THE ATTORNEY GENERAL
OF TEXAS

AUSTIN 11, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

January 25, 1951

Hon. F. T. Graham
County Attorney
Cameron County
Brownsville, Texas

Opinion No. V-1147.

Re: Authority of a county attorney to prosecute violations of municipal ordinances in corporation court.

Dear Mr. Graham:

Your request for an opinion presents the question of the duty of the county attorney in a county where there is no resident criminal district attorney to represent the prosecution in corporation court, where the offense charged is a violation of an ordinance, but not of any penal statute of the State of Texas.

Section 21 of Article V, Constitution of Texas, provides in part:

> "The county attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a district attorney, the respective duties of district attorneys and county attorneys shall in such counties be regulated by the Legislature."

By the express terms of the above constitutional provision and under the decisions of the courts of this State, "the county attorney has the right, and is charged with the duty, to represent the state in all prosecutions instituted for the violation of the criminal laws of the state in the corporation court, notwithstanding such prosecutions may appear to be for violation of ordinances of the city covering the same ground." (Emphasis added throughout) Howth v. Greer, 90 S.W. 211 (Tex.Civ.App. 1905, error ref.); Harris County v. Stewart, 91 Tex. 133, 41 S.W. 650 (1897); Upton v. City of San Angelo, 94 S.W. 436 (Tex.Civ.App. 1906).

Cities and towns may, within their delegated authority, prescribe offenses by ordinance which are not punishable under State penal statutes. Ayres v. City of

Dallas, 32 Tex. Crim. 603, 25 S.W. 631 (1894); Zydias Amusement Co. v. City of Houston, 185 S.W. 415 (Tex.Civ. App. 1916, error ref.).

Prior to 1899, the Texas courts had sanctioned the prosecution of cases and the issuance of process in the name of the municipal corporation rather than in the name of the State of Texas where violation of an ordinance was charged. Johnson v. Hanscom, 90 Tex. 321, 38 S.W. 761 (1897); Jackson v. Swayne, 92 Tex. 242, 47 S.W. 711 (1898); Ex parte Boland, 11 Tex. Ct. App. 159 (1881). Under this procedure, it was held in Jackson v. Swayne, supra, that a county attorney could not compel a city recorder to allow him to prosecute complaints filed in the name of the city which charged acts violative of State statutes. The case did not hold that the State had no interest in enforcing its penal statutes in a corporation court; it held merely that the county attorney had no authority to prosecute a case in the name of the city.

In view of the constitutional provision that all prosecutions shall be carried on in the name and by the authority of the State of Texas and that the style of all writs and processes shall be "The State of Texas" (Art. V, Sec. 12, Tex. Const.) and the above constitutional provision that the county attorneys "shall represent the State in all cases in the District and inferior courts in their respective counties," the conclusion to be drawn from these cases is that the real party in interest in cases involving violations of ordinances only is the city rather than the State. Otherwise, these prosecutions would have been required to be in the name of the State and the county attorney would have had the right, as well as the duty, to represent the State in such actions.

The Corporation Court Act of 1899 (Acts 26th Leg., 1899, ch.33, p.40) redefined the jurisdiction of corporation courts and changed the manner of conducting proceedings therein by providing that the complaint shall begin "In the name and by authority of the State of Texas." Art. 867, V.C.C.P. This statute was construed in Howth v. Greer, supra, where the court said:

> ". . . We think this shows an intention on the part of the Legislature that such prosecutions as may be instituted in the corporation court for violation of the criminal laws of the state, which are also made

> violations of ordinances of the city, notwithstanding such prosecutions may purport to be instituted under the ordinances, shall be regarded as state cases, cases in which the state is not only a nominal, but a real, party. . . ."

It is our opinion that the Legislature did not intend by Article 867, V.C.C.P., to make the State the real party in interest in prosecutions involving violations of ordinances only, but merely intended to make the State a nominal party. The State being only a nominal party, the county attorney is not required to make an appearance for the State and "represent the State" in such actions.

Nor is there anything in Article 869, V.C.C.P., imposing a duty upon the county attorney to prosecute these violations. This article, which imposes the duty upon the city attorney to prosecute such actions, provides that the county attorney "may, if he so desires, also represent the State in such prosecutions," and thus is merely permissive insofar as the county attorney is concerned.

It is our opinion, therefore, that the county attorney has no duty to represent the prosecution in corporation court when the offense is solely for the violation of an ordinance and no penal statute of the State is involved.

SUMMARY

The county attorney has no duty to represent the prosecution in corporation court when the offense is for a violation of a city ordinance and no penal statute of the State is involved.

Yours very truly,

PRICE DANIEL
Attorney General

Burnell Waldrep

Jesse P. Luton, Jr.
Assistants

APPROVED:

J. C. Davis, Jr.
County Affairs Division

Charles D. Mathews
First Assistant

BW:JPL:mw