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EXTRADITION—APPLICATION FOR TO GOVERNOR—AFFIDAVITS MAY BE SWORN BEFORE ANY OFFICER AUTHORIZED TO TAKE DEPOSITIONS, EXCEPT THE AFFIDAVIT CHARGING THE OFFENSE WHICH MUST BE SWORN TO BEFORE A MAGISTRATE. SECTION 2963.21.

SYLLABUS:

1. The affidavit of the person making application to the governor of Ohio for a requisition on the governor of another state under Section 2963.21, Revised Code, and any other affidavits attached to the application for requisition, except the affidavit charging an offense, need not be sworn to before a judge or magistrate, but is legally sufficient if sworn to before a clerk of court or any other person authorized to take depositions or administer oaths.

2. The affidavit charging an offense, submitted with the application for requisition, if no indictment has been found or information filed, must be made before a magistrate, if the demand of the governor of Ohio is to be recognized by the governor of the state of refuge.

Columbus, Ohio, May 14, 1959

Hon. Sumner J. Walters, Prosecuting Attorney
Van Wert County, Van Wert, Ohio

Dear Sir:

Your request for my opinion reads, in part, as follows:

“Would you please render us your opinion as to whether or not the statutes of Ohio, and particularly Revised Code, Section

2963.21, requires that the Affidavit, accompanying the application for requisition show that it was sworn to before the Judge rather than before the clerk of the Municipal Court."

Section 2963.21, Revised Code, referred to in your request, outlines the requisites for an application to the governor of Ohio for a requisition to return to Ohio from another state, a person who has been convicted of a crime in this state, and has escaped from confinement, or who stands charged with a crime in this state, and has fled to the other state. It provided, as to affidavits, the following :

"* * *

"Such application shall be verified by affidavit, executed in duplicate, and accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction, or of the sentence. The prosecuting officer, commission, warden, or sheriff may also attach such further affidavits and other documents in duplicate as he finds proper to be submitted with such application. * * *"

You will note that there are three kinds of affidavits referred to in the above quoted part of Section 2963.21. One is the affidavit of the person requesting the requisition. The next is a certified copy of the affidavit, if any, filed charging an offense. The third are "such further affidavits" as the applicant finds proper to submit with the application.

There is nothing in the section itself, nor in any other section of the code, specifically requiring that the affidavits of the applicant for the requisition or "such further affidavits as the applicant finds proper to submit" be sworn to before a judge or magistrate rather than before any other person authorized by law to administer oaths.

An affidavit is defined by Section 2319.02, Revised Code, as a "written declaration under oath made without notice to the adverse party."

Section 2319.04, Revised Code, prescribes before whom an affidavit may be made as follows :

"An affidavit may be made in or out of this state before any person authorized to take depositions * * *."

Section 2319.10, Revised Code, sets forth who may take depositions in Ohio as follows :

“Depositions may be taken in this state before a judge or the clerk of the supreme court, a judge or clerk of the court of appeals, a judge or clerk of the court of common pleas, a probate judge, judge of the county court, notary public, mayor, master commissioner, official stenographer of any court in this state, or any person empowered by a special commission.”

Section 1901.14, Revised Code, gives municipal judges the authority to administer oaths.

Section 1901.31, Revised Code, gives the clerk of a municipal court general powers to administer oaths and take affidavits. Deputy clerks have like power.

Section 2935.11, Revised Code, provides in part :

“When an affidavit charging a person with an offense is *filed with* a judge, clerk, or magistrate, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused.”

(Emphasis Added)

This section does not require that the affidavit be sworn to before the judge or magistrate, but that it *be filed with him or the clerk*. The affidavit may be sworn to before any person authorized to administer oaths.

However, although an affidavit charging a person with a criminal offense, sworn to before a person authorized to administer oaths other than a judge or magistrate, is valid as to an accused who is arrested in this state for a crime committed in this state, a different situation exists as to an accused, who is to be extradited from another state to stand trial in this state. Section 2963.03, Revised Code, provides in part as follows :

“No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless the demand is in writing alleging, except in cases arising under section 2963.06 of the Revised Code, that the accused was present in the demanding state at the time of the commission of the alleged crime, and that thereafter he fled from the state, and unless the demand is accompanied by :

“(A) A copy of an indictment found or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit *made before a magistrate* there, together with a copy of any warrant which was issued thereupon ;

“(B) * * * The indictment, information *or affidavit made before the magistrate* must substantially charge the person de-

manded with having committed a crime under the law of that state. * * *.” (Emphasis added)

It might be urged that the foregoing section applies only to demands on the governor of this state for the extradition of an accused from Ohio to another state, and not to an application to the governor of this state for a requisition on the governor of another state. However, the extradition chapter of the Revised Code is a uniform law, enacted in virtually all of the states, and Section 2963.27, Revised Code, provides:

“Sections 2963.01 to 2963.26, inclusive, of the Revised Code shall be so interpreted and construed as to make the law of this state uniform with the law of those states which enact similar legislation.”

Since, under the comparable section of section 2963.03, Revised Code, of the law of another state, the governor of that state should not recognize the demand of the governor of Ohio for the extradition to Ohio of a person who is a fugitive in such other state unless the demand is accompanied by a copy of an indictment, information, *or by a copy of an affidavit made before a magistrate*, it would be a vain and useless gesture to forward to the governor of another state a demand for extradition in such form that, under the uniform law, the governor of the responding state would be compelled to not recognize it.

There is another section of the extradition chapter of the Revised Code which warrants a holding that the affidavit in the particular proceeding covered by that section should be sworn to before a judge or magistrate. Section 2963.11 provides in part:

“When, on the oath of a credible person, *before any judge or magistrate* of this state, any person within this state is charged with the commission of any crime in any other state and with having fled from justice, * * *.” (Emphasis added)

It is also noted that section 2935.19, Revised Code, giving the form of an affidavit charging an offense shows it to be sworn to before a justice of the peace or judge. However, this section is not mandatory and any affidavit alleging all essential facts and sworn to before a person authorized to administer an oath is sufficient. In *State v. Lauser*, 111 Ohio St., 23, it was held that a criminal affidavit sworn to before the president of the village council in the absence of the mayor was a sufficient compliance with the statute.

It is therefore my opinion and you are accordingly advised that:

(1) The affidavit of the person making application to the governor of Ohio for a requisition on the governor of another state under Section 2963.21, Revised Code, and any other affidavits attached to the application for requisition, except the affidavit charging an offense, need not be sworn to before a judge or magistrate, but is legally sufficient if sworn to before a clerk of court or any other person authorized to take depositions or administer oaths.

(2) The affidavit charging an offense, submitted with the application for requisition, if no indictment has been found or information filed, must be made before a magistrate, if the demand of the governor of Ohio is to be recognized by the governor of the state of refuge.

Respectfully,

MARK McELROY

Attorney General