

Opinion No. 46-4901

May 10, 1946

BY: C. C. McCULLOH, Attorney General

TO: Mr. Ray C. Cowan Attorney at Law 212 Short Bldg. Carlsbad, New Mexico

{*228} In your letter dated May 7, 1946 you state that Mr. Roy Anderson, Assistant District Attorney, suggested that you write this office for an opinion as to whether or not a Justice of the Peace is entitled to retain costs assessed against a violator of an ordinance, and whether he is entitled to collect costs from the city where the violator is found not guilty.

Under the Laws of 1939, Ch. 230, Sec. 39-101 of the 1941 Compilation, there was created and established a Police Magistrate Court in all incorporated cities and towns, but no mention was made of incorporated villages or villages not incorporated.

Therefore, the provisions of the Laws of 1884, Ch. 39, as amended, and appearing in the 1941 Compilation as Sec. 39-215, is in force as to incorporated villages. This section reads, in part, as follows:

"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, * * *"

It was held in *Gutierrez v. Gober*, 43 N.M. 146, 87 P. 2d 437, that the Police Judge of the City of Albuquerque had jurisdiction **as justice of the peace**, to try offenses consisting of violation of municipal ordinances, and Sec. 90-910 N.M.S.A., 1929, which is the same as Sec. 39-215 of the 1941 Compilation, is cited as granting such authority. It is thus apparent that the Justice of the Peace of an incorporated village, when performing duties carried out {*229} by the Police Judge in an incorporated city or town, does not lose his authority, rights and privileges as a Justice of the Peace.

By the Laws of 1921, Ch. 42, appearing as Sec. 39-216 of the 1941 Compilation, it is provided that all fines and forfeitures collected by a justice of the peace when sitting as a Police Judge, shall turn same into the municipal treasurer of such municipality; "that all moneys collected from forfeited bonds or recognizances in **such justice of the peace courts**, when being held as police courts, shall be turned in to the city treasury of such municipality." Thus, again, it is evident that a Justice of the Peace does not lose his identity as such, even though he "sits" as a Police Judge in a particular prosecution or suit.

It is provided in Sec. 39-106, 107 and 108 of the 1941 Compilation, as amended by Ch. 59, Sec. 2, Laws of 1945, relating to monies collected, monthly reports, itemized statements and penalty for violation of the act, shall apply to any justice of the peace so

elected, to the same extent as though he were a duly elected, qualified and acting police judge in said municipality.

It is inconceivable that the Legislature intended to require a justice of the peace to handle certain cases while acting as the police judge of said municipality without compensation for his services.

Fees and costs of justices of the peace, in no case to exceed \$ 6.50, are provided for by Sec. 38-1901 of the 1941 Compilation. And it is further provided in Sec. 38-1918 of the 1941 Compilation that a justice of the peace, in certain instances, shall recover costs in criminal proceedings from the county treasurer, if unable to collect same from the defendant.

In view of the foregoing, it is my opinion that a Justice of the Peace in an incorporated village who "sits" as police judge is entitled to retain the costs assessed in accordance with the provisions of Sec. 38-1901 of the 1941 Compilation; that in case the violator is acquitted, said Justice of the Peace is entitled to collect costs from the village treasurer if the facts and circumstances of the case come within the applicable provisions of Sec. 38-1918 of the 1941 Compilation.

By ROBERT WOLLARD,

Asst. Atty. General