Opinion No. 87-23

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OPINION OF: HAL STRATTON, Attorney General

BY: Elizabeth Major, Assistant Attorney General

TO: Linn J. Tytler, New Mexico State Representative, 6031 McKinney Drive NE, Albuquerque, New Mexico 87109

QUESTIONS

Is the New Mexico habitual offender statute, Section 31-18-19 NMSA 1978 (Repl. Pamp. 1981), mandatory?

CONCLUSIONS

Yes.

ANALYSIS

The Supreme Court of New Mexico has stated that district attorneys in New Mexico do not have common-law powers. The state constitution and statutes prescribe and limit their authority. State v. Reese, 78 N.M. 241, 430 P.2d 399 (1967). The constitution provides that district attorneys shall perform such duties as the law may prescribe. N.M. Const. art. VI, § 24. Section 31-18-19 NMSA 1978 (Repl. Pamp. 1981), provides:

If at any time, either after sentence or conviction, it appears that a person convicted of a noncapital felony is or may be a habitual offender, it is the duty of the district attorney of the district in which the present conviction was obtained to file an information charging that person as a habitual offender.

In State v. McGraw, 59 N.M. 348, 284 P.2d 670 (1955), the Supreme Court stated that the terms of the statutes governing habitual offenders are mandatory and that "a district attorney or judge, or both, may not nullify the statutes by ignoring them." 59 N.M. at 351, 284 P.2d at 672. The New Mexico appellate courts have continued to follow McGraw in finding that the provisions of section 31-18-19 are mandatory. E.g., State v. Davis, 104 N.M. 229, 719 P.2d 807 (1986); State v. Sedillo, 82 N.M. 287, 480 P.2d 401 (Ct.App. 1971). In State v. Davis, the Supreme Court also stated that district attorneys have an affirmative duty to prosecute habitual offenders.

The legislature has the authority to designate the district attorney's duties. N.M. Const. art. VI, § 24; State v. Reese. Section 31-18-19 provides that it is the duty of a district attorney to file an information in habitual cases. The legislature has set out a specific procedure for district attorneys to employ in prosecuting habitual offenders. That

procedure does not contemplate the agreement not to seek potential habitual offender charges as part of a plea and disposition negotiation.

A statute should be read to mean what the legislature intended it to mean and to accomplish what it was designed to accomplish. See State ex rel. Newsome v. Alarid, 90 N.M. 790, 568 P.2d 1236 (1977). If it is free from ambiguity, it should be given effect as written. State v. Elliott, 89 N.M. 756, 557 P.2d 1105 (1977). The statute limits the district attorney's discretion in the method for prosecuting habitual offenders. The statutory language describing the method to be used is not ambiguous, and it provides no basis on which a district attorney can ignore or transform that method. See, e.g., State v. Madison. 120 Wis.2d 150, 353 N.W. 2d 835 (Ct.App. 1984); State v. Steffes, 2 Or. App. 163, 465 P.2d 905 (1970).

The statute calls for the district attorney to prosecute if it appears that a person convicted of a noncapital felony "is or may be a habitual offender." Within the context of this broad language, a district attorney must necessarily evaluate whether he can prove the habitual offender charges in any given case before he proceeds with a prosecution. For example, if he ascertains that he cannot present sufficient evidence of prior convictions, he would not have an adequate basis on which to file an information. The New Mexico Court of Appeals has stated that "[m]any reasons may exist for failure to prosecute persons subject to the increased penalty as habitual offenders; for example, the prior conviction may not be susceptible to proof, or the procedures necessary to enforce attendance of witnesses from out of state may not be adequate." State v. Baldonado, 79 N.M. 175, 177, 441 P.2d 215, 217 (Ct.App. 1968). See also Martinez v. Romero, 626 F.2d 807, 810 (10th Cir. 1980).

Section 31-18-19, read as a whole and in conjunction with surrounding statutes, is designed to ensure that habitual offenders are subjected to increased penalties. Section 31-18-18 NMSA 1978 (Repl. Pamp. 1981), makes it the duty of "any warden or prison official or any prison, probation, parole or police officer or other peace officer" to inform the district attorney when he receives facts that a person who is charged with or convicted of a noncapital felony is or may be a habitual offender. Section 31-18-18 also imposes a duty on the district attorney to file an information upon receipt of this information. Section 31-18-20 NMSA 1978 (Cum. Supp. 1986), provides that, upon the required findings by the court establishing that a person is a habitual offender, the court shall sentence him in accordance with Section 31-18-17 NMSA 1978 (Cum. Supp. 1986). Section 31-18-17 provides for specified increased penalties for habitual offenders. The statutes plainly require prison and police officials to report to the district attorney information that a person is a habitual offender, and they require judges to impose increased penalties for habitual offenders. These requirements would have little effect if district attorneys could ignore the facts reported or choose not to file informations. Macomber v. State, 181 Or. 208, 180 P.2d 793, 801 (1947) (cited by the Supreme Court of New Mexico in McGraw).

This statutory scheme develops a legislative intent to require increased punishment of habitual offenders. The habitual offender statutes do not create a new offense. They

merely increase the sentence for an existing conviction. State v. Marquez, 105 N.M. 269, 731 P.2d 965 (Ct.App. 1986). It is solely within the province of the legislature to establish penalties for criminal conduct. State v. Mabry, 96 N.M. 317, 630 P.2d 269 (1981). The limitation on the manner in which a district attorney must proceed, by filing an information, furthers the legislative intent.

It would be impossible for us to discuss this subject without noting the potential problem a district attorney might have in bringing mandatory prosecutions as prescribed by the legislature. It could be physically impossible to bring such actions without sufficient resources and prosecutors. Although we find the provisions of section 31-18-19 mandatory, only the New Mexico legislature can solve the practical problem of providing sufficient resources to allow district attorneys to comply with the statute.

ATTORNEY GENERAL

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