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October 24, 1978

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ATTORNEY GENERAL OPINION NO. 78- 342

Mr. Ray A. Neale
City Attorney
City Building
Coffeyville, Kansas 67337

Re: Municipal Courts--Arrest Warrants--Probable Cause;
Municipal Courts--Notice To Appear Distinguished From
Arrest Warrants

Synopsis: A municipal court must comply with the rules of Wilbanks v. State, 224 Kan. 66, in issuing an arrest warrant. However, Wilbanks does not apply to the issuance of a notice to appear by a law enforcement officer under 12-4204.

* * *

Dear Mr. Neale:

You inquire as to the probable application of the rules set forth by Wilbanks v. Kansas to the issuance of arrest warrants by a municipal court, and the issuance of notices to appear by a law enforcement officer.

The Kansas Supreme Court, in Wilbanks v. Kansas, 224 K. 66, (1978) has held that before a magistrate may issue an arrest or search warrant, there must be a finding of probable cause by a neutral and detached magistrate.

Additionally, when the arrest warrant is issued due to a complaint filed with the magistrate, the complaint must supply the magistrate with sufficient information to support an independent judgment that probable cause exists. A complaint containing only the language of the criminal statute is not to be held sufficient as to support a finding of probable cause.

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Under K.S.A. 12-4203, where a city attorney requests that a warrant be issued, "Such warrant will be issued if the complaint is positively sworn to and the municipal judge has probable cause to believe that . . ." (See K.S.A. 4203)

A similar provision is to be found in the code of criminal procedure, K.S.A. 22-2302,

"If the magistrate finds from the complaint, or from an affidavit or affidavits filed with the complaint or from other evidence, that there is probable cause to believe both that a crime has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue. Upon the request of the prosecuting attorney a summons instead of a warrant may issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue."

It is this statute construed in light of the Fourth Amendment to the United States Constitution that was construed in Wilbanks. The similarities between the Code of Criminal Procedure and Code of Procedure for Municipal Courts leave no doubt that Wilbanks shall apply to arrest warrants arising out of municipal courts.

You have made a second inquiry as to the applicability of Wilbanks to traffic citations - notices to appear issued by a law enforcement officer.

In answering this inquiry, it is necessary to distinguish "warrant" from "notice to appear". As defined by K.S.A. 12-4113, "'warrant' is a written order made by a municipal judge directed to any law enforcement officer commanding such officer to arrest the person named or described therein." "'Notice to appear' is a written notice to a person accused by a complaint of having violated an ordinance of a city to appear at a stated time and place to answer to the charge of the complaint."

A warrant is issued by a judge while a notice to appear is usually issued by a law enforcement office.

Additionally, a warrant directs the law enforcement officer to take an individual into custody while a notice to appear merely requires the individual to appear at a specified time and place.

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These distinctions make it obviously clear that warrants and notices to appear are to be treated in a different manner in the application of the Wilbanks case.

Further, K.S.A. 12-4206 provides:

"A notice to appear shall be used in all cases involving the violation of a municipal ordinance, except when a warrant is issued."

K.S.A. 12-4204 provides:

"A notice to appear shall describe the offense charged, shall summon the accused person to appear, shall contain a space in which the accused person may agree in writing to appear at a time not less than five (5) days after such notice to appear is given, unless the accused person shall demand an earlier hearing. A notice to appear may be signed by a municipal judge, the clerk of the municipal court, the city attorney, or any law enforcement officer of the city."

K.S.A. 12-4209 states, in part:

"A warrant may be issued: (a) when an accused person fails to appear as required in a notice to appear after its service . . . "

and

"No warrant shall issue unless the complaint giving rise to its issue is supported by oath or affirmation." [Emphasis supplied.]

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Hence, the Wilbanks case, supra, does not alter the statutory requirement of a supporting "oath or affirmation."

Succinctly stated, Wilbanks requires a complaint to be filed with a magistrate, supported by oath or affirmation, setting forth sufficient facts from which the magistrate could determine whether or not probable cause exists that a crime has been committed for which an arrest warrant should issue.

Therefore, a municipal court must comply with Wilbanks in issuing an arrest warrant. Wilbanks does not apply to the issuance of a notice to appear by a law enforcement office. However, if the notice to appear incorporates the substantive complaint which is ultimately to be filed with the Municipal Court, and upon which an arrest warrant is sought, the complaint must meet the requirements of Wilbanks.

Sincerely yours,


CURT T. SCHNEIDER
Attorney General

CTS:MGM:jj