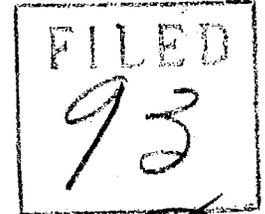


MAGISTRATES; Clerk of the magistrate court may not issue a commitment or a warrant, but may legally sign transcripts in criminal proceedings.

February 18, 1947



Honorable Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri

*Modified by
Eggers 11/17/47*

Attention: Mr. L. L. Bornschein,
Assistant Prosecuting Attorney

Dear Sir:

We hereby acknowledge receipt of your letters of recent date requesting an opinion of this department in relation to the questions of whether or not the clerk of the magistrate court may (1) issue a warrant; (2) issue a commitment; or (3) legally sign a transcript.

In answer to your first question as to the power of the clerk to issue a warrant, we direct your attention to Section 3791 of Senate Bill 215 of the 63rd General Assembly, providing in part:

"The following magistrates shall have power and jurisdiction to cause to be kept all laws made for the preservation of the public peace, to issue process for the apprehension of persons charged with criminal offenses, and hold them to bail; require persons to give security to keep the peace, and to execute the powers and duties herein conferred in relation thereto: The judges of the supreme court throughout the state; judges of the courts of record, except probate judges, within their respective jurisdiction; * * * *"

Since Section 19 of Senate Bill 207 of the 63rd General Assembly provides that magistrate courts shall be courts of record, they would come within the provisions of the above section. Pursuant to the above power the 63rd General Assembly, in Section 3 of Senate Bill 193, placed the following duty on the magistrates:

"* * * provided, that complaints subscribed and sworn to by any person competent to testify against the accused may be filed with any magistrate, and if the magistrate be satisfied that the accused is about to escape, or has no known place of permanent residence or property in the county likely to restrain him from leaving for the offense charged, he shall immediately issue his warrant and have the accused arrested and held until the prosecuting attorney shall have time to file an information."

And Section 5 of Senate Bill 193 provides in part:

"* * * and upon the filing of the information by the prosecuting attorney, as herein provided, with the magistrate, or upon the filing of an information by the prosecuting attorney upon his own information and belief, without complaint of a private individual having previously been filed, it shall be the duty of the magistrate to forthwith issue a warrant for the arrest of the defendant, directed to the sheriff, or, if no such officer is at hand, then to some competent person who shall be specially deputed by the magistrate to execute the same, by written indorsement to that effect on such warrant."

Although the above two sections provide that the magistrates shall issue the warrant, Section 44 of Senate Bill 193 reads as follows:

"All acts of an administrative nature herein required of the magistrate may be performed by the clerk of the magistrate court."

In the case of *Mauritz et al. v. Schwind et al.*, 101 S. W. (2d) 1085, the court adopted the following definition of "administrative," at l. c. 1090:

"Administrative is defined as follows: 'Commonly the word has been defined as ministerial; pertaining to administration, particularly, having the character of executive or ministerial action; and,

when particularly applied to official duties connected with government, executive, a ministerial duty; one in which nothing is left to discretion. 2 C.J.S. p. 56.

"A court is a body in the government to which the public administration of justice is delegated. The one common and essential feature in all courts is, a judge or judges having some sort of judicial functions, power, or authority." *Rupert v. Alturas County Com'rs*, 2 Idaho (Nasb.) 19, 2 P. 718, 720." (Underscoring ours.)

We do not believe the issuance of a warrant is an administrative function. In the case of *Zeraga v. United States*, 32 F. (2d) 963, the court stated at l. c. 964:

"It is perhaps not inappropriate to suggest that the issuance of a warrant of arrest is a judicial act which can be exercised only by an officer authorized by law. * * *"

Therefore, since the issuance of a warrant is a judicial function and since the General Assembly has not given the clerk the power to issue a warrant in criminal proceedings before a magistrate court, we are of the opinion that only the magistrate may issue said warrant.

In answer to your second question as to whether or not the clerk may issue a commitment, we direct your attention to section 13 of Senate Bill 193, which provides:

"If the defendant shall fail or refuse to enter into recognizance, the magistrate shall commit him to the common jail of the county, or to the calaboose or other prison of the city where the trial is pending, there to remain until the day fixed for the trial of the charge alleged against him."

And Section 25 of Senate Bill 193, which provides:

"Whenever the defendant shall be tried and found guilty, either by the magistrate or a jury, or shall enter a plea of guilty, and a fine shall be assessed, the magistrate shall enter judgment against the defendant for such fine, and if the punishment shall be imprisonment in the county jail, or shall be both a fine and imprisonment, the magistrate shall enter judgment according to the finding of the court or verdict of the jury, and immediately commit the defendant to the county jail for the time designated in the judgment, and the defendant shall be adjudged to pay the costs, and may be committed to the county jail until the judgment for both fine and costs shall be paid, or until he shall be discharged therefrom under the provisions of the next succeeding section."

In the case of State ex rel. Million v. Allen, 187 Mo. 560, the court stated at l. c. 564:

"A commitment means a judicial order, and until such an order is made the person arrested is the sheriff's prisoner by virtue of the capias. * * *"

It is noted that we have the same situation here as we had in your question in relation to warrants. Therefore, since the issuance of a commitment is also a judicial function the clerk of the magistrate court would not have the power to issue a commitment.

In answer to your third question as to whether or not the clerk of the magistrate court may legally sign a transcript, we direct your attention to Section 32 of Senate Bill 193, which provides:

"The clerk of the court shall file the transcript and papers in his office and enter the cause on the court docket; and if the appeal be regularly taken, the cause shall be heard on the merits at the first

term of the court, after the same shall have been filed in the clerk's office, or if said appeal be taken and filed in term, it shall be returnable to and triable at such term, unless for good cause shown the case be continued; and unless otherwise ordered by the court, the costs in both courts shall abide the event of the trial in the circuit or appellate court."

It is clear from the above section that the clerk would sign the transcript in criminal proceedings and that he has the duty of filing same on appeal.

Conclusion

Therefore, it is the opinion of this department (1) that a warrant and a commitment may not be issued by the clerk of the magistrate court, and (2) that the clerk may legally sign the transcript in criminal proceedings filed in the appellate court, and that it is his duty to file said transcript.

Respectfully submitted,

FRANKING WILSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

PW:EG