

tory and not to be regarded as mandatory. As noted in the 1948 Opinion, so that claims may not be made in more than one county, the "County Auditor where the exemption is claimed may make reasonable requirements to insure against allowance of more exemption than the statute authorizes," such as requiring sworn statements that these deductions are not being applied for in any other county or notifying other county auditors of the filing for such deductions.

Likewise, I need merely to state that your second question has been answered specifically by 1948 O. A. G. No. 39, *supra*, to the effect that a veteran who resides in Indiana may apply for and receive a tax deduction in a county other than the county wherein he resides if he is otherwise eligible for one or both of such deductions by complying with the requirements of Burns' 64-205, *supra*, and/or Burns' 64-223, *supra*.

OFFICIAL OPINION NO. 17

April 20, 1961

Col. John J. Barton, Superintendent
Indiana State Police
301 Indiana State Office Building
Indianapolis 4, Indiana

Dear Colonel Barton:

You have requested my Official Opinion on the following questions:

"1. When a resident of Indiana is arrested for a violation of the Motor Vehicle Act punishable as a misdemeanor and such person is not taken immediately before a magistrate as provided in Acts 1939, ch. 48, § 163, p. 289, the same being Burns (1952 Repl.) § 47-2307, is the procedure prescribed in Acts 1939, ch. 48, § 164, p. 289, the same being Burns' (1952 Repl.) § 47-2308 *mandatory*—or is the issuance of a notice to appear ticket (in lieu of detention until hearing) rendered *discretionary* to the arresting officer by the language of Acts 1939, ch. 48, § 166, p. 289, as amended by Acts 1951, ch. 221, § 1, p. 637, the same being Burns

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(1952 Repl.) § 47-2310, which indicates that said procedure '* * * shall not be exclusive * * *'?

"2. Do the provisions of Acts 1927, ch. 109, § 1, p. 287, as amended by Acts 1929, ch. 22, § 1, p. 43, the same being Burns (1952 Repl.) § 47-809, abolish the common law power of a State Police Officer who is not in uniform to effect a 'citizen's arrest' for a violation of the laws of Indiana regulating the use and operation of motor vehicles on public highways of this state when such violation of said laws constitutes a felony or breach of the peace committed in the presence of such officer, or does such State Police Officer, not in uniform, retain the power of arrest of any citizen notwithstanding the provisions of said statute?

"3. In your opinion, does a violation of Acts 1939, ch. 48, § 41, p. 289, as amended by Acts 1957, ch. 206, § 1, p. 426, the same being Burns (1959 Supp.) § 47-1912, constitute a misdemeanor or a felony under the penalty provided in Acts 1939, ch. 48, § 39, p. 289, as amended by Acts 1953, ch. 195, § 1, p. 726, and Acts 1957, ch. 341, § 1, p. 1000, the same being Burns (1959 Supp.) § 47-1910?

"4. In 1951, when Acts of 1939, ch. 48, § 166, p. 289, was amended by Acts of 1951, ch. 221, § 1, p. 637, the same being Burns (1952 Repl.) § 47-2310, reference was made in the amended statute to 'section 39 of this Act,' section 39 at that time being the same as Burns (1952 Repl.) § 47-1910. Said amendment, if my interpretation is correct, had the effect, in 1951, of authorizing a peace officer to arrest, without a warrant, a person whom he had reasonable cause to believe had committed a violation of said section 39 of the Acts of 1939, ch. 48. However, in 1953, § 39, which prior to that time seemed to contemplate only accidents involving 'injury to or death of any person,' was amended to include the words 'or injury to property' (see Acts 1953, ch. 195, § 1, p. 726). Therefore, my question is, does Burns (1952 Repl.) § 47-2310, by its reference to 'section 39 of this Act,' incorporate later amendments to said section 39, which have been made in 1953, and 1957, thus

extending the power of a peace officer to arrest without a warrant to the so-called violation of 'leaving the scene of a property-damage accident'?"

An examination of Acts of 1939, Ch. 48, Sec. 164, as found in Burns' (1952 Repl.), Section 47-2308 provides, in part, as follows:

"(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."

You will note the last sentence of the above-quoted paragraph specifically states that the officer shall forthwith release the person arrested from custody. It thus appears that the legislative intent was quite clear that the Indiana citizen arrested for a violation coming within this section be entitled to sign his written promise to appear in court, and upon signing such promise, obtain his immediate release from custody. It should be noted that an arrest for operating under the influence of intoxicating liquor does not come within this section.

See: *McClanahan v. State* (1954), 233 Ind. 317, 117 N. E. (2d) 749.

It is, therefore, my opinion that his release is not discretionary with the arresting officer, but is mandatory. I do not feel that the provisions contained in Acts of 1939, Ch. 48, Sec. 166, as amended and found in Burns' (1952 Repl.), Section 47-2310, to the effect that the procedure prescribed shall not be exclusive in any way, changes the above specific right of the person arrested to his immediate release.

In answer to your second question, it is my opinion that Acts of 1927, Ch. 109, Sec. 1, as amended, as found in Burns' (1952 Repl.), Section 47-809 must be strictly construed, and that, in order to make an arrest for the violation of Indiana law regulating the use and operation of a motor vehicle on the public highways, the officer must be wearing a distinctive

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uniform and badge in keeping with the terms of the statute. Even though a violation of the motor vehicle laws is incidentally involved, an officer can make a lawful arrest out of uniform, if he has reasonable cause to believe that there has been a violation of law for which he may make an arrest out of uniform. The Supreme Court has pointed out that Indiana state police officers have additional duties of law enforcement other than those set out in Burns' 47-809, *supra*, and have pointed out that these additional duties placed on the police officer in the enforcement of criminal laws do not restrict the officers in their making of arrests to such time as they are wearing a distinctive uniform and badge.

Arthur v. State (1949), 227 Ind. 493, 501, 86 N. E. (2d) 698.

It is my opinion, therefore, that the officer should not attempt to exercise the so-called "citizen's arrest" when out of uniform, but should confine his activities to the statutory duties as above set out.

In answer to your third question, it is my opinion that Acts of 1939, Ch. 48, Sec. 41, as amended, as found in Burns' (1960 Supp.), Section 47-1912, constitutes a felony insofar as it applies to cases involving personal injury or death. You will note that the penalty for violation of this section is set out in Acts of 1939, Ch. 48, Sec. 39, as amended and found in Burns' (1960 Supp.), Section 47-1910, and provides a maximum penalty of imprisonment of one year in cases involving personal injury or death. A felony has been described as a crime for which a person *may* be imprisoned in the Indiana State Prison, Acts of 1905, Ch. 169, Sec. 1, as found in Burns' (1956 Repl.), Section 9-101. Although this statute does not expressly provide that the time be served in the Indiana State Prison, the judgment in a prosecution under this statute, which was appealed to the Indiana Supreme Court, specifically provided for imprisonment in the state prison for one year; and although the case was reversed on other grounds, the appeal was treated as an appeal from a felony conviction.

Kelly v. State (1954), 233 Ind. 294, 296, 119 N. E. (2d) 322.

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In answer to your fourth question, I am of the opinion that Burns' 47-2310, *supra*, is applicable to later amendments of other sections of this original act, thus extending the power of a peace officer to arrest without a warrant for the leaving of a scene of a property damage accident as now provided in Burns' 47-1910, *supra*, for the reason that the 1957 amendment thereto was an amendment to Chapter 48 of the Acts of 1939. Therefore, this original act, as amended, should be construed as if it had been originally enacted in its present form.

Sutherland, Statutory Construction, 3rd Ed., Vol. I,
Sec. 1935.

OFFICIAL OPINION NO. 18

May 2, 1961

Honorable Anna Maloney
State Representative
131 E. 5th Avenue
Gary, Indiana

Dear Representative Maloney:

This is in answer to your letter of April 19, 1961, wherein you request an Official Opinion relative to the appointment of a member to the Board of Trustees of the Indiana State Teachers' Retirement Fund. Your specific question is stated as follows:

“Could a State Senator or Representative be appointed as a member of this Board and still retain the office of Senator or Representative?”

In any question pertaining to the legal right of an individual to hold more than one position under state government the following tests should be taken into consideration, namely:

(1) Is each position a “lucrative office” within the meaning of the Indiana Constitution, Art. 2, Sec. 9?

(2) Is such holding in violation of the provision of the distribution and separation of powers provided in the Indiana Constitution, Art. 3, Sec. 1?