

Opinion No. 73-46

June 6, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Larry Coughenour Director Administrative Office of the Courts Supreme Court Building Santa Fe, New Mexico 87501

QUESTIONS

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Under Section 41-1-6, N.M.S.A., 1953 Comp., enacted by Laws of 1973, Ch. 73, § 4, is an arresting officer required in all cases to issue a citation for a petty misdemeanor in lieu of taking the person to jail, and if not, what criteria should be used in making this decision?

CONCLUSION

The statute is not mandatory, but the apparent legislative intent is that citations should be issued in most petty misdemeanor cases. For criteria the officer should use in making this decision, see Analysis.

OPINION

{*92} ANALYSIS

Section 41-1-6, N.M.S.A., 1953 Comp., as enacted by Laws of 1973, Ch. 73, § 4 (effective March 14, 1973, since it contained an emergency clause), reads as follows:

"41-1-6. CITATION IN LIEU OF ARREST WITHOUT A WARRANT. -- A. A law enforcement officer who arrests a person without a warrant for a petty misdemeanor **may** offer the person arrested the option of accepting a citation to appear in lieu of taking him to jail.

"B. A citation issued pursuant to this section shall contain the name and address of the cited person, the offense charged, and the time and place to appear. Unless the person requests an earlier date, the time specified in the citation shall be at least three days after issuance of the citation. The law enforcement officer shall explain the person's rights not to sign a citation, the effect of not signing the citation, the effect of signing the citation, and the effect of failing to appear at the time and place stated on the citation.

"C. The person's signature on the citation constitutes a promise to appear at the time and place stated in the citation. One copy of the citation to appear shall be delivered to

the person cited and the law enforcement officer shall keep a duplicate copy which he shall file with the court as soon as practicable.

"D. A citation issued pursuant to this section is a valid complaint if the person receiving it appears in court.

"E. It is a petty misdemeanor for a person signing a citation not to appear at the time and place stated in the citation regardless of the disposition of the offense for which the citation was issued. A written promise to appear may be complied with by appearance of counsel." (Emphasis supplied)

"Petty misdemeanor" is defined by § 2(L) of the same act, compiled as Section 41-1-2, N.M.S.A., 1953 Comp., as "any offense so designated by law" or the penalty for which is "imprisonment for six months or less." It does not include violations of city ordinances in this penalty range, since such a violation is not a misdemeanor. **City of Roswell v. Gallegos**, 77 N.M. 170, 420 P.2d 438 (1966). However, there is nothing to keep a municipality from adopting an ordinance to the same effect.

It should be noted that Section 41-1-6, **supra**, provides that the officer "may" issue a citation for a petty misdemeanor offense in lieu of taking him to jail. It is true that "may" is sometimes construed to mean "shall" or "must" when necessary to accomplish the intent of the Legislature. **Lorentino v. State ex rel. James**, 18 N.M. 240, 135 P. 1172 (1913); **Reese v. Dempsey**, 48 N.M. 417, 152 P.2d 157 (1944). Whether words of a statute are mandatory or discretionary is a matter of legislative intent to be determined by consideration of the purpose sought to be accomplished. **Ross v. State Racing Comm'n**, 64 N.M. 478, 350 P.2d 701 (1958). The fundamental rule is that, in interpreting a statute, the words "shall" and "may" should not be used interchangeably but should be given their ordinary meaning. **Application of Sedillo**, 66 N.M. 267, 347 P.2d 162 (1959).

Since a citation procedure previously was not authorized except for traffic offenses (see §§ 64-22-8, **et seq.**, N.M.S.A., 1953 Comp.), it must be assumed that the Legislature intended to make a change. Applying the foregoing principles of statutory construction, we conclude that this legislative intent was to provide an alternative procedure to arrest and incarceration in petty misdemeanor cases, but to make its use discretionary with the arresting officer.

This discretion should be exercised liberally in favor of the alleged offender, in view of the minor nature of the petty misdemeanor offense. The purpose of the arrest-and-incarceration procedure, followed normally by release on bail, is to assure the appearance of the alleged offender in court to answer the charges. Another consideration is the preservation of the public peace. In other words, if the arresting officer does not have probable cause to believe that the alleged offender will flee the jurisdiction, or that there will be a breach of the peace if he is not taken to jail, he should use the citation procedure. Of course, if the alleged offender refuses to sign the promise to appear, he must be taken to jail.

{*93} The liberal use of the citation procedure is consistent with Rule 22 of the new Rules of Criminal Procedure, Section 41-23-22, N.M.S.A., 1953 Comp. (2d Repl. Vol. 6, 1972 Special Pocket Supp.), which provides for release on personal recognizance or on unsecured appearance bond, even in felony cases, "unless the court determines, in the exercise of its discretion, that such release will not reasonably assure the appearance of the person as required."

This construction will also result in more efficient use of the arresting officer's time, since he can issue a citation in a fraction of the time required to take an alleged offender to jail and go through the booking procedure.

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