

**OPINION NO. 90-054****Syllabus:**

A municipal court may, pursuant to R.C. 2317.06(B), when the interests of justice demand, order a subpoena issued directing the sheriff of the county in which the municipal court is located to deliver an individual in the custody of the Department of Rehabilitation and Correction or the Department of Youth Services to the court for the purpose of procuring the individual's testimony in a civil proceeding before the court.

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**To: Peter R. Seibel, Defiance County Prosecuting Attorney, Defiance, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, August 3, 1990**

I have before me your request for my opinion concerning a sheriff's responsibilities relative to the service of subpoenas issued by a municipal court located within the county served by the sheriff. You question whether a municipal court has the statutory authority to order a subpoena issued, directing the sheriff of the county in which the court is located to deliver an individual in the custody of the Department of Rehabilitation and Correction or the Department of Youth Services

to the court for the purpose of procuring the individual's testimony in a civil proceeding.

Initially, I note that in 1990 Op. Att'y Gen. No. 90-009 at 2-39, I stated that "if a municipal court has ordered a subpoena issued, directing the sheriff to bring a confined individual to the court, the sheriff must deliver the individual to the court or may be subject to a contempt proceeding." The sheriff may not, however, be found guilty of contempt of court for violating a court order, if the municipal court lacks either the jurisdiction<sup>1</sup> or the authority to order the issuing of the subpoena. See Op. No. 90-009 at 2-39. Therefore, as in Op. No. 90-009, I will examine the ability of a sheriff to challenge a subpoena directing him to bring a confined person before a municipal court on the grounds that such court lacked the authority to issue such a subpoena.

R.C. Chapter 1901 provides various sections related to the judges, jurisdiction, and procedures of municipal courts. With respect to the procedures to be utilized in civil proceedings brought in municipal courts, R.C. 1901.21(A) provides, in part:

In any civil case or proceeding for which no special provision is made in this chapter, the practice and procedure in the case or proceeding shall be the same as in courts of common pleas. If no practice or procedure for the case or proceeding is provided for in the courts of common pleas, then the practice or procedure of county courts shall apply.

See, e.g., *Carter-Jones Lumber Co. v. Eblen*, 167 Ohio St. 189, 206, 147 N.E.2d 486, 496-97 (1958) ("[t]he instant case originated in the Municipal Court where a jury is deemed waived unless demanded in writing as provided by rule of court. [See] Section 1901.24, Revised Code.<sup>2</sup> The statutes are silent, however, as to specific provisions concerning the subsequent waiver of a demanded jury in the Municipal Court, and, therefore, once a jury is demanded, sworn and seated in the Municipal Court, the provisions of Section 2315.20, Revised Code,<sup>3</sup> pertaining to the waiver of a jury in the Court of Common Pleas, are controlling so far as they are applicable by virtue of...Section 1901.21, Revised Code" (footnotes added)); *Toledo Edison Co. v. Allen*, 13 Ohio App. 3d 108, 110, 468 N.E.2d 373, 375 (Ct. App. Williams County 1983) ("in the absence of special procedure to the contrary in R.C. Chapter 1901, municipal courts, in aid of execution proceedings, have the power to issue all necessary orders for which similar power and authority is conferred upon the courts of common pleas under R.C. Chapter 2333"); *Hoerner v. Woods*, 108 Ohio App. 86, 88, 160 N.E.2d 541, 543 (Ct. App. Montgomery County 1958) ("[i]nasmuch as the Municipal Court Act contains no provision for filing motions for

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<sup>1</sup> Since your specific question concerns a municipal court's authority to order a subpoena issued which directs the sheriff to deliver a confined individual to the court for the purpose of procuring his testimony in a civil proceeding, I assume, for purposes of this opinion, that the municipal court has jurisdiction over the proceeding.

<sup>2</sup> R.C. 1901.24, as it existed when the case of *Carter-Jones Lumber Co. v. Eblen*, 167 Ohio St. 189, 147 N.E.2d 486 (1958) was decided, was repealed in its entirety by 1985-1986 Ohio Laws, Part I, 1569 (Am. Sub. H.B. 159, eff. Mar. 19, 1987). In its stead, the General Assembly enacted current R.C. 1901.24 which provides that an individual's right "to a jury trial in a municipal court is waived under the circumstances prescribed in the Rules of Civil Procedure or the Rules of Criminal Procedure." See Am. Sub. H.B. 159.

<sup>3</sup> The provisions of R.C. 2315.20 were repealed by 1969-1970 Ohio Laws, Part III, 3017 (Am. H.B. 1201, eff. July 1, 1971) as being in conflict with the Rules of Civil Procedure and, therefore, prima-facie superseded by the adoption of such rules.

judgment or for new trial, Sections 2323.18, 2323.181 and 2323.19, Revised Code,<sup>4</sup> pertaining to such procedure in Courts of Common Pleas, must be held to apply" (footnote added); *cf. Crumley v. Murphy*, 68 Ohio App. 2d 145, 145, 428 N.E.2d 452, 453 (Ct. App. Wayne County 1980) (the trial procedures outlined in R.C. Chapters 2315 and 2317 relating to the introduction of evidence apply to all proceedings in the small claims division of a municipal court). *But see Sterling Finance Co. v. Thornhill*, 25 Ohio Misc. 213, 215, 263 N.E.2d 925, 927 (Hamilton County Mun. Ct. 1970) (applied garnishment rules of county court rather than that of court of common pleas since the amount in controversy was less than the jurisdictional minimum of the courts of common pleas).

There are no special provisions in R.C. Chapter 1901 which concern the procedures whereby a municipal court may procure, in a civil proceeding, the testimony of a witness incarcerated in a penitentiary or reformatory<sup>5</sup> within this state or in the custody of the Department of Youth Services. However, R.C. 2317.06(B) authorizes a court of common pleas, if it is necessary in a civil action before it, to obtain the testimony of an individual in the custody of the Department of Rehabilitation and Correction or the Department of Youth Services. Said section provides:

(1) If it is necessary in a civil action before the court to procure the testimony of a person who is imprisoned in a workhouse, juvenile detention facility, jail, penitentiary, or reformatory<sup>6</sup> within this state, or who is in the custody of the department of youth services, the court shall require that the person's testimony be taken by deposition pursuant to the Civil Rules at the place of the person's confinement, unless the court determines that the interests of justice demand that the person be brought before the court for the presentation of his testimony.

(2) If the court determines that the interests of justice demand that a person specified in division (B)(1) of this section be brought before the court for the presentation of his testimony, the court shall order the person to be brought before it under the procedures set forth in division (B) or (C) of section 2945.47 of the Revised Code.

R.C. 2317.06(B), thus, authorizes a court of common pleas to obtain a confined individual's testimony for use in a civil proceeding either by deposition or by presentation of the individual before the court.

Under division (C) of R.C. 2945.47,<sup>6</sup> which is expressly incorporated into the provisions of R.C. 2317.06(B), a court of common pleas

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<sup>4</sup> Sections 2323.18, 2323.181, and 2323.19 of the Ohio Revised Code were repealed by Am. H.B. 1201. *See* footnote three, *supra*.

<sup>5</sup> Penitentiaries and reformatories located in the State of Ohio are administered by the Department of Rehabilitation and Correction. 1990 Op. Att'y Gen. No. 90-009 at 2-40 n.4; *see* R.C. 5120.05 (the Department of Rehabilitation and Correction "may maintain, operate, manage, and govern all state institutions for the custody, control, training, and rehabilitation of persons convicted of crime and sentenced to penal or reformatory institutions"). Individuals incarcerated in penitentiaries and reformatories within Ohio, are, thus, in the custody of the Department of Rehabilitation and Correction. Op. No. 90-009 at 2-40 n.4.

<sup>6</sup> R.C. 2945.47(B) authorizes a court to order a subpoena to be issued directing the keeper of a workhouse, juvenile detention facility, or jail within this state to deliver an imprisoned individual to the court for the purpose of giving testimony. Said division of R.C. 2945.47 has no relevance to your question since your concern is the transportation of witnesses in the custody of either the Department of Rehabilitation and Correction or the Department of Youth Services to municipal courts.

may order a subpoena to be issued directed to the sheriff of the county in which the indictment or grand jury proceeding is pending.<sup>7</sup> When a copy of the subpoena is presented by the sheriff to the warden of a penitentiary, to the superintendent of a state reformatory, or to the person in charge of the facility in which a juvenile is confined, he shall deliver the witness at the institution or facility to the sheriff who shall take him before the court at the time and place named in the subpoena and hold him until he is discharged by the court. When discharged, he shall be returned in the custody of the sheriff to the place of imprisonment from which he was taken. (Footnote added.)

Hence, a court of common pleas may, when the interests of justice demand, order a subpoena issued directing the sheriff of the county in which the court is located to bring before the court an individual in the custody of the Department of Rehabilitation and Correction or the Department of Youth Services for the purpose of procuring the individual's testimony in a civil proceeding before the court.

As indicated above, R.C. 1901.21(A) provides that in any civil proceeding before a municipal court, the procedures of a court of common pleas apply where no special provision is made in R.C. Chapter 1901. Since no special provision exists in R.C. Chapter 1901 regarding the procurement, in civil proceedings, of testimony from individuals imprisoned in penitentiaries or reformatories within this state or in the custody of the Department of Youth Services, I find that the provisions of R.C. 2317.06(B) are applicable in municipal courts.

Therefore, it is my opinion and you are hereby advised that a municipal court may, pursuant to R.C. 2317.06(B), when the interests of justice demand, order a subpoena issued directing the sheriff of the county in which the municipal court is located to deliver an individual in the custody of the Department of Rehabilitation and Correction or the Department of Youth Services to the court for the purpose of procuring the individual's testimony in a civil proceeding before the court.

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<sup>7</sup> As indicated in Op. No. 90-009 at 2-40 n.3, the Court of Common Pleas of Clermont County, in dictum, has stated that "a court may order a subpoena to be issued directing...the *sheriff of the county in which a state institution is located* to deliver the confined witness to court for the giving of testimony." *State v. Donnelly*, 17 Ohio Misc. 2d 1, 477 N.E.2d 1243 (C.P. Clermont County 1984) (emphasis added). Since your specific question, however, concerns the sheriff of the county in which the municipal court is located, I will address only that situation.