



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WILL WILSON
ATTORNEY GENERAL**

April 24, 1962

Honorable Burton S. Burks, Sr.
County Attorney
Hood County
Granbury, Texas

Opinion No. WW-~~1320~~ / 320

Re: Whether a magistrate is authorized under the law to appoint counsel to represent an indigent defendant charged with a felony, in an examining court, and related questions.

Dear Mr. Burks:

Your request for an opinion presents these three questions:

1. Is a magistrate, such as a Justice of the Peace, authorized under the law to appoint counsel to represent an indigent defendant, charged with a non-capital felony, in an examining court?
2. Is a magistrate, such as a Justice of the Peace, authorized under the law to appoint counsel to represent an indigent defendant, charged with a capital felony, in an examining court?
3. Is a Commissioners Court authorized to pay such court-appointed attorney for his services rendered in an examining court?

Article 35, V.C.C.P., provides as follows:

"When the magistrate sits for the purpose of inquiring into a criminal accusation against any person, this is called an 'examining court.'"

Article 245, V.C.C.P., provides as follows:

"When an 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." (Emphasis added)

Article 250, V.C.C.P., provides, among other things, that if no counsel appears, either for the State or for the defendant, the magistrate may examine the witnesses; and the accused has the same right.

The purpose of a preliminary examination is three-fold: (1) To inquire concerning the commission of a crime and the connection of the accused with it, in order that he may be informed of the nature and the character of the crime charged against him, and, if there is probable cause for believing him guilty, that the State may take the necessary steps to bring him to trial. (2) To preserve the evidence and keep the witnesses within the control of the State. (3) To determine the amount of bail if the offense is bailable.

The Constitution of the United States does not require that the accused be furnished counsel at a preliminary hearing in the prosecution for either a Federal or State offense. State of Utah v. Sullivan, 227 Fed.2d 511 (C.C.A. 10th, 1955, cert. den., 350 U.S. 973), Hawk v. Olson, 326 U.S. 271 (1945). The right to be furnished counsel under the provisions of the Federal Constitution does not accrue until an indictment is returned or an information or other like charge is lodged against the accused. State of Utah v. Sullivan, supra, Hawk v. Olson, supra. In the absence of constitutional or statutory provisions, there is no requirement that counsel must be appointed for the accused at a preliminary examination. 22 C.J.S. Crim. Law, § 339(c), p. 877.

Article 494, V.C.C.P., before amendment, read as follows:

"When the accused is brought into court for the purpose of being arraigned, if it appear that he has no counsel and is too poor to employ counsel, the court shall appoint one or more practicing attorneys to defend him. The counsel so appointed shall have at least one day to prepare for trial." (Emphasis added)

Under this Article it was mandatory for a court, upon the arraignment of an indigent defendant accused of a

capital offense, to appoint counsel. Holton v. State, 158 SW2d 772 (Tex.Crim. 1942, cert. den. 316 U.S. 703), Ex parte Bushnell, 353 SW2d 438 (Tex.Crim. 1962). This Article, however, did not apply to non-capital felonies. Cummings v. State, 282 SW 227 (Tex.Crim. 1926). Even in capital cases, the imperative duty of a court to appoint counsel arose only on appraisal that accused was too poor to employ counsel, and only upon the arraignment of the accused. Ex parte Mays, 212 SW2d 164 (Tex.Crim. 1948), Ex parte Grayson, 217 SW2d 1007 (Tex.Crim. 1949).

Article 494, V.C.C.P., was amended in 1959 by the 56th Legislature to read as follows:

"Whenever it is made known to the court at an arraignment or any other time that an accused charged with a felony is too poor to employ counsel, the court shall appoint one or more practicing attorneys to defend him.

"The counsel so appointed shall have ten days to prepare for trial unless such time be waived in writing by said attorneys and the accused." (Emphasis added)

Section 2 of the amending act of Article 494 provided as follows:

"The fact that Article 494 only applies to capital cases and does not apply to ordinary felonies creates an emergency"

Article 494a, V.C.C.P., provides for the compensation of counsel appointed to defend an indigent defendant, and was amended to increase the compensation in 1959 by the 56th Legislature. As amended, Article 494a, V.C.C.P., reads in part as follows:

"Section 1. Whenever the court shall appoint one or more counsel to defend any person or persons pursuant to law in any felony case in this state, each counsel may, at the discretion of the trial judge, be paid a fee in the sum of \$25.00 per day for each day such appointed attorney is actually in trial court representing the person he has been appointed to represent...."
(Emphasis added)

"Section 2. No such allowance shall be made unless an affidavit is filed with the clerk of the court by the defendant showing that he is wholly destitute of means to provide counsel, and that he has not been released on bail bond." (Emphasis added)

By the language of the above quoted section, the appointed counsel can only be paid for the days he is actually in trial court. The magistrate, under Article 245, is sitting as an "examining court" and not as a trial court. Art. 35, V.C.C.P.; Brown v. State, 118 SW 139 (Tex.Crim. 1909). The accused is not required to defend himself upon the merits of the case and the magistrate is not empowered to pass final judgment upon the guilt or innocence of the accused. The magistrate has only the authority to make an order committing the defendant to the jail of the proper county, discharging him, or admitting him to bail.

It is our opinion that the language of Article 494a, 494b, and particularly Section 2 of the amending act of Art. 494, does not manifest an intent by the Legislature to extend the provision of these Articles to an examining court.

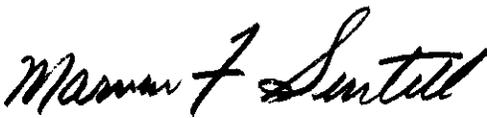
It is our opinion, therefore, that a magistrate is not authorized under Article 494 to appoint counsel to represent a defendant charged with either a capital or non-capital felony in an examining court. Your questions 1, 2, and 3 are therefore answered in the negative.

S U M M A R Y

A magistrate sitting as an examining court is not authorized under Article 494, V.C.C.P., to appoint counsel to represent an indigent defendant charged with a capital or non-capital felony, and the Commissioners Court is not authorized to pay a court-appointed attorney for services rendered at an examining trial.

Very truly yours,

WILL WILSON
Attorney General of Texas

By 
Marvin F. Sentell
Assistant Attorney General

MFS:bjh

APPROVED:

OPINION COMMITTEE:

W. V. Geppert, Chairman

John Reeves
Arthur Sandlin
Joseph Trimble
Elmer McVey

APPROVED FOR THE ATTORNEY GENERAL

BY: Houghton Brownlee, Jr.