

OFFICIAL OPINION NO. 37

August 22, 1963

George A. Everett, Superintendent
Indiana State Police Department
301 State Office Building
Indianapolis 4, Indiana

Dear Superintendent Everett:

Your letter of June 11, 1963, has been received and asks seven questions regarding House Enrolled Act No. 1055 of the 1963 General Assembly, being Acts of 1963, Ch. 11, as found in Burns' (1963 Spec. Supp.), Section 47-2319 *et seq.*, hereinafter referred to as The Act.

I shall answer your questions in the order in which they are asked.

I.

Your first question is:

- "1. *Section 4.* The terms 'information' and 'summons' as used in the Act are new to the Indiana Motor Vehicle procedure. In your opinion, in what sense are these terms used?"

The term "information" is used in Section 4 of The Act, being Acts of 1963, Ch. 11, Sec. 4, as found in Burns' (1963 Spec. Supp.), Section 47-2326, in describing the form to be used in the uniform traffic ticket. The statute says that the uniform traffic ticket is to consist, in part, of a "complaint or information." This section of the ticket merely informs the alleged wrongdoer which offense he is charged with committing. The complaint or information would presumably be signed by the observing or arresting officer. This complaint or information represents the charge of the state or municipality against an individual, and it is this charge upon which the case will be based.

The problem with calling the charge an "information," at least in Indiana, is that in addition to being largely outmoded, traditionally an "information," as opposed to an "affidavit," could only be issued by the prosecutor.

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Lynn v. State (1934), 207 Ind. 393, 193 N. E. 380.

The Legislature has specified that all criminal actions with the exception of treason and murder may be prosecuted by affidavit, which need only be *approved* by the prosecutor.

Acts 1905, Ch. 169, Secs. 118 and 119, as found in Burns' (1956 Repl.), Sections 9-908 and 9-909.

The problem is that if only a prosecutor can issue an information, then a peace officer would be unauthorized to issue a ticket so designated. The statute, however, clearly distinguishes between a "complaint" and an "information" which is made by the prosecutor. Section 4, Subsection (4) (b), as found in Burns' 47-2326, *supra*, states:

"When used. The complaint or information form shall be used in traffic cases, whether the complaint is made by a peace officer or by any other person, or the information is made by the prosecutor."

Thus, a peace officer can issue a complaint to an alleged wrongdoer and regardless of the meaning given to the word "information" it would have no effect on the conventional ticketing procedure of peace officers.

If traffic tickets could only be issued by "information," it would have an absurd result, as it would defeat the obvious intent of the Legislature to facilitate traffic ticketing and the trial of traffic offenses. As stated in 26 I. L. E. Statutes § 115:

"The rule of construction according to the spirit of the law is especially applicable where adherence to the letter would lead to injustice, absurdity, or contradictory provisions, and in adhering to this rule words may be modified or rejected and others substituted * * *"

It is, therefore, my opinion that where necessary the word "affidavit" may be used as synonymous with the word "information."

By the same reasoning as above, the term "summons" should be read as "notice to appear." In Indiana, a summons in a criminal case can only be issued by a magistrate.

Acts 1905, Ch. 169, Sec. 62, as found in Burns' (1956 Repl.), Section 9-701.

Thus, Section 4 of The Act (Burns' 47-2326, *supra*) might be said to be in conflict with Burns' 9-701, *supra*, as it provides for the issuance of a summons by a peace officer. Section 5 (Burns' 47-2327, *supra*) and Section 6 (Burns' 47-2328, *supra*) of The Act both seem to use "summons" as synonymous with "traffic ticket." Penalties are provided for the failure to appear in answer to a "traffic ticket or summons."

It is my opinion that the term summons, which was lifted from the Model Act, can be read as notice to appear, so as not to conflict with Burns' 9-701, *supra*.

II.

Your second question is :

"2. Section 4. To what extent does this section affect the procedure required under the Acts of 1939, Ch. 48, §§ 163 and 164 (Burns, 1952 Repl. §§ 47-2307 and 47-2308)?"

The statutes in question read as follows :

47-2307 "Whenever any person is *arrested* for any violation of this act punishable as a misdemeanor, the arrested person shall be immediately taken before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of such offense and is nearest or most accessible with reference to the place where said arrest is made, in any of the following cases :

"1. When a person arrested demands an immediate appearance before a magistrate ;

"2. When the person is arrested and charged with an offense under this act causing or contributing to an accident resulting in injury or death to any person ;

"3. When the person is arrested upon a charge of reckless homicide ;

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"4. When the person is arrested upon a charge of driving while under the influence of intoxicating liquor or narcotic drugs;

"5. When the person is arrested upon a charge of failure to stop in the event of an accident causing death, personal injuries, or damage to property;

"6. In any other event when the person arrested refuses to give his written promise to appear in court as hereinafter provided." (Our emphasis)

47-2308 "(a) Whenever a person who is a resident of this state is *arrested* for any violation of this act punishable as a misdemeanor, and such person is not immediately taken before a magistrate as hereinbefore provided, the arresting officer shall prepare in duplicate written notice to appear in court containing the name and address of such person, the license number of his vehicle, if any, the offense charged, and the time when and the place where such person shall appear in court.

"(b) The time specified in said notice to appear must be at least five [5] days after such arrest unless the person arrested shall demand an earlier hearing.

"(c) The place specified in said notice to appear must be before a magistrate within the township or county in which the offense charged is alleged to have been committed and who has jurisdiction of such offense.

"(d) The arrested person in order to secure release, as provided in this section, must give his written promise so to appear in court by signing in duplicate the written notice prepared by the arresting officer. The original of said notice shall be retained by said officer and the copy thereof delivered to the person arrested. Thereupon, said officer shall forthwith release the person arrested from custody.

"(e) Any officer violating any of the provisions of this section shall be guilty of misconduct in office

and shall be subject to removal from office.” (Our emphasis)

The above-quoted statutes deal with the same general subject-matter as The Act. These statutes are thus *in pari materia* and as far as possible should be construed together so as to give effect to all of the provisions of each and create one harmonious system.

See: 26 I. L. E. Statutes § 130.

Burns' 47-2307, *supra*, sets up the procedure for taking a person to a magistrate when *arrested* for certain enumerated offenses or if he requests it or if he refuses to give his written promise to appear. Burns' 47-2308, *supra*, provides that whenever a person is arrested for a misdemeanor and not immediately taken before a magistrate, he shall be given a notice to appear, which date shall be more than five (5) days after the arrest.

Except for changing the form of the ticket, The Act really has no bearing on these two statutes. No arrest can be made for a misdemeanor committed out of the presence of an officer.

Brown v. State (1951), 229 Ind. 470, 99 N. E. (2d) 103;

See also: 3 I. L. E. Arrest and Recognizance § 3.

The Act does not speak in terms of an arrest, but this could *not* be read to broaden the power of an officer to include the giving of a ticket for a misdemeanor committed outside his presence. Reading The Act and Burns' 47-2307, *supra*, and 47-2308, *supra*, *in pari materia* a violator of a traffic law in Indiana would still have to be arrested before he could be ordered to appear in court.

III.

Your third question is:

- “3. Section 4. Is administrative rule-making authority vested in the Chief Examiner of the State Board

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of Accounts and the Commissioner of the Bureau of Motor Vehicles by virtue of Section 4(c)?"

Section 4(c) of The Act (Burns' 47-2326, *supra*), reads as follows:

"(c) Records and reports. Each judicial officer or police authority issuing uniform traffic tickets and complaints shall be responsible for the disposition of all uniform traffic tickets and complaints issued under his authority, and shall prepare and submit such records and reports relating to the uniform traffic tickets and complaints in the manner and at the time as shall be prescribed by both the chief examiner of the state board of accounts and by the commissioner of the bureau of motor vehicles."

Section 4(c) of The Act thus authorized the Chief Examiner of the State Board of Accounts and the Commissioner of the Bureau of Motor Vehicles to prescribe the manner and time in which a judicial officer or police authority shall prepare and submit records and reports relating to uniform traffic tickets and complaints. This is a general grant by the Legislature to the two agencies involved to prescribe procedures implementing a statute, which procedures affect, at least in part, other branches of government.

The general statute regarding the method of adopting and promulgating rules and regulations defines a "rule" in Acts of 1945, Ch. 120, Sec. 3, as found in Burns' (1961 Repl.), Section 60-1503, as follows:

"The word 'rule' means any rule, regulation, standards, classification, procedure, or requirement of any agency, designed to have or having the effect of law or interpreting, supplementing or implementing any statute, but does not include resolutions or directions of any agency relating solely to internal policy, internal agency or organization or internal procedure which do not have the force of law and does not include 'administrative adjudication.'"

In my opinion any action of either the Bureau of Motor Vehicles or the State Board of Accounts implementing The Act pursuant to Section 4(c) would fall within the above definition of "a rule" and should be adopted and promulgated pursuant to the terms of the rule-making act.

IV.

Your fourth question is:

"4. *Section 6.* To what extent does Section 6(a) affect The Acts of 1939, Ch. 48, § 165 (Burns, 1952 Repl., § 47-2309)?"

Acts of 1939, Ch. 48, Sec. 165, as found in Burns' (1952 Repl.), Section 47-2309, reads as follows:

"(a) Any person wilfully violating his written promise to appear in court, given as provided in this article, is guilty of a misdemeanor regardless of the disposition of the charge upon which he was originally arrested.

"(b) A written promise to appear in court may be complied with by an appearance by counsel."

Section 6(a) of The Act, as found in Burns' 47-2328, *supra*, reads as follows:

"(a) Residents. The court shall issue a warrant for the arrest of any defendant who is a resident of this state and who fails to appear or answer a traffic ticket or summons served upon him and upon which a complaint has been filed. If the warrant is not executed within 30 days after issue, the court shall promptly forward the bureau of motor vehicles copy of the uniform traffic ticket and complaint to the bureau of motor vehicles indicating thereon that the defendant failed to appear in court as ordered. The court shall then mark the case as closed on its records, subject to being re-opened if the appearance of the defendant is thereafter obtained."

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The "Uniform Traffic Ticket and Complaint" which is presently in use by your department in Indiana, contains the following statement at the bottom of the ticket:

"I promise to appear in said Court or bureau at said time and place.

"Signature _____"

Bearing this language in mind and bearing in mind the rule of construction regarding statutes to be read *in pari materia* as outlined in question No. 2 above, it is my opinion that the two sections have no effect on one another. Burns' 47-2309, *supra*, provides that a person who fails to appear as per his written promise to appear is guilty of a misdemeanor. An individual, who signs a written promise to appear on any new ticket form devised, would be subject to the terms of this statute. Section 6(a), *supra*, of The Act merely provides for the issuance of a warrant to a state resident who fails to appear when a complaint has been filed and in the event the warrant is not executed within 30 days a copy of the uniform traffic ticket and complaint is forwarded to the Bureau of Motor Vehicles. There is no conflict between these two statutes. The one providing for a misdemeanor for failure to appear and the other providing a method of forcing an appearance after an initial failure to do so.

V.

Your fifth question is:

"5. Section 6. What is the significance of the words 'or answer', and 'or otherwise answer', as used in Section 6(a) and (b)? Are they limited to the procedure prescribed in Section 10(c) of the Act?"

Section 6(a), *supra*, of The Act provides that a resident of the state shall "appear or answer" on the date specified on the ticket or a warrant shall be issued for his arrest. Section 6(b) provides that if a nonresident of the state fails to "appear or answer" the traffic ticket or summons 30 days after the date set, the court shall forward a copy of the ticket to the Bureau of Motor Vehicles, which shall notify the Bureau of

Motor Vehicles of the state of the nonresident notifying them of the defendant's failure to appear and of any action taken on the part of the Commissioner of Motor Vehicles of the State of Indiana. If the defendant fails "to appear or otherwise answer" within 30 days the court marks the case as closed.

Your question is apparently directed to whether a defendant must physically appear in court or may dispose of the case in some other manner by "answer." Whether the defendant must appear in person or by attorney or some other means on the original date when he promised to appear must be left to the sound discretion of the judge. Burns' 47-2309 (b), *supra*, provides as follows:

"(b) A written promise to appear in court may be complied with by an appearance by counsel."

Section 6 of The Act (Burns' 47-2328, *supra*) does not provide for an appearance by attorney.

However, it is clear from The Act that a defendant must be personally present for the imposition of sentence in most cases.

Section 8 of The Act, as found in Burns' (1963 Spec. Supp.), Section 47-2330, provides:

"The defendant shall be present at the imposition of sentence in all traffic cases, except in cases involving parking, standing or non-moving traffic offenses and cases in which a plea of guilty may be accepted by the traffic court violations bureau, as described below."

Section 10(c) of The Act, as found in Burns' (1963 Spec. Supp.), Section 47-2332(c), provides a further exception:

"(c) Plea and payment of fines and costs. (1) Parking and non-moving offenses. Any person charged with a parking, standing or a non-moving offense may mail or deliver the amount of the fine and costs indicated on the ticket for the violation, together with a signed plea of guilty and a waiver of trial, to the violations clerk."

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Therefore, it is my opinion that the terms "answer" or "otherwise answer" would give the court discretion to accept either an appearance by an attorney or other suitable evidence of intent to comply with the promise to appear at the initial appearance date on the ticket, but for the imposition of sentence the defendant must be present with the exceptions noted.

VI.

Your sixth question is:

"6. *Section 10.* Is a Justice of the Peace empowered to establish a Traffic Court Violations Bureau pursuant to Section 10?"

Section 10(a) of The Act, as found in Burns' (1963 Spec. Supp.), Section 47-2332(a), *supra*, provides:

"(a) Appointment and functions. Any court, when it determines that the efficient disposition of its business and the convenience of persons charged so requires, may establish a traffic court violations bureau and constitute the clerk or deputy clerk of the court or any other appropriate official within the jurisdiction in which the court is held as a violations clerk for the traffic court violations bureau.

"The violations clerk shall accept written appearance, waiver of trial, plea of guilty and payment of fine and costs in traffic offense cases, subject to the limitations hereinafter prescribed. The violations clerk shall serve under the direction and control of the court appointing him."

Section 2(2) of The Act, as found in Burns' (1963 Spec. Supp.), Section 47-2324(2), defines "court," as follows:

"'Court' means any tribunal with jurisdiction to hear and determine traffic violation cases and the magistrate, judge, or other presiding officer thereof sitting as a court."

The jurisdiction of justices of the peace courts is established in Acts of 1905, Ch. 169, Sec. 75, as found in Burns' (1956

Repl.), Section 9-715 and Acts 1927, Ch. 109, Sec. 4, as found in Burns' (1956 Repl.), Section 9-716. These statutes read respectively as follows:

9-715 "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 [\$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."

9-716 "No justice of the peace and no officer or peace officer of any city or town shall have any jurisdiction to hear or try any case involving a violation of any of the laws of this state, or any of the ordinances of any city or town thereof, regulating the use and operation of motor vehicles on the public highways of this state, unless such case has been properly presented in writing, and is heard in the presence of the prosecuting attorney of the county in which such case arose, or his legally authorized deputy; nothing, however, herein contained shall prevent an immediate determination of any such case on a plea of guilty."

Since Section 10(a) of The Act, *supra*, provides that "any court" may establish a traffic court violations bureau, a justice of the peace court may create such a bureau to hear those traffic cases which fall within their jurisdiction.

VII.

Your last question is:

"7. Section 10. 'Indictable offenses' are not included within the authority of the violations clerk, as stated in Section 10 (b) (1). What is the effect of this limitation under Indiana law?"

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The section in question, being Burns' 47-2332, *supra*, reads as follows:

“(b) Offenses within the authority of violations clerk; schedule of fines. The court shall by order, which may from time to time be amended, supplemented or repealed, designate the traffic offenses within the authority of the violations clerk. Such offenses shall not include:

“(1) *indictable offenses*;

“(2) offenses resulting in an accident;

“(3) operation of a motor vehicle while under the influence of intoxicating liquor or a narcotic or habit-producing drug, or permitting another [permitting another] person, who is under the influence of intoxicating liquor or a narcotic or habit-producing drug, to operate a motor vehicle owned by the defendant or in his custody or control;

“(4) reckless driving;

“(5) leaving the scene of an accident;

“(6) driving while under suspension or revocation of driver's license;

“(7) driving without being licensed to drive;

“(8) exceeding the speed limit by more than 15 miles per hour; or

“(9) a second moving traffic offense within a twelve months' period.

“The court shall establish schedules, within the limits prescribed by law, of the amounts of fines to be imposed for first offenses, designating each offense specifically. The order of the court establishing the schedules shall be prominently posted in the place where the fines are paid. Fines and costs shall be paid to, receipted by and accounted for by the violations clerk in accordance with [with] this act.

“(c) Plea and payment of fines and costs. (1) Parking and non-moving offenses. Any person charged with a parking, standing or a non-moving offense may mail or deliver the amount of the fine and costs indi-

cated on the ticket for the violation, together with a signed plea of guilty and a waiver of trial, to the violations clerk.

“(2) Other offenses. Any person charged with any traffic offense, other than a parking, non-moving, or standing offense, within the authority of the violations clerk, may appear before the violations clerk and, upon signing an appearance, plea of guilty and waiver of trial, pay the fine established for the offense charged, and costs. He shall, prior to the plea, waiver and payment, be informed of his right to stand trial, that his signature to a plea of guilty will have the same force and effect as a judgment of court, and that the record of conviction will be sent to the motor vehicle commissioner of this state or the appropriate officers of the state where he received his license to drive.” (Our emphasis)

The statute would thus exclude “indictable offenses” from the purview of the Traffic Court Violations Bureau.

In Indiana any crime, misdemeanor or felony may be charged by indictment.

Douglas v. State (1880), 72 Ind. 385.

That this is true is implicit in the law setting up the distinction between a felony and a misdemeanor (Acts of 1905, Ch. 169, Sec. 1, as found in Burns' [1956 Repl.], Section 9-101), and the law regarding the issuance of a warrant or summons upon the return of an indictment (Acts of 1905, Ch. 169, Sec. 121, as found in Burns' [1956 Repl.], Section 9-1001). All violations of state motor vehicle laws, with the exception of reckless homicide, are misdemeanors. Acts 1939, Ch. 48, Sec. 160, as found in Burns' (1952 Repl.), Section 47-2304. Therefore it would seem under the broad meaning of “indictable offense” that no violation of a state motor vehicle law could be handled by a Traffic Violations Bureau. It is my opinion, however, that the term “indictable offense” can be given another meaning so as to effectuate the obvious legislative intent of the statute.

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In the first place where a municipal ordinance was violated, and the violation was not at the same time a violation of a state statute, and no imprisonment could be assessed, no indictment could be had for the violation. This is so because it has many times been held in Indiana that the violation of a city ordinance in which a monetary penalty only is sought is a civil and not a criminal action.

Biedinger v. City of East Chicago (1958), 129 Ind. App. 42, 154 N. E. (2d) 58;

Jerzakowski v. City of South Bend (1924), 82 Ind. App. 132, 145 N. E. 520.

However, it must be borne in mind that as a general rule if the violation of a city ordinance is also a violation of a state statute, then the ordinance is null and void. Acts of 1905, Ch. 169, Sec. 78, as found in Burns' (1956 Repl.), Section 9-2402. It is recognized that municipalities are given certain specific powers in the Motor Vehicle Code to enact ordinances (Burns' 47-1828) and even in certain instances to modify the state speed regulations (Burns' 47-2005), but there are still a significant number of offenses excluded from local control by the operation of a state statute. These offenses are subject to being prosecuted by indictment.

To exclude all of the offenses created by a state statute would be to severely emasculate the function of the Traffic Violations Bureau. Where the legislative intent is clear the words of a statute should be given, if possible, a meaning consistent with that intent. The authority for effectuating legislative intent is stated in answer to your question No. 1.

See: 26 I. L. E. Statutes § 115, *supra*.

In Section 10(c) (2) of The Act, as found in Burns' 47-2332(c) (2), *supra*, the Legislature clearly intended that the Traffic Violations Bureau procedure should be applicable to offenses other than just municipal ordinance violations. Secondly, the important traffic offenses are specifically excluded in Burns' 47-2332(b) (2) through (9), *supra*. It is therefore, my opinion that the term "indictable offenses" as used in Burns' 47-2332(b) (1), *supra*, should be restricted to include only

