



**THE ATTORNEY GENERAL
OF TEXAS**

October 19, 1987

**JIM MATTOX
ATTORNEY GENERAL**

Honorable Charles D. Houston
District Attorney
One East Main
Bellville, Texas 77418

Opinion No. JM-810

Re: Whether a constable
is authorized to execute
civil process outside
his county and related
questions

Dear Mr. Houston:

You have submitted the following questions concerning
the duties of constables and deputy constables to serve
civil process:

1. Can a constable or deputy constable
serve civil process:

a. Issued in his county and served
in another county?

b. Issued in another county . . .
and served in another county . . .?

2. Does all the money received by a
constable, paid deputy constable, unpaid
deputy constable or reserve deputy con-
stable, have to be turned in to the county
treasurer of his county, regardless of where
the process originates or is executed?

3. Can a deputy constable act as a
private process server?

We conclude that a constable or deputy constable may serve
civil process in the county in which he is elected or
appointed or in a county contiguous to that county. A
constable or deputy constable must deposit all money
received for serving citation with the county treasurer of
his county regardless of where the citation originates or
is served. A deputy constable authorized to serve
citation pursuant to Rule 106(b) of the Texas Rules of
Civil Procedure may not act as a private process server.

The first question is in two parts, both parts concerning the authority of a constable or deputy constable to serve civil process outside the county in which he holds office. Specifically, the inquiry is directed to the authority conferred upon these officers by the Texas Rules of Civil Procedure.

Rule 103 of the Texas Rules of Civil Procedure provides the following in pertinent part:

All process may be served by the sheriff or any constable of any county in which the party to be served is found, or, if by mail, either of the county in which the case is pending or of the county in which the party to be served is found. . . . (Emphasis added.)

The courts have held that for a valid service of civil citation, the officer serving citation must be acting within the county in which he is an officer. Hisler v. Channelview Bank, 538 S.W.2d 200 (Tex. Civ. App. - Houston [14th Dist.] 1976, no writ), and authorities cited therein.

Section 86.021 of the Local Government Code (effective September 1, 1987) sets forth the general powers and duties of the constable:

(a) A constable shall execute and return as provided by law each process, warrant, and precept that is directed to the constable and is delivered by a lawful officer.

(b) A constable may execute any civil or criminal process throughout the county in which the constable's precinct is located and in other locations as provided by the Code of Criminal Procedure or by any other law.

(c) The constable shall attend each justice court held in the precinct. (Emphasis added.)

Acts 1987, 70th Leg., ch. 149, at 1579. The emphasized provision was derived from article 6889, V.T.C.S., which was repealed simultaneously with the enactment of the Local Government Code. Id. at 2547.

Article 6889, however, was amended by the 70th Legislature to read as follows:

(a) Every constable may execute any process, civil or criminal, throughout his county and elsewhere, as may be provided for in the Code of Criminal Procedure, or other law.

(b) A constable expressly authorized by statute to perform an act or service, including the service of civil or criminal process, citation, notice, warrant, subpoena, or writ, may perform the act or service anywhere in the county in which the constable's precinct is located.

(c) Notwithstanding the Texas Rules of Civil Procedure, all civil process may be served by a constable in his county or in a county contiguous to his county, except that a constable who is a party to or interested in the outcome of a suit may not serve any process related to the suit. (Emphasis added.)

Acts 1987, 70th Leg., ch. 713, at 5179. The amendment of article 6889 became effective on September 1, 1987, despite the repeal and recodification of the act during the same legislative session:

(c) The repeal of a statute by a code does not affect an amendment, revision or reenactment of the statute by the same legislature that enacted the code. The amendment, revision, or reenactment is preserved and given effect as part of the code provision that revised the statute so amended, revised or reenacted.

(d) If any provision of a code conflicts with a statute enacted by the same legislature that enacted the code, the statute controls.

Gov't Code §311.031(c), (d). See Attorney General Opinion JM-761 (1987).

The amended version of article 6889 provides the answer to the first question. Accordingly, a constable or

deputy constable may serve civil process in the county in which he is elected or appointed or in a county contiguous to that county.¹

The second question is whether all money received by a constable or deputy constable for serving citation must be deposited with the county treasurer regardless of where the citation originates or is served. The question is prompted by a situation in which citation is to be served in a county other than the county from which it was issued. The citation is delivered by a private person (usually the attorney for the party procuring the citation) to a constable or deputy constable of the county in which service is sought. The constable or deputy constable is paid a fee for serving the citation; apparently, the sum is not taxed and secured as a cost of court. It is suggested that under these circumstances the constable or deputy constable may retain whatever fee he receives from the private person for the performance of this service. We disagree. It should be noted here that the duty of a constable to serve citations is unaffected by the fact that the citation was delivered to the constable by the attorney for the party procuring the citation, rather than by a "lawful officer." Medlin v. Seidemann, 88 S.W. 250 (Tex. Civ. App. 1905, no writ).

Article XVI, section 61, of the Texas Constitution requires the commissioners court of every county to compensate constables and deputy constables on a salary basis. See Vondy v. Commissioners Court of Uvalde County, 620 S.W.2d 104, 108 (Tex. 1981). Section 61 also provides the following in pertinent part:

1. Rule 103 of the Texas Rules of Civil Procedure, which suggests that a constable's jurisdiction to serve process does not extend beyond the borders of his county, was recently amended by the Texas Supreme Court to make it clear that sheriffs and constables may serve process outside their county. The amended rule, which takes effect January 1, 1988, includes the following relevant language: "Citation and other notices may be served by (1) any sheriff or constable or other person authorized by law or, (2) by any person authorized by written order of the court who is not less than eighteen years of age." Order of March 10, 1987, adopting amendments to Texas Rules of Civil Procedure, reprinted in The Texas Lawyer, Aug. 3, 1987, at 16-17.

All fees earned by district, county and precinct officers shall be paid into the county treasury where earned for the account of the proper fund, provided that fees incurred by the State, county and any municipality, or in case where a pauper's oath is filed, shall be paid into the county treasury when collected and provided that where any officer is compensated wholly on a fee basis such fees may be retained by such officer or paid into the treasury of the county as the Commissioners Court may direct.

Section 154.003 of the Local Government Code requires district, county, and precinct officers who are paid on a salary basis to charge and collect all fees for official services and to dispose of the collected money as provided by subchapter B of chapter 113 of the code. Section 113.021 requires all fees belonging to the county to be deposited with the county treasurer in accordance with any applicable procedures prescribed by the county auditor under either section 112.001 or section 112.002 of the code. Accordingly, all fees collected by a constable or deputy constable for the performance of an official duty must be deposited with the county treasurer.

We have been informed that a number of deputy constables engaged in the practices described above justify the retention of fees on the theory that since the citation is delivered to the deputy by a person other than the clerk of the court, the deputy is acting as a private process server. Thus, you ask whether a deputy constable may act as a private process server.

Rule 106 of the Texas Rules of Civil Procedure provides the following in part:

(a) Unless the citation or an order of the court otherwise directs, the citation shall be served by any officer authorized by Rule 103 by

(1) delivering to the defendant, in person, a true copy of the citation with the date of delivery endorsed thereon with a copy of the petition attached thereto, or

(2) mailing to the defendant by registered or certified mail, with delivery restricted to addressee only, return receipt requested, a true copy of the citation with a copy of the petition attached thereto.

Rule 103 authorizes service of citation by sheriffs, constables and, in limited circumstances, clerks of the court. Rule 106 also provides the following:

(b) Upon motion supported by affidavit stating the location of the defendant's usual place of business or usual place of abode or other place where the defendant can probably be found and stating specifically the facts showing that service has been attempted under either (a)(1) or (a)(2) at the location named in such affidavit but has not been successful, the court may authorize service

(1) by an officer or by any disinterested adult named in the court's order by leaving a true copy of the citation, with a copy of the petition attached, with anyone over sixteen years of age at the location specified in such affidavit, or

(2) in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

The courts have construed these rules to require an officer authorized to serve process by Rule 103 to attempt service by one of the methods provided in Rule 106(a)(1) and (2) before the trial court may appoint a private process server pursuant to Rule 106(b). Lawyer's Civil Process, Inc. v. State ex rel. Vines, 690 S.W.2d 939 (Tex. App. - Dallas 1985, no writ). It is apparent, then, that a deputy constable serving a citation delivered to him in the circumstances described above is not acting as a private process server. Furthermore, because we believe a deputy constable appointed pursuant to Rule 106(b) is under a legal duty to serve citation, he does not act as a "private" process server.

Rule 106(b) permits the trial court, upon a motion and affidavit stating the required facts, to authorize service "by an officer or by any disinterested adult named in the court's order." Tex. R. Civ. Proc. 106(b)(1) (emphasis added). Rule 105 emphatically states the duty of the officer to whom process is delivered:

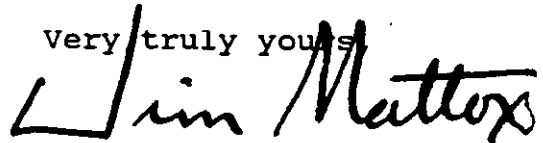
The officer to whom process is delivered shall endorse thereon the day and hour on which he received it, and shall execute and return the same without delay. (Emphasis added.)

The courts characterize as mandatory the duty of sheriffs and constables to serve all writs and processes presented to them. Garcia v. Gutierrez, 697 S.W.2d 758, 759 (Tex. App. - Corpus Christi 1985, no writ); Lawyer's Civil Process, Inc. v. State ex rel. Vines, *supra*. See generally Attorney General Opinion Nos. H-595 (1971); S-71 (1953). Accordingly, we conclude that a deputy constable authorized to serve citation pursuant to Rule 106(b) does not act as a private process server, but is under a legal duty to serve citation.

S U M M A R Y

A constable or deputy constable may serve civil process in the county in which he is elected or appointed or a county contiguous to that county. Acts 1987, 70th Leg., ch. 713, at 5179 (amending article 6889, V.T.C.S.). All money received by a constable or deputy constable for serving citation must be deposited with the county treasurer of his county. A deputy constable authorized to serve citation pursuant to Rule 106(b) of the Texas Rules of Civil Procedure does not act as a private process server, but is under a legal duty to serve citation.

Very truly yours



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