

Opinion No. 52.

Highway Patrol—Power of Arrest—
Cities & Towns—Incorporated.

HELD: Highway patrolmen are without authority to arrest intoxicated automobile drivers within the limits of an incorporated city or town. One resisting such an arrest cannot be guilty of resisting an officer.

March 3, 1937.

Mr. Leif Erickson
County Attorney
Sidney, Montana

Dear Mr. Erickson:

You have submitted the following state of facts to this office, asking

for an opinion: It appears that two persons were arrested for driving an automobile while intoxicated within the incorporated limits of a city or town, and these persons resisted the State Highway Patrolman in making said arrest, and that informations have been filed against them in the district court for resisting an officer. The question being whether or not a highway patrolman has power to arrest a person, driving an automobile while intoxicated, within the incorporated limits of a city or town.

Section 1741.7 provides among other things, as follows:

"For the purpose of this act, the following acts on the main or secondary highways of the State of Montana outside of incorporated cities and towns, shall be deemed and declared menaces to the public health and safety, and constitute a crime punishable by law as hereinafter provided: * * *.

11. Driving a motor or other vehicle while intoxicated."

Section 1741.8 provides the punishment for violation of any of the provisions of the above mentioned sections, or other provisions of the state motor vehicle laws, other than driving in a reckless manner or while intoxicated.

Section 1741.9 provides the duties of patrolmen and authorizes them to make arrests in certain crimes committed in their presence or when requested by any peace officer as follows:

"The crimes of murder, assault with a deadly weapon, arson, burglary, grand larceny, kidnaping, illegal transportation of narcotics, or violation of the Dyer act regarding the transportation of stolen automobiles, but in no event shall patrolmen be deemed police officers in making arrests in other offenses, and shall in felony offenses, cooperate with sheriffs and other peace officers; provided that such highway patrolmen shall have no authority and are expressly forbidden to make arrest in labor disputes or in preventing violence in connection with strikes, and shall not be permitted to perform any duties whatsoever in connection with labor disputes, strikes or boycotts, and shall not be permitted to congre-

gate or act as a unit in one county to suppress riots or to preserve the peace."

Section 1741.7 designates the crimes while Section 1741.8 prescribes the penalties. Section 1741.9 has reference to the duties of the highway patrolmen, and this section circumscribes their duties, and must necessarily refer to Section 1741.7 because Section 1741.8 does not enumerate the crimes but only provides for the punishment, and Section 1741.9 refers to the authority of the patrolmen by this language: "In addition to the above mentioned duties, the highway patrol supervisor and all patrolmen are authorized under this act to make arrests for the following offenses," and then certain felonies are described therein. The purpose of Section 1741.9 was to expressly limit the authority of the patrolmen, and particularly did the legislature fear that patrolmen may be used, either directly or indirectly, to break strikes and in labor disputes.

Section 1746.2 was enacted in 1929, while the Highway Patrol Law and the sections last referred to were enacted in 1933, and while the Patrol Act and Section 1746.2 are not in conflict, yet, inasmuch as the legislature has expressly excepted incorporated cities and towns in Section 1741.7, and did not include offenses within a municipality as described and provided in Section 1746.2, then it is evident that these patrolmen have no authority to make an arrest of an intoxicated automobile driver within an incorporated city or town.

This opinion shall not be construed to mean that a patrolman does not have the right to sign a complaint and have a warrant issued for the arrest of intoxicated automobile drivers within incorporated cities,—only that the patrolman is without authority to act as a police officer in making the arrest. Nor is this opinion to be construed as holding that to drive and operate an automobile while intoxicated, within an incorporated city, is not a crime. The statute so declares it a crime and that statute has not been repealed. This interpretation of the statute simply points out the lack of authority for the patrolman to make an arrest, and a person resisting such an arrest cannot be guilty of resisting a police officer.

Therefore, it is my opinion that inasmuch as these patrolmen were not deemed to be police officers, and were without authority to arrest these persons for driving an automobile in an incorporated city or town, while intoxicated, it follows that these persons charged in your district court, could not be guilty of resisting a police officer.