



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751

February 14, 1979

ATTORNEY GENERAL OPINION NO. 79-18

Mr. Paul Oakleaf  
County Attorney  
Montgomery County Courthouse  
Independence, Kansas 67301

Re: Criminal Procedure -- Aid to Indigent Defendants --  
Payment of Costs of Preliminary Hearing Transcript

Synopsis: The cost of preparing a transcript of a preliminary hearing for an indigent defendant is to be considered an expense of the defense and is in turn subject to K.S.A. 1978 Supp. 22-4507.

Dear Mr. Oakleaf:

In your letter of January 16, 1979 you requested our opinion in regards to the cost of preparing a preliminary hearing transcript. More specifically your question is whether this expense is the county's responsibility or an expense of the defense, subject to reimbursement under K.S.A. 1978 Supp. 22-4507.

K.S.A. 22-2904 provides:

"The magistrate may cause a record of the proceedings to be made and should do so when requested by the prosecuting attorney or the defendant or his counsel at least 48 hours prior to the time set for preliminary examination. The cost of preparation of such record shall be paid by the party requesting it. If neither party requests the record or the request is made by an indigent defendant, such costs shall be paid from the general fund of the county and taxed as costs in the case."

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A close reading of this statute indicates that it does not mention the preparation or the costs thereof in making a transcript. It deals only with the making of a record and provides that the expense incurred in making a record is born by the county when the defendant is indigent.

The recent case of State v. Hornbeak, 221 Kan. 397 (1977) deals with this statute and sets out guidelines for securing a transcript of a previous hearing when the defendant is indigent.

"Before we leave this matter, however, we think it well to fix guidelines for the court and counsel with regard to the furnishing of transcripts of preliminary examinations. Our statute, K.S.A. 22-2904, provides that the examining magistrate may cause the record of a preliminary examination to be made, and he should do so when a request is made by either the prosecuting attorney or by the defendant or his counsel. This statute requires the taking of a record, either by a court reporter or by electronic means (see rules relating to court reporters, No. 360, et seq., effective January 10, 1977) but it does not specifically provide for the transcription and distribution of a transcript from that record.

"K.S.A. 22-4509, as amended by section 25 of chapter 163 of the Laws of 1976, relates only to transcripts necessary for the purposes of an appeal or other post-conviction remedy, and is here inapplicable.

"K.S.A. 22-4507, as amended by section 111 of chapter 145 of the Laws of 1976, provides for the reimbursement of expenses reasonably incurred by an attorney appointed for an indigent, and thus provides a method whereby the indigent may secure a transcript of a preliminary proceeding or an earlier trial, when such transcript is needed for use at trial.

"Appointed counsel should secure the approval of the trial judge in accordance with the rules of the board of supervisors of panels to aid indigent defendants. The application for a transcript need not detail the uses to which the transcript may be put, but the applicant should make known to the trial court, either in the motion or orally at the time the motion is heard, the primary reason why a transcript is requested. In the usual case where identity is challenged, for example, the motion should so state, and upon such a showing a transcript should be provided.

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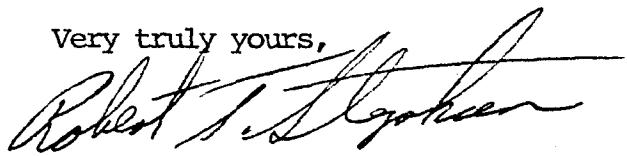
"In those instances where the state secures a transcript, the original should be filed with the clerk of the court, thus making the transcript available to defense counsel. Where a request is made and initially denied, defense counsel has an obligation to renew the request upon discovery of additional information which would justify the request." State v. Hornbeak, supra at 401, 402.

Thus, reading K.S.A. 22-2904 together with State v. Hornbeak, supra, we have concluded:

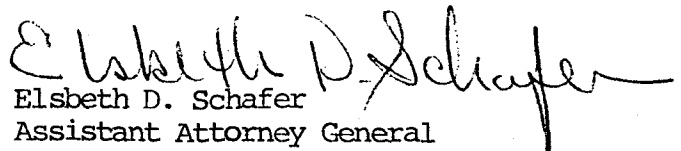
- 1) K.S.A. 1978 Supp. 22-4509 deals only with transcripts in a post-conviction situation and is therefore inapplicable to the question at hand.
- 2) K.S.A. 22-2904 deals with the making of a record and does not specifically provide for the making of a transcript.
- 3) The court in Hornbeak made a distinction between the preparation of a record and the preparation of a transcript.
- 4) As per the guidelines set out in Hornbeak, defense counsel, pursuant to K.S.A. 1978 Supp. 22-4507, shall be reimbursed for expenses incurred in representing an indigent defendant.
- 5) The provisions of K.S.A. 1978 Supp. 22-4507 then provide a method by which an indigent defendant may secure a transcript of preliminary hearing.

Therefore, it is our opinion, based on the Hornbeak decision, that K.S.A. 1978 Supp. 22-4507 provides a method whereby an indigent defendant may secure a transcript of a preliminary hearing. The expense of preparation then becomes an expense of the defense under K.S.A. 1978 Supp. 22-4507 and payable from the Aid to Indigent Defendants fund.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Elsbeth D. Schafer  
Assistant Attorney General