

2089.

WARRANT—FOR ARREST OF PERSON CHARGED WITH VIOLATING VILLAGE ORDINANCE—CONSTABLES MAY NOT SERVE SUCH A WARRANT AND COLLECT FEES.

SYLLABUS:

A mayor of a village has no authority to issue a warrant for the arrest of a person charged with the violation of a village ordinance directed to a constable and this is so even though such constable is an officer of a township whose boundaries are identical with the corporate limits of a village and, since no authority exists for directing such warrant to a constable, fees for serving the warrant cannot be taxed against a defendant nor collected by a constable serving such warrant.

COLUMBUS, OHIO, July 14, 1930.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your letter of recent date, in which you request my opinion upon the following questions:

“Question 1. May the mayor of the village issue a warrant to the constable of the township in which the village is located for the arrest of a person charged by such constable, with the violation of a village ordinance?”

Question 2. If a warrant may be issued to such constable in an ordinance case, may the fees provided by Section 3347, G. C., be legally collected from the defendant?

Question 3. May such fees be legally paid to such constable?

Question 4. When village limits are identical with township limits, and the village council has failed to adopt ordinances regulating the disposition of the fees of the justice of the peace and constable, may the village mayor tax and collect fees for the constable in ordinance cases when such constable makes the arrest, and files the affidavit in the mayor's court?

Question 5. May such fees be legally paid to, and be retained by, such constable?”

Section 13432-1 of the General Code authorizes peace officers, which includes a constable, to arrest and detain a person found violating an ordinance of the village. Section 13432-3 of the General Code provides that an officer making an arrest without a warrant must, without unnecessary delay, take the person arrested before a court or magistrate having jurisdiction of the offense, and must make or cause to be made before such court or magistrate a complaint stating the offense for which the person was arrested. These sections authorize a constable to arrest and detain a person violating a city or village ordinance until a warrant can be obtained from a proper court or magistrate. However, before a person can be tried before such court or magistrate a warrant must be issued.

Section 13432-9 of the General Code provides as follows:

“When an affidavit charging a person with the commission of an offense is filed with a judge, clerk or magistrate, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused; if the offense charged is a violation of the laws of the state, such warrant may be directed to and executed by any officer named in Section 1 of this chapter, but if the offense charged is a violation of the ordinance or regulation of a municipal corporation, such process shall be directed to and executed by the officers of such corporation.”

It is apparent from a reading of this section that if the offense charged is a violation of an ordinance of a village a warrant can only be directed and executed by the officers of the village. A mayor of a village has no authority to direct a warrant to a constable when the offense committed is a violation of an ordinance of that village. An officer is not entitled to fees for serving a warrant unless such warrant is directed to him and is personally served by him. See *Haserodt vs. State ex rel*, 29 O. C. A., at page 231. Since a mayor of a village cannot direct a warrant to a constable in the case of a violation of an ordinance then it necessarily follows that a constable cannot lawfully collect fees for serving such warrant nor can such fees be taxed as costs and collected from a defendant.

I now come to a discussion of your fourth and fifth questions. Section 3512 of the General Code provides as follows:

“When the corporate limits of a city or village become identical with those of a township, all township offices shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of the city or village, except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employees. Such justices and constables shall be elected at municipal elections. All property, moneys, credits, books, records and documents of such township shall be delivered to the council of such city or village. All rights, interests or claims in favor of or against the township may be enforced by or against the corporation.”

Keeping in mind that Section 13432-9 of the General Code provides that if the offense charged is a violation of an ordinance or regulation of a municipal corporation a warrant shall be directed to and executed by the officers of such corporation, in order to answer your fourth and fifth inquiries, it is first necessary to determine whether or not a constable elected under the provisions of Section 3512 of the General Code is a township or a municipal officer, for if such constable is a township officer then the mayor of a village has no authority to direct a warrant to such constable and he is not entitled to collect fees for serving such warrant, regardless of whether or not the village council passed an ordinance regulating the disposition of his fees. You will note from a reading of Section 3512 of the General Code that all township offices are abolished when the corporate limits of a village become identical with those of a township, except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employees. From a reading of this language in Section 3512 it is not clear as to whether or not such a justice of peace and constable retain the status of township officers. In order to determine the status of a justice of peace and constable it is necessary to determine what was meant by the Legislature when it provided that “except that justices of the peace and constables shall continue the exercise of their functions”. At the time this legislation was enacted (96 O. L. 20) the office of a justice of peace was a constitutional office and the constitution provided that “a competent number of justices of the peace shall be elected by the qualified electors of each township in the several counties”. Apparently to meet this constitutional requirement the offices of justices of peace and constables as township officers were not abolished.

A statute similar to Section 3512, General Code, was construed by the Supreme Court in the case of *McGill vs. State*, 34 O. S. 228. The court said “The act of May 7, 1872 (69 O. L. 23), preserves the corporate existence of such township for the sole purpose of electing justices of the peace and constables evidently to meet the constitutional requirements that justices of the peace shall be elected by townships”.

In an opinion rendered by Hon. Edward C. Turner, found in Opinions of the Attorney General, 1915, at page 1043, the then Attorney General expressed the view that a constable elected after the corporate limits of a city or village became identical with those of a township retains his status as a township officer. The then Attorney General said:

"Under the facts stated in your letter, Akron Township being entirely within the City of Akron, the only township officers retaining a status as such under the provisions of Section 3512 of the General Code, are the justices of the peace and constables, and as held in the case of *McGill vs. The State*, 34 O. S. 228, the provision for their continuance as township officers was evidently inserted to conform to the constitutional provision governing the election of justices of the peace."

A similar view was expressed by the same Attorney General in an opinion found in Opinions of the Attorney General, 1915, Vol. II, at page 1348. He said:

"Notwithstanding it is provided that constables shall be elected at municipal elections, they do not solely for that reason cease to be township officers.

In an opinion of this department under date of April 30, 1915, No. 303, it was held that under Section 7, Article 5 of the Constitution, and Section 4951, G. C., as amended in 103 O. L. 426, primary elections may not be held for the nomination of township officers unless petitioned for by a majority of the electors of the township. It therefore follows that unless a constable, under the facts stated, ceases to be a township officer, a primary election may not be held for the nomination of candidates for such office, except upon petition therefor by a majority of the electors of the township.

I am therefore of the opinion that a candidate for constable may not be nominated at the primary election to be held August 10, 1915, unless a primary election for the nomination of township officers is petitioned for by a majority of the electors of the township."

I am inclined to agree with the views expressed by my predecessor that when the corporate limits of a city or village become identical with those of a township the constable elected at a municipal election is a township officer.

Since I have concluded that such a constable is a township officer it therefore follows that a village mayor does not have authority to direct a warrant to him when a person is arrested for a violation of the village ordinance and therefore the village mayor has no authority to tax and collect fees for the constable in such cases.

In view of the discussion herein and in specific answer to your inquiry, I am of the opinion that a mayor of a village has no authority to issue a warrant for the arrest of a person charged with the violation of a village ordinance directed to a constable and this is so even though such constable is an officer of a township whose boundaries are identical with the corporate limits of a village and, since no authority exists for directing such warrant to a constable, fees for serving the warrant cannot be taxed against a defendant nor collected by a constable serving such warrant.

Respectfully,

GILBERT BETTMAN,

Attorney General.