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SPRINGFIELD

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FILE NO. 82-017

CRIMINAL LAW AND PROCEDURE:
Appointment of Counsel

Honorable Thomas J. Homer
State's Attorney
Fulton County Courthouse
Lewistown, Illinois 61542

Dear Mr. Homer:

I have your letter in which you state:

"On occasion, particularly in traffic cases, an indigent defendant is charged with committing petty offenses together with misdemeanors and felonies, all arising out of the same incident. In addition, it is not uncommon that an indigent defendant charged with driving under the influence of alcohol or other drug has refused to submit to a chemical test and has a right to a hearing pursuant to sec. 11-501.1 of the Illinois Vehicle Code. [Ill. Rev. Stat. 1981, ch. 95 1/2, par. 11-501.1, as amended by Public Act 82-311.]

Under these circumstances, is it proper that public defenders be appointed and conduct defenses in cases arising out of the same transaction which are either:

1. Petty offenses; or

2. Hearings conducted with respect to the refusal to submit to chemical analysis under section 11-501.1 of the Illinois Vehicle Code?"

In response to your first question, it is my opinion that there is no duty imposed upon the court to appoint counsel to represent indigent defendants charged with the commission of petty offenses; in circumstances such as you have described, however, a court possesses inherent power to do so. With regard to your second question, it is my opinion that it would be improper to appoint counsel to represent an indigent defendant in an implied consent hearing conducted pursuant to section 11-501.1 of The Illinois Vehicle Code since such a proceeding is civil in nature and since there is no statutory authority to appoint counsel in such a circumstance.

Section 113-3 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1981, ch. 38, par. 113-3) provides in pertinent part:

"(a) Every person charged with an offense shall be allowed counsel before pleading to the charge. If the defendant desires counsel and has been unable to obtain same before arraignment the court shall recess court or continue the cause for a reasonable time to permit defendant to obtain counsel and consult with him before pleading to the charge.

(b) In all cases, except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel. If there is no Public Defender in the county or if the defendant requests counsel other than the Public Defender and the court

> finds that the rights of the defendant will be prejudiced by the appointment of the public defender, the court shall appoint as counsel a licensed attorney at law of this State * * * .
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> (Emphasis added.)

Section 4 of "AN ACT in relation to the office of Public Defender" (Ill. Rev. Stat. 1981, ch. 34, par. 5604) provides in pertinent part:

> "The Public Defender, as directed by the court, shall act as attorney, without fee, before any court within any county for all persons who are held in custody or who are charged with the commission of any criminal offense, and who the court finds are unable to employ counsel.
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> * * *
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> (Emphasis added.)

For purposes of the Criminal Code of 1961 and the Code of Criminal Procedure of 1963, an offense is defined as "a violation of any penal statute of this State". (Ill. Rev. Stat. 1981, ch. 38, pars. 2-12, 102-15.)

The Supreme Court of Illinois in People v. Scott (1977), 68 Ill. 2d 269, 273-74, held that an indigent criminal defendant is not entitled to the appointment of counsel unless the penalty imposed for the offense is imprisonment. The United States Supreme Court in affirming this decision (Scott v. Illinois (1979), 440 U.S. 367), held that the United States Constitution requires only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has

afforded him the right to appointed counsel. Thus, "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony unless he was represented by counsel at his trial". (Argersinger v. Hamlin (1972), 407 U.S. 25, 37.) While an indigent defendant may not be imprisoned without representation by counsel, or a knowing and intelligent waiver of counsel, indigent defendants accused of petty offenses, which, by definition, do not carry a term of imprisonment (Ill. Rev. Stat. 1981, ch. 38, par. 1005-1-17), are not entitled to court appointed counsel. People v. Guice (1979), 83 Ill. App. 3d 914, 917; Ill. Rev. Stat. 1981, ch. 38, par. 113-3.

Courts are, however, faced with a difficult problem when a public defender is appointed to represent an indigent defendant at trial upon felony or misdemeanor charges, and the defendant is additionally charged with committing petty offenses arising from the same transaction. Section 3-3 of the Criminal Code of 1961 (Ill. Rev. Stat. 1981, ch. 38, par. 3-3) requires that all charges known to the prosecuting officer which arise from a single course of conduct by a defendant be prosecuted in a single prosecution, unless the court orders one or more charges severed and tried separately. Failure to join offenses pursuant to section 3-3 of the Criminal Code of 1961 may bar subsequent prosecution of offenses which could have

been joined. (Ill. Rev. Stat. 1981, ch. 38, par. 114-1(a)(2).) Under these circumstances, a court must either proceed upon the trial of all charges in a single proceeding, with the public defender conducting the defense upon the felony or misdemeanor charges, and the defendant responsible for conducting the defense of the petty offenses, or the court may sever one or more of the offenses in the interests of justice. In the first instance, such dual representation in a single proceeding is likely only to hinder the presentation of an effective defense, to the detriment of the orderly administration of justice. In the second instance, proceedings are likely to be duplicative, resulting in uneconomical expenditure of the court's time, with no benefit to the defendant or the judicial process.

A judge is not relegated to being a mere referee during a trial. (City of Danville v. Frazier (1969), 108 Ill. App. 2d 477, 480-81.) Rather, it is the duty of the court to exercise its broad discretionary powers to control the proceedings, in order to maintain proper judicial decorum and insure that each defendant receives a fair trial. (People v. Allen (1967), 37 Ill. 2d 167, 172.) Permitting a defendant to conduct a simultaneous pro se and pro counsel defense in cases where counsel has been appointed to assist and aid the defendant places a very difficult burden upon the trial court, which

may properly refuse to allow such a request. (People v. Guthrie (1978), 60 Ill. App. 3d 293, 297.) Certainly, no less of a burden is placed upon the trial court if the defendant and public defender are required to conduct a simultaneous pro counsel and pro se defense by the mandatory joinder of offenses.

Inherent in the power of the judiciary to regulate the practice of law and conduct the orderly administration of justice is the power to appoint counsel for indigent defendants. (People v. Randolph (1966), 35 Ill. 2d 24, 28-29.) Illinois courts have held that the appointment of counsel upon motion of the court, to represent an indigent defendant in cases in which appointment is not required, is not error. (People v. Johnson (1970), 45 Ill. 2d 38, 41; People v. Ephraim (1952), 411 Ill. 118, 120-21; People v. Witt (1946), 394 Ill. 405, 407; People v. Montville (1946), 393 Ill. 590, 591-92.) Although counsel may not be appointed for a nonindigent defendant merely because he desires such representation (People v. Sheridan (1978), 57 Ill. App. 3d 765, 770), the court possesses the inherent power to appoint counsel for an indigent defendant not entitled by statute to appointment of counsel, when, in its discretion, it deems such appointment necessary and desirable to attain the interests of justice. (See, e.g., People v. Allen (1967), 37 Ill. 2d 167, 172; State v. State Dep't of Health and Social Serv. (Sup. Ct. Wis. 1968), 155 N.W.2d 549,

555.) Therefore, it is my opinion that, in circumstances where an indigent defendant is charged with committing petty offenses together with misdemeanors and felonies arising out of the same incident, the trial court may, in its discretion, appoint the public defender to represent an indigent defendant on all charges, including petty offenses, properly joined in a single prosecution pursuant to section 3-3 of the Criminal Code of 1961.

With regard to your second question, subsection 11-501.1(a) of The Illinois Vehicle Code, as amended by Public Act 82-311, effective January 1, 1982 (Ill. Rev. Stat. 1981, ch. 95 1/2, par. 11-501.1), provides that any person who operates a motor vehicle upon the public highways of Illinois is deemed to have given consent to submit to chemical, blood, breath, or urine tests for the purpose of determining the alcohol or other drug content of such person's blood if arrested for the offense of driving while under the influence of alcohol or other drug. (Ill. Rev. Stat. 1981, ch. 95 1/2, par. 11-501.) Further, subsection 11-501.1(c) provides that refusal to submit to such a test will result in the mandatory suspension of a person's driving license or privilege unless, within 28 days, such person requests a hearing. Subsection 11-501.1(c) of The Illinois Vehicle Code provides, in pertinent part:

" * * *

> * * * Such hearing shall proceed in the court in the same manner as other civil proceedings, shall cover only the issues of whether the person was placed under arrest for an offense as defined in Section 11-501 of this Code or a similar provision of a local ordinance as evidenced by the issuance of a uniform traffic ticket; whether the arresting officer had reasonable grounds to believe that such person was driving or in actual physical control of a motor vehicle while under the influence of alcohol, other drug, or combination thereof; and whether such person refused to submit and complete the test or tests upon the request of the law enforcement officer. * * *
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> Immediately upon the termination of the court proceedings, the clerk shall notify the Secretary of State of the court's decision. The Secretary of State shall thereupon suspend the driver's license, the privilege of driving a motor vehicle on highways of this State given to a nonresident, or the privilege which an unlicensed person might have to obtain a license under the Driver's License Act, of the arrested person if that be the decision of the court. * * * " (Emphasis added.)

It is clear from the language of section 11-501.1 of The Illinois Vehicle Code that an indigent defendant who has refused to submit to breath, blood, chemical or urine tests as required under subsection 11-501.1(a) has not, by his refusal, committed an "offense" as defined in the Criminal Code of 1961 and the Code of Criminal Procedure of 1963, and does not face any possibility of imprisonment as a result of the implied consent hearing provided for by subsection 11-501.1(c). The purpose of the implied consent hearing is only to determine whether a defendant's driving license or privilege should be suspended by the Illinois Secretary of State.

Because hearings conducted pursuant to the implied consent provisions of The Illinois Vehicle Code are civil proceedings, no right to counsel exists. (See, People v. Finley (1974), 21 Ill. App. 3d 335; see also, Agnew v. Hjelle (Sup. Ct. N.Dak. 1974), 216 N.W.2d 291; Rusho v. Johns (Sup. Ct. Neb. 1970), 181 N.W.2d 448; State v. Pandoli (Super. Ct. N.J. 1970), 262 A.2d 41.) Therefore, it is my opinion that, even if such a hearing arises out of a single course of conduct by an indigent resulting in charges of criminal offenses which carry a penalty of imprisonment, it would be improper for a public defender to be appointed and represent defendants in implied consent hearings conducted pursuant to section 11-501.1 of The Illinois Vehicle Code.

Very truly yours,

ATTORNEY GENERAL