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Municipal Cororations - Review - Trial De Novo in District Court by Virtue of Appeal Is Not the Exercise of Original Jurisdiction

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expenditure is large or small.[7] This type of an action is not an interference with the discretionary powers of an officer when it prevents him from doing that which which he has no legal right to do.[8]

Generally the individual has no remedy where evidence is obtained illegally by police officers since illegally obtained evidence is admissible in the majority of state courts.[9] However, one effect of the decision in the instant case is to provide an indirect remedy by denying law enforcement agencies the funds to gather such illegal evidence.[10]

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MUNICIPAL CORPORATIONS — REVIEW — TRIAL DE NOVO IN DISTRICT COURT BY VIRTUE OF APPEAL IS NOT THE EXERCISE OF ORIGINAL JURISDICTION. — Defendant was found guilty in police magistrate's court of violating a city ordinance. The District Court dismissed defendant's appeal on the grounds that a trial de novo in the district court, as prescribed by statute, is the exercise of original jurisdiction,[1] and because no other method of appellate procedure is provided for with respect to the police magistrate's court. The Supreme Court of North Dakota, *held,* that a trial anew in a district court is not the exercise of original jurisdiction by the district court and therefore, is not violative of the police magistrate's original jurisdiction. *Minot v. Davis,* 84 N.W.2d 891 (N.D. 1957).

Despite the fact that the court in the instant case stated their holding as settled law in this state, the constitutional and statutory provisions concerning an appeal from police magistrate's court appear to be in conflict. Article 113[2] of the North Dakota Constitution provides that police magistrates shall have jurisdiction of all cases arising under the ordinances of cities. The legislature has conferred upon police magistrates exclusive jurisdiction in all cases arising under ordinances of cities.[3] Thus, it would appear that the police magistrate has exclusive original jursdiction over the violation of city ordinaces.

In regards to appeal, the constitution[4] provides that the district court shall have original jurisdiction except as otherwise provided for in the constitution, and that appeals shall lie from the county, justice of peace, and police magistrate's court in accord with such regulations as the law will prescribe.[5] The legislature in section 33-1234 of the code[6] provides that appeal may be had from a justice of the peace or a police magistrate sitting as a justice of the peace in criminal matters. Section 40-1819 of the code[7] provides

7. See Trickey v. Long Beach, 101 Cal. App.2d 416, 226 P.2d 694 (1951); Brown v. Boyd, 33 Cal. App.2d 416, 91 P.2d 926 (1939); Crowe v. Boyle, 184 Cal. 117, 193 Pac. 111 (1920); Osburn v. Stone, 170 Cal. 480, 150 Pac. 367 (1915).

8. Viestenz v. Arthur Tp., 78 N.D. 1029, 54 N.W.2d 572 (1952).

9. 8 Wigmore, Evidence § 2183 (3d ed., 1940). Technically the individual has a right of action in tort against the law enforcement officer who obtains the evidence illegally, however, this remedy is illusory. See Nueslein v. District of Columbia, 115 F.2d 690, 695 (D.C. Cir. 1940).

10. See Wirin v. Horrall, 85 Cal. App.2d 497, 193 P.2d 470 (1948).

1. Under § 113 of the N.D. Const. and § 40-1801 of the N.D. Rev. Code (1943) *exclusive original* jurisdiction over the violation of city ordinances is vested in the police magistrate. (Emphasis added)

2. N.D. Const. art. IV, § 113.

3. N.D. Rev. Code § 40-1801 (1943).

4. N.D. Const. art. IV, § 103.

5. N.D. Const. art. IV, § 114.

6. N.D. Rev. Code § 33-1234 (1953 Supp.).

7. N.D. Sess. Laws 1955, c. 266, § 1.

for an appeal to the district court from any judgment of a police magistrate's court in the same form and manner as appeals are taken and perfected from a judgment of conviction of a defendant in a justice court. That procedure calls for a trial anew in a district court.[8]

The case law in North Dakota on this subject indicates that: trial anew in a district court involves original jurisdiction, not appellate jursdiction and that an appeal divests the trial court of jurisdiction and confers it upon the district court;[9] that an appeal and a trial de novo from county court to the district court is not violative of articles 111 or 114 of the constitution;[10] and that the Juvenile Court Laws do not violate article 113 which provides for jurisdiction of all cases arising under city ordinances.[11]

The case law in other states which construes "appellate" and "original" jurisdiction appears to be, in general, that a trial de novo in an appellate court is the exercise of original jurisdiction by that court.[12] Appellate jurisdiction is the resort to a superior court from an inferior tribunal to revise the judgments of the latter.[13] This is the sense in which the expressions have been used by legal writers.[14] Appellate jurisdiction is generally confined to the correction of errors committed by the trial court and its jurisdiction cannot be extended beyond that conferred by the constitution unless subsequent constitutional provision is made to cover such instance.[15]

It is submitted that the constitutional and statutory provisions in regards to appeal and jurisdiction, if not in conflict, at least produce confusion. The case law has not sufficiently decided the question and the only method of clarification would seem to be the resort to legislative action.[16]

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8. N.D. Rev. Code § 33-1116 (1943).

9. See Nomland Motor Co. v. Alger, 77 N.D. 29, 39 N.W.2d 899 (1949); *In re* Guon, 76 N.D. 589, 38 N.W.2d 280 (1949); Bryan v. Miller, 73 N.D. 487, 16 N.W.2d 275 (1944).

10. *In re* Nysteun's Estate, 80 N.W.2d 671 (N.D. 1956); *In re* Peterson's Estate, 22 N.D. 480, 134 N.W. 751 (1912).

11. State *ex rel.* City of Minot v. Gronna, 79 N.D. 673, 59 N.W.2d 514, 547 (1953) (In this 3-2 decision, the dissenting justices said, "The power which the statute thus purports to vest in the juvenile judge collides directly with the jurisdiction of the police magistrate under section 113 of the constitution. The constitution being supreme, the statute must yield.").

12. See State v. Johnson, 100 Utah 316, 114 P.2d 1034 (1941) (The jurisdiction to decide causes anew is original jurisdiction). See also *In re* Constitutionality of House Bill No. 222, 262 Ky. 437, 90 S.W.2d 692, 693 (1936) (The Supreme Court of Kentucky quoting Marbury v. Madison, 5 U.S. (1 Cranch) 175 (1803) said, "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."); *In re* Burnette, 73 Kan. 609, 85 Pac. 575 (1906) (Jurisdiction to consider causes de novo, on appeal, is original, not appellate jurisdiction.).

13. *In re* Constitutionality of House Bill No. 222, 262 Ky. 437, 90 S.W.2d 692 (1936). *Contra,* Cavanaugh v. Wright, 2 Nev. 166 (1866) (Appellate jurisdiction in its broad sense may be a review of the proceedings of the lower court or a trial de novo.).

14. See *In re* Constitutionality of House Bill No. 222, 262 Ky. 437, 90 S.W.2d 692 (1936).

15. See Sanborn v. Pacific Mutual Life Ins. Co., 42 Cal. App.2d 99, 108 P.2d 458 (1940) (Appeal is not a trial but simply a method of rectifying errors that may have occurred at trial). See also State *ex rel.* Wallace v. Baker, 19 Fla. 19 (1882); State v. Johnson, 100 Utah 316, 114 P.2d 1034 (1941).

16. If it is held that no constitutional right of appeal exists from a judgment of a police magistrate's court, possibly this shortcoming could be adequately disposed of by the issuance of a writ of certiorari. See N.D. Rev. Code § 32-3301 (1943); Espeland v. Police Magistrate's Court, 77 N.D. 29, 49 N.W.2d 394 (1951); Crum, *The Writ of Certiorari in North Dakota,* 27 N. Dak. L. Rev. 271 (1951).