

OPINION NO. 72-095

Syllabus:

In the absence of specific legislation providing for payment of counsel appointed to defend indigents in misdemeanor cases involving a jail sentence, neither the county commissioners nor other state fiscal officers can appropriate funds for this purpose.

To: G. William Brokaw, Columbiana County Pros. Atty., Lisbon, Ohio

By: William J. Brown, Attorney General, October 18, 1972

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

"On Thursday, June 29, 1972, the Columbiana County Bar Association held an emergency meeting to discuss the present situation regarding appointment of counsel to defendant indigents in misdemeanor cases in the inferior courts. After considerable discussion, it became evident that we have an emergency situation on our hands since the Supreme Court in rendering its decision in no way suggested where the money was going to come from to pay for these appointments.

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"There is no specific legislative enactment similar to that covering felony case appointments; and the issue involved that I am seeking an answer to is 'Can the county commissioners or other state fiscal officers appropriate funds for this purpose under emergency powers since it is rather obvious that we have a mandate by the Supreme Court of the United States directing the people of the United States to provide the required services of attorneys, and this order is immediately effective.' Obviously, it will be some period of time before any legislation can be enacted to deal with the immediate problem."

The United States Supreme Court case to which you refer is Argersinger v. Hamlin, 407 U.S. 25, 32 L. Ed. 2d 530 (1972). That case holds that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he is represented by counsel at his trial." The syllabus of the case reads in part as follows:

"The right of an indigent defendant in a criminal trial to the assistance of counsel, which is guaranteed by the Sixth Amendment as made applicable to the States by the Fourteenth, Gideon v. Wainwright, 372 U.S. 335, is not governed by the classification of the offense or by whether or not a jury trial is required. No accused may be deprived of his liberty as the

result of any criminal prosecution, whether felony or misdemeanor, in which he was denied the assistance of counsel. * * *

The General Assembly has provided for payment in situations where counsel has been assigned to represent indigents accused of a felony. Section 2941.50, Revised Code, reads in pertinent part as follows:

"(A) After a copy of an indictment has been served or opportunity had for receiving it, or if indictment be waived under section 2941.021 of the Revised Code, the accused shall be brought into court, and if he is without and unable to employ counsel, the court shall assign him counsel, not exceeding two, who shall have access to such accused at all reasonable hours. Such counsel shall not be a partner in the practice of law of the attorney having charge of the prosecution. A partner of the attorney having charge of the prosecution shall not be employed by or conduct the defense of a person so prosecuted."

And Section 2941.51, Revised Code, reads as follows:

"Counsel assigned in a case of felony under section 2941.50 of the Revised Code shall be paid for their services by the county, and shall receive therefor:

"(A) In a case of murder in the first or second degree, and manslaughter in the first and second degree, such compensation and expenses as the trial court may approve;

"(B) In other cases of felony, such compensation as the trial court may approve, not exceeding three hundred dollars and expenses as the trial court may approve;

"(C) In a case where counsel have been assigned to conduct an appeal under section 2941.50 of the Revised Code, such compensation shall be fixed by the court of appeals or in the supreme court, as provided in divisions (A) and (B) of the section.

"The fees and expenses approved by the court under this section shall be taxed as part of the costs.

"The county auditor shall draw his order on the county treasurer for the payment of such counsel in the amount fixed by the court, plus expenses as the court may fix, and certified by the court to the auditor."

These two Sections appear to be the only provision for appointing and compensating counsel for an indigent and the statutes specifically limit the payment of compensation only to counsel assigned in felony cases.

It is clear that provision for compensation for public services belongs exclusively to the legislature. Section 22, Article II, Ohio Constitution, states in part as follows:

"No money shall be drawn from the treasury except in pursuance of a specific appropriation, made by law. * * *"

In dealing with a similar question, one of my predecessors in Opinion No. 67-068, Opinions of the Attorney General for 1967, had the following to say:

"With respect to compensation by the public of an attorney for services under appointment by a court in defending an indigent in the absence of a statute providing therefor, I am unaware of any decisions in Ohio. However, the great weight of authority supports the view that in the absence of statute, an attorney who has been assigned by the court to defend an indigent accused cannot recover compensation therefor from the public. * * *"

It appears, therefore, that, until such time as legislation is enacted providing for the payment of counsel appointed to represent indigents charged with crimes which could result in a jail sentence, neither the county commissioners nor a state fiscal officer can provide for such payments under emergency or any other powers. To do so would be to expend public monies without legislative authority.

Since there is no funding presently available, it would appear that there are two choices available to the courts in adhering to the mandate of the Argersinger case, supra. On the one hand, it seems abundantly clear that it is the duty of attorneys in any given locality to provide a defense for indigents even without being compensated therefor. I fully concur in the following statement of my predecessor in Opinion No. 67-068, supra:

"* * * The duty of attorneys to furnish gratuitous service is correlative to the rights and privileges which have been conferred upon them."

The alternative is that an indigent charged with an offense which may result in a jail sentence cannot be prosecuted. The majority opinion in Argersinger, supra, clearly foresaw this possibility. That opinion states in part as follows:

"Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel."

This will undoubtedly cause hardship throughout the state and, especially, in those smaller communities where there is a shortage of attorneys available to represent the indigents accused. The Supreme Court considered this situation in rendering its decision in Argersinger, but, notwithstanding the accompanying funding difficulties, the opinion is clear and unambiguous. Action has, however, been initiated in the General Assembly to alleviate the situation. Senate Bill No. 565, currently pending, would amend Section 2941.50 and 2941.51, to provide for legal counsel in all cases involving jail sentences. The proposed changes read in pertinent part as follows:

Section 2941.50

"(A) After an accused has been charged with any offense involving a jail sentence

or after a copy of an indictment has been served or opportunity had for receiving it, * * *."

Section 2941.51

"Counsel assigned in case of felony or in any case involving a jail sentence under section 2941.50 of the Revised Code shall be paid for their services by the county and shall receive therefor:

"* * * * * * * * * * * * * * *"

"(B) In other cases of felony, or in any case involving a jail sentence, such compensation as the trial court may approve, not exceeding three hundred dollars and expenses as the trial court may approve; * * *."

I must reiterate, however, that, until the above legislation is enacted, there appears to be no means by which counsel for indigents accused of crimes other than felonies can be compensated.

In specific answer to your question it is my opinion, and you are so advised, that in the absence of specific legislation providing for payment of counsel appointed to defend indigents in misdemeanor cases involving a jail sentence, neither the county commissioners nor other state fiscal officers can appropriate funds for this purpose.