

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 96-F-08

Date Issued: March 26, 1996

Requested by: Representative Francis J. Wald

- QUESTION PRESENTED -

Whether there is a conflict between N.D.C.C. § 40-18-15, which requires a defendant charged with the violation of a city ordinance to waive the right to a jury trial in writing before the case may be heard by a municipal judge, and N.D.C.C. § 40-18-15.1, which provides that a municipal court case may be transferred to district court for jury trial only if the defendant has requested the transfer in writing.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that there is a conflict between N.D.C.C. §§ 40-18-15 and 40-18-15.1 if a defendant does not either waive the right to a jury trial or request to transfer the case to district court. It is my further opinion that this conflict may be resolved in certain home rule cities by providing for a jury trial in municipal court. It is my further opinion that if a jury trial is not available in municipal court, then N.D.C.C. § 40-18-15.1 prevails because its later enactment implicitly amended N.D.C.C. § 40-18-15.

- ANALYSIS -

Trials in municipal courts are regulated, in part, by N.D.C.C. §§ 40-18-15 and 40-18-15.1.

40-18-15. Trial in nonjury cases rising under the ordinances of a city. An action for the violation of a city ordinance for which the right to a jury trial does not otherwise exist or in which the defendant has timely and appropriately waived a right to a jury trial in writing pursuant to rules of the supreme court, may be tried and determined by the municipal judge without the intervention of a jury. In the event of an adverse verdict in a municipal court trial, a defendant may appeal

as provided in section 40-18-19, but a waiver of jury trial in the municipal court proceeding also constitutes a waiver of jury trial in the district court.

40-18-15.1. Transfer to district court - Expenses of prosecution - Division of funds and expenses between city, county, and state. A matter may be transferred to district court for trial only if within 28 days after arraignment the defendant has requested in writing to transfer the case to district court and to exercise the defendant's right to a jury trial. . .

There is no conflict between these statutes if the defendant waives the right to a jury trial in writing pursuant to Rules of the Supreme Court or timely requests in writing to transfer the case to district court and to exercise the right to a jury trial because the defendant will either have a bench trial in municipal court or a jury trial in district court. N.D.C.C. § 1-02-07.

A conflict between these sections may arise if a defendant who is entitled to a jury trial in municipal court neither waives the right to a jury trial nor requests a transfer to district court. In such a case, the defendant is not in district court to receive a jury trial and cannot be given a bench trial in municipal court because the right to a jury trial has not been waived.

An action for the violation of a city ordinance may be tried before a municipal judge without a jury in two instances: (1) where the right to a jury trial does not otherwise exist; or (2) where the defendant has timely and appropriately waived the right to a jury trial in writing pursuant to Rules of the Supreme Court. N.D.C.C. § 40-18-15. A transfer of the case for a district court jury trial may only be obtained upon a timely written demand. N.D.C.C. § 40-18-15.1. One possible interpretation which could reconcile N.D.C.C. §§ 40-18-15 and 40-18-15.1 would be to conclude that a defendant in municipal court who has neither waived the right to a jury trial nor requested a transfer to district court for a jury trial may be given a jury trial in municipal court. Whether this is permitted differs for home rule cities and cities without a home rule charter.

Cities without a home rule charter are not authorized to provide a jury trial in their municipal court. See City of Riverside v. Smuda, 339 N.W.2d 768, 770 (N.D. 1983). Former authority permitting municipal courts to hold jury trials was repealed by the Legislature. 1973 N.D. Sess. Laws ch. 327. "Cities are creatures of statute and possess only those powers and authorities granted by statute or

March 26, 1996

Page 3

necessarily implied from an expressed statutory grant." Ebach v. Ralston, 469 N.W.2d 801, 804 (N.D. 1991). The rule of strict construction applies in defining municipal powers. Id. There is no extant statutory law permitting cities generally or municipal courts specifically to hold jury trials. Although statutory language adopted in 1973 which specifically required municipal court cases to be heard without a jury was subsequently modified, 1987 N.D. Sess. Laws ch. 375, § 10, this modification did not revive the former statutory authority for municipal court jury trials. N.D.C.C. § 1-02-16. Therefore, N.D.C.C. §§ 40-18-15 and 40-18-15.1 may not be reconciled by assuming that a defendant who has neither waived the right to a jury trial nor requested transfer to district court may have a jury trial in municipal court in cities without a home rule charter.

However, the charter of a home rule city may contain the power:

To provide for city courts, their jurisdiction and powers over ordinance violations, duties, administration, and the selection, qualifications, and compensation of their officers; however, the right of appeal from judgment of such courts shall not be in any way affected.

N.D.C.C. § 40-05.1-06(5). A home rule charter and the ordinances made under it supersede state laws to the contrary within the city's jurisdiction and are to be liberally construed for such purposes. N.D.C.C. § 40-05.1-05. The power must be contained in the city's home rule charter and implemented by ordinance in order to supersede state law. Litten v. City of Fargo, 294 N.W.2d 628, 631-32 (N.D. 1980); N.D.C.C. § 40-05.1-06. A prior Attorney General Opinion concluded that a home rule city possessing charter authority to define offenses and provide penalties may, through ordinances, supersede the limits in state law placed upon penalties for violating city ordinances. 1982 N.D. Op. Att'y Gen. 188. Therefore, a home rule city may supersede state law and provide for a jury trial in its municipal court if its charter contains the power found in N.D.C.C. § 40-05.1-06(5) and if it has passed ordinances to implement that power. It is my opinion that the conflict between N.D.C.C. §§ 40-18-15 and 40-18-15.1 can be avoided if a home rule city has provided a jury trial for charges of violating a city ordinance because a defendant who neither waives the right to a jury trial nor timely requests a transfer to district court may obtain a jury trial in municipal court.

In the absence of authority for a municipal court to hold a jury trial, the conflict between N.D.C.C. §§ 40-18-15 and 40-18-15.1 must

March 26, 1996

Page 4

be resolved in light of how the right to a jury trial in criminal cases is interpreted under the federal and state constitutions. A preliminary issue is whether it is constitutionally permitted to condition the right to a jury trial for ordinance violations on a timely demand by the defendant.

The right to a jury trial when charged with a crime as found in the Sixth Amendment to the United States Constitution applies to the states through operation of the Fourteenth Amendment to the United States Constitution. Duncan v. Louisiana, 391 U.S. 145, 149 (1968). Petty offenses do not invoke the right to trial by jury under the Sixth Amendment. Baldwin v. New York, 399 U.S. 66, 69 (1970). See also Duncan, 391 U.S. at 159. However, no offense can be deemed petty for these purposes where imprisonment for more than six months is allowed. Baldwin, 399 U.S. at 69. For federal purposes, petty offenses are defined as those punishable by more than six months in prison and a \$500 fine. Duncan, 391 U.S. at 161. The maximum punishment for violation of a city ordinance is imprisonment for 30 days or a fine of \$1,000 or both, except when enlarged by a home rule city. N.D.C.C. § 40-05-06; 1982 N.D. Op. Att'y Gen. 188. Therefore the Sixth Amendment right to a jury trial is generally not implicated in prosecutions for the violation of a city ordinance.

However, the North Dakota Constitution may be interpreted to provide greater protection than the safeguards guaranteed in the federal constitution. City of Bismarck v. Altevogt, 353 N.W.2d 760, 766 (N.D. 1984). Article I, Section 13, of the North Dakota Constitution provides, in part, "the right of trial by jury shall be secured to all, and remain inviolate." The right of trial by jury is preserved as it existed at the time of the adoption of our state constitution in 1889. Altevogt at 764. The North Dakota Supreme Court has held that a defendant is not entitled to a jury trial as a matter of right where the maximum penalty for a crime is 30 days in jail and \$250 fine. State v. Heath, 177 N.W.2d 751, 754 (N.D. 1970). That opinion, however, has been called into question. Altevogt, at 765-66. Altevogt was decided by finding that a former version of N.D.C.C. § 40-18-15 guaranteed a jury trial, and the court specifically stated that it did not decide whether the state constitution guarantees a jury trial in municipal ordinance cases. Id. at 766. However, the court stated in dicta that statutes in place at the time North Dakota adopted its constitutional right to trial by jury may be evidence of what was understood to be the right of trial by jury when the North Dakota Constitution was adopted. Id. at 764-65. The earlier statutes provided for a jury trial in cases where the defendant may be imprisoned for more than 10 days or fined more than \$20. Id. at 765.

Previously existing law which provided a jury trial for charges of violating a city ordinance required the defendant to demand a jury before commencement of the trial. Altevogt, 353 N.W.2d at 765. However, a felony defendant cannot be required to make a written demand for a twelve person jury, and waiver of the right to a full jury trial by a felony defendant will not be inferred without evidence of a clear and certain waiver. State v. Hegg, 410 N.W.2d 152, 154 (N.D. 1987). Both positions may be reconciled by recognizing the general principle that a defendant's fundamental right to a jury trial is preserved with increasing caution as the offense increases in gravity. State v. Bakke, 498 N.W.2d 819, 821-22 (N.D. App. 1993) (counsel may waive defendant's right to jury for misdemeanor but counsel may not waive jury for felony charge). This implies that less protection is required as the severity of the offense decreases. Further, it is presumed that the Legislature intended to comply with the constitutions of the state and of the United States, and any doubt must be resolved in favor of a statute's validity. State ex rel. Johnson v. Baker, 21 N.W.2d 355, 359 (N.D. 1945); Snortland v. Crawford, 306 N.W.2d 614-26 (N.D. 1981); N.D.C.C. § 1-02-38(1). This presumption is conclusive unless the statute clearly contravenes the state or federal constitutions. Hegg, 410 N.W.2d at 154; State ex rel. Lesmeister v. Olson, 354 N.W.2d 690, 694 (N.D. 1984). Also, a statute will only be found unconstitutional upon concurrence of four of the five justices of the North Dakota Supreme Court. N.D. Const. art. VI, § 4. "One who attacks a statute on constitutional grounds, defended as that statute is by a strong presumption of constitutionality, should bring up his heavy artillery or forego the attack entirely." So. Valley Grain Dealers v. Bd. of County Comm'rs, 257 N.W.2d 425, 434 (N.D. 1977). Therefore, without regard to any future resolution of the constitutional decision avoided in Altevogt, the right of trial by jury, at the time of the adoption of the North Dakota Constitution in 1889, may be defined to mean that a defendant does not have the right to receive a trial by jury absent a demand before the commencement of trial in cases involving the violation of a city ordinance. Altevogt, 353 N.W.2d at 764-65.

Two possibilities must be analyzed without regard to where the Supreme Court may draw the line between a petty offense without the right to trial by jury and an offense for which there is a constitutional right to trial by jury. If there is no right to a jury trial for a particular ordinance violation other than by statute, then the defendant must either take advantage of the right to demand a transfer to district court for jury trial under N.D.C.C. § 40-18-15.1 or receive a bench trial under N.D.C.C. § 40-18-15, and

March 26, 1996

Page 6

thereby avoid the conflict between these sections. In the event that the North Dakota Supreme Court would determine that there is a constitutional right to a jury trial for certain violations of city ordinances, then there is an irreconcilable conflict if a defendant neither waives the right to a jury trial nor timely requests transfer to district court for jury trial.

As noted above, there is no federal constitutional impediment, nor state constitutional impediment, to the Legislature's providing that actions for the violation of a city ordinance may be by jury trial only upon demand by the defendant and not as a matter of right absent such demand. Although statutes relating to the same subject matter must be construed together and should be harmonized if possible to give meaningful effect to each without rendering one or the other useless, Westman v. North Dakota Workers Compensation Bureau, 459 N.W.2d 540, 541 (N.D. 1990), the requirement that the right to a jury trial must be waived in writing under N.D.C.C. § 40-18-15 cannot be reconciled or harmonized with the requirement that a jury trial must be demanded in writing under N.D.C.C. § 40-18-15.1. "If an irreconcilable conflict exists, the latest enactment will control or will be regarded as an exception to or as a qualification of the prior statute." City of Fargo, Cass County v. State, 260 N.W.2d 333, 338 (N.D. 1977). It is not possible to determine that either the requirement of N.D.C.C. § 40-18-15 that the defendant timely and appropriately waive the right to a jury trial in writing pursuant to the North Dakota Supreme Court Rules or the requirement of N.D.C.C. § 40-18-15.1 for a written request to transfer the case to district court and to exercise defendant's right to a jury trial is a particular exception to the other which prevails under N.D.C.C. § 1-02-07. See Northwestern Sav. & Loan Ass'n v. Baumgartner, 136 N.W.2d 640, 643 (N.D. 1965).

Although an implied repeal or implied amendment of a statute is disfavored, that conclusion may be found where a conflict between two statutes is irreconcilable. Birst v. Sanstead, 493 N.W.2d 690, 695 (N.D. 1992). N.D.C.C. § 40-18-15.1 was amended during the 1995 legislative session to specifically require that a defendant in municipal court request in writing to transfer the case to district court and to exercise defendant's right to a jury trial. 1995 N.D. Sess. Laws ch. 388. This statute previously stated that the case was automatically transferred to district court for a jury trial after 28 days if the defendant had not waived in writing the right to a jury trial. Id. N.D.C.C. § 40-18-15 was not amended during the 1995 session. The requirement in N.D.C.C. § 40-18-15 that the defendant waive the right to a jury trial in writing pursuant to North Dakota Supreme Court Rules has been implicitly repealed or amended by the

March 26, 1996

Page 7

later enactment of N.D.C.C. § 40-18-15.1. Therefore, in the event that a defendant neither waives in writing the right to a jury trial under N.D.C.C. § 40-18-15 nor timely demands in writing the transfer of the case to district court and to exercise the defendant's right to a jury trial pursuant to N.D.C.C. § 40-18-15.1, and where there is no authority permitting a jury trial in municipal court, it is my further opinion that the requirement that the defendant must request in writing to transfer the case to district court in order to obtain a jury trial under N.D.C.C. § 40-18-15.1 prevails over conflicting terms in N.D.C.C. § 40-18-15.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: Edward E. Erickson
Assistant Attorney General

vkk