

**STATE OF TENNESSEE
OFFICE OF THE
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Opinion No. 08-12

Judicial Commissioners Conducting Preliminary Hearings under Tenn. Code Ann. § 40-1-111

QUESTION

Can a Shelby County General Sessions Judge assign Judicial Commissioners to preside over preliminary hearings under Tenn. Code Ann. § 40-1-111?

OPINION

Yes. Judicial Commissioners are appointed to perform various judicial functions as magistrates, and there is nothing in the language of the statute that prohibits them from presiding over preliminary hearings.

ANALYSIS

Tenn. Code Ann. § 40-1-111 provides for the appointment, duties, terms, and compensation of Judicial Commissioners. It first requires determination of the population of the county and/or district in question. This request involves the 30th Judicial District, which encompasses Shelby County with a population of more than 700,000 people.

Tenn. Code Ann. § 40-1-111(a)(1)(A) provides:

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 seventy-six thousand (276,000) nor more than two hundred seventy-seven thousand (277,000), according to the 1970 federal census or any subsequent federal census may appoint, and the chief legislative body of any county having a population of over seven hundred thousand (700,000), according to the 1970 federal census or any subsequent federal census, may initially appoint one (1) or more judicial commissioners whose duty or duties shall include, but not be limited to, the following:

- (i) Issuance of search warrants and felony arrest warrants upon a finding of probable cause and pursuant to requests from on-duty law enforcement officers and in accordance with the procedures outlined in chapters 5 and 6 of this title;

- (ii) Issuance of mittimus following compliance with the procedures prescribed by § 40-5-103;
- (iii) The appointing of attorneys for indigent defendants in accordance with applicable law and guidelines established by the presiding general sessions judge of the county;
- (iv) The setting and approving of bonds and the release on recognizance of defendants in accordance with applicable law and guidelines established by the presiding general sessions judge of the county; and
- (v) Issuance of injunctions and other appropriate orders as designated by the general sessions judges in cases of alleged domestic violence.

The statute does not limit a Judicial Commissioner's duties to only those specifically enumerated in Tenn. Code Ann. § 40-1-111(a)(1)(A), as is evident from the statute's language providing that a Judicial Commissioner's "duty or duties shall include, but not be limited to . . ." Additionally, its language in section (a)(1)(B)(ii) is broad enough to allow the presiding General Sessions Judge to determine his or her county's need for Judicial Commissioners and their manner of service. Tenn. Code Ann. § 40-1-111(a)(1)(B)(ii) provides, in relevant part:

. . . the presiding general sessions criminal court judge of the 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 . . .

There is no specific limitation on a Judicial Commissioner's duty or duties under Tenn. Code Ann. § 40-1-111(a)(1)(A), and Tenn. Code Ann. § 40-1-111(a)(1)(B)(ii) gives the presiding general sessions judge the authority to determine the Judicial Commissioner's manner of service, which could include presiding over preliminary hearings if he or she determines there is such a need.

Judicial Commissioners in Shelby County are required to be licensed to practice law in Tennessee. Tenn. Code Ann. § 40-1-111(a)(1)(C). According to Tenn. Code Ann. § 40-1-106 and Tenn. R. Crim. P. 1(e)(3), Judicial Commissioners are magistrates. Tenn. Code Ann. § 40-1-106 provides:

The judges of the supreme, appellate, chancery, circuit, general sessions and juvenile courts throughout the state, judicial commissioners and county executives in those officers' respective counties are magistrates within the meaning of this title.

Tenn. R. Crim. P. 1(e)(3) also provides a definition of magistrate:

"Magistrate" includes all judges of courts of record in the state but is primarily intended to mean judges of courts of general sessions. It also includes judicial

commissioners and justices of the peace when they perform any of the functions contemplated by these rules.

As magistrates, Judicial Commissioners make probable cause determinations to issue search warrants and arrest warrants. Tenn. Code Ann. § 40-5-101 (“[a] magistrate is an officer having power to issue a warrant for the arrest of a person charged with a public offense.”). Tenn. R. Crim. P. 5.1 outlines the procedure for preliminary hearings, involving the determination of probable cause. It provides, in relevant part:

(b) When Probable Cause Found.

When the magistrate at a preliminary examination determines from the evidence that an offense has been committed and there is probable cause to believe that the defendant committed it, the magistrate shall bind the defendant over to the grand jury and either release the defendant pursuant to applicable law or commit the defendant to jail by a written order.

(c) When Probable Cause Not Found.

When the magistrate determines from the evidence that there is not sufficient proof to establish that an offense has been committed or probable cause that the defendant committed it, the magistrate shall discharge the defendant. The discharge of the defendant does not preclude the state from instituting a subsequent prosecution for the same offense.

The statutes governing magistrates contemplate that Judicial Commissioners can conduct preliminary examinations, as they involve probable cause determinations. *See* Tenn. Code Ann. § 40-10-101; *see also State v. Nimmons*, No. E2000-02396-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 619, *4 (Tenn. Crim. App. August 14, 2001) (explaining “[t]he purpose of the preliminary hearing is to determine whether probable cause exists for the charge against the defendant”) (citing Tenn. R. Crim. P. 5.1).

Based on the foregoing, it is the opinion of this Office that Judicial Commissioners in Shelby County may preside over preliminary hearings.

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