OPINION
72-65

November 27, 1972 (OPINION)

Mr. R. G. Nerison
Assistant City Attorney
Office of City Attorney
Box 1560
Jamestown, ND 58401

Dear Mr. Nerison:

This is in response to your request for an opinion as to whether or not violations of the provisions of Chapter 19-03.1 (Uniform Controlled Substances Act) can be prosecuted in the municipal court of the city of Jamestown. In brief, would the municipal court of the City have jurisdiction over violations of ordinance, if it had an ordinance containing substantially the same subject matter as set out in Chapter 19-02.1 of the North Dakota Century Code.

The Uniform Controlled Substances Act, Chapter 19-03.1, enacted by the 1971 Legislature by Chapter 235, embraces the broad spectrum of drugs, narcotics, opiates, and marijuana, including derivatives of all of the aforementioned drugs, plus the prohibition, control and regulation of such substances and others.

It appears quite obvious that the Legislature deemed it necessary to legislate on a statewide basis with matters pertaining to certain controlled substances. The act is comprehensive in nature and attempts to cover all phases pertaining to the substances to be prohibited or controlled.

Basically, municipalities have such authority as is specifically granted or necessarily implied from the grant. In reviewing the provisions of Chapter 40-05 and 40-05.1 (pertaining to home rule) we do not find any specific provision which authorizes the cities to enact ordinances either regulating or prohibiting the possession, use and traffic of and in substances which are controlled under Chapter 19-03.1

Significantly, under Section 40-05-01(1) the power is given to municipalities "to enact or adopt all such ordinances, resolutions, and regulations, not repugnant to the Constitution and laws of this state, as may be proper and necessary to carry into effect the powers granted to such municipality or as the general welfare of the municipality may require, and to repeal, alter, or amend the same."

While this provision may appear to grant unlimited authority the North Dakota Supreme Court has not construed it as such.

For cities with home rule, a similar provision is found in Section 40-05.1-06(7) which gives authority "to provide for the adoption, amendment, and repeal of ordinances, resolutions, and regulations to carry out its government and proprietary powers and to provide for public health, safety, morals, and welfare, and penalties for a violation thereof."

Prior to the enactment of Subsection 15 of the Section 40-05-02 which grants authority to the city to prohibit the operation of a motor vehicle upon the streets by any person under the influence of intoxicating liquors or narcotics, the Supreme Court had under consideration whether the city had the authority to enact such ordinance.

The North Dakota Supreme Court in City of Fargo v. Glaser, 62 N.D. 673, 244 N.W. 905, held that the city did not have the power to regulate the operation of motor vehicles on its streets by persons who were intoxicated on the basis that the subject matter was one of statewide concern and was not of a local nature. The Court, quoting approvingly from the case of Helmer v. Superior Court, 191 P. 1001, decided by the California Supreme Court, which held that because of the necessity of uniform regulation of motor vehicles, such regulation was not a municipal affair, but a matter of statewide importance, and the motor vehicle act making it a felony to drive while intoxicated, is an act for the protection of the lives of all the citizens and not a mere regulation of motor traffic.

The North Dakota Supreme Court held that the Uniform Motor Vehicle Act relating to the offense of driving an automobile while under the influence of intoxicating liquor is not a municipal affair, but is a matter of statewide importance, intended for the protection of the lives of the citizens of the state and not a mere regulation of motor traffic. Correspondingly, the attempt to proceed under an ordinance where the state had legislated on a statewide basis on the subject matter was denied on the grounds that the municipal court did not have jurisdiction and on the grounds that the municipality did not have the authority to enact such ordinance.

It is also significant that the court quoted approvingly from the case of Swann v. Mayor and the City of Baltimore, 132 MD 256, where the Court had under consideration the question whether or not a city ordinance covering the regulation of city taxi cabs could stand after the state subsequently legislated on the subject matter. There it held that in instances where the Legislature subsequently enacts a law regulating the same matter which had been permitted to be regulated by city ordinances, it shows that the Legislature intended to take the regulation of the matter out of the hands of the municipal corporation to the extent to which such general law regulated it.

Applying the same rationale to the instant question, it is our opinion that the cities under the present statutes have not been granted the power to enact ordinances involving controlled substances which are covered by the Uniform Controlled Substances Act enacted by the Legislature and now codified as Chapter 19-03.1.

In addition to the lack of authority, there is a further matter which must be seriously considered. Until recently, numerous courts have held that a person could be prosecuted under a city ordinance and also under a state law upon the same acts, if both the city ordinance and state law prohibited such act. This concept was also recognized in the City of Fargo, supra, in the dissenting opinion in which it was argued that where there is no conflict the perpetrator of the

forbidden act becomes subject to punishment under both the ordinance and the statute (state law). The concept of prosecution under both ordinance and state law was also recognized in state v. Colohan, 286 N.W. 888, where the Court said: "It may create an extra hazard for the drunken driver, but it does not amount to a surrender of legislative power. This statement was made with reference to a charge of driving a vehicle while under the influence where the accused claimed he should have been charged under the ordinance instead of state law. (Apparently this was after the enactment of Subsection 15 of Section 40-05-02.) However, be that as it may, the ruling by the United States Supreme Court in Waller v. Florida, 397 U.S. 387, 25 L. Ed. 2d. 435 (1970) held that a prosecution under the city ordinance constitutes double jeopardy if the defendant is prosecuted under state law arising out of the same facts. The Court clearly stated that the double jeopardy prohibition in the Fifth and through the Fourteenth Amendment to the United States Constitution apply to individuals which are tried for the violation of a city ordinance and subsequently tried under state law on the same acts. The court said:

> "We decide only that the Florida courts were in error to the extent of holding that - 'even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court.'"

In essence, the United States Supreme Court overruled such ruling or holding by the Florida Supreme Court.

With reference to city ordinances, it is noted that the maximum fines and punishments which may be assessed pursuant to the provisions of Section 40-05-06 are limited to $500 and imprisonment not to exceed thirty days for one offense.

The punishments for violating the provisions of Chapter 19-03.1 are substantially greater than those for violating a city ordinance. Similarly, the penalties for driving a motor vehicle while under the influence is substantially greater and in certain instances the mandatory minimum sentence and punishment must be imposed, which is considerable greater than the maximum permitted under a city ordinance. See Section 39-08-01.

With the ruling of the Unites States Supreme Court in the Waller case, an erroneous concept was laid to rest and new concepts came into being. As a result of this ruling, the Legislature may wish to examine the authority granted to cities to enact ordinances covering or paralleling acts prohibited by state law. Conceivably, the enactment of a city ordinance paralleling the prohibition of certain acts under state law could result in thwarting the intention and purpose of the state law. By way of an exaggerated illustration, assuming the city has the authority and were to adopt an ordinance making it unlawful to take the life of another person, any person tried under the ordinance could be punished only by the maximum authorized by the ordinance and he could not be tried for the same crime under state law because of the double jeopardy provision in the Fifth Amendment and the Fourteenth Amendment to the United States Constitution as construed by the United States Supreme Court.

Other constitutional questions also arise because the defendant is at the whim of the prosecutor either made subject to state law or ordinances.

It is because of the Waller case that we deemed it advisable to make these additional comments so that if deemed appropriate, the subject matter can be called to the attention of the Legislature for such action as it may deem advisable.

Sincerely yours,

HELGI JOHANNESON

Attorney General