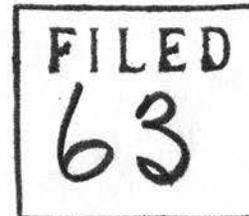


JAIL BREAKING: A city ordinance is not a penal statute, and, therefore, a person may not be tried for violating
CITY ORDINANCE: Section 557.390, RSMo 1949, when he escapes after being arrested by the city police and lodged in the city jail for a violation of a city ordinance.

September 6, 1951

9-6-51

Honorable Weldon W. Moore
Prosecuting Attorney
Texas County
Houston, Missouri



Dear Mr. Moore:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"I should like to know if a person may be tried under Section 557.390, MRS 1949, when he was taken into custody by the city police of a fourth (4th) class city and lodged in the city jail for a violation of a city ordinance pertaining to careless and reckless driving.

"There was also a warrant for the arrest of this subject on a state charge but the city police did not know of this charge at the time of the arrest for a violation of the city ordinance."

Section 557.390, RSMo 1949, is as follows:

"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."

Honorable Weldon W. Moore

This statute is most comprehensive insofar as the general laws of the state are concerned. But a city ordinance is not a penal statute within the meaning of the laws of Missouri. The courts have consistently held to this view.

The Supreme Court in the case of *St. Louis v. Tielkemeyer*, 226 Mo. 130, l.c. 140, said:

"When we are considering the question of the validity of this ordinance in the light of the State statute we must keep in mind the essential difference between the two acts. The State has authority to declare an act to be a crime, the city has no such authority.

"In *City of Kansas v. Clark*, 68 Mo. 588, it was held that a prosecution under a city ordinance for keeping a gambling table contrary to the ordinance was not a prosecution for a crime, but a civil suit to recover a penalty, the court saying: 'Nor do we regard the violation of the ordinance under consideration as a crime, since "a crime . . . is an act committed in violation of a public law" (4 Black., Com., 5); a law coextensive with the boundaries of the State which enacts it. Such a definition is obviously inapplicable to a mere local law or ordinance, passed in pursuance of, and in subordination to, the general or public law, for the promotion and preservation of peace and good order in a particular locality, and enforced by the collection of a pecuniary penalty.' That language was quoted and followed as the correct rule of law in *State v. Muir*, 164 Mo. 610, in which it was held that a conviction under a city ordinance against gaming was not a bar to a subsequent prosecution for the same act under the State statute; in that case the court said that the prosecution under the city ordinance was a civil action, and quoted *Cooley's Const. Lim.* (6 Ed.), p. 239, to sustain the doctrine.

* * *

Honorable Weldon W. Moore

The Supreme Court in the case of State v. Mills, 272 Mo. 526, l.c. 537, said:

"We are of the opinion that neither by our decisions, nor by statute, is a conviction for vagrancy in a city court 'a criminal offense' within the purview of the above quoted statute. For while the procedure, or some of it, in a prosecution for the violation of a town or city ordinance is criminal in form, that is, it follows the forms of the criminal procedure, we have nevertheless uniformly held that it is but a civil action to recover a debt or penalty due the city for the infraction of its ordinances. [St. Louis v. Tielkemeyer, 226 Mo. l.c. 141; State v. Muir, 164 Mo. 610.]"

CONCLUSION

It is the opinion of this office that a city ordinance is not a penal statute within the meaning of the law, and, therefore, a person may not be tried for the crime of jail breaking under Section 557.390, RSMo 1949, when he escapes after being arrested by the city police of a fourth class city and lodged in the city jail for a violation of a city ordinance.

Respectfully submitted,

B. A. TAYLOR
Assistant Attorney General

APPROVED:



J. E. TAYLOR
Attorney General

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