

2385.

INDIGENT PRISONER—UNLESS REQUESTED TO INVESTIGATE BY COURT PROSECUTING ATTORNEY UNAUTHORIZED TO OFFICIALLY OPPOSE APPOINTMENT OF COUNSEL ON GROUND ACCUSED NOT INDIGENT.

SYLLABUS:

Under the provisions of section 13439-2, General Code, it is the duty of the court to assign counsel for an indigent prisoner. The prosecuting attorney may not in his official capacity oppose the appointment of counsel by the court on the ground that the accused is not indigent, unless requested by the court to investigate the matter and his opposition is a result of such investigation.

COLUMBUS, OHIO, March 20, 1934.

HON. LYMAN R. CRITCHFIELD, JR., *Prosecuting Attorney, Wooster, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

“Section 13439-2 of the General Code provides for the appointment of counsel for the defense of an indigent prisoner if the prisoner is without and unable to employ counsel.

I would like to have your opinion as to whether or not the Prosecuting Attorney has any authority to appear before the Court where such request is made by a prisoner and oppose the appointment of counsel for the prisoner on the ground either that he has counsel or that he is able to employ counsel. I would also appreciate your opinion as to whether or not the Prosecuting Attorney can subpoena witnesses to testify upon such question.”

Section 13439-2 of the General Code, referred to in your letter, reads as follows:

“After a copy of the indictment has been served or opportunity had for receiving it, as provided in the next preceding section, 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; and a partner of such attorney shall not be employed by or conduct the defense of a person so prosecuted.”

I may say at the outset that after a careful examination of the authorities in Ohio, I am unable to find any reported case, or any opinion of this office, which has passed upon the question presented in your letter.

It is to be noticed that the statute makes use of the word “court.” While it is true that the prosecuting attorney is an officer of the court, I do not think that the legislature intended the word “court” to include the prosecuting attorney. The statute provides inter alia that a partner of a prosecuting attorney may not be appointed as counsel for the indigent prisoner. Clearly, there is an intent

that the prosecuting attorney shall have no say in the appointment of counsel for an indigent prisoner.

Section 13439-3, General Code, provides that in capital cases the counsel for the indigent prisoner shall receive such compensation as is fixed by the "court." Certainly, it could not be argued that the prosecuting attorney has any say in the amount as finally fixed by the judge.

Section 13439-4, General Code, provides that the court shall allow the accused a reasonable time to examine the indictment. Certainly, the prosecuting attorney has no say in reference to the time which is finally fixed by the judge.

The prosecuting attorney, being a public officer, has only such powers as are expressly given him by statute and such implied powers as are necessary to effectuate the express powers. An examination of the statutory powers and duties of the prosecuting attorney fails to disclose the authority of the prosecuting attorney to examine the prisoner as to whether or not he is really indigent. It is significant to note that in all the reported cases, dealing with section 13439-2, *supra*, it is assumed that the judge appoints the attorney if he finds that the accused is indigent, and in none of these cases is the prosecuting attorney mentioned. In this connection, I call your attention to the case of *Brooks vs. State of Ohio*, 17 O. A. 510. The first branch of the syllabus of that case reads as follows:

"Under section 13617, General Code, providing that in case accused is without or unable to employ counsel the court shall assign him counsel, it is the duty of the trial court to assign counsel, before arraignment, to one under indictment for first degree murder, where such prisoner notifies the court before arraignment that 'he did not intend to employ counsel.'"

The following language appears at page 517:

"From the foregoing it appears that the accused when first brought into court was of the opinion that he had property that would enable him to employ counsel of his choice, and so stated, but after learning what his defense would cost him abandoned that idea and accordingly sent a message to the court with the request that he assign him counsel. Evidently he recognized the necessity of having counsel, as did the court, for in its statement the court said that 'the court assumed to know that he would not be able to conduct his own defense.' Of course, if a defendant charged as the accused here was charged, was able to procure and had procured counsel of his own choice before his arraignment, he need not invoke the benefits of Section 13617, General Code, *nor would the court after making such inquiry of him*, under such circumstances, undertake to assign him counsel." (Italics the writer's.)

While the court in the above case did not have the exact question presented to it, nevertheless the language in the opinion is indicative of a well accepted understanding that it is the duty of the trial judge to determine the question of indigency. The trial court could, no doubt, ask the prosecuting attorney whether or not he had any knowledge of the indigency of the accused. However, the court could do this of any private person. To summarize, it is within the sound discretion of the court to determine whether or not the accused is indigent.

In view of my answer to your first question, it is unnecessary to consider your second question.

Without further extending this discussion, it is my opinion, in specific answer

to your question, that under the provisions of section 13439-2, General Code, it is the duty of the court to assign counsel for an indigent prisoner. The prosecuting attorney may not in his official capacity oppose the appointment of counsel by the court on the ground that the accused is not indigent, unless requested by the court to investigate the matter and his opposition is a result of such investigation.

Respectfully,

JOHN W. BRICKER,
Attorney General.

2386.

APPROVAL—BONDS OF WELLSTON CITY SCHOOL DISTRICT, JACKSON COUNTY, OHIO—\$6,000.00.

COLUMBUS, OHIO, March 20, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2387.

APPROVAL — BONDS OF VILLAGE OF MURRAY CITY, HOCKING COUNTY, OHIO—\$3,560.00.

COLUMBUS, OHIO, March 20, 1934.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

2388.

CHILDREN'S HOME—TRUSTEES THEREOF NOT OBLIGATED FOR CARE AND SUPPORT OF MINOR WHERE TEMPORARY COMMITMENT TERMINATED BY SUBSEQUENT ORDER OF JUVENILE COURT.

SYLLABUS:

1. *Under Sections 3093 and 1653 of the General Code, when the commitment of a minor to a children's home is merely temporary and such commitment is terminated by subsequent orders of the juvenile court and there is no further commitment by the juvenile court to the children's home, the trustees of such children's home are no longer obligated to provide for the care and support of such minors.*

2. *Care and support of minors after temporary commitment to a children's home is terminated discussed.*