

1548

A COUNTY COURT IS NOT A COURT OF RECORD AND IN A CRIMINAL CASE IN A COUNTY COURT WHERE THE DEFENDANT IS ENTITLED TO A TRIAL BY JURY AND DOES NOT WAIVE SUCH RIGHT, THE JUDGE IS REQUIRED TO CERTIFY THE CASE TO A COURT OF RECORD IN THE COUNTY AND—§§1907.012, 2937.08, 2938.04, 3773.22, 2938.10, 2938.13.

SYLLABUS:

1. Under Section 1907.012, Revised Code, a county court is not a court of record until January 1, 1963, and, under the provisions of Sections 2937.08 and 2938.04, Revised Code, in a criminal case in a county court where the defendant is entitled to a trial by jury, and does not waive such right, the judge is required to certify the case to a court of record in the county.

2. In prosecutions under Section 3773.22, Revised Code, a county court has original, but not exclusive, jurisdiction and where in such a case the defendant is entitled to a trial by jury, and does not waive such right, the case must be certified to a court of record as provided in Section 2937.08, Revised Code.

3. Where pursuant to Section 2937.08, Revised Code, a judge of a county court is required to certify a case to a court of record, he may certify the case to the court of common pleas or, under Section 2938.10, Revised Code, to any municipal court in the county regardless of its territorial jurisdiction.

4. Under Section 2938.13, Revised Code, where a solicitor or law director of a municipal corporation presents a case in a county court and such case is certified to a court of record pursuant to Section 2937.08, Revised Code, said solicitor or law director should present the case in the transferee court; and where the county prosecuting attorney presents such a case which is so certified, or where neither a solicitor, law director, or the prosecuting attorney presents a case in a county court, which case is so certified, the prosecuting attorney should present the case in the transferee court.

Columbus, Ohio, July 12, 1960

Hon. Fred E. Jones, Prosecuting Attorney
Warren County, Lebanon, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

“Several questions have risen regarding the somewhat confusing code sections dealing with the jurisdiction of a county court judge to try a defendant for a misdemeanor when such defendant would be entitled to a jury trial.

“Section 1913.09, effective November 6, 1959 reads in part as follows:

“ ‘.....In any criminal case in which the accused is entitled to a jury trial, a demand for a jury trial must be made by the accused before the court proceeds to inquire into the merits of the cause, otherwise a jury shall be deemed to be waived In any criminal action, a jury shall be composed of twelve qualified electors and their verdict shall be unanimous.’

“The sections following R.C. 1913.09 deal with other matters relating to a jury, and when taken together, they certainly seem to indicate that a jury trial may be held in county court in a criminal case.

“However, Section 2937.08 R.C., effective January 1, 1960 seems to indicate that a county court cannot grant a jury trial in a criminal case, but must ‘certify the case to a court of record’. Additionally, Section 2938.04 unequivocally says in part as follows:

“ ‘In courts not of record jury trial may not be had, but failure to waive jury in writing where right to jury trial may be asserted shall require the magistrate to certify such case to a court of record as provided in Section 2937.08 of the Revised Code.’

“My first question is whether a county court may grant a jury trial in a misdemeanor case. In certain sections such as 3773.22 R.C., it would appear that the county court has final jurisdiction. Section 3773.22, dealing with the charge of intoxication, disturbing the peace, and disorderly conduct, carries a fine up to \$100.00, and if the defendant can accordingly demand a jury trial, how can the county court have final jurisdiction?

“Assuming that a county court cannot grant a jury trial, and must certify a misdemeanor case wherein a jury trial is demanded to a court of record, Section 2937.08 R.C., raises other questions. Can the county court judge ‘certify’ the case to any municipal court in the county, as well as common pleas court? Who has the duty of prosecuting a case so certified, the municipal prosecutor or the county prosecutor?”

Section 2931.01, Revised Code, defines “magistrate” to include county court judges, police judges or justices, mayors of municipal corporations and judges of other courts inferior to the court of common pleas.

Section 2937.08, Revised Code, provides in part:

“* * * * * * * * *

“Upon the entry of such pleas to a charge of misdemeanor in a court not of record, the magistrate shall forthwith set the

matter for future trial, or, with the consent of both state and defendant may set trial forthwith, both pursuant to Chapter 2938. of the Revised Code, provided that if the nature of the offense is such that right to jury trial exists, such matter shall not be tried before him unless the accused, by writing subscribed by him, waives a jury and consents to be tried by the magistrate.

“If the defendant in such event does not waive right to jury trial, then the magistrate shall require the accused to enter into recognizance to appear before a court of record in the county, set by such magistrate, and the magistrate shall thereupon certify all papers filed, together with transcript of proceedings and accrued costs to date, and such recognizance if given, to such designated court of record. Such transfer shall not require the filing of indictment or information and trial shall proceed in the transferee court pursuant to Chapter 2938. of the Revised Code.”

Section 1907.012, Revised Code, specifically states that “effective January 1, 1963, county courts shall be considered courts of record for all purposes of law.” Thus, it must be assumed to be the legislative intent that a county court will not be a court of record until January 1, 1963. Accordingly, under Section 2937.08, *supra*, in a criminal case in a county court where the defendant is entitled to a jury trial, unless the defendant specifically waives his right to trial by jury, in writing, the judge must certify the matter to a court of record within the county.

Also significant in this regard are the provisions of Section 2938.04, Revised Code, which reads:

“In courts of record right to trial by jury as defined in section 2945.17 of the Revised Code shall be claimed by making demand in writing therefor and filing the same with the clerk of the court not less than three days prior to the date set for trial or on the day following receipt of notice whichever is the later. Failure to claim jury trial as provided herein shall be a complete waiver or right thereto. *In courts not of record jury trial may not be had, but failure to waive jury in writing where right to jury trial may be asserted shall require the magistrate to certify such case to a court of record as provided in section 2937.08 of the Revised Code.*” (Emphasis added)

The provisions of Sections 2937.08 and 2938.04, *supra*, relative to trial by jury, were inserted in the law by Amended Substitute Senate Bill No. 73 of the 103rd General Assembly, effective November 9, 1959. While these provisions preclude a judge of a county court from hearing a trial by jury, they are in apparent conflict with Sections 1913.09 and 1913.14, Revised Code.

Section 1913.09, *supra*, reads in part:

“* * * In any criminal case in which the accused is entitled to a jury trial, a demand for a jury trial must be made by the accused before the court proceeds to inquire into the merits of the cause, otherwise a jury shall be deemed to be waived. * * *

“* * * In any criminal action a jury shall be composed of twelve qualified electors and their verdict shall be unanimous.”

Section 1913.14, *supra*, reads in part:

“* * * The fees of jurors in any criminal case involving the violation of state law shall be paid out of the county treasury, and in any case involving a violation of a municipal ordinance shall be paid out of the treasury of the municipal corporation which has enacted the ordinance.”

The above provisions, while implying that a jury trial may be held in a county court, do not specifically so provide. On the other hand, Sections 2937.08 and 2938.04, *supra*, expressly preclude a county court from hearing a trial by jury—such court not being a court of record. Further, Amended Substitute Senate Bill No. 73, *supra*, repealed former Sections 2931.11, 2931.12, and 2931.13 to 2931.17, Revised Code, which sections had provided for jury trial cases in all magistrate courts—including county courts. Answering your first question, therefore, I conclude that in a criminal case in a county court in which the defendant is entitled to a trial by jury, and does not waive such right, the judge is required to certify the case to a court of record in the county. Your letter states:

“My first question is whether a county court may grant a jury trial in a misdemeanor case. In certain sections such as 3773.22 R.C., it would appear that the county court has final jurisdiction. Section 3773.22, dealing with the charge of intoxication, disturbing the peace, and disorderly conduct, carries a fine up to \$100.00, and if the defendant can accordingly demand a jury trial, how can the county court have final jurisdiction?”

Section 3773.22, Revised Code, dealing with a charge for intoxication reads:

“No person shall be found in a state of intoxication or, being intoxicated, shall disturb the peace and good order, or shall conduct himself in a disorderly manner. The county court has final jurisdiction to hear and determine any prosecution arising under this section.”

Division (O) of Section 3773.99, Revised Code, provides:

“Whoever violates section 3773.22 of the Revised Code shall be fined not less than five nor more than one hundred dollars.”
Section 2945.17, Revised Code, pertaining to trial by jury, reads:

“At any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of fifty dollars, the accused has the right to be tried by a jury.”

The reference to “final jurisdiction” in Section 3773.22, *supra*, is not limited to that section. A like provision is found in Section 3781.04, Revised Code, which provides:

“A judge of the county court, police judge, or municipal court judge has final jurisdiction within the territory for which he is elected or appointed in a prosecution for a violation of Chapters 2781., 3783., 3785., 3787., 3789., and 3791. of the Revised Code.”

The Court of Appeals of Hancock County in the case of *State v. Houser*, 73 Ohio App., 115, considered a somewhat similar situation wherein the mayor’s court bound over to the grand jury an individual charged with an offense not punishable by imprisonment but subject to a possible \$1000.00 fine upon a plea of not guilty and a demand for a jury trial. The appellant contended that the grant of “final jurisdiction” to the mayor’s court imposed exclusive jurisdiction upon the court and prevented the mayor’s court from referring the matter to the court of common pleas. The court concluded that the phrase “final jurisdiction” as used in Section 4528., General Code, presently Section 1905.02, Revised Code, is not the equivalent of exclusive jurisdiction.

The court in *State v. Houser*, *supra*, stated at pages 123 and 124 of its opinion:

“The use of the word ‘final’ to describe the jurisdiction of the mayor’s court is not sufficient to preclude the general original jurisdiction of the Common Pleas Court as granted by Section 13422-5, General Code. That section, when read in the light of Section 13436-5, General Code, which invests the Common Pleas Court with general authority, through the grand jury, ‘to inquire of and present all offenses committed within the county,’ is so expressive of an intent on the part of the Legislature to vest such jurisdiction in the Common Pleas Court that it cannot lightly be disregarded. The jurisdiction so clearly granted cannot be taken away by an inference or implication. *Small v. State*, 128 Ohio St., 548, 192 N.E., 790.

“The fact that the offense charged was of such a character that the accused had no constitutional right to trial by jury did not preclude the Legislature from providing for a jury trial for the accused upon such charge.”

In view of the foregoing, I am of the opinion that the words “final jurisdiction” as used in Section 3773.22, *supra*, is indicative of original jurisdiction in such actions rather than exclusive jurisdiction, and that where a right to trial by jury is involved, the provisions of Sections 2937.08 and 2938.04, *supra*, take precedence. Therefore, in answer to your second question, the county court at the present time has original jurisdiction in cases involving Section 3773.22, Revised Code, but the failure to waive trial by jury in such cases requires the county court to certify the matter to a court of record under Section 2937.08, Revised Code, regardless of the fact that the section gives the court final jurisdiction in such cases.

The answer to your third question is found in Section 2937.08, Revised Code, which provides in part :

* * *

* * *

* * *

“If the defendant in such event does not waive right to jury trial, then the magistrate shall require the accused to enter into recognizance to appear *before a court of record in the county, set by such magistrate*, and the magistrate shall thereupon certify all papers filed together with transcript of proceedings and accrued costs to date, and such recognizance if given, *to such designated court of record*. Such transfer shall not require the filing of indictment or information and trial shall proceed in the transferee court pursuant to Chapter 2938. of the Revised Code.” (Emphasis added)

This section requires that the person shall enter into recognizance to appear before a court of record in the county “set by the magistrate” and the transcript shall be presented to the designated court indicating the intent that the magistrate may specify any court of record within the county. This intent is further evidenced by Section 2937.31, Revised Code, which provides :

“If an accused is held to answer and offers sufficient bail, a recognizance or deposit shall be taken for his appearance to answer the charge before such *magistrate or before such court to which proceedings may be transferred pursuant to Chapter 2937. of the Revised Code*, at a date certain, or from day to day, or in case of the common pleas court on the first day of the next term thereof, and not depart without leave.” (Emphasis added)

Section 2938.10, Revised Code, further specifies that in cases certified under Section 2937.08, the prosecutor does not have to prove the offense occurred within the territorial limits of the court indicating that the certification may well be to any municipal court in the county as well as the common pleas court. Therefore, it is my opinion that a county court may properly designate any court of record within the county to dispose of a case wherein the defendant has demanded a jury pursuant to Section 2937.08, Revised Code.

The answer to your final question is found in Section 2938.13, Revised Code, which designates the person responsible for the prosecution of cases in magistrate court. Said Section 2938.13 reads as follows:

“In any case prosecuted for violation of a municipal ordinance the solicitor or law director, and for a statute, he or the prosecuting attorney, shall present the case for municipality and state respectively, but either may delegate such responsibility to some other attorney in a proper case, or, if the defendant be unrepresented by counsel may with leave of court, withdraw from the case. But the magistrate or judge shall not permit prosecution of any original case by private attorney employed or retained by a complaining witness.”

Section 2937.08, *supra*, in referring to a transfer of a case to a court of record for jury trial, provides:

“* * * Such transfer shall not require the filing of indictment or information and trial shall proceed in the transferee court pursuant to Chapter 2938. of the Revised Code.”

The answer to this question is further dependent upon who instituted the action in the county court. In Opinion No. 1185, Opinions of the Attorney General for 1960, issued on March 16, 1960, I held that a county court has jurisdiction to hear cases involving violations of municipal ordinances. Therefore, under Section 2938.13, *supra*, in an ordinance case instituted in a county court, the solicitor or law director is responsible for the prosecution. This seems to be further supported by the fact that Section 1901.34, Revised Code, would allow the city solicitor or city attorney in a municipal court to which the action might be transferred to prosecute only such cases as arise within the territory of said municipal court. It would further appear that all cases originating in a county court under state statutes should be prosecuted in the transferee court by the county prosecutor or the city solicitor depending upon who instituted the action in the county court. It is quite possible that a solicitor

might well institute an original action in the county court under a state affidavit and under these circumstances it would seem that he would have the duty and obligation to prosecute the matter in the transferee court as well as the county court. The county prosecutor is likewise responsible for all actions not originated by city or village authorities in the county court and is under the above cited provisions responsible for their prosecution in the transferee court.

In conclusion, it is my opinion and you are accordingly advised :

1. Under Section 1907.012, Revised Code, a county court is not a court of record until January 1, 1963, and, under the provisions of Sections 2937.08 and 2938.04, Revised Code, in a criminal case in a county court where the defendant is entitled to a trial by jury, and does not waive such right, the judge is required to certify the case to a court of record in the county.

2. In prosecutions under Section 3773.22, Revised Code, a county court has original, but not exclusive, jurisdiction and where in such a case the defendant is entitled to a trial by jury, and does not waive such right, the case must be certified to a court of record as provided in Section 2937.08, Revised Code.

3. Where pursuant to Section 2937.08, Revised Code, a judge of a county court is required to certify a case to a court of record, he may certify the case to the court of common pleas or, under Section 2938.10, Revised Code, to any municipal court in the county regardless of its territorial jurisdiction.

4. Under Section 2938.13, Revised Code, where a solicitor or law director of a municipal corporation presents a case in a county court and such case is certified to a court of record pursuant to Section 2937.08, Revised Code, said solicitor or law director should present the case in the transferee court; and where the county prosecuting attorney presents such a case which is so certified, or where neither a solicitor, law director, or the prosecuting attorney presents a case in a county court, which case is so certified, the prosecuting attorney should present the case in the transferee court.

Respectfully,

MARK McELROY

Attorney General