

OPINION
69-153

November 17, 1969 (OPINION)

Mr. John B. Hart

State's Attorney

Rolette County

RE: Criminal Procedure - Municipal Court - Counsel for Indigent

Defendants

This is in reply to your letter of November 12, 1969, relative to the furnishing of counsel in municipal court. You state the following facts and questions:

The September 1969 issue of the 'Defender Newsletter' points out that the Supreme Court of Oregon on September 10, 1969, ruled that a municipality must furnish counsel for an indigent violating a municipal ordinance.

This office requests an OPINION as to whether or not an indigent defendant brought before a municipal judge for a violation of a city ordinance is entitled to be informed of his right to have counsel appointed for him at public expense before entering his plea to the alleged violation of such city ordinance.

For your information, I am enclosing a thermofax of the material portion of the 'Defender Newsletter' dated September 1969, being Volume VI, No. 4."

As you are aware, the North Dakota statutes governing trials in municipal courts do not specifically provide for the appointment of counsel for an indigent defendant charged with the violation of a city ordinance. As you are also aware, the Supreme Court of North Dakota has consistently held that cities, being creatures of the Legislature, have only such powers as are specifically granted them by the Legislature or must necessarily be implied from the powers so granted. See, e.g., *Kirkham, Michael & Associates v. City of Minot*, 122 N.W.2d. 862 (N.D. 1963). The Legislature has approved the appointment of counsel for indigents charged with violation of a State criminal law. See section 29-07-01.1 of the North Dakota Century Code, as amended. The use of the term "state criminal law" as well as the provision that expenses of court appointed counsel for indigents shall be paid by the county wherein the alleged offense took place makes it abundantly clear that such statute is not, by its own terms, applicable to charges of violations of municipal ordinances.

Since the cities may impose a jail sentence as well as a monetary penalty for violation of a city ordinance, the Supreme Court of North Dakota has also recognized that certain city ordinances may, in fact, be criminal in nature. See e.g., *City of Minot v. Whitfield*, 71

N.W.2d. 766 (N.D. 1955). However, we also note the 1969 North Dakota Legislature reduced the permissible jail sentence for violation of a city ordinance from 90 to 30 days. See Section 40-05-06 of the North Dakota Century Code, as amended.

Section 40-18-11 of the North Dakota Century Code provides:

HOW PROCEEDINGS IN CRIMINAL CASES NOT PROVIDED FOR IN THIS CHAPTER TO BE GOVERNED. In all cases not specifically provided for in this chapter, the process and proceedings in the court of a municipal judge shall be governed by the provisions of the laws of this state regulating proceedings in justices' courts in either civil or criminal cases."

An argument could be made that since section 29-07-01.1 is applicable to justice courts it is also, by reason of the provisions of section 40-18-11, quoted above, applicable to municipal courts. This office has previously been requested to answer the question of whether or not a city may spend public funds to pay for a defense lawyer appointed by the municipal judge. Because of the fact the municipal judge in that case had already determined such authority existed, we refrained from answering the question since it is a policy of this office to refrain from comments on matters pending judicial determination or judicial decisions already made. Thus we believe the decision as to whether the municipal judge has the authority (as opposed to the duty) to appoint counsel for an indigent defendant charged with violation of a city ordinance is a matter for the court to determine. In appropriate cases we will provide the court with a brief on questions submitted to us by the court. However, we do not deem it proper to substitute our judgment for that of the judiciary when the question is concerned directly with a procedural power of the judiciary.

Your question, however, is concerned with whether the municipal judge is required, as a matter of law, to appoint counsel for an indigent defendant charged with a violation of a city ordinance. In this regard we would note that section 29-07-01.1 of the North Dakota Century Code, as amended, is permissive rather than mandatory. Each situation must be determined on its own merits. If there is no statutory requirement that counsel be appointed for the indigents charged with a violation of State criminal law, it is obvious that no such statutory requirement exists with regard to indigents charged with violation of a city ordinance in municipal court. We are, of course, aware that in many instances the Supreme Court of the United States as well as the Courts of other States have held appointment of counsel in criminal cases is a requirement of the United States constitution. In cases which are directly similar to those decided by the United States Supreme Court decisions of the United States Supreme Court are binding upon the States.

In this instance you note the Supreme Court of Oregon in *Stevenson v. Holzman* 458 P2d. 414 (1969) has held that a municipality must furnish counsel for an indigent defendant charged with violating a municipal ordinance when the punishment for conviction of such ordinance is the imposition of a jail sentence. The courts of some other States have arrived at similar conclusions although there are as noted in the Oregon case, several States which have arrived at

contrary conclusions. See, e.g., *Hendrix v. City of Seattle* 456 P2d. 696 (Wash. 1969.)

The Oregon court in the *Stevenson* case noted the Supreme Court of the United States has refused to resolve the issue of whether counsel is required to be appointed for indigent defendant in misdemeanor cases. We have no decisions of the Supreme Court of the United States which can be considered binding upon North Dakota in this instance. We must therefore conclude that the municipal court is not required, as a matter of law, to appoint counsel for an indigent defendant charged with violation of a city ordinance. The majority of the Washington Court in the *Hendrix* case noted that in keeping with the doctrine of separating powers of government into legislative, executive and judicial functions, the Courts ought not abrogate or compel legislative action either directly or indirectly unless the Constitution requires it and where reasonable doubt exists as to constitutional duty or prohibition affecting the legislative branch of government, the doubts should be resolved in favor of the legislature's action or inaction. If this is true of the Courts, it is, of course, even more applicable to this office which is a part of the executive branch of government.

The cases cited in the Oregon case above referred to make it quite evident there is no unanimity of opinion with regard to the question presented. The Oregon Court is not the first court to have considered this matter nor is its decision so much more recent than the decisions in States holding to a contrary view as to make the Oregon decision more persuasive. The Washington case referred to above was decided some few months prior to the decision in the Oregon case.

The Legislature and the Courts of this State and the Supreme Court of the United States have not spoken with regard to this matter. This office cannot, by opinion, usurp the functions of the Legislature or the Courts by holding that the municipal court is required to appoint counsel for indigent defendants charged with violation of a city ordinance when, as discussed above, no statute or Court decisions of this State or of the Supreme Court of the United States require same nor when the Courts of other States are by no means unanimous in their determination of this question when same has been presented.

For the reasons stated above, it is our opinion that a municipality is not, under present law, required to appoint counsel at public expense for an indigent defendant charged with violation of a city ordinance.

HELGI JOHANNESON

Attorney General