OFFICIAL OPINION NO. 27

December 15, 1972

Hon. James M. Plaskett
State Senator
New Washington, Indiana 47162

Dear Senator Plaskett:

This is in response to your request for my Official Opinion on the following question:

> "Is the public offense of shoplifting articles of value less than one hundred dollars under Offenses Against Property Act (Burns' Ind. Stat. Ann. § 10-3030 to § 10-3039) a felony or a misdemeanor, and in which courts can the offense be heard and sentence be given?"

ANALYSIS

The distinction between felony and misdemeanor in Indiana depends not on the length of sentence, but the place it is to be served.

> "All crimes and public offenses which may be punished with death or imprisonment in the state prison shall be denominated felonies * * *."
>
> Acts 1905, Ch. 169; IC 1971, 35-1-1-1, as found in Burns' Ind. Stat. Ann. § 9-101 (1956 Repl.).

The offense of theft of less than $100 is a crime for which the perpetrator may be imprisoned in the state prison not less than one [1] year nor more than five [5] years. *Heacock v. State*, 249 Ind. 453, 233 N.E. 2d 179 (1968); Acts 1963, Special Session, Ch. 10, as amended; IC 1971, 35-17-5-12, Burns' Ind. Stat. Ann. § 10-3039 (1972 Supp.). Therefore, "shoplifting", or theft of less than $100 is a felony.

City court judges have criminal jurisdiction as follows:

> "* * * He shall also have original concurrent jurisdiction with the circuit court or criminal court in all cases of petit larceny and assault and battery and all other violations of the laws of the state where the

> penalty provided therefor may be less than a fine of five hundred dollars [$500] and imprisonment for a period of six [6] months: Provided, That such city judge, in any case brought before him charging any person with a crime or misdemeanor shall not penalize such person more than a fine of five hundred dollars [$500] and imprisonment for six [6] months * * *."
>
> Acts 1905, Ch. 129, as amended: IC 1971, 18-1-14-5, as found in Burns' Ind. Stat. Ann. § 4-6002 (1968 Repl.).

The criminal jurisdiction of municipal courts (found only in Marion County) is essentially similar:

> "Original jurisdiction with the circuit, superior and criminal courts in such county, in all cases of violations of the laws of the state for which the penalty provided may be a fine of five hundred dollars [$500] or imprisonment in the county jail or state farm for a period of six [6] months, or less, or both such fine and such imprisonment; * * *"
>
> Acts 1925, Ch. 124, as amended: IC 1971, 33-6-1-2, as found in Burns' Ind. Stat. Ann. § 4-5802(d) (1972 Supp.).

In *Wischmeyer v. State*, 200 Ind. 512, 514, 165 N.E. 57 (1929), the Supreme Court said that a city court in Indianapolis had no felony jurisdiction:

> "The affidavit in the case at bar charged felonies, which the city court of the City of Indianapolis did not have jurisdiction to try and make its finding of guilty and render judgment. The jurisdiction of such city court was limited to a preliminary hearing * * *."

Later, in *State ex rel. Hale v. Marion Municipal Court*, 234 Ind. 467, 475, 127 N.E. 2d 897, 900 (1955), it was said:

> "Confronted with a felony charge, the [city court] judge could not try and convict the accused of any offense, either of the felony itself or a lesser offense (a misdemeanor) within the felony charged. His authority was limited to the discharge of the accused

> or to his recognizance to the criminal (circuit) court which alone had jurisdiction to try the offense * * *."

However, the jurisdictional statute relating to city courts was amended in 1963. The statute originally gave city courts criminal jurisdiction where the penalty "*cannot* exceed a fine of five hundred dollars and imprisonment for a period of six months." The 1963 amendment (Acts 1963, Ch. 186, § 1, p. 235) gave criminal jurisdiction where the penalty "*may be* less than a fine of five hundred dollars and imprisonment for a period of six months." (Emphasis added.) Whatever effect this change might have had on the validity of the *Wischmeyer* statement was adjudicated in 1965 in *In re Sobieski*, 246 Ind. 222, 204 N.E. 2d 353, 355 (1965):

> "The possibility of a lesser than felony penalty in some states is termed a reducible felony but the offense is a felony nevertheless. Since the offense is a felony, the jurisdiction of city or magistrate courts if presented with a second or subsequent offense of driving under the influence is limited to the holding of a preliminary hearing to determine probable cause for holding for trial by a court of competent jurisdiction."

In support of its holding, the court cited Burns' Ind. Stat. Ann. § 4-2402 (1964 Supp.), now found as § 4-6002 (1968 Repl.) set out in relevant part previously. This is the current jurisdictional statute for city courts and includes the 1963 amendment. As the *Sobieski* decision was rendered in 1965, it clearly affirms earlier holdings that city courts are limited to the holding of preliminary hearings in felony cases, and construes § 4-6002 with the 1963 amendment. Municipal courts are subject to the same limitations. *State ex rel. Hale v. Marion Municipal Court, supra.* The proviso to Burns' Ind. Stat. Ann. § 4-6002 (1968 Repl.) clearly limits the sentencing by a city court judge to six months; however, as previously noted, the city court has no jurisdiction to sentence on felony charges.

Under Burns' Ind. Stat. Ann. § 9-101 (1956 Repl.) the felonious nature of the crime charged would not be changed by the nature of the forum in which it was tried:

> "All crimes and public offenses which may be punished with death or imprisonment in the state prison shall be denominated felonies * * *." (Burns' Ind. Stat. Ann. § 9-101).

However, city courts do not have trial jurisdiction in felony cases.

CONCLUSION

It is, therefore, my Official Opinion that the offense of "shoplifting" articles of value less than $100 is a felony, and city and municipal courts have no jurisdiction in felony cases beyond the holding of preliminary hearings.