Opinion No. 2011-143

February 28, 2012

The Honorable Buddy Lovell
State Representative
201 West Riverside Drive
Marked Tree, Arkansas 72365-2014

Dear Representative Lovell:

This is my opinion on your questions about writs of execution:[1]

1. Are district court clerks or district court judges in Arkansas authorized to issue writs of execution? Are district court clerks or district court judges authorized under Arkansas Code to issue writs of execution? Are district court clerks or district court judges authorized to issue writs of execution under rules of the Supreme Court or Court Rules?

2. In what manner is a district court judgment filed with the circuit clerk and/or recorded with the recorder of the same county so a writ of execution may be properly issued by the clerk of the circuit court?

3. In what manner is a district court judgment from *another* county filed and/or recorded with the recorder so a writ of execution may be properly issued by the clerk of the circuit court?

4. In what manner is a circuit court judgment of *another* county filed with the circuit clerk and/or recorded with the recorder of the county so a writ of execution may be properly issued by the clerk of the circuit court?

[1] I have reordered and renumbered your last three questions and moved the first two sentences of your question 5 to new question 5 (your question 7).

5. Sheriffs in Arkansas by virtue of the Arkansas Code serve as officers of the circuit courts. Under the Arkansas Code Sheriffs are assigned responsibility for serving writs of execution of the circuit courts and conducting the sale of seized lands, personal property, etc. at the circuit court level. Is a Sheriff under a duty to serve or execute a writ of execution issued by a district court? In the absence of compliance with the procedure set forth in response to question number 2, is a Sheriff under a duty to serve or execute a writ of execution issued from the district court of the same county? Does a sheriff have authority to conduct a sale of property of a writ of execution issued from a district court? Or must the procedure outlined under the answer to question number 2 be followed so that the writ of execution is issued by the circuit court of the county where the property is located?

6. Is a Sheriff under a duty to serve or execute a writ of execution issued by a district court of *another* county? In the absence of compliance with the procedure set forth in response to question number 3, is a Sheriff under a duty to serve or execute a writ of execution issued from the district court of *another* county? Does a sheriff have authority to conduct a sale of property of a writ of execution issued from a district court of *another* county? Or must the procedure outlined under the answer to question number 3 be followed so that the writ of execution is issued by the circuit court of the county where the property is located?

7. Is a Sheriff under a duty to serve or execute a writ of execution issued by the circuit court of *another* county? In the absence of compliance with the procedure set forth in response to question number 4, is a Sheriff under a duty to serve or execute a writ of execution from the circuit court of another county? Does a sheriff have authority to conduct a sale of property of a writ of execution issued from a circuit court of *another* county? Or must the procedure outlined under the answer to question number 4 be followed so that the writ of execution is issued by the circuit court of the county where the property is located?

RESPONSE

In my opinion, (1) an Arkansas district court may issue, through its judge or clerk, a writ of execution to enforce its own judgment; (2) there is generally no need or occasion to obtain a writ of execution from a circuit court to enforce a judgment of a district court located in the same county; (3-4) where the defendant owns real property in a county other than the one in which a district or circuit court judgment was rendered, the judgment may be filed with the circuit clerk of such other county, and that circuit court may issue a writ of execution to enforce the judgment; and (5-7) a sheriff must comply with a writ of execution directed to him or her and issued by a district or circuit court of any county.

Question 1 – Are district court clerks or district court judges in Arkansas authorized to issue writs of execution? Are district court clerks or district court judges authorized under Arkansas Code to issue writs of execution? Are district court clerks or district court judges authorized to issue writs of execution under rules of the Supreme Court or Court Rules?

I assume these questions concern writs of execution to put into effect the judgments of the district court itself. As a general rule, in the absence of a statute providing otherwise, only the court that rendered a judgment may issue a writ of execution to carry out that judgment. *Bank of McGehee v. Greeson & Sons, Inc.*, 223 Ark. 18, 263 S.W.2d 901 (1954).

In my opinion, an Arkansas district court may issue writs of execution to enforce its own judgments.

> A "writ of execution" is defined as a formal process issued by a court generally evidencing the debt of the defendant to the plaintiff and commanding the officer to take the property of the defendant in satisfaction of the debt. *Black's Law Dictionary*, 510 (5th ed. 1979).

Campbell v. White, 294 Ark. 656, 658, 746 S.W.2d 42 (1988).

"The power of state courts in general to issue executions is derived from statutory enactments, and, in the absence of statute, is conferred by the common law." 33 C.J.S. *Executions* § 57 (1998). In Arkansas, "[a]n execution may issue on any final

judgment order of a court of record . . . ." A.C.A. § 16-66-101 (Repl. 2005); *see, e.g., Morgan v. Scott-Mayer Comm'n Co.*, 185 Ark. 637, 48 S.W.2d 838 (1932) (citing statute as authority for chancery court's issuance of writ of execution on its own judgment).

The question becomes whether a district court is a "court of record" within the meaning of that phrase as used in the statute.

"The fact that [a] court has a clerk and a seal, raises the presumption, and is *prima facie* evidence, that it is a court of record." *Adamson v. Adamson*, 9 Ark. 26 (1848). A district court is required to have a seal. A.C.A. § 16-10-110(a) (Repl. 2010). District courts have clerks. *See, e.g.*, A.C.A. §§ 16-17-211 (Supp. 2011) (district court clerks generally), 16-17-108 (Supp. 2011) (specifying district court clerk salaries), 16-17-707 (Repl. 2010) (imposing duties on district court clerks).

A more recent case states that a court of record is one "that is required to keep a record of its proceedings, and that may fine or imprison." *Dodrill v. Executive Director*, 308 Ark. 301, 306, 824 S.W.2d 383 (1992) (quoting *Black's Law Dictionary*, 353 (6th ed. 1990)). The district court clerk must "keep a fair record of all the acts done and proceedings had in the court and . . . enter all judgments of the court, under the direction of the judge." A.C.A. § 16-17-211(c); *cf. Arkansas Democrat-Gazette v. Pulaski Cnty. Dist. Court*, 375 Ark. 310, 289 S.W.3d 901 (2008) (circuit court has authority to issue writ of certiorari to bring up district court record). District courts have jurisdiction, concurrently with circuit courts, over misdemeanors. Ark. Const. amend. 80, § 7(B). A person convicted of a misdemeanor may be fined or imprisoned. A.C.A. §§ 5-4-201(b) (Supp. 2011), 5-4-401(b) (Repl. 2006).

Predecessors in this office repeatedly opined that municipal courts were courts of record. *See* Op. Att'y Gen. 2001-133, 92-005,[2] 89-285, 84-215. The opinions were based, as to some municipal courts, on the rule in *Adamson* quoted above. District courts are regarded as a continuation of the municipal courts. Ark. Const. amend.

[2] Opinion 92-005 also considered A.C.A. § 16-66-221 (currently in Repl. 2005), a statute that, like A.C.A. § 16-66-101, is in a code chapter entitled "Execution of Judgments" and applies to judgments of courts of record. The opinion concluded that, because municipal courts were courts of record, the cited statute applied to their judgments.

80, § 19(C). Reported cases include reference to enforceable municipal court writs of execution. *See, e.g., Fortner v. Air Conditioning Training Co., Inc.*, 245 Ark. 873, 435 S.W.2d 784 (1968); *West v. General Contract Purchase Corp.*, 221 Ark. 33, 252 S.W.2d 405 (1952).

Based on all the foregoing, it is my view that a district court is a court of record within the meaning of A.C.A. § 16-66-101,[3] and is empowered thereunder to issue writs of execution to enforce its own judgments.

You also inquire about court rules. One rule governing procedure in district courts provides that "no execution or enforcement proceedings shall issue on any judgment [from the small claims division of a district court] until after the expiration of ten (10) days from the entry thereof." ADCR 10(e)(4). The rule also provides that, other than with respect to an exception not relevant here, "[p]roceedings to enforce or collect a judgment [in the small claims division of a district court] shall be in all respects as in other cases" and that "judgment may include an order of delivery directing the sheriff to deliver . . . property subject to [a] security interest[] to the plaintiff." ADCR 10(e)(3).[4] In my view, the rule

[3] There is authority suggesting that district courts are not courts of record. *See, e.g.*, A.C.A. §§ 9-11-213(a) (Repl. 2009) (separately authorizing judges of courts of record and district court judges to solemnize marriages), 16-10-104 (Repl. 2010) (designating certain courts, not including district courts, as courts of record), 66-90-115(a) (Repl. 2006) (separately authorizing courts of record and district courts to suspend imposition of sentence). Most direct is a statement that "[t]he district court is not a court of record." *McNabb v. State*, 367 Ark. 93, 101, 238 S.W.2d 119 (2006) (Gunter, J., concurring on denial of rehearing). The statement is part of a demonstration that appeal of a district court decision to circuit court involves a trial *de novo*, not the review of a full record or transcript of all the district court proceedings. The concurrence maintains that requiring a person appealing to circuit court to file more than the district court docket sheet is superfluous and will "mak[e] the district court a court of record." *Id.* But the majority opinion makes clear that, in some cases at least, the record of proceedings that must be filed in connection with an appeal from district court to circuit court will include more than the district court docket sheet. *Id.* at 100 (majority opinion). Under the concurring justice's reasoning, a district court should be regarded as a court of record in such a case. In any event, the decision in *McNabb* did not hinge on whether the district court is a "court of record" within the meaning of any statute or rule, and the question arose in a context significantly different from that presented here. I do not view the concurrence in *McNabb* or any of the other authorities suggesting that district courts are not courts of record as being dispositive of the question here.

[4] *See* Op. Att'y Gen. 2002-291 (interpreting statute, now repealed, containing identical language, and implying that district court is empowered to issue writs of execution).

clearly implies that district courts may issue writs of execution, subject to the rule's limitations.

It being my opinion that a district court is authorized to issue a writ of execution to enforce its own judgment, it is self-evident, in my view, that a district court judge is authorized to issue such a writ. If a court can act at all, surely it can act through its principal official, the person who is in many respects the court itself. "[T]he act of the court is necessarily the act of the judge." *Patton v. Vaughan, Judge,* 39 Ark. 211, 214 (1882).

District court clerks shall "[i]ssue and attest all process." A.C.A. § 16-17-211(d)(6). "Process is a comprehensive term which includes all writs . . . issued during the progress of an action, even those used to carry a judgment into effect . . . ." *Henderson v. Dudley*, 264 Ark. 697, 709, 574 S.W.2d 658 (1978). "Process" includes "[a] summons or writ . . . ." *Black's Law Dictionary* 1325 (9th ed. 2009). *Black's* defines a related term, "final process," as process "issued at the conclusion of a judicial proceeding; *esp., a writ of execution*." *Id.* (emphasis added); *see also, e.g.,* Ark. Const. art 9, §§ 1, 2 (exempting certain property from sale "on execution or other process"); *Campbell*, 294 Ark. at 658 ("A 'writ of execution' is defined as a formal process . . . ."); *Henderson, supra* (court's order directing sheriff to confine defendant constituted process).

Another statute provides that "[e]very clerk of the courts of record in this state shall endorse upon every *execution issued by him or her* the debt, damages, and costs to be recovered . . . ." A.C.A. § 16-66-105 (Repl. 2005) (emphasis added).

Because A.C.A. § 16-17-211(d)(6) expressly states that district court clerks shall issue all process – which includes writs of execution – and A.C.A. § 16-66-105 takes for granted that court clerks do issue writs of execution, it is my opinion that a district court clerk is authorized to issue writs of execution to enforce judgments rendered by the clerk's district court.

Question 2 – In what manner is a district court judgment filed with the circuit clerk and/or recorded with the recorder of the same county so a writ of execution may be properly issued by the clerk of the circuit court?

I conclude above that a district court may issue writs of execution to enforce its own judgments. Accordingly, in my view, there is generally no need or occasion to obtain a writ of execution from a circuit court to enforce a judgment rendered by a district court in the same county.[5] In any event, as noted above, only the court that rendered a judgment may issue a writ of execution to carry it out, unless a statute provides otherwise. *Bank of McGehee, supra.* Absent a statute, then, a circuit court has no authority to issue a writ of execution to enforce a district court judgment. There is no statute unequivocally[6] authorizing a circuit court to issue a writ of execution in the first instance[7] to enforce a judgment of a district court of the same county.

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[5] A district court judgment is not a lien on real estate owned by the defendant in the county in which the judgment was rendered until the judgment is filed with the circuit clerk. *See* A.C.A. § 16-65-117(a)(1)(A) (Supp. 2011); *see also* ADCR 8(d) (district court judgment not lien against real property unless filed with circuit clerk of county where land is located). Accordingly, a district court judgment must be filed with the circuit clerk under A.C.A. § 16-65-117(a)(1)(A) before real property may be sold pursuant to the district court's writ of execution. *See* Ark. Const. amend. 80, § 19(C) (district courts regarded as continuation of justice of the peace courts); A.C.A. §§ 16-19-1004(b) (Repl. 1999) ("No real estate shall be levied upon or sold by virtue of any execution issued from a justice of the peace court"), 16-66-417(a) (Repl. 2005) ("Land shall not be levied on or sold under execution from a justice of the peace's court or any court of similar jurisdiction"); *Smith v. Credit Serv. Co.*, 339 Ark. 41, 2 S.W.3d 69 (1999) (holding that A.C.A. § 16-19-1004(b) applied to a municipal court execution when the municipal court judgment had not been filed with the circuit clerk under A.C.A. § 16-65-117(a)(1)(A) or predecessor to ADCR 8(d)). But the filing of a judgment with a circuit clerk under A.C.A. § 16-65-117 does not in and of itself mean that the writ of execution is issued by that circuit clerk. *See Bank of McGehee, supra.*

[6] A circuit court may issue a writ of execution to enforce a judgment of a justice of the peace of the same county after the judgment has been filed with the circuit clerk. *See* A.C.A. 16-19-1011 (Repl. 1999). Although district courts are regarded as a continuation of justice of the peace courts, Ark. Const. amend. 80, § 19(C), the statute's language is sufficiently specific to justices of the peace that it seems doubtful that the statute would be interpreted to apply to district court judgments.

[7] In some cases "[w]hen an execution on a judgment of a court of similar jurisdiction to the justice of the peace courts" is returned unsatisfied in whole or in part, a copy of the judgment may be filed with the circuit clerk of the same county, and the circuit clerk shall thereupon issue writs of execution on the judgment. A.C.A. § 16-66-417(b). Because district courts are regarded as a continuation of justice of the peace courts, Ark. Const. amend. 80, § 19(C), it is my view that a district court probably is a "court of similar jurisdiction to the justice of the peace courts" within the meaning of the statute. The statute therefore constitutes a limited exception to the general rule that a circuit court does not issue writs of execution on judgments of district courts in the same county.

Question 3 – In what manner is a district court judgment from another county filed and/or recorded with the recorder so a writ of execution may be properly issued by the clerk of the circuit court?

Question 4 – In what manner is a circuit court judgment of another county filed with the circuit clerk and/or recorded with the recorder of the county so a writ of execution may be properly issued by the clerk of the circuit court?

"Executions issued upon any judgment . . . rendered in any court of record may be directed to and executed in any county in this state without first procuring an order of the court for that purpose." A.C.A. § 16-66-109 (Repl. 2005). Under this statute, any district or circuit court may direct a writ of execution to the sheriff of any other county. *See Bank of McGehee, supra.* Accordingly, in my view, there is no universal need to obtain a writ of execution from the circuit court of one county to enforce the judgment of a district or circuit court in another county.

Again, as noted above, only the court that rendered a judgment may issue a writ of execution to carry it out, unless a statute provides otherwise. *Bank of McGehee, supra.* So, absent a statute, a circuit court has no authority to issue a writ of execution to enforce the judgment of a district or circuit court in another county.

There is one such exception applicable to district and circuit court judgments. No judgment is a lien on land owned by the defendant in a county other than the one in which the judgment was rendered until the judgment is filed with the circuit clerk of the county in which the land is located. *See* A.C.A. § 16-65-117(b)(1). A circuit court in which a judgment from another county has been filed pursuant to A.C.A. § 16-65-117 may issue writs of execution on that judgment. A.C.A. § 16-66-102.

In my opinion, then, where the defendant owns real property in a county other than the one in which a district or circuit court judgment was rendered, the judgment may be filed with the circuit clerk of such other county under A.C.A. 16-65-117, and that circuit court may issue a writ of execution under A.C.A. § 16-66-102 to enforce the judgment.

Question 5 – Sheriffs in Arkansas by virtue of the Arkansas Code serve as officers of the circuit courts. Under the Arkansas Code Sheriffs are assigned

responsibility for serving writs of execution of the circuit courts and conducting the sale of seized lands, personal property, etc. at the circuit court level. Is a Sheriff under a duty to serve or execute a writ of execution issued by a district court? In the absence of compliance with the procedure set forth in response to question number 2, is a Sheriff under a duty to serve or execute a writ of execution issued from the district court of the same county? Does a sheriff have authority to conduct a sale of property of a writ of execution issued from a district court? Or must the procedure outlined under the answer to question number 2 be followed so that the writ of execution is issued by the circuit court of the county where the property is located?

Question 6 – Is a Sheriff under a duty to serve or execute a writ of execution issued by a district court of another county? In the absence of compliance with the procedure set forth in response to question number 3, is a Sheriff under a duty to serve or execute a writ of execution issued from the district court of another county? Does a sheriff have authority to conduct a sale of property of a writ of execution issued from a district court of another county? Or must the procedure outlined under the answer to question number 3 be followed so that the writ of execution is issued by the circuit court of the county where the property is located?

Question 7 – Is a Sheriff under a duty to serve or execute a writ of execution issued by the circuit court of another county? In the absence of compliance with the procedure set forth in response to question number 4, is a Sheriff under a duty to serve or execute a writ of execution from the circuit court of another county? Does a sheriff have authority to conduct a sale of property of a writ of execution issued from a circuit court of another county? Or must the procedure outlined under the answer to question number 4 be followed so that the writ of execution is issued by the circuit court of the county where the property is located?

"A writ of execution is in the form of *a command to the sheriff* to take into possession property of the judgment debtor . . . ." *Moory v. Quadras, Inc.*, 333 Ark. 624, 628, 970 S.W.2d 275 (1998) (emphasis added). Where the writ of execution is "regular on its face, issued pursuant to the judgment of a court of competent jurisdiction, and [is] to enforce a legal right already established," the sheriff "is not clothed with discretion with respect to the levy of the execution,"

but rather has "the imperative duty to enforce" the remedy provided by the writ. *Ghent v. State Use Sch. Dist.*, 189 Ark. 747, 75 S.W.2d 67 (1934) (holding mandamus available against sheriff refusing to act under writ of execution).

In this context in particular, the existence of the sheriff's duty is demonstrated by a statute, A.C.A. § 16-66-416 (Repl. 2005), under which the "sheriff is required to make a return on a writ and . . . file it with the issuing clerk within sixty days . . . ." *Vinson Elec. Supply, Inc. v. Poteete*, 321 Ark. 516, 905 S.W.2d 831 (1995). Two other statutes impose liability in specified circumstances on a sheriff who fails to comply with a writ of execution. *See* A.C.A. §§ 16-65-202 (Repl. 2005), 16-66-118 (Repl. 2005).

"The sheriff shall . . . [e]xecute all process directed to him or her by legal authority [and] [a]ttend upon all courts held in his or her county until otherwise provided by law . . . ." A.C.A. § 14-14-1301(a)(5)(B)(ii), (iii) (Supp. 2011). "The sheriffs of the several counties shall be sheriffs of the several courts in their respective counties . . . ." A.C.A. § 16-10-122 (Repl. 2010). "The status of the sheriff as an officer of the courts in his county seems to be beyond doubt. He has been called the executive arm of the court." *Henderson*, 264 Ark. at 710, n.2. "As an officer of the court it is [the sheriff's] duty to obey its orders and his failure to do so is punishable as contempt of the court." *Id.* at 710.

One of the statutes cited above, imposing liability on a sheriff who fails to comply with a writ of execution, has been held to "cover executions issuing from any court created by the Constitution or by its authority." *Lewis v. Pearson Co.*, 118 Ark. 271, 273, 176 S.W. 160 (1915) (involving writ of execution issued by common pleas court then provided for by constitution but abolished by Amendment 80).

In my opinion, it follows from all the foregoing that a sheriff must comply with a writ of execution directed to him or her and issued by a circuit or district court located in the sheriff's own county.

With respect to writs of execution issued by courts of counties other than the sheriff's own county, recall that, as set forth above in my answer to your third and fourth questions, a statute provides that "[e]xecutions issued upon any judgment . . . rendered in any court of record may be directed to and executed in any county in

this state without first procuring an order of the court for that purpose." A.C.A. § 16-66-109. Thus a district or circuit court may issue a writ of execution, in enforcement of its own judgment, directed to the sheriff of any county. See *Atkinson v. Means*, 252 Ark. 8, 477 S.W.2d 178 (1972), *Perry County v. Gatlin*, 186 Ark. 116, 52 S.W.2d 626 (1932), and *Smith v. Drake*, 174 Ark. 715, 297 S.W.2d 817 (1927), for examples of valid writs of execution directed by a court of one county to a sheriff of another county.

As set forth above, a sheriff "shall . . . [e]xecute all process directed to him or her *by legal authority* . . . ." A.C.A. § 14-14-1301(a)(5)(B)(ii) (emphasis added). The same statute requires the sheriff to "[p]erform all other acts and things that are required by law . . . ." A.C.A. § 14-14-1301(a)(5)(B)(iv). In my view, a district or circuit court constitutes such "legal authority," whether or not the court is of the same county as the sheriff, and a sheriff commanded by such a court to act is "required by law" to act.

I conclude from all the foregoing that a sheriff must comply with a writ of execution directed to him or her and issued by a circuit or district court located in a county other than the sheriff's own county.

Assistant Attorney General J. M. Barker prepared this opinion, which I approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM:JMB/cyh