Office of the Attorney General
State of North Dakota

Opinion No. 81-107

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Requested by: Hugh P. Seaworth
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--QUESTION PRESENTED--

Whether a municipal court has jurisdiction to try a defendant charged with the offense of driving a motor vehicle while under the influence of intoxicating liquor if that defendant has a prior conviction for a violation of that offense within the previous twenty-four months.

--ATTORNEY GENERAL'S OPINION--

It is the Attorney General's opinion that a municipal court does have jurisdiction over a defendant charged with a violation of driving while under the influence of intoxicating liquor when that person has a conviction of this offense within the previous twenty-four months.

--ANALYSIS--

The North Dakota Legislative Assembly granted to municipalities the power to prohibit by ordinance the operation of any motor vehicle on the city's streets by any person under the influence of intoxicating liquor. See Section 40-05-02(15), of the North Dakota Century Code.

Section 40-05-06, N.D.C.C., limits the penalty for violation of an ordinance of this type to a fine not exceeding $500.00, and imprisonment not exceeding 30 days.

Section 39-08-01, N.D.C.C., makes a second conviction of that section within a twenty-four month period a Class A misdemeanor. A Class A misdemeanor is punishable by a fine not exceeding $1,000.00 and imprisonment not exceeding one year.

The basic question presented is whether such an ordinance of a city conflicts with Section 12.1-01-05, N.D.C.C., by improperly superseding that law. Section 12.1-01-05, N.D.C.C., states as follows:

> '12.1-01-05. CRIMES DEFINED BY STATE LAW SHALL NOT BE SUPERSEDED BY CITY ORDINANCE OR BY HOME RULE CITY'S CHARTER OF ORDINANCE.--No offense defined in this title or elsewhere

by law shall be superseded by any city ordinance, or city home rule charter, or by an ordinance adopted pursuant to such a charter and all such offense definitions shall have full force and effect within the territorial limits and other jurisdiction of home rule cities. This section shall not preclude any city from enacting any ordinance containing penal language when otherwise authorized to do so by law.'

The general law on this subject may be stated as follows:

'Where the legislature delegates power to a municipality to adopt ordinances with reference to a particular subject, ordinances enacted pursuant to such special authority are, as a general rule, held to be valid although they prescribe different penalties from those provided by state law for the same offense.

138 A.L.R. 1208, 1214.

In the case of Village of Struthers v. Sokol, 140 N.E. 519 (Ohio 1923), the court held:

'No real conflict can exist unless the ordinance declares something to be right which the state law declares to be wrong, or vice versa. There can be no conflict unless one authority grants a permit or license to do an act which is forbidden or prohibited by the other.'

140 N.E. 519, 521.

A general law treatise notes that:

'The test, it has been said, in determining whether an ordinance is in conflict with general laws, is whether the ordinance permits or licenses that which the state forbids or prohibits, and vice versa; and ordinances which assume directly or indirectly to permit acts or occupations which the state prohibits, or to prohibit acts or businesses prohibited by the state, are uniformly declared to be null and void. However, local and state regulations dealing with the same subject matter are not necessarily incompatible and conflicting merely because they are not identical. Further, mere differences in detail do not render them conflicting; nor does the fact that a municipal ordinance is not as broad as a statute render it so inconsistent as to make it void.' 62 C.J.S., Municipal Corporations, § 43, p. 291.

In the case of City of Bellingham v. Schampera, 356 P.2d 292 (Wash. 1960), a similar situation was discussed. The state of Washington's penalty for the offense of driving under the influence of intoxicating liquor was augmented for the second and subsequent convictions of the offense and contained a maximum penalty of $1,000.00 and a year in the county jail. The maximum that a city could sentence under their ordinance was

90 days and a fine of not more than $250.00. Although the majority did not speak directly to that disparity, they did uphold the validity of the ordinance as not being in conflict with state law. The majority concluded that the state legislature has not indicated that it intended to preempt the field of legislation concerned with driving while under the influence of intoxicating liquor.

Therefore, it is the Attorney General's opinion that cities in this state, having duly enacted an appropriate ordinance, have jurisdiction to try a defendant charged with the offense of driving a motor vehicle while under the influence of intoxicating liquor, even if that defendant has a prior conviction for that same violation within the previous twenty-four months. The court, since it does have jurisdiction to try an individual for that offense, would, of course, have jurisdiction to sentence in accordance with the penalties provided in such municipal ordinance. Any appeal taken from that conviction to District Court would be an appeal of a violation of a municipal ordinance and the appellate court could only sentence in accordance with the penalties provided by the municipal ordinance.

--EFFECT--

This opinion is issued pursuant to Section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

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