

Opinion No. 54-6034

November 8, 1954

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Lotario D. Ortega Assistant District Attorney Gallup, New Mexico

{*501} Recently, you requested the opinion of this office upon the matter of the proper handling of misdemeanors, the punishment of which is beyond the jurisdiction of justices of the peace, and which are commonly referred to as "District Court Misdemeanors".

Your request relates specifically to whether or not the criminal complaint in a case involving the commission of such a misdemeanor must be filed in the District Court at the outset.

This office considered a similar question in its Opinion No. 5594, a copy of which is enclosed herewith, and concluded that it was the clear intention of the Legislature, in adopting § 38-205, N.M.S.A., 1941, which section limits the jurisdiction of justices of the peace in misdemeanor cases to those in which the maximum fine might not be more than \$ 100.00, and the maximum imprisonment not more than 90 days, to deprive justice of the peace courts of any jurisdiction whatever in all other types of misdemeanor cases.

It is our conclusion that the complaint in a matter involving a misdemeanor over which a justice of the peace has no jurisdiction should be filed originally in the District Court.

Secondly, you ask the question whether § 68-2317, N.M.S.A., 1941, our drunken driving statute, is not, in fact, a felony, and deserving to be treated as such.

Section 41-103, N.M.S.A., 1941, defines a felony 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."

{*502} Section 68-2317 provides, in its penalty provision:

"Every person who is convicted of a violation of this section shall be punished by imprisonment for not less than 30 days nor more than 1 year, or by fine of not less than \$ 100 nor more than \$ 1,000."

Section 45-137, N.M.S.A., 1941, provides, in part:

". . . all persons convicted of any crime, where the punishment is imprisonment for a term or time exceeding six (6) months, shall be imprisoned in the penitentiary, . . ."

Thus, drunken driving is an offense which may, in the discretion of the Court, be punishable by imprisonment in the penitentiary; hence, it is a felony, and should be treated like other felony.

It should be noted that at the time that our Opinion No. 5594 was written, the penalty provision for the offense of drunken driving specifically provided that the punishment for that offense would be imprisonment **in the county jail**. The phrase "in the county jail" was deleted from the statute as it was amended by the Legislation in 1953, and it is our opinion that such deletion had the effect of changing the offense from a misdemeanor to a felony.

It should be noted further that, in one specific instance, drunken driving should be treated as a misdemeanor within the jurisdiction of justice of the peace courts. Section 68-2317 (e) provides:

"Justices of the peace shall have jurisdiction to accept a plea of guilty to a first offense under this section and to impose a fine of \$ 100."

Only in the instance of a plea of guilty to a first offense, however, could the offense be treated as a misdemeanor within the jurisdiction of a justice of the peace.

We call your attention to the fact that litigation is now pending in the Supreme Court of New Mexico testing the constitutionality of § 68-2317.

Trusting that the foregoing will answer your questions satisfactorily, I am,

By: Henry A. Kiker, Jr.

Assist. Attorney General