

**OPINION
69-156**

January 8, 1969 (OPINION)

Mr. LeRoy P. Anseth

State's Attorney

Williams County

RE: Criminal Procedure - Transcript - Indigent Defendants

This is in reply to your request for an opinion concerning Section 29-07-15 of the North Dakota Century Code. This statute, copy of which you enclosed, provides as follows:

TESTIMONY REDUCED TO WRITING - CONDITIONS - PAYMENT. Where the offense charged is a felony, on demand of the state or the defendant, all the testimony in the case must be reduced to writing in the form of depositions. When the offense charged is a misdemeanor, either the state or the defendant may elect to have such testimony taken and reduced to writing, but in case the defendant so elects, the state shall not be required to pay the cost of such transcript. If the accused shall make and file with the committing magistrate his affidavit duly sworn to, stating that he is financially unable to pay the expense of transcribing such testimony, and that the transcript thereof is necessary to his proper defense, such transcript of testimony shall be made and a copy thereof delivered to such accused. Such affidavit shall not be made on information and belief."

You state your question is as follows:

"* * * what would happen if you have a defendant charged with a felony and the defendant demanded that the testimony be reduced to writing and further then who would pay for these costs of the original transcript and further what would happen if the defendant requested a copy. Would the State have to pay for the copy or would the defendant? I am assuming in this instant that the defendant is not an indigent and does not have a court appointed attorney."

Unfortunately in the case cited in the footnotes to this statute in the Century Code, (State v. Schook, 57 N.D. 401, 222 N.W. 267), the Court gives a great deal of consideration to the fact that after the demand that the testimony be reduced to writing counsel stipulated: "That the proceedings in this preliminary hearing be taken down in shorthand * * * * and that upon request of either party they shall be transcribed * * * * ." This makes it a bit difficult to attempt from that case to determine what the Court would have ruled without such stipulation.

Section 27-06-08 of the 1967 Supplement to the North Dakota Century Code, after providing for the computation of the compensation to be paid to the reporter for transcripts, further provides:

* * * * Such compensation shall be paid by the party requesting the transcript or by the county chargeable with the costs of the action, when the transcript is ordered prepared, by the judge at such county's expense."

We note further the provisions of Section 27-06-06 of the North Dakota Century Code providing:

"TRANSCRIPT IN CRIMINAL ACTION PREPARED AT EXPENSE OF COUNTY - FILING AND USE OF TRANSCRIPT. A judge of a district court in which a criminal action or proceeding has been tried, on the application of the defendant or the state's attorney of the county, may order a transcript of the original shorthand minutes of such action or proceeding, or of any part thereof, to be made at the expense of the county whenever in his judgment there is reasonable cause therefor. Such transcript, when prepared, shall be filed in the office of the clerk of such court and shall be available alike to either party to such action or proceeding."

In view of the first sentence of Section 29-07-15, as quoted herein, we would assume that upon the demand of the defendant that all of the testimony in the case must be reduced to writing in the form of depositions, we would assume in the first instance that the demand would be complied with. In the usual instance, in view of the quoted provision of Section 27-06-08 we would further assume that by demanding such reduction of the testimony to writing, such defendant would be volunteering to pay for any transcript he requested. We note, however, the exception contained in that statute and in Section 27-06-06 to the effect that the judge can order the transcript prepared at the county's expense. On such basis we would assume that if the defendant wished the transcript prepared at county expense he could either as part of the demand or by separate motion request that the transcript prepared be prepared at county expense.

Your further question as to the costs where defendant demanded a copy would appear to be answered by the last sentence of Section 27-06-06, quoted above, unless of course the defendant ordered a copy directly. Said last sentence of Section 27-06-06 does not provide for a copy to be furnished the defendant - only for the transcript to be filed with the clerk and available to either party to the proceeding.

Whether the Court would grant that part of the defendant's request that the transcript be prepared at county expense would appear to be within the Court's sound discretion. Also the Schook case, cited above, would appear to indicate that in a proper case counsel could by stipulation vary the basic premises set forth in these statutes.

HELGI JOHANNESON

Attorney General