

OPINION NO. 90-009**Syllabus:**

A municipal court, pursuant to R.C. 2945.47(C), may 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 Ohio Department of Rehabilitation and Correction or the Department of Youth Services to the court for the purpose of obtaining the individual's testimony in any trial conducted under R.C. Chapter 2938.

To: Peter R. Seibel, Defiance County Prosecuting Attorney, Defiance, Ohio
By: Anthony J. Cobilebrezze, Jr., Attorney General, March 9, 1990

I have before me your request for my opinion regarding 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 Ohio Department of Rehabilitation and Correction or the Department of Youth Services to the court for the purpose of obtaining the individual's testimony in a criminal proceeding.

I note at the onset that an opinion of the Attorney General regarding a court's authority cannot authorize a public official to disregard any order of that court. When a municipal court issues a subpoena directed to the sheriff of the county in which the court is located, the sheriff, regardless of the court's authority to issue the subpoena, may be subject to a contempt proceeding if he fails to obey the commands contained in the subpoena.¹ See R.C. 2705.02 (setting forth the acts which may be punished as contempts); *Robertson v. Robertson*, 22 Ohio Law Abs. 26, 29 (Franklin County 1936) ("[c]ontempt always lies for the wilful failure to comply with or abide by the order of the court"). See generally *Zakany v. Zakany*, 9 Ohio St. 3d 192, 459 N.E.2d 870 (1984) (syllabus) ("[a] court has authority both under R.C. 2705.02(A) and on the basis of its inherent powers to punish the disobedience of its orders with contempt proceedings"). Hence, 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.

I note further that "[a]n individual against whom an order of a court is directed may violate such order and properly urge in his defense in a contempt proceeding that the order is void." *Petition for Green*, 172 Ohio St. 269, 273, 175 N.E.2d 59, 62 (1961), *rev'd on other grounds*, 369 U.S. 689 (1962); see *Hogan v. Hogan*, 29 Ohio App. 2d 69, 278 N.E.2d 367 (Cuyahoga County 1972); *Robrock v. Robrock*, 105 Ohio App. 25, 151 N.E.2d 234 (Summit County 1956), *modified*, 167 Ohio St. 479, 150 N.E.2d 421 (1958), *appeal dismissed mem. for the reason that no debatable constitutional question exists*, 170 Ohio St. 239, 163 N.E.2d 174 (1959); *State v. Morrow*, 57 Ohio App. 30, 11 N.E.2d 273 (Summit County 1937); *Frederick v. Owens*, 25 Ohio C.C. (n.s.) 581, 25 Ohio C.C. Dec. 538 (Cuyahoga County 1915), *appeal dismissed mem. sub nom. Owens v. Board of Educ.*, 95 Ohio St. 407, 116 N.E. 1085 (1916); *In re Thomas*, 52 Ohio Op. 375, 117 N.E.2d 740 (P. Ct. Hamilton County 1954). An order of the court is void when the court lacks either the jurisdiction² or the authority to enter the order. See *Hogan v. Hogan*; *Robrock v. Robrock*; *State v. Morrow*; *Frederick v. Owens*; *In re Thomas*. Consequently, if a municipal court lacks authority to order the issuing of a subpoena directing the sheriff to bring a confined individual before the court, the sheriff may not be found guilty of contempt of court.

You are concerned, therefore, with the ability of a sheriff to challenge a subpoena directing him to bring a confined individual before a municipal court on the grounds that the court lacked the authority to issue such a subpoena. R.C. 2945.47(C) delineates the procedures for obtaining the testimony in a criminal

¹ Municipal courts are empowered to punish for contempts. *In re Sherlock*, 37 Ohio App. 3d 204, 525 N.E.2d 512 (Montgomery County 1987); see R.C. 1901.13(A)(1); R.C. 2705.01; R.C. 2705.02.

² Your question only concerns a municipal court's authority to order a subpoena issued which directs the sheriff to deliver a confined individual to the court. As such, I assume, for purposes of this opinion, that the municipal court has jurisdiction over any case in which the court issues a subpoena directing the sheriff to deliver a confined individual to the court.

proceeding of a witness incarcerated in a penitentiary or reformatory within this state or in the custody of the Department of Youth Services. This section, provides:

If it is necessary in a criminal proceeding before the court to procure the testimony of a person who is imprisoned in a penitentiary or reformatory within this state, or who is in the custody of the department of youth services, the court may order a subpoena to be issued directed to the sheriff of the county in which the indictment or grand jury proceeding is pending.³ 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.)

Thus, pursuant to R.C. 2945.47(C), a court, in which an indictment or grand jury proceeding is pending, may 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.⁴

Only courts of common pleas are empowered to form grand juries and to conduct proceedings thereunder. Ohio R. Crim. P. 6(A) ("[t]he judge of the court of common pleas for each county, or the administrative judge of the general division in a multi-judge court of common pleas...shall order one or more grand juries to be summoned at such times as the public interest requires"); *State ex rel. Shoop v. Mitrovich*, 4 Ohio St. 3d 220, 221, 448 N.E.2d 800, 801 (1983) ("[t]he grand jury itself is under the control and direction of the court of common pleas"). See generally R.C. Chapter 2939 (setting forth the powers, selection, and duties of grand juries). Indictments are issued by grand juries to prosecute felonies and misdemeanors only in courts of common pleas. See R.C. 2939.22 ("[i]ndictments found by a grand jury shall be presented by the foreman to the court of common pleas, and filed with the clerk of the court of common pleas"); Ohio R. Crim. P. 7(A) ("[a] misdemeanor may be prosecuted by indictment or information in the court of common pleas"). As such, only courts of common pleas are explicitly authorized,

³ One court, 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, 1, 477 N.E.2d 1243, 1243 (C.P. Clermont County 1984) (emphasis added). Since your inquiry, specifically, concerns the sheriff of the county in which criminal proceedings are pending, I will only address that situation.

⁴ The language of R.C. 2945.47(C) specifically provides for the delivering of a witness "imprisoned in a penitentiary or reformatory within this state" to the court requesting the presence of the witness. In Ohio, penitentiaries and reformatories are administered by the Department of Rehabilitation and Correction. 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"). See generally R.C. 5120.03(B) ("[t]he director of rehabilitation and correction, by executive order, issued on or before December 31, 1988, shall eliminate the distinction between penal institutions and reformatory institutions"); R.C. Chapter 5143 (covering reformatories); R.C. Chapter 5145 (covering penitentiaries). Consequently, an individual imprisoned in a penitentiary or reformatory within this state is in the custody of the Department of Rehabilitation and Correction.

under R.C. 2945.47(C), to order subpoenas issued directing sheriffs to bring confined individuals before the court.

It is readily apparent from the foregoing that municipal courts are not directly empowered by R.C. 2945.47(C) to order subpoenas issued directing sheriffs to deliver confined individuals before such courts. The question, thus, becomes whether municipal courts have such power through the operation of another statute or rule. R.C. 2938.15 authorizes the application of certain sections of R.C. Chapter 2945 in trials conducted under R.C. Chapter 2938, which governs municipal courts. R.C. 2938.15 provides:

The rules of evidence and procedure, including those governing notices, proof of special matters, depositions, and joinder of defendants and offenses set forth in Chapter 2945. of the Revised Code, which are not, by their nature, inapplicable to the trial of misdemeanors, shall prevail in trials under Chapter 2938. of the Revised Code where no special provision is made in such chapter, or where no provision is made by rule of the supreme court adopted pursuant to section 2937.46 of the Revised Code.

Pursuant to R.C. 2938.02, the provisions of R.C. Chapter 2938

apply to trial on the merits of any misdemeanor, ordinance offense, prosecution for the violation of any rule or regulation of any governmental body authorized to adopt penal regulations, or to complaints to keep the peace, which may be instituted in and retained for trial on the merits in any court or before any magistrate inferior to the court of common pleas. (Emphasis added.)

Further, a municipal court has jurisdiction and authority to proceed to a final determination in any prosecution or case brought for the violation of any ordinance of any municipal corporation within its territory,⁵ any misdemeanor committed within the limits of its territory, any vehicle parking or standing resolution or regulation if certain conditions exist,⁶ and any appeal from a judgment or default judgment entered pursuant to R.C. Chapter 4521. R.C. 1901.20. Also, a municipal court, in the exercise of its criminal jurisdiction, is a magistrate's court inferior to the court of common pleas. See *City of Cincinnati v. Nunnolley*, 20 Ohio App. 2d 163, 252 N.E.2d 295 (Hamilton County 1969) (syllabus, paragraph two); *City of Cleveland v. Gunn*, 8 Ohio App. 2d 301, 302, 221 N.E.2d 714, 715 (Cuyahoga County 1966). See generally R.C. 2931.01(A) ("[m]agistrate' includes...judges of other courts inferior to the court of common pleas"); R.C. 2938.01 ("[t]he definition of 'magistrate' set forth in section 2931.01 of the Revised Code...applies to Chapter 2938. of the Revised Code"). Municipal courts, thus, are statutorily authorized to conduct trials under R.C. Chapter 2938. Consequently, unless some provision of R.C. Chapter 2938 or rule of the Ohio Supreme Court provides otherwise, the rules of evidence and procedure governing notices, proof of special matters, depositions, and joinder of defendants and offenses included in R.C. Chapter 2945, which are not, by their nature, inapplicable to the trial of misdemeanors, are applicable, pursuant to R.C. 2938.15, to any trial conducted under R.C. Chapter 2938 in a municipal court.

⁵ I note that a municipal court does not have jurisdiction of the violation of an ordinance of a municipal corporation within its territory if the violation is required to be handled by a parking violations bureau or joint parking violations bureau pursuant to R.C. Chapter 4521. R.C. 1901.20(A).

⁶ A municipal court only has jurisdiction of the violation of a vehicle parking or standing resolution or regulation if a local authority, as defined in R.C. 4521.01(D), "has specified that it is not to be considered a criminal offense, if the violation is committed within the limits of the court's territory, and if the violation is not required to be handled by a parking violations bureau or joint parking violations bureau pursuant to [R.C. Chapter 4521]." R.C. 1901.20(A).

R.C. 2945.47 governs the use of depositions in criminal proceedings in which it is necessary to procure the testimony of an individual incarcerated in a penal institution within this state, or who is in the custody of the Department of Youth Services. Pursuant to this section, a court may procure a confined individual's testimony either by deposition or by presentation of the individual before the court. A confined individual's testimony may be taken by deposition pursuant to Ohio R. Crim. P. 15 at the place of the individual's confinement if the individual is not a defendant in the case and if the court determines that the interests of justice do not demand that the individual be brought before the court for the presentation of his testimony. R.C. 2945.47(A). However, if a court determines that it is necessary to procure the testimony of a confined individual in a criminal proceeding and such testimony may not be procured by deposition, the individual must be brought before the court. *See, e.g.,* R.C. 2945.47(A) ("[a]ll witnesses for the prosecution shall be brought before the court," unless the defendant waives his right to compel the appearance of a witness). Accordingly, the General Assembly established a procedure to procure such testimony, by authorizing a court to order a subpoena to be issued directing the keeper of a local facility, R.C. 2945.47(B), or the sheriff of the county in which the criminal proceeding is pending, R.C. 2945.47(C), to deliver the confined individual to the court for the giving of testimony. It reasonably appears from the foregoing that R.C. 2945.47 sets forth a comprehensive scheme whereby courts may procure the testimony of confined individuals through the use of depositions and subpoenas. Clearly, if a deposition is inappropriate in a criminal proceeding in which the testimony of a confined individual is necessary, the court must issue a subpoena to cause the confined individual to appear in court.

In addition, the procedures set forth in R.C. 2945.47 are not by their nature inapplicable to the trial of misdemeanors. As indicated above, misdemeanors may be prosecuted in courts of common pleas by indictments. Ohio R. Crim. P. 7(A). It follows therefrom that the provisions of R.C. 2945.47 may be utilized in such misdemeanor proceedings in a court of common pleas. Since R.C. 2945.47 clearly applies to misdemeanors when they are prosecuted by an indictment in a court of common pleas, there can be nothing about these procedures which is inherently inapplicable to the trial of misdemeanors. Moreover, there is no provision in R.C. Chapter 2938 nor rule of the Ohio Supreme Court, issued pursuant to R.C. 2937.46, which prescribes the manner whereby a municipal court may procure the testimony of a confined individual. I find, accordingly, that the provisions contained in R.C. 2945.47 are applicable, pursuant to R.C. 2938.15, to any trial conducted under R.C. Chapter 2938 in a municipal court.

Therefore, it is my opinion and you are hereby advised that a municipal court, pursuant to R.C. 2945.47(C), may 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 Ohio Department of Rehabilitation and Correction or the Department of Youth Services to the court for the purpose of obtaining the individual's testimony in any trial conducted under R.C. Chapter 2938.