

OPINION NO. 71-080**Syllabus:**

When city police officers have been indicted by a federal grand jury for violation of 18 U.S.C. 242, it is the duty of the city solicitor to examine carefully all the facts and circumstances on which the charge is based and to determine whether such facts and circumstances indicate a good faith attempt on the part of the officers to perform the duties of their official position. If the solicitor, following such evaluation, concludes that there was a good faith attempt by the officers to perform their official duties, he is then authorized to undertake their defense.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: William J. Brown, Attorney General, November 18, 1971

Your request for my opinion asks the following question:

May a municipality legally expend public funds, either by representation from the Solicitor's office or outside counsel, for the defense of police officers who have been indicted by a federal grand jury for the violation of Title 18, Section 242 of the United States Code, making it a criminal offense for any person to violate the civil rights of another while acting under color of law?

The duties of a city solicitor have been set forth in various sections of the Revised Code, and I assume that the City of Parma either has no charter, or that if it does, the duties of its solicitor do not vary from those prescribed in the Code. The pertinent Sections are 705.11, 733.51 and 733.53, Revised Code.

Section 705.11, Revised Code, provides as follows:

"The solicitor shall act as the legal ad-

viser to and attorney for the municipal corporation, and for all officers of the municipal corporation in matters relating to their official duties.* * *"
(Emphasis added)

Section 733.51, Revised Code, provides as follows:

"The city solicitor shall prepare all contracts, bonds, and other instruments in writing in which the city is concerned, and shall serve the several directors and officers provided in Title VII of the Revised Code as legal counsel and attorney.

"* * * * * * * *"
(Emphasis added)

Section 733.53, Revised Code, provides as follows:

"The city solicitor, when required to do so by resolution of the legislative authority of the city, shall prosecute or defend on behalf of such city, all complaints, suits, and controversies in which the city is a party, and such other suits, matters, and controversies as he is, by resolution or ordinance, directed to prosecute.* * *"
(Emphasis added)

Title VII specifically provides for the appointment of city police officers. Section 737.05, Revised Code. And one of my predecessors has held that a deputy sheriff, although not specifically so denominated in the Code, is an "officer" within the meaning of that term as used in the Code, and is entitled to be defended by the prosecuting attorney. Opinion No. 1750, Opinions of the Attorney General for 1933. It is clear, therefore, that a city policeman is an "officer" as that term is used in the pertinent statutes.

Beginning at least as early as 1911, a long series of opinions by my predecessors has held that the solicitor, or the county prosecutor, as the case may be, has a duty to defend an officer accused of wrongful use of official powers if he is satisfied that the action has been taken with due caution and in good faith. One such opinion, No. 40, Annual Report of the Attorney General for 1912, at page 1108, said as follows:

"* * *In general, whenever the circumstances would indicate to the prosecutor, the solicitor or the attorney general, as the case might be, that the officer against whom the action has been brought in committing the official act complained of has proceeded with due caution and in good faith and has consulted with his legal adviser under circumstances under which he ought to consult with him, he ought to serve the officer in his official capacity. In such cases public officers ought not to be subjected to suits by private individuals at the peril of being obligated to defend themselves.

"To hold otherwise would be to encourage captious or meaningless litigation and discourage

the acceptance of public office on the part of those who might be apprehensive of such litigation.

" * * * * * * * * "

Opinion No. 1750, Opinions of the Attorney General for 1933, which involved charges of false arrest, quoted the above passage and concluded, at page 1606, as follows:

"If the facts of your cases show that the false arrest arose out of well intentioned attempts on the part of the sheriff and deputy sheriff to perform duties attending their official positions, I feel that it is your duty to defend them. A more explicit answer to your first question can obviously not be expressed, in view of the lack of knowledge on my part as to the facts and circumstances of the cases involved in your communication."

To the same effect, see Opinion No. 2835, Opinions of the Attorney General for 1928; Opinion No. 4567, Opinions of the Attorney General for 1954; Opinion No. 18, Opinions of the Attorney General for 1963; Opinion No. 65-205, Opinions of the Attorney General for 1965; Opinion No. 65-220, Opinions of the Attorney General for 1965; and Opinion No. 70-029, Opinions of the Attorney General for 1970.

The somewhat inconsistent position taken in Opinion No. 65-66, Opinions of the Attorney General for 1965, seems to have been forsaken in Opinion No. 65-205, supra.

The holdings of my predecessors have been so admirably expressed in Opinion No. 4567, Opinions of the Attorney General for 1954, that I take the liberty of quoting at length as follows:

"Whether or not an autopsy is illegally ordered by the coroner depends, of course, upon the circumstances surrounding the individual case, where a coroner is confronted with a suit for damages arising out of an alleged illegal autopsy stemming from an order issued by him, almost assuredly his defense would revolve around a plea that he acted in good faith in his official capacity as coroner, and within the discretion lodged in him. The very issue to be decided is whether the coroner acted wholly outside of the scope of his authority, so that it could be said that he committed a purely personal tort.

"While I realize that the coroner has been sued, or is about to be sued, as a private individual and in tort for damages, I do not consider that such a theory of the cause of action dictates an answer to your question to the effect that you therefore have no duty whatsoever to represent the coroner. Pursuant to Section 309.09, Revised Code, supra, a county prosecutor has the duty of defending all actions which a county officer directs, or to which the county officer is a party.* * *

" * * * * * * * * "

"If it reasonably appears to you, upon a preliminary examination into the facts and circumstances, that the coroner acted in good faith and out of a well intended attempt to perform duties required of him by law, then and in that event, he is entitled to be represented by you.

"In so advising you I do not intend to convey the impression that I consider it to be the duty of the prosecuting attorney to defend the county coroner in every suit brought against him. It is entirely possible, for example, that the circumstances might reveal that a coroner (or any other county officer, for that matter) committed a purely personal tort arising out of an act so totally unrelated to the officer's official duties that it could not reasonably be said to have been committed in the furtherance or performance of those official duties. Hence, were the coroner recklessly to drive his car into a person while on his way to the county morgue, it does not behoove you to feel compelled to defend him in a negligence suit arising therefrom. Public money is not to be expended for the purpose of compensating a prosecuting attorney for representing persons who happen to be public officers, in their individual and purely private actions.

* * * * *

"It will be noted that although the 1933 opinion, supra, refers to a 'duty' to defend the officer there involved, such duty was conditioned upon an evaluation by the prosecuting attorney of the facts and circumstances on which the action was based and a conclusion that there was involved a well intended attempt to perform an official duty by the defendant. In other words, the 'duty' exists only if the prosecuting attorney, following such evaluation, concludes that he has such a 'duty.'

"It cannot be said, therefore, that there is ever found, in a case of this sort, a duty to defend as we normally understand that term. It would be more appropriate to say that the prosecuting attorney in such a case is under a duty to make a careful evaluation of such facts and circumstances and is then authorized to defend the officer concerned if such evaluation indicates that there is involved a well intentioned attempt to perform an official duty on the part of the defendant."

The most recent pronouncement of the Supreme Court on the general subject is consistent with the above line of reasoning. In State ex rel., v. Bedford, 7 Ohio St. 2d 45, at page 47 (1966), the Court approved payment by the city council of legal expenses incurred by the mayor in defending a libel suit:

"* * * [f]or the reason that we cannot, as a matter of law, say on the record before us that the council of Bedford could not reasonably have had a public purpose in adopting the resolution under attack." (Emphasis added)

It is, of course, true that "Public money may be used only for public purposes", Kohler v. Powell, 115 Ohio St. 418, 425 (1926), and it may be argued that the defense of a criminal charge brought against a public officer is always a purely private affair. This view seems to have been prevalent some years ago. See Lunkenheimer v. Hewitt, 10 Ohio Dec. Reprint 798, 23 W.L.B. 433 (1890); Annotation, 130 A.L.R. 736, 739-740; 42 Am. Jur. 765-766; 43 Am. Jur. 100. However, these same citations indicate that the climate has changed and that the expenditure of public funds in defense of a public officer is justified if his superiors are convinced that the alleged act was committed in the course of good faith performances of official duties. Recent Supreme Court decisions have indicated a broadening of the concept of "public purpose." See State ex rel., v. Rich, 159 Ohio St. 13, 26-27 (1953). The solicitor's duty with respect to the defense of the accused officers is, therefore, the same, whether the alleged violation be civil or criminal. (The situation would, of course, be entirely different if the solicitor were required to prosecute the charge.) The civil rights offense alleged against the officers is a violation of 18 U.S.C. 242, which reads in pertinent part:

"Whoever, under color of law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities* * *." (Emphasis added)

Conviction under this statute requires a finding of specific intent to deprive an individual of a defined right, Screws v. United States, 325 U.S. 91, 101-107 (1945), and good faith exercise of his official duty is a complete defense. The basis of the solicitor's decision to defend the officers here will, accordingly, be the same as that which my predecessor laid down in Opinion No. 4567, supra, as a guide for the prosecuting attorney in the alleged illegal autopsy, a purely civil action. It may be noted that when three federal officials were arrested two or three years ago for criminal violations of Columbus ordinances, they were defended by attorneys from the Department of Justice.

The decision which confronts the solicitor is not an easy one and it should be made with great care. The indictment is only a finding of probable cause based on the prosecution's evidence alone, and if the evidence on the other side to indicate that the officers acted in good faith is strong, the morale of the force requires that the solicitor undertake their defense. Should he, on the other hand, undertake the defense in a perfunctory manner and should the evidence at the trial show a clear lack of good faith, the solicitor may run some risk of a civil action to recover public funds expended for a private purpose. It should also be noted that, if the solicitor decides not to represent the officers and they are thereafter acquitted upon a strong showing of innocence, they will have a moral claim for recovery of their legal expenses which the city council may possibly recognize. State ex rel., v. Anderson, 159 Ohio St. 159 (1953); and see Opinion No. 1330, Opinions of the Attorney General for 1939, overruling Opinion No. 3517, Opinions of the Attorney General for 1938. If the solicitor either can not, or will not, defend the officers, and the municipal legislature authority feels that they have a moral claim to representation, such authority may appoint special counsel for that purpose.

In specific answer to your question, it is my opinion, and

you are so advised, that when city police officers have been indicted by a federal grand jury for violation of 18 U.S.C. 242, it is the duty of the city solicitor to examine carefully all the facts and circumstances on which the charge is based and to determine whether such facts and circumstances indicate a good faith attempt on the part of the officers to perform the duties of their official position. If the solicitor, following such evaluation, concludes that there was a good faith attempt by the officers to perform their official duties, he is then authorized to undertake their defense.