CRIMES: Escaping jail. Aiding prisoner to escape.

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Hon. Douglas Mahnkey,
Prosecuting Attorney-Elect,
Taney County,
Forsyth, Missouri.

Dear Sir:

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

> "I am the Prosecuting Attorney-Elect of Taney County. I have a question I would like some advice about as it will come up at once upon my taking over the office.
>
> A man was arrested and lodged in the city jail of Branson by the city marshall on a charge of drunkeness. All necessary steps were taken to lodge him in said jail. While in the jail another person sawed the lock off the jail door and released the prisoner.
>
> Will you please advise me as to the strongest case I can make against each of these parties? I understand that I can charge the party who sawed the lock under Section 3909. But that is only a misdemeanor and would like to know if there is any stronger Section.
>
> I am anxious to prosecute these parties to the limit as they have been for years a constant bother to all law enforcing officers."

Section 3903, R. S. Mo. 1929, provides:

> "If any person or persons shall, by force, set at liberty or rescue any person held in custody or prison for any offense other than felony, whether before or after conviction, or upon any writ or process, original or judicial, every person so offending shall, on conviction, be adjudged guilty of a misdemeanor."

The question arises whether the word "offense" is limited to a crime against the State, or whether it includes the violation of an ordinance of a city or town.

In the case of Dunson v. Baker, 80 So. (La.) 238, l. c. 239, the plaintiff's son was arrested on the order of the defendant, the Mayor of the town, for having broken into the town jail and set at liberty a prisoner who had been placed in custody for violating a town ordinance under Section 864, R. S. of Louisiana, 1904, which is, in part, as follows:

> "'Whoever shall, by force or without due authority, set at liberty any person in custody for any offense not capital, shall on conviction,' etc.
>
> "That section follows two other sections referring to those who set at liberty persons in custody for capital offenses.
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> "Plaintiff contends that the word 'offense' in section 864, R. S., means a crime against the state, and not the violation of a city or town ordinance penal in its nature; and that he was illegally arrested under the section, as the person whom he was charged with having liberated had been jailed for violating a town ordinance denouncing the carrying of concealed weapons, which offense is also denounced by a state statute.
>
> "The object of the law is to punish jail breaking and the liberating of prisoners by force, or without authority.

> The law is not concerned with the nature of the crime, offense, or misdemeanor with which the person liberated was charged, provided his offense was not capital. It is immaterial, under the law, whether his offense was against the state, or the state and a municipality."

In the above case the person liberated from jail was charged with the carrying of concealed weapons, which offense was also denounced by a state statute, so the argument might be advanced that it differs from the instant case in that the person liberated was charged with drunkenness, which is not in violation of a state statute, as evidenced by the language of the court in the case of City of St. Joseph v. Harris, 59 Mo. App. 123, l. c. 127:

> "It would seem that in this state drunkenness is not per see the subject of legislative prohibition."

However, the court in the Dunson case, supra, specifically points out that the law is not concerned with the nature of the offense. The object of the law is to punish the liberating of prisoners without authority.

In Missouri it has been held that the violation of a city ordinance is not a criminal offense, and the question might be raised that the rule is different in the State of Louisiana.

In the case of Meredith v. Whillock, 158 S. W. 1061, l. c. 1063, the court said:

> "The real question in this case is whether the violation of a city ordinance is a <u>criminal offense</u> as contemplated by the statute.
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> "Since the case of Kansas City v. Clark, 68 Mo. loc. cit. 589, was decided, it has been uniformly held in this state that the violation of a city ordinance is not a crime. The proceeding is only a civil suit and has the incidents and attributes merely of a quasi criminal character. City of St. Louis v. Knox, 74 Mo. loc. cit. 81. In Ex parte Hollwedell, 74 Mo. loc. cit. 401, the Supreme Court said: 'If the violation of the ordinance for which petitioner was fined is to be regarded as a <u>criminal</u>

> offense in the sense of the Constitution, there would be much plausibility in the position taken by counsel. Such offenses, however, have never in this state been regarded as criminal.' In Kansas City v. Neal, 122 Mo. loc. cit. 234, 26 S. W. 695, 696, the court used this language: 'In Ex parte Hollwedell, 74 Mo. 395, it was held that the violation of a city ordinance is not a criminal offense within the meaning of the Constitution,' etc. The law is well established that a prosecution for a violation of a city ordinance is a civil action, and this court has often so held."

In the case of State v. Boneil, 42 La. Annual Reports 1110, l. c. 1112, the court said:

> "Violations of municipal ordinances are not usually or properly regarded as crimes, in the sense in which that word is commonly used, which embraces only offences against the public criminal statutes of the State, and the laws regulating forms of proceeding and the constitutional provisions relating to the latter do not generally apply to the former. State vs. Henchert, 42 An. 270; Mener vs. Monroe, 35 An. 1192; 1 Dillon Munc. Corp., Sec. 432, et seq."

It is thus apparent from the reading of the latter two cases that violations of municipal ordinances are not regarded in Missouri and Louisiana as criminal offenses.

We are therefore of the opinion that although the person liberated in the instant case was not lodged in the city jail for an offense denounced by the statutes of this state, the person having liberated him without authority may be properly prosecuted under Section 3903, supra.

Section 3909, R. S. Mo. 1929, provides:

> "Every person who shall, by any means whatever, aid or assist any prisoner lawfully committed to any jail or place of confinement, in any case other than a felony, to escape therefrom, whether such escape be effected or not, shall be adjudged guilty of a misdemeanor."

The question arises whether the person charged with having liberated the prisoner may also be charged under Section 3909, supra. This section uses the words "in any case", and the court in the case of Litton v. Commonwealth, 44 S. E. (Va.) 923, l. c. 927, in construing the above words as used in a Virginia statute, said:

> "When the statute says 'in any case,' it includes the only two classes of cases we have, viz., civil and criminal; and doubtless it was in the legislative mind that, having used the words 'in any case,' the words 'either civil or criminal' would be mere surplusage.
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> "If the words 'in any case' are to be construed as not applying both to civil and criminal cases, which class is to be excluded? Would it not be as grave an evasion of the province of the Legislature to say, by judicial interpretation, civil cases only were in the contemplation of the framers of the statute, as it would be to hold that criminal cases only were within its purview? Is it not safer to do no violence to the language employed, to give to the words used their natural meaning and effect, and to hold that the phrase 'any case' covers all cases to be tried by a jury?"

We are of the opinion that the words "in any case" as used in Section 3909, supra, were intended to include both civil and criminal cases with the exception of felonies, and inasmuch as our courts take the position that the prosecution of a violation of an ordinance is in the nature of a civil action, the person having liberated the prisoner without authority may also properly be charged under Section 3909, supra.

Section 3916, R. S. Mo. 1929, provides:

> "If any person lawfully imprisoned or detained in any county jail or other place of imprisonment, or in the custody of any officer, upon any criminal charge, before conviction, for the violation of any penal statute,

> shall break such prison or custody and escape therefrom, he shall, upon conviction, be punished by imprisonment in the penitentiary for a term not exceeding two years, or in a county jail not less than six months."

Section 4474, R. S. Mo. 1929, defines the term "criminal offense", thus:

> "The terms 'crime,' 'offense,' and 'criminal offense,' when used in this or any other statute, shall be construed to mean any offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine, or both, may by law be inflicted."

In the Meredith case, supra, the court in construing the above section held that the term "criminal offense", which may be said to be synonymous with "criminal charge", did not include the violation of a city ordinance, and cited (l. c. 1064) the case of Koch v. State, 126 Wis. 470, 106 N. W. 531, to the effect that:

> " * * *it was held that upon principle and authority the term 'criminal offense' used in the statute includes misdemeanors as well as felonies, but that conviction under a municipal ordinance is not a conviction of a 'criminal offense' within the meaning of the statute."

We are of the opinion that it can not be said that a person who is being held in a city jail for violation of a city ordinance can be said to be in custody upon a "criminal charge" as used in Section 3916, supra, and hence the person charged with escaping the city jail must be punished by some city ordinance, if any, and not under any state law.

Respectfully submitted,

WM. ORR SAWYERS,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

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