



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

October 21, 1975

ATTORNEY GENERAL OPINION NO. 75- 405

Mr. Terry J. Malone
Assistant County Attorney
Ford County Courthouse
Dodge City, Kansas 67801

Re: Criminal Procedure--Magistrate--Appearance Before

Synopsis: The procedure of the county court must conform to K.S.A. 22-2901, including the fixing of terms and conditions of release of an accused person by the magistrate, and the requirement that the accused be ordered to appear on a date certain, within ten days.

* * *

Dear Mr. Malone:

You inquire concerning the procedure to be followed, pursuant to K.S.A. 22-2901, by a law enforcement officer after arresting an accused upon a warrant or probable cause.

Subsection (1) of that statute states thus:

"When an arrest is made in the county where the crime charged is alleged to have been committed, the person arrested shall be taken without unnecessary delay before a magistrate of the court from which the warrant was issued. If the arrest has been made on probable cause, without a warrant, he shall be taken without unnecessary delay before the nearest available magistrate and a complaint shall be filed forthwith."

Subsection (a) specifies the procedure to be followed when the arrest is made in a county other than where the crime charged is alleged to have been committed. In either event, subsection (3) applies:

"The magistrate shall fix the terms and conditions of the appearance bond upon which the defendant may be released. If the first appearance is before a magistrate in a county other than where the crime is alleged to have been committed, the magistrate may release the defendant on an appearance bond in an amount not less than that endorsed on the warrant. The defendant shall be required to appear before the magistrate who issued the warrant or a magistrate of a court having jurisdiction on a day certain, not more than 10 days thereafter."
[Emphasis supplied.]

You advise that the county judge has followed the practice in recent years of allowing the arrested individual to be bonded out without every appearing before the magistrate, and that much of the time, accused persons are not ordered to appear on a day certain, but only on the call of the court.

Under K.S.A. 22-2901, the accused may be released only under an appearance bond the terms and conditions of which have been fixed by the magistrate. The magistrate may not delegate this authority to any law enforcement officer, and any standard procedure for the release of accused persons without the benefit of having the terms and conditions of that release fixed by the magistrate is entirely improper. Similarly, as you point out, K.S.A. 22-2901(3) requires that the accused be given notice to appear before the magistrate "on a day certain, not more than 10 days thereafter." This language is designed to assure the right of the accused to preliminary examination within ten days of his arrest, and the failure of the court to observe the statute may jeopardize the rights of accused persons unless steps are taken promptly to conform the procedure of the court with the Kansas criminal procedure code, specifically including the foregoing provisions.

If we can be of further assistance in this matter, please do not hesitate to call upon us.

Yours very truly,



CURT T. SCHNEIDER
Attorney General