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OFFICIAL OPINION NO. 38

December 16, 1966

**TOWNSHIP OFFICERS—Justices of the Peace—Suspending
Fees Taxed in Favor of Commissioner of Motor Vehicles
—Method of Auditing by State Board of Accounts.**

Opinion Requested by Mr. Richard L. Worley, State Examiner,
State Board of Accounts.

This is in response to your letter of October 24, 1966, requesting an official opinion as to the authority of courts to suspend fines and costs in view of legislative enactments since 1956, such as Acts 1957, ch. 22, concerning justices of the peace, Acts 1965, ch. 350, § 18, pertaining to fees taxed in favor of the Commissioner of Motor Vehicles, and Acts 1965, ch. 270, of fixing fees of prosecuting attorneys.

The Supreme Court of Illinois in *People ex rel. Browne v. Eastern Illinois & St. L. Ry.*, 353 Ill. 40, 186 N.E. 537, 538, 539 (1933) gave the following historical background of the office of justice of the peace:

“Justices of the peace were known to the common law of England for a century and a half before the discovery of America, but they were in their original institution mere conservators of the peace, as the name implies, exercising no judicial functions. . . . The powers of justices of the peace were enlarged as time progressed until they constituted an important agency in the administration of local affairs. They performed a great variety of duties connected with such affairs, among them the support of the poor and the repair of highways. It appears they first were invested with judicial powers by the statute 34, Edward the Third, 2 Stat. at Large (Eng.), pp. 135, 136.

Thereafter from time to time their powers were enlarged. . . . From the earliest period, justices of the peace in the English colonies of North America were invested with various and important functions connected with local administration, but not judicial in character. Under the Code, known as the Duke's Laws for the Government of the Colony of New York, promulgated in 1665, justices of the peace were commissioned for the towns, with like powers as in England. *People v. Mann*, 97 N.Y. 530, 534, 49 Am. Rep. 556. In Virginia they were authorized in 1742, while sitting as a county court, to contract for the building of bridges and the making of causeways and by levies to discharge the cost thereof. 5 Henning's Virginia Stat. at Large, pp. 175, 489. Likewise in the early history of Massachusetts, they were clothed with administrative powers. 1 Laws of Mass. 1780-1791, p. 319. By the laws of the Northwest Territory, justices of the peace were charged with the performance of administrative duties. Maxwell's Code, 1796, pp. 107, 109, 125, 127, 128, 139."

Courts of justices of the peace are created by Art. 7, § 14, Constitution of Indiana. They are not, however, courts of general jurisdiction. *Thomas v. Winters*, 4 Blackf. 161 (1836). The powers and jurisdiction of courts of justices of the peace are wholly statutory. *Mosley v. Bd. of Comm'rs.*, 200 Ind. 522, 165 N.E. 244 (1929). *State ex rel. Coppage v. Reichard*, 59 Ind. App. 338, 109 N.E. 438 (1915); *Matlock v. Strange*, 8 Ind. 57 (1856); *Willey v. Strickland*, 8 Ind. 453 (1856).

The power, therefore, of justices of the peace to suspend fines and costs must come from the statute if it is to exist at all.

Acts 1957, ch. 322, § 14, being Burns IND. STAT. ANN., § 5-1721, provides:

"In each criminal case before any justice of the peace, where the final judgment is entered against the defendant in the case, in addition to the fine provided by ordinance or statute, the justice of the peace shall

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charge and collect as a docket fee the sum of six dollars [\$6.00]. There shall be no other costs taxed in any criminal case except witness fees and trial fees for prosecuting attorney as provided by law, a permanent operator's record fee of one dollar and fifty cents [\$1.50], and a fee of twenty-five cents [25c] for certifying the abstract of the record of conviction relating to moving traffic violations as required by chapter 159, Acts 1947 as amended: Provided, That the abstract fee of twenty-five cents [25c] shall be collected for the benefit of the township; and civil penalties that may be legally assessed for overweight truck violations pursuant to the provisions of chapter 83, Acts 1931 as amended." (Emphasis added.)

The word "shall" relating to the collection of fees by justices of the peace is used throughout §§ 6, 14 and 15, ch. 322, Acts 1957, being Burns IND. STAT. ANN., §§ 5-1721—1722. "Shall" is generally used in a mandatory sense.

Also in response to your question it is necessary to separate justices of the peace courts from city courts, magistrates, and courts of general criminal jurisdiction.

The statutes establishing the powers of judges of city and magistrate courts provide for the power to suspend judgment, Burns IND. STAT. ANN., § 4-2403 (hereinafter set out). A provision for such a power does not exist in the statutes prescribing the power and duties of justices of the peace. Burns IND. STAT. ANN., § 9-715 provided:

"The jurisdiction of justices of the peace in criminal cases shall be coextensive with their respective counties, and they shall have exclusive original jurisdiction in all cases where the fine assessed can not exceed three dollars [\$3.00], and concurrent jurisdiction with the criminal court and circuit court to try and determine all cases of misdemeanor punishable by fine only; and in trials before justices, fines to the extent of twenty-five dollars [\$25.00], with costs, may be assessed; and they shall have jurisdiction to make examination in all cases; but they shall have no power

to adjudge imprisonment as a part of their sentence, except in the manner specially provided in this act.”

As for judges of the circuit courts, criminal courts, and city courts, it is necessary that we look to the particular statute creating such courts in order to determine their powers. Your attention is specifically directed to Burns IND. STAT. ANN., § 4-2403 providing:

“In the trial of any person in any city court for the violation of any law of this state or ordinance of such city, the court or jury shall have power to assess a fine in any sum not exceeding five hundred dollars [\$500], or adjudge imprisonment, as a part of the sentence, for any time not exceeding six [6] months, in the county jail, work-house or other lawfully designated place of confinement, or both. . . . *The several city courts shall have power to suspend or to withhold judgment in any case where any person shall have been convicted in such court or shall have entered a plea of guilty, as now provided by law for the circuit and criminal courts of this state.*” (Emphasis added.)

It is interesting to note that this section explicitly states that the city courts shall have power to suspend or withhold judgment in any case where any person shall have been convicted as now provided by law for the circuit and criminal courts of this state. To state that a city judge does not have power to suspend fines and costs would be to import absolutely no meaning to the final sentence in Burns § 4-2403.

Burns IND. STAT. ANN., § 4-3827(a) provides that the judge shall charge and collect as a county's docket fee the sum of five dollars [\$5.00] in the event a final judgment is entered against the defendant. In the same section, Burns § 4-3827(d), the magistrate is explicitly given the power to suspend the execution of judgment as is now possessed by the courts of general criminal jurisdiction.

In conclusion, the powers and duties of justices of the peace exist only by statutory provision; the mandatory word “shall” appears in the statute relating to the charging and collection

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of fees by a justice of the peace, and there is no statute giving the power to a justice of the peace to suspend judgments as has been given to city and magistrate courts; it is therefore, my opinion that justices of the peace do not have the power to suspend fines and fees.

OFFICIAL OPINION NO. 39

December 20, 1966

CITY OFFICERS—Employees of Municipal Corporations— City Police Officer as Employee, Rather Than Officer, of City—Employment During Off-Duty Hours.

Opinion Requested by Hon. George W. Dye, State Senator.

I am in receipt of your recent letter requesting an opinion as to the legality and the propriety of a city employing a city policeman during off-duty hours for street department work. You state that a city in your district has found it impossible to obtain part-time street employees, thus creating an emergency, and that the city, therefore, contemplates employing a willing city policeman during his off-duty hours.

You have directed my attention to an Official Opinion of my predecessor in office, 1964 O.A.G. No. 56, p. 304, which you state indicates that such employment of a city police officer under such circumstances would be valid.

As you are aware, the particular Opinion you cite was rendered in response to an inquiry relating to the legality of the employment by the city of a city fireman to engage in work relating to street repairs. The fireman was to perform such work under the supervision of the city engineer.

Since your letter clearly indicates that you are familiar with the former Attorney General's Opinion cited above, and