

MAGISTRATE COURTS) No fee allowed magistrate court for issuance
FEES) of a search warrant where no criminal proceed-
CRIMINAL LAW) ing against an individual is instituted.

August 9, 1949



Honorable Bryan A. Williams
Probate Judge and Ex-Officio Magistrate
Bollinger County
Marble Hill, Missouri

Dear Sir:

We acknowledge your request for an opinion of this office submitting the following question:

"If upon recovery of goods by search warrant, alleged to have been stolen, and there is no criminal proceeding instituted; what fee or fees if any would accrue to the Magistrate Court?"

The issuance of a search warrant to recover property is a process of a criminal nature inasmuch as it is never issued in connection with civil cases, but rather is issued in connection with or ancillary to criminal cases.

In an opinion submitted by this office to the Honorable Forrest Smith, under date of June 20, 1947, we concluded that in criminal proceedings in the magistrate court, the only fee accruing for the services of the magistrate or the clerk is the \$2.50 fee provided for in Senate Bill No. 108, enacted by the Sixty-Fourth General Assembly, Section 13403.1, R.S.A. We enclose a copy of this opinion with the statute set out therein.

In your request you state that after recovery of the property by search warrant, there was no criminal proceeding subsequently instituted. By this we take it that no criminal action was instituted against any individual. Consequently, if any fee would accrue to the magistrate court in the situation you have presented, we believe it would have to be the \$2.50 fee hereinbefore referred to. The allowance and collection of this fee, by the language of the statute, is dependent upon the institution of a criminal proceeding. Therefore, we apprehend the basic question for our determination to be whether or not the making of a complaint and issuance of a warrant is a "criminal proceeding" within the meaning of the statute.

In this connection let us refer to certain statutes relating to search warrants to determine their nature and purpose.

Section 4159, R. S. Missouri, 1939, provides:

"Upon complaint being made, on oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any personal property has been stolen or embezzled, and that the complainant suspects that such property is concealed in any particular house or place, if such magistrate shall be satisfied that there is reasonable ground for such suspicion, he shall issue a warrant to search for such property."

Section 4160, R. S. Missouri, 1939, provides:

"Such warrant shall be directed to the sheriff of the county, or to any constable of the township, and shall command him to search the place where such property is suspected to be concealed, in the daytime, which place shall be designated and the property particularly described in such warrant, and to bring such property before the magistrate issuing the warrant."

A reading of the above quoted sections relating to the issuance of a search warrant, we believe, indicates its purpose to be for the discovery, recovery and delivery, before the magistrate issuing the warrant, property stolen or embezzled. The issuance of the search warrant alone does not of itself constitute the bringing of any criminal action or proceeding against an individual.

In the case of *Boeger v. Langenberg*, 11 S.W. 223, 97 Mo. 390, the Supreme Court of Missouri in defining the functions of a search warrant said at Missouri l.c. 396:

" * * * The function of such a warrant is to cause a search to be made by an officer at a particular place for personal property stolen or embezzled and to secure the production of the property, if found, before the magistrate. * * *"

In Volume 56, C. J., the following is said regarding the nature and purpose of a search warrant, at pages 1184-1185, Sections 71-72:

"A search warrant is a legal process * * * in the nature of criminal process, and has been likened to a writ of discovery. It is, indeed, a special and peculiar remedy, drastic in its nature, and made necessary because of public necessity. It is restricted to cases of public prosecutions, and it has no relation to civil processes or civil trials; hence the common law never recognized it as being available to individuals in civil proceedings or as a process for adjudicating civil rights or maintaining mere private rights. It is a police weapon, issued under the police power, and is a valid exercise thereof. * * *

"While the primary purpose of the search warrant is to aid in the detection and suppression of crime and to obtain evidence for use in criminal prosecutions, yet it cannot be used solely as a means to secure such evidence, and general exploratory searches and seizures, with or without a warrant, can never be justified. * * * Another function of a search warrant is the restoration to the owner of his property. Search warrant proceedings are not proceedings against a person, but are solely for the discovery and to get possession of personal property, and it is not their purpose to try title of, or right to the possession of, goods, nor to try the person in whose possession the goods, upon search, are found.

(Emphasis ours.)

We have also undertaken to determine what the courts have generally considered to be a "criminal proceeding." In the case of

Gibson v. Sacramento County, 174 Pac. 935, 37 Calif. App. 523, it was said at Pac. l.c. 936:

"* * * A 'criminal proceeding' means some authorized step taken before a judicial tribunal against some person or persons charged with the violation of some provision of the criminal law.
* * *"

The above rule was also declared in similar language in the case of McGoldrick v. Downs, 53 N. Y. Supp. (2d) 333, 184 Misc. 168.

In the case of Post v. United States, 16 S. Ct. 611, 161 U.S. 583, the United States Supreme Court, in holding that the submission of a bill of indictment by the Government attorney to the grand jury was not the institution of a criminal proceeding, said at U.S. l.c. 587:

"Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate. * * *"

In the exposition of a statute it is of ultimate importance that the true intent and meaning of the lawmaking authority be ascertained as expressed in the language of the statute, and this intent is to be taken according to what is consonant with reason and good discretion. (State v. Schwartzmann Service Inc., 40 S.W. (2d) 479, paragraphs 1 and 3.) In interpreting Section 13403.1, R.S.A., supra, which provides for the fee allowed the magistrate court in criminal proceedings, in accordance with the true intent and meaning of the legislature which enacted the statute, we believe it was contemplated that a criminal proceeding in a sense that some formal charge be lodged against a person or persons in the magistrate court is first required before the fee can be allowed.

CONCLUSION

It is therefore our opinion that upon recovery of property allegedly stolen, by a search warrant issued by the magistrate court,

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and thereafter no criminal proceeding or charge is brought against an individual for a violation of our criminal laws that no fee would accrue to said court for the complaint and issuance of a search warrant thereon, is not of itself the bringing of a criminal proceeding in the court for which the statutory fee would be allowed.

Respectfully submitted,

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APPROVED:

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