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VOLUME NO. 45

OPINION NO. 9

ARREST - Authority of police officers;  
CITIES AND TOWNS - Authority to adopt ordinances prohibiting breaches of peace;  
COUNTY OFFICERS AND EMPLOYEES - Sheriffs, their duties, number of deputies;  
PEACE OFFICERS - Duties and authority of police officers and sheriffs;  
POLICE - Arrest authority;  
POLICE - Minimum number of officers in department;  
POLICE DEPARTMENTS - Minimum number of officers;  
SHERIFFS - Duties and authority;  
SHERIFFS - Minimum number of officers in department;  
MONTANA CODE ANNOTATED - Sections 7-32-2102, 7-32-2121, 7-32-4101, 7-32-4105, 7-32-4106, 7-32-4302, 45-2-101(48), 46-1-202(17), 46-6-210, 46-6-311;  
MONTANA CONSTITUTION - Article XI, section 2;  
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 8 (1987).

- HELD: 1. Montana Code Annotated § 7-32-4302 authorizes, but does not require, a city or town to enact ordinances to prevent acts or conduct calculated to disturb the public peace.
2. A city or town police officer acting within the officer's territorial jurisdiction may arrest a person for a violation of state law prohibiting offenses against public order regardless of whether the city or town has exercised its power to adopt an ordinance prohibiting breaches of the peace.
3. Each city or town must have a chief of police; no further police officers are required. Each county sheriff, except those in counties of the seventh class, must appoint an undersheriff. No other deputy sheriffs are required by law.
4. The sheriff has the primary duty to enforce county and state laws throughout the county. If local enforcement is lacking, the sheriff must undertake such enforcement.

Ms. Vicki Knudsen  
Musselshell County Attorney  
One Main Street  
Roundup, MT 59072

Dear Ms. Knudsen:

You have requested my opinion on four questions I have rephrased as follows:

1. Does MCA § 7-32-4302 require that a city or town council adopt an ordinance or ordinances regulating breaches of the peace?
2. Do city or town police officers have any authority to arrest persons for breach of the peace if the city or town has not adopted an ordinance or ordinances regulating breaches of the peace?
3. Is there a statutory minimum number of officers that must be maintained in either a police or sheriff's department?
4. Is the sheriff required to enforce all county and state laws everywhere within the county, without regard to city or town boundaries?

Montana Code Annotated § 7-32-4302 provides:

Within the city or town and within 3 miles of the limits thereof, the city or town council has power to prevent and punish ... fights, riots, loud noises, disorderly conduct, obscenity, and acts or conduct calculated to disturb the public peace or which are offensive to public morals.

By its plain language, MCA § 7-32-4302 gives a city or town the authority to enact ordinances to prevent acts or conduct calculated to disturb the public peace. Accord State ex rel. Moreland v. Police Court of City of Hardin, 87 Mont. 17, 22, 285 P. 178, 180 (1930). See also 42 Op. Att'y Gen. No. 8 at 22, 26 (1987). However, there is no requirement in the statute that the city or town exercise this express grant of power.

In situations where a city or town has not exercised its authority to prevent and punish such acts or conduct by enacting an ordinance pursuant to MCA § 7-32-4302, you question whether a city or town police officer has authority to arrest an individual for breach of the peace. It is my opinion that a city or town police officer acting within the officer's territorial jurisdiction may arrest a person for a violation of state law prohibiting offenses against

"A peace officer may arrest a person when: ... (d) he believes on reasonable grounds that the person is committing an offense or that the person has committed an offense and the existing circumstances require his immediate arrest."

The hit and run accident in particular, as well as the reported erratic driving, clearly required Mr. McDole's immediate arrest in order to prevent his getting in additional accidents and possibly seriously injuring someone. In addition, the preservation of Mr. McDole's blood alcohol content required his immediate arrest.

(Citation omitted.) The reasoning of the Court supports my conclusion that, similarly, a city or town police officer has the authority to arrest an individual who violates state laws prohibiting breach of the peace if the arrest is made within the territorial jurisdiction of the officer and the existing circumstances require the individual's immediate arrest. MCA § 46-6-311. See also MCA § 46-6-210 (a peace officer may arrest a person when the officer has a warrant commanding that the person be arrested or when he believes on reasonable grounds that a warrant for the person's arrest has been issued).

Your second question concerns whether there is a statutory minimum number of officers that must be maintained in either a police or sheriff's department. Montana Code Annotated § 7-32-4101 requires that "[t]here shall be in every city and town of this state a police department which shall be organized, managed, and controlled as provided in this part." The statutes regarding the municipal police force also specifically refer to the chief of police, and include among the chief's duties the duty "to have charge and control of all policemen, subject to such rules as may be prescribed by ordinance." MCA § 7-32-4105 (1991). MCA § 7-32-4106(1) expressly gives the city council power to set the number of members of a police force, stating:

The city council shall have absolute and exclusive power to determine and limit the number of police officers and members to comprise the police force of any city, to reduce the number of the police force at any time, and to divide the police membership into two lists:

- (a) one an active list, who are to be actually employed and receive pay while so employed; and
- (b) one an eligible list, who shall not receive pay while not actually employed as an officer or member.

Reading and construing these statutes as a whole, as I must, Crist v. Segna, 191 Mont. 210, 212, 622 P.2d 1028, 1029 (1981), I reach

public order regardless of whether the city or town has exercised its power to prohibit breaches of the peace by ordinance.

Montana Code Annotated § 7-32-4105 includes within the duties of the chief of police the duty "to arrest all persons guilty of a breach of the peace or for the violation of any city or town ordinance and bring them before the city judge for trial." MCA § 7-32-4105(1)(b) (1991). The language of the statute mandating that the chief arrest persons guilty of a breach of the peace or for violation of an ordinance would be redundant if his duties encompassed only arrests for breaches of the peace prohibited by city ordinance.

Additionally, it is clear that a city or town police officer is a peace officer under Montana law. MCA §§ 45-2-101(48), 46-1-202(17) (1991) ("Peace officer" means any person who by virtue of the person's office or public employment is vested by law with a duty to maintain public order and make arrests for offenses while acting within the scope of the person's authority"). See also Maney v. State, 49 St. Rep. 980, 842 P.2d 704 (1992) (recognizing Chinook city police officer is a peace officer).

Pursuant to MCA § 46-6-311(1):

A peace officer may arrest a person when no warrant has been issued if the officer has probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest.

This statute does not restrict the arrest authority of a city or town peace officer to arrests for the violation of a city ordinance. In State v. McDole, 226 Mont. 169, 734 P.2d 683, 685 (1987), a Eureka city police officer arrested McDole for driving under the influence of alcohol in violation of a state law, MCA § 61-8-401. McDole argued on appeal that his arrest was illegal because it was made outside the Eureka city limits and without an arrest warrant. He argued that because the City of Eureka could not produce an ordinance authorizing its police officers to make arrests within five miles of the city limits in accordance with MCA § 7-32-4301, the police officer was without authority to arrest him. The Court held that McDole's arrest was proper because the officer had authority to make a warrantless arrest outside his jurisdiction in his capacity as a private citizen. In the McDole opinion, the Court noted, in dicta:

There is no question that Mr. McDole's arrest would have been legal under § 46-6-401(1)(d), MCA, [now MCA § 46-6-311(1)] if that arrest had been made within the Eureka city limits. Section 46-6-401(1)(d), MCA, provides:

the same conclusion reached years ago when the Montana Supreme Court analyzed substantially similar statutes:

The office of chief of police is required to be maintained. The subordinate offices need not be. They are created to meet the needs of the city; and if out of the necessities of any given case a reduction in the number of members of the force becomes imperative, patrolmen may be relegated to the eligible list[.]

State ex rel. Dwyer v. Duncan, 49 Mont. 54, 59, 140 P. 95, 97 (1914). Each city or town must have a chief of police; no further police officers are required.

My conclusion is similar with regard to a minimum number of members required in a sheriff's department. The constitution and statutes clearly contemplate the election of a county sheriff. Mont. Const. art. XI, § 2; MCA §§ 7-4-2203, 7-4-3001, 7-32-2101 to -2145. Additionally, "[t]he sheriff, as soon as possible after he enters upon the duties of his office, must, except in counties of the seventh class, appoint some person undersheriff to hold during the pleasure of the sheriff. Such undersheriff has the same powers and duties as a deputy sheriff." MCA § 7-32-2102(1) (1991). None of the other statutes regarding the power and authority of the sheriff to organize the department require the appointment of further officers. See MCA §§ 7-32-2104 to -2145 (1991). I therefore conclude that each county sheriff, except those in counties of the seventh class, must appoint an undersheriff. No other deputy sheriffs are required by law.

Finally, you have requested my opinion on the issue of whether the sheriff is required to enforce all county and state laws everywhere within the county, without regard to city or town boundaries. The duties of the sheriff include the duties to preserve the peace, arrest all persons who have committed a public offense, and prevent and suppress all breaches of the peace. MCA § 7-32-2121(1), (2), and (3) (1991). The sheriff is a county officer and his authority extends over the entire county, and includes all municipalities and townships within the county. State v. Williams, 144 S.W.2d 98, 104 (Mo. 1940) (en banc); 80 C.J.S. Sheriffs and Constables § 36, at 205. Nonetheless, it is often customary for a sheriff to leave local policing to local enforcement officers. While the sheriff may, in the absence of information to the contrary, assume that a local police department will do its duty in enforcing the law, the primary duty of such enforcement is the sheriff's and cannot be altered by custom. Id.

If the sheriff has reason to believe that the police force is neglecting its duty it is his duty to inform himself. And if he knows that the police are ignoring or permitting offenses his duty to prevent and suppress

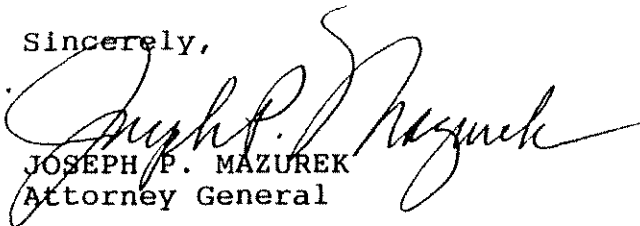
such offenses is the same as it would be if there was no municipality and no police force.

Williams, 144 S.W.2d at 105. I therefore conclude that the sheriff has the primary duty to enforce county and state laws throughout the county. If local enforcement is lacking, the sheriff must undertake such enforcement.

THEREFORE, IT IS MY OPINION:

1. Montana Code Annotated § 7-32-4302 authorizes, but does not require, a city or town to enact ordinances to prevent acts or conduct calculated to disturb the public peace.
2. A city or town police officer acting within the officer's territorial jurisdiction may arrest a person for a violation of state law prohibiting offenses against public order regardless of whether the city or town has exercised its power to adopt an ordinance prohibiting breaches of the peace.
3. Each city or town must have a chief of police; no further police officers are required. Each county sheriff, except those in counties of the seventh class, must appoint an undersheriff. No other deputy sheriffs are required by law.
4. The sheriff has the primary duty to enforce county and state laws throughout the county. If local enforcement is lacking, the sheriff must undertake such enforcement.

Sincerely,



JOSEPH P. MAZUREK  
Attorney General

jpm/kcs/brf