



STATE OF KANSAS

Office of the Attorney General

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

CURT T. SCHNEIDER
Attorney General

September 24, 1975

ATTORNEY GENERAL OPINION NO. 75- 376

George H. Herrelson, Jr.
Cherokee County Attorney
Cherokee County Courthouse
Columbus, Kansas 66725

RE: Cities and Municipalities -- Code of Procedure;
Proceedings After Arrest And Prior to Trial --
Appointment of Counsel

SYNOPSIS: The municipal judge must appoint counsel for any
indigent defendant whenever a reasonable possibility
exists that a jail term might be imposed if the
defendant is found guilty.

RE: Constitutionality of Incarcerating Indigent Defendants
Unable to Pay a Fine Imposed by the Municipal Court

SYNOPSIS: An indigent defendant may not constitutionally be
incarcerated for the sole reason that he is presently
unable to pay a fine imposed by the municipal court.

RE: Permissibility of Confining a Defendant Prior to
Trial Who is Financially Unable to Post Bond

SYNOPSIS: Although a strong presumption exists in favor of
pre-trial release, a defendant unable to post bond
may nevertheless be confined prior to trial if the
conditions of his bond are necessary to assure his
presence at trial.

* * *

Dear Mr. Herrelson:

Your recent letter to this office raises several questions
concerning the rights of indigent criminal defendants in the
municipal courts.

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Initially, you inquire whether a municipal judge could avoid the necessity of appointing counsel for an indigent defendant by declaring before trial that should the defendant be found guilty, the court would suspend any sentence of confinement that might be imposed and order only that a fine be paid. In our view of the question, both statutory and constitutional law would foreclose this attempt to avert the appointment of counsel.

In Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1972), the Supreme Court held that an indigent defendant could not be incarcerated for violation of any offense unless he had been provided the services of counsel. The Court thus stated its ruling:

"We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."
407 U.S. at 37, 92 S.Ct. at 2012.

Although your inquiry is premised upon the supposition that the judge would suspend the jail term, your letter clearly implies that the Court would order the imprisonment of the defendant should he be unable to satisfy the alternative of paying the fine imposed. Under these circumstances, Argersinger requires that the defendant be provided counsel, since there exists a substantial likelihood that confinement could result from the offense.

Inspired by the Argersinger decision, K.S.A. 1974 Supp. 12-4405 requires the same result by providing thus:

"If the municipal judge has reason to believe that if found guilty, the accused person might be deprived of his liberty and is not financially able to employ counsel, the judge shall appoint an attorney to represent the accused person. . ."

The statutory provisions are self-explicating and mandate the appointment of counsel in all cases where a reasonable possibility exists that incarceration might occur as a consequence of the defendant's conviction. Thus, we think it beyond question that counsel must be provided under the circumstances that you have related.

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In a related query you next ask whether the Court could confine a convicted defendant for non-payment of a fine after having imposed a sentence including both a fine and a suspended term of imprisonment. As we interpret your question, the answer is clearly no.

Even if the defendant has been afforded the benefit of counsel in this situation, another constitutional infirmity inheres in this procedure which precludes its employment. In Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), the Court confronted an equal protection challenge by an indigent defendant against statutory procedure which extended an individual's term of confinement beyond the statutory maximum if he was unable to immediately satisfy the monetary provisions of his sentence. The defendant therein received a sentence including both a fine and imprisonment and at the expiration of his one-year prison term remained in confinement because of his present inability to pay a \$500 fine. The Court unanimously concluded that the statutory procedure effected an invidious discrimination based upon wealth since only indigent defendants continued to suffer incarceration beyond the statutory maximum provided and not those with sufficient means to satisfy the judgment.

Subsequently, in Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), the Court confronted a situation wherein a Texas defendant had been sentenced to a fine only, but because of his inability to immediately satisfy its cost, suffered imprisonment for 85 days, each day being deemed the equivalent of \$5 of the fine.

In again unanimously voiding the statutory scheme, the Court approvingly quoted the following language from the concurring opinion in Morris v. Schoonfield, 399 U.S. 508, 90 S.Ct. 2232, 26 L.Ed.2d 773 (1970):

"the same constitutional defect condemned in Williams also inheres in jailing an indigent for failing to make immediate payment of any fine, whether or not the fine is accompanied by a jail term and whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine. In each case, the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."

The situation that you have described, although differing slightly in form, is essentially the equivalent of the familiar courtroom procedure of pronouncing sentence in the alternative, i.e., "\$30 or 30 days." An individual with sufficient means to pay the fine receives a suspension of the added jail term while his indigent counterpart invariably suffers incarceration for his misdeeds. Such a practice operates to discriminate against defendants solely on the basis of wealth and is therefore constitutionally impermissible under the equal protection clause.

Although the Court in Williams expressly reserved ruling on the validity of an alternative sentencing procedure such as the one here employed,¹ the underlying philosophy of Williams and the forceful language of the subsequent Tate decision leave little doubt of the constitutional invalidity of the procedure. Although in this situation the fine itself is not converted into a jail term as in Williams and Tate, actual incarceration under the jail sentence results only if the defendant is financially incapable of immediately satisfying a monetary judgment. Such a practice cannot survive rigorous constitutional scrutiny since it effects an invidious discrimination based upon wealth.² Thus, it is our opinion that the described procedure violates the equal protection clause of the Fourteenth Amendment.³

Finally, you inquire whether it is permissible to detain a defendant pending trial because of his inability to post bail. The function of bail, of course, is to enable the defendant to regain his liberty pending disposition of the charges upon such terms and conditions that will assure his appearance at trial. The courts have observed that the right of a person to obtain release on bail should be heavily favored. Bandy v. United States, ___ U.S. ___, 81 S.Ct. 197, 5 L.Ed.2d 218 (1960), and the Kansas statutes evince a clear intent forbidding needless pre-trial incarceration. See K.S.A. 22-2801 and K.S.A. 1974 Supp. 12-4213. Nevertheless it has consistently

¹ 399 U.S. at 243, 90 S.Ct. at 2023.

² The Fifth Circuit has so concluded. See Frazier v. Jordan, 457 F.2d 726 (5th Cir. 1972). One member of the Supreme Court has also intimated such a view. See Argersinger v. Hamlin, 407 U.S. 25, 55 n.17, 92 S.Ct. 2006, 2021, 32 L.Ed.2d 1530 (1972) (Powell, J., concurring).

³ However, it should be noted that the Tate Court reserved ruling whether an indigent could be imprisoned for non-payment of a fine after having been provided a reasonable opportunity to do so. See 407 U.S. at 400-401, 91 S.Ct. at 672.

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been recognized that although a bail requirement may adversely affect an indigent defendant more so than other defendants, the requirement is constitutionally permissible if bail is necessary to insure the defendant's presence during judicial proceedings. See Dillehay v. White, 264 F.Supp. 164 (M.D. Tenn. 1966); White v. Gilligan, 351 F.Supp. 1012 (S.D. Ohio 1972). Thus, we must conclude that a defendant may be held prior to trial because of inability to post bond if the circumstances warrant the imposition of bail to guarantee his presence at trial.⁴

Very truly yours,



CURT T. SCHNEIDER
Attorney General

CTS:RMT:en

⁴ Parenthetically, it should be noted that the courts have diligently endeavored to prevent invidious discrimination against defendants unable to meet bail by mandating that indigent defendants be given presentence jail credit for the period of their incarceration before judgment and sentence. See Paroutian v. United States, 471 F.2d 289 (2nd Cir. 1972); Monsour v. Gray, 375 F.Supp. 786 (E.D. Wisc. 1973); White v. Gilligan, 351 F.Supp. 1012 (S.D. Ohio 1972). Additionally, note Cox v. State, 214 Kan. 779, 522 P.2d 1973 (1974); K.S.A. 21-4614; and Op. Atty. Gen. No. 74-389.