

COURTS: Judge of police court of a fourth class city  
JUDGES: must hear case arising out of occurrence  
RULE OF NECESSITY: which he witnessed where no provision made  
for substitute judge.

October 22, 1963

OPINION NO. 103



Honorable Don Burrell  
Prosecuting Attorney  
Greene County  
Springfield, Missouri

Dear Sir:

We have your request for an opinion of this office as follows:

"One of my Magistrate Judges for Greene County has asked for my opinion in regard to the interpretation of Section 98.500 RSMo 59. It deals with the office of the Police Judge in the cities of the fourth class.

"The facts are as follows: A councilman is charged with fighting in the street with the Mayor. The Mayor entered a plea of guilty and paid a fine for fighting in the street. The councilman refused to pay a fine, and the City of Ash Grove charged the councilman with fighting in the street. The Police Judge disqualified himself because he was a witness in the case. All councilmen have disqualified themselves as possible police judges in the case at a regular meeting of the City Council. Under Section 98.500, the question is: Who would be a competent judge, authorized by law, to hear this case?"

Section 98.500, RSMo 1959, to which you refer, provides that cities of the fourth class may elect a police judge who shall have exclusive jurisdiction to hear and determine all

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offenses against the city ordinances. We note from the Blue Book for 1961-1962 that the City of Ash Grove is a city of the fourth class. It appears from your letter that the city has provided for the election of a police judge. However, it further appears that the police judge proposes to disqualify himself from hearing the case in question because he witnessed the occurrence out of which it arises.

Section 98.500 also provides that:

" \* \* \* in case of the absence, sickness, or disability in anywise of such police judge, or in case of vacancy in such office, the mayor shall perform all such duties until the disability is removed or the vacancy is filled."

Obviously this provision cannot be applied in the present case inasmuch as the mayor was a party to the affray out of which the case arises.

It is therefore necessary to discover some authority of law for a judge other than the regularly elected police judge to hear a case involving violation of a municipal ordinance. In so doing, it is necessary to keep in mind the basic principle that the right to a change in judge is a creature of statute and does not exist in the absence of such authority. *Erhart v. Todd, Mo.*, 325 SW2d 750; *Browder v. Milla, Mo. App.*, 296 SW2d 502; *Sherwood v. Steel, Mo. App.*, 293 SW 798.

We find no statutes which provide for a substitute judge to hear a case arising out of the violation of an ordinance of a fourth class city. However, Supreme Court Rule 37.01, which relates to the disqualification of judges in municipal courts, does purport to deal with the situation. This rule is as follows:

"Whenever a judge is disqualified, said judge shall forthwith make an order transferring and removing the case to another judge authorized by law to hear such case."

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While the rule authorizes the transfer of the case to another judge authorized by law to hear such case, it does not specify the judge who is so authorized. We must therefore determine whether any provision of law vests in either the circuit or magistrate judge, or a municipal judge, jurisdiction over the subject matter, i.e., the violation of a municipal ordinance of this particular city.

Section 482.090, RSMo 1959, sets out the jurisdiction of magistrate judges. Without going into detail, it can be seen that the magistrate is limited to jurisdiction over certain matters, not including municipal ordinance violations.

By the same token, Section 478.070, RSMo 1959, which deals with the jurisdiction of circuit courts, does not grant original jurisdiction over municipal ordinance violations to circuit judges.

In terms of jurisdiction of the subject matter, it would appear that another municipal judge would be authorized by law to hear such a case. However, the territorial jurisdiction of an inferior court, such as the police court of a municipality, is limited to the boundaries of the city in which it exists. 48 C.J.S., Judges, Section 59. Therefore, since the judge of another municipal court would not be authorized by law to hear the case in question in the first instance, he would have no authority to hear such case on a transfer.

From the foregoing it can be seen that, although the Supreme Court has provided for the transfer of a case in a municipal court in the event of the disqualification of the judge of such court, the Court rule is qualified in that the judge to whom the case is so transferred must be one authorized by some other provision to hear the case. As we have pointed out, there is no authority at law granting jurisdiction over the subject matter to the judge of any other court. Thus we reach a hiatus in the law.

In such a situation, the well-established "rule of necessity" must be applied. A leading example of the application of this rule is found in *Evans v. Gore*, 253 US 245, 40 S.Ct. 550, 64 L.Ed. 887. In that case the United States Supreme Court was presented with a case involving the power of Congress to tax the salary of federal judges. The justices

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had an obvious interest in the outcome of the case inasmuch as its resolution would determine whether their own salaries were subject to such taxation. The court pointed this out but ruled that since no other court could render an authoritative decision on the issue it was incumbent upon the Supreme Court to place aside any personal interest and decide the case.

State ex rel. Mitchell v. Sage Stores Company, 157 Kan. 622, 143 P.2d 652, was a quo warranto action instituted by the Attorney General of Kansas to oust the respondent from doing business in the state of Kansas. Sometime after the institution of the suit and before it finally reached the Supreme Court of Kansas, the Attorney General, in whose name the action had been filed, was appointed to the Supreme Court of Kansas. When the case was heard it became necessary for the former Attorney General to participate in the decision, due to an equal division of the other judges of the court. On motion for rehearing it was contended that the former Attorney General should be disqualified. In ruling that it was proper for the judge in question to hear the case, the Supreme Court said (1.c. P.2d 656-657):

"While our previous cases, as the instant one, pertain to participation of justices who were not legally disqualified, it is well established that actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question properly presented to such court, adjudicated. Barber County Com'rs v. Lake State Bank [123 Kan. 10, 13, 254 P. 401]; Aetna Ins. Co. v. Travis [124 Kan. 350, 259 P. 1068]; Brinkley v. Hassig [10 Cir., 83 F.2d 351, 357].

"The rule is based upon what judges and text-writers frequently refer to as the Doctrine of Necessity. In the Barber County Com'rs case, we quoted the following statement from City of Philadelphia v. Fox, 64 Pa. 169, 185, with approval:

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"The true rule unquestionably is that wherever it becomes necessary for a judge to sit even where he has an interest - where no provision is made for calling another in, or where no one else can take his place - it is his duty to hear and decide, however disagreeable it may be."

See also Kennett v. Lavine, 150 Wash. 2d 212, 310 P.2d 244, and cases cited therein; Annotation 39 A.L.R. 1476.

CONCLUSION

Applying the rule of necessity to the question which you present, it is our view that, in the absence of any other judge authorized by law to decide the case involved, the regularly elected police judge of the City of Ash Grove should hear and determine the case despite the fact that he witnessed the occurrence out of which it arises.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Yours very truly,

THOMAS F. EAGLETON  
Attorney General

JJM:ml