

Opinion No. [30-36]

February 28, 1930

BY: J. A. MILLER, Assistant Attorney General

TO: Hon. W. B. Walton, District Attorney, Silver City, New Mexico.

JUSTICE OF THE PEACE -- Jurisdiction in criminal cases.

OPINION

I have yours of the 25th inst. with which you enclose a letter from Mr. Henry T. Duncan, a justice of the peace and which raises questions concerning the jurisdiction of justices of the peace in criminal prosecutions. You ask for an opinion from this office. Judge Duncan quite evidently has given this matter serious consideration and has prepared quite a brief on the subject. It is not the intent of this office at this time to expand our opinion to the proportions of a brief. We have gone into the matter with considerable care and have unearthed old statutes and compilations in that search. However, we feel that a discussion of changes which have taken place since the Kearney Code and the Organic Act might lead to confusion rather than to clarifying the situation.

The jurisdiction of justices of the peace, as that jurisdiction existed in 1908, is set forth in section 3232 of the Compiled Laws of 1897, *Douthit vs. Bailey*, 14 N.M., 533, and it appears that that statute was still in full force and effect at the time of adoption of the constitution and remained in effect until the enactment of chapter 13 of the Session Laws of 1915, in consequence of which it may not be profitable to spend much time on earlier statutes.

It may be well to explain at this point that in this opinion we confine ourselves strictly to the jurisdiction of justices of the peace in criminal prosecutions inasmuch as no question is presented as to jurisdiction in civil matters and by "jurisdiction" in this letter we do not refer to territorial jurisdiction which is co-extensive with the county, but to jurisdiction to try and impose sentence.

It may be well first to get a clear understanding of the meaning of the terms felony and misdemeanor.

Felony is defined by section 35-103, New Mexico Statutes Annotated, 1929 Compilation, as follows:

"A felony is a public offense punishable with death, or which is, or, in the discretion of the court, may be punishable by imprisonment in the penitentiary, or any other public offense which is, or may be, expressly declared by law to be a felony."

Following that, in section 35-104 we read, "Every other public offense is a misdemeanor."

But the definition of felony, as above quoted, is not complete in that we are not there told what offenses may be punishable by imprisonment in the penitentiary. For that information we turn to section 130-145, 1929 Compilation, and learn that where the punishment is imprisonment for a term or time exceeding six months a person convicted shall be imprisoned in the penitentiary. A felony then is a public offense which may be,

1. punishable with death or,
2. which may be, in the discretion of the court, punishable by imprisonment for more than six months or,
3. any other public offense expressly declared by law to be a felony. All other offenses are misdemeanors.

Justices of the Peace have no jurisdiction to try felonies. They have jurisdiction to try some misdemeanors but not all.

"Jurisdiction in Misdemeanors. Justices of the peace are hereby given jurisdiction in all cases of misdemeanors where the **punishment prescribed by law** may be a fine of \$ 100.00 or less or imprisonment for six months or less, or may be both such fine and imprisonment provided that this act shall not apply to misdemeanors, jurisdiction whereof is exclusively vested in district courts." Laws of 1915, Chap. 13, § 79-208, 1929 Compilation.

It will be noted that justices of the peace are given jurisdiction, (that is, jurisdiction to try) cases of misdemeanors where the punishment prescribed by law may be a fine of \$ 100.00 or less, or imprisonment for six months or less, or both such fine and imprisonment. They have no jurisdiction to try cases in which the punishment may be greater than above stated and it is the **maximum** penalty prescribed by the statute upon which the complaint is based that determines the question of jurisdiction.

"A justice of the peace has no jurisdiction where the maximum penalty for the offense, as alleged in the complaint, is greater than such officer is authorized to impose. The test is the maximum penalty which may be imposed. If no limit is fixed to the penalty a justice will not have jurisdiction to try the offense." 18 Am. & Eng. Enc. of Law, Second Edition, 38.

A justice of the peace may have jurisdiction in special cases but only where the statute governing such case specifically so provides.

Let us now consider the justice as a committing magistrate. In this connection we observe first,

"There shall be no preliminary examination in misdemeanor cases."

Laws 1925, Chap. 144, Sec. 8, 4th paragraph.

This disposes of all misdemeanor cases so far as a justice of the peace is concerned. Certain ones he may try, as heretofore explained. In no misdemeanor case is there to be a preliminary examination either by justice of the peace or any one else and as we have already seen, he has no jurisdiction to try any felony case.

"Every felony must be prosecuted by indictment or information in the district or superior court. Misdemeanors must be prosecuted by information except as otherwise provided by law. Provided, however, that the district court or the judge thereof may, by an order made, direct that any particular misdemeanor be presented to the grand jury and when so ordered it may be prosecuted by indictment."

Laws of 1925, chapter 145, section 1.

The procedure to be followed by justices of the peace when sitting as magistrates, that is, in preliminary hearings, is so completely and clearly set forth by chapter 144, Laws of 1925, that I shall not do more than make reference to that chapter here. I should, however, call attention to the amendment of sub-paragraph 3 of section 8 of that chapter as the same appears as chapter 132 of the Session Laws of 1927. Those two chapters completely cover the subject.

It will be noted that in cases of misdemeanors the punishment of which is beyond the jurisdiction of justices of the peace, ample provision is made for the filing of informations by the district attorney and the handling of such cases in the district court, hence the expressed concern of Judge Duncan as to such cases would appear to be without foundation. There is no preliminary complaint and no preliminary hearing. The defendant is not arrested until after the filing of the information or indictment when he will be permitted to make bail in the district court.