



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTON
ATTORNEY GENERAL**

May 4, 1989

Honorable Hugh Parmer
Chairman
Senate Committee on
Intergovernmental Relations
P. O. Box 12068
Austin, Texas 78711

LO-89-41

Dear Senator Parmer:

This is in regard to your November 23, 1988, request for an attorney general opinion in which you ask two questions pertaining to hospitalized prisoners. You first ask:

[A]t what point is the county sheriff required to accept responsibility for a prisoner who has been guarded in a hospital by a city police officer?

We note at the outset that we have been apprised of no administrative rules or interlocal contract provisions which would affect the respective responsibilities of the police and sheriff's departments with respect to the question you present, and we accordingly do not consider any such contract provisions or rules in the following discussion.

Attorney General Opinion JM-151 (1984) ruled in part that the sheriff is not responsible for a person arrested by city police until the prisoner is committed to the county jail by a magistrate. See also Code Crim. Proc. art. 2.18 (providing that "[w]hen a prisoner is committed to jail by warrant from a magistrate or court, he shall be placed in jail by the sheriff"); Local Gov't Code § 351.041 (providing that the "sheriff shall safely keep all prisoners committed to the jail by a lawful authority, subject to an order of the proper court"); Attorney General Opinion H-169 (1973); 58 Tex. Jur.3d Penal and Correctional Institutions § 203.

We note, however, that the September 21, 1988, letter from Houston Police Officer F. M. Atkins that accompanies your request raises uncertainty in our minds as to the scope of your question. Officer Atkins apparently originated this request by asking Officer Mark Clark, President of the Houston Police Officers Association, to obtain an attorney general opinion. The association contacted Senator John Whitmire through its general counsel, Mr. Edward Lasof. Senator Whitmire in turn, by his letter of November 8, 1988, asked you as chairman of the Intergovernmental Relations Committee to make the request. Officer Atkins' letter outlining the situation in Harris County giving rise to the request, however, concludes by asking that an attorney general opinion be obtained "pertaining to the length of time the Police Department should guard a prisoner after the Houston Police Department has released [its] 'Hold' and the Sheriff assumes responsibility of the prisoner" (emphasis added). Thus, Officer Atkins' letter appears to ask about police officers' duties with respect to guarding hospitalized prisoners after the sheriff has assumed responsibility for the prisoners, while your request asks at what point the sheriff is required to accept responsibility. Both Senator Whitmire's and Officer Atkins' letters allude to the problem as being one of guarding injured "Hold" prisoners, but Officer Atkins' letter concludes by asking the question with respect to the time after the police department has released its "Hold."

Because we are uncertain as to the scope of your first question, we have simply enclosed a copy of Attorney General Opinion JM-151, which we hope will answer your first question. If it does not, please clarify the question and resubmit it.

Your second question is:

[S]hould hospitalized prisoners be arraigned before a magistrate; and if so, when; and if not, when?

Article 26.01 of the Code of Criminal Procedure provides that there shall be an arraignment in all felony cases after indictment and in all misdemeanor cases punishable by imprisonment. The purpose of the arraignment is to fix the identity of the accused and hear his plea. Code Crim. Proc. art. 26.02. Also, article 26.04 of the Code of Criminal Procedure provides for the appointment of counsel at the arraignment or at any time prior to arraignment if the court determines that the defendant "is too poor to employ counsel."

May 4, 1989

Page 3

The exact time for arraignment is not prescribed by statute. It would appear that the arraignment may lawfully be held at any time prior to trial so long as two days have elapsed since a copy of the indictment was served on the defendant if the charge is by indictment, unless there is a waiver by the defendant or the defendant is out on bail. Code Crim. Proc. art. 26.03. See Wood v. State, 515 S.W.2d 300 (Tex. Crim. App. 1974). The arraignment may take place even at the trial stage after the jury has been sworn so long as it is not done in the presence of the jury. Thompson v. State, 447 S.W.2d 920 (Tex. Crim. App. 1969). See generally 22 Tex. Jur.3d Criminal Law §§ 2403-08.

Officer Atkins' letter evinces a concern that delay in arraigning a hospitalized prisoner might possibly violate civil rights. Our research indicates that the principal untoward consequence of such a delay would be that the admissibility of a confession would possibly be thrown into question when made by a prisoner who had not been appointed counsel or who had not been adequately informed of the charges against him. See, e.g., Recent Decisions, Delay in Arraignment Only an Element to be Considered in Determining Voluntariness of Defendant's Confession in a Prosecution by the State, 8 S. Tex. L.J. 125 (1965-66).

We note also that articles 14.06 and 15.17 of the Code of Criminal Procedure provide that a person arrested be taken "without unnecessary delay" before a magistrate and specifically require that the person be informed at that proceeding of the charges against him and of his right to counsel. That proceeding is distinct, at least, in the statutory scheme, from the arraignment under chapter 26 of the code, and is required, again, to be performed "without unnecessary delay" after the arrest. Since you do not ask about compliance with articles 14.06 and 15.17 with respect to hospitalized prisoners, we do not address that issue.

Very truly yours,



William Walker
Assistant Attorney General
Opinion Committee

APPROVED: Sarah Woelk, Chief
Letter Opinion Section

WW/SW/mc

Ref.: RQ-1601
ID# 5029
Enclosure:JM-151