

**OPINION
70-107**

June 11, 1970(OPINION)

Mr. A. J. Pederson
Burke County Justice

RE: Counties - County Justice - Jurisdiction

This is in response to your letter in which you ask does the County Justice have jurisdiction to try cases arising out of violations of section 19-03-28.1, as amended, of the North Dakota Century Code.

Normally we do not answer legal questions for any person holding a judicial position lest we be accused of interfering with due process of law. However, the question of jurisdiction is one where the jurisdiction is with the Court or it is not, depending on the nature of the crime and charge. Resolving this question would not be considered with interfering with due process.

Section 19-03-28.1, as is material here, provides as follows:

"SALE OR POSSESSION OF MARIJUANA PROHIBITED - PENALTY. No person shall grow, sell, trade, furnish, give away, or have in his possession any marijuana except in accordance with the provisions of this chapter. Any person convicted of a violation under this section shall be punished by a fine of not more than two thousand dollars, and by imprisonment in the county jail for not less than six months, or by imprisonment in the state penitentiary for not more than two years, or by both such fine and imprisonment. Any person convicted of a violation under this section who had previously been convicted of a violation under this same section, shall be punished by a fine of not more than two thousand dollars, or by imprisonment in the state penitentiary for not more than five years, or by both such fine and imprisonment.

"Any person over the age of eighteen who is convicted of a violation under this section wherein he sold, traded, furnished, or gave away marijuana to another person eighteen years of age or less, or who utilized the services of another person eighteen years of age or less for the purpose of selling, trading, furnishing, or giving away marijuana to another, shall be punished by imprisonment in the state penitentiary for a period of not less than five years, nor more than ten years." (Underscoring ours.)

The Office of County Justice has limited criminal jurisdiction. Section 27-18-04 limits the criminal jurisdiction of County Justices to hear and determine all cases of misdemeanors arising from crimes committed in the County.

In examining the provisions of section 19-03-28.1, particularly the underscored language, it becomes obvious that the violation may be a felony. The maximum punishment corresponds to that of a felony as such term is defined in section 12-01-07. Said section provides as follows:

"CLASSIFICATION OF CRIMES - 'FELONY' AND 'MISDEMEANOR' DEFINED. Crimes or public offenses are either felonies or misdemeanors. A felony is a crime which is or may be punishable with death or imprisonment in the penitentiary. Every other crime is a misdemeanor. When a crime punishable by imprisonment in the penitentiary also is punishable by fine or imprisonment in a county jail, in the discretion of the court or jury, it is, except when otherwise specially declared by law to be a felony, a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the penitentiary." (Underscoring ours.)

The above section has been construed in the case of *Ex parte Stricker v. Andrews*, 62 N.D. 215, 242 N.W. 912, in which the Court had under consideration a similar type statute. The Court on Page 913 said:

"It will be noticed that this provision providing for the lesser penalty, and thus the reduction of the crime from felony to a misdemeanor, is confined to the time of passing of sentence. Prior to such time, the crime charged is a felony, must be charged as such, must be tried as such, and this implies must be court that has the jurisdiction to try a felony. After the case is tried, and when the defendant is ready for sentence, the court, in the exercise of judicial discretion, may reduce the crime to the status of a misdemeanor.

"Here the court has no jurisdiction to hear and determine a felony, and consequently did not have the right to exercise any discretion as to punishment."

The Court, in effect, said that the authority to reduce the crime to a misdemeanor or to consider the crime a misdemeanor is only for purposes of imposing punishment or sentence which can occur only after a conviction or judgment has been obtained. A person charged with having violated Section 19-03-28.1 may be subject to a penalty which constitutes a felony. This fact alone removes the case from the jurisdiction of a county justice who may only hear and determine misdemeanors. The fact that after the person has been found guilty or has plead guilty the Court may impose a sentence less severe, does not confer jurisdiction upon a Court having jurisdiction only over misdemeanors.

You mention the case of *Davis v. Riedman*, 114 N.W.2d. 881, as authority for the County Justice to exercise jurisdiction. However, said case is not applicable. The principle question involved there is whether or not a penalty provision which, amongst other things, stated that a conviction subjected the individual to imprisonment for not more than one year without specifying the place of confinement. The Court made the observation that where a statute does not specify the crime to be a misdemeanor or felony but merely provides a maximum imprisonment for one year, without specifying the place of imprisonment there is doubt as to the grade of the crime and the doubt must be resolved in favor of the defendant. On Page 833, the Court specifically said:

"Generally where the statute does not state a crime is a felony or a misdemeanor, or classify it by fixing the place of imprisonment, and doubt exists whether it shall be punished by imprisonment in the State penitentiary or the county jail, the defendant will be given the benefit of the doubt and the offense will be deemed a misdemeanor, punishable by confinement in the county jail. This has been held in a number of cases. * * *." (Citations omitted.)

In the instant matter the penalty provisions specifically state: "* * * by a fine of not more than two thousand dollars and by imprisonment in the county jail for not less than six months or by imprisonment in the state penitentiary for not more than two years or by both such fine and imprisonment."

It is, therefore, our opinion that a County Justice does not have the jurisdiction to try cases arising out of violations of section 19-03-28.1 of the North Dakota Century Code.

HELGI JOHANNESON
Attorney General