OFFICIAL OPINION NO. 7

May 11, 1966

SUPERINTENDENT OF INDIANA STATE POLICE—Peace Officers Serving Warrants Issued by Justices of the Peace and Other Magistrates—County Clerk's Certificate—Payment of Clerk's Certification Fee.

Opinion Requested by Supt. Robert A. O'Neal, Indiana State Police.

This is in answer to your letter of January 26, 1966, which reads as follows:

> "Acts of 1905, Chapter 169, Section 62, as amended by Acts 1935, Chapter 114, Section 1, (Burns Indiana Statutes, Section 9-701) provides, in effect, that justices of the peace and city court warrants when served outside the county where such courts are located, must have attached thereto the certificate of the county clerk, setting forth that the judge or justice signing the warrant was at the time duly commissioned and qualified as such.
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> "In the course of their duties, Indiana State Police Officers are often required to serve these warrants in counties other than the county of issuance of the warrant. It is our experience that some Circuit Court Clerks charge a fee for the required certificate in these cases, and others do not.
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> "I would appreciate your Official Opinion in answer to the following questions:
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> "1. Is the certificate by the Clerk of the Circuit Court, as provided in Burns Section 9-701, required in all cases when justice of

the peace criminal arrest warrants are to be served outside the county where the court is located?

"2. Is said certificate required in all cases when city court criminal arrest warrants are to be served outside the county where the court is located, regardless of the class of the city involved?

"3. When such certificate is required, is it lawful and proper for the Clerk of the Circuit Court to charge a fee for said certificate?

"4. If such fee is lawful and proper, who is responsible to pay it?

"5. If the court is responsible to pay the fee, may it be added to court costs?

"Your consideration of these questions and your Official Opinion in answer thereto will be appreciated."

Burns IND. STAT. ANN., § 9-701, provides as follows:

"Any justice of the peace or city judge, hereinafter referred to as the magistrate, on complaint made on oath before him, charging any person with the commission of any felony or misdemeanor, shall issue his warrant for the arrest of such person, and cause him to be brought, forthwith, before him for examination or trial; and such warrant may be served throughout the county: Provided, That where the complaint is for the commission of an offense which said magistrate is empowered to try he shall issue a summons instead of a warrant of arrest, unless he has reasonable ground to believe that the person against whom the complaint was made will not appear upon a summons, in which case he shall issue a warrant of arrest. The summons shall set forth substantially the nature of the offense, and shall command the person against whom the complaint was made to appear before the magistrate issuing the summons at a time and place stated therein.

> The summons may be served in the same manner as a summons in a civil action. If the person summoned fails, without good cause, to appear as commanded by the summons, he shall be considered in contempt of court, and may be punished by a fine of not more than twenty dollars [$20.00]. Upon such failure to appear the magistrate shall issue a warrant of arrest. If after issuing a summons the magistrate becomes satisfied that the person summoned will not appear as commanded by the summons he may at once issue a warrant of arrest. *And if the accused flee from justice, or has already escaped from the county in which the offense was committed, the officer holding the warrant, upon having the certificate of the county clerk attached thereto, setting forth that the magistrate signing the warrant was at the time duly commissioned and qualified as such,* may pursue and arrest him in any county in this state; or the same may be served by any constable or other peace officer in any county where he may be found, and such constable or other peace officer shall have the power and right to take recognizance for the appearance of the accused in such amount as the magistrate may indorse upon the warrant, which recognizance must require the accused to appear before such magistrate at a time therein fixed within forty-eight [48] hours from the time of making such arrest, and the bond shall be approved by the constable or other peace officer." (Emphasis added.)

As to question 1: Said certificate is required in all cases when justice of the peace criminal arrest warrants are to be served outside the county where the court is located, because there is no limitation in the statute. The statute states that "the officer holding the warrant, *upon having the certificate of the county clerk attached thereto* . . . may pursue and arrest him [the accused] in any county in this state." (Emphasis added.) Burns § 9-701, *supra.*

As to question 2: Said certificate is required in all cases when city court criminal arrest warrants are to be served outside the county where the court is located regardless of

the class of the city involved, since there is no limitation in the statute on the class of the city involved.

As to question 3: The Clerk of the Circuit Court is directed by Acts 1927, ch. 131; 1955, ch. 133 as found in Burns IND. STAT. ANN., § 49-1301, to tax, charge and collect the specified amounts as set forth in § 49-1301c for actions in certain designated courts, various petitions and proceedings, among which is the following:

* * *

> *"For attesting the official character of any person, one dollar [$1.00]."* (Emphasis added.)

Thus, the Clerk of the Circuit Court has statutory authority for an attestation of the official character of any person and would, therefore, seemingly have the right to charge for the certificate setting forth that the magistrate signing the warrant was duly commissioned and qualified as such. However, the Clerk's authority to charge and collect such a fee is limited to private entities and such charge cannot be made against the state and its agencies in legal action to which it or its agencies are parties unless a statute expressly or by implication so provides.

The Attorney General rendered an opinion, 1964 O.A.G. No. 16, at page 61, in which he had occasion to answer an analogous question. The question was, in substance, whether the Indiana State Highway Commission acting in its official capacity and in performance of its duties in the recording of descriptions of right of way pursuant to the terms of a specified act was subject to another specified act and required to pay the recording fee set out therein.

The Attorney General's opinion is exhaustive on the subject matter. It quotes from several national jurisprudences, case law of other states, as well as prior Attorney General Opinions concerning the same type of inquiry and several Indiana Supreme Court decisions, namely *Henderson v. State ex rel. Baldwin,* 96 Ind. 437 (1884); and *Ex parte Fitzpatrick,* 171 Ind. 557, 86 N.E. 964 (1909).

The Attorney General's Opinion in conclusion may be stated in essence to be as follows:

> " 'In the absence of legislative provision that the state should pay recording fees, we have recourse only to the common law and cases decided in Indiana. It has long decided both at common law and under our statutes that the state is not liable for costs.' " (Citing *Henderson v. State ex rel. Baldwin* (1884), 96 Ind. 437.)
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> " ' "The policy of the law and the express provision of the statute are against the taxation of costs to the State." ' " (Citing *Ex parte Fitzpatrick* (1909), 171 Ind. 557, 86 N.E. 964.)
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> "The policy of the law which does not permit assessment of costs against the sovereign in the absence of express statutory provisions *therefore would seem to apply equally to the taxation of fees, particularly where those fees become the property of the state or a subdivision thereof.*" (Emphasis added.)

It should be noted in respect to the last above-quoted statement that Acts 1927, ch. 131; 1955, ch. 133, as found in Burns IND. STAT. ANN., § 49-1301, reads, in part, as follows:

> "Clerks of the circuit courts of this state, acting as clerks of the circuit courts or as clerks of superior, probate, criminal or juvenile courts on behalf of the county in which said courts are held, shall tax and charge upon proper books, to be kept in their offices for that purpose, the fees and amounts provided by law, which amounts so taxed shall be designated as 'clerk's costs,' *but they shall in no sense belong to and be the property of the clerk, but shall belong to and be the property of the county; . . .*" (Emphasis added.)

Accordingly, in view of the above-cited authorities and the fact that the clerk's fees are expressly declared the property of the county, a subdivision of the state, I am of the opinion that when the Indiana State Police acting in the interest of the State and its citizens procuring such certification as required under Burns, *supra*, § 9-701 and in the absence of an express authorization for the assessment of such a fee against

the state, neither the State or its agency, the Indiana State Police, is obligated to pay a fee for the said clerk's certificate. Since the Indiana State Police, as an agency of the State, is *not* required to pay this fee to the clerk, it is unnecessary to answer your questions 4 and 5.

OFFICIAL OPINION NO. 8

May 16, 1966

STATE DEPARTMENT OF PUBLIC WELFARE—Licensing and Regulation of Maternity Homes for Girls under 21 Years of Age—Definition of Maternity Hospital.

Opinion Requested by Mr. Albert Kelly, Administrator, Department of Public Welfare.

I am in receipt of your recent letter which reads:

> "Your official opinion is requested regarding whether or not there is any legal responsibility or authority vested in the State Department of Public Welfare to license maternity homes for girls under 21 years of age under the provisions of Chapter 185, Section 4, Acts of 1945."

Acts 1945, ch. 185, § 4, the same being Burns IND. STAT. ANN., § 42-1308, reads as follows:

> "A children's home or child caring institution is defined as any children's home, orphanage, institution or other place maintained or conducted by any group of persons, a firm, association or corporation engaged in receiving and caring for dependent, neglected, handicapped children, or children in danger of becoming