

Opinion No. 66-27

March 2, 1966

BY: OPINION OF BOSTON E. WITT, Attorney General James V. Noble, Assistant Attorney General

TO: John Humphrey, Jr., Assistant District Attorney, Tenth Judicial District, Fort Sumner, New Mexico

QUESTION

QUESTIONS

1. When two or more defendants are jointly charged with a felony, may the court appoint two attorneys to represent each defendant or is the court limited to appoint only two counsel to represent the entire group of defendants?
2. May the district court pay an appointed attorney his reasonable expenses incurred in the defense of an indigent defendant?
3. May the district court pay an appointed attorney a fee for representing a defendant in an habitual criminal proceeding even though the same attorney had been appointed and paid a fee to represent the same defendant in the hearing which formed one of the bases for the habitual criminal proceeding?
4. If two or more defendants are jointly charged, may the district court pay an appointed attorney a fee for each defendant so represented?

CONCLUSIONS

1. See analysis.
2. Yes.
3. Yes.
4. See analysis.

OPINION

{*31} ANALYSIS

Sections 41-11-2 and 41-11-3 N.M.S.A., 1953 Compilation are statutory provisions relating to the appointment of counsel for indigent defendants and payment of fees of counsel so appointed. Section 41-11-2, *supra*, provides as follows:

"ASSIGNMENT OF COUNSEL FOR INDIGENT DEFENDANTS. -- The court before whom any person shall be indicted, or informed against, for any offense which is capital, or punishable by imprisonment in the penitentiary, is hereby authorized and required to assign to such person counsel not exceeding two, if the prisoner has not the financial means to procure counsel, and such counsel shall have full access to the prisoner at all reasonable hours."

Section 41-11-3, *supra*, reads as follows:

"ATTORNEY FEES. -- The court, assigning such counsel, shall authorize the payment of the attorney fees of such counsel out of the court fund and in such amount as the court shall fix, not less than twenty-five dollars and not exceeding the sum of one hundred dollars in any case other than homicide."

Question No. 1 concerns itself with the appointment of counsel to represent indigent defendants and will be treated separately from the other questions which are primarily involved with the question of compensation or reimbursement of costs.

Under the first question there would be two or more defendants jointly indicted or informed against for the alleged commission of a felony. At least one of these defendants is determined to be indigent. In the case of **Glasser v. U.S.**, 315 U.S. 60, 62 Sup.Ct. 457, 86 L. Ed. 680 and numerous state and Federal cases, it has been held that it is a denial of due process to appoint one lawyer to represent two or more jointly charged defendants if there is any prejudicial conflict of interest.

This may be the case whether or not one or more defendants request separate counsel and whether or not one or more of said defendants is retaining the same counsel who has been appointed to represent one or more defendants also charged and who are indigent. This is unquestionably the case where a defendant who is retaining such attorney requests that such attorney represent him alone.

It is noted that there must, under the overwhelming majority of the cases, be some prejudicial conflict of interest appearing either before or during trial or proceedings preliminary thereto. However, the courts will not attempt to determine the degree of prejudice but if such is present in fact, no matter how slight, there is a denial of due process.

It is a fundamental rule of construction that statutes will, where possible, be construed as constitutional. **Fowler v. Corbett**, 56 N.M. 430. The right to counsel being a constitutional right, Section 41-11-2, *supra*, will not be construed as denying an indigent defendant the right to {32} counsel to which he is constitutionally entitled unless the language clearly requires such construction. **Fowler v. Corbett**, *supra*.

The language of Section 41-11-2, *supra*, does not require any construction denying to a court the power to appoint attorneys for each jointly charged indigent defendant as the circumstances appear. Indeed, if a prejudicial conflict of interest arose or if the number

of defendants being represented and divergence in defenses would reduce the attorneys' effectiveness the court is required to appoint additional attorneys.

The primary concern of our legislature was and is to insure that an indigent defendant is protected in his right to counsel. Such being the case the district court has the authority to appoint such counsel as circumstances warrant in order to insure that an indigent defendant receives adequate legal representation.

The second question involves the payment of costs reasonably incurred in the defense of an indigent defendant. If such costs are reasonably necessary to the adequate defense of such indigent defendant, they must be incurred whether in connection with the trial or prior to trial. The question then resolves into that of who ultimately bears the burden of such costs so incurred -- the appointed attorney or the appointing court? No decisions directly in point have been found.

Keeping in mind the constitutional right of an indigent defendant to be adequately represented by counsel and the duty of the court to preserve and protect such right it is readily apparent that the payment of reasonable costs necessarily incurred in the defense of such indigent defendant may be paid by the court. To hold otherwise would tend to make the question of the adequacy of the defense of an indigent defendant depend to some prejudicial extent upon the financial means of the appointed attorney. The entire theory of adequate representation of a defendant, whether indigent or otherwise, precludes our reaching any such result. **Gideon v. Wainright**, 372 U.S. 355.

It is our opinion, therefore, that a court may pay the costs reasonably and necessarily incurred in the defense of an indigent defendant. The question of whether such costs are reasonably necessary to the defense of the indigent defendant is one of fact to be determined for each instance, and within the exercise of reasonable discretion by the trial court. It may be that the trial court would find it desirable to adopt one or more rules concerning the incurring of and payment of such expenses.

Questions 3 and 4 are concerned with the payment of attorneys appointed to represent indigent defendants and may be considered together. The first matter raises the question of whether a proceeding under habitual criminal statutes is a separate proceeding within the language of 41-11-2, supra, and 41-11-3, supra. It is well settled that an indigent defendant facing the imposition of penalties under the habitual criminal statutes is entitled to have an attorney appointed to represent him in such hearing. **Williams v. Kaiser**, 323 U.S. 471, **State v. Dalrymple**, N.M. Docket No. 7857 dated October 28, 1965. There is no requirement that such appointed attorney be the same attorney that represented the indigent defendant in the proceeding which resulted in the habitual criminal act becoming applicable. This is so even though the habitual criminal proceedings may be filed in the same action. Such being the case, it necessarily follows that the question of identity of the attorney in the two proceedings is of no consequence and that the court may pay him for his services in the initial proceeding and in the habitual criminal proceeding as well.

The last question similarly concerns itself with the compensation of an appointed attorney. The question above answered was concerned with representing the same defendant in two separate proceedings or stages of a proceeding. This last question is concerned with representing different defendants in the same proceeding. However, the question is analogous in that the statute concerning compensation relates to the defense of an indigent defendant. The obvious intent is to provide the court-appointed {*33} attorney some slight compensation for his time and effort in protecting the rights of an indigent defendant. The mere fact that more than one defendant is jointly charged does not mean that their defenses are identical or that there is the same amount of time and effort expended in their defense as would be the case if there were only one defendant. The increase in the number of defendants necessarily increases the time and effort to be expended by the attorney. For example, there would be additional investigation of prospective jurors and examination on voir dire, additional investigation of prospective witnesses, additional cross-examination, additional defense witnesses, different argument and similar matters usually necessary to an adequate defense of each jointly charged defendant. The court may, therefore, pay the appointed attorney for the defense of each jointly charged defendant, jointly tried the same as though a severance had been effected and separate trials had. In either case some of the defense efforts would constitute duplication but it would be unlikely that it all would be a duplication.