

Opinion No. 81-18

August 14, 1981

OPINION OF: Jeff Bingaman, Attorney General

BY: Jill Z. Cooper, Deputy Attorney General

TO: Honorable Michael F. McCormick, District Attorney, Fifth Judicial District, P.O. Box 1488, Carlsbad, New Mexico 88220

CRIMINAL OFFENSES; MOTOR VEHICLES; COURTS

Synopsis: If an offense defined as a "penalty assessment misdemeanor" is committed and the offender is not arrested by a police officer, then a person other than a law enforcement officer may file a criminal complaint in accordance with the procedure established for all misdemeanors.

QUESTIONS

May a private citizen who is an eye witness to an act which is a violation of one of the penalty assessment misdemeanors listed in Section 66-8-116 NMSA 1978, file a complaint initiating a criminal action in Magistrate Court?

CONCLUSIONS

Yes.

ANALYSIS

A violation of any of the acts described in the statutes listed in Section 66-8-116 NMSA 1978 as "penalty assessment misdemeanors" would be, notwithstanding the provisions of Section 66-8-118, a misdemeanor. The list includes statutes from the Motor Vehicle Code and statutes from the Criminal Code. Section 66-8-7 NMSA 1978 states that the violation of any provision of the Motor Vehicle Code shall be a misdemeanor unless such violation is otherwise defined as a felony.

OPINION

The magistrate court has jurisdiction "in all cases of misdemeanors," Section 35-3-4 NMSA 1978. Magistrate jurisdiction would therefore include all misdemeanors arising under the Motor Vehicle Code. Compare, Opinion of the Attorney General No. 69-53, dated June 5, 1969. A criminal action commences with the filing of a complaint in a court of proper jurisdiction by a law enforcement officer or any other person. Section 31-1-4 NMSA 1978; Rule 4 of the Rules of Criminal Procedure for the Magistrate Courts.

If a person alleged to have committed an offense defined as a penalty assessment misdemeanor is stopped by a police officer, then, pursuant to Section 66-8-117 NMSA 1978, the alleged offender shall be given a warning notice or the opportunity of accepting a penalty assessment notice. See also, Section 66-8-123 NMSA 1978. When the alleged offender signs the penalty assessment notice, he acknowledges his guilt of the offense stated in the notice. Section 66-8-117(A). Having thus "plead" guilty, the defendant has been "convicted" of the offense, **State v. Larranaga**, 77 N.M. 528, 424 P.2d 804 (1967), and cannot again be convicted for the same offense.

If on the other hand, an offense defined as a "penalty assessment misdemeanor" is committed and the offender is **not** arrested by a {248} police officer, then a person other than a law enforcement officer may file a criminal complaint in accordance with the procedure established for all misdemeanors. That is, the complaint must conform to the requirements of Rule 4, see e.g., **State v. Nixon**, 89 N.M. 129, 548 P.2d 91 (1976), docketing fees must be paid in accordance with Section 35-6-3 NMSA 1978; and the prosecution of such a complaint would be undertaken at the discretion of the district attorney.

However, should a person be convicted of a penalty assessment misdemeanor on complaint of a person other than a law enforcement officer, he would still be liable only for the penalty assessment established by Section 66-8-116. Section 66-8-7 NMSA 1978 defines the maximum penalty which may be imposed for convictions of misdemeanors under the Motor Vehicle Code **unless** another penalty is specified. Section 66-8-116(C) specifies that if an alleged violator declines to accept a notice of penalty assessment, "no fine imposed upon later conviction shall exceed the penalty assessment established for the particular penalty assessment misdemeanor."

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