

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 79-910
	:	
of	:	<u>April 11, 1980</u>
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SUBJECT: MUNICIPAL COURT JUDGE’S ORDER TO SHERIFF—Municipal court judges may not order a sheriff to allow inmates in the county jail to place personal telephone calls upon request.

The Honorable James M. Cramer, District Attorney, San Bernardino County has requested an opinion on the following question:

May a municipal court judge order a sheriff to allow inmates in the county jail the right to place personal telephone calls upon request?

CONCLUSION

A municipal court judge may not order a sheriff to allow inmates in the county jail to place personal telephone calls upon request.

ANALYSIS

We are presented with the question of whether a municipal court judge may order a sheriff to allow prisoners to make personal telephone calls at the prisoner's request. We conclude a municipal court judge does not possess the authority to make such an order.¹

The constitutional statement of the doctrine of the separation of powers is found at article III, section 3 of the California Constitution which reads as follows:

“The powers of state government are legislative, executive and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.”

This “constitutional statement of the doctrine of the separation of powers . . . protects the executive branch from encroachment no less than the judicial branch.” (*Younger v. Superior Court (Mack)* (1978) 21 Cal. 3d 102, 115.)

In 46 Ops. Cal. Atty. Gen. 20 (1965), we concluded a court does not possess the authority to order the custodian of the jail to permit social visits which are not provided for by reasonable rules and regulations of the jail adopted by the custodian. A general order permitting a prisoner to make social calls at his request would similarly encroach upon the executive authority of the sheriff.

Government Code section 26605 provides that the sheriff is the keeper of the county jail. (See also Pen. Code, § 4000.) In that capacity he is an executive officer who executes the jail sentence. (*People v. Thomas* (1959) 52 Cal. 2d 521, 532.) As keeper of the jail and the person responsible for the custody of prisoners committed thereto (Gov. Code, § 26605) and the security of the institution, the sheriff may impose reasonable restrictions on prisoner conduct, including prisoner communications, which do not abridge certain constitutional rights such as the right to counsel. (*Bell v. Wolfish* (1979) 441 U.S. 520, 537–540, 544–546; *In re Chessman* (1955) 44 Cal. 2d 1, 9–11, *People v. Lovercamp* (1974)

¹ We were also asked whether a municipal court judge may order the sheriff to make written notice of compliance or noncompliance with such an order. Since we conclude that a judge has no authority to make the general order in the first place, it would follow that he has no authority to enforce its compliance by written return or otherwise. While every court has power to compel obedience to its judgments and orders and to be informed of that compliance in a reasonable way (Code Civ. Proc., § 128 (4), (5), 177 (2), 181; *Lee v. Superior Court* (1976) 63 Cal. App. 3d 705, 710; *Vanderstok v. Bank of America* (1972) 29 Cal. App. 3d 731, 734) jurisdiction is a prerequisite to the exercise of that power (*Wisniewski v. Clary* (1975) 46 Cal. App. 3d 499, 506) and an order made without jurisdictional authority is void. (*Hays v. Superior Court* (1940) 16 Cal. 2d 260, 264.)

43 Cal. App. 3d 823, 826; *Clifton v. Superior Court* (1970) 7 Cal. App. 3d 245, 255; *Davis v. Superior Court* (1959) 175 Cal. App. 2d 8, 20; *Akamine v. Murphy* (1951) 108 Cal. App. 2d 294, 296; 46 Ops. Cal. Atty. Gen. 20 (1965); 32 Ops. Cal. Atty. Gen. 228 (1958) § 20 Ops. Cal. Atty. Gen. 146 (1952); 11 Ops. Cal. Atty. Gen. 146 (1948).)

“It is hardly earth shattering to observe that prisons are not Brownie Camps and that within the inmate population are those, who, if given the opportunity, will depart without due process of law.” (*People v. Lovercamp, supra.*) Recognizing this, “institutional authorities must be afforded a certain firmness of program by which the malefactors be kept where sentenced for the allocated period of time.” (*Ibid.*) Controlling their communication with the outside is part of that program. As the court said in *Davis v. Superior Court, supra*, “To censor and in certain instances to forbid communication to and from a prisoner is inherent in its administration. Such authority is necessary to protect against escape.” (175 Cal. App. 2d at p. 20.)

The Legislature has recognized this necessity by enacting section 4570 which makes it a misdemeanor to communicate with a prisoner without the permission of the person in charge of the jail. That section forcefully underscores the authority of the sheriff to control prisoner communications and reads in full as follows:

“Every person who, without the permission of the warden or other officer in charge of any State prison, or prison road camp, or prison forestry camp, or other prison camp or prison farm or any other place where prisoners of the State prison are located under the custody of prison officials, officers or employees, or any jail, or any county road camp in this State, *communicates with any prisoner or person detained therein, or brings therein* or takes therefrom any letter, writing, literature, or reading matter to or from any prisoner or person confined therein, is guilty of a misdemeanor.” (Emphasis added.)

The Legislature has not ignored the question of prisoners placing telephone calls and for particular situations it has specifically provided that they be permitted. (E.g., §§ 851.5 (two calls on arrest)² and 976 (three calls prior to transferred arraignment in

² Section 851.5 reads in full as follows:

“(a) Immediately upon being booked, and, except where physically impossible, no later than three hours after arrest, an arrested person has the right to make at least two completed telephone calls, as described in subdivision (b).

“The arrested person shall be entitled to make at least two such calls at no expense if the calls are completed to telephone numbers within the local calling area.

“(b) At any police facility or place where an arrestee is detained, a sign containing

certain counties).)³ The question is thus to what extent the Legislature has intended that municipal courts also share a role in determining whether prisoners should have a right to place calls other than those specifically granted.

The jurisdiction and powers of the municipal court are on legislative origin. Article VI, section 5 of the Constitution provides that “The Legislature shall provide for the organization and prescribe the jurisdiction of municipal and justice courts.”⁴ That

the following information in bold block type shall be posted in a conspicuous place:

“That the arrestee has the right to free telephone calls within the local dialing area, or at his own expense if outside the local area, to two of the following:

“(1) An attorney of his choice or, if he has no funds, the public defender or other attorney assigned by the court to assist indigents, whose telephone number shall be posted. This phone call shall not be monitored, eavesdropped upon, or recorded.

“(2) A bail bondsman.

“(3) A relative or other person.

“(c) These telephone calls shall be given immediately upon request, or as soon as practicable.

“(d) This provision shall not abrogate a law enforcement officer’s duty to advise a suspect of his right to counsel or of any other right.

“(e) Any public officer or employee who willfully deprives an arrested person of any right granted by this section is guilty of a misdemeanor.”

³ Section 976 reads in full as follows:

“(a) When the accusatory pleading is filed, the defendant must be arraigned thereon before the court in which it is filed, unless the action is transferred to some other court for trial; provided, that a defendant arrested in another county shall be informed of his right to be taken before a magistrate in the arresting county for the purpose of being admitted to bail, as provided in Section 821 or 822.

“(b) In any county of the first or third class, [i.e., counties containing a population over 4,000,000 and a population between 1,300,000 and 1,400,000, respectively (Gov. Code, §§ 28022, 28024)] if the defendant is to be arraigned in municipal court and is in custody, upon the approval of both the presiding judge of the municipal court in which the accusatory pleading is filed and the presiding judge of the municipal court within the county nearest to the place in which he is held in custody, he may also be arraigned before the municipal court within the county nearest to the place in which he is held in custody. Prior to being taken from the place where he is in custody to the place where he is to be arraigned, such defendant shall be allowed to make three completed telephone calls, at no expense to such defendant, in addition to any other telephone calls which such defendant is entitled to make pursuant to law.”

⁴ The sentence is derived from a similar provision in former article VI, section 11 which until its repeal on November 8, 1966 read “The Legislature shall provide by general law for the

jurisdiction is set forth at section 86 of the Code of Civil Procedure and sections 1462, 1462.1, and 1462.2 of the Penal Code, and the powers of the municipal court are set forth at section 128 of the Code of Civil Procedure.

Scanning the statutes we find no indication that the Legislature wished the municipal court to share with the sheriff the determination of what communications a prisoner might have. The powers accorded the court are incident only “to proceedings before it.” (Code Civ. Proc., § 128, subds. 2, 3, 4, 5, 6, 7.) In view of the duties imposed on the sheriff as keeper of the jail and the specific statutes relating to prisoner phone calls, we believe the courts authority to make orders relating to prisoner phone calls is limited to phone calls which relate to some proceeding before the court. To the extent that a municipal court order might be worded or interpreted to direct the sheriff to permit a prisoner to make personal phone calls unrelated to a proceeding before the court, we believe such order would exceed the jurisdiction of the court and to that extent be void.

We thus conclude that a municipal court judge does not have the authority to require the sheriff to allow a prisoner to make personal calls simply at the prisoner’s request.

regulation, government, procedure and jurisdiction of municipal courts and of justice courts and shall fix by law the powers, duties and responsibilities of such courts and of the judges thereof.” The repeal was a part of the general effort mandated by the electorate in 1962, to modernize the California Constitution—which then was the third longest in the world, and which had then been amended over 300 times since 1879. (Argument in Favor of Proposition No. 1–a, Arguments Submitted to the Electorate contained in the Voter’s Pamphlet for the General Election held on November 8, 1966 at p. 2.) The 1966 revision effected the first part of the commission’s work: it covered approximately one third of the Constitution, reducing it from 22,000 to 6,000 words! (*Ibid.*) Although some of the revisions were substantive, this apparently was not, as it was not commented upon by either the proponents or opponents of the proposition. (*Id.*, at pp. 1–2.) Rather, it appears to have been part of the streamlining process to eliminate surplusage and redundancy. (*Cf. People v. Ottey* (1936) 5 Cal. 2d 714, 723–724; see also *Carter v. Seaboard Finance Co.* (1949) 33 Cal. 2d 564, 581; *Beneficial Loan Society, Ltd. v. Haight* (1932) 215 Cal. 506, 515, quoting *Crooke v. People’s Finance etc., Co.* (1930) 111 Cal. App. Supp. 769, 775–776; *Story v. Richardson* (1921) 186 Cal. 162, 165.)