

Note from the Attorney General's Office:

1954 Op. Att'y Gen. No. 54-3998 was modified by 1977 Op. Att'y Gen. No. 77-079.

3998

GASOLINE EXCISE TAX—FUNDS DISTRIBUTED TO SEVERAL COUNTIES—MOTOR VEHICLE FUEL EXCISE TAX—SECTION 5735.23 RC—NEITHER OF THE FUNDS AVAILABLE FOR EXPENDITURE FOR EQUIPMENT OR COMPENSATION OF DEPUTY SHERIFF FOR SERVICES PERFORMED ON HIGHWAYS, SECTION 5577.13 RC.

SYLLABUS:

Neither the funds derived from the gasoline excise distributed to the several counties, under the provisions of Section 5735.23, Revised Code, nor those derived from the motor vehicle fuel excise distributed to the counties as provided in Section 5735.27, Revised Code, are available for expenditure for the equipment or compensation of a deputy sheriff for services rendered under the provisions of Section 5577.13, Revised Code. Paragraph one of the syllabus in Opinion No. 3305, Opinions of the Attorney General for 1931, p. 779, approved and followed.

Columbus, Ohio, June 22, 1954

Hon. Don W. Montgomery, Prosecuting Attorney
Mercer County, Celina, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Section 5577.13 of the Revised Code (Section 7251-1, General Code), provides in substance that in counties having 40 miles or more of improved inter-county or state highways, the Sheriff shall detail one or more deputies to enforce Sections 5577.01 to 5577.14 inclusive of the Revised Code.

“The statute further provides that ‘The Board of County Commissioners shall appropriate such amount of money annually from the road fund of the county, as is necessary to equip and compensate such deputies.’ 1931 O.A.G. 3305 at page 779 in the first syllabus holds that funds derived from the gasoline tax as distributed to the county under Section 5537 of the General Code may not be expended for the compensation of deputies provided for in Section 7251-1 of the General Code. This opinion was written some 17 years ago and since that time the ‘road fund of the county’ is primarily the funds received from the gasoline tax. The levies for county road purposes are no longer used to any great extent. At least they are not used in Mercer County since the proceeds of the gasoline tax are ample.

“I seriously question the validity of this Opinion No. 3305 and the rationale used therein in arriving at the conclusion that gasoline tax money is not a road fund within the meaning of Section 5577.13, Revised Code, 7251-1, General Code, pertaining to enforcement by deputy sheriffs.

“1937 O.A.G. 136 at page 185 and following mentions the legal anomaly to which I have referred.

“Mercer County has 250 miles of improved county roads and 212 miles of state highways. These improved county roads hold difficult enforcement problems and our sheriff is desirous of detailing one or more deputies as provided in Section 5577.13.

“In view of the confused state of the law on this question, I respectfully request your opinion as to whether the County Commissioner may appropriate from the gasoline tax money which is our only road fund to pay the compensation of deputy sheriffs detailed under Section 5577.13 of the Revised Code.”

In the 1931 opinion to which you have referred the writer, after quoting the provisions of Section 7251-1, General Code, now found in Section 5577.13, Revised Code, said, page 781:

“In analyzing the section last above mentioned, which was enacted by the 85th General Assembly (110 v. 319) it clearly appears that the appropriation for such a service as is contemplated in the section shall be appropriated ‘from the road fund of such county.’ It will be noted in connection with your inquiry, that the provisions of the so-called gasoline tax law were not in existence at the time of the enactment of said section. Your question then would appear to be whether the gasoline tax which is distributed to the counties may be said to be a ‘road fund’ within the meaning of Section 7251-1, General Code.

“Section 6956-1, General Code, expressly provides for a two mill levy to be made upon each dollar of taxable property of the county, for road purposes. It will be observed that at the time of the enactment of Section 7251-1, General Code, there was a ‘road and bridge fund.’

“Section 5537, General Code, which relates to the distribution of the first gasoline tax fund, contains the following:

“‘Twenty-five per cent of such gasoline tax excise fund shall be paid on vouchers and warrants drawn by the auditor of state in equal proportions to the county treasurer of each county within the state, and shall be used for the sole purpose of maintaining and repairing the county system of public roads and highways within such counties.’

“Section 5541-8, General Code, which relates to the distribution of the so-called ‘second gasoline tax,’ contains the following:

“‘Five per cent of said highway construction fund shall be paid on vouchers and warrants drawn by the auditor of state in equal proportions to the county treasurer of each county within the state, and shall be expended by each county for the sole purpose of constructing, widening and reconstructing the county system of public roads and highways within such county.’

“From the foregoing it would appear that the enforcement of a criminal law which may indirectly tend to preserve the highways can not be said to be either maintenance or repair or the construction of a highway. While the term ‘road fund’ as used in the section authorizing the appointment of a deputy to enforce the law might be broad enough to include any funds that could be used for road purposes, the provisions in the tax laws limiting the use to maintenance and construction respectively, would seem to be inconsistent with the use mentioned in Section 7251-1, General Code. Therefore, the gasoline tax laws being later in the order of enactment would control over the former ones.”

The statutory provisions analogous to those quoted above from Sections 5537 and 5541-8, General Code, prescribing the purpose for which

the county's share of the proceeds of the two gasoline tax levies may be expended are presently set out in Sections 5735.23 and 5735.27, Revised Code, as follows:

Section 5735.23:

* * * "Twenty-five per cent of such gasoline excise tax fund shall be paid in equal proportions on vouchers and warrants drawn by the auditor of state to the county treasurer of each county within the state, and shall be used only for the purpose of maintaining and repairing the county system of public roads and highways within such county, the construction and repair of walks or paths along county roads in congested areas, the construction and maintenance of suitable buildings for the housing of county road machinery, and the purchase, installation, and maintenance of traffic signal lights." * * *

Section 5735.27:

"When appropriated by the General Assembly the highway construction fund shall be appropriated and expended in the following manner: * * *

"(B) Seven and one-half per cent of said highway construction fund shall be paid in equal proportions on vouchers and warrants drawn by the auditor of state to the county treasurer of each county for the sole purpose of maintaining, constructing, widening and reconstructing the county system of public roads and highways." * * *

From these provisions it will be observed that no language has been added to the statute since the publication of the 1931 opinion, which could be supposed to evince an intent to include expenditures for road policing purposes among the purposes for which these funds may be expended. In view of this, and in view of the circumstance that Section 7251-1, General Code, Section 5577.13, Revised Code, whereby expenditures from the county "road fund" for deputy hire were authorized, was enacted prior to the enactment of the gasoline tax levies, I am impelled to the view that the conclusion stated in the 1931 opinion on this point still represents a correct statement of the law.

Accordingly, in specific answer to your inquiry, it is my opinion that neither the funds derived from the gasoline excise distributed to the several counties, under the provisions of Section 5735.23, Revised Code, nor those derived from the motor vehicle fuel excise distributed to the counties as provided in Section 5735.27, Revised Code, are available for ex-

penditure for the equipment or compensation of a deputy sheriff for services rendered under the provisions of Section 5577.13, Revised Code. Paragraph one of the syllabus in Opinion No. 3305, Opinions of the Attorney General for 1931, p. 779, approved and followed.

Respectfully,

C. WILLIAM O'NEILL

Attorney General