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1. CLERK, COURT OF COMMON PLEAS—MAY ISSUE WARRANT RETURNABLE TO COURT HAVING JURISDICTION—ARREST OF PERSON CHARGED WITH MISDEMEANOR, BASED ON AFFIDAVIT, FILED BY PEACE OFFICER BEFORE INFORMATION HAS BEEN FILED BY PROSECUTING ATTORNEY.
2. JUDGE, COURT OF COMMON PLEAS, MAY ADMIT SUCH PERSON TO BAIL BEFORE AN INFORMATION IS FILED BY THE PROSECUTING ATTORNEY.
3. PERSON CHARGED WITH MISDEMEANOR, MAY BE TRIED BY COURT OF COMMON PLEAS—ONLY UPON INFORMATION OR INDICTMENT—IN ABSENCE OF STATUTORY PROVISIONS DEALING SPECIFICALLY WITH OFFENSE CHARGED.

SYLLABUS:

1. A clerk of the court of common pleas may issue a warrant returnable to a court having jurisdiction thereof, for the arrest of a person charged with a misdemeanor based upon an affidavit filed by a peace officer before an information has been filed by the prosecuting attorney.

2. A judge of the court of common pleas may admit such person to bail before an information is filed by the prosecuting attorney.

3. In the absence of statutory provisions, dealing specifically with the offense charged, a person charged with a misdemeanor may be tried by the court of common pleas only upon information or indictment.

Columbus, Ohio, August 27, 1945

Hon. George W. Slaughter, Prosecuting Attorney
Port Clinton, Ohio

Dear Sir:

This will acknowledge receipt of your recent request for my opinion, which request reads as follows:

“I would appreciate your opinion on the following questions:

1. Does the clerk of the common pleas court have the authority to issue a warrant for the arrest of a person charged with a misdemeanor based upon the affidavit of a peace officer filed with the clerk of the common pleas court when no information has been filed with the clerk of said court by the prosecuting attorney?
2. If your answer is in the affirmative to question one, does the judge of the common pleas court have authority to admit said person to bail before any information is filed by the prosecuting attorney?
3. If your answer to questions one and two is in the affirmative, would the common pleas court have jurisdiction to proceed to try such a misdemeanor case if no information is filed by the prosecuting attorney?”

Since you have chosen to break down your request into three separate questions, I will treat the subject in the same manner.

Authority for the clerk of the court of common pleas to issue a warrant in misdemeanor cases, where an affidavit has been filed by a

police officer, is found in Sections 13432-8 and 13432-9 of the General Code of Ohio, which sections read respectively as follows:

Section 13432-8.

“Any judge, or clerk of a court of record, or of any municipal court, or a magistrate, may issue process for the arrest of any person charged with an offense returnable in the court having jurisdiction thereof.”

Section 13432-9.

“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.”

The section referred to above is codified as Section 13432-1 and reads:

“A sheriff, deputy sheriff, marshal, deputy marshal, watchman or police officer, herein designated as ‘peace officers’ shall arrest and detain a person found violating a law of this state, or an ordinance of a city or village, until a warrant can be obtained. A constable within the limits of the township in which said constable has been appointed or elected, shall arrest and detain a person found by him in the commission of a misdemeanor, either in violation of a law of this state or an ordinance of a village, until a warrant can be obtained.”

It will be noted from the above that: 1. The judge or the clerk may issue process for the arrest of persons charged with an offense returnable to the proper court. 2. That after the filing of an affidavit, the judge, clerk or magistrate may issue a warrant for the arrest of the accused person to the officials named in the latter section.

Your second question is determined by the provisions of Section 13435-2 of the General Code, which read as follows:

“In cases of felony the amount of the bail shall be fixed by the judge or magistrate, but in cases of misdemeanor such amount

shall be fixed by the judge, magistrate or clerk of the court. The amount of the bond shall be fixed with consideration of the seriousness of the offense charged, the previous criminal record of the defendant and the probability or improbability of his appearing at the trial of the cause."

It is needless for me here to discuss the basic legal principle that all persons accused of crime are permitted to give bail except in capital offenses where the proof is strong or the presumption is great. You have clear authority for the judge to admit the person so held, to bail, pending further proceedings.

Your third question which deals with the jurisdiction of courts of common pleas in misdemeanor cases, was under consideration by the then Attorney General in 1928. In an opinion rendered by him (Opinions of the Attorney General, 1928, page 3034), it was held:

"Courts of common pleas do not have jurisdiction in misdemeanor cases unless indictments are first procured by a grand jury, excepting in those instances wherein the Legislature has specifically given jurisdiction to said courts to try criminal cases upon affidavits."

Since the rendition of this opinion, the Criminal Code of Ohio has been recodified and in Section 13437-34 (113 O.L.) we find the following:

"In prosecutions for misdemeanor in the court of common pleas, indictment by the grand jury shall not be necessary, but such prosecution may be upon information filed and verified by the prosecuting attorney of the county, or by affidavit when such method is by statute especially provided. The provisions of law as to form and sufficiency, amendments, objections and exceptions to indictments and as to the service thereof shall apply to such informations."

Section 1 of Article IV of the Constitution of Ohio provides:

"The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas, courts of probate, and such other courts inferior to the courts of appeals as may from time to time be established by law."

In Section 4 of Article IV of the Constitution it is provided:

"The jurisdiction of the courts of common pleas, and of the judges thereof, shall be fixed by law."

The law fixing the jurisdiction of the court of common pleas in criminal matters is set forth in Section 13422-5, General Code, which reads:

“The court of common pleas shall have original jurisdiction of all crimes and offenses, except in cases of minor offenses, the exclusive jurisdiction of which is vested in courts inferior to the court of common pleas.”

It has been held by the courts of Ohio on many occasions that although the court of common pleas is established by the constitution, its jurisdiction is fixed by statute and such court has only the authority and power given to it by the statutes of Ohio. *Allen v. Smith*, 84 O. S., 283; *Mattone v. Argentine*, 123 O. S., 393.

From the comparison of the statutes herein cited, it is my view that although the clerk of the court of common pleas may, upon the affidavit of the police officer, issue a warrant and cause the arrest of a person accused of a misdemeanor and that thereafter such person may be admitted to bail by the judge of the court of common pleas, yet under the law this person cannot lawfully be tried before the court of common pleas unless and until an indictment is returned by the grand jury, or an information is filed by the prosecuting attorney, except in cases where the statutes of Ohio specifically authorize the use of affidavit.

Therefore, specifically answering your inquiry, it is my opinion that:

1. A clerk of the court of common pleas may issue a warrant returnable to a court having jurisdiction thereof, for the arrest of a person charged with a misdemeanor based upon an affidavit filed by a peace officer before an information has been filed by the prosecuting attorney.
2. A judge of the court of common pleas can admit such person to bail before an information is filed by the prosecuting attorney.
3. In the absence of statutory provisions, dealing specifically with the offense charged, a person charged with a misdemeanor may be tried by the court of common pleas only upon information or indictment.

Respectfully,

HUGH S. JENKINS,

Attorney General