

OPINION
76-82

December 7, 1976 (OPINION)

Mr. John E. Jacobson
Assistant State's Attorney
Mercer County
Stanton, ND 58571

Dear Mr. Jacobson:

This is in response to your letter to this office dated August 13, 1976. In that letter you ask two questions which are stated as follows and which will be considered in the order presented:

1. May a Municipal Judge, who is not an Attorney licensed in the State of North Dakota, issue a search warrant for property located in the Municipality for which he serves as Municipal Judge?
2. May a Municipal Judge admit a defendant to bail and take bail from a defendant charged under a state statute?

As to your first question, the following is presented for your consideration. Rule 41(a) of the North Dakota Rules of Criminal Procedure grants authority to the judiciary of this state to issue search warrants. Rule 41(a) is quoted as follows:

(a) Authority to Issue Warrant.

A search warrant authorized by this Rule may be issued by a State or Federal magistrate acting within or for the territorial jurisdiction wherein the property sought is located or from which it has been removed. (Emphasis added).

Your question then turns on the definition of the word "magistrate". A review of the North Dakota Rules of Criminal Procedure does not disclose such a definition. However, section 29-01-13(5), N.D.C.C., contains such a definition, and is stated as follows:

29-01-13. DEFINITIONS. - As used in this title unless the context or subject matter otherwise clearly requires:

. . .

5. A "magistrate" is an officer authorized by law to issue a warrant for the arrest of a person charged with a crime or public offense; . . .

In addition to the definition quoted above, section 29-01-14(3), N.D.C.C., establishes which persons are considered magistrates, and is quoted as follows:

29-01-14. WHO ARE MAGISTRATES. - The following officers are magistrates:

. . .

3. As limited by law directing the place of exercising their jurisdiction and authority, county justices, municipal judges, small claims court referees who are licensed to practice law and authorized by the county commissioners in case of an emergency and, when authorized by law, the judges of the county courts, including those with increased jurisdiction, each with authority to act as magistrate throughout the county or the city for which he is elected or appointed. (Emphasis added).

Section 29-01-14(3) was amended twice by the 1973 Legislative Assembly, the latter amendment including small claims court referees as designated magistrates. (See the note in the annotations following section 29-01-14, N.D.C.C.). This is not material to this discussion, however.

While the Criminal Rules do not specifically adopt the definition of "magistrate" as set out in Title 29 N.D.C.C., the explanatory notes to Rule 3, N.D.R. Crim. P., refer to the definition of "magistrate" as defined in section 29-01-13(5), N.D.C.C. We can assume, therefore, that the Supreme Court contemplated reliance upon this statutory definition.

In addition, and from a constitutional standpoint, Section 113 of the Constitution of the State of North Dakota, as amended, grants to the Legislative Assembly the authority to confer jurisdiction upon municipal judges in addition to the jurisdiction to hear, try and determine cases arising under municipal ordinances. That section is quoted as follows:

SECTION 113. The legislative assembly shall provide by law for the selection or election and the qualifications of municipal judges in cities, incorporated towns, and villages, who shall hear, try, and determine cases arising under the ordinances of said cities, towns and villages, and shall have such other jurisdiction as the legislative assembly may confer upon them.

With regard to this constitutional provision, another issue surfaces which you have not directly asked, but which is relevant to this discussion. That question becomes, can the Legislative Assembly confer jurisdiction upon the municipal courts of this state in addition to jurisdiction to "hear, try, and determine cases" as set out in Section 113 quoted above through such means as court rule. A close look at this constitutional provision and relevant statutes leads us to an affirmative conclusion.

In section 27-02-08, N.D.C.C., the legislature has granted to the North Dakota Supreme Court the authority to promulgate procedural rules of court for "all courts of this state". Relevant portions of that section are as follows:

27-02-08. RULES OF PLEADING, PRACTICE, AND PROCEDURE MAY BE MADE BY SUPREME COURT. - The supreme court of this state may make all rules of pleading, practice, and procedure which it

may deem necessary for:

1. The administration of justice in all civil and criminal actions, remedies, and proceedings in any and all courts of this state; and

. . .

Sections 27-02-09 and 27-02-10, N.D.C.C., indicate respectively that legislatively-enacted statutes concerning pleading, practice and procedure in court, may be amended or altered by supreme court rule, but that no such rule may modify substantive rights of litigants. There is little doubt, therefore, and you do not raise the issue, that the North Dakota Rules of Criminal Procedure were appropriately promulgated by the North Dakota Supreme Court under the enabling statutory provisions of sections 27-02-08 through 27-02-15. The legislature has conferred procedural jurisdiction upon the municipal and other courts of this state through the provisions of section 28-02-09 in the subject areas addressed by the Criminal Rules.

It appears, therefore, that the authority granted to a "magistrate" pursuant to Rule 41(a), N.D.R. Crim. P., is also granted to municipal judges through the definition of the word "magistrate". Also, while your letter does not pose the question, we feel that the term "State . . . Magistrate" as used in Rule 41(a), includes municipal judges and was meant to distinguish all magistrates under state law from federal magistrates.

While practically speaking it may be advisable to secure warrants from county judges or justices as the case may be, it appears as though the Criminal Rules allow sufficient flexibility to permit the municipal judge to issue search warrants for the seizure of property within the municipal judge's "territorial jurisdiction". The Rules appear not to permit the municipal judge to issue a search warrant for the seizure of property outside of his jurisdiction. In addition, in misdemeanor violations of state law, while the municipal judge may issue the search warrant for the seizure of property within his jurisdiction, it would be the county judge or justice, as the case might be, who would ultimately determine the sufficiency of that action in a suppression hearing. Therefore, from a practical standpoint, unless the county judge or justice were absent or unable to act, it may be more advantageous to obtain search warrants from the county judge or justice, rather than the municipal judge. Nevertheless, according to the Criminal Rules, there appears to be no prohibition against a municipal judge issuing a search warrant for the seizure of property located within his territorial jurisdiction. We find this to be true regardless of whether the offense alleged to have been committed and which prompted the need for a search warrant is a municipal ordinance or a state law. We also can find no law which qualifies this grant of authority merely because the municipal judge is not legally trained.

Your second question asks whether a municipal judge may admit a defendant to bail or receive bail from a defendant charged under state law. Rule 46 of the North Dakota Rules of Criminal Procedure states when and under what conditions a defendant may be admitted to bail. This rule requires the release on bail of a defendant pending

trial" . . . at his initial appearance before a magistrate. . ."

Upon a reading of both Rules 5 and 46, N.D.R. Crim. P., it is the opinion of this office that a municipal judge may admit a defendant to bail or receive bail from a defendant charged under the state statute when the facts disclose that such municipal judge is the "nearest available magistrate" as mandated by Rule 5(a), N.D.R. Crim. P., and when such judge is sitting as the magistrate at the defendant's initial appearance. There is little doubt, of course, that a municipal judge may admit a defendant to bail and receive bail from a defendant charged under a violation of a municipal ordinance within that municipal judge's territorial jurisdiction.

Sincerely,

ALLEN I. OLSON

Attorney General