

Office of the Attorney General
State of North Dakota

Opinion No. 87-10

Dated Issued: June 22, 1987

Requested by: Brian D. Neugebauer
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--QUESTIONS PRESENTED--

I.

Whether the provisions of Senate Bill No. 2040, which revise the operation of municipal courts, become effective as to those criminal offenses occurring on July 8, 1987, and thereafter.

II.

Whether the amendments to N.D.C.C. § 40-18-15 concerning the waiver of a jury trial in an action for the violation of a city ordinance, as enacted in Senate Bill No. 2040, contemplate or require the promulgation of specific rules concerning such a waiver by the North Dakota Supreme Court.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that the provisions of Senate Bill No. 2040, revising the operation of municipal courts, become effective as to those criminal offenses occurring on July 8, 1987, and thereafter.

II.

It is my further opinion that the amendments to N.D.C.C. § 40-18-15 concerning the waiver of a jury trial in an action for the violation of a city ordinance, as enacted in Senate Bill No. 2040, do not contemplate or require the promulgation of specific rules concerning such a waiver by the North Dakota Supreme Court.

--ANALYSES--

I.

The 50th Legislative Assembly enacted Senate Bill No. 2040 revising the operation of municipal courts in North Dakota. Essentially, Senate Bill No. 2040 requires all actions brought for the violations of city ordinances, for which the right to a jury

trial has not been waived by the defendant, to be transferred to the county court for the jury trial. Actions for violations of city ordinances for which the right to a jury trial does not otherwise exist or for which the defendant has timely and appropriately waived in writing his right to a jury trial may continue to be heard by a municipal judge.

Art. IV, § 13 of the North Dakota Constitution states that every law enacted by the Legislative Assembly takes effect on July 1 after its filing with the Secretary of State or 90 days after its filing, whichever ever comes later. Senate Bill No. 2040 was filed in the Secretary of State's office on April 9, 1987. Thus, pursuant to this constitutional provision, this law will become effective on July 8, 1987.

Although the provisions of Senate Bill No. 2040 have the effect of law as of July 8, 1987, the question occurs as to its application to facts and circumstances which may exist on that date. Specifically, do the provisions of Senate Bill No. 2040 apply to offenses which have occurred prior to July 8, 1987, but have not resulted in final resolution? On the other hand, are those criminal matters pending as of July 8, 1987, subject to the provisions of Senate Bill No. 2040 or is the application of this statute restricted to those offenses occurring on or after July 8, 1987?

North Dakota law states that no part of the North Dakota Century Code is retroactive unless it is expressly declared to be so. N.D.C.C. § 1-02-10. Since 1979, the North Dakota Supreme Court has reviewed N.D.C.C. § 1-02-10 and has interpreted that statute to firmly and unequivocally prohibit the application of any new statute to matters existing previous to its effective date. *Reiling v. Bhattacharyya*, 276 N.W.2d 237 (N.D.1979); *State v. Kaufman*, 310 N.W.2d 709 (N.D.1981). This strict construction of N.D.C.C. § 1-02-10 has been provided to criminal cases as well by the North Dakota Supreme Court. The court has stated that changes in criminal law may not be applied to offenses which were committed prior to the effective date of those legislative amendments.

We can discern no expressed legislative intent that Section 39-08-01, as amended by the 1983 Legislative Assembly, apply to offenses committed prior to the effective date of the amendment, July 1, 1983.

State v. Good Bird, 344 N.W.2d 483, 486 (N.D.1984); see also *State v. Kaufman*.

In 1986, the North Dakota Supreme Court carved a limited exception from its prior rulings that subsequent amendments to criminal statutes apply only to offenses occurring on or after the effective date of the legislative amendments. In *State v. Cummings*,

386 N.W.2d 468 (N.D.1986), the court noted that its previous interpretations of N.D.C.C. § 1-02-10 had elevated those decisions to a "per se" bar to the retroactive application of statutes regardless of any positive effect produced by such an application. "The rule was imbued with a life of its own." Id. at 471.

In Cummings, however, the supreme court was unable to follow its previous rulings where the subsequent legislative amendment had the effect of providing a lesser punishment for the commission of an offense. Thus, although the court continued to maintain that statutes are not retroactive unless expressly declared so by the Legislature, the court concluded that an exception should be made to this general rule in the case of ameliorating penal legislation.

There is no provision within Senate Bill No. 2040 as to the manner in which this amendment is to become effective and applicable to criminal offenses. Furthermore, a review of relevant legislative history, including discussions with persons intimately involved in the passage of Senate Bill No. 2040, reveals no indication that the bill was intended to be applied retroactively. Based upon N.D.C.C. § 1-02-20 and the decisions of the North Dakota Supreme Court, Senate Bill No. 2040 may not be applied retroactively. Thus, it is my opinion that the provisions of Senate Bill No. 2040 become effective on July 8, 1987, and affect only those criminal offenses occurring on and after that date.

II.

In its amendments to N.D.C.C. § 40-18-15, Senate Bill No. 2040 provides that a municipal court may continue to hear an action for a violation of a city ordinance for which the right to a jury trial does not exist or in which the defendant has timely and appropriately waived a right to a jury trial "in writing pursuant to rules of the supreme court." To date, the North Dakota Supreme Court has not enacted specific rules discussing the manner in which a defendant may waive a right to a jury trial in municipal court thus resulting in the transfer of that case to county court pursuant to Senate Bill No. 2040. Indeed, the available information indicates that no such specific rules are contemplated by the court at this time.

However, it is noted that the amendments to N.D.C.C. § 40-18-15 as to the defendant's waiver of a right to a jury trial in writing pursuant to rules of the supreme court do not refer to specific rules adopted by the supreme court following the enactment of this bill. In other words, the implementation of Senate Bill No. 2040 is not conditioned upon the North Dakota Supreme Court's promulgation of specific rules providing the manner in which a defendant charged with a violation of a municipal ordinance may waive the right to a jury trial. Thus, rules already in existence as issued by the supreme

court concerning this subject are available in connection with the implementation of Senate Bill No. 2040.

One such rule which would be applicable is rule 23(a) of the North Dakota Rules of Criminal Procedure. This particular rule states as follows:

(a) Trial by Jury. Trial shall be by jury in all cases as provided by law unless the defendant waives a jury trial in writing or in open court with the approval of the court and consent of the prosecuting attorney.

A more detailed statement of the requirements of an effective waiver of one's right to a jury trial is provided for in State v. Kranz, 353 N.W.2d 748 (N.D.1984).

Senate Bill No. 2040 does not contain any specific requirement that a waiver of one's right to a jury trial as a result of an allegation of a violation of a municipal ordinance is governed by a specific North Dakota Supreme Court rule enacted pursuant to Senate Bill No. 2040. Furthermore, there is no indication either in legislative history or in the actual words found within the statute that the "waiver rule" requirement of Senate Bill No. 2040 would not be effective unless it was further implemented by specific rules enacted by the North Dakota Supreme Court discussing this particular subject. Instead, the statute requires that the waiver of a jury trial occur pursuant to rules of the North Dakota Supreme Court. As rule 23(a) of the North Dakota Rules of Criminal Procedure currently exists and provides the necessary guidelines as to how a waiver must occur, Senate Bill No. 2040 needs no further rule-making action by the North Dakota Supreme Court in order to become effective as law. Naturally, the North Dakota Supreme Court is free to address this specific subject by specific rule should it so desire.

--EFFECT--

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question is decided by the courts.

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Attorney General

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