

Opinion No. 72-20

April 28, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General Winston Roberts-Hohl,
Assistant Attorney General

TO: Mr. Morris Stagner, District Attorney, Ninth Judicial District, County Courthouse,
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QUESTIONS

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1. Is the state required to pay transportation costs for prisoners committed for diagnostic evaluation under Section 40A-29-15, N.M.S.A., 1953 Comp. (Supp. 1971)?
2. Is the state required to pay transportation costs when prisoners are required to be returned to the county of commitment for further proceedings after the diagnostic evaluation has been received by the court?

CONCLUSIONS

1. Yes.
2. Yes.

OPINION

{*35} ANALYSIS

Attorney General Opinion No. 66-115, dated October 18, 1966, dealt with a related question and advised that under Section 15-43-11.1, N.M.S.A. 1953 Comp. it was the responsibility of the state to pay the transportation costs incurred when a prisoner is transported from the state prison to the county jail for the purpose of collaterally attacking his conviction. However, Attorney General Opinion No. 69-34, dated April 22, 1969, distinguished that opinion and ruled that the state is not responsible for payment of mileage and per diem expenses incurred in the transportation of a prisoner from the penitentiary to a {*36} court so that he may be a witness in a pending matter. Nevertheless, using the rationale distinguishing the prior opinion we find that the latter opinion is not controlling in the question posed when we consider the current Appropriation Act.

The distinguishing language in the 1969 opinion is:

"However, since that time the Legislature has limited these funds in the General Appropriation Act to strict terms of the statute and our prior opinion is no longer applicable."

But we find that the General Appropriation Act of 1971 will not permit this distinction. Laws of 1971, Chapter 327, page 1362 reads as follows:

"TRANSPORTATION AND EXTRADITION OF PRISONERS: \$ 50,000

"The appropriation shall be paid in accordance with the provisions of Sections 15-43-11.1 and 41-17-28.1 NMSA 1953 and shall be used only for reimbursement of mileage and personal traveling expenses properly incurred by officers and employees; and no part shall be used for reimbursement of mileage to any agency of state, county or municipal government; no reimbursement for mileage shall be made for the use of privately owned vehicles when government owned conveyances are available for this purpose."

The General Appropriation Act, then, clearly leaves the determination of your questions to be resolved by an interpretation of Section 15-43-11.1, **supra**. Subsection C reads:

"Sheriffs; their deputies and guards shall be paid per diem expenses, at the same rate as state employees, for transporting prisoners to the penitentiary and extraditing prisoners from without the state. These per diem expenses shall be paid by the state upon sworn accounts filed with the department of finance and administration."

In this subsection we find no qualification on the transportation of prisoners to the penitentiary and so the answer to question No. 1 is obvious. A literal reading of Subsection C, **supra**, indicates that the state should bear that burden. A literal reading of that subsection does not answer the second question, but from the following analysis we conclude that the state likewise should bear this cost.

In a related issue regarding the liability for the expense of maintenance of a person who spent some time in the penitentiary awaiting appeal, the county was said to be liable. **State v. Board of County Comm'rs of Colfax Co.**, 33 N.M. 340, 267 Pac. 72 (1928). This decision spoke of someone who is sent to the penitentiary for safe-keeping during those periods when he would normally be in the custody of the Sheriff. We think the situation here is different. Section 40A-29-15(C), **supra**, does not contemplate sending one for diagnostic commitment until after he has been convicted.

Secondly, on its face the diagnostic commitment provision is an attempt by the Legislature to provide all judges in the State of New Mexico with an additional means of determining the proper sentence for each individual, a legitimate objective in our indeterminate sentencing scheme. See **McCutcheon v. Cox**, 71 N.M. 274, 377 P.2d 683 (1962). When we consider the purpose of the diagnostic commitment statute in light of some language in the case of **State v. Board of Comm'rs of Bernalillo Co.**, 43 N.M. 521, 96 P.2d 290 (1939), we likewise reach our conclusion. The court in that case said:

"So far as the matter of dollars and cents is concerned as to which would be the better policy would probably be none of our concern, but even then we believe that over the course of a long period of time the taxpayers of the state generally would not have to pay any more out of their pockets if the state penitentiary bears the expense than if the respective counties did so."

Using this language as a guide in a consideration of costs in relation to objectives, we believe that the purpose of the diagnostic commitment statute is more likely to be achieved if a trial judge did not have to consider the possible shortage of funds in the county at {*37} the time he considers the future of a convicted person. We believe it is common knowledge that before the end of the fiscal year some judicial districts are short on funds and so persons convicted in these districts would most likely be treated differently from persons convicted in counties who had some money. Clearly, this result would be inconsistent with the comprehensive legislative purpose of Section 40A-29-15, **supra**. For this reason, we believe that the centralized system of payment by vouchers by the state is more likely to accomplish the legislative purpose of this act. And so, in the absence of any statutory prohibition, it is our opinion that the state should pay the transportation costs even when prisoners are being returned after diagnostic evaluations.