

## OPINION NO. 74-009

## Syllabus:

1. A mayor's court is not deprived of original jurisdiction over criminal offenses, committed to its jurisdiction by statute, by the fact that the fines and fees collected by such court constitute a substantial part of the income of the municipality;

2. However, since, in such a case, the mayor has an interest in the cases which come before him, he should disqualify himself and have the cases transferred, under R.C. 2937.20, to the county judge having concurrent jurisdiction over the particular offense;

3. The bond posted in the mayor's court under its original jurisdiction will be transferred, together with the other papers in the cause, to the proper county court judge.

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To: John R. Cole, Adams County Pros. Atty., West Union, Ohio  
By: William J. Brown, Attorney General, February 8, 1974

I have your request for an opinion which reads as follows:

"The County Court has requested I seek your opinion as to the procedure to be followed in getting a case involving a village ordinance on a not guilty plea to the County Court as a result of the decision by the United States Supreme Court in Ward v. Village of Monroeville, decided November 14, 1972.

"Specifically, our court would like to know if the violation of the ordinance has to be refiled in County Court and if so, what about the bond that is posted in the Mayor's Court or does the Mayor's Court merely certify the case to County Court and if this is the method; what procedure and papers are necessary for the County Court to have jurisdiction?"

Some of the effects of Ward v. Monroeville, 409 U.S. 57 (1972), were discussed in a very recent opinion. Opinion No. 74-001, Opinions of the Attorney General for 1974. I pointed out there that, while the Monroeville decision did not abolish the jurisdiction of the mayors' courts, it did drastically reduce the number of criminal cases within the jurisdiction of such a court, in which the defendant could get a fair trial before a disinterested magistrate. Only where the mayor's court does not provide any substantial portion of the municipality's finances may the mayor proceed to trial upon a plea of not guilty; and, if the court does contribute

substantially to the municipal treasury, the mayor may not even accept a plea of guilty or no contest and impose sentence unless such sentence is mandatory.

Since the mayors' courts still retain an original jurisdiction over the cases which have been assigned to them in the Revised Code (R.C. 1905.01, 1907.031), I conclude, in answer to your first question, that it is unnecessary that a charge pending in such a court be refiled in the county court having concurrent jurisdiction (R.C. 1907.011, 1907.012, 1907.031, 1907.071, 2931.02). The next question is the procedure to be followed to effect a transfer of the case from the mayor's court to the county court.

If the mayor, upon consideration of a charge filed in his court, realizes that he has an interest in the outcome within the terms of the Monroeville decision, he should, under long recognized principles, disqualify himself. As long ago as 1855 the Supreme Court of Ohio, in Gregory v. C.C. & C. Railroad Co., 4 Ohio St. 675, 678, quoted the following language from a Massachusetts case:

"It is very certain, that, by the principles of natural justice and of the common law, no man can lawfully sit as judge in a case in which he may have a pecuniary interest. \* \* \*"

The Court then set forth the following procedure for self-disqualification and transfer of the cause to another court (4 Ohio St. at 679):

"We think, for the administration of justice, the safe way is, in all cases, for interested judges to decline acting in such cases; and where it appears, on the record, that they were interested, and acted on questions of fact, and especially when they were to select the jury who try the facts, they should refuse to sit, and make known their interest at the earliest stage of the proceedings, that the case may, under our statute, be transferred to an adjoining county. \* \* \*" (Emphasis added.)

The Canons of Judicial Ethics adopted by the Supreme Court provide in Canon 26 (176 Ohio St. lxxxiii):

\* \* \* \* \* \* \* \*

"Where he has a personal investment in an enterprise involved in litigation in the court, he should disqualify himself from acting in such litigation unless the interest is so slight that he does not believe it could affect the impartial performance of his official duties and the parties to such litigation are so informed and do not object.

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(Emphasis added.)

The general subject has been summarized in 31 Ohio Jur. 2d 432 in the following language:

"It often happens that a judge solely on his own motion steps down and gives place to another, conceding that he might be prejudiced and that he is therefore disqualified to sit in the case; and not only may a judge refuse to sit upon such an occasion, but it has been recognized as highly proper and becoming to the dignity of the court that he do so. Thus, where it appears on the record that judges are interested and have acted on questions of fact, especially when they are to select the jury who try the facts, they should refuse to sit, and make known their interest at the earliest stage of the proceedings. (Footnotes omitted.)

Pursuant to this principle, a mayor, who decides that he is interested in a case pending in his court within the rule of the Monroeville decision, should recuse himself by filing a statement with the clerk of his court. This will open the way for a transfer of the case to the proper county court under R.C. 2937.20 which provides as follows:

"When a magistrate or a judge of a court inferior to the court of common pleas is interested in a cause pending before him, or is related to or has a bias or prejudice either for or against a party to such cause or to his counsel, or is otherwise disqualified to sit in such cause, on the filing of an affidavit of such party or his counsel, setting forth the fact of such interest, relationship, bias, prejudice, or disqualification, the clerk or deputy clerk of such court, or such magistrate, shall enter the filing of such affidavit on the docket in said cause, and forthwith notify the presiding judge, or the chief justice of the court of common pleas, or if there is no such officer, then a judge of the court of common pleas or if such judge is not available then a judge of the probate court of such county, who shall proceed without delay to examine into said affidavit, and if he finds from all the evidence that such interest, relationship, bias, prejudice, or disqualification exists, he shall designate another magistrate of the township or county, or another judge of said inferior court, or the court of common pleas to hear and determine said cause. The judge or magistrate so designated shall proceed to try such cause. Such affidavit must be filed not less than twenty-four hours before the time set for the hearing of said cause, unless such filing is unavoidably prevented. This section applies to criminal and civil proceedings."  
(Emphasis added.)

Although this Section speaks only of an affidavit filed by a party alleging that the magistrate has an interest in the outcome, the only reasonable interpretation of the statute is that the General Assembly intended the prescribed procedure to be followed, regardless of the manner in which the interest of the magistrate is first made a matter of record. The term, "magistrate," includes, of course, a mayor holding a mayor's court as well as all other judges inferior to the court of common pleas. R.C. 2931.01 (A).

It should be noted that it has frequently been held that the issue of a judge's interest in the cause before him may possibly be waived if not properly raised prior to final judgment. Tari v. State, 117 Ohio St. 481 (1928); Ashland Bank & Sav. Co. v. Houseman, 5 Ohio App. 165 (1915); cf. Opinion No. 69-117, Opinions of the Attorney General for 1969. Although the opinion of the Supreme Court contains some dicta on this point, the Court found it unnecessary to decide it since the Supreme Court of Ohio had passed upon the petitioner's constitutional challenge despite his failure to raise the issue of the judge's interest under R.C. 2937.20. Ward v. Village of Monroeville, supra, 409 U.S. at 60-61.

It should be noted also that a bill, presently pending before the General Assembly, would amend R.C. 1905.01 so as to automatically terminate the mayor's jurisdiction over any criminal charge upon a plea of not guilty and transfer the case to the municipal or county court in the territory in which the alleged offense was committed. See H.B. No. 113, presently pending in the House Judiciary Committee.

I conclude, therefore, that, when the issue of a mayor's interest in a cause pending before him has been properly raised, either by the mayor's own statement or by the affidavit of a party, the clerk of the mayor's court should promptly notify the chief judge of the court of common pleas who should then designate the county judge having concurrent jurisdiction with the mayor to hear and determine the cause.

Your final question, as to the bond posted in the mayor's court, has already been answered by what has been said in response to the second question. Since the setting of the amount of a bond is a discretionary matter, the mayor should not act on the request if he realizes that he is disqualified under the Monroeville test. But if he has done so, the bond will be transferred along with the other papers in the cause to the county judge, and any relief should be sought from him.

In specific answer to your request it is my opinion, and you are so advised, that:

1. A mayor's court is not deprived of original jurisdiction over criminal offenses, committed to its jurisdiction by statute, by the fact that the fines and fees collected by such court constitute a substantial part of the income of the municipality;

2. However, since, in such a case, the mayor has an interest in the cases which come before him, he should disqualify himself and have the cases transferred, under R.C. 2937.20, to the county judge having concurrent jurisdiction over the particular offense;

3. The bond posted in the mayor's court under its original jurisdiction will be transferred, together with the other papers in the cause, to the proper county court judge.