

Opinion No. 60-34

February 25, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: A. P. Winston, Jr., Chief New Mexico State Police P. O. Box 919 Santa Fe, New Mexico

QUESTION

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When a police officer arrests a person for driving while under the influence of alcohol and because of the hour of the night is unable to find a justice of the peace court open, may the officer hold the accused under arrest until such time as he is able to take him before a justice of the peace or is the officer required to release the accused with a citation?

CONCLUSION

The police officer may detain the accused under arrest until it is possible to take him before a magistrate.

OPINION

{*386} ANALYSIS

Section 64-22-2, N.M.S.A., 1953 Compilation, (P.S.), provides that it is unlawful for a person to drive a vehicle while under the influence of alcohol.

Section 64-22-8, N.M.S.A., 1953 Compilation, (P.S.), provides that when a person is arrested for a violation of the act punishable as a misdemeanor the officer may either (1) take such person immediately before a magistrate, or (2) issue to the person a properly filled out uniform traffic citation. It is to be noted that the offender may be actually **under arrest** at the time the options above are exercised. If the officer chooses to issue a citation, then under subsection (c) the accused is to be forthwith released from custody. On the other hand, if the officer chooses to exercise the first alternative of taking the offender before a magistrate, then he is charged with the duty of doing so "immediately."

The term "immediate," when used in contracts or statutes, means that the act referred to shall be accomplished within such convenient time as is reasonably requisite. **Gross Income Tax Department of Treasury v. Harbinson Walker Refractories Co.**, 48 N. E. 2d 834, 113 Ind. App. 695.

The statutory use of the word "immediate" does not mean "instantaneously," without any delay or any time intervening, but means within a reasonable time, without unreasonable or unnecessary delay, having due regard to the nature and circumstances of a particular case. **Hughes v. Weaver**, 178 N.Y.S. 2d 440, 11 Misc. 2d 821.

In Bouvier's Law Dictionary, it is said that the word "immediate" strictly implies not deferred by any lapse of time, but, as usually employed, it is, rather, within reasonable time, having due regard to the nature and circumstances of the case. The word is certainly no stronger than the word "forthwith" or the expression "as soon as possible." **Fidelity and Deposit Co. v. Courtney**, 103 F. 599.

{*387} Therefore, if at the time of the arrest of the person charged with driving while under the influence, it is not possible to take the accused "instantaneously" before a magistrate because none are available by virtue of the hour of the night, then the accused may be held in a place of detention, under arrest, until the courts reopen.

A citation is not a cure for drunkenness, and we do not feel that it was the intention of the legislature that those persons apprehended driving a vehicle under the influence of alcohol should be released upon our highways in the dead of night, possibly to drive again or at the very least to wander the roads in a stupor and present a hazard to other drivers upon the road.

If the circumstances are such that the officer deems it best that the person charged with drunken driving be taken before a magistrate and charged forthwith, he is justified in detaining the offender under arrest until it is possible to so take and charge him.

By: B. J. Baggett

Assistant Attorney General