N.D.A.G. Letter to Johnson (May 12, 1989)

May 12, 1989

Mr. Erik R. Johnson
City Prosecutor
Office of City Attorney
P.O. Box 1897
Fargo, ND 58107-1897

Dear Mr. Johnson:

Thank you for your April 24, 1989, letter concerning a municipal court's jurisdiction to hear, try, and determine a municipal ordinance violation equivalent to a violation of N.D.C.C. § 39-08-01. Opinions of the Attorney General are not binding upon the judiciary. Only the courts, therefore, have the authority to determine whether or not they have jurisdiction under any particular circumstances. I do, however, offer for your information the following discussion of the issues you raise.

According to your letter, on occasion an offender has pled guilty to a second DUI or actual physical control offense in municipal court and the court has later learned that this offender had more than two prior convictions at the time of the entry of plea. As a result of the new information, one municipal court has determined that it did not have jurisdiction to accept the offender's plea, dismissed the case, and then directed that the offense be filed in the county court. In one case, the county court determined that jeopardy had attached in the municipal court and dismissed the county court proceeding.

You have inquired whether the mere fact that a municipal court learns two or more prior N.D.C.C. § 39-08-01 or equivalent municipal ordinance offenses requires the court to dismiss a pending DUI or actual physical control charge or, if a judgment of conviction has been entered to vacate a previously imposed judgment.

The 1983 Legislature amended N.D.C.C. § 40-18-01, which sets forth the jurisdiction of a municipal judge, as a part of the DUI revision of North Dakota state law. The changes to this section arose as a result of amendments to Senate Bill No. 2373. As originally proposed, Senate Bill No. 2373 authorized a municipal court to impose penalties equivalent to a class A misdemeanor in DUI and actual physical control cases. This extension of the municipal court sentencing authority was in line with the increased DUI and actual physical control penalties imposed in amendments to N.D.C.C. § 39-08-01.

The House of Representatives made significant revisions to the original bill. Representative Pat Conmy, a member of the conference committee on Senate Bill No. 2373, explained the reasoning behind the House's proposed amendments to this bill. Concern was expressed pertaining to the cities' ability to provide jail space, facilities, and resources for persons who may be subjected to the long-term incarceration provisions

mandated by a class A misdemeanor DUI or actual physical control offense. In addition, the amendments to the original bill permitted the penalties for first and second offenses to correspond with existing sentencing provisions of N.D.C.C. § 40-05-06 which limits such ordinance violation penalties to a maximum 30-day imprisonment and $500 fine. Hearing on S. 2373 Before the House and Senate Conference Committee, 48th Leg. (April 4, 1983).

The legislative history of Senate Bill No. 2373 did not specifically address the questions presented in your inquiry as to whether the mere existence of two or more prior convictions automatically deprives the municipal court of the authority to try and sentence an offender for a DUI or actual Physical control ordinance violation.

A municipal court possesses subject matter jurisdiction over class B misdemeanor equivalent ordinance violations. N.D.C.C. § 40-05-06. If a greater offense is charged in municipal court, that court has no jurisdiction to hear or determine that specific offense.

However, I do not believe that the mere existence of two or more offenses automatically deprives the municipal court of authority to hear and determine a DUI or actual physical control offense.

North Dakota Supreme Court opinions construing the enhancement provisions of N.D.C.C. § 39-08-01 are helpful in resolving this issue.

In State v. Edinger, 331 N.W.2d 553 (N.D. 1983), the court found that no prejudicial error existed in admitting evidence of the defendant's prior N.D.C.C. § 39-08-01 conviction. In Edinger, the defendant was charged with a class A misdemeanor DUI offense. At a jury trial his prior conviction was admitted into evidence.

In finding no error in the admission of this evidence, the court determined that a prior conviction should be alleged in the complaint or information to insure that the defendant is notified of the offense of which he is charged. In addition, the court stated:

> It would appear that because the enhancement from class B to class A does not apply unless there has been a prior conviction, proof of the prior conviction is an element of the class A misdemeanor.

331 N.W.2d at 554.

In State v. Gahner, 413 N.W.2d 359 (N.D. 1987), the court discussed the differences between an offense enhancing conviction and a sentence-enhancing conviction. If a prior conviction only enhances a sentence and not the seriousness of an offense, the prior conviction is not always regarded as an element of the offense. In this Gahner was charged with DUI on a uniform traffic complaint and summons. After he was tried and found guilty, the prosecutor presented at sentencing records of two prior DUI convictions within five years. The court then sentenced Gahner for a class A misdemeanor as a third-time offender. The charging document, the uniform traffic summons and complaint,

did not allege the prior convictions nor did it state that the defendant was being charged with a class A misdemeanor.

The court remanded this case to the trial court and ordered that Gahner be resentenced for a class B misdemeanor offense. The court determined that the prior convictions were offense-enhancing convictions and not merely sentence-enhancing convictions. To sentence a person for a class A misdemeanor, the prosecutor must either charge the class A misdemeanor, allege the prior offense-enhancing convictions, or both.

As a result of Gahner it appears that the prior convictions are an element of the class A misdemeanor offense of DUI or actual physical control. In addition, before an offender may be sentenced under the class A misdemeanor provisions, the charging document must allege the class A misdemeanor, allege the prior convictions, or both. Therefore, the actual charge determines the potential punishment and offense an offender will be subject to for a violation of N.D.C.C. § 39-08-01.

The same principles may be applied to municipal ordinance offenses equivalent to N.D.C.C. § 39-08-01 violations. The charging document establishes whether the offender is charged with a class B or class A misdemeanor offense. If a class A misdemeanor offense is charged in municipal court or if the charging document alleges two or more prior convictions, the municipal court has no jurisdiction to hear or determine the case. However, if two or more prior convictions are not alleged in the charging document or only a class B equivalent offense is charged, the municipal court retains authority to hear and determine the offense and to impose sentence within the limitations imposed by law.

Reading the relevant supreme court decisions with the provisions of N.D.C.C. § 40-18-01, I conclude that the "offense" charged which requires a court to dismiss the charge and direct the charge be filed against the person in county court is an "offense" charged as a class A misdemeanor or which alleges two or more prior convictions. If the charging document does not allege the prior convictions or that a class A misdemeanor is being charged, only a class B misdemeanor offense is being alleged and the municipal court will continue to act within its authority under N.D.C.C. § 40-18-01 subject to the sentencing limitations of N.D.C.C. § 40-05-06.

If an offender is charged with an equivalent class B misdemeanor offense and the court learns of prior convictions prior to entry of judgment, the court may advise the city attorney of this fact. The city attorney may decide not to charge the enhanced class A misdemeanor offense after further review of the matter. As recognized in Gahner, the prosecutor may make no effort to develop the prior convictions or may decide that defects in the prior convictions make them unusable. For example, questions may be raised as to whether a prior conviction was uncounseled. In such a case, the conviction may not be used to enhance the offense or the sentence. State v. Orr, 375 N.W.2d 171 (N.D. 1985). As a result, the prosecutor may decide to maintain or pursue a class B equivalent charge and not subject the offender to a class A misdemeanor penalty. In such a case, the municipal court retains jurisdiction. If, however, the enhanced offense is or will be charged, N.D.C.C. § 40-18-01 requires the municipal court to dismiss the charge without

prejudice and to direct that the charge be filed against the person in county court.

You have also asked whether an offender may be prosecuted for a N.D.C.C. § 39-08-01 offense after a municipal court dismisses or vacates a judgment of conviction pursuant to N.D.C.C. § 40-18-01.

It is settled that application of the principles of former or double jeopardy is premised upon a prior court proceeding in a court having jurisdiction to try the offense in question. State v. Sadowski, 331 N.W.2d 274 (N.D. 1983). If the municipal court did not possess jurisdiction of the offense, former or double jeopardy principles will not apply to an offender who is to be prosecuted in a county court for an N.D.C.C. § 39-08-01 class A misdemeanor offense. However, if the municipal court did possess jurisdiction over a class B misdemeanor equivalent municipal ordinance offense, a recharging of that offense in a county court after acquittal or conviction in the municipal court will result in jeopardy attaching.

Resolution of this issue will require a determination as to whether a class B misdemeanor equivalent offense has been charged in municipal court or if an enhanced class A misdemeanor offense was alleged in the municipal court. Jeopardy will not attach if dismissal of the municipal court proceeding occurs prior to the commencement of the case for trial regardless of the offense charged. However, in the cases which may involve the application of N.D.C.C. § 40-18-01, reference to the charging document must be made to determine whether later municipal court action pertaining to the ordinance violation is within or beyond the court's statutory jurisdiction.

I hope that I have adequately responded to your inquiries. Should you desire further information concerning this matter, please feel free to contact me at your convenience.

Sincerely,

Nicholas J. Spaeth

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