S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
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May 18, 2001

Opinion No. 01-081

Review of judicial commissioner appointment and powers

QUESTIONS

1. Is the method used to appoint and retain judicial commissioners in Shelby County constitutional?

2. If constitutional, does any legal infirmity exist that would preclude judicial commissioners in Shelby County from issuing search warrants or arrest warrants in cases where the defendant is being charged with a class A or class B felony?

OPINIONS

1. Yes.

2. No.

ANALYSIS

1. Tenn. Code Ann. §40-1-111 (Supp. 1998) provides as follows:

(a)(1)(A) The chief legislative body of any county having a population of less than two hundred thousand (200,000) or a population of not less than two hundred thousand seventy-six thousand (276,000) nor more than two hundred seventy-seven thousand (277,000) or a population of over seven hundred thousand (700,000) according to the 1970 federal census or any subsequent federal census may appoint one (1) or more judicial commissioners . . ..

* * * *

(B) The term or terms of the officers shall be established by the chief legislative body of the counties but shall not exceed a four-year term. No member of the county legislative body shall be eligible for appointment as a judicial commissioner. Notwithstanding the provisions of this subdivision to the contrary, the presiding general sessions judge of a county may appoint a temporary, or part-time, judicial

commissioner to serve at the pleasure of the presiding judge in case of absence, emergency or other need. The legislative body of any county, in appointing, evaluating and making decisions relative to retention and reappointment shall take into consideration views, comments and suggestions of the judges of the courts in which the judicial commissioners are appointed to serve.

(C) In any county having a population greater than seven hundred thousand (700,000) according to the 1970 federal census or any subsequent federal census, to be eligible for appointment and service as a judicial commissioner a person must be licensed to practice law in the state of Tennessee.

Thus, for a county such as Shelby County with a population greater than seven hundred thousand (700,000), the county legislative body or the appropriate general sessions judge has the authority to appoint a judicial commissioner. Such an appointee must be licensed to practice law and cannot serve a term greater than four years before being reappointed.

This statute was previously found to be constitutional in *State v. Bush*, 626 S.W.2d 470, 474 (Tenn. Crim. App. 1981), where the Court of Criminal Appeals held that the appointment of judicial commissioners does not create an "inferior court" or a "corporation court" under Article VI, Section 1 of the Tennessee Constitution. Rather, this legislation created a "magistrate." Therefore, Article VI, Section 4 of the Tennessee Constitution, which would require the election of judicial commissioners, an age limit of at least 30 years, and a term of office of 8 years, is inapplicable. The court further held that the statute "is not repugnant to either the constitution of the United States or of this State and that the General Assembly acted within its constitutional power in adopting this legislation." *Id.* Accordingly, it is the opinion of this Office that the statute governing the appointment and retention of judicial commissioners in Shelby County is constitutional.

2. Tenn. Code Ann. §40-1-111(i)(1998 Supp.) provides that the duties of judicial commissioners include the "[i]ssuance of search warrants and felony arrest warrants upon a finding of probable cause and pursuant to requests from on-duty law enforcement officers . . .." Pursuant to the plain language of the statute, judicial commissioners are authorized to issue search warrants and felony arrest warrants, upon a finding of probable cause, without regard to the classification of the offense. Tenn. Code Ann. §§40-1-106 and 40-5-102(3) state that judicial commissioners are magistrates. Tenn. Code Ann. §40-5-101 defines a magistrate as an officer having power to issue a warrant for the arrest of a person charged with a public offense. In *State v. Bush*, 626 S.W.2d 470, 473 (Tenn. Crim. App. 1981), the Court of Criminal Appeals held that determinations of probable cause may be made by an appointed "magistrate," and the only requirements for the party who determines probable cause are that he or she be "neutral and detached," and "be capable of determining whether probable cause exists." *Bush*, 626 S.W.2d at 473 (citing *Shadwick v. City of Tampa*, 407 U.S. 345(1972)). Once these requirements are met, a judicial commissioner, or magistrate, is authorized to issue search warrants and felony arrest warrants, regardless of the classification of the offense. Accordingly, it is the opinion of this Office that there is no legal infirmity that would preclude judicial commissioners from issuing search warrants or arrest warrants in cases where the defendant is charged with a class A or class B felony.

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