Opinion No. 58-36

February 20, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Howard M. Rosenthal, Assistant Attorney General

TO: Mr. Dan Sosa, Jr., District Attorney, Third Judicial District, Las Cruces, New Mexico

QUESTION

QUESTIONS

1. In Corporation Commission violations, namely, hauling for hire without Corporation Commission permit, as well as other similar Corporation Commission offenses, which are District Court misdemeanors, is the defendant entitled to a jury trial?

2. In liquor law violation cases such as serving liquor to minors and similar liquor law violations, is the defendant entitled to a jury trial?

3. In a driving while intoxicated case initiated in District Court for violation of a State statute, is the defendant entitled to a jury trial?

4. In a driving while intoxicated case initiated in the Justice of the Peace Court and which is subsequently determined in the District Court, would the defendant be entitled to a jury trial?

CONCLUSIONS

1. No.

2. No.

3. No. with reservations as indicated in the analysis.

4. No. subject to the same qualification as in question 3.

OPINION

ANALYSIS

Please note that your letter of inquiry, dated January 24, 1958, contains several questions of a diverse nature and that this office has attempted to group your questions so that individual opinions would be concerned with one major topic. Also, note that we have broken your question No. 5 into two parts (this being our understanding of your inquiry) in order to simplify the opinion of this office.

This office is aware of the importance of the ground covered by that portion of your inquiry relating to civil rights. It would be with the utmost reluctance that this office would issue an opinion that would in any way circumscribe the rights of an individual. This is especially true with reference to the right of jury trial.

On the opposite side of the coin would be the practical impossibility of vouchsafing a jury trial to a defendant in any and all causes both because of the expense to the public and the likely breakdown of our judicial system. Further, as will be indicated later, while this office is doubtless swayed by practical considerations looking toward the benefit of the public, our primary function is to interpret the law as, in our opinion, it exists.

With the foregoing factors in mind, this office at the very outset would like to point out that our opinion is subject to interpretative error. We confess our inability to reconcile the constitutional provisions, statutes, cases, common law conceptions, Law Review articles, previous Attorney General opinions, etc. of this jurisdiction and other jurisdictions, all dealing with the right of jury trial. Authorities and cases in amplitude may be found to contradict any opinion on this subject that this office may issue.

Despite this timorous prologue, we are required to give our best opinion on specific matters and we will do so, with the sincere conviction that some borderline decisions may be difficult to reconcile with others and that a future testing of some of these will result in contradictions.

Our thought is to formulate a pattern on the right to jury trial and then attempt to fit your various instances into it. With this in mind, we offer the following propositions.

Trial by jury in the various State courts is not guaranteed by the Federal Constitution. Article III and the Sixth Amendment to the United States Constitution concern defendants before Federal Courts only. Nor is this right extended by the Fourteenth Amendment, which is limited to the general requirement of due process, more particularly concerning the procedural and substantive requirements of notice and an opportunity to be heard etc. Within this the states may establish any system of criminal courts deemed desirable. Ohio v. Tumey, 273 U.S. 10; Campbell v. St. Louis Union Trust, 129 A.L.R. 316.

The Constitution of New Mexico granted no new rights so far as the question of a right to a jury trial is concerned. Section 12 of Article II provides:

"The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate. . . ."

By this provision, the right to trial by jury was guaranteed only to the extent that it existed prior to the adoption of the Constitution. Gutierrez v. Gober, 43 N.M. 146.

Thus, absent any affecting statutory provision, we must look to the common law to determine whether a defendant has a right to trial by jury in a particular case. Generally,

at common law a line of distinction is drawn with reference to right of trial by jury between offenses considered "petty" and those of graver consequence, only the latter requiring the right of jury trial.

Throughout the history of the common law many offenses have been punished exclusively by justices of the peace or magistrates sitting without a jury. Some of these offenses tried without a jury at common law are discussed in Gutierrez v. Gober, supra, and District of Columbia v. Colt, 232 U.S. 63. Among the offenses to which no right to jury trial existed are violations of liquor laws, municipal ordinances, gambling, drunkenness and disorderly conduct.

In New Mexico the summary disposition of some of these "petty" offenses has been changed or modified by statutory provision. Section 36-12-3, N.M.S.A., 1953, provides:

"In all trials before justices of the peace for offenses within their jurisdiction the defendant may demand a jury, which shall consist of six jurors, . . ."

Obviously then, in justice of the peace court a jury of six is the right of every defendant no matter his violation.

There is no provision by statute in New Mexico granting the right to trial by jury for "petty" offenses in courts other than justice of the peace courts. Section 36-12-3 includes the words:

". . . nothing herein shall be held to authorize a jury in justice courts on preliminary examinations, nor in prosecutions under municipal ordinances."

Adding to this that it is well held that violations of municipal ordinances were tried without a jury at common law and we have the principle that no jury can be demanded in municipal courts. Natal v. Louisiana, 139 U.S. 621; People v. Van Houten, 35 N.Y.S. 186.

The case of Tucumcari v. Briscoe, 58 N.M. 721, specifically holds that the offense of driving while intoxicated is within the class denominated "petty" and as such is triable without a jury if the violation is that of a municipal ordinance. However, it should be pointed out that this case appears to be limited to municipal ordinances and is not concerned with acts of our State Legislature.

It is, of course, obvious that many offenses we are called upon to classify today did not even exist as common law. The complexities of modern existence have given rise to the exercise of police power in fields unknown to the common law. Further, offenses committed in the sparsely populated territorial New Mexico must now be weighed in the light of a mature political system.

This brings us to your first question. The situation you spell out therein was certainly unknown in the yesteryear of the New Mexico territory. Our statutes indicate that the

penalty that can be imposed on that particular violation includes a small fine and incarceration up to 180 days. In the Gober case, a case is cited of an offense punishable by a fine of not more than $ 300.00 or imprisonment of not more than 90 days as a petty offense which may be tried without a jury.

The United States Supreme Court in D. C. v. Clawans, 81 L. ed. 848, has also stated and I quote:

"If we look to the standard which prevailed at the time of the adoption of the Constitution we find that confinement for a period of ninety days or more was not an unusual punishment for petty offenses tried without a jury. Laying aside those offenses for which the punishment was of a type no longer commonly employed such as whipping, confinement in stocks and the like etc. . . . we know that there were particular offenses tried summarily under English statutes which carried possible sentences of imprisonment for periods from three to twelve months."

Also, of interest in this connection is the holding in Tucumcari v. Briscoe that the automatic suspension of driving privileges for one year as in the case of certain D.W.I. violations does not remove the cause from that class of offenses triable without a jury. Hence this office is of the opinion that hauling for hire without Corporation Commission permit, triable as a District Court misdemeanor, is a petty offense and the defendant is not entitled to a jury trial. Please note that this opinion is limited to the specific offense covered and this office will not pass an opinion upon offenses designated as "other similar Corporation Commission offenses".

Fitting your second question into the pattern previously outlined, this office is of the opinion that serving liquor to minors in violation of the liquor law does not require a jury determination, and again we note that this opinion is limited to the specific offense and does not include "similar liquor law violations".

In placing the instance of your third question in our pattern, we would like to indicate our consideration of several additional factors. First of all, an Opinion numbered 6564, issued by this office December 31, 1956, held that a first offense drive while intoxicated defendant is not entitled as a right to a jury trial in the District Court for the reason that such an offense was deemed a "petty" offense in New Mexico pursuant to the Gutierrez v. Gober, supra, and Tucumcari v. Briscoe, supra, cases. Despite this opinion and since the date of it, at least two District Courts have ruled to the opposite. While it appears uncontrovertible that a D.W.I. charge brought in a municipal court for an ordinance violation does not give rise to a jury right, it would appear to be the opinion of at least two District Courts that the same offense brought under a legislative enactment either gives rise to such a right or comes so close to that principle that as a matter of policy the right should be extended to such defendants. While it may appear illogical for a defendant in the identical causes to be vouchsafed a jury trial in District Court and not in a municipal court, this office was of the opinion that the instance is so borderline as to make inadvisable dogmatic insistence. However, we are still of the same opinion, namely, that the defendant on such a charge has no right to a trial by jury for the basic

reason that at common law drunkenness was a matter handled summarily by various courts and that even under our statutes the offense would still, pursuant to the United States Supreme Court, be classified as a "petty" offense. While we share the reluctance of several of our honorable District Judges to deprive individuals of jury trial rights, as a matter of policy our opinion is as yet unchanged. Perhaps it might be wise to secure an adjudication from our Supreme Court.

In resume, answering your third question, we are of the opinion that D.W.I. violations of State statutes in District Courts tested by the petty or grave standard do not give rise to the right of trial by jury.

Your fourth question is a slight variation of your third. There can be no question but that a defendant in a D.W.I. case in the Justice of the Peace Court is entitled to a jury trial. A statute in specific derogation of the common law (note provision for six jurors) confers such right. The right so conferred is not limited to a specific course of action. Any defendant in any cause before the Justice of the Peace Court is entitled to a jury. However, this by no means certifies that a defendant in a J.P. Court action can carry with him his privilege in the J.P. Court on up to the District Court and conceivably to the Supreme Court. The privilege is confined to the court in which it is conferred, and if the defendant in the J.P. Court is bound over to the District Court, he subjects himself to the province of the District Court in the same manner as one appealing to the District Court from the J. P. Court secures a trial de novo. In short, going from the J.P. Court to the District Court constitutes a waiver of the J. P. Court privileges. On this basis, we are of the opinion that your third question would come into play and that our opinion on it would be operative here as well.