

N.D.A.G. Letter to Nordsven (Sep. 24, 1991)

September 24, 1991

Ms. Mary E. Nordsven
Belfield City Attorney
PO Box 370
Dickinson, ND 58601

Dear Ms. Nordsven:

Thank you for your September 9, 1991, letter in which you have presented several questions concerning N.D.C.C. § 40-18-01(4). This provision, as adopted by the 1991 Legislative Assembly, provides:

4. Notwithstanding any other provision of law, a municipal court in which the judge is not a person licensed to practice law in this state has no jurisdiction to hear, try, and determine an offense that would be a violation of section 39-08-01 or equivalent ordinance.

I have enclosed with this letter a copy of a September 11, 1991, letter to Mercer County State's Attorney Charles Isakson which, I believe, provides a response to many of the questions you presented in your letter to me. I will, however, discuss other issues that were not raised by Mr. Isakson.

You have inquired as to whether a municipal court, without jurisdiction to hear a DUI case, can enter an order of dismissal. I know of no provision in our law or court rules which prohibit a court from dismissing an action when that court has no jurisdiction to hear or try the case. It is not uncommon for courts, whether in criminal, civil, or appellate proceedings, to issue dismissal orders if the court lacks jurisdiction to proceed in that matter. If a court did not have this inherent power to enter a dismissal order based upon its lack of jurisdiction to proceed further in the case, the case could sit indefinitely because the court could not remove that case from its docket. I note also that N.D.R. Crim. P. 12(b)(2) authorizes a court to consider objections to its jurisdiction at any time during the pendency of a proceeding. The power of a court to hear an objection also necessarily includes the power to rule upon that objection which may also include a dismissal order of the proceeding if that court, in fact, lacks jurisdiction to proceed in the case.

You have also inquired as to whether a municipal judge not licensed to practice law in this state could appoint an alternate judge who is licensed to practice law to hear municipal court DUI and actual physical control cases brought under municipal ordinances. N.D.C.C. § 40-18-01(4) limits the jurisdiction of a municipal court only if the judge is not a person licensed to practice law in this state. If the municipal court has a judge who is licensed to practice law in this state, the N.D.C.C. § 40-18-01(4) limitation of jurisdiction will not apply. A person properly appointed as an alternate municipal judge who is

licensed to practice law in this state has jurisdiction to hear DUI/actual physical control municipal ordinance violations.

You have also inquired as to whether the city is responsible for the cost of prosecution in cases involving alleged violations of municipal ordinances which may be transferred to the county court because of N.D.C.C. § 40-18-01(4).

Unlike N.D.C.C. § 40-18-15.1, a municipal court case is not transferred to the county court if the municipal court lacks jurisdiction to hear the matter under N.D.C.C. § 40-18-01(4). As noted in the Isakson letter, the transfer provisions of N.D.C.C. § 40-18-15.1 apply only if the defendant has not, within 28 days after arraignment, waived the defendant's right to a jury trial in writing.

If a DUI/actual physical control municipal ordinance case is submitted to a municipal court in which the judge is not licensed to practice law, that court has no jurisdiction to hear the matter and the case must be dismissed. Any initiation of criminal charges in the county court must begin anew, whether those charges are initiated under municipal ordinance or state law.

The question of what entity is responsible for the cost of prosecution if a municipal ordinance violation is filed in the county court was unfortunately not addressed by the 1991 Legislative Assembly when N.D.C.C. § 48-18-01(4) was adopted. It would be safe to assume that the city would be responsible for the costs of the municipal prosecutor. However, the Legislature did not clarify whether the city or the county, or a combination of the two, would be responsible for indigent defense costs, the costs of witnesses, and the expenses of a jury.

As I have noted in the Isakson letter, a county court has jurisdiction to hear violations of municipal ordinances. Therefore, a strong argument can be made that the prosecution of a municipal ordinance violation in county court is a county court case to be treated in the same manner as any other county court prosecution. N.D.C.C. § 31-01-16 and 31-01-18 require that witness fees be paid by the county in county court cases. If a municipal court has no jurisdiction to hear a DUI/actual physical control case, the case initiated in the county court would not be a municipal court case, but, rather, would be a county court case involved in a municipal ordinance violation

N.D.C.C. § 27-09.1-14 requires that mileage and compensation of jurors must be paid by the county for jurors at sessions of the county court. N.D.C.C. § 29-07-01.1 requires that expenses necessary for the adequate defense of a needy person, when approved by the judge, must be paid by the county wherein the alleged offense took place if the action is prosecuted in county court. That section also provides that the city shall pay the costs of attorney defense "if the action is prosecuted in municipal court." As noted previously, any initiation of a proceeding in county court based upon a municipal ordinance prosecution will be a county court case and not a municipal court action if the municipal judge lacked jurisdiction to hear the matter pursuant to N.D.C.C. § 40-18-01(4).

Since the matters pertaining to division of fees and payment of various expenses were not addressed by the 1991 Legislative Assembly, I can foresee potential conflicts existing between the municipal and county court system as to the prosecution of municipal ordinance violations in a county court. I have discussed, in the Isakson letter, my belief that some understanding should be made between the prosecuting authorities to avoid these conflicts. N.D.C.C. § 54-40-08(1) authorizes the governing bodies of the city and county to enter into a joint agreement to resolve the potential dispute which may arise in these types of prosecutions.

I trust that your questions have been answered. Should you desire further clarification of these matters or have additional questions, please do not hesitate to contact me.

Sincerely,

Nicholas J. Spaeth

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Enclosure