

1076.

VILLAGE MARSHAL—ARREST — WARRANT — VIOLATION
 LAWS RELATING TO MOTOR VEHICLES—MAYOR—
 FOREIGN VILLAGE—JUSTICE OF PEACE—COMMON
 PLEAS COURT — VIOLATION — MUNICIPAL ORDINANCE,
 STATE LAW — MISDEMEANOR — CRIMINAL
 CASE—TRIAL BY JURY — JURISDICTION — PENALTY —
 FINE—IMPRISONMENT—BAIL.

SYLLABUS:

1. *A village marshal may not arrest without a warrant any person whom he finds violating the laws relating to motor vehicles outside the limits of the village in which he is elected, where such violation amounts only to a misdemeanor.*

2. *If a village marshal, without a warrant, arrests a person whom he finds violating the motor vehicle laws within the limits of the village in which he is elected and such offense amounts to a misdemeanor, he may take such arrested person before the mayor of another village in the county without first ascertaining if the mayor of his own village is available to try the case.*

3. *If a village marshal pursuant to the command of a warrant arrests a person within the limits of the village in which he is elected or appointed, for an offense under the laws relating to motor vehicles, he may take such arrested person before the mayor of another village in the county without first ascertaining if the mayor of his own village is available to try the case.*

4. *If a village marshal arrests a person whom he finds violating the laws relating to motor vehicles within the limits of the village for which he is elected and such act also constitutes a violation of a municipal ordinance of said village, such marshal may take such person before the mayor of another village in the county and charge him with such violation of the state law.*

5. *A village marshal may execute warrants issued by any justice of the peace or mayor in the county wherein the village in which he is elected is situated when such warrants are issued pursuant to an affidavit charging a violation of the motor vehicle laws of the state.*

6. *A marshal may not execute a mittimus or execution issued in a criminal case by a court or magistrate other than the mayor of the village in which he is elected.*

7. *A mayor of a village has final jurisdiction co-extensive with the county of offenses under the motor vehicle laws of the state amounting to misdemeanors where (a) the accused is not entitled to trial by jury by the Constitution, (b) the accused being entitled to trial by jury by the Constitution, subscribes to a waiver thereof in writing which is filed in*

the case before commencement of the trial, or (c) the accused being entitled to trial by jury by the Constitution, subscribes to a request for a trial by jury before the mayor which is filed in the case before commencement of the trial.

8. *A mayor of a village may refuse to permit a person brought before him charged with the violation of the laws of the state relating to motor vehicles for which the penalty prescribed by law is a fine less than fifty dollars without imprisonment, to give bail for his appearance in common pleas court if indicted by the grand jury, and such mayor may exercise final jurisdiction in such case.*

COLUMBUS, OHIO, August 22, 1939.

COL. LYNN BLACK, *Superintendent, State Highway Patrol, Columbus, Ohio.*

DEAR SIR: Your recent request for my opinion reads as follows:

"The State Highway Patrol has found a practice existing in certain parts of the State wherein certain village marshals make deliberate patrols, outside their villages, for the purpose of making arrests and taking the offenders to any court in the county they desire. In many cases the marshals admit they charge the offenders on state affidavits for the sole purpose of collecting costs to which they are not entitled when they make an arrest under a village ordinance.

We would be grateful for an opinion from your office, the weight of which we believe would clarify this confusing situation.

We submit the following questions for your consideration:

1. (a) Has a Village Marshal the power to make an arrest on a misdemeanor involving the Motor Vehicle Laws of the State of Ohio on a State Highway outside (without) the limits of the village for which he is elected Marshal—on sight and without a warrant? (b) Having made above arrest, can the Marshal take the accused to any court in the county for trial or must he try the accused in the Mayor's Court for whom he serves as Marshal?

2. (a) Can a Village Marshal after having made an arrest on a misdemeanor involving the Motor Vehicle Laws of the State of Ohio within the confines of his village limits, take the accused to the Mayor's Court of another village in the said county without first ascertaining if the Mayor of his own village is available to try the case and is not absent at the time? (b) If in the above case the village has an ordinance covering the violation

must the Marshal try the case as a violation of the village ordinance or can he take the accused on a state affidavit even unto a Mayor's Court other than the village for which he is elected Marshal?

3. (a) Can a Village Marshal serve warrants on state affidavits involving misdemeanors under the Motor Vehicle Laws of the State of Ohio—serve such warrants from any Justice of the Peace or Mayor's Court in the county? (b) Can a Village Marshal serve a mittimus, execution papers or any writs, etc., from any court other than the Mayor's Court for whom he is elected as Village Marshal?

4. (a) Has the Mayor of a village final jurisdiction on any misdemeanor involving the Motor Vehicle Laws of the State of Ohio on an affidavit on same brought to his court by a Village Marshal from another village in the county who has arrested the accused on sight and without a warrant in any part of the county? (b) If in the above case, the fine is prescribed in the specific section of law as having a maximum fine of less than \$50.00 and there is no jail sentence involved, has the Mayor final jurisdiction and may he refuse to allow the accused to post bond and be bound over to the Grand Jury of that county."

1. The right, power and duty of a village marshal to make arrests are set forth in Sections 4386 and 13432-1, General Code, which respectively read as follows:

Sec. 4386.

"He shall suppress all riots, disturbances and breaches of the peace and to that end may call upon the citizens to aid him. He shall arrest all disorderly persons in the corporation and pursue and arrest any person fleeing from justice in any part of the state. He shall arrest any person in the act of committing any offense against the laws of the state or the ordinances of the corporation, and forthwith bring such person before the mayor or other competent authority for examination or trial, and he shall receive and execute any proper authority for the arrest and detention of criminals fleeing or escaping from other places or states."

Sec. 13432-1.

"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."

Neither of these two statutes places any territorial limits upon the power of a village marshal to make arrests without a warrant in cases of misdemeanor. However, as a general rule, a peace officer has no authority to make arrests without a warrant outside of the territorial jurisdiction in which he is elected or appointed, unless specifically otherwise authorized by law. In 5 C. J., 422, Section 57, the rule is stated as follows:

"When acting within the state as a peace officer without a warrant, or when acting under a warrant directed to him by description of his office, or directed generally to the class of officers to which he belongs, a peace officer may arrest in his official capacity *only within the limits of the geographical or political subdivision* of the state of which he is an officer, except as otherwise provided by statute." (Emphasis the writer's.)

In Lanning on Arrest and Prosecution, at page 112, I find the following statement:

"This jurisdiction of the mayor, in criminal matters, is set forth in Section 4542, as co-extensive with the county while the jurisdiction of the marshal, except in cases of felonies is confined to cases arising *within the municipality*. * * *."

I also find the rule stated in 4 Am. Jur., 35, Section 51, as follows:

"A public officer appointed as a conservator of the peace for a particular county or municipality as a general rule has no official power to apprehend offenders beyond the boundaries of the county or district for which he has been appointed."

It must therefore be regarded as the law of Ohio that a village marshal has no power or authority to make an arrest without a warrant outside the limits of the village in which he is elected or appointed for a violation of the laws relating to motor vehicles when such violation amounts only to a misdemeanor. This conclusion makes it unnecessary to give any consideration to the second part of your first question.

2. The first part of your second question involves the right of a village marshal who makes an arrest within the limits of the village for which he is elected or appointed, for a violation of the laws relating to

motor vehicles constituting a misdemeanor, to take the arrested person before the mayor of another village in the county without first ascertaining if the mayor of the village in which such marshal is elected or appointed is available to hear the case. In this connection, your attention is directed to Sections 13432-3 and 13432-19, General Code, which respectively provide as follows:

Sec. 13432-3.

“When a peace officer has arrested a person without a warrant, he 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.”

Sec. 13432-19.

“A warrant shall contain a copy of the affidavit inserted therein, or annexed thereto, or shall recite the substance of the accusation and command the officer to whom issued, forthwith, to take the accused and bring him before the magistrate or court issuing such warrant, or other magistrate of the county having cognizance of the case, to be dealt with according to law. The following shall be sufficient form of warrant: The State of Ohio,County, ss: To the Sheriff (or other officer) greeting: Whereas, there has been filed with me an affidavit, of which the following is a copy: (here copy the affidavit); These are therefore to command you to take the said E. F., if he be found in your county, or, if he is not found in your county, that you pursue after him in any other county in this state, and take and safely keep the said E. F., so that you have his body forthwith before me or some other magistrate of said county, to answer the said complaint, and be further dealt with according to law. Given under my hand this..... day of.....19.... A. B., Justice of the Peace.”

It will be noted that Section 13432-3 requires a peace officer making an arrest without a warrant to take the person arrested without delay before a court or magistrate having jurisdiction of the offense. It does not require him necessarily to take such person before the nearest or most convenient court nor in the case of a marshal does it require that he take the arrested person before the mayor of the village in which he has been elected. The officer is merely required to take the arrested person before a court or magistrate having jurisdiction of the offense. In this respect Section 13432-3, supra, differs from Section 13432-4, General

Code, which provides that where a private person makes an arrest he shall, without unnecessary delay, take the person arrested before the most convenient court or magistrate authorized to issue a warrant or deliver such person to a peace officer, who must without unnecessary delay take such person before such court or magistrate.

If such arrest is made by reason of the command of a warrant, such Section 13432-19, *supra*, provides that the officer to whom it is issued take the accused and bring him before the court or magistrate issuing the warrant, or some other magistrate of the county having cognizance of the case.

In order to determine whether a marshal who makes an arrest within the limits of his own village pursuant to the command of a warrant may take the arrested person before the mayor of another village in the county, it must be determined whether the mayor of such other village would have cognizance or jurisdiction of the offense. Section 4536, General Code, gives to the mayor of a village final jurisdiction co-extensive with the county in prosecutions for misdemeanors unless the accused is, by the constitution, entitled to a trial by jury. Section 4537, General Code, provides that the mayor of a village shall have jurisdiction in such cases, notwithstanding the right to a jury, if a written waiver subscribed by the accused is filed in the case before the commencement of the trial. Section 4540, General Code, provides that a village mayor may summon a jury and try the case notwithstanding the accused has a right to the jury which he has not waived, if a request for such trial subscribed by the accused is filed in the case before the commencement of the trial. In any criminal proceeding not provided for in said sections a village mayor has jurisdiction throughout the county concurrent with justices of the peace. It is therefore clear that a village mayor has jurisdiction, either final or as an examining court depending on the penalty prescribed or the action of the accused, of an offense against the laws relating to motor vehicles constituting a misdemeanor, even though such offense be committed in another village in the county.

The second part of your second question does not disclose whether the arrest is assumed to be made with or without a warrant. If it is made pursuant to the command of a warrant issued by the mayor of a village because of an alleged violation of an ordinance of such village, then the arrested person should be taken before such mayor because he only would have jurisdiction to hear the case. On the other hand, if the marshal makes an arrest within the limits of the village in which he has been elected, for an act constituting a violation of an ordinance of the village and also a violation of the motor vehicle laws of the state, he may take the arrested person before the mayor of such village or the mayor of another village within the county and charge such person with a violation of the state law. Such officer may *also* take the arrested person before the mayor of the village in which he has been elected and charge

him with a violation of the ordinance. Where the same act constitutes a violation both of a municipal ordinance and a state statute, the offender may be prosecuted for both violations. See *State v. Shimman*, 122 O. S., 522. However, when the officer wishes to file a charge of violating a state law, he may choose to do so with any magistrate or court having jurisdiction.

3. The first part of your third question involves the right of a village marshal to serve and execute warrants issued by any justice of the peace or mayor in the county on affidavits charging a misdemeanor under the state laws relating to motor vehicles. Section 13432-1, *supra*, makes the marshal a "peace officer." This section is the first section of Chapter 11 of Title II of Part Fourth of the General Code. Section 13432-9, which is also contained in said Chapter 11, 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."

Inasmuch as Section 13422-1, General Code, provides that the term "magistrate" shall include mayors of municipal corporations, it is clear that warrants issued by a mayor may be directed to and executed by the marshal of a village in the county other than the village in which the mayor holds office.

The second part of your third question concerns the authority of a village marshal to serve a mittimus, execution papers, writs, etc., issued by any court other than that of the mayor of the village in which he is elected. I assume that your question is meant to include only such writs as are issued in criminal cases. Section 13454-1, General Code, reads as follows:

"When a person convicted of a misdemeanor is sentenced to imprisonment in jail or the workhouse, the judge or magistrate shall order him into the custody of the sheriff or constable, who shall deliver him, with the record of his conviction, to the jailer or keeper, in whose custody he shall remain in the jail of the county or workhouse, as the case may be, until the term of his imprisonment expires or he is otherwise legally discharged."

This section does not authorize a marshal to deliver a prisoner to the keeper of the county jail and I have found no other section which would authorize him to do so where the sentence is imposed by a court or magistrate other than the mayor of the village in which he is elected. Since there is no statute giving the marshal authority to execute process, other than warrants, in criminal cases, issued by courts or magistrates other than the mayor of the village in which such marshal is elected, it would seem that the marshal has no authority to do so.

4. Your fourth question involves the final jurisdiction of a village mayor in cases of violation of the state laws relating to motor vehicles amounting to a misdemeanor. Your question is divided into two parts, but since they are closely related, I shall discuss them together. Section 4536, General Code, provides as follows:

“He shall have final jurisdiction to hear and determine any prosecution for a misdemeanor unless the accused is, by the constitution, entitled to a trial by jury. His jurisdiction in such cases shall be co-extensive with the county, and in keeping his dockets and files, making report to the county auditor, disposing of unclaimed moneys, and in purchasing his criminal docket and blanks for state cases, shall be governed by the laws pertaining to justices of the peace.”

By reason of the provisions of this section, the mayor of a village is given final jurisdiction in any prosecution for a misdemeanor unless the accused, by the Constitution, is entitled to trial by jury. His jurisdiction in such case is county wide. An accused is entitled to trial by the Constitution only where imprisonment is part of the penalty. *Inwood v. State*, 42 O. S., 186; *Sheward v. State*, 117 O. S., 586; and *Weimer v. State*, 118 O. S., 129.

Section 4537, General Code, is quoted as follows:

“He shall have the jurisdiction in the cases mentioned in the last two sections, notwithstanding the right to a jury, if before the commencement of the trial, a waiver in writing, subscribed by the accused, is filed in the case.”

This section permits the mayor to exercise final jurisdiction notwithstanding the right to a jury trial where the accused subscribes to a written waiver thereof which is filed in the case before commencement of the trial. I am of the opinion that the right to a jury referred to in this section means the constitutional right and not the statutory right prescribed by Section 13443, General Code, which I quote as follows:

“At any trial, in any court, for the violation of any statute of the state of Ohio, or of any ordinance of any municipality,

except in cases where the penalty involved does not exceed a fine of fifty dollars, the accused shall be entitled to be tried by a jury drawn in the manner prescribed by law for the selection of jurors.”

Section 4537, *supra*, is in the same chapter and follows immediately after Section 4536, *supra*, and the right to a jury referred to in Section 4537, must mean the constitutional right referred to in Section 4536. Moreover, Section 4537, *supra*, was enacted and in existence a great many years before Section 13443, *supra*.

Section 4540, General Code, provides as follows:

“In misdemeanors prosecuted in the name of the state he may summon a jury and try the case notwithstanding the accused has a right to a jury which he has not waived, if a request for such trial subscribed by the accused is filed in the case, before the commencement of the trial. In such case the trial shall be had on the affidavit in the same manner and with like effect as a trial is had on indictment for such offense in the court of common pleas.”

For the reasons above stated, I am of the opinion that the right to a jury referred to in this section also means the constitutional right and not the statutory right. By reason of this section where the accused is entitled to trial by jury by the Constitution in the case of a misdemeanor prosecuted in the name of the state, if a request for such trial subscribed by the accused is filed in the case before commencement of the trial, the mayor of a village may summon a jury and try the case. In view of the provisions of Section 4536, *supra*, which is in *pari materia* with Section 4540, I am of the opinion that the mayor's jurisdiction under Section 4540 is co-extensive with the county.

In consonance with the foregoing, I am of the opinion that the mayor of a village has final jurisdiction co-extensive with the county in a case involving a misdemeanor charged under the motor vehicle laws where (1) the accused is not entitled by the Constitution to trial by jury, (2) the accused, being entitled to trial by jury by the Constitution, subscribes to a written waiver thereof which is filed in the case before commencement of the trial and (3) the accused, being entitled to a trial by jury under the Constitution, subscribes to a request for trial by jury before the mayor which is filed in the case before the commencement of the trial.

Clearly the mayor may exercise final county wide jurisdiction where the accused is not entitled to trial by jury by the Constitution. If the fine prescribed for an offense is less than fifty dollars and there can be no jail sentence, the mayor of a village may exercise final jurisdiction

and may refuse to put the accused under bond to await action by the grand jury.

The mere fact that the defendant has been arrested without authority of law by the marshal of one village who has filed an affidavit against the defendant before the mayor of another village will not operate to deprive such mayor of jurisdiction given to him by law. The marshal might be liable for false arrest, but the mayor would nevertheless have jurisdiction.

Specifically answering your questions, I am of the opinion that :

1. A village marshal may not arrest without a warrant any person whom he finds violating the laws relating to motor vehicles outside the limits of the village in which he is elected, where such violation amounts only to a misdemeanor.

2. If a village marshal, without a warrant, arrests a person whom he finds violating the motor vehicle laws within the limits of the village in which he is elected and such offense amounts to a misdemeanor, he may take such arrested person before the mayor of another village in the county without first ascertaining if the mayor of his own village is available to try the case.

3. If a village marshal pursuant to the command of a warrant arrests a person within the limits of the village in which he is elected or appointed, for an offense under the laws relating to motor vehicles, he may take such arrested person before the mayor of another village in the county without first ascertaining if the mayor of his own village is available to try the case.

4. If a village marshal arrests a person whom he finds violating the laws relating to motor vehicles within the limits of the village for which he is elected and such act also constitutes a violation of a municipal ordinance of said village, such marshal may take such person before the mayor of another village in the county and charge him with such violation of the state law.

5. A village marshal may execute warrants issued by any justice of the peace or mayor in the county wherein the village in which he is elected is situated when such warrants are issued pursuant to an affidavit charging a violation of the motor vehicle laws of the state.

6. A marshal may not execute a mittimus or execution issued in a criminal case by a court or magistrate other than the mayor of the village in which he is elected.

7. A mayor of a village has final jurisdiction co-extensive with the county of offenses under the motor vehicle laws of the state amounting to misdemeanors where (a) the accused is not entitled to trial by jury by the Constitution, (b) the accused being entitled to trial by jury by the Constitution, subscribes to a waiver thereof in writing which is filed in the case before commencement of the trial, or (c) the accused being

entitled to trial by jury by the Constitution, subscribes to a request for a trial by jury before the mayor which is filed in the case before commencement of the trial.

8. A mayor of a village may refuse to permit a person brought before him charged with the violation of the laws of the state relating to motor vehicles for which the penalty prescribed by law is a fine less than fifty dollars without imprisonment, to give bail for his appearance in common pleas court if indicted by the grand jury, and such mayor may exercise final jurisdiction in such case.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1077.

BOND—MARY MARGARET NOLAN, STENOGRAPHER-BOOK-KEEPER, \$10,000.00, DEPARTMENT OF PUBLIC WORKS, DIVISION OF STATE ARCHITECT AND ENGINEER.

COLUMBUS, OHIO, August 23, 1939.

HON. EARL GRIFFITH, *Secretary of State, Columbus, Ohio.*

DEAR SIR: I am transmitting to you herewith the official bond in the sum of \$10,000.00 of Mary Margaret Nolan, stenographer-bookkeeper, in the office of the Department of Public Works, Division of State Architect and Engineer, with the Massachusetts Bonding and Insurance Company as surety.

Finding said bond in proper legal form, I have noted my approval thereon.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1078.

BONDS — CITY OF ALLIANCE, STARK COUNTY, \$35,000.00.

COLUMBUS, OHIO, August 23, 1939.

Retirement Board, Public Employes Retirement System, Columbus, Ohio.

RE: Bonds of the City of Alliance, Stark County, Ohio,
\$35,000.

GENTLEMEN: I have examined the transcript of proceedings relative to the above bonds purchased by you. These bonds comprise part of