

Opinion No. 69-88

August 5, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Gary O'Dowd, Deputy Attorney General

TO: Mr. E. T. Johnson, Court Administrator, Supreme Court Building, Santa Fe, New Mexico 87501

QUESTIONS

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May a person who has accepted and signed a penalty assessment for violation of any portion of the Motor Vehicle Code enumerated in Section 64-22-4, N.M.S.A., 1953 Compilation, thereafter change his position and request an appearance before a magistrate?

CONCLUSION

No.

OPINION

{*139} ANALYSIS

The system of penalty assessment procedures is entirely statutory in origin. Sections 64-22-4 through 64-22-12, N.M.S.A., 1953 Compilation, establish a method whereby certain non-contested traffic violations may be satisfied without a court appearance by the violator; these statutory arrangements contemplate that the violator who chooses to accept the penalty assessment will deal directly with the Administrative Office of the Courts in Santa Fe, and not with an individual magistrate.

When a motorist charged with the violation of one of the enumerated traffic regulations accepts penalty assessment, he enters into a legal obligation with the state. Section 64-22-4.1, N.M.S.A., 1953 Compilation, provides in part:

"A. Unless a warning notice is given, at the time of making an arrest for any penalty assessment misdemeanor the arresting officer shall offer the alleged violator the option of accepting a penalty assessment. The violator's signature on the penalty assessment notice constitutes an acknowledgment of guilt of the offense stated in the notice, any payment of the prescribed penalty assessment is a complete satisfaction of the violation.

B. Payment of any penalty assessment must be made by mail to the administrative office of the courts, Supreme Court building, Santa Fe, within five [5] days from the date of arrest. Payments of penalty assessments are timely if postmarked within five [5] days from the date of arrest."

A default in this obligation results in a two-fold penalty. Section 64-22-4.2, N.M.S.A., 1953 Compilation, declares:

"A. If a penalty assessment is not paid within five [5] days from the date of arrest, the violator shall be prosecuted for the violation charged on { *140 } the penalty assessment notice in a manner as if a penalty assessment notice had not been issued. Upon conviction in such prosecution, the court shall impose penalties as provided by the Motor Vehicle Code or other law relating to motor vehicles for the particular offense charged, and the schedule of penalty assessments shall not apply.

B. In addition to the prosecution provided for in subsection A, it is a misdemeanor for any person who has elected to pay a penalty assessment to fail to do so within five [5] days from the date of arrest."

The statute does not provide for a waiver of these penalties in the event of a non-compliance with the five-day payment deadline. In specific terms, the statute provides that once the election in favor of penalty assessment is made, an obligation is incurred which is bound by unambiguous terms concerning time, place, and form of discharge.

It may be instructive to examine the provisions which exist in the corresponding Colorado statute, for that state does allow the violator the privilege of reconsidering his acceptance of penalty assessment. Section 13-5-130 (4) (b), Colo. Rev. Stat. Ann., 1963 Compilation, provides in relevant part:

"Should the violator accept the notice, but fail to pay the prescribed penalty within five days thereafter, the notice shall be construed to be a summons as for a charge of a misdemeanor and the prosecution for said violation shall thereafter be heard in the court of competent jurisdiction prescribed on the notice, in which event the violator shall be privileged to answer the charge made against him in the same manner as is provided in this article for prosecutions of the misdemeanors not specified in subsection (3) of this section, except that the maximum penalty which may be imposed shall not exceed the penalty set forth in the schedule of fines contained in subsection (3) of this section for such violation."

It will be observed that the Colorado plan differs from our own in several important respects. First, Colorado laws does not subject the non-paying violator to an additional misdemeanor liability based on non-payment, while the New Mexico statute does. Next, Colorado law provides explicitly that an unpaid citation become by operation of law a summons to appear in a named court; New Mexico law does not. Moreover, New Mexico law evidently does not anticipate the practical operation of a privilege to reconsider, for it makes no provision for the specification of a place and date of

appearance when penalty assessment is agreed upon. Colorado law, in contemplation of the privilege to reconsider, provides that all citations issued must specify the date and place of appearance in the event of non-payment. Finally, the Colorado law provides that one who reconsiders his acceptance of penalty assessment remains subject to the limitations of the fine schedule provided for payments by mail; New Mexico law removes this limitation by clear, direct language.

It would appear that neither by textual implication nor by practical operation can the New Mexico statute be interpreted as providing for a violator's reconsideration of his acceptance of penalty assessment. Your office may wish to consider the desirability of such a system, and may wish to propose changes in the statute to the legislature; as the statute presently stands, however, that body must act before any reconsideration of acceptance may be permitted.