

Opinion No. 52-5594

September 25, 1952

BY: JOE L. MARTINEZ, Attorney General

TO: J. P. Roach, Chief New Meico State Police Santa Fe, New Mexico

{*305} Under date of September 18, 1952 you requested an opinion as to whether justices of the peace have jurisdiction over drunken driving cases. You state that it has been your understanding that District Courts are the only ones who have such jurisdiction. I also note that there has been a lot of newspaper comment in the First Judicial District where drunken driving cases have been handled by the justices of the peace.

On July 13, 1936 this office wrote an opinion No. 150, 1935-36 Opinions of the Attorney General holding that justices of the peace have no jurisdiction in drunken driving cases and all such cases should be filed in the District Court.

I have done additional research on this question since our deplorable number of accidents on the highways seem to be increasing every year. Section 68-502 N.M.S.A., 1941 Compilation reads as follows:

"Persons under the influence of intoxicating liquor or narcotic drugs. -- It shall be unlawful and punishable as provided in section 60 (68-902) of this act for any person whether licensed or not who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle upon a highway within this state."

Section 68-902 N.M.S.A., 1941 Compilation which is the penalty for violation of Section 68-502 reads as follows:

"Driving while under Influence of Liquor or Drugs -- Penalty -- Revocation of driving license. -- Every person who is convicted of a violation of section 2 (§ 68-502) of this act relating to habitual users of narcotic drugs and driving while under the influence of intoxicating liquor or narcotic drugs shall be punished by imprisonment in the county or municipal jail for not less than thirty (30) days nor more than one (1) year or by fine of not less than one hundred dollars (\$ 100) nor more than one thousand dollars (\$ 1,000) or by both such fine and imprisonment. On a second or subsequent conviction he shall be punished by imprisonment for not less than ninety (90) days nor more than one (1) year, {*306} and, in the discretion of the court, a fine of not more than one thousand dollars (\$ 1,000). The commissioner shall revoke the operator's or chauffeur's license of the person so convicted."

Section 129 of 22 CJS of volume 22 reads as follows:

"129. Extent of Penalty -- The penalty which attaches to a particular offense often determines which court has jurisdiction thereof. A penalty is not increased for jurisdictional purposes by the fact that a good behavior bond is required, or that an automatic forfeiture is provided for.

The penalty which attaches to a particular offense often determines which court has jurisdiction thereof, and the general rule has been stated to be that no court can have jurisdiction of an offense punishable by penalties which are beyond the power of the court to impose. A penalty is not increased so as to take the offense beyond a court's jurisdiction by the fact that a good behavior bond is required, or that an automatic forfeiture is provided for."

See also Section 125 of 22 CJS on page 208 of volume 22 which reads as follows:

"Penalty Determining Jurisdiction -- As a general rule a justice of the peace or similar officer has no jurisdiction of an offence the maximum penalty for which exceeds his power to impose, but this rule does not apply where he is expressly given exclusive jurisdiction of the offense.

The rule is well recognized in most jurisdictions that a justice of the peace, police judge, or other inferior magistrate has no jurisdiction to try one accused of a crime, the maximum penalty or punishment for which exceeds the power of his court to impose, his only jurisdiction in such case being to hold a preliminary examination and to bind the accused person over to the proper court. A similar rule obtains where the justice is given jurisdiction of certain types of offenses only where they are punishable by no other or greater penalty than stated. Clearly, however, an offense the maximum penalty for which does not have either of these effects, is within the jurisdiction of a justice possessing all other jurisdictional requirements. A statute giving a justice or similar officer power to fine or to imprison does not give him jurisdiction to try a criminal case punishable by a fine and imprisonment, unless one or the other penalty is discretionary and not imperative. Neither has he power to punish by imprisonment where the statute limits his jurisdiction to punishment by fine only, or to inflict a fine or imprisonment, according to the gravity of the offense, where the statute fixes no limit and leaves the amount of the fine and the term solely in the discretion of the court. Under this rule, it is the maximum penalty which may be imposed that determines the justice's jurisdiction; if the potential penalty takes the case beyond his jurisdiction, the fact that the penalty actually imposed is smaller and within his power to impose does not give him jurisdiction."

See *People vs. Young*, 215 Pac., p. 409.

The statute in drunken driving cases permits imposition of a maximum sentence for drunken driving of one year's imprisonment or a fine of not more than \$ 1,000 or by both such fine and imprisonment. The statutory limits on a justice of the peace's jurisdiction as to trial of misdemeanors is as stated by Section 38-205 N.M.S.A., 1941 Compilation which reads as follows:

"Jurisdiction of Misdemeanors. -- Justices of the peace are here-by {^{*307}} given jurisdiction in all cases of misdemeanors where the punishment prescribed by law may be a fine of one hundred dollars (\$ 100) or less, or imprisonment for six (6) months or less or may be both such fine and imprisonment. Provided, that this act (section) shall not apply to misdemeanors, jurisdiction whereof is exclusively vested in district courts."

The test seems to be not what is done, but what may be done. It is clear that the intention of the Legislature in passing this latter statute was to restrict the jurisdiction of the justice court to cases where the fine might be not more than \$ 100, imprisonment for 90 days or both.

In view of the foregoing authorities, it is my opinion that a justice of the peace does not have jurisdiction in drunken driving cases and all such drunken driving cases must be filed in the District Court.

Trusting that this fully answers your inquiry, I remain