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Opinion No. 00-088

Police Department Dispatcher as Neutral and Detached Magistrate.

QUESTION

May an employee of the City of Whitewall Police Department, who is a dispatcher rather than a sworn police officer, and who is also a magistrate, issue search warrants at the request of police officers?

OPINION

No. A search warrant can only be issued by a neutral and detached magistrate. It can be inferred from a magistrate's employment with the police department that the magistrate has divided loyalties and is not neutral and detached.

ANALYSIS

Rule 41, Tennessee Rules of Criminal Procedure, provides that a search warrant may be issued by a magistrate based upon a determination that probable cause for the warrant exists. The Fourth Amendment warrant requirement commands that such a probable cause determination be made by a neutral and detached magistrate. *State v. Jacumin*, 778 S.W. 2d 430, 431 (Tenn. 1989).

In *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972), the United States Supreme Court stated that a magistrate issuing a warrant "must be neutral and detached" rather than an "officer engaged in the often competitive enterprise of ferreting out crime," and he must be capable of determining whether probable cause for the requested search warrant exists. *Id.* Relying on *Shadwick*, this office has previously opined that "[t]he requirement of neutrality and detachment extends to prohibiting those who are actively engaged in law enforcement and those who have potential division of loyalty problems from making probable cause determinations." Op. Tenn. Atty.

Gen. 97-135 (September 30, 1997)(copy attached); *see also* Op. Tenn. Atty. Gen. 92-16 (February 25, 1992)(copy attached).[1] Furthermore, this office has opined that "one who has any connection or association with law enforcement cannot be a neutral and detached magistrate." Op. Tenn. Atty. Gen. 90-07 (January 17, 1990)(copy attached).[2]

The fact that the magistrate in question is an employee of the police department, albeit a dispatcher rather than a police officer, establishes that there is a division of professional loyalties, especially when faced with the issuance of a search warrant. Accordingly, it is the opinion of this office that a dispatcher who is an employee of the City of Whitewall Police Department is not a neutral and detached magistrate for the purpose of issuing search warrants.

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[1]In Op. Tenn. Atty. Gen. 97-135 (September 30, 1997), this office opined that a security officer at a Board of Regents campus is not a neutral and detached magistrate. In Op. Tenn. Atty. Gen. 92-16 (February 25, 1992), this office opined that a judicial commissioner who also serves as a county jailer is not a neutral and detached magistrate.

[2]In Op. Tenn. Atty. Gen. 90-07 (January 17, 1990), this office opined that a deputy general sessions clerk who is also a full-time deputy sheriff is not a neutral and detached magistrate.