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Legal Opinion 2015-025

TO: City Council; Mayor John Engen; Dale Bickell; Mike Brady; Scott Hoffman; Mike Colyer; Chris Odlin; Richard Stepper; Laurie Clark; Steve Johnson; Marty Rehbein; Kirsten Hands; Kelly Elam

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE August 7, 2015

RE: Municipal ordinance penalties authorized by Montana State Law

FACTS:

The City of Missoula is participating in a jail diversion study review in an effort to identify how the Missoula County detention center jail prisoner population might be able to be reduced. The City of Missoula is contributing \$20,000.00 to assist in paying for consultant services and has city representatives on the jail diversion advisory and steering committees. One potential means of reducing incarceration is to identify misdemeanor criminal offenses for which incarceration as a potential penalty is not authorized. Implementation of offenses for which incarceration is not to be a potential penalty likely will require Montana State Legislative enactments with respect to Montana state law, while the Missoula City Council is the legislative body that could determine as a matter of city policy which city ordinance violations should not have incarceration as a potential penalty.

Also, it should be noted and emphasized that if jail incarceration is not a penalty for an offense, generally law enforcement may not arrest a person solely for violating a state law or municipal ordinance for which incarceration is not a penalty, unless there are factual circumstances that justify the person's immediate arrest.

ISSUE:

What range of penalties has the Montana State Legislature authorized municipalities to implement with respect to municipal ordinance violations?

CONCLUSION:

Several provisions of Montana state law authorize a Montana municipality to impose penalties of a fine up to \$500.00 and/or incarceration in jail for up to six (6) months for municipal ordinance violations. An exception authorizing a \$1,000.00 fine exists for violation of an ordinance relating to local or federal wastewater pretreatment standards implementing the Federal Water Pollution Control Act, 33 U. S. C. 1251 through 1387.

LEGAL DISCUSSION:

There are three (3) Montana state municipal government laws that specifically govern the penalties that a Montana municipality is authorized by the Montana State Legislature to impose for violations of a municipal ordinance. These sections of Montana state law include sections 7-1-111(8); 7-5-109 and 7-5-4207 MCA. These sections of Montana state law provide as follows:

7-1-111. Powers denied. A local government unit with self-government powers is prohibited from exercising the following:

...
(8) any power that defines as an offense conduct made criminal by state statute, that defines an offense as a felony, or that fixes the penalty or sentence for a misdemeanor in excess of a fine of \$500, 6 months' imprisonment, or both, except as specifically authorized by statute;

7-5-109. Penalty for violation of ordinance. (1) Except as provided in 7-5-4209 and subsection (2) of this section, a local government may fix penalties for the violation of an ordinance that do not exceed a fine of \$500 or 6 months' imprisonment or both the fine and imprisonment.

(2) A local government may fix penalties for the violation of an ordinance relating to local or federal wastewater pretreatment standards implementing the Federal Water Pollution Control Act, 33 U.S.C. 1251 through 1387, if the penalties do not exceed \$1,000 per day for each violation or 6 months' imprisonment, or both.

7-5-4207. Penalties for violation of municipal ordinances. (1) Except as provided in 7-5-4209 and subsection (2) of this section, the city or town council may impose fines and penalties for the violation of any city ordinance, but a fine or penalty may not exceed \$500 and imprisonment may not exceed 6 months for any one offense.

(2) A local government may fix penalties for the violation of an ordinance relating to local or federal wastewater pretreatment standards implementing the Federal Water Pollution Control Act, 33 U.S.C. 1251 through 1387, if the penalties do not exceed \$1,000 per day for each violation or 6 months' imprisonment, or both.

The 1999 Montana State Legislature enacted sections 7-1-4150 through 7-1-4152 MCA authorizing Montana municipalities to establish their respective ordinance violations as "municipal infractions" as a civil offense rather than a criminal offense. Establishing municipal ordinance violations as civil offenses also would mean that jail incarceration would not be a potential penalty and a person could not be arrested solely for a violation of a municipal ordinance established as a municipal fraction civil offense.

Sections 7-1-4150 through 7-1-4152 MCA provide:

7-1-4150. Municipal infractions -- civil offense. (1) A municipal infraction is a civil offense punishable by a civil penalty of not more than \$300 for each violation or if the infraction is a repeat offense, a civil penalty not to exceed \$500 for each repeat violation.

(2) A municipality may by ordinance provide that a violation of an ordinance is a municipal infraction.

(3) (a) A municipality may by ordinance provide that a criminal offense under state law that is punishable only by a fine is a municipal infraction.

(b) Statutory surcharges must be imposed, as provided in 3-1-317(1)(a), 3-1-318(1), and 46-18-236(6)(a), on municipal infractions that are criminal offenses under state law, and the amounts must be distributed as provided in those sections.

(c) A person may not be proceeded against for the same act or omission to act under both a municipal infraction ordinance and the corresponding state law criminal offense on which the municipal infraction ordinance is based.

(4) An officer who is authorized by a municipality to enforce a municipal code or regulation may issue a civil citation to a person who commits a municipal infraction. The citation may be served by personal service, by certified mail addressed to the defendant at the defendant's last-known mailing address, return receipt requested, or by publication, as provided in Rule 4(o), M.R.Civ.P. A copy of the citation must be retained by the issuing officer and one copy must be sent to the clerk of the municipal or city court. The citation must serve as notification that a municipal infraction has been committed and must contain the following information:

- (a) the name and address of the defendant;
- (b) the name or description of the infraction attested to by the officer issuing the citation;
- (c) the location and time of the infraction;
- (d) the amount of civil penalty to be assessed or the alternate relief sought, or both;
- (e) the manner, location, and time in which the penalty may be paid;
- (f) the time and place of court appearance; and
- (g) the penalty for failure to appear in court.

7-1-4151. Municipal infractions -- proceedings. (1) In municipal infraction proceedings:

(a) the matter must be tried before a municipal court judge or city court judge in the same manner as a small claim if the total amount of civil penalties does not exceed \$7,000. The matter may only be tried before a judge in district court if the total amount of civil penalties assessed exceeds \$7,000.

(b) the city has the burden of proof that the municipal infraction occurred and that the defendant committed the infraction. The proof must be by clear and convincing evidence.

(c) the court shall ensure that the defendant has received a copy of the charges and that the defendant understands the charges. The defendant may question all witnesses who appear for the municipality and produce evidence or witnesses on the defendant's behalf.

(d) the defendant may be represented by counsel of the defendant's own choosing and at the defendant's own expense;

(e) the defendant may answer by admitting or denying the infraction;

(f) if a municipal infraction is proven, the court shall enter a judgment against the defendant. If the infraction is not proven, the court shall dismiss the charges. Each day that a violation occurs or is permitted to exist by the defendant constitutes a separate infraction.

(2) All penalties or forfeitures collected by the court for municipal infractions must be remitted to the municipality in the same manner as fines and forfeitures collected for criminal offenses. If the person named in the citation is served as provided in 7-1-4150 and fails without good cause to appear in response to the civil citation, judgment must be entered against the person.

(3) A person against whom judgment is entered shall pay court costs and fees as in small claims court under Title 25, chapter 35. If the action is dismissed by the court, the municipality is liable for the court costs and court fees.

(4) Seeking a civil penalty as authorized in this section does not preclude a municipality from seeking alternative relief from the court in the same action.

(5) When judgment has been entered against a defendant, the court may do any of the following:

(a) impose a civil penalty by entry of a judgment against the defendant;

(b) direct that payment of the civil penalty be suspended or deferred under conditions imposed by the court;

(c) grant appropriate alternative relief ordering the defendant to abate or cease the violation;

(d) authorize the municipality to abate or correct the violation;

(e) order that the municipality's costs for abatement or correction of the violation be entered as a judgment against the defendant or assessed against the property where the violation occurred, or both.

(6) If a defendant willfully violates the terms of an order imposed by the court, the failure is contempt.

7-1-4152. Municipal infractions -- jurisdiction -- appeal. (1) A municipal court judge or city court judge has jurisdiction to assess or enter judgment for costs of abatement or correction in any amount not to exceed the jurisdictional amount for a money judgment in a civil action pursuant to 3-11-103. If the municipality seeks abatement or correction costs in excess of that amount, the matter must be referred to the district court for hearing and entry of an appropriate order. The procedure for hearing in the district court shall be the same procedure as that for a small claims appealed under 25-35-803.

(2) The defendant or the municipality may file a motion for a new trial or may appeal the decision to district court. A factual determination made by the trial court, supported by substantial evidence as shown in the record, is binding for purposes of appeal relating to the violation at issue, but is not admissible or binding as to any future violations for the same or similar ordinance provision by the same defendant.

(3) Except for willful or wanton misconduct on the part of the municipality, the issuance of a civil citation for a municipal infraction or the ensuing court proceedings do not provide an action for false arrest, false imprisonment, or malicious prosecution.

(4) An action brought pursuant to this section for a municipal infraction that is an environmental violation does not preclude, and is in addition to, any other enforcement action that may be brought under state law.

During recent decades the Missoula City Council has adopted several dozen ordinances in which the Missoula City Council has included language indicating that for the specific ordinance being adopted, jail incarceration is not to be a municipal ordinance penalty for that ordinance. Recently the City attorney's office attempted to compile a general identification of Missoula Municipal Code provisions which if violated include jail incarceration as penalty as well as the more recent Missoula City Council ordinance enactments where the Missoula City Council included ordinance language indicating that jail incarceration was not to be a potential penalty for a violation of that municipal ordinance. This general compilation of Missoula Municipal Code violations generated the following information about Missoula Municipal Code penalties.

IMPRISONMENT AS A PENALTY: Two sections that have very broad application in Missoula Municipal Code are:

- a. Section 1.20.010(A) MMC the general municipal code penalty provision that applies to any Missoula Municipal Code section that does not specifically identify its own penalty. This section authorizes imprisonment as a penalty; and
- b. Section 10.04.050 MMC of title 10 entitled "VEHICLES AND TRAFFIC". Section 10.04.050 MMC includes incarceration and more importantly it applies to all of title 10 MMC, unless there is a specific section that as its own specific penalty provision.

OTHER MISSOULA MUNICIPAL CODE SECTIONS AUTHORIZING IMPRISONMENT AS A PENALTY

- a. Section 5.40.060 MMC pertaining to boiler room operations (intense telephone solicitation operations);
- b. Section 6.07.030 (B) MMC pertaining to animal but only including offense of interference with police dog;
- c. Section 8.36.02 Smoking in Elevator;
- d. Section 8.56.050 MMC Transportation of Radioactive Materials." Actually this chapter of Missoula Municipal Code should be repealed; because the United States District Court invalidated the City of Missoula transportation of radioactive materials ordinance more than three decades ago; but the city council refused to repeal it after the United States District Court ruling;
- e. Section 8.58.030 MMC regulating firearms in public buildings or meetings;
- f. Section 8.64.130 (B)(2) MMC pertaining to Missoula Outdoor lighting
- g. Section 9.24.020 MMC disturbing the peace. City police generally charge a person with disorderly conduct pursuant to Montana state law and do not actually use this section. Current Montana state disorderly conduct law authorizes a penalty in addition to a fine of up to 10 days incarceration;
- h. Section 9.40.010 MMC removal of any official notice of the City;
- i. Section 10.26.070 MMC emergency parking restrictions, up to 30 days;
- j. Section 10.40.030 MMC snowmobile regulations, up to 30 days;
- k. Section 10.48.060 MMC size and weight restrictions on 23rd Avenue;

- l. Section 10.50.050 MMC street cleaning, although not clear. Provides violation is a misdemeanor and may be subject to towing at owners expense;
- m. Section 13.04.050 MMC failure to connect to sewer;
- n. Section 13.04.120 MMC damaging or tampering with sewage works;
- o. Section 13.07.1620 MMC wastewater pretreatment regulations;
- p. Section 13.26.130 MMC Missoula Valley Water Quality ordinance;
- q. Section 15.04.020 MMC violation of model technical building and fire codes constitutes a violation of municipal ordinance and subject to penalties under the parameters of what Montana State Law allows for municipal ordinance violation for violations of state adopted technical codes;
- r. Section 15.52.230 MMC building security codes, any person violating any provision of this “article” ...should be title or chapter; and
- s. Section 16.32.010 MMC manufactured housing and mobile home park. Note I do not recall this chapter ever being utilized; it is so old that section 16.32.010 MMC specifically refers to a city jail. The city has not had a city jail for approximately 3 decades.

NUMEROUS EXAMPLES OF CITY COUNCIL ENACTMENTS IN RECENT DECADES THAT SPECIFICALLY PROVIDE THAT THERE SHALL BE NO PENALTY OF IMPRISONMENT FOR THE SPECIFIC OFFENSE BEING ADDRESSED.

- a. Section 5.08.160 MMC business licensing;
- b. Sections 5.20.050, 5.24.060, 5.24.070; 5.28.060 MMC secondhand dealers and Pawnshops penalty for false information (there actually cross reference a non-existent penalty, should be 5.08.160 general business licensing penalty for 1.20.010 general penalty);
- c. Section 5.36.130 MMC going out of business sale;
- d. Section 5.45.1100 MMC ambulance services;
- e. Section 6.07.860 MMC of Missoula Cat Ordinance specifically cross references to subsection 6.07.030 MMC, fine only;
- f. Section 6.07.120 feeding wildlife prohibited;
- g. Section 6.08.450 MMC of pet shops ordinance specifically cross references to subsection 6.07.030 MMC, fine only;
- h. Section 8.28.150 garbage and rubbish;
- i. Section 8.37.110 MMC smoking in indoor places of employment and public places;
- j. Section 8.40.050 MMC hazardous vegetation and nuisance weeds;
- k. Section 8.52.070 MMC fireworks;
- l. Section 8.60.030 MMC burning regulations;
- m. Section 8.62.60 pesticide notification and contamination prevention;
- n. Section 9.30.080 MMC noise control;
- o. Section 9.34.050 MMC pedestrian interference;
- p. Section 9.36.70 MMC aggressive solicitation;
- q. Section 9.52.060 and Section 9.56.040 MMC offenses by and against minors;
- r. Section 9.58.040 MMC social host;
- s. Section 9.64.090 MMC illegal discrimination, first 3 violations enforced only by complaining party, 4th violation is misdemeanor-fine only;

- t. Section 10.16.130 MMC vehicles required to yield to urban transportation system buses utilizing flashing yield sign;
- u. Section 10.20.300 MMC passengers under 18 riding in cargo area;
- v. Section 10.20.320 MMC cell phone;
- w. Section 10.22.090 MMC violation of restricted parking areas;
- x. Section 10.22.190 MMC parking for camping purposes;
- y. Section 10.22.260 residential parking permit area;
- z. Section 10.22.290 MMC failure to display parking area permit;
- aa. Section 10.54.110 MMC vehicle operation, speeding, improper turn; etc., fine only;
- bb. Section 10.56.140 MMC parking violations;
- cc. Section 10.56.030 MMC refusal to submit to breath or blood alcohol and/or drug test;
- dd. Section 10.58.040 MMC golf cards;
- ee. Section 12.16.045 MMC snow and ice removed from sidewalk;
- ff. Section 12.18.100 MMC Sidewalk cafés;
- gg. Section 12.24.190 MMC excavations;
- hh. Section 12.28.140 MMC visibility obstructions;
- ii. Section 12.30.060 MMC fence obstructions;
- jj. Section 12.32.190 MMC comprehensive tree and shrub planting, pruning and maintenance regulations;
- kk. Section 12.36.200 MMC \$10 fine for failure to remove dead wires and unused poles;
- ll. Section 12.36.055 MMC alcohol glass beverage bottles prohibited in city parks and open space;
- mm. Section 12.040.060 MMC city parks;
- nn. Section 12.40.070 MMC prohibited conduct at City of Missoula skatepark;
- oo. Section 12.58.070 MMC special events permits;
- pp. Section 13.10.070 MMC phosphorus content in wastewater discharge;
- qq. Section 15.48.150 MMC building security code;

As previously noted, if jail incarceration is not a potential penalty, generally law enforcement may not legally arrest a person solely for violation of an ordinance or state law for which jail incarceration is not a penalty, unless there are specific factual circumstances justifying an immediate arrest. See *State of Montana v. Bauer*, 2001 Mt 248, 307 M 105, 36 P 3d 892(2001) wherein the Montana Supreme Court held that the arrest by Havre city police of a young male adult for the non-jailable offense of second offense of minor in possession was unreasonable absent specific factual circumstances to justify immediate arrest. In the Bauer case, the male ran and hid when he observed the police car driving down the street. The Havre city police eventually found Bauer and arrested him for minor in possession second offense, which was a non-jailable offense. During booking at the Havre police station Bauer was found to be in possession of cocaine as well. The Montana Supreme Court suppressed the evidence pertaining to the cocaine violation indicating that when determining the reasonableness of a warrantless arrest the interests of the State of Montana must be balanced against the level of intrusion into an individual's privacy resulting from the search and that such a legal analysis applies to the seizure of a person by law enforcement. The Montana Supreme Court concluded that it was unreasonable for a law enforcement officer to effect an arrest and detention of a person for a non-jailable offense when there are no circumstances to justify an immediate arrest and a person stopped for a non-jailable offense should not be subjected to the indignity of an arrest and police

station detention when a simple nonintrusive notice to appear will serve the interests of law enforcement. Since the arrest for a non-jailable offense was unreasonable, the subsequent discovery of the cocaine was legally unacceptable and the cocaine evidence was suppressed.

In paragraph 33 of its decision the Montana Supreme Court stated:

“We hold that under Article II, Section 10 and Section 11, of the Montana Constitution, it is unreasonable for a police officer to effect an arrest and detention for a non-jailable offense when there are no circumstances to justify an immediate arrest. In the absence of special circumstances such as a concern for safety of the offender or the public, a [person stopped for a non-jailable offense such as second offense, MIP, or a seatbelt infraction should not be subjected to the indignity of an arrest and police station detention when a simple non-intrusive notice to appear pursuant to section 46-6-31`0(1) MCA, will serve the interests of law enforcement.”

The reference to a seatbelt infraction in the above quote above pertains to a legal discussion the Montana Supreme Court in its Bauer decision had earlier in paragraphs 20 through 23 of its decision when it discussed a United States Supreme Court decision decided earlier that year in 2001, in which a mother in Texas was driving with her two children, all of whom were not wearing seatbelts. See *Atwater v. City of Lago Vista* (2001) 532 U. S. 318, 121 S. Ct. 1536, 149 L. Ed. 2d 549. The Texas mother was arrested and booked pursuant to Texas law. After more than an hour incarceration in a cell the Texas mother was taken before a magistrate who set a bond for the Texas mother. The United States Supreme Court relying on Texas state laws upheld the arrest of the Texas mother for a seatbelt violation.

The Montana Supreme Court in Bauer was making the legal point that the Texas statute differed considerably from the relevant Montana statutes and that in Montana a motorist could not be arrested for not wearing a seatbelt; so what the Texas mother experienced could not happen in Montana. In paragraph 23 of its Bauer decision the Montana Supreme Court stated in part that “Article II, Section 10 of the Montana Constitution guarantees an individual’s right of privacy. Article II, Section 11 of the Montana Constitution protects the citizens of the United States from unreasonable searches and seizures. . . .”

CONCLUSION:

Several provisions of Montana state law authorize a Montana municipality to impose penalties of a fine up to \$500.00 and/or incarceration in jail for up to six (6) months for municipal ordinance violations. An exception authorizing a \$1,000.00 fine exists for violation of an ordinance relating to local or federal wastewater pretreatment standards implementing the Federal Water Pollution Control Act, 33 U. S. C. 1251 through 1387.

OFFICE OF THE CITY ATTORNEY

/s/

Jim Nugent, City Attorney
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