

**OPINION
71-130**

April 5, 1971 (OPINION)

Mr. Maurice E. Cook

Acting State's Attorney

Slope County

RE: Courts - Court Reporter - Employed by Defendant

This is in reply to your letter of March 19, 1971, with regard to a court reporter engaged by the defendant in a criminal case.

You indicate that in a recent trial of a misdemeanor traffic violation the defendant appeared in court with a court reporter. The court reporter was not requested by the state but brought by the defendant solely for the defendant's purpose. The court permitted the court reporter to take what it is assumed was a verbatim record of the proceedings.

The county justice has now received from the court reporter a voucher drawn on the county requesting that he authorize by his signature payment to the court reporter, of the cost of the transcript.

You ask that this office examine the contents of State v. Decker, 181 N.W.2d. 746 and State v. Hapip, 174 N.W.2d. 717, and advise of our opinion as to whether or not the county is properly charged with the expense of the transcript in a misdemeanor traffic case where the court reporter was engaged by the defendant without consent or knowledge of the office of the state's attorney or the court.

The cases you cite are very interesting. We believe that in view of those decisions any conviction obtained in the proceeding you outline would not be sustained upon appeal in the absence of availability of a transcript, on which basis we would necessarily assume that a court reporter in trial of misdemeanor cases is desirable from the state's point of view. While these decisions do indicate that a defendant in such a proceeding is entitled to have a court reporter and opportunity for a transcript, they do not indicate that any and all defendants should obtain a transcript and the services of the court reporter free and clear of costs therefor, at least in the absence of a judicial determination of the defendant's indigency. We do note, for example, the provisions of Section 29-26-22 of the North Dakota Century Code providing in part that:

"* * *In all cases of conviction, the cost of the prosecution shall be taxed against the defendant.* * *

From the facts as you outline them, we would assume that the court and the state's attorney didn't do anything about obtaining a court reporter on their assumption that the defendant was furnishing same. In the absence of the defendant furnishing a court reporter, we would assume that the state or the court, in view of the State v. Decker

and State v. Hapip decision, might have furnished one, though this question apparently never came up, and though again they may have at least attempted to insist that either the defendant furnish a court reporter or waive his right to a court reporter. If the defendant furnished adequate proof of indigency, probably the state or court would have agreed to furnish a court reporter at county expense.

In the instant case apparently none of these possible variations on the basic theme occurred in view of the fact that the defendant appeared to be furnishing the court reporter. We would further assume that if the defendant was convicted, the court did not feel it necessary to add the costs of a court reporter to the fine and costs, on the basis of this assumption that the defendant was furnishing same.

At this point, however, we do not see that the transcript becomes an expense of the county. Perhaps the defendant has furnished to the court reporter adequate evidence of his indigency; however, a determination of indigency should be made by the court, not the court reporter.

It is thus our conclusion that the county is not properly charged with the expense of the transcript in a misdemeanor traffic case where the court reporter was engaged by the defendant without consent or knowledge of the office of the state's attorney or the court, at least in the absence of a determination by the court on the basis of adequate evidence that the defendant was and is actually unable to pay the costs of same.

We hope the within and foregoing will be sufficient for your purposes.

HELGI JOHANNESON

Attorney General