

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 12

CITIES AND TOWNS - Prosecution of third offense DUI or per se violations by city attorney;
COUNTY ATTORNEYS - Responsibility to prosecute third offense DUI or per se violations;
COURTS, CITY - Third offense DUI or per se violations, jurisdiction, responsibility of city attorney to prosecute;
CRIMINAL LAW AND PROCEDURE - Prosecution of third offense DUI or per se violations by city attorney;
JURISDICTION - City court, third offense DUI or per se violations;
MOTOR VEHICLES - Prosecution of third offense DUI or per se violations by city attorney;
TRAFFIC - Prosecution of third offense DUI or per se violations by city attorney;
MONTANA CODE ANNOTATED - Sections 1-2-102, 3-11-102, 3-11-103, 3-11-301, 3-11-302, 7-4-2716, 7-4-4604, 46-2-203, 61-8-401, 61-8-406, 61-8-408, 61-8-714, 61-8-722;

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OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 42 (1977), 37 Op. Att'y Gen. No. 62 (1977).

- HELD: 1. The Red Lodge city attorney does not have the authority to prosecute third offense DUI or per se violations under sections 61-8-401 and 61-8-406, MCA.
2. The City of Red Lodge may adopt an ordinance pursuant to section 61-8-401(5), MCA, which would empower the city attorney to prosecute third offense DUI or per se violations under the city ordinance.

31 March 1987

Michael G. Alterowitz
Carbon County Attorney
Carbon County Courthouse
Red Lodge MT 59068

Dear Mr. Alterowitz:

You have requested my opinion on the following questions:

1. Whether the Red Lodge city attorney has the authority to prosecute third offenses under sections 61-8-401 and 61-8-406, MCA, when the offenses occur within the city or town, in view of the maximum penalties provided which exceed a \$500 fine, six months in jail, or both.
2. Whether the City of Red Lodge may adopt an ordinance pursuant to section 61-8-401(5), MCA, which would empower the city attorney to prosecute third offense DUI or per se violations under the city ordinance.

Answering your questions involves reviewing the statutes concerning city attorneys and city courts as well as sections 61-8-401, 61-8-406, 61-8-714, and 61-8-722, MCA.

"The city attorney must prosecute all cases for the violation of any ordinance ... both in the city court and on appeal therefrom to the district court." § 3-11-301, MCA. It is the duty of the city attorney to attend before the city court and other courts of the

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city and the district court and prosecute on behalf of the city. § 7-4-4604, MCA.

In a 1977 Attorney General's Opinion, I held that the city attorney had primary responsibility to prosecute offenses committed in the city limits and charged as violations of state law. 37 Op. Att'y Gen. No. 62 at 252 (1977). District Judge William Speare of the Thirteenth Judicial District, in and for Carbon County, in effect overruled that portion of my opinion in two cases, State v. Kirk S. Nelson, Cause No. DC 79-07, and State v. Ronald W. Nelson, Cause No. DC 79-06. The district judge noted in orders in each of the cases, dated May 19, 1980, as follows:

1. The City Court of Red Lodge, Montana has concurrent jurisdiction with the Justice Court of Carbon County, Montana to hear prosecutions for violations of state penal codes. 3-11-102 MCA 1979; Vol 37, No. 42, Attorney General Opinions, July 1, 1977.

2. Prosecutions for violation of city ordinances are conducted by the city attorney. 3-11-301, MCA 1979. The county attorney is required to prosecute all public offenses on behalf of the state. 7-4-2716, MCA 1979.

Prosecutions for violations of local ordinances must be conducted in the name of the municipality, by its prosecuting officer. Criminal cases arising under state laws must be prosecuted in the name of the state and by the county attorney. State ex rel. Streit v. Justice Court of Chinook, 45 Mont. 375, 123 P. 405 (1912).

3. All cases prosecuted for violation of city ordinance shall be brought in the name of the city. Cases prosecuted under state penal code shall be prosecuted in the name of the State of Montana. 3-11-302, MCA 1979.

Pursuant to this reasoning, once a defendant was cited under state law, the responsibility for prosecution fell to the county attorney. I agree with the district court's reasoning and it correctly states the law as it existed prior to 1983.

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The law was changed in 1983 when section 3-11-302(2), MCA, concerning city court procedure, was amended to provide:

An action brought for violation of a state law within the city or town may be brought either in the name of the state of Montana as the plaintiff or in the name of the city or town as the plaintiff and must be brought against the accused as the defendant.

As a result of this amendment, an action brought for violation of a state law within the city or town may be brought in the name of the city or town, empowering the city attorney to prosecute violations of state law in city court. § 7-4-4604, MCA.

A third offense DUI conviction has a maximum possible penalty of a \$1000 fine and a one-year jail sentence. § 61-8-714(3), MCA. A third conviction under the per se law, section 61-8-406, MCA, carries a maximum penalty of a \$1000 fine and a six-month jail sentence. § 61-8-722(3), MCA. City court jurisdiction is limited to misdemeanors punishable by a fine not exceeding \$500 or by imprisonment not exceeding 6 months or by both fine and imprisonment. §§ 3-11-102, 46-2-203, MCA. Therefore, third offense DUI and per se violations under state law may not be brought in the name of the city as plaintiff under section 3-11-302(2), MCA, because they may not be tried in city court. The county attorney is responsible for prosecuting them.

As discussed above, generally only an offense punishable by a maximum penalty of a \$500 fine and a six-month jail sentence may be brought in city court. An exception to this rule exists where, pursuant to section 61-8-401(5), MCA, a municipality enacts sections 61-8-401(1) to (4), 61-8-406, 61-8-408, 61-8-714, and 61-8-722, MCA, as an ordinance. Under section 61-8-401(5), MCA, the municipality "is given jurisdiction of the enforcement of the ordinance and of the imposition of the fines and penalties therein provided." Section 3-11-103, MCA, provides in pertinent part: "[T]he city court has exclusive jurisdiction of: (1) proceedings for the violation of an ordinance of the city or town, both civil and criminal." These sections appear to conflict with the general statutory provisions regarding city court jurisdiction. Cf. §§ 3-11-102, 3-11-103(1), 46-2-203, 61-8-401(5), MCA. However, a more specific statutory provision will control a general one that is inconsistent with it. § 1-2-102, MCA. Therefore, if a city enacts sections 61-8-401(1) to (4), 61-8-406, 61-8-408, 61-8-714, and 61-8-722, MCA, as an ordinance,

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the city court has jurisdiction over a third offense DUI or per se violation charged under the ordinance, and the city attorney has the authority and responsibility to prosecute charges brought under the city ordinance.

Gary Thomas, the Red Lodge city attorney, has informed me that Red Lodge has adopted no such ordinance. Therefore, the Red Lodge city attorney would have no authority to prosecute a third offense DUI or per se charge in the city of Red Lodge.

THEREFORE, IT IS MY OPINION:

1. The Red Lodge city attorney does not have the authority to prosecute third offense DUI or per se violations under sections 61-8-401 and 61-8-406, MCA.
2. The City of Red Lodge may adopt an ordinance pursuant to section 61-8-401(5), MCA, which would empower the city attorney to prosecute third offense DUI or per se violations under the city ordinance.

Very truly yours,

MIKE GREELY
Attorney General