he has done so and that he finds the testimony of one or more witnesses to be material; and provided further that a certificate from the District Clerk, showing that the written testimony of the material witnesses has been filed with said District Clerk, in accordance with the preceding paragraph, shall be attached to said account before such District or County Attorney shall be entitled to a fee in any felony case for services performed before an examining court.

"Only one fee shall be allowed to any officer mentioned herein for services rendered in an examining trial, though more than one defendant is joined in the complaint, or a severance is had. When defendants are proceeded against separately, who could have been proceeded against jointly, but one fee shall be allowed in all cases that could have been so joined. No more than one fee shall be allowed to any officer where more than one case is filed against the same defendant for offenses growing out of the same criminal act or transaction. The account of the officer and the approval of the District Judge must affirmatively show that the provisions of this Article have been complied with."

In an opinion written by Hon. Bruce W. Bryant, Assistant Attorney General, September 9, 1932, this department held:

".....that a Justice of the Peace is entitled to his fees where the accused waives an examining trial in anyailable case and consents for the magistrate to require bail of him. In such cases the Justice of the Peace, sitting as a magistrate, enters his order binding the defendant over to the District Court to await the action of the grand jury in his case, and in such an instance the case has been tried and finally disposed of within the meaning of

Article 1052. In such a case every thing has been done that could have been done upon a full hearing and trial. The defendant has admitted, by waiving his right to an examining trial, that the State has testimony ready to introduce upon the trial of the case which would justify the magistrate in binding the defendant over to the District Court.

"You are therefore advised that in all felony cases filed before a Justice of the Peace, sitting as a magistrate, where no examining trial has been held or where the defendant does not waive his right to an examining trial, that the Justice of the Peace is not entitled to any fee for his services so rendered."

Hon. Homer C. DeWolfe, Assistant Attorney General, in a letter opinion to Hon. John O. Harris, County Attorney, Coleman, Texas, dated February 17, 1933, in passing upon a similar question reached the same conclusion as above set forth in the opinion written by Judge Bryant.

We quote from the case of *McCalla vs. City of Richdale*, 246 SW 654, as follows:

"The courts of this State have adopted the rule construing strictly those statutes prescribing fees for public officers and against permitting such fees by implication. No officer is permitted to collect fees or commissions unless the same are provided for and the amount thereof declared by law. This is true, notwithstanding such officer may be required by law to perform specific services for which no compensation is provided. The obligation to perform such services is imposed as an incident to the office and the officer is deemed to have engaged to perform them without compensation by his acceptance thereof."

Articles 245 and 299 of the Code of Criminal Procedure read as follows:

"Art. 245. When the accused has been brought before a magistrate, that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure counsel."

"Art. 299. The accused may waive an examining trial in any bailable case and consent for the magistrate to require bail of him; but the prosecutor or magistrate may examine the witnesses for the State as in other cases. The magistrate shall send to the proper clerk with the other proceedings in the case a list of the witnesses for the State, their residence and whether examined."

In the case of Brown vs. State, 118 S.W. 135, among other things, the court held that a magistrate cannot sit as an examining court or conduct an examining trial until he has the party under arrest and before him.

Under the facts stated in your inquiry, the accused was neither present nor before the magistrate when the county attorney took the statements from the officer regarding each case; nor did the defendant waive an examining trial; as he was not present, there could not have been an examining trial or a waiver of the same by him under the opinion of the court in the case of Brown vs. State, supra.

In view of the foregoing authorities and under the facts set forth in your letter, you are respectfully advised that it is the opinion of this Department that neither the county attorney nor the justice of the peace would be entitled to any examining trial fees in the cases mentioned in your inquiry.

Trusting that the foregoing answers your question, we remain

Yours very truly

ATTORNEY GENERAL OF TEXAS

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APPROVED DEC 7, 1939
s/Geral C. Mann
Attorney General of Texas

Approved Opinion Committee By s/BWB Chairman