

65.

JUSTICES OF THE PEACE—ONLY BIND OVER TO GRAND JURY IN CONCEALED WEAPON CASES—CHARTERED OR NON-CHARTERED CITIES MAY PASS ORDINANCE CONFERRING JURISDICTION—MISDEMEANOR CASES ONLY. PROSECUTION UNDER ORDINANCE NO BAR TO PROSECUTION UNDER STATUTE.

*SYLLABUS:*

*Justices of the peace may not exercise final jurisdiction in concealed weapon cases, but may only bind over to the grand jury.*

*Chartered or non-chartered cities may pass ordinances conferring jurisdiction on proper magistrates in misdemeanor cases only. Such prosecution under such ordinance, however, is no bar to prosecution under the statute.*

COLUMBUS, OHIO, February 10, 1923.

HON. C. B. McCLINTOCK, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—Acknowledgment is made of the receipt of your letter requesting the opinion of this department, which letter reads as follows:

“The question has arisen as to the jurisdiction of the justices of the peace in concealed weapon cases.

It will be noticed by the statute that the punishment for carrying concealed weapon cases may be a fine and workhouse sentence, or imprisonment in the penitentiary.

Most of the cities have an ordinance covering the misdemeanor part of the statute and I understand that the Attorney General a number of years ago held that cities could have an ordinance covering the misdemeanor part of the statute.

In cases that are not aggravated, the justices of the peace desire to exercise final jurisdiction if they have the right to do so.

I desire an opinion from your department as to whether or not the justice of the peace can exercise final jurisdiction, and impose a fine, or a fine and workhouse sentence, without binding the accused over to the grand jury.”

The following is quoted from an opinion to which you refer found in Opinions of the Attorney General, 1919, Volume II, p. 1539, in which the authority of municipalities to enact ordinances regulating the carrying of concealed weapons was considered:

“Section 3628 G. C., which relates to the powers of municipalities, provides as follows:

‘To make the violation of ordinances a misdemeanor, and to provide for punishment thereof by fine or imprisonment, or both, but such fine shall not exceed five hundred dollars and such imprisonment shall not exceed six months.’

Article XVIII, section 3, of the amended constitution of Ohio provides as follows:

'Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.'

The supreme court of Ohio, in the case of city of Fremont v. Keating, 96 O. S., 468, clearly holds that under said constitutional provision municipalities may 'adopt, and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws.' Said opinion makes no distinction as to the application of such rule as between chartered and non-chartered municipalities.

Therefore, in view of the foregoing, I am of the opinion that non-chartered as well as chartered municipalities may enact proper ordinances regulating the carrying of concealed weapons.

\* \* \*

I am further of the opinion that a prosecution under such an ordinance does not prevent a prosecution under section 12819 G. C., as in the case of Köch v. State, 53 O. S. 433, the syllabus reads:

'A former conviction before a mayor for the violation of an ordinance is not a bar to the prosecution of an information charging the same act as a violation of the statute.'

The rule in Ohio seems to be that municipalities, within the limits of the power granted to them, may pass ordinances regulating the same acts as state statutes have regulated so long as the said ordinance prescribes a punishment which limits the offense to a misdemeanor. If a city ordinance should prescribe such a punishment as would result in placing the accused in jeopardy when being prosecuted under said ordinance, this would defeat the operation of the state statute providing an offense for the same act and render said ordinance invalid."

While the opinion above quoted I think rightfully holds that chartered or non-chartered cities may pass valid ordinances conferring jurisdiction on proper magistrates in misdemeanor cases only, I am of the opinion that justices of the peace, as such, could not exercise jurisdiction under such ordinances. Such authority could only be exercised by the magistrate or magistrates created by and under the ordinance itself.

It will be noticed the penalty provided in section 12819 G. C. covering the subject of carrying concealed weapons is as follows:

*Carrying of concealed weapons prohibited; penalty.*

"Whoever carries a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person shall be fined not to exceed five hundred dollars, or imprisoned in the county jail or workhouse not less than thirty days nor more than six months, or imprisoned in the penitentiary not less than one year nor more than three years. Provided, however, that this act (G. C. 12819) shall not affect the right of sheriffs, regularly appointed police officers of incorporated cities and villages, regularly elected constables, and special officers as provided by sections 2833, 4373, 10070, 10108 and 12857 of the General Code to go armed when on duty. Provided further, that it shall be lawful for deputy sheriffs and specially appointed police officers, except as are appointed or called into service by virtue of the authority of said sections 2833, 4373, 10070, 10108 and 12857

of the General Code to go armed if they first give bond to the State of Ohio, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them; and any person injured by such improper use may have recourse on said bond."

Article 1, paragraph 5, of the Bill of Rights guaranteed by the Constitution of Ohio as adopted in 1912 provides:

"The right of trial by jury shall be inviolate. \* \* \* "

Also, paragraph 10 of said Article 1 provides as follows:

"Except in cases of impeachment, \* \* \* no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury; \* \* \* "

Section 13422 G. C. is as follows:

"A justice of the peace shall be a conservator of the peace and have jurisdiction in criminal cases throughout the county in which he is elected and where he resides, on view or on sworn complaint, to cause a person, charged with the commission of a felony or misdemeanor, to be arrested and brought before himself or another justice of the peace, and, if such person is brought before him, to inquire into the complaint and either discharge or recognize him to be and appear before the proper court at the time named in such recognizance, or otherwise dispose of the complaint as provided by law. He also may hear complaints of the peace and issue search warrants."

The syllabus of *Inwood v. State*, 42 O. S., 186, reads as follows:

"A statute, which authorizes a penalty by fine only, upon a summary conviction under a police regulation or of an immoral practice prohibited by law, although imprisonment, as a means of enforcing the payment of the fine is authorized, is not in conflict with either section 5 or 10 of article 1 of the constitution, on the ground that no provision is made for a trial by jury in such cases."

In the case of the *City of Fremont v. Keating*, 96 O. S., 468, paragraphs 2 and 3 of the syllabus announce the law of Ohio on the subject as follows:

2. "Where imprisonment may be imposed as a punishment for the commission of an offense, the accused is entitled to a trial by jury.

3. In such case, the fact that imprisonment was not actually included as a part of the punishment imposed by the sentence of the court cannot affect the right of the accused to a jury trial."

Replying to the question submitted in your letter, beg to say that it is my opinion that in concealed weapon cases inasmuch as the penalty may be imprisonment in the penitentiary under section 12819 G. C., a justice of the peace may not exercise final jurisdiction but may only bind over to the grand jury.

Respectfully,

C. C. CRABBE,

*Attorney General.*