

Opinion No. [29-41]

November 27, 1929

BY: J. A. MILLER, Assistant Attorney General

TO: Hon. Eugene D. Lujan, District Attorney, Albuquerque, New Mexico.

JUSTICES OF THE PEACE -- Jurisdiction under city ordinances.

OPINION

Reference is made to yours of the 19th inst. which followed a discussion we had with you and Mr. McGuinness, a few days ago, relative to the differences of opinion as to the effect of a city ordinance prescribing a penalty for an act already covered by State statute.

You propound three questions as follows:

1. Can a municipal corporation pass an ordinance punishing for an offense which is made a crime and covered by a general statute of the State?
2. How far does the jurisdiction of the Justice of the Peace run with reference to the enforcement of city ordinances?
3. Can the city council give him greater powers than those given by the statute?

You state that the City of Albuquerque has passed an ordinance for the punishing of persons driving a motor vehicle while under the influence of liquor and that the said ordinance is verbatim with section 26, Chapter 150 of the Laws of 1929, except as to the punishment. You give it as your opinion that a municipality cannot punish for a crime which is punishable and covered by a State statute unless it be authorized by special legislation or such authority is given to it by its charter.

As pertinent to this, I quote somewhat at random and rather indiscriminately from various sources:

Being a creature of the state a municipal corporation, possesses such power and such only as the state confers upon it. Ordinarily these powers are conferred by the legislature, but where the constitution authorizes a municipality to adopt its own charter, it is held that the powers of such municipality are derived direct from the constitution, subject to constitutional limitations. The legislature may confer upon municipal corporations such powers as it sees fit. It is a matter within its discretion. A municipal corporation may derive a particular power from different grants of power. It may derive its power to legislate from one or more of the provisions of the statute. (43 C. J., 176.)

Both the state and its governmental agency, the municipal corporation, may have concurrent jurisdiction over the same subject matter relating to municipal affairs. A municipal corporation may exercise police power on the subjects connected with municipal concerns which are also proper for state legislation, but upon which the state has not spoken, until it speaks, their position in that regard being analogous to that of the state to the federal government with reference to matters of interstate commerce. It is no objection to an ordinance that it affords additional regulation complementary to the end which state legislation would effect, if it is not in contravention of any state law The power of the corporation to exercise police power over a particular subject matter ceases when the state acts upon the same subject matter unless there is room for the exercise of concurrent jurisdiction.

In the absence of constitutional limitations the legislature may confer police power upon a municipal corporation over subjects within the provisions of existing state laws and ordinarily under their general police power municipal corporations may regulate all municipal subjects on which the state has acted but not in conflict with general law. The general state law and the municipal regulation may have concurrent operation. (43 C. J., 214.)

The question as to whether or not a municipal ordinance or regulation is in conflict with the general law is sometimes difficult of solution and cannot be determined by any fixed rule. Each particular case must be determined as it arises. Broadly speaking, the question whether a conflict exists depends upon whether the state has occupied the whole field of prohibitory legislation with respect to the subject. If such is the case it is held that a conflict exists. In order that there be a conflict between a state enactment and a municipal regulation, both must contain either express or implied conditions which are inconsistent and irreconcilable with each other. Mere differences in details do not render them conflicting. If either is silent where the other speaks there can be no conflict between them. Where no conflict exists, both laws stand As a general rule, additional regulation to that of the state law does not constitute a conflict therewith. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than a statute requires, creates no conflict therewith unless the statute limits the requirement for all cases to its own prescriptions Merely because a municipal ordinance is not as broad as the statute, does not render it so inconsistent as to make it void. (43 C. J., 218.)

Although a municipal corporation has no power to enact regulations that tend to defeat or that run counter to the penal laws of the state, whether they be laws relating to felonies or to misdemeanors, generally speaking, it is within the power of such corporation to enact and enforce regulations penal in their nature in aid of or not in conflict with the penal laws of the state. And in most jurisdictions in the absence of express inhibition it is generally held that municipal corporations may prohibit and punish acts which are also prohibited and punishable under the general laws of the state or which may involve a common law offense so far, but only so far as such acts pertain to municipal affairs, but this power must be vested in the corporation either by direct grant or by necessary implication. (43 C. J., 222.)

While in determining its reasonableness some courts have considered that the punishment or penalty provided by municipal ordinances or regulations should be in harmony with the laws of the state in the absence of inhibition, it is generally held that the punishment or penalty imposed by municipal corporations for violation of their ordinances or regulations may differ from the punishment or penalty prescribed by state law for the same offense. (43 C. J., 263.)

As to specific legislation in this state, note the following: Section 3563, Codification of 1915.

"All municipal corporations organized under Article II of this chapter shall have the general powers and privileges and be subject to the rules and restrictions granted and provided in the sections of this article.

"Sec. 3564. The City Council and Board of Trustees in towns shall have the following powers:

Sub-sec. sixty-sixth. To pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted to cities or towns, with such fines and penalties as the council or board of trustees shall deem proper: Provided, No fine or penalty shall exceed three hundred dollars, and no imprisonment shall exceed ninety days for one offense."

"3261 (Sec. 91) Municipal corporations shall have power to make and publish from time to time ordinances not inconsistent with the laws of the state for carrying into effect or discharging the powers and duties conferred by law and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporation and the inhabitants thereof, and to enforce obedience to such ordinances by fines not exceeding three hundred dollars or by imprisonment not exceeding ninety days, by suit or prosecution before any Justice of the Peace within the limits of such city or town."

Considering the wording of the section last quoted, the legislative grant of power to municipal corporations appears to be broad and extensive, about the only limit being that ordinances passed shall be "not inconsistent" with the laws of the state. The municipal legislative body within that limit may pass what it deems necessary and proper "to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporation and the inhabitants thereof."

A helpful and clearly reasoned case is, *C. Theisen vs. W. H. H. McDavid, City Marshal*, 34 Fla. 440. As this will be available to you I shall not quote at length though I commend it to you especially because of the discussion of the question of double jeopardy. One section of the syllabus is as follows:

"1. There is nothing in our Constitution that prohibits the Legislature from clothing our municipal governments with legislative power to prohibit and punish by ordinance any act made penal by the State laws, when perpetrated within municipal limits. And such an ordinance is not invalidated because it prescribes the same penalties as the State law for the commission or omission of the same act. Neither is it any objection to such an ordinance that the offender may be tried and punished for the same act under both the ordinance and the State law. A conviction or acquittal by the municipal courts under such an ordinance is no bar to a prosecution under the State law. Neither is such an ordinance invalid because the trial thereunder is without a jury."

I have examined the cases to which you make reference in your letter and find the rule to be recognized throughout that if legislative authority exists therefor, a municipal corporation may, by ordinances not inconsistent with state statute, punish acts within the corporation limits even though such acts are made penal by the State laws and I am of the opinion that the authority granted municipal corporations in this state by the legislature is so broad and generous as to permit the passing and enforcing of an ordinance such as you describe as having been passed by the commission in the City of Albuquerque.

Before leaving this topic I desire to emphasize one sentence in the syllabus of *Theisen v. McDavid*, supra, "Neither is it any objection to such ordinance that the offender may be tried and punished for the same act under both the ordinance and the State law. A conviction or acquittal by the municipal courts under such an ordinance is no bar to a prosecution under the State law."

We now turn to your second question, "How far does the jurisdiction of the Justice of the Peace run with reference to the enforcement of city ordinances?" In answer to this I will say that the jurisdiction of the Justice of the Peace, as you probably use that expression, does not include the enforcement of city ordinances. Under the State Constitution and statutes the justice court is part of the judiciary of the state. (Constitution Article VI, Sec. 1) By constitutional limitation and statutory enactment, Justices of the Peace have jurisdiction in civil actions for the collection of debt, in which the debt or sum claimed shall not be in excess of two hundred dollars, exclusive of interest, (Constitution Article VI, Sec. 26; Codification Sec. 3173) and in cases of misdemeanors where the punishment prescribed by law may be a fine of one hundred dollars or less, or imprisonment of six months or less, or may be both, and with the proviso that this does not apply to misdemeanors, jurisdiction where of is exclusively vested in district courts. (Chap. 13, Session Laws 1915).

It is true that the court designated to have jurisdiction to enforce obedience to ordinances of municipal corporations must be a Justice of the Peace, but the jurisdiction conferred upon such justice, as police magistrate, or police judge, or whatever name you may choose to call him, is a special jurisdiction provided by statute and for the making effective of which a special procedure is provided. This special jurisdiction, so provided, is co-extensive with the power and authority granted municipal corporations in the making and publishing of ordinances.

We quote again from the 1915 Codification the following:

"Sec. 3621. Municipal corporations shall have power to make and publish, from time to time, ordinances not inconsistent with the laws of the State, for carrying into effect or discharging the powers and duties conferred by law, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporation and the inhabitants thereof, and to enforce obedience to such ordinances by fines not exceeding three hundred dollars, or by imprisonment not exceeding ninety days, by suit or prosecution before any justice of the peace within the limits of such city or town."

"Sec. 3630. Any and all justices of the peace shall have jurisdiction in all prosecutions and suits for the recovery of fines arising under the provisions of this chapter, or any ordinance passed in pursuance thereof, or the city council or board of trustees of any city or town may designate one justice of the peace, who shall have such jurisdiction exclusively."

Without quoting, I would direct your attention to sections 3627 and 3628 of the Codification. You will note that all actions brought to recover any fine or to enforce any penalty under the ordinance of any city or town, shall be brought in the name of the city or town as plaintiff and note further that in actions for the violation of any ordinance, the first process shall be a summons, it being also provided that a warrant for the arrest of the offender may issue in the first instance upon affidavit based on information and belief. Two forms of proceedings for violations of city ordinances, one civil and the other suggestive of criminal prosecution, are provided and all actions are to be brought in the name of the city or town and not in the name of the state, as would be the case in prosecutions for the violation of a state statute. The jurisdiction conferred on the designated Justice of the Peace to try and punish violations of city ordinances is a jurisdiction separate and distinct from that enjoyed by him by virtue of his being a justice of the peace and such jurisdiction is limited to cases arising under the city ordinances.

This question was before the Supreme Court of the State of Montana in, *State of Montana ex rel. Herman Streit vs. Justice Court of Chinook Township, et al.*, 123 Pac. 405. In the discussing the case in the opinion the court said:

"In order to enforce the ordinances of a town, the town council is given authority to designate a justice of the peace of the township in which the town is situated, to act as police judge to try and punish violations of them. Rev. Codes, pp. 3242. In this capacity he has exclusive jurisdiction of all cases arising under the ordinances, in addition to his jurisdiction as a justice. Sections 3242, 3298. The two jurisdictions are separate and distinct, however, because he can act as police judge only by virtue of his designation under the statute and by the mode of procedure provided for that purpose. Prosecutions for violations of local ordinances must be conducted in the name of the municipality (pp. 3298) by its prosecuting officer (pp. 3303). Criminal cases arising under the state laws must be prosecuted in the name of the state and by the county attorney. Const. pp. 27, art. 8; Rev. Codes, pp. 3052. It does not appear from the record whether the defendant

was ever designated by the town council of Chinook to act as police judge. It was assumed by counsel at the argument that he had been so designated, but for the purposes of this case it is not material to inquire whether he had been or not. It is evident that he issued the warrant upon the assumption that the violation of an ordinance of a municipality is a public offense, within the meaning of the statute, *supra*; for the proceedings were entitled, "The State of Montana, Plaintiff, v. Herman Streit, Defendant," and the warrant ran in the name of the state. This brings us to the inquiry whether this assumption is correct.

In *Helena v. Kent*, 32 Mont. 279, 80 Pac. 258, 4 Ann. Cas. 235, this court considered the question whether a violation of a city ordinance making it the duty of the occupant of premises to keep the sidewalks in front of them free from snow and ice is a crime or misdemeanor and must be prosecuted in the name of the state. It was held that infractions of local police regulations, such as that, are not in their essence "crimes" or "misdemeanors," as those terms are employed in our criminal jurisprudence, and that prosecutions of them are therefore not criminal prosecutions. See also, *State ex. rel. Butte v. District Ct.* 37 Mont. 202, 95 Pac. 841. In the statute *supra*, "crime" and "public offense" are used synonymously and include all felonies and misdemeanors, -- that is, all acts which are denounced as crimes *eo nomine*, -- but do not include violations of local ordinances. It must follow, therefore, that violations of city ordinances are not included within the meaning of the expression "public offense," as used in the statute (pp. 9677, *supra*) authorizing the issuance of a search warrant. It is true that, in the section conferring upon police courts exclusive jurisdiction of ordinance cases, they are referred to as both civil and criminal. Section 3298. The same act may be a violation of an ordinance and at the same time of a public law. *State ex rel. Butte v. District Ct. supra*; *Dill. Mun. Corp.* pp. 633. It may therefore be punishable both under the state law and under the ordinance. Again, there is attached to the violation of an ordinance a penalty in the form of a fine, imprisonment, or both. Nevertheless, whether such offense be classified as civil or criminal, or quasi criminal, the prosecution to enforce the penalty does not rise to the dignity of a criminal prosecution in the sense in which that expression is commonly used."

This case is also reported in 48 L. R. A. N. S., 156, and accompanied by an extensive note which you, no doubt, will find interesting. You also will desire to read the entire opinion.

Your third question and last, "Can the city council give him greater powers than those given him by the statute?" has probably been sufficiently covered in what precedes. The city council does not give jurisdiction: that is done by statutory enactment. All that the city council or commission may do is to designate the justice of the peace who is to have exclusive jurisdiction as provided by statute.

Should this opinion come to the attention of justices of the peace, their attention should be directed specifically to the idea that it is only in the enforcement of municipal ordinances and in the trial of offenses growing out of municipal ordinances that their

jurisdiction is in any wise different from that prescribed by section 3173 of the Codification in civil actions, and by chapter 13, Laws of 1915, in misdemeanor cases.