

Opinion No. 79-12

April 2, 1979

OPINION OF: Jeff Bingaman, Attorney General

BY: Arthur Encinias, Assistant Attorney General

TO: Honorable Lalo Garza, Third Judicial District Attorney, Dona Ana County Courthouse, Room 207, Las Cruces, New Mexico 88001

MOTOR VEHICLES

Persons who have been cited for motor vehicle violations cannot be heard as a matter of right in a magistrate district other than where the offense occurred.

QUESTIONS

Does Section 35-3-6(A) NMSA 1978 permit persons who have been cited for motor vehicle violations to be heard as a matter of right in a magistrate district other than where the offense occurred?

CONCLUSIONS

No.

ANALYSIS

Section 35-3-6(A), *supra*, provides as follows: "The territorial jurisdiction of a magistrate is coextensive with the magistrate district in which he serves, except that a magistrate has jurisdiction in any criminal action involving violation of a law relating to motor vehicles arising in any magistrate district adjoining at any point that in which he serves and within magistrate trial jurisdiction unless the defendant requests trial by jury."

This statute simply extends or enlarges the territorial jurisdiction of the magistrate in criminal actions involving motor vehicle violations from the adjoining magistrate district without stating when or upon what conditions such extraterritorial jurisdiction may be exercised. It does not expressly create or identify a right of election on the part of the accused. Nor may a right of election be inferred from the language of the statute. While this specific question has not been raised before New Mexico courts, analogy can be drawn from a similar situation. Rule 18 of the Federal Rules of Criminal Procedure provides that the trial court may fix place of trial in any division within the district with due regard to the convenience of the defendants and witnesses. This Rule, which is more explicit than the statute under review, was held to confer no absolute right upon the defendant to be tried in the division of his choice but was viewed as a discretionary

power of the court upon a showing of good cause. **Houston v. United States**, 419 F.2d 30 (1969).

The statute in question does not set out a new or different procedure for change of venue. Thus, change of venue is still governed by the general venue statutes. See Sections 38-3-3 et seq. NMSA 1978.

These conclusions are consistent with the present constitutional and statutory provisions regarding the place of prosecution. Article II, Section 14 of the New Mexico State Constitution confers upon an accused a right to be tried in the county or district where the crime {**28*} is alleged to have been committed. Sections 30-1-14 and 35-3-5A(2) NMSA 1978, reiterate the personal right to venue. In **State v. Lopez**, 84 N.M. 805, 807, 508 P.2d 1292 (1973), the Court explained:

"Our constitutional and statutory provisions . . . have been construed and are considered as conferring a personal right or privilege of venue on the accused. This right may be waived by the accused."

The defendant's personal right of venue is a legal concept, separate and distinct from the territorial jurisdiction of the magistrate and a statute affecting one does not necessarily affect the other.

Therefore, the accused must seek to change venue within the time allowed for pre-trial motions. See Section 38-3-3 et seq., **supra**, and Rule 7 of the Rules of Criminal Procedure for the Magistrate Courts. While a party to the action may seek venue change, a trial court, may order a change of venue **sua sponte** when the requirements for a venue change are met. See **State v. Valdez**, 83 N.M. 632, 495 P.2d 1079 (Ct. App.) **aff'd**, 83 N.M. 720, 497 P.2d 231, **cert. denied**, 409 U.S. 1077 (1972).

ATTORNEY GENERAL

Jeff Bingaman, Attorney General