OFFICIAL OPINION NO. 42

June 28, 1962

Colonel John J. Barton
Superintendent Indiana State Police
Third Floor, State Office Building
Indianapolis 4, Indiana

Dear Superintendent Barton:

This is in answer to your request for an Official Opinion.

In your letter you ask seven questions. I shall answer the questions in the order in which they appear in your letter.

Your first question is:

> "Is Burns (1952 Repl.) § 47-1822 constitutional within Article 4, Section 19 of the Constitution of Indiana?"

The Acts of 1939, Ch. 48, Sec. 22, as found in Burns' (1952 Repl.), Section 47-1822, reads as follows:

> "The provisions of this act relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways except:
>
> "1. Where a different place is specifically referred to in a given section.
>
> "2. The provisions of articles IV and V shall apply upon highways and elsewhere throughout the state."

The Indiana Constitution, Art. 4, Sec. 19, reads as follows:

> "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

Articles IV and V referred to in subsection 2 of Burns' 47-1822, *supra,* are contained in Burns' (1952 Repl.), Sections 47-1910 to 47-1926 and Sections 47-2001 to 47-2003b, inclu-

sive. These sections of the statute deal with crimes connected with driving an automobile.

The title to the original act establishing Articles IV and V, and also embracing Burns' 47-1822, *supra,* being the title to Acts of 1939, Ch. 48, reads as follows:

> "AN ACT regulating traffic on highways and defining certain crimes in the use and operation of vehicles, providing for traffic signs and signals and defining the power of local authorities to enact or enforce ordinances, rules, or regulations in regard to matters embraced within the provisions of this act and to provide for the enforcement of this act and to make uniform the law relating to the subject matter of this act, and repealing all laws and parts of laws in conflict therewith."

The question under the Indiana Constitution, Art. 4, Sec. 19, *supra,* is whether the subject matter of Burns' 47-1822, *supra,* making the provisions of Articles IV and V apply "upon highways and elsewhere" is expressed in the title to the act.

It is my opinion that the subject matter of Articles IV and V, being the defining of certain crimes in the use of motor vehicles, is embraced in the clause of the title which reads "* * * and defining certain crimes in the use and operation of vehicles * * *"

The title to the act does not restrict the subject matter of the act to highways in the definition of crimes involving motor vehicles. When Burns' 47-1822, *supra,* subsection 2, causes Articles IV and V to apply "elsewhere" as well as on "highways," it is not broader than the title, and is therefore well within the constitutional proscription of Art. 4, Sec. 19.

Your second and third questions involve the interpretation of Acts of 1939, Ch. 48, Secs. 163 and 164, as found in Burns' (1952 Repl.), Sections 47-2307 and 47-2308.

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;

"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."

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."

More specifically, in question No. 2, you ask whether the phrase, "nearest and most accessible," in Burns' 47-2307, *supra,* is jurisdictional, and if a court is deprived of the power to hear a case by virtue of the statutory language involved.

The answer to this question must be no. The power to entertain any matter and to exercise jurisdiction therein must come from the Constitution or from some statute.

State *ex rel.* Wilson v. Howard Circuit Court (1957), 237 Ind. 263, 145 N. E. (2d) 4;

See 7 I. L. E. Courts, §§ 1 and 2.

Burns' 47-2307, *supra,* states that the arrested person shall be immediately taken before a *magistrate* within the county in which the offense charged is alleged to have been committed. Magistrate is not defined in Burns' 47-2307, *supra.* In Acts of 1905, Ch. 169, Sec. 65, as amended, and found in Burns' (1956 Repl.), Section 9-704, a similar statute, dealing with the duties of magistrates following arrests, magistrate is defined broadly to mean "any justice of the peace, city judge or mayor acting as city judge." Since 1905, the Legislature has created courts of record which are known as magistrate courts, and which have jurisdiction of traffic offenses and other minor offenses.

Acts of 1939, Ch. 164, Sec. 1, as amended, and as found in Burns' (1946 Repl.), Sections 4-3801 to 4-3809, inclusive.

It is my opinion that the Legislature intended the term "magistrate" in Burns' 47-2307, *supra,* to include all of the courts above enumerated that would have jurisdiction over minor traffic offenses.

The jurisdiction of the courts embraced within the term, "magistrate," comes from the various statutes creating these courts. All of these courts involved are created by statute, and their jurisdiction is strictly limited by the creating statutes. The jurisdiction does not come from Burns' 47-2307, *supra.* This conclusion is bolstered by the language of Burns' 47-2307, *supra,* itself. The statute limits a magistrate as being (1) within the county, (2) having jurisdiction, and (3) nearest and most accessible. Two and three are not considered dependent on one another, but are treated as separate. The words "nearest and most accessible" are not jurisdictional, as the decision as to jurisdiction is made separately from nearness and accessibility. Thus, "nearest and most accessible" can be viewed as language of convenience rather than jurisdiction.

If Burns' 47-2307, *supra,* were to change, modify, or decrease the jurisdiction of magistrates, the statute should specifically so state. The Indiana Law Encyclopedia in *Courts,* Section 1 states the rule:

> "Jurisdiction when once conferred may be taken away only by express words, or by necessary implications from the terms, of a statute relied on to withdraw jurisdiction * * *"

Your third question asks whether under Burns' 47-2308, *supra,* the arresting officer in his notice to appear may, in his discretion, specify any court having jurisdiction within the county.

Burns' 47-2308, subsection (c), *supra,* reads:

> "(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."

The statute says the magistrate may be in the township or county in which the offense charged is alleged to have been committed. It does not limit the arresting officer's discretion in any way to the township. The statute might have limited the forum to the township and failing one available, then included the county, but it did not. It is therefore my opinion that the arresting officer has the discretion to designate any magistrate in the county in which the offense is alleged to have been committed.

Your fourth and fifth questions deal with the authority in Indiana for the creation of "cafeteria courts" or "traffic violations bureaus." You then ask whether such courts can accept a guilty plea, waiver of appearance, and payment of a fine for a city ordinance violation, or a misdemeanor violation of the Indiana statutes governing the use and operation of motor vehicles which carries the penalty of a fine, or imprisonment, or both.

Acts of 1945, Ch. 159, Sec. 5, as amended, and found in Burns' (1952 Repl.), Section 47-1048, recognize the existence of a "traffic violations bureau" or "cafeteria court." Your letter states that as a matter of fact, such "traffic violations bureaus" have been created in several Indiana communities as a branch of the city courts to provide around-the-clock availability of an agent of the court for those persons who wish to plead guilty to the charge upon which they were arrested, waive their right to a hearing before the court, and dispose of the case by paying a prescribed fine.

It would appear that the "traffic violation bureaus" of the various cities have been created on the theory that they are a separate and distinct agency of the city government whose function it is to *compromise civil claims* that the city may have against its citizens for the violation of city ordinances. In Biedinger v. City of East Chicago (1958), 129 Ind. App. 42, 154 N. E. (2d) 58, it was stated that:

> "* * * It has many times been held in this state that a prosecution for the violation of a city ordinance

> in which a monetary penalty only is sought, is a civil and not a criminal action * * *"

The court further held that when initial imprisonment is adjudged as a part of the penalty, the action takes on the character of a criminal action.

The Acts of 1905, Ch. 129, Sec. 215, as amended, and as found in Burns' (1946 Repl.), Section 4-2401, provides in part as follows:

> "The judicial power of every city of the first, second, third and fourth classes shall be vested in a city court * * *"

In speaking of the jurisdiction of the city judge, Section 216 of the above cited act, as amended, and as found in Burns' (1946 Repl.), Section 4-2402, provides in part as follows:

> "* * * He shall have exclusive jurisdiction of all violations of the ordinances of such city. In all cities of the first and second and third class he shall have exclusive jurisdiction of the trial of all misdemeanors constituting violation of highway traffic ordinances of such city, and of violations of the highway traffic laws of the state of Indiana * * *"

Therefore, it would follow that a city "traffic violations bureau" may, as other litigants in a civil disagreement, accept a prearranged compromise settlement of a claim that the city has against a citizen for an infraction of a city ordinance so long as there are procedures established whereby the citizen litigant may have recourse to the city court in the event they do not wish to compromise the claim.

Further, I am of the opinion that in no event would such a "traffic violations bureau" have authority to so compromise a city ordinance violation where initial imprisonment is provided as a part of the penalty, or for the violation of any state statute as both of these are criminal actions and not subject to compromise.

The Constitution of the State of Indiana, in Art. 7, Secs. 1 and 19, provides:

"§ 1. The judicial power of the State shall be vested in a Supreme Court, in Circuit Courts and such other courts as the General Assembly may establish."

"§ 19. Tribunals of conciliation may be established, with such powers and duties as shall be prescribed by law; or the powers and duties of the same may be conferred upon other Courts of Justice; but such tribunals or other Courts when sitting as such, shall have no power to render judgment to be obligatory on the parties, unless they voluntarily submit their matters of difference, and agree to abide by the judgment of such tribunal or Court."

The Legislature of the State of Indiana is empowered to establish a court for the specific purpose of accepting guilty pleas in traffic violation misdemeanors, and to administer a penalty in accordance with a predetermined schedule, if done on a voluntary basis and recourse to the courts is provided. However, the Legislature has not, as yet, done so and such traffic violations bureaus, as exist in cities, would not be empowered, without legislative authority, to handle infractions of state laws.

Your sixth and seventh questions refer to the payment of towing and storage charges of vehicles when impounded pursuant to a statute so authorizing, or when the person driving the vehicle is so incapacitated as to render his further control of the vehicle inadvisable.

The Indiana statutes authorizing a police officer to impound a motor vehicle are:

Acts of 1925, Ch. 213, Sec. 55, as found in Burns' (1952 Repl.), Section 47-551, and reads as follows:

"Any representative of the secretary of state, or any state police officer or any officer or member of any municipal police department who may discover any motor vehicle or motor-bicycle without the proper registration and license plates attached, shall take such motor vehicle or motor-bicycle into his custody and may cause such motor vehicle or motor-bicycle to be taken to and stored in a suitable place until the legal

owner thereof can be found or the proper registration and license plates have been procured."

Acts of 1925, Ch. 213, Sec. 54, as amended, and as found in Burns' (1961 Supp.), Section 47-550, reads as follows:

"Any sheriff or any state police officer or any officer or member of a municipal police department or any representative of the secretary of state who may discover any motor vehicle or motor bicycle which has apparently been abandoned or any motor vehicle, any trailer, semi-trailer, mobile home, or motor bicycle which is in the possession of any person other than the legal owner, and who cannot establish his right to the possession of such motor vehicle or motor bicycle, shall cause such motor vehicle, any trailer, semi-trailer, mobile home, or motor bicycle to be taken to and stored in a suitable place, and shall report such fact in writing to the secretary of state within five [5] days after the discovery of such motor vehicle or motor bicycle. Immediately upon receipt of such notice, it shall be the duty of the secretary of state to institute search for the legal owner of such motor vehicle or motor bicycle, and if such legal owner cannot be found within thirty [30] days from the date on which such motor vehicle or motor bicycle was discovered, the secretary of state shall cause such motor vehicle or motor bicycle to be advertised for sale as abandoned or seized property, by inserting a notice, three [3] consecutive days, in a newspaper published and enjoying a general circulation in the county in which such motor vehicle or motor bicycle was discovered, and within five [5] days after the date on which the notice was last published, the secretary of state shall sell such motor vehicle or motor bicycle to the highest bidder. All expenses which may be incurred in carrying out the provisions of this section, including the seizure, sale and storage of such motor vehicle or motor bicycle, shall be paid by the secretary of state out of the auto theft fund, and all proceeds of the sale of any such motor vehicle or motor bicycle shall be covered into the state treasury and shall be credited to the auto theft fund. Any sheriff or police

officer who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars [$25.00] and not more than one hundred dollars [$100.00]."

Acts of 1939, Ch. 48, Sec. 107, as found in Burns' (1952 Repl.), Section 47-2121, and reads as follows:

"(a) Whenever any police officer finds a vehicle standing upon a highway in violation of any of the provisions of this act, such officer is hereby authorized to move such vehicle, or to require the driver or other person in charge of the vehicle to move the same, to a position off the paved or improved or main traveled part of such highway.

"(b) Whenever any police officer finds a vehicle unattended upon any bridge or causeway or in any tunnel where such vehicle constitutes an obstruction to traffic, such officer is hereby authorized to provide for the removal of such vehicle to the nearest garage or other place of safety."

Acts of 1931, Ch. 83, Sec. 8a, as amended and as found in Burns' (1961 Supp.), Section 47-536a, and reads as follows:

"Any person who operates or causes to be operated any vehicle or combination of vehicles having a weight of more than one thousand [1,000] pounds in excess of one or more of the limitations set out in section 8 shall be guilty of a misdemeanor and on conviction shall be fined in the sum of five dollars [$5.00], and shall in addition be assessed the following civil penalties:

"(1) If the total of all excesses of weight under one [1] or more of the limitations in section 8 is less than 1,000 pounds, no fine nor penalty.

"(2) If the total of all excesses of weight under one or more of the limitations in section 8 is less than 2,000 pounds and more than 1,000 pounds, two cents [2c] a pound for each pound over 1,000 pounds.

"(3) If the total of all excesses of weight under one or more of the limitations in section 8 is 3,000 pounds

or less and more than 2,000 pounds, four cents [4c] a pound for all such excesses.

"(4) If the total of all excesses of weight under one or more of the limitations in section 8 is 4,000 pounds or less and more than 3,000 pounds, six cents [6c] a pound for all such excesses.

"(5) If the total of all excesses of weight under one or more of the limitations in section 8 is 4,000 pounds or more and less than 5,000 pounds, eight cents [8c] a pound for all such excesses.

"(6) If the total of all excesses of weight under one or more of the limitations in section 8 is 5,000 pounds or more, ten cents [10c] a pound for all such excesses.

"All civil penalties so assessed shall be collected and deposited to the credit of the motor vehicle highway account. In the event any civil penalty is not paid the prosecuting attorney of the judicial circuit in which the action is pending is authorized to bring an action in the name of the state of Indiana to enforce the collection of the same.

"When a person is apprehended operating or causing to be operated a vehicle or combination of vehicles on any public highway in the state of Indiana with a weight in excess of the limitations set out in section 8, said vehicle or combination of vehicles shall be impounded and kept within the custody of the officer apprehending such vehicle or combination of vehicles and to be moved only as directed by said officer; and such officer shall cause said truck to be kept impounded until its weight is so reduced as to comply with the limitations expressed in section 8 and until all fines and costs levied on the basis of such excess weight are paid or stayed, and any person so apprehended who shall move said vehicle or combination of vehicles or cause the same to be moved, after the same is impounded by said officer, other than as expressly directed by said officer, shall be subject to be charged with a felony and upon conviction shall be subject to a fine of not less than $500 nor more than $1,000 to which may be added

imprisonment in the Indiana state reformatory or state prison for a period of not less than one [1] nor more than five [5] years. If any motor vehicle, impounded under the provisions of this act, is held for a period in excess of sixty [60] days, the impounding officer after giving notice by registered mail to the owner of said vehicle, at his last known address, shall cause such motor vehicle to be advertised for sale by inserting a notice, by one publication, in two [2] newspapers, of general circulation and of opposite political faiths in the county in which the motor vehicle is impounded, and within ten [10] days after the date on which the notice was published, the impounding officer shall sell such motor vehicle to the highest bidder. All expenses which may be incurred in the storage and selling of such motor vehicle, including civil penalties, shall be deducted from the proceeds received from the sale, and any amount remaining shall be forwarded to the owner by registered mail to the address to which original notice was given. The civil penalties shall be covered into the state treasury and shall be credited to the motor vehicle highway account. The impounding officer is hereby authorized to give a bill of sale to any such purchaser, upon which the bureau of motor vehicles is authorized to issue a certificate of title.

"Provided, however, that nothing herein contained shall affect the rights or remedies of any persons holding prior valid liens on such impounded vehicles and any sale under this act shall be subject to liens of record or recorded on the title and to mechanic's possessory liens."

You will note that these acts, with the exception of the second one cited (Burns' 47-550, *supra*) make no provision for the payment of towing or storage charges. (We do not need to worry about Burns' 47-550, *supra,* as it specifically provides that all expenses incurred in carrying out the provisions of that section come out of the auto theft fund.) The other statutes impose a duty on the officer involved to impound a car if there are no license plates or registration (Burns' 47-551, *supra*), or if the weight is in excess of specified limits (Burns' 47-536a, *supra*). In Burns' 47-2121, *supra,* the officer is au-

thorized to remove a car to a position of safety, if it is obstructing the highway or to have it removed to a garage or other place of safety if it is in a tunnel or on a bridge or causeway and obstructing traffic.

In any of the above statutory situations, there are three possible persons who could pay for the towing and/or storage charges—the garage owner, the car owner, or the officer involved.

The garage owner obtains a lien on the motor vehicle for storage, which would presumably include towing charges, by statute. The statute is Acts of 1927, Ch. 189, Sec. 1, as found in Burns' (1952 Repl.), Section 43-801, and reads as follows:

> "Every person, firm or corporation engaged in storing or furnishing supplies or accessories for, or repairing any automobile, motor truck or other motor vehicle, and every person, firm or corporation maintaining a motor vehicle garage, shall have a lien on such automobile, motor truck or other motor vehicle stored, for storage charges, or for keeping any such automobile, motor truck, or other motor vehicle, or for furnishing supplies or accessories for, or for work and labor done in repairing any such automobile, motor truck or other motor vehicle."

This excludes the garage owner and leaves either the car owner or the officer. It seems anomalous to impose a duty on a police officer to perform an act and then monetarily penalize him for the diligent performance of that duty. But by making the police officer liable for the storage and towing charges that is just what would happen. There have been no decisions on this point in Indiana, but a Kentucky court has considered this problem and resolved it in favor of the police officer.

> Hodge v. Sharpe (1956), — Ky. —, 287 S. W. (2d) 596.

It is, therefore, my opinion that where an officer of the law is specifically authorized or mandated by statute to cause a motor vehicle to be impounded, and he exercises his authority under that statute, then the car owner is liable for the charges of towing and storage.

In question No. 7, you ask who is responsible for the towing and storage charges where a police officer takes a vehicle to a place of safekeeping, when the car owner is physically or mentally incapable of driving, as in the case of driving while under the influence of intoxicating liquor. There is no specific statutory authority authorizing a police officer to remove an individual's car to a place of safekeeping when the individual is incapable of driving. However, under Indiana Acts of 1945, Ch. 344, Sec. 12, as found in Burns' (1952 Repl.), Section 47-855, a state police officer is given very broad powers with respect to the enforcement of the motor vehicle laws. Said act reads in part as follows:

> "The officers and police employees of the department are hereby vested with all necessary police powers to enforce the provisions of the laws of the state of Indiana for the regulation and use of automobiles, motor vehicles and other vehicles, and the laws for the safeguarding and protection of the surface or other physical portion of the highways of the state of Indiana * * *"

Under this provision, a police officer would certainly be authorized to remove the vehicle to a place of safekeeping if a motor vehicle law were involved, or if the vehicle were in any way obstructing the highway. Then under the same reasoning, as used in answer to your question No. 6, the car owner would be responsible for any expense incurred in the removal.

It should be noted that while such authority, as given under the statute, is very broad, the police officer should only do what is necessary under all the circumstances. If he incurs any expense in doing an unnecessary act, he may be responsible for any expense incurred in the commission of such an act, as he would be acting without statutory authority.

Other jurisdictions have held that where a police officer impounds a vehicle without any statutory authority, he is responsible for the storage and towing charges.

Pollard v. Borneman (1924), 47 S. D. 622, 201 N. W. 525;

Rickenberg v. Capitol Garage (1926), 68 Utah 30, 249 Pac. 121;

Brown v. Ace Motor Co. (1942), 30 Ala. 479, 8 So. (2d) 585;

50 A. L. R. 1309;

Blashfield, Cyclopedia of Automobile Law and Practice, Vol. 7A, § 5004.

The Indiana Supreme Court has never passed on the specific question which you pose in your question No. 7. However, I am confident that if the police officer acts under the authority given to him in the above cited statute, and uses discretion in his actions, he cannot be said to have operated without the scope of his statutory authority. Just what the scope of this authority is would have to be discovered in the light of all the surrounding circumstances in each individual case.

In summary, Burns' 47-1822, *supra,* is constitutional within the Indiana Constitution, Art. 4, Sec. 19, *supra.*

Secondly, the phrase, "nearest and most accessible" in Burns' 47-2307, *supra,* is not jurisdictional, and the arresting officer may, in his discretion, take the arrested person to any magistrate in the county in which the offense is alleged to have been committed.

Thirdly, a city may establish a "traffic violations bureau" to accept a prearranged compromise settlement of a claim that the city has against the citizen for the infraction of a city ordinance, so long as there are procedures established whereby the citizen litigant may have recourse to the city court in the event that they do not wish to compromise the claim and where initial imprisonment is not provided as a part of the penalty. However, such a "traffic violations bureau" may not be established for the purpose of hearing any violations of any state motor vehicle statute.

Fourthly, an automobile driver must pay the towing and storage charges of vehicles when impounded pursuant to a statute so authorizing; or when the driver is so incapacitated as to render his further control of the vehicle inadvisable, and when the removal of the vehicle is necessary for the proper enforcement of the motor vehicle laws.