August 22, 1997

OPINION NO. 97-039

The Honorable Scott W. Nusbaum
Ross County Prosecuting Attorney
72 North Paint Street
Chillicothe, Ohio 45601-2418

Dear Prosecutor Nusbaum:

We have received your request for an opinion concerning a situation in which a person who is accused of a drug offense or a controlled substance violation seeks to have an independent analysis made of the substance that is the basis of the alleged violation. Your questions concern the transportation of a sample portion of the substance to a qualified laboratory analyst pursuant to R.C. 2925.51(E), as follows:

1. Does the sheriff of the jurisdiction have a duty to transport the sample to the defendant's laboratory for analysis?

2. If so, how shall the sheriff's costs be allocated in the case of an indigent defendant and in the case of a non-indigent defendant?

3. If the sheriff holds no such duty, who shall be held responsible for the transportation of such a sample, particularly in the case of an indigent defendant?

You have indicated that in some instances the court has ordered the sheriff to transport the sample portion to a laboratory in Columbus. Your concerns relate to this type of order and also to other types of transfer arrangements.[1]

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[1] You have asked only about the allocation of costs of transportation and not about the allocation of costs of the independent laboratory analysis. Therefore, this opinion addresses only transportation costs incurred in connection with an independent laboratory analysis requested pursuant to R.C. 2925.51(E).

In order to address your questions, we must begin with an examination of R.C. 2925.51(E). That provision grants a person who is accused of a drug offense or a controlled substance violation the right, upon written request to the prosecuting attorney, "to have a portion of the substance that is the basis of the alleged violation preserved for the benefit of independent analysis performed by a laboratory analyst employed by the accused person, or, if he is indigent, by a qualified laboratory analyst appointed by the court." R.C. 2925.51(E). The statute states that the prosecuting attorney "shall provide the accused's analyst with the sample portion." *Id.*

The statute does not address transportation of the sample portion except to state that the sample must be provided to the defendant's analyst. The use of the term "provide" indicates that the sample must be made available to the defendant, or authorized for release to the defendant, much as various other materials held by the state must be made available to the defendant. *See, e.g.*, Ohio R. Crim. P. 16. There is no statutory requirement that the prosecutor deliver the sample drug to the defendant's analyst at any particular location.

In the absence of a statutory directive or a court order concerning the transportation of the sample drug, the prosecuting attorney may "provide" the sample by such means as the prosecutor determines to be reasonably appropriate. Experts at the Bureau of Criminal Identification & Investigation (BCI & I) report that prosecuting attorneys commonly make the drug samples available at their own offices, or at the sheriff's office, police department, or laboratory, for the defendant's qualified laboratory analyst to pick up. Because the samples may be released only to persons who have proper authority to hold such samples, and there are requirements for licensing, proper transfer, and documentation, the experts recommend that the transfer take place at the prosecutor's office.[2] Under this procedure, neither the sheriff nor any other public official is responsible for transporting the sample to the laboratory of the independent analyst. The costs of transportation are assumed by the analyst and allocated in the same manner as the costs of the analysis, unless otherwise provided. *See* note 1, *supra*.

In summary, then, pursuant to R.C. 2925.51(E), the prosecuting attorney is required, upon the request of an individual accused of a drug or controlled substance violation, to provide a sample

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[2] The independent analyst needs to provide identification and a license from both the Ohio Board of Pharmacy and the Drug Enforcement Administration in the United States Department of Justice. *See* R.C. Chapter 3719; R.C. Chapter 4729; 21 U.S.C.A. §§801-890 (West 1981 & Supp. 1997); 21 C.F.R. §§1301.11-.93 (1996). This helps ensure the legitimacy of the transfer and compliance with legal regulations governing proper possession of the controlled substance. Copies of the licenses should be kept for file. This aids in establishing the chain of custody. *See, e.g., State v. Brown*, 107 Ohio App. 3d 194, 668 N.E.2d 514 (Allen County 1995). The licenses must cover the schedule of the drug being transferred. *See* R.C. 3719.41; R.C. 3719.43-.44.

The licenses should be in the name of the analyst or expert receiving the evidence, and not in the name of a laboratory or organization, unless the expert is an integral part of that laboratory or organization. For example, an individual who represents himself as a paid consultant should not be taking advantage of a license issued to a university for research purposes.

portion of the substance that is the basis of the alleged violation to a laboratory analyst for independent analysis. This can be accomplished by making the sample available for the laboratory analyst to pick up from the prosecutor's office. If the sample is picked up by the analyst, the transportation costs are allocated in the same manner as costs of the analysis, unless otherwise provided.

Experts at BCI & I indicate that it is usually a good idea to have a court order for transfer of the sample, to help ensure that all parties are aware of the transaction, that it is properly authorized, and that it can be documented for file. *See* note 2, *supra*. You have asked specifically about a situation in which a court, acting pursuant to R.C. 2925.51(E), orders the county sheriff to transport a drug sample to the laboratory analyst employed by the accused person or, if the accused is indigent, to the qualified laboratory analyst appointed by the court. As discussed above, the statute does not require that such transportation be provided. Should a court order that the sheriff provide such transportation, however, the sheriff must consider the nature of the obligation to comply with the order.

A court has power, in the first instance, to determine its own jurisdiction. *See State ex rel. Beil v. Dota*, 168 Ohio St. 315, 154 N.E.2d 634 (1958), *cert. denied*, 360 U.S. 912 (1959). It is inappropriate to use an opinion of the Attorney General to evaluate the validity of a court order or to attempt to define the limits of a court's authority. *See, e.g.*, 1992 Op. Att'y Gen. No. 92-038. A public officer who is the subject of a court order has the choice of complying with the order, challenging the order through proper procedures, or disregarding the order and facing the consequences, including possible charges of contempt. *See, e.g.*, 1993 Op. Att'y Gen. No. 93-079; 1992 Op. Att'y Gen. No. 92-072; 1990 Op. Att'y Gen. No. 90-009; *see also State ex rel. Heintz v. Hamann*, 10 Ohio N.P. (n.s.) 569 (C.P. Hamilton County 1911) (sheriff may be charged with contempt for failure to perform duties for the court).

There is legal authority to support the argument that a court may order the sheriff to transport a drug sample to the defendant's independent laboratory.[3] By statute, the sheriff is directed to "attend upon" the court of common pleas and the court of appeals, R.C. 311.07(A); R.C. 2501.19, and is required to provide transportation for various individuals who are in custody or who serve or appear before the court. *See* R.C. 325.07; R.C. 341.12; R.C. 2301.15; *see also State ex rel. Heintz v. Hamann;* 1995 Op. Att'y Gen. No. 95-033; 1993 Op. Att'y Gen. No. 93-003; 1991 Op. Att'y Gen.

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[3] R.C. 3719.14 permits law enforcement officials and common carriers to transport controlled substances, in the course of their duties. As a practical matter, records should be kept to document the chain of custody. *See, e.g., State v. Brown*, 107 Ohio App. 3d 194, 668 N.E.2d 514 (Allen County 1995).

No. 91-047; 1989 Op. Att'y Gen. No. 89-071; 1979 Op. Att'y Gen. No. 79-106. The court is responsible for ensuring that R.C. 2925.51(E) is fairly implemented, as is evidenced by the fact that the court is authorized to determine that the size of the drug sample is sufficient for analysis. R.C. 2925.51(E). Thus, it can be argued that a court has authority to direct the manner in which the drug sample comes into the possession of the defendant's laboratory analyst. *See generally* Ohio R. Crim. P. 16(E)(2) (in matters of discovery, an order of the court granting relief under rule 16 "shall specify the time, place and manner of making the discovery and inspection permitted, and may prescribe such terms and conditions as are just").

If the sheriff acts as the attendant of the court in transporting a drug sample to a laboratory pursuant to the court's order under R.C. 2925.51(E), the transportation is one of the general duties that the sheriff performs for the court. Our research has disclosed no statutory provision directing the allocation of the sheriff's costs of providing the transportation of a drug sample pursuant to R.C. 2925.51(E).[4] Therefore, the transportation should be provided at the sheriff's expense, unless the court order provides otherwise. *See generally* 1987 Op. Att'y Gen. No. 87-078.

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[4] R.C. 311.17 authorizes a sheriff to charge fees for specified services and provides for the court or clerk to tax those fees in the bill of costs against the judgment debtor or those legally liable therefor. The transportation of a drug sample is not included among the services for which such fees may be charged. Various other statutes similarly provide for the allocation of various fees and costs, but none expressly includes the transportation charges in question. *See, e.g.*, R.C. 109.17; R.C. 117.18; R.C. 311.12; R.C. 341.12; R.C. 341.13; R.C. 1717.10; R.C. 2151.19; R.C. 2301.15; R.C. 2303.22; R.C. Chapter 2335; R.C. 2501.19; R.C. 2947.23; R.C. 2949.17; R.C. 2949.19; R.C. 5155.12; R.C. 5310.15. *See generally* 1989 Op. Att'y Gen. No. 89-086; 1987 Op. Att'y Gen. No. 87-078; 1987 Op. Att'y Gen. No. 87-062; 1982 Op. Att'y Gen. No. 82-009.

Costs of such transportation appear to come within R.C. 325.07, which requires the board of county commissioners to provide the sheriff with monthly allowances "for all expenses of maintaining transportation facilities necessary to the proper administration of the duties of his office" and permits the board to allow any "necessary transportation expense for the proper administration of the duties of his office." R.C. 325.07; *see also* 1989 Op. Att'y Gen. No. 89-086. *See generally* 1987 Op. Att'y Gen. No. 87-078. If the transportation is provided by the sheriff upon the order of the court without any direction concerning costs, the indigency of the defendant is not relevant to the sheriff's allocation of the costs of transportation.[5]

The general conclusion, then, is that if, pursuant to R.C. 2925.51(E), a court orders the county sheriff to deliver a sample portion of a substance to a laboratory analyst for independent analysis, the sheriff may make the delivery and may seek allowance of the transportation costs from the board of county commissioners pursuant to R.C. 325.07, unless the court order contains other provisions regarding costs.

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. Pursuant to R.C. 2925.51(E), the prosecuting attorney is required, upon the request of an individual accused of a drug or controlled substance violation, to provide a sample portion of the substance that is the basis of the alleged violation to a laboratory analyst for independent analysis. This can be accomplished by making the sample available for the laboratory analyst to pick up from the prosecutor's office. If the sample is picked up by the analyst, the transportation costs are allocated in the same manner as costs of the analysis, unless otherwise provided.

2. If, pursuant to R.C. 2925.51(E), a court orders the county sheriff to deliver a sample portion of a substance to a laboratory analyst for independent analysis, the sheriff may make the delivery and may seek allowance of the transportation costs from the board of county commissioners pursuant to R.C. 325.07, unless the court order contains other provisions regarding costs.

Respectfully,

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[5] This opinion does not address the means by which a county may obtain funding for the sheriff's transportation expenses.

BETTY D. MONTGOMERY
Attorney General

August 22, 1997

The Honorable Scott W. Nusbaum
Ross County Prosecuting Attorney
72 North Paint Street
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SYLLABUS: 97-039

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2. If, pursuant to R.C. 2925.51(E), a court orders the county sheriff to deliver a sample portion of a substance to a laboratory analyst for independent analysis, the sheriff may make the delivery and may seek allowance of the transportation costs from the board of county commissioners pursuant to R.C. 325.07, unless the court order contains other provisions regarding costs.