

**OPINION
73-70**

July 18, 1973 (OPINION)

Mr. William J. Johnson
City Attorney
Larimore, ND 58251

Dear Mr. Johnson:

This is in response to your letter of July 12, 1973, wherein you asked a number of questions relating to the procedural changes resulting from the enactment of Chapter 301, Session Laws of 1973. Your questions and our answers thereto are as follows:

1. "Does a Municipal Judge have the right to give an officer the authority to take a bond for a noncriminal offense at the time of the violation, for out-of-state violators?"

The final paragraph in section 2 of Chapter 301, Session Laws 1973 states: "This section shall not be construed as allowing a halting officer to receive the statutory fee or bond, unless he is otherwise authorized by law to do so."

Section 29-08-02, N.D.C.C., which was last amended in 1969 provides: "Any magistrate or municipal judge in this state may in his discretion designate, authorize, and appoint an additional person or persons to arrange, receive, and approve bail in cases involving traffic violations."

Serious questions of propriety can be raised when an arresting officer accepts bail from a person he has arrested and for that reason we would not want you to conclude that this office approves of a delegation of such power by the court to officers that will be making arrests. It would be much more acceptable that the bail, bond or statutory fee be handled by a clerk or desk sergeant when the Judge is unavailable, only however, when authorized by the court.

2. "Is a Municipal Judge still required to take the license of an offender convicted of DWI, at the time of the conviction?"

The statute requiring courts to obtain the license from persons convicted certain violations was not amended by Chapter 301, Session Laws 1973 or any other act passed in 1973. The provision is found in section 39-06-28, N.D.C.C., and states: "Whenever any person is convicted of any offense for which this chapter makes mandatory the revocation of the operator's license of such person by the commissioner, the court in which such conviction is had shall require the surrender to it of any operator's license then held by the person so convicted and the court shall thereupon forward the same together with a record of such conviction to the commissioner."

Under the law applicable prior to July 1, 1973, those convictions requiring mandatory revocation of driver's license did include "driving a motor vehicle while under the influence of intoxicating

liquor" together with others identified in section 39-06-31, N.D.C.C. This section was amended by section 20 of Chapter 301, Session Laws of 1973, and eliminated DWI convictions from the mandatory revocation category. Accordingly, the Municipal Judge need not take the license from persons convicted of DWI in his court.

3. "Can a City continue to use the same bond schedule for offenses classified as criminal offenses, that we used prior to the new law that went into effect on July 1st?"

Assuming that the bond schedule that you used was valid prior to July 1st, it would be valid now insofar as it relates to offenses that were not decriminalized by Chapter 301, Session Laws 1973. The acceptance of a cash deposit in lieu of bail is a practice recognized in law and the use of a predetermined schedule of cash deposits for traffic offenders is not prohibited by the provisions of Chapter 29-08, N.D.C.C., and we know of no court decisions having held such practice invalid.

As to traffic offenses that we made noncriminal by Chapter 301, the Legislature itself provided the bond schedule in section 6 of that Act.

4. "Can the City demand bond in all cases or whenever they feel it is necessary?"

This question involves the applicability of sections 39-07-07, 39-07-08 and 39-07-09 of the North Dakota Century Code which provide:

"39-07-07. Halting person for violating traffic regulations - Duty of officer halting. Whenever any person is halted for the violation of any of the provisions of chapter 39-08 through 39-13, 39-18 and 39-21, the officer halting such person, except as otherwise provided in section 39-07-09, may:

1. Take the name and address of such person;
2. Take the license number of his motor vehicle; and
3. Issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice."

"39-07-08. Hearing - Time of - Promise of defendant to appear - Failure to appear. The time to be specified in the summons or notice provided for in section 39-07-07 shall be at least five days after the issuance of such summons or notice unless the person halted shall demand an earlier hearing, and, if the person halted desires, he may have the right, at a convenient hour, to an immediate hearing or to a hearing within twenty-four hours. Such hearing shall be before a magistrate of the township, municipality, or county in which the offense was committed. Upon the receipt from the person halted of a written promise to appear at the time and place mentioned in the summons or notice, such officer shall release him for custody. Any person refusing to give such written promise to appear shall be taken immediately by the halting officer before

the nearest or most accessible magistrate. Any person willfully violating his written promise to appear shall be subject to the penalty prescribed by section 39-07-06 regardless of the disposition of the charge upon which he originally was halted." (Emphasis Added)

"39-07-09. OFFENSES UNDER WHICH PERSON HALTED MAY NOT BE ENTITLED TO RELEASE UPON PROMISE TO APPEAR. The provisions of section 39-07-07 shall not apply to a person if:

1. The halting officer shall have good reason to believe such person guilty of any felony or when such person is halted and charged with any of the offenses listed, in section 5 of this Act, except reckless driving; or
2. The halting officer, acting within his discretion, deems it inadvisable to release such person upon his promise to appear when halted and charged with either of the following offenses:
 - a. Reckless driving; or
 - b. Driving in excess of speed limitations established by the state or by local authorities in their respective jurisdictions.

The halting officer forthwith shall take any person not released upon his promise to appear before the nearest or most accessible magistrate.

section 39-07-09 was amended by Chapter 301, section 22.

If sections 39-07-07, 39-07-08, and 39-07-09, N.D.C.C., are applicable to traffic offenses where a violation of a city ordinance is charged, as distinguished from charges that a state law has been violated, then it would appear that there are four categories of offenses, and whether bail or a written promise to appear is necessary to obtain the release of the person charged, will depend upon in which category the offense charged falls.

1. Certain traffic offenses require bail for a release because a written promise to appear is not permitted. These include felony charges; driving while under the influence of intoxicating liquor; operating while an habitual user of narcotic drugs; aggravated reckless driving; negligent homicide; manslaughter resulting from the operation of a motor vehicle; leaving the scene of an accident; driving while license or driving privilege is suspended or revoked; and driving a snowmobile while under the influence of intoxicating liquor, narcotic drug, or in a careless, reckless or negligent manner.
2. In certain traffic offenses, the decision is left to the discretion of the halting officer. These include reckless driving and driving in excess of speed limitations established by the state or by local authorities in their respective jurisdictions. If the officer deems in

inadvisable to release a person so charged upon his written promise to appear, then the posting of bail for the release of such person, applies.

3. For traffic offenses which do not come within the above two categories, the person charged if he is a resident of North Dakota, must be released on his written promise to appear. If he is a nonresident and no traffic accident is involved, he also must be released on his written promise to appear.
4. If the person is not a resident of North Dakota and if the charge arose out of an accident as described in section 29-06-15.1, N.D.C.C., the person will not be released on a written promise to appear if the officer has reasonable and probable grounds to believe that such person will disregard a written promise to appear.

Neither the written promise to appear nor the posting of bail to obtain the release of the person are involved when the officer takes the person, without unnecessary delay, to the nearest magistrate.

The question of whether all or any part of sections 39-07-07, 39-07-08 and 39-07-09, N.D.C.C., apply to traffic offenses under a city ordinance, is most difficult to determine. By its language, there is nothing in section 39-07-07 which would tend to indicate that it is applicable to a city ordinance violation. However, the words used by the Legislature in both sections 39-07-08 and 39-07-09 pretty well tie in the three sections together as a package, and the words " * * * before a magistrate of the * * * municipality * * * " in section 39-07-08 and the words " * * * offenses listed in section 5 of this Act * * * " and " * * * local authorities in their respective jurisdictions" in section 39-07-09 leave little doubt that the Legislature intended that all three sections were applicable to proceedings under city ordinances. The opinion that we are compelled under the circumstances to render, is that all three of these sections as well as the provisions of section 29-06-05.1, N.D.C.C., are applicable to violations of city traffic ordinances.

5. "Does an arresting officer have the right to demand that a juvenile submit to a breathalyzer test? If so, must the juveniles' parents also sign the consent form?"

Section 39-20-01, N.D.C.C., provides that "Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent subject to the provisions of the chapter to a chemical test, or tests, of his blood, breath, saliva, or urine for the purpose of determining the alcoholic content of his blood". We interpret this provision to be applicable to any person who operates a motor vehicle upon a public highway regardless of his age. Provisions of Chapter 27-02, N.D.C.C., the Uniform Juvenile Court Act, which may appear to be in conflict with such interpretation, are in our opinion; applicable. Chapter 27-20 is a procedural statute applicable to criminal offenses committed by juveniles and has no bearing upon the implied consent statute, which has only indirect relationships to any criminal offense.

The offer to administer the breathalyzer test to a juvenile, or any

adult, must be preceded by an arrest and by informing him that he is or will be charged with the offense of driving or being in actual physical control of a vehicle upon the public highways while under the influence of intoxicating liquor.

We would not agree that the arresting officer has a right to "demand" submission to the test, he may only "offer" the test as specified in section 39-20-04, N.D.C.C., if there is a refusal to submit, no test shall be given.

Finally, we are of the opinion that no one may be required to sign any consent forms as a prerequisite to the taking of a test under the provisions of Chapter 39-21, N.D.C.C.. A refusal to sign a consent form cannot be interpreted as a refusal to submit to the test. The consent is implied under the statute from the act of driving a motor vehicle on the public highways and no further action is required other than to offer to give the test and then a submission by taking the test or a refusal to submit.

Sincerely yours,

ALLEN I. OLSON

Attorney General