

Opinion No. 75-58

October 23, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: David Griego Chief Probation Officer Juvenile Probation Office Thirteenth Judicial District P. O. Box 328 Los Lunas, New Mexico 87031

QUESTIONS

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May an ordinance of the City of Grants pertaining to curfew, and parent responsibility for children who violate the curfew, permit detention of children in jail?

CONCLUSION

See analysis:

OPINION

{*156} ANALYSIS

The City of Grants adopted Ordinance No. 172 in 1963. This ordinance prohibited the loitering of minors under the age of 18 upon public streets and in public places between the hours of 11:00 p.m. and 5:00 a.m. and imposed responsibility upon parents who knowingly permit their minor children to loiter upon public streets and in public places during the prohibited times. The penalty section of the ordinance provides that minors violating the curfew are to be dealt with in accordance with juvenile court law and procedure. Such section also provides that the penalty to be imposed upon parents violating the parent responsibility provision is either a fine of \$ 5 to \$ 50 or imprisonment for not more {*157} than 15 days or both. Ordinance No. 172 has since been amended but the relevant provisions are still in effect.

It is our understanding that the current ordinance is being enforced by detaining children in jail until a bond in the amount of \$ 50 is posted by the parents of the child violating the curfew ordinance. We conclude that enforcement of the ordinance in this manner violates certain provisions of the Children's Code, Sections 13-14-1 to 13-14-45, NMSA, 1953 Comp., and it is, therefore, impermissible.

Children may be taken into custody only in certain situations. Section 13-14-20, **supra**, provides:

13-14-20. Taking into custody. -- A child may be taken into custody:

A. pursuant to the order of the court endorsed on the summons because the child needs to be detained;

B. pursuant to the order of the court issued because a parent, guardian or custodian fails when requested to bring the child before the court after having promised to do so when the child was delivered upon release from custody;

C. pursuant to the laws of arrest for commission of a delinquent act;

D. by a law enforcement officer when the officer has reasonable grounds to believe that the child is suffering from illness, or injury, or is in immediate danger from the child's surroundings, and removal from those surroundings is necessary;

E. by a law enforcement officer when he has reasonable grounds to believe that the child has run away from his parents, guardian or custodian; and

F. by a probation officer proceeding under section 8 [13-14-8] of the Children's Code [13-14-1 to 13-14-45].

Children taken into custody may be detained only if the criteria set forth in Section 13-14-22, **supra**, are met:

13-14-22. Criteria for detention of children. -- A. Unless ordered by the court pursuant to the provisions of the Children's Code, a child taken into custody shall not be placed in detention prior to the court's disposition unless:

(1) probable cause exists to believe that if not detained the child will commit injury to the persons or property of others or cause injury to himself or be subject to injury by others; or

(2) when probable cause exists to believe that the child has no parent, guardian, custodian or other person able to provide adequate supervision and care for him; or

(3) when probable cause exists to believe that the child will run away or be taken away so as to be unavailable for proceedings of the court or its officers.

B. The criteria for detention in this section shall govern the decisions of all persons responsible for determining whether detention is appropriate prior to the court's disposition.

Such detention may be in a jail. Section 13-14-23 (B), **supra**, states:

B. Until July 1, 1976, and not {*158} thereafter, a child alleged to be a delinquent child or a child in need of supervision may be detained pending court hearing in a jail or other facility for the incarceration of adults, but only if:

- (1) a detention facility established by the department of corrections for children alleged to be delinquent children or in need of supervision is not available;
- (2) the facility meets the standards for detention facilities under the Children's Code;
- (3) the detention is in a room separate and removed from incarcerated adults;
- (4) adequate supervision is provided;
- (5) detention in the facility does not exceed forty-eight [48] hours; and
- (6) upon the expiration of the forty-eight [48] hours time limitation, detention shall, if necessary, be continued in facilities specified under this section for children alleged to be delinquent or for children alleged to be in need of supervision, as appropriate.

Section 13-14-21, **supra**, requires that a person taking a child into custody shall either release that child or deliver that child to probation services or to a place of detention designated by the court. If such delivery is made, subsection B of Section 13-14-21 becomes operative:

B. When a child is delivered to probation services, or to a place of detention designated by the court, a probation officer, prior to the placing of the child in detention, shall review the need for detention and shall release the child from custody unless detention is appropriate under the criteria established by the Children's Code or has been ordered by the court pursuant to those criteria.

It is the duty of your office to determine whether detention is appropriate according to the statutory criteria. In the absence of a court order, detention is not permitted by statute in the absence of your determination that it is warranted. The city police, acting on their own, may not detain a child. Moreover, if detention is determined to be appropriate, the posting of bond does not make it less so. Indeed, a bond is not a consideration in determining whether to release or detain a child.

In summary, the action of the police, acting unilaterally, in detaining a child in jail until his parents post a \$ 50 bond is contrary to the Children's Code.

By: Andrea Buzzard

Assistant Attorney General