

1978 S.C. Op. Atty. Gen. 230 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-203, 1978 WL 22671

Office of the Attorney General

State of South Carolina

Opinion No. 78-203

December 6, 1978

***1** In the absence of a statute or court decision requiring same, the State is not obligated to pay for the appearance fee of a court reporter and/or the transcript costs for an indigent defendant appearing at a preliminary hearing.

Honorable L. Edmund Atwater, III
Director
South Carolina Court Administration
P. O. Box 11788
Columbia, SC 29211

Dear Mr. Atwater:

You have requested an opinion of this Office with respect to the following question:

Is the state obligated to pay, under the Defense of Indigents Act and rules promulgated thereunder, for the appearance fee of a court reporter and/or the transcript cost for an indigent defendant appearing at a preliminary hearing?

[Section 17-3-80 of the 1976 Code](#) states in part as follows:

This fund shall be used to reimburse private appointed counsel, public defenders, and assistant public defenders for necessary expenses actually incurred in the representation of persons pursuant to this chapter, provided that the expenses are approved by the trial judge.

The Defense of Indigents Act of which this section is a part also states that the Supreme Court is empowered to establish such rules and regulations as are necessary for the proper administration of the Act. [Section 17-3-110](#). Pursuant to that authority the Court promulgated Rule 7 of the Rules issued pursuant to the Defense of Indigents Act which states in subsection 2:

Necessary expenses which may be approved by the trial judge pursuant to [Section 7](#) of the Act ([Section 17-3-80](#)) may include court reporter fees provided in Rule 37 of the Rules of the Supreme Court.

Rule 37 of the Supreme Court Rules sets the fees which may be charged by official court reporters for furnishing the original transcript in criminal indigency cases.

Although a preliminary hearing in this State is a critical stage in the criminal process, [State v. Taylor](#), 255 S.C. 268, 178 S.E.2d 244 (1970), there is no requirement that a preliminary hearing be held in every case. It may be waived simply by failing to meet the statutory requirements for demanding such. [Blandshaw v. State](#), 245 S.C. 385, 140 S.E.2d 784 (1965). Its purpose is to allow the accused to be apprised of the nature of the state's evidence, [State v. Flood](#), 257 S.C. 141, 184 S.E.2d 549 (1971), and to determine whether the state can show probable cause, [State v. White](#), 243 S.C. 238, 133 S.E.2d 320 (1963).

An accused is, however, not entitled to plead or even make a sworn statement. He is not permitted to offer any evidence, but he may make an unsworn statement; however, it cannot be thereafter used against him. He may cross-examine the state's witnesses, but such evidence is not admissible in any subsequent proceeding. [State v. White](#), 243 S.C. 238, 133

[S.E.2d 320 \(1963\)](#). A magistrate does not have jurisdiction to acquit a defendant and he may only discharge him from custody until he is indicated. [Williams v. South Carolina](#), 257 F.Supp. 360 (E. D. S. C. 1965).

*2 There is no statutory provision designating the magistrates' courts as courts of record. In fact, [Section 22-3-730 of the 1976 Code](#) states in part that all criminal proceedings in magistrates' courts 'shall be summary.' This Office has previously issued an opinion that magistrates' courts are not courts of record and should not be considered as such.

Official court reporters are not provided for magistrates' courts and it has been the custom for attorney's to provide their own reporters or to make a tape recording of the proceedings for their future reference. The statutes provide that in appeals from magistrates' courts the magistrate shall make a return setting forth the testimony taken before him. [Section 18-3-40 Code of 1976](#). All of this goes toward demonstrating the proposition that the only possible use which could be made of a transcript of the testimony taken at a preliminary hearing is to serve as a memory tool for the attorneys in preparation for trial and possibly as a tool at the trial itself for the impeachment of prosecution witnesses.

It seems clear that it was not contemplated in the consideration of the Defense of Indigents Act nor the rules promulgated thereunder that the State should be required to pay for an appearance fee for a court reporter nor to provide a free transcript to indigent defendants of the testimony taken at a preliminary hearing. I have been unable to locate any authority which would require the State to pay for such costs and in the absence of such authority I do not believe that it should be implied. It is certain that neither the Defense of Indigents Act nor the rules promulgated by the Court thereunder require such payment.

Although not mentioned in your letter, the only question which might arise is whether or not the United States Constitution requires the State to provide such a transcript. Obviously none of the cases by the United States Supreme Court dealing with this area specifically mention such a transcript. In [Hardy v. U. S.](#), 375 U.S. 277 (1964) the Court stated that:

We conclude that . . . counsel's duty cannot be discharged unless he has a transcript of the testimony and evidence presented by the defendant and also the court's charge to the jury, as well as the testimony and evidence presented by the prosecution. 375 U.S. at 282.

There is no mention of such a preliminary transcript in that case. The more difficult situation is presented by the court's decision in [Britt v. North Carolina](#), 404 U.S. 226. In that case the defendant's original trial ended in a mistrial when the jury reported a hopeless deadlock. A retrial was scheduled for the following month and in interim the defendant filed a motion seeking a free transcript of the first trial alleging that he was indigent. His request was denied by the state courts and was subsequently heard by the United States Supreme Court. The Supreme Court citing [Griffin v. Illinois](#), 351 U.S. 12, stated that a state must as a matter of equal protection provide indigent prisoners with the basic tools of an adequate defense or appeal when those tools are available for a price to other prisoners. The Court further went on to state that the outer limits of the principle were not clear, however, the state must provide an indigent defendant with 'a transcript of prior proceedings when that transcript is needed for an effective defense or appeal' 404 U.S. at 227. The Court cited two factors relevant to a determination as to the indigent defendant's claim, (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought and (2) the availability of alternative devices that would fulfill the same functions as the transcript. The Court stated that there was no requirement that the defendant be required to show a need tailored to the facts of the particular case because it could be assumed that the transcript of a prior mistrial would be valuable to the defendant in at least two ways, 'as a discovery device in preparation for trial, and as a tool at the trial itself for the impeachment of prosecution witnesses.' 404 U.S. at 228. The Supreme Court, however, affirmed the state court's denial of the transcript on the ground that the decision was based on the availability of an adequate alternative to a transcript. The Court cited the fact that the second trial was before the same judge, with the same counsel and the same court reporter and the two trials were only a month apart. In those circumstances the petitioner's memory and that of his attorney's should have furnished an adequate substitute for a transcript and additionally the petitioner

could call the court reporter to read to the jury the testimony given at the mistrial in the event that inconsistent testimony was offered at the second trial.

*3 It would appear that an adequate alternative to a transcript is available under our situation. The attorneys representing the defendant are presumably the same. The magistrates' courts are not courts of record and are, in fact, summary courts. No official court reporter is provided. If a question arises at the second trial with respect to inconsistent testimony, it would appear that the magistrate could be called to testify as well as any other persons present at the preliminary hearing.

Although not directly in point the cases dealing with the requirement to provide a transcript at collateral proceedings are instructive. In [Gunter v. State](#), 267 S.C. 468, 229 S.E.2d 723, our Supreme Court citing [Jones v. Superintendent](#), 460 F.2d 150 (CA4 1972) held that an indigent prisoner applying for relief under the Uniform Post Conviction Procedure Act does not have an absolute right to a free transcript where the prisoner made no showing of need and the Application raises no genuine issue of material fact. The Court cited the decision of the United States Supreme Court in [U. S. v. MacCollom](#), 426 U.S. 317, holding essentially the same thing. These cases state that there is no doubt that the transcript would be helpful, but the decision does not turn on whether or not it might be helpful to the indigent. The Court in [MacCollom](#) stated that the decision places an indigent in a somewhat less advantageous position than a person of means.

But neither the equal protection clause of the Fourteenth Amendment, nor the counter-part equal protection requirement embodied in the Fifth Amendment guarantees 'absolute equality or precisely equal advantages.' . . . In the context of a criminal proceeding they require only 'an adequate opportunity to present [one's] claim fairly . . . ' 426 U.S. at 324.

In answer to the precise question presented by your letter, therefore, it is my opinion that there is nothing in the statutes or rules which would require the State to provide a free transcript of a preliminary hearing to an indigent defendant nor is there any requirement that the state pay an appearance fee for a court reporter.

If your inquiry contemplates whether or not there is any right generated by the Federal constitution, there is a substantial question. Whether or not a court would find the alternatives available to be adequate is questionable.

In view of the nature of a preliminary hearing in this State and the alternatives available to an indigent defendant, it would appear that there is no constitutional requirement that the State provide a transcript or a court reporter for an indigent defendant. The denial of such, absent some extraordinary showing, would not preclude him from having adequate opportunity to present his contentions fairly.

It is therefore my opinion that in the absence of a statute or court decision requiring same, the State is not obligated to pay for the appearance fee of a court reporter and/or the transcript costs for an indigent defendant appearing at a preliminary hearing.

Very truly yours,

*4 Emmet H. Clair
Deputy Attorney General

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