

## Opinion No. 61-117

November 10, 1961

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

**TO:** Mr. Philip T. Manly, Attorney, State Judicial System Study Committee, 201 State Capitol Building, Santa Fe, New Mexico

### QUESTION

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In situations involving violations of the Motor Vehicle Code other than those enumerated in Section 64-22-7, can a police officer make a physical arrest without a warrant rather than issuing a uniform traffic citation?

#### CONCLUSION

Yes, so long as the arrest is made for the commission of a felony or for the commission of a misdemeanor committed in his presence.

### OPINION

#### ANALYSIS

When the particular violations of the Motor Vehicle Code enumerated in Section 64-22-7, N.M.S.A., 1953 Compilation, are charged, a uniform traffic citation cannot be issued. Rather, the officer must make a physical arrest and immediately take the person arrested before a magistrate. These charged offenses are the following: a charge of negligent homicide; a charge of driving while under the influence of intoxicating liquor or a narcotic drug; a charge of failure to stop in the event of an accident causing death, personal injuries, or damage to property; a charge of reckless driving. In addition, a physical arrest must be made and the person arrested taken immediately before a magistrate under the following conditions: when the person arrested is charged with a violation of the Motor Vehicle Code amount-to a misdemeanor and he so demands; when the arresting officer has good cause to believe the person arrested has committed a felony; when the person arrested for any violation of the Motor Vehicle Code refuses to sign the uniform traffic citation giving his written promise to appear in court. Under the conditions set forth above a physical arrest must be made.

Your question is whether the peace officer has the prerogative to make a physical arrest without a warrant when **other** violations of the Motor Vehicle Code are charged.

Based on Section 64-22-10, N.M.S.A., 1953 Compilation (P.S.), our conclusion is in the affirmative. This section provides as follows:

"Sections 64-22-7 through 64-22-8.2, New Mexico Statutes Annotated, 1953 Compilation, govern all police officers in making arrests without warrant for violations of the Motor Vehicle Code and other laws relating to motor vehicles but **the procedure prescribed is not exclusive of any other method prescribed by law** for the arrest and prosecution of a person violating these laws." (Emphasis added.)

Since, under the common law rule in effect in this jurisdiction, peace officers may make an arrest without a warrant for a misdemeanor committed in their presence, a physical arrest for violating the Motor Vehicle Code is a method "prescribed by law." **City of Clovis v. Archie**, 60 N.M. 239, 290 P. 2d 1075. Actually, peace officers in this State can make arrests without warrants for other than trivial misdemeanors when they have **probable cause** to believe an offense is being committed in their presence. **Cave v. Cooley**, 48 N.M. 478, 152 P. 2d 886. Such probable cause exists when there is a reasonable foundation for the judgment of the officer that a misdemeanor is being committed.

Enforcement of the statutes relative to motor vehicles being vital to the protection of the public, any violation thereof would seem to be something more than trivial. However, in the majority of traffic violations, at least as regards those involving New Mexico residents, it would seem preferable for the officer to issue a uniform traffic citation rather than to make a physical arrest. By the use of the uniform citation the arrested person's fate is neither "jail nor bail" but release after agreeing to appear in court at a specified time. See **Cave v. Cooley**, supra.

When a person to whom a uniform traffic citation has been issued violates his written promise to appear in court, he has committed a violation **in addition** to that for which he was originally cited. Section 64-22-11.1,A (1) and 64-22-9, N.M.S.A., 1953 Compilation (P.S.). And for the commission of the misdemeanor in failing to appear, the violator may be tried in any court of competent jurisdiction in the county where the original violation for which the citation was issued took place. Arrest for such violation is to be made upon warrant issued out of the particular court.

You next refer to Section 64-22-8.2, N.M.S.A., 1953 Compilation (P.S.), particularly subsections (3) and (B) thereof, and inquire as to the constitutionality of the provisions contained therein. When properly interpreted, we find no constitutional prohibition against the use of Section 64-22-8.2, supra. Subsection 3 of this Section permits a peace officer to arrest without a warrant any person "charged with crime in another jurisdiction, upon receipt of a message giving the name or a reasonably accurate description of the person wanted, the crime alleged and a statement he is likely to flee the jurisdiction of the state." Subsection B places certain additional limitations on the authority to make such arrests. The arresting officer must have reasonable grounds, based upon personal investigation, to believe the person arrested has committed a crime.

Since Section 64-22-8.2 is incorporated in the Motor Vehicle Code, we are firmly of the opinion that use of this statutory arrest procedure is contemplated only in the case of violations of the Motor Vehicle Code and laws relating to motor vehicles, and is not meant to be used in the case of crimes in general. It seems obvious that the legislative intent was adoption of a method designed to foreclose the tourist from evading a traffic citation by the simple expediency of leaving the confines of this State. It would be a rare case indeed when a New Mexico resident would flee the jurisdiction of this State to avoid payment of a fine for a traffic violation.

Police officers must be careful in using the procedure set forth in Section 64-22-8.2, supra. Before sending such a message the officer should make certain that the person has been charged with a traffic violation in a particular county; he should have reasonable grounds for believing the person is likely to flee the jurisdiction of this State, and he must give either a reasonably accurate description of the person or his name. This latter requirement is necessary to protect the officer receiving the message and making the arrest. Someone other than the person originally charged may be driving when the actual arrest is made. This is the reason for the "personal investigation" requirement placed on the arresting officer.

In and of itself "fleeing" does not constitute a separate offense. For this reason, the person must be returned for trial to the county where the offense charged was committed. Of course, if the person has already violated a promise to appear under a uniform traffic citation, that is, as pointed out earlier, specifically decreed to be an additional violation.