

**OPINION NO. 84-014**

**Syllabus:**

1. Pursuant to R.C. 1901.20 and R.C. 2931.041, municipal courts have jurisdiction over criminal prosecutions for violations of R.C. 3704.05(A) through (H). (1978 Op. Att'y Gen. No. 78-001, overruled.)

2. County prosecuting attorneys or city directors of law have authority to prosecute criminal actions for violations of R.C. 3704.05(A) through (H) in municipal courts in accordance with the provisions of R.C. 1901.34.
3. Where the Director of Environmental Protection has delegated certain of his monitoring and enforcement powers and duties to city or general health districts or political subdivisions under R.C. 3704.03(P), such delegation does not authorize such city or general health districts or political subdivisions to direct that a city director of law or county prosecuting attorney prosecute criminal actions for violations of R.C. 3704.05.

**To: Robert H. Maynard, Director, Ohio Environmental Protection Agency, Columbus, Ohio**

**By: Anthony J. Celebrezze, Jr., Attorney General, March 26, 1984**

I have before me your opinion request in which you ask:

- (1) whether municipal courts in Ohio have criminal jurisdiction over open burning violations. . .brought under R.C. 3704.05 and 3704.99, and
- (2) whether city directors of law and county prosecutors are authorized to prosecute criminal actions for such open burning violations in the municipal courts.
- (3) whether local air enforcement agencies which [have been recognized by the director of environmental protection as his] agents to enforce the state's air pollution control laws, can request a city director of law or county prosecutor to institute criminal proceedings for open burning violations which have occurred within the boundaries of their jurisdictions.

Your first question asks whether municipal courts have jurisdiction over criminal prosecutions for violations of R.C. 3704.05.<sup>1</sup> In order to avoid encroachment upon the judicial power, this office generally abstains from directly addressing questions concerning the authority and duties of the courts. See generally Ohio Const. art. IV, §1 and art. III, §1 (establishing the judges of the courts and the Attorney General as members of separate branches of state government). A court generally has the power to determine its own jurisdiction in the first instance. *State ex rel. Beil v. Dota*, 168 Ohio St. 315, 154 N.E.2d 634 (1958) (citing *United States v. United Mine Workers*, 330 U.S. 258 (1947)). As noted in your letter of request, however, the question you ask was addressed in 1978 Op. Att'y Gen. No. 78-001. Because of certain changes in the law which formed the basis of that opinion, I believe it is necessary to discuss the analysis therein set forth.

1978 Op. Att'y Gen. No. 78-001 concluded in the syllabus, that: "Jurisdiction over criminal violations of R.C. 3704.05 rests with the Court of Common Pleas, and may not be conferred upon an inferior court by local rule." The opinion relied on the case of *State v. Supinger*, No. 75 CA 9 and 10 (Ct. App. Miami County 1975), which concluded that a municipal court did not have jurisdiction over violations of R.C. 3704.05(G), as set forth in R.C. 3704.99. The court stated that, pursuant to R.C. 1901.20 and R.C. 2931.041, "the Municipal Court has jurisdiction in criminal matters only where they are classifiable as misdemeanors or local ordinance violations." *Supinger*, slip op. at 5. Pursuant to R.C. 3704.99 as it read in 1975 (1971-1972 Ohio Laws, Part I, 695, 723 (Am. Sub. S.B. 397, eff. Oct. 23, 1972)), a person could be fined up to twenty-five thousand dollars for a violation of R.C.

<sup>1</sup> R.C. 3704.05 prohibits various actions related to the emission of air contaminants and sets forth requirements for compliance with various provisions of R.C. Chapter 3704.

3704.05. At the time, R.C. 3704.99 did not make imprisonment a possible penalty for violation of R.C. 3704.05 and, therefore, violation of R.C. 3704.05 could not be classified as a misdemeanor. See generally R.C. 2901.02 (classification of criminal offenses). Since violation of R.C. 3704.05(G) was neither a misdemeanor nor a local ordinance violation, the court in Supinger concluded that a municipal court had no jurisdiction over such a matter.

Since the decision in Supinger and the issuance of Op. No. 78-001, R.C. 3704.99 has been amended, Am. Sub. S.B. 258, 113th Gen. A. (1980) (eff. Dec. 19, 1980), and currently states, in pertinent part:

(A) Whoever violates division (A), (B), (C), (D), (E), (F), (G), or (H) of section 3704.05 of the Revised Code, shall be fined not more than twenty-five thousand dollars or imprisoned not more than one year, or both, for each violation. Each day such violation continues after a conviction for a violation is a separate offense.

(B) Whoever violates division (I) of section 3704.05 of the Revised Code shall be fined not more than twenty-five thousand dollars. (Emphasis added.)

Thus, it is now possible that a person convicted of violating divisions (A) through (H) of R.C. 3704.05 may be fined up to twenty-five thousand dollars or imprisoned for not more than one year, or both. Because a person is subject to imprisonment for a violation of R.C. 3704.05(A) through (H), such an offense now constitutes a misdemeanor. R.C. 2901.02(F) ("[a]ny offense not specifically classified is a misdemeanor if imprisonment for not more than one year may be imposed as a penalty"). I note, however, that violation of R.C. 3704.05(I) remains an offense not specifically classified. See generally R.C. 2901.02.

The jurisdiction of municipal courts is set forth in R.C. 1901.20 and R.C. 2931.041. R.C. 1901.20 states, in part:

(A) The municipal court has jurisdiction of the violation of any ordinance of any municipal corporation within its territory, unless the violation is required to be handled by a parking violations bureau or joint parking violations bureau pursuant to Chapter 4521. of the Revised Code, and of the violation of any misdemeanor committed within the limits of its territory. (Emphasis added.)

R.C. 2931.041 states:

Municipal courts have jurisdiction in criminal cases to finally try and determine prosecutions for the violation of municipal ordinances within corporate limits of municipal corporations within their territories and misdemeanor cases within their territories as provided in Chapter 1901. of the Revised Code. Such courts also have the same power as a county court as a committing magistrate in felony cases. (Emphasis added.)

Since violation of divisions (A) through (H) of R.C. 3704.05 now constitutes a misdemeanor, it is clear that, pursuant to R.C. 1901.20 and R.C. 2931.041, municipal courts have jurisdiction over such matters. Thus, based upon the amendment of R.C. 3704.99 classifying violations of R.C. 3704.05(A) through (H) as misdemeanors, municipal courts have jurisdiction over criminal prosecutions for violations of R.C. 3704.05(A) through (H). I, therefore, overrule 1978 Op. Att'y Gen. No. 78-001 to the extent that it is inconsistent with this opinion.

Your second question asks whether city directors of law and county prosecutors are authorized to prosecute criminal actions for such open burning violations in the municipal courts. Concerning criminal prosecutions in municipal courts, R.C. 1901.34 states, in part:

(A) The village solicitor, city director of law, or similar chief legal officer for each municipal corporation within the territory of a municipal court shall prosecute all criminal cases brought before the municipal court for violations of the ordinances of the municipal corporation for which he is the solicitor, director of law, or similar

chief legal officer, or for violation of state statutes or other criminal offenses occurring within the municipal corporation for which he is the solicitor, director of law, or similar chief legal officer, except as provided in division (B) of this section and except that in the Auglaize, Hocking, Jackson, and Portage county municipal courts and the Port Clinton municipal court, the prosecuting attorney of the county shall prosecute all violations of state law occurring within the municipal corporations that are within the territory of the court. The village solicitor, city director of law, or similar chief legal officer of the municipal corporation in which the court is located shall prosecute all criminal cases brought before the court arising in the unincorporated areas within the territory of the municipal court, except that in the Auglaize county, Crawford county, Hamilton county, Hocking county, Jackson county, Madison county, Portage county, and Wayne county municipal courts and the Port Clinton municipal court, the prosecuting attorney of the county shall prosecute all violations of state law arising within such unincorporated areas.

The prosecuting attorney of the county given the duty of prosecuting violations of state law shall receive no additional compensation for assuming these additional duties, except that the prosecuting attorney of Hamilton, Portage, and Wayne counties shall receive compensation at the rate of four thousand eight hundred dollars per year, and the prosecuting attorney of Auglaize county shall receive compensation at the rate of one thousand eight hundred dollars per year, each payable from the county treasury of the respective counties in semimonthly installments. The village solicitor, city director of law, or similar chief legal officer shall perform the same duties, as far as they are applicable thereto, as are required of the prosecuting attorney of the county. He or his assistants whom he may appoint shall receive for such services additional compensation to be paid from the treasury of the county as the board of county commissioners prescribes.

(B) The prosecuting attorney of any county, other than Auglaize, Hocking, Jackson, and Ottawa, or Portage county, may enter into an agreement with any municipal corporation in the county in which he serves pursuant to which the prosecuting attorney prosecutes all criminal cases brought before the municipal court that has territorial jurisdiction over that municipal corporation for violations of the ordinances of the municipal corporation, and for violations of state statutes or other criminal offenses occurring within the municipal corporation. The prosecuting attorney of Auglaize, Hocking, Jackson, Ottawa, or Portage county may enter into an agreement with any municipal corporation in the county in which he serves pursuant to which the respective prosecuting attorney prosecutes all cases brought before the Auglaize, Hocking, Jackson, or Portage county municipal court or the Port Clinton municipal court for violations of the ordinances of the municipal corporation or for criminal offenses other than violations of state law occurring within the municipal corporation. (Emphasis added.)

Pursuant to R.C. 1901.34, the chief legal officer of each municipal corporation within the territory of a municipal court has a duty to prosecute actions for violations of state statutes brought before the court for criminal offenses occurring within the municipal corporation, except that in certain municipal courts the county prosecuting attorney has a duty to prosecute violations of state law occurring in municipal corporations within the municipal court's territory. Where violations of state law occur in unincorporated areas within the territory of a municipal court, it is generally the duty of the chief legal officer of the municipal corporation in which the municipal court is located to prosecute such criminal cases, except that in certain municipal courts the county prosecuting attorney has a duty to prosecute such cases. R.C. 1901.34(B) provides that in most counties, the prosecuting attorney may enter into an agreement with any municipal corporation within the county and pursuant to such agreement, the prosecuting attorney may

prosecute all criminal cases for violations of state statutes occurring within the municipal corporation when such cases are brought before the municipal court having territorial jurisdiction over the municipal corporation. Thus, criminal actions for violation of R.C. 3704.05(A) through(H) may be prosecuted in municipal courts by either the chief legal officer of a municipal corporation or a county prosecuting attorney as directed by R.C. 1901.34.

In addition to the general authority of the chief legal officer of a municipal corporation or the county prosecuting attorney to prosecute criminal actions for violations of R.C. 3704.05(A) through (H) in a municipal court, I note that R.C. 3704.06 confers upon the Attorney General certain authority to prosecute such violations. R.C. 3704.06 states, in pertinent part:

(A) The attorney general, upon the request of the director of environmental protection, shall prosecute any person who violates section 3704.05 of the Revised Code.

(B) The attorney general, upon request of the director, shall bring an action for an injunction, civil penalty, or any other appropriate proceedings in any court of competent jurisdiction against any person violating or threatening to violate section 3704.05 of the Revised Code. The court shall have jurisdiction to grant prohibitory and mandatory injunctive relief and to require payment of a civil penalty upon the showing that such person has violated Chapter 3704. of the Revised Code or regulations adopted thereunder.

As concluded by my predecessor in 1977 Op. Att'y Gen. No. 77-016, R.C. 3704.06 does not limit or repeal the power of county prosecutors or the chief legal officers of municipal corporations to prosecute criminal actions for violations of R.C. 3704.05, "but rather enlarges the power of the Attorney General, enabling him to bring criminal prosecutions for violations of R.C. 3704.05." Op. No. 77-016 at 2-53. Since a municipal court has jurisdiction over misdemeanors, the Attorney General, upon the request of the Director of Environmental Protection, may, pursuant to R.C. 3704.06, prosecute actions for violations of R.C. 3704.05(A) through(H) in municipal courts.

Your third question asks whether local air enforcement agencies can request a city director of law or county prosecutor to institute criminal proceedings for open burning violations which have occurred within their jurisdictions. Information provided by your office indicates that your reference to "local air enforcement agencies" means "any city or general health district or political subdivision" to which the Director of Environmental Protection may delegate his enforcement and monitoring powers and duties under R.C. 3704.03(P). It is my understanding that your question is whether a city law director or county prosecutor is under the same duty to prosecute actions for violations of R.C. 3704.05 upon request of local air enforcement agencies as is the Attorney General upon request of the Director of Environmental Protection.

Pursuant to R.C. 3704.03(P), the Director of Environmental Protection may: "Delegate to any city or general health district or political subdivision of the state any of his enforcement and monitoring powers and duties, other than rule making powers, as the director elects to delegate. . . . Technical and other services shall be performed, insofar as practical, by personnel of the environmental protection agency." As stated in Op. No. 77-016 at 2-51: "This section provides a vehicle whereby certain governmental entities may exercise powers reserved in the first instance to the Director. However, it does not provide for these entities to exercise greater or additional powers than those delegated to the Director by the General Assembly."

The Director's authority with regard to the prosecution of criminal actions for violations of R.C. 3704.05 is merely to request that the Attorney General bring such actions. Upon request of the Director, the Attorney General has the authority to prosecute violations of R.C. 3704.05.<sup>2</sup> R.C. 3704.06. The Director does not,

<sup>2</sup> I note that, with respect to the prosecution of criminal actions, prosecuting attorneys maintain a great deal of discretion. United States v. Robbins, 32 Ohio Misc. 113, 337 F.Supp 1050 (N.D. Ohio 1972). The

however, have similar statutory authority in relation to county prosecutors or city law directors. Thus, although the Director may delegate certain of his enforcement and monitoring powers and duties to local air enforcement agencies, such delegation would not establish the same relationship between such agencies and the county prosecutors or city law directors as exists between the Director of Environmental Protection and the Attorney General with regard to the prosecution of violations of R.C. 3704.06.

It is, therefore, my opinion, and you are advised, that:

1. Pursuant to R.C. 1901.20 and R.C. 2931.041, municipal courts have jurisdiction over criminal prosecutions for violations of R.C. 3704.05(A) through (H). (1978 Op. Att'y Gen. No. 78-001, overruled.)
2. County prosecuting attorneys or city directors of law have authority to prosecute criminal actions for violations of R.C. 3704.05(A) through (H) in municipal courts in accordance with the provisions of R.C. 1901.34.
3. Where the Director of Environmental Protection has delegated certain of his monitoring and enforcement powers and duties to city or general health districts or political subdivisions under R.C. 3704.03(P), such delegation does not authorize such city or general health districts or political subdivisions to direct that a city director of law or county prosecuting attorney prosecute criminal actions for violations of R.C. 3704.05.

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determination as to whether to prosecute a particular action is within the prosecutor's discretion. See State v. Wolery, 46 Ohio St. 2d 316, 348 N.E.2d 351 (1976) (cert denied, 429 U.S. 932 (1976)); State v. Lamp, 59 Ohio App. 2d 125, 392 N.E.2d 1090 (Summit County 1977).