

LETTER OPINION
2000-L-78

May 22, 2000

The Honorable Duane L. DeKrey
House of Representatives - District 14
4323 27th St SE
Pettibone, ND 58475

Dear Representative DeKrey:

Thank you for your letter requesting assistance in settling a dispute between the Kidder County Commissioners and the Kidder County Sheriff.

You state that the Kidder County Sheriff confiscated a large volume of equipment used to grow marijuana and secured the evidence in a rented garage. You also state that the sheriff did not believe that the county had an area or facility to store the evidence properly. The county commissioners now refuse to pay the storage fee since they believe the county has no financial responsibility because the case is now being prosecuted in federal court, rather than state court, and that a suitable storage area could have been found on county property. In addition to the information set forth in your letter to me, I have confirmed that the property was seized by the sheriff pursuant to a search warrant issued by a court.

N.D.C.C. § 11-15-11 provides:

Unless otherwise ordered by the court, the sheriff shall receive the actual expense incurred for taking, transporting, keeping possession of, and preserving property taken under an attachment, execution, or other process. No keeper is entitled to receive more than five dollars per day. Property may not be placed in charge of a keeper unless the property cannot be stored safely and securely, nor unless there is reasonable danger of loss to the property, nor unless the property is of a character as to require the personal attention and supervision of a keeper. The sheriff may require the person in whose favor the attachment, execution, or other process was issued to pay, or to provide security for, in advance, all expenses

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actually incurred in the taking, keeping, transporting, or preserving the property.

A sheriff is entitled to receive reimbursement for the "actual expense" incurred for the taking, transporting, keeping possession of, and preserving property taken under "process." A search warrant is "process." N.D.C.C. §§ 1-01-49(11), (20); 29-29-01; N.D.R. Crim. P. 41. A search warrant is a written order of the court authorizing a peace officer to search a person or premises and to seize property found during that search. N.D.C.C. § 29-29-01; N.D.R. Crim. P. 41.

N.D.C.C. § 11-15-11 is clear in its requirement that a sheriff receive the "actual expense" incurred by the sheriff for keeping possession of and preserving property taken under "process"; i.e., a search warrant.

North Dakota state law is to be construed liberally with a view to effect its objects and to promote justice. N.D.C.C. § 1-02-01.

The Legislative Assembly intended that a sheriff be reimbursed for the "actual expense" incurred by the sheriff for the taking, transporting, keeping possession of, and preserving property taken under "process." This intention is consistent with the responsibility imposed upon a sheriff to protect evidence. Prosecuting and law enforcement officials have a duty to zealously protect evidence in their possession. Arizona v. Youngblood, 488 U.S. 51, 61 (Blackman, J., dissenting) (1988).

Protecting property secured under a search warrant is a duty of the sheriff as a county official. The protection of the property not only complies with the sheriff's responsibility to protect evidence, but also provides protection of the property itself and protection of the county from future claims for damage or loss to the property seized by the sheriff pursuant to a court order.

Although N.D.C.C. § 11-15-11 does require the sheriff to receive the "actual expense" incurred by the sheriff for keeping possession of and preserving property taken under "process," I do not believe that this statutory requirement is without limitation. If the "actual expense" is grossly disproportionate to that which could be reasonably charged for storage of like property, the sheriff may not be entitled to reimbursement for such excessive charges. However, the determination of the appropriate expense may depend on the type of property seized and stored. In the instant case, contraband, property which is illegally possessed, and evidence of criminal acts may very well justify a greater degree of secure storage than other classes or types of seized property.

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Your letter does not indicate or provide any basis to conclude that the sheriff either acted in bad faith or exceeded his authority as a county official in making the decision to secure the evidence seized under a state search warrant and incurring the expense to meet the responsibilities imposed upon him by law. Absent a factual basis to reach such conclusions, the sheriff is entitled to reimbursement for the actual expense incurred for the taking, transporting, keeping possession of, and preserving property taken under a search warrant. The county commissioners certainly may adopt policies, to be utilized in the future should a similar situation arise, which are consistent with the previously discussed duties and responsibilities of the sheriff, as a county official, to protect and preserve evidence of a crime and to lessen the county's liability for future claims for damage or loss of property is in its care and custody.

I hope that this information is helpful to you and the Kidder County officials.

Sincerely,

Heidi Heitkamp
Attorney General

rpb/vkk