OPINION
63-13

May 15, 1963 (OPINION)

ARREST

RE: Peace Officer or Private Citizen - City Ordinance

This office acknowledges receipt of your letter of May 7, 1963. You state that the city officials of Dunseith would like to have an opinion as to whether a city policeman or other person can make an arrest without a warrant for the violation of a city ordinance committed in his presence. Your letter contains the following additional paragraph:

> I have noted sections 40-11-10 and 40-11-11, N.D.C.C., along with the case annotated there of Kist v. Butts, and I have noted section 40-18-11, but it is not clear to me that sections 29-06-15, or 29-06-20 have any application whatsoever to arrests made for the violation of a city ordinance, apparently a civil proceeding. Nevertheless, it seems unreasonable that a city policeman would have to watch a violation occur, and then leave and go and obtain a warrant before making an arrest. Can you shed any light on this?"

Section 12-01-04(13) of the North Dakota Century Code defines a peace officer as follows:

> 'Peace officer' signifies any sheriff, coroner, constable, policeman or marshal and any other officer or officers whose duty it is to enforce and preserve the public peace." (Emphasis supplied).

Section 29-06-15 of the North Dakota Century Code deals with arrest without warrant, and in the following language: "A peace officer, without a warrant, may arrest a person:

1. For a public offense, committed or attempted in his presence;

2. When the person arrested has committed a felony, although not in his presence;

3. When a felony in fact has been committed, and he has reasonable cause to believe the person arrested to have committed it;

4. On a charge, made upon reasonable cause, of the commission of a felony by the party arrested; or

5. For such public offenses, not classified as felonies and not committed in his presence as provided for under section 29-06-15.1"

From reading the preceding sections, it is clear that policeman is a peace officer, and that as such he may make an arrest, without a warrant, where a public offense is committed or attempted in his presence.

Therefore, it appears that the real question involved may be stated in this manner, "Is the violation of a city ordinance a public offense?"

Section 12-01-06 of the North Dakota Century Code defines "public offense" in these words, "A crime or public offense is an act committed or omitted in violation of a statute forbidding or commanding it, and to which is annexed, upon conviction, one of the following punishments:

1. Death;

2. Imprisonment;

3. Fine;

4. Removal from office;

5. Disqualification to hold or enjoy any office of honor, trust, or profit under this state; or

6. Other penal discipline." (Emphasis supplied).

But the question still remains, does the term "public offense" include the violation of a city ordinance, or does it apply only to the violation of a state statute?

Our state constitution and laws confer upon a municipality a measure of sovereignty essential to the government of same, and a city has the power given to it by the legislature to enact ordinances requisite for the proper administration of its affairs. A municipality may provide for the preservation of the peace within its borders, prevent disorderly conduct, prohibit public intoxication, suppress riots and disturbances, as well as fix fines and penalties for the violation of its ordinances within the limitations prescribed by statute.

Section 40-11-11 of the North Dakota Century Code reads as follows:

> In all actions for the violation of an ordinance, the first process shall be a summons, but a warrant for the arrest of the offender shall be issued upon the sworn complaint of any person that an ordinance has been violated and that the person making the complaint has reasonable grounds to believe the person charged is guilty of such violation. Any person arrested under a warrant shall be taken without unnecessary delay before the proper officer to be tried for the alleged offense."

The precise nature of a municipal ordinance is not entirely clear, and how much latitude is permitted to one acting under it is somewhat obscured. The Supreme Court of Montana, (December 28, 1929), in the case of State ex rel. Marquette v. Police Court, City of Deer Lodge

et al., 283 Pac. 430, made the following comment: "The exact character of proceedings for violation of municipal ordinances is a matter upon which courts are divided. Some courts characterize the proceeding as civil, others as quasi-civil; some as criminal, others as quasi-criminal; and still others take the view that the proceedings may be considered criminal from some points of view and civil from other viewpoints."

However, the Montana court in the above-cited case held that "The nature of the action, whether civil or criminal, must be determined by the proceeding itself without regard to the question as to whether some other proceeding may or may not be brought under state statutes."

In this same case, the Montana Supreme Court held that the violation of a Deer Lodge City ordinance prohibiting the practice of the profession of physician and surgeon without first procuring a license was a public offense within the meaning of Section 10721, Revised Codes of 1921. (Emphasis supplied). Their Section 10721 is practically identical with section 12-01-06 of the North Dakota Century Code.

The Montana court in reaching its decision quoted liberally from an old Minnesota case, State v. Cantieny, 24 N.W. 458. In this case, Robert Laughlin, a Minneapolis police officer, was shot to death by the defendant when the police officer arrested the defendant for disorderly conduct, the arrest being made without a warrant, such disorderly conduct being a violation of a city ordinance. The Minnesota Supreme Court said, "But it is claimed that admitting the ordinance to be valid, and that the defendant was engaged in violating it in the presence of the officer, the officer had no right to arrest without a warrant, because, as is said, the breach of the ordinance did not constitute a public offense. We hold the contrary. * * * *The statute of the state authorizes any peace officer to arrest, without warrant, for a public offense committed or attempted in his presence. Although the offense does not amount to a breach of the peace, the term 'offense' here used is defined to be 'a breach of the laws established for the protection of the public, as distinguished from an infringement of mere private rights - a punishable violation of law.' ABB. Law Dict. 'The doing of that which a penal law forbids to be done, or omitting to do what it commands.' Bouv. Law Dict. The term 'public offense' means no more. The word 'public' was not intended to express the idea of a distinction between offenses made such by common law or by a general statute, and those defined by a law having but a limited territorial operation. We think the term 'public offenses', as here employed, has the signification which would ordinarily be put upon such terms, and bears no peculiar meaning. It includes all such violations of municipal ordinances as are punishable by fine or imprisonment. The right to arrest without warrant for infractions of such ordinances was assumed in Wahl v. Walton, supra, although it was not questioned in the points presented for discussion. The right is sustained in Scircle v. Neeves, 47 Indiana 289; State v. Freeman, 86 N.C. 683; Mitchel v. Lemon, 34 Md. 176; Roddy v. Finnegan, 43 Md. 490. The charge of the court upon this point was not erroneous, nor was it for any reason prejudicial to the rights of the defendant."

While, as indicated in your letter, section 29-06-15 of the North Dakota Century Code seems to apply to arrests made under state law, it is clear from the decision of our Supreme Court in Kist v. Butts, 71 N.D. 436; 1 N.W.2d. 612, that section 40-11-11 provides alternative methods of commencing actions for the violations of city ordinances, they may be commenced either by the issuance and service of a summons or in a proper case by the issuance of a warrant of arrest. To me this indicates the quasi-criminal character of certain ordinances, and supports the proposition that section 29-06-15 may be relied on for authority to a peace officer to arrest without a warrant where a public offense is committed or attempted in his presence, said offense being the violation of a city ordinance.

Taking into account the fact that the state constitution and the legislature have made provision for establishing municipal government; that the legislature has conferred upon such government the power to enact ordinances covering many areas of human activity within its borders; that the legislature has created municipal courts with the power to impose fines and penalties within certain limitations; that the legislature has clothed municipalities with a certain sovereignty intended to be sufficient for the municipality to function; and because of the quasi-criminal nature of certain municipal ordinances, we believe that the term "public offense" as mentioned in section 29-06-15(1) may be considered as including the violation of a city ordinance as well as a state statute.

Based upon the same general line of reasoning, it is our impression that the provisions of section 29-06-20 of the North Dakota Century Code, entitled "when private person may arrest" would apply to the violation of a proper municipal ordinance as well as to the statutes of the state.

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