

CRIMINAL PROCEDURE:

Court cannot require reporter or notary public to take deposition in behalf of indigent defendant without compensation.

May 26, 1950

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



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"At the request of Circuit Judge Fred E. Mueller, Division No. 4 of the St. Louis County Circuit Court, we are requesting an opinion from your office on the following questions:

"1. Does a Circuit Judge have authority to appoint either his Court Reporter or a Notary Public to take depositions on behalf of an indigent defendant who is confined in jail charged with Robbery First Degree by means of a Dangerous and Deadly Weapon and the Habitual Criminal Act, and for whom the Court had previously appointed counsel?

"2. And may the cost of such depositions be taxed as other costs?

"3. If it does have the authority, is such action discretionary or mandatory on the oral or written application of the defendant?"

We find no statute expressly applicable to the situation presented by you. Provision for depositions on behalf of defendants in criminal cases is made by Sections 4010, 4011 and 4012, R. S. Missouri, 1939. Section 4010 provides:

"When any issue of fact is joined in any criminal case, and any material witness for

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the defendant resides out of the state, or residing within the state, is enciente, sick or infirm, or is bound on a voyage or is about to leave this state, or is confined in prison under sentence for a felony, such defendant may apply to the court, or judge thereof, in which the cause is pending, for a commission to examine such witness upon interrogatories thereto annexed, and such court may grant the same upon the like proof and on the like terms as provided by law in civil cases. The court, or judge thereof, granting such commission, may permit the officer prosecuting for the state to join in such commission. The deposition of any witness confined in prison under sentence for a felony shall be taken where such witness is confined."

Section 4011 provides:

"Interrogatories to be annexed to such commission shall be settled and such commission shall be issued, executed and returned in the manner prescribed by law in respect to commissions in civil cases, and the depositions taken thereon and returned shall be read in like cases and with the like effect as in civil suits."

Section 4012 provides:

"The defendant in any criminal cause may also have witnesses examined on his behalf, conditionally, upon a commission issued by the clerk of the court in which the cause is pending, in the same cases and upon the like notice to the prosecuting attorney, with the like effect and in all respects as is provided by law in civil suits: Provided, that the notice in such case to the prosecuting attorney shall state the name or names of the witness or witnesses whose depositions are desired or will be taken."

The procedure under what is now Section 4012 was discussed in the case of *Ex parte Welborn*, 237 Mo. 297, l. c. 302, as follows:

" * * * The right to take depositions in criminal cases is statutory and the statute required

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no affidavit or written application. Since the defendant may have witnesses examined, conditionally, in his behalf exactly as in civil cases (Sec. 5173, R.S. 1909), save that a commission must issue, and since in civil cases a party to a pending suit 'may obtain the deposition of any witness, to be used in such suit, conditionally,' (Sec. 6384, R.S. 1909), the commission under section 5173 issues on demand as a matter of right, without any preliminary showing.

"The deposition of any, consequently every, witness may be taken, and the sole prerequisite to the issuance of a commission under section 5173 is that defendant desires one and asks for it. An affidavit or written application setting forth such desire could serve no useful purpose. The Legislature saw no reason for it and neither do we.
* * *"

Section 1920, R. S. Missouri, 1939, dealing with depositions in civil proceedings provides that depositions, if taken in this state, may be taken by one of the following officers, " * * * some judge, justice, justice of the peace, notary public or clerk of any court having a seal, in vacation of court, mayor or chief officer of a city or town having a seal of office; * * *."

In the case of Watkins v. McDonald, 70 Mo. App. 357, l. c. 362, the court discussed the matter of compensation of commissioners appointed to take depositions in civil proceedings as follows:

" * * * This act neither fixes the compensation of the officer empowered thereunder to take depositions, nor provides how or by whom it shall be paid. It cannot be intended that the duties imposed by an appointment under this statute should be gratuitously performed. It necessarily results that upon the rendition of such services the commissioner to take depositions is entitled to a reasonable compensation, which must be determined by the court appointing him, in view of all the facts and circumstances attending the performance of his duties. In making such allowance in the present case, the court should have assessed the proper amount for the services of the commissioner and his stenographer, the parties having agreed that the stenographer

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should be employed, and should have ordered the sum so fixed to be taxed as a part of the general cost, at the end of the litigation. * * * Within the limits furnished by those analogous employments, and in view of the circumstances and facts showing what was done by the commissioner and his stenographer in this case, the court in the exercise of a just discretion should have fixed a reasonable compensation. Commissioners are not deprived of adequate protection by this ruling. If they choose to serve when appointed, they can take proper steps to secure their fees, either by stipulation between the parties, or by motion for security for costs.
* * *

The right of the defendant to take depositions in a criminal case has no constitutional source such as the right to compulsory process for the attendance of witnesses and the right to counsel. (See Section 18(a), Art. I, Constitution of Missouri, 1945.)

Section 4003, R. S. Missouri, 1939, expressly provides that the court shall appoint counsel for an indigent defendant in a criminal proceeding. The courts have held that attorneys appointed under this section are not entitled to receive compensation in the absence of any provision therefor by the Legislature. In the case of Kelley v. Andrew County, 43 Mo. 338, 1. c. 341, the court stated:

"The constitution of the State (art. I, section 18) provides 'that in all criminal prosecutions the accused has the right to be heard by himself and his counsel;' and by the statute (Gen. Stat. 1865, ch. 212, Sec. 4) it is enacted that 'if any person about to be arraigned upon an indictment for a felony be without counsel to conduct his defense, and be unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not exceeding two, who shall have free access to the prisoner at all reasonable hours.' These provisions, no doubt, are quite in accordance with the spirit and principles of our Christian civilization, and deserve to be liberally construed and generously carried into effect, for the amelioration of the condition of the class thereby intended to be benefited. But these reflections do not materially contribute to the solution of the particular question

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before us. Chandler has had and enjoyed the fullest benefit of the benevolent provisions of the law in his behalf; but the Legislature has failed to make any provisions for the pecuniary compensation of those who, under the appointment of the court, rendered him service. It is at least within the range of a reasonable conjecture that this omission was intentional; that the statute in behalf of the friendless and destitute who are charged with crime was framed upon the idea that members of the legal profession, in the interests of humanity and as an honorary and humane duty, would for such persons, under such circumstances, on the appointment of the court, render their professional services and skill without fee or pecuniary reward; and that has been the practice in this and other States; and the fact is significant that this is the first case of the kind that has appeared upon the record of the court in the whole course of our judicial history. The practice has been so uniform, general, and long continued, that it might, perhaps, be regarded as an established professional usage or custom, so that those who assume such service may be understood as undertaking it gratuitously and without reference to pecuniary profit."

The right to counsel being a constitutional right afforded the defendant, we do not feel that the cases requiring an attorney to act on behalf of a defendant without compensation are analogous to the situation here involved. There is neither law nor custom which requires a person to whom a commission to take depositions is directed to proceed to take the depositions without assurance of compensation. In the case of *Trail v. Somerville*, 22 Mo. App. 308, the court discussed the question of compensation of a referee as follows (22 Mo. App. 308, l.c. 313):

"Upon the whole, we are of the opinion that a referee in this state is in no better position in respect of his costs than any other officer of the court. He is entitled to the same remedies which are accorded to them, and has the further advantage over them of being able to protect himself, by declining the reference, or by requiring the parties, as a condition of his entering upon the discharge of its duties, to secure the payment of his compensation. * * *" (Underscoring ours.)

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A notary public would, we feel, be in the same situation as a referee in regard to his services. He is not, as is a lawyer, an officer of the court. A court reporter is an officer of the court. (State ex rel. v. Hitchcock, 171 Mo. App. 109, 153 S.W. 546.) However, a court reporter as such is not authorized to take depositions. (Section 1920, R. S. Missouri, 1939, supra.) He would have such authority only if he is a notary public. Assuming that he is a notary public, the taking of depositions on behalf of indigent defendants is not a duty imposed upon him either by law or custom. His duty in such respect, therefore, would differ from that of a lawyer in defending indigent defendants. The legislature has seen fit to require the court reporter to prepare a transcript upon appeal for a defendant who is unable to pay the cost of such transcript. (Section 13344, R. S. Missouri, 1939.) However, the Legislature has not seen fit to impose upon the court reporter the duty of taking depositions.

Therefore, our answer to your first question is that a circuit judge does not have the authority to require either a notary public or his court reporter to take depositions on behalf of an indigent defendant in a criminal proceeding. Under Section 4012, R. S. Missouri, 1939, supra, and the case of Ex parte Welborn, supra, the defendant is entitled to the issuance of a commission upon application, either oral or written, but there is no method by which the court could force a notary public or his court reporter to accept and execute the commission without provision for his compensation.

As for your second question, in the event that the commission should be accepted and executed, the costs of the depositions could properly be taxed as other costs. In the case of State v. Krueger, 69 Mo. App. 31, the court held that the costs of depositions taken on behalf of the defendant in criminal proceedings may properly be taxed as costs.

As for your third question, we have concluded that there is no authority vested in the judge to require a notary public or his reporter to take depositions on behalf of an indigent defendant, and, therefore, there would be no question as to whether or not the court has discretion in the exercise of its authority.

CONCLUSION

Therefore, this department is of the opinion that a circuit judge does not have authority to require his court reporter or a notary public to take depositions in behalf of an indigent defendant for whom the court had previously appointed counsel where no

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provision is made for the compensation of the reporter or notary public in taking the depositions.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General