



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 83- 17

Dennis W. Moore
District Attorney
Johnson County Courthouse
P.O. Box 728, 6th Floor Tower
Olathe, Kansas 66061

Re: Criminal Procedure -- Code; Preliminary Proceedings --
Form of Warrant or Summons

Synopsis: The clerk of the court may properly be the signatory on an arrest warrant only (a) when the warrant is based upon an indictment returned by a grand jury pursuant to K.S.A. 22-3011, or (b) in a misdemeanor case when the prosecution is commenced by the filing of an information, which is verified positively or accompanied by affidavits setting forth the facts of the crime, and a judge has expressly made the requisite findings of probable cause. A bench warrant for failure to appear must be signed by a magistrate in accordance with K.S.A. 22-2304. Cited herein: K.S.A. 22-2301, 22-2302, 22-2303, 22-2304.

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Dear Mr. Moore:

As District Attorney for the Tenth Judicial District (Johnson County), you have requested our interpretation of the apparently conflicting language of K.S.A. 22-2303 and 22-2304. More specifically, you inquire as to whether arrest warrants which are signed by the clerk of the court in accordance with subsection (2) of K.S.A. 22-2303 are valid in light of the language in K.S.A. 22-2304 which requires that a warrant be signed by a magistrate.

K.S.A. 22-2303 provides:

"(1) When an indictment is returned, as provided by section 22-3011, a prosecution shall be deemed to have been begun. In misdemeanor cases a prosecution may be begun by filing an information in the district court. Such information shall be verified positively or shall be accompanied by affidavits stating the facts constituting the crime charged. When an information is filed under this section further proceedings shall be had only after the judge has determined from the information, or from an affidavit or affidavits filed with the information 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.

"(2) When a prosecution is begun by the filing of an indictment or information, upon which the judge has made a finding of probable cause as provided in subsection (1) of this section, a warrant for the arrest of the defendant shall issue forthwith unless otherwise directed by the court. The warrant may be signed by the clerk of the court, but shall be in the same form, executed and returned in the same manner as other warrants. The court may order that a summons issue instead of a warrant." (Emphasis supplied.)

And, K.S.A. 22-2304 provides:

"(1) The warrant shall be signed by the magistrate and shall contain the name of the defendant, or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the crime charged in the complaint. It shall command that the defendant be arrested and brought before a magistrate, as provided by law. The amount of the appearance bond to be required shall be stated in the warrant.

"(2) The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before the court at a stated time and place. The summons shall be signed by the magistrate or the clerk of his court." (Emphasis supplied.)

Dennis W. Moore
Page Three

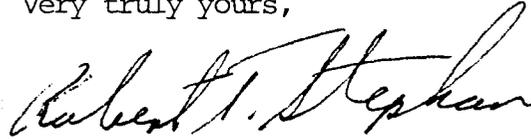
While we agree with your assessment that at first blush the foregoing statutes appear to conflict, we believe that further analysis reveals that no conflict actually exists. The issuance of an arrest warrant pursuant to subsection (2) of K.S.A. 22-2303 is necessarily limited to those prosecutions commenced in accordance with the provisions of subsection (1) of K.S.A. 22-2303. Therefore, it is our opinion the clerk of the court may properly be the signatory on an arrest warrant only when the warrant is based upon an indictment returned by a grand jury pursuant to K.S.A. 22-3011 or in a misdemeanor case in which an information, which is verified positively or accompanied by affidavits setting forth the facts of the crime, has been filed. In the latter situation, an express finding that there is probable cause to believe that a crime has been committed and that the defendant committed it must be made by a judge before the arrest warrant may issue. In light of this express requirement, it is our opinion that the probable cause finding of the judge should be endorsed in writing on the information. We believe that, if there is compliance with the foregoing procedures, the arrest warrant signed by the clerk of the court is valid. We note, however, that such a determination provides little assistance to the sheriff of Johnson County, since the arrest warrant he receives for execution would not, on its face, reflect the probable cause finding of the judge.

In a practical sense, however, our experience indicates that relatively few prosecutions are commenced by grand jury indictment or by information in misdemeanor cases. Rather, it would appear the vast majority of prosecutions are commenced by the filing of a complaint in accordance with K.S.A. 22-2301 and 22-2302. In such cases we believe that K.S.A. 22-2304 is controlling and that any arrest warrant issued must be signed by a magistrate. Further, as indicated in subsection (2) of K.S.A. 22-2304, any summons issued subsequent to the filing of a complaint and a judicial finding of probable cause may properly be signed by either the magistrate or the clerk of the court.

To summarize, it is our opinion that an arrest warrant which is based upon a grand jury indictment or an information in a misdemeanor case, upon which a judicial finding of probable cause has been made, is valid when signed by the clerk of the court. In all other instances the arrest warrant must be signed by a magistrate. Further, a summons issued in lieu of an arrest warrant may be signed by either the magistrate or the clerk of the court.

Finally, you inquire as to which of the previously cited statutes would be applicable when a bench warrant for failure to appear is issued. As stated above, we believe that all arrest warrants must be signed by the magistrate, except where the warrants are the result of grand jury indictments or misdemeanor informations. Thus, it is our opinion that bench warrants commanding the arrest of an individual must be signed by a magistrate.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



James E. Flory
Deputy Attorney General

RTS:JEF:may