

Opinion No. 65-04

January 21, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Roy G. Hill, Assistant Attorney General

TO: Louis R. Lopez, Assistant Court Administrator, Supreme Court Building, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Can a sheriff, constable, or municipal peace officer refuse to serve a Justice of the Peace warrant issued by a duly qualified justice of the peace?
2. Can a sheriff or other officer take a statement from a complainant and the officer sign the official complaint; or can a sheriff or other officer take a complaint under Section 41-1-2 without the affidavits being in the district attorney's possession?
3. Can a justice of the peace issue a warrant for arrest upon a complaint charging a misdemeanor which the justice of the peace does not have jurisdiction to try?

CONCLUSIONS

1. No, but see analysis.
2. No.
3. Yes.

OPINION

{*6} ANALYSIS

To answer your first question we must consider the following Sections of the New Mexico Statutes Annotated, Section 41-1-1, Section 36-13-1 and Section 14-17-6.

Section 41-1-1, N.M.S.A., 1953 Compilation (P.S.) provides as follows:

"Whenever complaint shall be made to any judge or justice of the peace that a criminal offense has been committed, it shall be his duty to examine the complainant and any witnesses who may be introduced to him under oath; if it appear on such examination that any crime has been committed, the magistrate shall issue a warrant commanding

the sheriff or other officer forthwith to take the accused and bring him before such magistrate, to be dealt with according to law. . ."

Section 36-13-1, N.M.S.A., 1953 Compilation prescribes the forms to be used by justice of the peace in all criminal actions filed in their courts. The warrant prescribed in this section reads in part:

"The State of New Mexico to the sheriff or any constable in this county."

These two sections above would indicate that the "other officer" referred to in Section 41-1-1 would be a constable only. In addition to the above sections however, we must look to Section 14-17-6, {*7} N.M.S.A., 1953 Compilation which governs municipal officers and provides in part as follows:

"The marshall and other peace officer or officers of cities, towns and villages shall execute and return all writs and processes to them directed by the mayor, police judge or justice of the peace as the case may be, and in criminal cases or cases in violation of city ordinances they may serve the same in any part of the county where such municipality is situated. . . ."

The conclusion to be drawn from the above sections is that the peace officers enumerated in your first question must serve properly issued justice of the peace warrants. Of course, in addition to the above officers a New Mexico State Policeman may serve justice of the peace warrants. Attorney General Opinion No. 4252 published in the report for 1943-44 ruled that State Police and county sheriffs have concurrent authority within a county. This means a State Police Officers may, but cannot be required to, serve justice of the peace warrants.

The answer to both of the questions included in your number two paragraph is no. A sheriff may not take a statement from a complainant and then sign the justice of the peace complaint upon which a warrant will be issued because of the prohibition in Section 41-1-2, N.M.S.A., 1953 Compilation. This section reads in pertinent part as follows:

"No warrant for the arrest of any person charged with a misdemeanor or crime, shall be issued out of any court or by any justice of the peace in this state on the official oath of any prosecuting officer, nor upon the information and belief only of any such officer or other person; but in all cases such warrants shall only issue upon the affidavit of such officer or other person, showing specific facts within his or their own personal knowledge, that constitute probable cause for the issuance of the same."

Such a complaint would first run afoul of that portion of the statute which says no warrant shall issue on the official oath of any prosecuting officer. Further, such a complaint would not comply with that part of the section which requires a prosecuting officer to proceed as any other complainant, that is give an affidavit showing specific facts within his personal knowledge before a warrant may issue.

To fully understand the statutory procedure for issuing a justice of the peace warrant Section 41-1-2 must be read in conjunction with Sections 41-1-1, 36-13-1 and 36-12-1, N.M.S.A., 1953 Compilation. In reading these sections it must be remembered that the words "complaint" and affidavit" are synonymous. **City of Ironton v. Bundy**, 129 N.E. 2d 831, 98 Ohio A. 416; See also **Dawson v. Beasley**, 180 N.E. 2d 367, 379, 24 Ind. 53; **Carrier v. Maberly**, 315 SW 2d 633, 635.

Section 36-13-1 sets out the form of criminal complaint to be used by a justice of the peace. Section 41-1-1, supra, makes it the duty of a justice of the peace to examine under oath a complainant and any witnesses introduced to him and if it appears from this examination that any crime has been committed he shall issue a warrant. Section 36-12-1 provides that a justice of the peace is:

". . . authorized and required, on view or complaint made on oath or affirmation, to cause any person charged with the commission of a crime or breach of the law, to be brought before him or some other justice of the peace. . . ."

Reading the four sections above together, it is clear that a justice of the peace should issue a warrant on a complaint only when a {*8} statutory complaint is signed on affirmation or oath by a person or persons with specific facts within his or their own personal knowledge. A complaint signed by a sheriff without personal knowledge of specific facts would not be a proper complaint upon which to issue a warrant. In addition, such a situation would not permit the justice of the peace to perform his duty of examining the complainant or other witnesses.

There is only one exception to the above conclusion. Section 41-1-2, supra has a proviso as follows:

". . . Provided; that such warrants may issue upon affidavits based upon information and belief when such affidavits are approved in writing by the district attorney, or his assistant, in and for the district or county wherein such affidavits are made."

This proviso permits the issuance of a warrant when a statutory complaint is signed upon affirmation or oath by a person, or persons upon their information and belief if this complaint is approved in writing by the district attorney.

The second part of your second question, "can a sheriff or other officer take a complaint under Section 41-1-2 without the affidavits being in the District Attorney's possession," is answered, I believe, by the above discussion. Section 41-1-2, supra, places restrictions on when a warrant may issue. As noted above, the complaint, or affidavit as it is called in Section 41-1-2, supra, must be signed by someone with personal knowledge or specific facts. If this is the situation then there is no reason why the complaint need ever pass through the possession of a district attorney. A district attorney need only be involved when a complaint is made on information and belief. In such a situation the complaint must be approved in writing by the District Attorney or his assistant, in and for the district or county wherein such complaint is made.

Your third question regarding warrants for the arrest of misdemeanants not triable in your court has previously been answered by this office. In Attorney General Opinion No. 60-6 dated January 19, 1960 this office ruled that a justice of the peace has the right to issue warrants, upon proper complaint for the arrest of a person accused of any crime. The opinion also pointed out that once it has been determined that the justice of the peace cannot try the case it would have to be refiled in district court.