

Opinion No. 63-156

November 18, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. Alexander F. Sceresse District Attorney County Court House Albuquerque, New Mexico

QUESTION

FACTS

A police officer issues a traffic citation which states the hour and date for the defendant's appearance before a justice of the peace. The Defendant promises to appear at the designated time by signing the uniform traffic citation. However, the defendant fails to appear and is then in violation of Section 64-22-9. In many instances the justice of the peace will contact the defendant and advise him that he must appear for trial within five days and if he fails to do so a warrant will be issued for his arrest. The defendant does fail to appear, whereupon the justice of the peace issues a warrant for the defendant's arrest. A number of such defendants, when confronted by a constable who takes them before the justice of the peace, are prepared to post an appearance bond with the justice who issued the warrant. A bond is posted and the matter is set down for trial both on the failure to appear and the original traffic citation. Then at some time prior to the trial, and usually at the time designated for the trial, the defendant files an affidavit of disqualification upon the justice.

QUESTION

Is such an affidavit of disqualification timely as to either or both charges?

CONCLUSION

It is not timely as to either charge.

OPINION

{*366} ANALYSIS

Section 36-3-11, N.M.S.A., 1953 Compilation, specifically provides for the disqualification of justices of the peace, and a companion measure, Section 36-3-14, authorizes such disqualification "at any time after the service of process and before the trial in such cause." There is a limitation on this disqualification right when, prior to the filing of the affidavit of disqualification, the judicial discretion of the court has been exercised in response to a request by the party. **State v. Hester**, 70 N.M. 301, 373 P.

2d 541; **State el rel. Tittmann v. Hay**, 40 N.M. 370, 60 P. 2d 353; see Attorney General's Opinion No. 63-124.

When the defendant appears before the court to make an appearance bond, the judicial discretion of the court is invoked on setting the amount of the bond. See Section 36-15-1, N.M.S.A., 1953 Compilation. This is particularly true where, as in the situation presented, the accused is charged with two violations, i.e., the original traffic citation and the failure to appear. Section 64-22-9, N.M.S.A., 1953 Compilation (P.S.); Attorney General's Opinion No. 61-117. **In re McGarry**, Ill., 44 N.E. 2d 7; **Sauskelonis v. Herting**, Conn., 94 Atl. 368; **State v. Langford**, S. C., 73 S.E. 2d 854.

The amount of the appearance bond will necessarily vary from case to case. The purpose of such a bond is to guarantee that the defendant will be present in court at such time as the court may direct, and since the bond is not furnished for the purpose of punishment, the guide in fixing the amount thereof is a determination as to what amount is needed to insure the defendant's appearance to answer the charges against him. **Ex parte Sanders**, Okla., 289 P. 2d 155; **United States v. Pessin**, 21 F. Supp. 896; **State v. Springer**, La., 19 So. 2d 147.

Thus, in the situation you pose the court has been called upon to exercise its judicial discretion and the filing of an affidavit of disqualification thereafter is **not** timely.

By: Oliver E. Payne

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