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OPINION	:	No. 83-913
	:	
of	:	<u>APRIL 24, 1984</u>
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THE HONORABLE JOHN J. MEEHAN, DISTRICT ATTORNEY,
ALAMEDA COUNTY, has requested an opinion on the following questions:

1. What duties may be assigned to a municipal court commissioner, who is not a temporary judge, when he or she is conducting an arraignment in a criminal case pursuant to Government Code section 72190.1?

2. Does a municipal court commissioner who is not a temporary judge have the authority to preside over the preliminary hearing of a defendant charged with a felony offense?

CONCLUSIONS

1. A municipal court commissioner, who is not a temporary judge, when he or she is conducting an arraignment in a criminal case pursuant to Government Code

section 72190.1, may be assigned only subordinate judicial duties, which are duties not involving serious, complex or diverse issues of fact or law.

2. A municipal court commissioner who is not a temporary judge does not have the authority to preside over the preliminary examination of a defendant charged with a felony offense.

ANALYSIS

Article VI, section 22, of the California Constitution provides:

"The Legislature may provide for the appointment by trial courts of records of officers such as commissioners to perform subordinate judicial duties."

The Legislature is thus empowered to enact statutes which allow subordinate judicial duties to be assigned to court commissioners.¹ A subordinate judicial duty has been described as one "'placed in a lower order, class or rank; holding a lower or inferior position . . .'" (*People v. Lucas* (1978) 82 Cal.App.3d 47, 54.) The *Lucas* court said that in separating a subordinate judicial duty from other judicial duties the seriousness, complexity and diversity of the factual and legal issues must be examined. (*Id.*, at pp. 50-56.) A strong presumption, however, favors the Legislature's own interpretation of the above seminal provision of the Constitution. (*Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 365-366.)

The duties of court commissioners have been spelled out by the Legislature in section 259 of the Code of Civil Procedure:²

"Subject to the supervision of the court every court commissioner shall have power to do all of the following:

¹ This opinion does not involve court commissioners who are temporary judges acting upon stipulations of the litigating parties. (Cal.Const., art VI, 21; Cal.Rules of Court, rule 244.) "A temporary judge has full judicial power, and his orders are final and nonreviewable as those of a permanent judge." (*In re Mark L.* (1983) 34 Cal.3d 171, 178, mod. 34 Cal.3d 377a.) This opinion also does not encompass court commissioners acting as traffic referees or traffic trial commissioners pursuant to Government Code sections 72400-72451 or exercising jurisdiction in infraction cases under Government Code section 72190.

² Section 259 is contained in title 3 of part 1 of the Code of Civil Procedure, captioned "Persons Specially Invested with Powers of a Judicial Nature."

"(1) Hear and determine ex parte motions, for orders and alternative writs and writs of habeas corpus in the superior court for which the court commissioner is appointed.

"(2) Take proof and make and report findings thereon as to any matter of fact upon which information is required by the court. Any party to any contested proceeding may except to the report and the subsequent order of the court made thereon within five days after written notice of the court's action, a copy of the exceptions to be filed and served upon opposing party or counsel within the five days. The party may argue any exceptions before the court on giving notice of motion for that purpose within 10 days from entry thereof. After a hearing before the court on the exceptions, the court may sustain, or set aside, or modify its order.

"(3) Take and approve any bonds and undertakings in actions or proceedings, and determine objections to the bonds and undertakings.

"(4) Administer oaths and affirmations, and take affidavits and depositions in any action or proceeding in any of the courts of this state, or in any matter or proceeding whatever, and take acknowledgments and proof of deeds, mortgages, and other instruments requiring proof or acknowledgment for any purpose under the laws of this or any other state or country.

"(5) Act as temporary judge when otherwise qualified so to act and when appointed for that purpose. While acting as temporary judge the commissioner shall receive no compensation therefor other than compensation as commissioner.

"(6) Hear and report findings and conclusions to the court for approval, rejection, or change, all preliminary matters including motions or petitions for the custody and support of children, the allowance of temporary alimony, costs and attorneys' fees, and issues of fact in contempt proceedings in divorce, maintenance, and annulment of marriage cases.

"(7) Hear, report on, and determine all uncontested actions and proceedings other than actions for divorce, maintenance, or annulment of marriage.

"(8) Charge and collect the same fees for the performance of official acts as are allowed by law to notaries public in this state for like services.

This paragraph does not apply to any services of the commissioner, the compensation for which is expressly fixed by law. The fees so collected shall be paid to the treasurer of the county, for deposit in the general fund of the county.

"(9) Provide an official seal, upon which must be engraved the words 'Court Commissioner' and the name of the county, or city and county, in which the commissioner resides.

"(10) Authenticate with the official seal the commissioner's official acts."

Commissioners of municipal courts, under direction of the judges, may exercise all the power and perform all of the duties authorized by law to be performed by commissioners of superior courts "and such additional powers and duties as may be prescribed by law." (Gov. Code, § 72190.) One such additional power and duty is the authority to conduct arraignment proceedings. Government Code section 72190.1 provides:

"A commissioner of a municipal court may conduct arraignment proceedings in the court if directed to perform such duties by the presiding or sole judge of the court, including the issuance and signing of bench warrants."

In plain meaning this section authorizes the presiding judge or the sole judge of a municipal court to direct a court commissioner to perform duties involved in arraignment proceedings. The difficulty with this statute, however, is that it does not describe the duties and does not define arraignment proceedings. The imprecision of the language was noted contemporaneously by Legislative Counsel: "[T]here is no precise manner in which an arraignment must be conducted or any ideal procedure to be followed" (1 Assm. J. p. 1152 (1970).) Arraignment of the defendant is required after an accusatory pleading is filed. (Pen. Code, § 976.) To determine what occurs at an arraignment other statutes must be examined. Penal Code section 988, for example, provides:

"The arraignment must be made by the court, or by the clerk or prosecuting attorney under its direction, and consists in reading the accusatory pleading to the defendant and delivering to him a true copy thereof, and of the endorsements thereon, if any, including the list of witnesses, and asking him whether he pleads guilty or not guilty to the accusatory pleading; provided, that where the accusatory pleading is a

complaint charging a misdemeanor triable in an inferior court, a copy of the same need not be delivered to any defendant unless requested by him."

In a noncapital case, if the defendant appears for arraignment without counsel, he shall be informed that it is his right to have counsel before being arraigned and shall be asked if he desires the assistance of counsel; if he desires and is unable to employ counsel, counsel will be assigned to defend him. (Pen. Code, § 987, subd. (a).) More specific advice on counsel must be given at an arraignment in a capital case. (Pen. Code, § 987, subd. (b).) The defendant seeking appointment of counsel is directed to file a financial statement. (Pen. Code, § 987, subd. (c).) When the defendant is arraigned he must be informed that he must declare his true name if the name by which he is prosecuted is not his true name or be proceeded against by the name in the accusatory pleading. (Pen. Code, § 989.) If the defendant is in custody and his personal appearance is necessary, he may be ordered into court for arraignment. (Pen. Code, § 978.) If he has been discharged on bail or other security and does not appear to be arraigned when his personal presence is necessary, the undertaking may be forfeited and a bench warrant may be issued for his arrest. (Pen. Code, § 979.) The bench warrant must be indorsed with the amount of bail. (Pen. Code, § 982; see also Pen. Code, § 978.5.)

If on arraignment the defendant requires it, he must be allowed a reasonable time to answer the accusatory pleading. (Pen. Code, § 990.) Penal Code section 1003 provides: "Both the demurrer and plea must be put in, in open Court, either at the time of arraignment or at such other time as may be allowed to the defendant for that purpose."³ (See also Pen. Code, § 977.2.) If the defendant refuses to answer the accusatory pleading, by demurrer or plea, a plea of not guilty must be entered. (Pen. Code, § 1024.)

There is disagreement, however, as to whether an arraignment includes the taking and entry of a plea. In *Chartuck v. Municipal Court* (1975) 50 Cal.App.3d 931, 936 the court discussed this problem:

"In section 990, the Penal Code provides that 'If *on the arraignment*, the defendant requires it, he must be allowed a reasonable time to answer . . .' (italics added) and section 1003 of the Penal Code provides '[b]oth the demurrer and plea must be put in, in open Court, either *at the time of the arraignment* or at such other time as may be allowed to the defendant for that purpose.' (Emphases added.) The only fair implication to be drawn from those sections is that the arraignment is complete when the court 'asks him [the defendant] whether he pleads guilty or not guilty' and that the entry of

³ A demurrer to the accusatory pleading is made prior to entry of plea. (Pen. Code, § 1004.)

the plea is a separate act, not a part of the arraignment, although it may (or may not) follow at the same session of court." (Emphasis in original.)

Two earlier cases seemingly held contrary to *Chartuck*. In *Simpson v. Municipal Court* (1975) 45 Cal.App.3d 112, 114 the court held the speedy trial period of Penal Code section 1382 begins to run when "defendant enters his plea during proceedings on arraignment." The *Simpson* court relied on *People v. Terry* (1970) 14 Cal.App.3d Supp. 1, 3-4 wherein that court explained:

"Section 988 Penal Code provides that the arraignment 'consists in reading the accusatory pleading to the defendant . . . and asking him whether he pleads guilty or not guilty to the accusatory pleading . . .'

"If we are to apply this language exactly, it might be noted that the docket does not show that defendant was, on June 19, asked whether he pleads guilty or not guilty, only that the complaint was read to him. Hence, the arraignment was not completed on that day regardless of whether a plea is necessary to complete an arraignment.

"Furthermore, it is our opinion that the arraignment includes the plea and is not completed until the plea is entered. We cannot ascribe to the Legislature an intent to outline an idle act. It would be idle to consider that the arraignment is completed by asking the unanswered question: How do you plead? The complete arraignment should include the answer and not stop with the question. This is necessarily implied by Penal Code section 990 providing that 'on the arraignment' at the request of defendant 'he must be allowed a reasonable time to answer.' When the court grants the defendant time to plead, it extends completion of the arraignment. If the defendant refuses to plead when asked to, the court may enter a not guilty plea on his behalf."

(See also *Valdes v. Municipal Court* (1977) 69 Cal.App.3d 434, 438 fn. 3.)

No purpose would be served by allowing the judge to ask the defendant whether he pleads guilty or not guilty and disallowing the judge from receiving the response. Moreover, Penal Code section 1003 specifically permits a plea to be entered at arraignment. (See 63 Ops.Cal.Atty. Gen. 193, 197 (1980).)

An arraignment proceeding, thus, may encompass a wide range of duties from the ministerial act of delivering a copy of the accusatory pleading to the judicial act

of taking and entering a plea. Each act, nevertheless, is an important preliminary step in the criminal process. As stated in *In re Johnson* (1965) 62 Cal.2d 325, 332:

"Within the ambit of the constitutional guarantees, therefore, a certain leeway is permissible in handling these important but essentially preliminary matters. No hard and fast rule, no ideal procedure, will accommodate the diverse problems facing our arraignment courts today . . . "

Clearly, Government Code section 72190.1 allows the presiding judge or sole judge of a municipal court to assign to a commissioner only those duties at arraignment proceedings which are subordinate judicial duties.

There is no obstacle, of course, to a judge taking or entering a plea at an arraignment. However, under article VI, section 22, of the California Constitution a commissioner may do so only if the taking and entering of a plea is a subordinate judicial duty.

The plea question was touched upon by the court in *People v. Haskett* (1982) 30 Cal.3d 841 where the defendant complained that his preliminary hearing was conducted by a commissioner who was a temporary judge. The court observed at page 858:

"[T]here is no inherent danger here, as there is *when a plea of guilty is entered*, that the defendant will be irretrievably prejudiced by the unknowing waiver of the underlying right." (Emphasis added.)

In our view the taking and the entry of a plea of guilty (or nolo contendere) is a critical part of the criminal proceeding. Indeed, by pleading guilty the defendant waives his right to trial and places himself before the court for sentencing. This cannot be classified as a preliminary step in the criminal process; it more closely resembles a final determination. (See *People v. Tijerina* (1969) 1 Cal.3d 41, 49 (commissioner could not revoke probation); *In re Plotkin* (1976) 54 Cal.App.3d 1014, 1017 (commissioner's act in finding witness in contempt and sentencing him to jail was not a subordinate judicial duty); *People v. Oaxaca* (1974) 39 Cal.App.3d 153, 158 (a commissioner does not have the authority to accept a plea bargain guilty plea and to pronounce sentence).) In *People v. Haendiges* (1983) 142 Cal.App.3d Supp. 9, 15 the court found that a commissioner properly transferred a case to a judge for sentencing:

"When the parties have not stipulated that a commissioner may act as a temporary judge, the commissioner has only the authority to perform 'subordinate judicial [duties]' which do not include the power to sentence a

defendant. (*People v. Oaxaca* (1974) 39 Cal.App.3d 153, 158, 165 [114 Cal.Rptr. 178].)"

Accordingly, we conclude that a commissioner is prohibited by the California Constitution from taking and entering a guilty plea at an arraignment.

On the other hand, the taking and the entering of a not guilty plea does not similarly prejudice the defendant. A not guilty plea puts in issue every material allegation of the accusatory pleading. (Pen. Code, § 1019.) The manner in which such a plea is made does not involve a substantial right. (*People v. Conley* (1963) 220 Cal.App.2d 296, 298 (defendant not prejudiced by failure to make formal not guilty plea to amended information.)) We conclude that a commissioner may take and enter a not guilty plea.

Penal Code section 1025 provides that when a defendant who is charged in the accusatory pleading with having suffered a previous conviction pleads guilty or not guilty to the offense charged against him, "he must be asked whether he suffered such previous conviction." The defendant's admission to the prior conviction, even after entry of a plea of not guilty, may have serious consequences in the determination of his sentence if he is ultimately convicted. Consequently, in our view, acceptance of such admission which, under section 1025, is "conclusive of the fact of his having suffered such previous conviction in all subsequent proceedings," also would not be a subordinate judicial duty.

Respecting other duties which may arise in the course of arraignment proceedings, the line between judicial duties and subordinate judicial duties is difficult to draw. For example, the determination of the amount of bail or of a release on recognizance is a duty expressly placed upon judges and magistrates by the California Constitution and statutes. (Cal. Const., art I, § 28(e); Pen. Code, § 1269b, subds. (c) and (d).) However, the act of fixing or accepting bail in accordance with a countywide bail schedule adopted by the judges of the courts would be a subordinate judicial duty. (See *People v. Surety Ins. Co.* (1971) 18 Cal.App.3d Supp. 1, 3.)

By Government Code section 72190.1 the Legislature has allowed court commissioners to conduct arraignment proceedings but has left to the presiding judges or sole judges of the municipal courts to direct which duties may be performed by the commissioners. In our view such matters as reading and delivering the accusatory pleading, delivering the witness list, advising of rights, determining the defendant's true name, ordering the defendant to appear, issuing bench warrants and granting time to answer are judicial duties of a lower order and preliminary in nature. "The Legislature thus must be deemed to have concluded that the constitutional provision empowered it . . . to specify as subordinate judicial duties the hearing and determination of particular preliminary or uncontested matters . . ." (*Rooney v. Vermont Investment Corp.*, *supra*, 10 Cal.3d 351, 366

(commissioner may render a stipulated judgment) *E.N.W. v. Michael W.* (1983) 149 Cal.App.3d 896, 899 (commissioner may enter default judgment).) Where the judicial duty at arraignment involves a serious, complex or diverse issue of fact or law, it is not a subordinate task assignable to a commissioner. (*People v. Lucas, supra*, 82 Cal.App.3d 47, 50-56.)

The Legislature has not authorized municipal court commissioners to conduct preliminary hearings in felony cases. Preliminary hearings are conducted by magistrates. (Pen. Code, §§ 858-883.) Magistrates are judges of the supreme court, courts of appeal, superior courts, municipal courts and justice courts. (Pen. Code, § 808.)

To preside over a preliminary hearing, the municipal court commissioner must have the stipulation of the defendant and prosecutor which authorizes him to act as a temporary judge. (Cal. Const., art. VI, § 21; Code Civ. Proc., § 259, subd. (5); Cal. Rules of Court, rule 244; *Amos v. Superior Court, supra*, 182 Cal.App.2d 343, 345-346.) As clearly stated in *People v. Haskett, supra*, 30 Cal.3d 841, 858:

"To act as magistrate at a preliminary hearing, a court commissioner must attain the status of 'temporary judge' (Pen. Code, § 808; *Amos v. Superior Court* 182 Cal.App.2d 343, 349-350 [6 Cal. Rptr. 252], cited with approval in *Sarracino v. Superior Court* (1974) 13 Cal.3d 1, 10 [118 Cal.Rptr. 21, 529 P.2d 53].) Consequently, he must be a member of the State Bar and must obtain the 'stipulation of the parties litigant.' (Cal. Const., art. VI, § 21.)"

Accordingly, we conclude that a municipal court commissioner who is not a temporary judge does not have the authority to preside over the preliminary hearing of a defendant charged with a felony offense.
