

Opinion No. 61-107

October 13, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E. Payne, Assistant Attorney General

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

QUESTION

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1. Can a justice of the peace appoint a referee for the purpose of setting bonds in misdemeanor traffic violations, subject to the approval of the District Judge, where a definite schedule of bonds for such violations has been prepared and filed or posted of record?
2. When a justice of the peace is unavailable to hear a complaint for a misdemeanor or traffic violation, can the misdemeanant appear before the secretary to the justice of the peace and sign an affidavit entering an appearance and authorizing the judge to enter a plea of nolo contendere for him at the time of trial, with the understanding that the bond posted with the secretary will be forfeited?

CONCLUSIONS

1. No.
2. No.

OPINION

ANALYSIS

We will not discuss at length various objections, constitutional and otherwise, which **might** be raised against the procedure mentioned in questions 1 and 2; for example, the fact that the person arrested is not taken before a magistrate (see Sections 64-22-7, and 36-12-1, N.M.S.A., 1953 Compilation); the fact that by the very nature of the proposed procedure there would be undue pressure on the accused to enter such a plea, at least in the case of a traveling motorist; the apparent attempt to turn an appearance bond into a fine and costs; the issue as to whether such a procedure amounts to an improper delegation of judicial functions. Rather, we ground our answer to question 1 on the fact that nowhere in the Constitution or statutes do we find any authority granted to a justice of the peace to appoint a referee in a criminal case. And it has long since been established in this jurisdiction that justices of the peace have only such powers as are expressly conferred upon them. **Jaramillo v. Romero**, 1 N.M. 190.

In answering your second inquiry, we are assuming that in this jurisdiction plea of nolo contendere can be entered in a justice of the peace court, although we have some reservations in this regard. See Section 36-13-1, N.M.S.A., 1953 Compilation (P.S.) and **People v. Miller**, 264 Ill. 148, 106 N.E. 191; **State v. Kiewel**, 166 Minn. 302, 207 N.W. 646. Even if such a plea can be entered, still the proposed procedure cannot be sanctioned. Our answer here is based on the general rule that a person can enter such a plea only with the approval of the magistrate. **State v. McIntyre**, 238 N.C. 305, 77 S.E. 2d 698; **Nelson v. State**, 87 Ga. App. 39, 75 S.E. 2d 39; **Commonwealth v. Smith**, 151 Pa. super. 113, 30 A. 2d 339; **Federal Deposit Insurance Corp. v. Cloonan**, 165 Kan. 68 Kan. 68, 193 P 2d 656.

Obviously if the magistrate is not present he cannot accede to the request that such a plea be entered. Nor can he evade the responsibility of making an individual determination in each case as to whether such a plea should be received by a before-the-fact blanket-type approval. A plea of nolo contendere is "in the nature of a compromise between the state and the defendant" and its appropriateness is dependent upon the facts of each particular case. **State v. LaRose**, N.H., 52 Atl. 943.