

Opinion No. 64-37

March 24, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Thomas A Donnelly, Assistant Attorney General

TO: Mr. Norman M. Neel, Assistant District Attorney, First Judicial District, Santa Fe County Courthouse Santa Fe, New Mexico

QUESTION

QUESTIONS

Is a defendant in a case brought in any of the following named courts entitled as a matter of right, to demand a jury trial:

- (1) Police Magistrate Court;
- (2) Justice of the Peace Court;
- (3) District Court when the matter involves a misdemeanor?

CONCLUSIONS

See analysis.

OPINION

ANALYSIS

The right of trial by jury in certain cases is guaranteed by the New Mexico State Constitution. Article II, Section 12, of the State Constitution provides as follows:

"The right of trial by jury as it has herefore existed shall be secured to all and remain inviolate. In all cases triable in courts inferior to the district court the jury may consist of six. The legislature may provide that verdicts in civil cases may be rendered by less than a unanimous vote of the jury."

This constitutional provision has been interpreted by the New Mexico Supreme Court to continue the right to jury trial in that class of cases where the right to a trial by jury existed prior to the constitution of New Mexico. In **State v. Greenwood**, 63 N.M. 156, 215 P. 2d 223, the court stated:

"Clearly, the Constitution continues the right to jury trial in that class of cases in which it existed either at common law or by statute at the time of the adoption of the

Constitution, 50 C.J.S. Juries Sec. 10, and in that class of cases where the right to a trial by jury existed prior to the Constitution, it cannot be denied by the legislature. . . . And, as we view the matter, the phrase "as it has heretofore existed" refers to the right to jury trial as it existed in the Territory of New Mexico at the time immediately preceding the adoption of the Constitution. *Gutierrez v. Gober*, 43 N.M. 146, 87 P. 2d 437; *Young v. Vail*, 29 N.M. 234, 222 P. 912, 34 A.L.R. 980; *State v. Holloway*, 19 N.M. 528, 146 P. 1066, L.R.A. 1915F, 922."

The New Mexico State Legislature enacted Section 36-12-3, N.M.S.A., 1953 Compilation, implementing the above quoted constitutional provision in cases triable in justice of the peace courts. This section provides in full as follows:

"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, to be summoned in the same manner as jurors in civil cases in justice courts, and said jury shall be empaneled and sworn, but nothing herein shall be held to authorize a jury in justice courts on preliminary examinations, nor in prosecutions under municipal ordinances."

This statute was interpreted in ***Gutierrez v. Gober***, 43 N.M. 146, 87 P. 2d 437, where the court noted that "The 1915 enactment is consistent with the view that the legislature believed that under existing laws in trials before justices of the peace for offenses within their jurisdiction, a jury trial could not be demanded by the defendant as of right in prosecutions for offenses of a petty or minor nature because jury trial in that sort of case had been dispensed with by the common law. The 1915 Act seems designed to confer a right thought not theretofore to exist.

The court also stated in the ***Gutierrez v. Gober*** case, *supra*, that the above quoted statute which declares in part that "nothing herein shall be held to authorize a jury in . . . prosecutions under municipal ordinances" was not an affirmative declaration that trials without a jury could be conducted in municipal courts, but "rather a recognition of the fact that they theretofore had the power to proceed in that manner" without jury trials. Continuing, the court noted:

"There was no recognized mechanical line of demarcation between petty offenses arising from the violation of municipal ordinances and those arising from the violation of general statutes. Apparently the 1915 legislature adopted this mechanical division and conferred the right of jury trial for offenses, namely, petty offenses, arising from violations of enactments other than municipal ordinances, **but that the legislature was cautious not to disturb the existing common law practice of summary prosecutions without a jury in cases arising from the violation of city ordinances.**

. . .

Whether the violation of any and all municipal ordinances may fall within the class of offenses usually denominated "petty" or "minor," it is not necessary now to decide. When so called upon, the nature of the offense and the severity of the penalty prescribed will doubtless be elements to be considered." (Emphasis supplied).

In subsequent cases, **City of Tucumcari v. Briscoe**, 58 N.M. 721, 275 P. 2d 958; **City of Albuquerque v. Arias**, 64 N.M. 337, 328 P. 2d 593, **Hamilton v. Walker**, 65 N.M. 470, 340 P. 2d 407, and **Flores v. Federici**, 70 N.M. 358, 374 P. 2d 119, the New Mexico Supreme Court has consistently adhered to the position that a party charged with a "petty" or "minor" offense in violation of a municipal ordinance is not entitled to a jury trial.

Based upon the above authorities, we therefore conclude in answer to your inquiry as to whether a defendant is entitled to a trial by jury in police magistrate court or municipal court, that no such right of trial by jury so exists in "petty" or "minor" cases arising from the violation of city ordinances. In **Hamilton v. Walker**, supra, **City of Albuquerque v. Arias**, supra, and **City of Tucumcari v. Briscoe**, supra, this result was applied even in cases involving a charge of driving while under the influence of intoxicating liquor in violation of a municipal ordinance.

Your second question asks if a defendant in a criminal case is entitled to a trial by jury in justice of the peace court. Section 36-12-3, supra, in our opinion is controlling as to this matter. Such enactment provides in part that "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. . . ." The 1953 state legislature (Laws of 1953, Chapter 163, Section 1) further confirmed this right by the adoption of a statute providing that in all "cases wherein a jury trial is demanded including inquests, each juror summoned and empaneled shall be paid at the rate of one dollar fifty cents (\$ 1.50) a day. The jury fee shall be taxed as a part of the court costs in the case against the losing party." We believe that in criminal cases over which a justice of the peace has jurisdiction, a defendant is entitled to a jury trial by a six man jury, if demand is timely made.

Third, you have inquired if a defendant is entitled to a jury trial in criminal cases brought in District Court and which involves a misdemeanor. A careful examination of the New Mexico Statutes regarding the right to trial by jury reveals no statute expressly granting a jury trial in misdemeanor cases triable by the district court. The Criminal Code, enacted by the 1963 Legislature, divided misdemeanor offenses into two categories: Petty misdemeanors and misdemeanors.

Section 40A-1-6, N.M.S.A., 1953 Compilation distinguishes between "petty misdemeanors" and "misdemeanors" as criminal offenses. Section 40A-29-4, N.M.S.A., 1953 Compilation specifies the punishment for both petty misdemeanors and misdemeanors. Under the new Criminal Code it is clear that misdemeanors as denominated therein are to be tried only in the district courts. The Criminal Code does not however revise all of the criminal laws contained in the New Mexico statutes and a number of criminal misdemeanor statutes exist outside the Criminal Code.

Those misdemeanors triable in District Court do not provide for a trial by jury unless such crime was of the type which enjoyed and permitted trial by jury at the time of the adoption of Article II, Section 12, of the state constitution.

The Supreme Court in **Gutierrez v. Gober**, supra, in construing Article II, Section 12, of the state constitution stated:

"As it has heretofore existed (quoted from the constitution) of course, refers to the right as it existed in the territory of New Mexico at the time immediately preceding the adoption of the constitution. *Young v. Vail*, 29 N.M. 324, 222 P. 912, 916, 34 A.L.R. 980. It is conceded by appellant that the provision quoted from our Constitution does not confer a right to trial by jury in all classes of cases but merely guarantees the continuance of the right of jury trial as it existed, citing 35 C. J., *Juries*, pages 148, 149."

Thus, as stated in **Gutierrez v. Gober**, supra, and **State v. Greenwood**, it is our opinion that except in such instances where a right of trial by jury existed for a particular offense prior to the adoption of Article II, Section 12, of the state constitution for a specific **misdemeanor**, no such right exists presently to a trial by jury on such case in the state district courts.