

**Opinion No. 89-27**

October 18, 1989

**OPINION OF:** HAL STRATTON, Attorney General

**BY:** Margaret B. Alcock, Assistant Attorney General

**TO:** Thomas A. Rutledge, District Attorney, P.O. Box 1448, Carlsbad, New Mexico 88220

**QUESTIONS**

Whether a peace officer who has prosecuted a criminal case in magistrate or municipal court may continue to prosecute the case in district court after an appeal of the magistrate or municipal court judgment has been filed in district court.

**CONCLUSIONS**

No.

**ANALYSIS**

NMSA, Section 29-1-1 (Repl. Pamp. 1984) sets out the duties of peace officers, which include the following:

[I]t is also declared the duty of every such officer to diligently file a complaint or information, if the circumstances are such as to indicate to a reasonably prudent person that such action should be taken, and it is also declared his duty to cooperate with and assist the attorney general, district attorney or other prosecutor, if any, in all reasonable ways....

NMSA, Section 36-1-19 (Supp. 1988) sets out the general rule regarding legal representation of governmental entities in criminal prosecutions:

[N]o one shall represent the state or any county thereof in any matter in which the state or county is interested except the attorney general, his legally appointed and qualified assistants or the district attorney or his legally appointed and qualified assistants and such associate counsel as may appear on order of the court, with the consent of the attorney general or district attorney.

NMSA, Section 36-1-2 (Repl. Pamp. 1984) defines "assistants" to the district attorney as "persons who shall be attorneys-at-law practicing their profession in this state and members of the bar of this state...."

In interpreting a statute, the intent of the Legislature is to be sought first in the meaning of the words used, and when they are free from ambiguity, no other means of interpretation should be resorted to. *State v. Pitts*, 103 N.M. 778, 779, 714 P.2d 582, 583 (1986). The plain language of the statutes quoted above indicates that while peace officers are to "cooperate" with the attorney general or district attorney, peace officers may not themselves prosecute criminal cases on behalf of the state.

By rules adopted effective July 1, 1988, the New Mexico Supreme Court provided an exception to the statutory rule regarding legal representation of governmental entities before the state's magistrate, metropolitan and municipal courts.

SCRA 1986, Rule 6-108(B) (Anno. 1989) of the Rules of Criminal Procedure for the Magistrate Courts and SCRA 1986, Rule 7-108(B) (Anno. 1989) of the Rules of Criminal Procedure for the Metropolitan Courts are identical and state:

B. Other authorized appearances. A governmental entity may appear and prosecute any misdemeanor proceeding if the appearance is by an employee of the governmental entity authorized by the governmental entity to institute or cause to be instituted an action on behalf of the governmental entity.

SCRA 1986, Rule 8-111(B) (Anno. 1989) of the Rules of Criminal Procedure for the Municipal Courts states:

B. Other authorized appearances. A municipal officer or employee may appear and prosecute any petty misdemeanor proceeding on behalf of the municipality if the municipality has authorized the officer or employee to institute or cause to be instituted an action on behalf of the governmental entity.

The exception provided for prosecution of criminal cases in the magistrate, metropolitan and municipal courts does not apply to the district courts. All trials upon appeals to the district court are de novo "and shall be governed by the rules of Criminal Procedure for the District Courts." SCRA 1986, Rules 6-703(H), 7-703(I), and 8-703(I). There is no provision contained in the Rules of Criminal Procedure for the District Courts which would modify the general rule of NMSA, Section 36-1-19 (Supp. 1988) so as to permit a peace officer to appear before the district court to prosecute the appeal.

In conclusion, a peace officer does not have authority to prosecute a criminal case in district court on de novo appeal from the metropolitan or municipal court.

## **ATTORNEY GENERAL**

HAL STRATTON Attorney General