

Opinion No. 68-115

November 13, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Mr. Abner Schreiber County Attorney Los Alamos County P.O. Box 800 Los Alamos, New Mexico 87544

QUESTIONS

Must a complaint, sworn to and filed upon information and belief by a police officer, which alleges a violation of a municipal ordinance be endorsed or approved by the District Attorney or his representative?

CONCLUSION

No.

OPINION

{*185} ANALYSIS

Section 38-1-3, N.M.S.A., 1953 Compilation, states, in pertinent part:

"A. In any action for the violation of any ordinance in which an arrest has not been made, **a warrant for the arrest of the defendant may issue in the first instance upon the affidavit of any person making a complaint that he has reasonable grounds to believe the party charged is guilty.** Any person arrested upon such {*186} warrant shall, without unnecessary delay, be taken before the proper officer to be tried for the alleged offense, or be allowed to post an appropriate bond.

B. Any municipality may provide by ordinance that the first process shall be a citation or summons in cases involving violations of any municipal ordinance not amounting to a breach of the peace, requiring the party charged to appear before the municipal magistrate court, at a time fixed in the citation or summons. The ordinance may also provide that, upon the failure of the party charged to appear, a warrant for his arrest shall forthwith issue by the municipal judge for the offense specified in the citation or summons, commanding that the party charged shall be arrested and proceedings had as in the case when arrest is made upon a warrant issued upon affidavit as provided in subsection A of this section." (Emphasis supplied.)

Clearly, under the above language, "any person" may cause the issuance of an arrest warrant. Of course, such a complaint must affirm that he believes a crime was committed. No mention is made of the District Attorney's office.

This section should be contrasted with Section 41-1-2, N.M.S.A., 1953 Compilation, states:

"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. 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.**" (Emphasis supplied.)

Section 41-1-2, supra deals with offenses against the state. Section 38-1-3, supra, deals with offenses against municipalities.

The difference in these two statutes is obvious. Based upon these sections, it is the opinion of this office that the District Attorney or his representative need not endorse complaints alleging violations of municipal ordinances. The proper court may obtain jurisdiction when "any person" makes the complaint, provided the other conditions of Section 38-1-3, supra, are met. See **State v. Chacon**, 62 N.M. 291, 309 P.2d 230 (1957).

By: Donald W. Miller

Assistant Attorney General