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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Opinion No. 03-136

Bailiff or Court Officer serving as Judicial Commissioner

QUESTION

Whether a bailiff or court officer may be appointed as a judicial commissioner.

OPINION

No, because a bailiff or court officer would not be a "neutral or detached" magistrate or clerk as required by the Constitution.

ANALYSIS

Under Rules 3 and 4 of the Tennessee Rules of Criminal Procedure, a party who issues arrest and search warrants must be neutral, detached and capable of determining probable cause. *See also State v. Bush*, 626 S.W.2d 470, 473 (Tenn. Crim. App. 1981); *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 observed that "this Court has long 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).

This Office has previously opined 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. 02-109 (October 2, 2002) (a constable with law enforcement powers is not a "neutral and detached" magistrate qualified to issue search warrants and arrest warrants); *see also* Op. Tenn. Atty. Gen. 97-135 (September 30, 1997) (a security officer at a state university campus is not a "neutral and detached" magistrate); 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). In Op. Tenn. Atty. Gen. 90-17 (January 17, 1990) this Office opined that a full-time deputy sheriff whose duties are restricted to civil process is not a "neutral and detached" magistrate. Furthermore, "one who has any connection

with law enforcement cannot be a neutral or detached magistrate or clerk within the meaning of Rule 3." *Id.*

Tenn. Code Ann. § 5-7-108 provides as follows:

> The sheriff has charge of the courthouse, unless some other person is specially appointed by the county legislative body for that purpose, and shall prevent trespasses, exclude intruders, and keep it and the grounds attached thereto in order, reporting from time to time the repairs required, and the expense, to the county legislative body.

In a municipality or county with a certain population, the trial judges and general sessions judges are authorized to appoint court officers for the respective courts. Tenn. Code Ann. § 8-8-201(2)(B)(i) and (2)(C)(i). While performing their duties, these officers "possess and exercise police powers" to the same extent as those granted to members of the metropolitan police department or county sheriff's department. Tenn. Code Ann. § 8-8-201(2)(B)(ii) and (2)(C)(ii). Accordingly, it is the opinion of this Office that a bailiff or court officer is not a "neutral and detached" magistrate or clerk, and thus may not be appointed as a judicial commissioner.

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