S T A T E O F T E N N E S S E E
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Opinion No. 02-109

Constable as Neutral and Detached Magistrate

QUESTION

May a constable with law enforcement powers also serve as a judicial commissioner whose duties include issuing arrest warrants at the request of law enforcement officers, and issuing search warrants in the absence of local judges?

OPINION

No, these positions are incompatible under the common law because an individual with a position in law enforcement is not a "neutral and detached" magistrate qualified to issue search warrants and arrest warrants under state and federal law.

ANALYSIS

This opinion concerns the power of the same individual to serve as a constable in Sevier County and as a judicial magistrate. Constables in Sevier County have law enforcement powers. Tenn. Code Ann. § 8-10-108(b).

There is a common law prohibition against a public officer holding two incompatible offices at the same time. *State ex rel. Little v. Slagle*, 115 Tenn. 336, 89 S.W. 316 (1905). This prohibition is generally applied when an individual occupies two inherently inconsistent offices. 63C Am. Jur. 2d *Public Officers and Employees* § 62 (1997). In determining incompatibility, the crucial question is whether the occupancy of both offices by the same person is detrimental to the public interest, or whether the performance of the duties of one interferes with the performance of those of the other. *Id.*

The question is whether the offices of constable and judicial commissioner are inherently inconsistent. Judicial commissioners are generally appointed by a county commission under Tenn. Code Ann. § 40-1-111. Duties of judicial commissioners include issuing search and felony arrest warrants upon a finding of probable cause and pursuant to requests from on-duty law enforcement officers. Tenn. Code Ann. § 40-1-111(i). A party who determines probable cause must be neutral and detached and capable of determining whether probable cause exists. *State v. Bush*, 626 S.W.2d 470, 473 (Tenn. Crim. App. 1981), *citing Shadwick v. City of Tampa*, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972). In *Shadwick*, the United States Supreme Court noted that "[t]his Court long

has insisted that inferences of probable cause be drawn by a 'neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" 92 S.Ct. at 2123, *quoting Johnson v. United States,* 333 U.S. 10, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948). Based on this authority, this Office has concluded that the 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) (a security officer at a state university campus is not a "neutral and detached" magistrate); *see also,* Op. Tenn. Atty. Gen. 00-88 (May 5, 2000) (a police department dispatcher, who is not a sworn police officer, is not "neutral and detached" as required by state and federal law); Op. Tenn. Atty. Gen. 92-16 (February 25, 1992) (a county jailer would not be a "neutral and detached" magistrate who could serve as a judicial commissioner); Op. Tenn. Atty. Gen. 90-17 (January 17, 1990) (a full-time deputy sheriff whose duties are restricted to civil process is not a "neutral and detached" magistrate).

As the request notes, this Office issued an opinion in 1984 concluding that there is no *per se* conflict of interest involved in an individual being both a constable of Sevier County and a judicial commissioner of Sevier County. Op. Tenn. Atty. Gen. 84-328 (December 10, 1984). But that opinion focused on whether the neutrality requirement would be violated if a constable got paid for serving a warrant he or she issued in his or her capacity as a judicial commissioner. Our Office later expressly found the 1984 opinion superceded to the extent it implied that a judicial commissioner may also hold a job in law enforcement. Op. Tenn. Atty. Gen. 92-16 (February 25, 1992). Based on the reasoning in the opinions discussed above, a constable with law enforcement powers is not a "neutral and detached" magistrate qualified to issue criminal arrest and search warrants. Serving as constable, therefore, directly interferes with an individual's ability to carry out the duties of the office of judicial commissioner. In addition, a judicial commissioner is subject to the Code of Judicial Conduct. Tenn. R. Sup. Ct. 10, Application of the Code of Judicial Conduct, ¶ A. Under Canon 2.A, "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and *impartiality* of the judiciary." Tenn. R. Sup. Ct. 10, Canon 2.A (emphasis added). By acting as a law enforcement official, a judicial commissioner arguably undermines public confidence in the impartiality of the judiciary. For these reasons, the offices of constable and judicial commissioner are incompatible under the common law.

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