

Opinion No. 75-45

August 1, 1975

OPINION OF: TONEY ANAYA, Attorney General

BY: W. Royer, Assistant Attorney General

TO: Honorable John E. Hobbes District Attorney Eighth Judicial District P. O. Box 1017
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QUESTIONS

Do the Magistrate Courts have jurisdiction to try second and subsequent offenses against Section 64-22-2, NMSA, 1953 Comp., which prohibits persons from driving or being in physical control of a motor vehicle while under the influence of intoxicating liquor or drugs?

CONCLUSION

Yes.

ANALYSIS

{*125}

Section 64-22-2, NMSA 1953 Comp. provides:

"A. It is unlawful for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of any vehicle within this state.

"B. It is unlawful for any person who is an habitual user of, or under the influence of, any narcotic drug, or who is under the influence of any other drug to a degree which renders him incapable of safely driving a vehicle, to drive or be in actual physical control of any vehicle within this state. The fact that any person charged with a violation of this subsection is or has been entitled to use such drug under the laws of this state is not a defense against the charge.

"C. Every violation of this section shall be punished by imprisonment for not less than thirty [30] days nor more than ninety [90] days, or by a fine of not less than one hundred dollars (\$ 100) nor more than two hundred (\$ 200), or both. On a first conviction under this section, any time spent in jail for the offense prior to conviction for that offense shall be credited to any term of imprisonment fixed by the court. A second or subsequent conviction shall be punished by imprisonment for not less than ninety days nor more than one year, or by a fine of not more than one thousand dollars (\$ 1,000), or both. In the case of a first offense under this section, the magistrate court has concurrent

jurisdiction with district courts to try the offender. This section does not affect the authority of a municipality, under a proper ordinance, to prescribe penalties for driving while under the influence of intoxicating liquor or drugs."

Section 36-3-4A, NMSA 1953 Comp., the jurisdictional statute for the Magistrate Courts, provides:

"Magistrates have jurisdiction **in all cases of misdemeanors**. Magistrates also have jurisdiction in any other criminal action where jurisdiction is specifically granted by law . . ." (Emphasis added.)

Section 64-10-7, NMSA, 1953 Comp. provides:

"It is a misdemeanor for any person to violate any provision {**126*} of the Motor Vehicle Code (Sections 64-1-1 et seq, NMSA, 1953 Comp.) unless the violation is declared a felony."

Driving or being in physical control of an automobile while under the influence of intoxicating liquor or drugs is declared unlawful pursuant to Section 64-22-2, **supra**, and a misdemeanor pursuant to Section 64-10-7, **supra**. Therefore, as a misdemeanor, the Magistrate Courts have jurisdiction pursuant to Section 36-3-4A, **supra**. See also Opinion of the Attorney General No. 73-67, dated September 24, 1973.

Nevertheless, the above statutes do not completely clarify the question you pose. We note that subsection C of Section 64-22-2, **supra**, provides in part:

"In the case of a first offense under this section, the Magistrate Court has concurrent jurisdiction with the district courts to try the offender."

It is our opinion, however, that this language does not present a bar to magistrate court jurisdiction over second or subsequent offenses.

The history of this section reveals that this language was first inserted by Chapter 184, Laws of 1955. Section 8 of Chapter 184 provided that Justices of the Peace had concurrent jurisdiction with the District Courts. The Magistrate Courts were substituted for the Justices of the Peace Courts by Section 2, Chapter 210, Laws of 1969.

The Magistrate Courts replaced the Justice of the Peace system through the enactment of Chapter 62, Laws of 1968. Section 49, Chapter 62, Laws of 1968 enacted Section 36-3-4, NMSA 1953 Comp. (amended by Section 2, Chapter 206, Laws of 1973) which provide the Magistrate Courts with original criminal jurisdiction. Section 49, **supra**, provided in part:

"A. Magistrates have jurisdiction in all cases of misdemeanors where the punishment prescribed by law is a fine of one hundred dollars (\$ 100) or less, or imprisonment for six months or less, or where fine or imprisonment or both are prescribed but neither

exceeds these maximums. Magistrates also have jurisdiction in any other criminal action where jurisdiction is specifically granted by law"

The jurisdiction of the Justice of the Peace Courts was similarly limited. See Section 36-2-5, NMSA 1953 Comp. (Repealed; Section 171, Chapter 62, Laws of 1968).

Therefore, the sentence of Section 64-22-2, **supra**, that is in question was intended by the legislature as a specific grant of jurisdiction to the magistrate courts pursuant to Section 49 of Chapter 62, Laws of 1968 because the fine that could be levied exceeded \$ 100.

The legislature, by the enactment of Chapter 206, Laws of 1973, in amending Section 36-3-4, **supra**, specifically expanded the jurisdiction of Magistrate Courts to include all misdemeanors, whether considered a high or a petty misdemeanor. See Opinion of the Attorney General No. 73-67, **supra**. Therefore, the specific provision of Section 64-22-2C, **supra**, is no longer required to confer jurisdiction on the Magistrate Courts and, in our opinion, it should not be read as a bar to Magistrate Courts jurisdiction over second or subsequent offenses.

Opinion of the Attorney General {^{*127}} No .72-13, dated March 20, 1972, discussed this issue with reference to Section 36-3-4, **supra**, prior to the 1973 amendment. To the extent that Opinion No. 72-13 varies from this opinion, it is hereby withdrawn.