

corporation was also charged with seven violations of the Dade County Metropolitan Pollution Control Ordinance in 1970. Six of the charges were not pressed, and the corporation paid a five hundred dollar fine on the seventh charge, which was based on a single emission at the corporation's Pensuco Plant. A single violation of the federal Anti-Pollution Act by the corporation also drew a fine. Insofar as the individual's personal activities are concerned, it appears that a civil action on a tax deficiency is pending against him in the federal tax court in Washington, D.C., and that there is some question concerning a conflict-of-interest situation arising out of the sale of property owned by the corporation to the Downtown Improvement Authority, of which the individual was a member at the time.

The circumstances recounted above do not appear to reflect significantly upon the individual's qualifications for the office in a factual sense; and it is abundantly clear that they do not constitute a *legal* disqualification for holding the office. I am advised that the Charter Act of the City of Miami contains nothing that would disqualify the individual from serving as a municipal officer on account of these matters and things; and the only absolute disqualification for holding public office in this state under the constitution or general law, so far as I can find, is contained in Art. VI, §4, State Const., as follows:

No person *convicted of a felony*, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.
(Emphasis supplied.)

Cf. Article IV, §7, State Const., authorizing the governor to *suspend* a state or county official for the stated misconduct in office, and to suspend a municipal official who has been indicted for crime.

The former provision in this respect was contained in §112.01, F. S. (repealed in 1971); and it has been uniformly held by my predecessors in office that a mere charge of a felonious crime, prior to conviction, does not bar an individual from running for and holding public office. Thus, in AGO 069-119, it was ruled that a municipal chief of police under indictment for conspiracy to commit bribery was not prohibited by §112.01, *supra*, or Art. VI, §4, *supra*, from running for public office. *Accord:* Attorney General Opinion 060-45. As the individual in question has not been charged with any crime whatsoever, much less charged and convicted of a felony, there can be no doubt that he is qualified, under the law, to assume the duties of the office of mayor.

073-125—April 18, 1973

ARREST WARRANTS

PRESIGNED WARRANT; AFFIDAVIT—PERSONAL APPEARANCE BEFORE MAGISTRATE

To: Richard A. Gordon, Chief of Police, Niceville

Prepared by: Wallace E. Allbritton, Assistant Attorney General

QUESTION:

When a complainant executes an affidavit before a person authorized to administer oaths and then advises the judge by telephone of all pertinent facts and the judge determines that there is probable cause to issue a warrant, may the person who administered the oath complete and use a presigned arrest warrant if authorized by the judge?

SUMMARY:

When a complainant executes an affidavit before a person authorized to administer oaths and then advises the judge by telephone of all pertinent facts and the judge determines that there is probable cause to issue a warrant, the person who administered the oath may complete and use a presigned arrest warrant if authorized by the judge.

Your question requires a construction of Rule 3.120, Florida Rules of Criminal Procedure, which provides:

Each state and county judge is a committing magistrate and may issue a summons to, or a warrant for the arrest of, a person against whom a complaint is made in writing and sworn to before a person authorized to administer oaths, when the complaint states facts which show that such person violated a criminal law of this State within the jurisdiction of the magistrate to whom the complaint is presented. The magistrate may take testimony under oath to determine if there is reasonable ground to believe the complaint is true. The magistrate may commit the offender to jail, may order the defendant to appear before the proper court to answer the charge in the complaint, or may discharge him from custody or from any undertaking to appear. The magistrate may authorize the clerk to issue a summons.

Committee Note: Substantially same as former rule. Altered to incorporate the provision for testimony under oath formerly contained in Rule 3.121(a), and authorizes the execution of the affidavit before a notary or other persons authorized to administer oaths.

I find nothing in the above-quoted rule which would prohibit or render unlawful the issuance of a warrant under the circumstances described in your question. As indicated in the committee note, the rule was altered to permit the execution of an affidavit before a notary or other person authorized to administer oaths. This does not mean that the person before whom the affidavit is executed makes a determination of probable cause. I know of no statute authorizing a clerk or anyone else other than a magistrate to make a determination of probable cause. *See* ACO 071-40.

The case of *State v. Hickman*, 189 So.2d 254 (2 D.C.A. Fla., 1966), is informative. There, the Second District Court of Appeal held that a justice of the peace could authorize his chief clerk to affix his signature on warrants by using a rubber stamp facsimile when done in his presence, and when the justice of the peace himself made the determination as to whether the facts recited in the sworn complaint constituted probable cause sufficient to justify the issuance of an arrest warrant. Under the facts alleged in your question, the magistrate or judge does make the determination of probable cause and, based on *Hickman*, I do not believe that the use of a presigned warrant would invalidate the procedure.

I must say, however, that the practice of using presigned arrest warrants leaves much to be desired. The practice is too susceptible to abuse. It seems to me that a warrant for the arrest of an individual is of sufficient importance to merit the personal signature of the issuing magistrate at the time the warrant is to be issued. This in my opinion would be the better practice.

~~I find nothing in the rule requiring the personal appearance of the complainant before the magistrate to whom the sworn complaint or affidavit is presented. In my opinion, the language of the rule, "the jurisdiction of the magistrate to whom the complaint is presented," does not require the complainant to personally appear before the magistrate. However, should the~~

magistrate be unable to determine the existence of probable cause from the affidavit presented to him, then he may require the complainant to come in and give sworn testimony for the purpose of determining if there is reasonable ground to believe the complaint to be true.

In the circumstances described in your question, the magistrate determined the existence of probable cause, not only from the contents of the affidavit executed by the complainant but also from talking with him on the telephone. The magistrate then expressly authorized the person before whom the affidavit was executed to complete a presigned warrant, which is a ministerial function. It is assumed that the magistrate conveyed to the officer sufficient information, *i.e.*, amount of bail and return date, to enable him to complete the presigned warrant. I find nothing unlawful in this procedure. Accordingly, your question is answered in the affirmative.

073-126—April 19, 1973

GAME AND FRESHWATER FISH

IMPORTATION FOR AQUATIC WEED CONTROL

To: *Bill Fulford, Chairman, House Committee on Natural Resources, Tallahassee*

Prepared by: *Halley B. Lewis, Assistant Attorney General*

QUESTION:

Does the amendment of §§372.26 and 372.265, F. S., subsequent to the rendering of AGO 071-12 affect your conclusions in that opinion relative to the importation of animals not indigenous to this state?

SUMMARY:

The term "any species of the animal kingdom" as used in §372.265, F. S., was defined in AGO 071-12 to embrace fish and reptiles as well as mammals, and it was concluded in that opinion that the unlawful importation, sale, use, or release of any species of the animal kingdom (including fish and reptiles) not indigenous to Florida without first having obtained a permit therefor from the Game and Fresh Water Fish Commission subjected a violator to the more severe criminal penalty prescribed by §372.265(3). Since that time the specified penalty provision has been amended so as to make a violation punishable as a misdemeanor of the first degree as prescribed in §§775.082 and 775.083, F. S.; and the penalty prescribed by §372.71, F. S., 1969, for a violation of Ch. 372, F. S., has been amended so as to provide punishment for a misdemeanor of the second degree for first offenders for a violation of Ch. 372, *supra*, as provided in §775.082 or §775.083. The aforesaid amendments in no way changed or modified AGO 071-12 in the definition of "any species of the animal kingdom" or the conclusion thereof relative to the more severe penalty prescribed by §372.265(3), *supra*.

Sections 372.26 and 372.265, F. S., have been amended, effective September 1, 1971, so as to provide that the restriction therein contained shall not apply to the Department of Natural Resources acting under authority of §372.925(4), F. S. Said amendments per se did not operate to effect any change in or modification of AGO 071-12