

## Opinion No. 56-6484

July 2, 1956

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. Charles A. Feezer, Assistant District Attorney, Fifth Judicial District, Carlsbad, New Mexico

You have related the following situation:

A resident of Eddy County was arrested in Sierra County by a State Policeman and a citation was issued. By agreement with the State Policeman, he was to appear in Carlsbad, Eddy County. He has refused to appear in Eddy County and a further citation has been issued in Truth or Consequences, Sierra County, by a Justice of the Peace for his failure to appear and answer the first charge. Pursuant to your advice, the State Police in Eddy County have requested a transmittal of the warrant of arrest from Sierra County for endorsement by a Justice of the Peace in Eddy County so that the arrest can be effected. Your inquiry concerns the legality of arresting in Eddy County under the warrant issued in Sierra County.

The question involves an interpretation of § 41-1-5, N.M.S.A., 1953. That section reads:

"Whenever any person who shall have committed any criminal offense in any county, **shall escape into any other**, any magistrate within the county in which such offender may be found may issue his warrant for his apprehension, or may endorse a warrant which has been issued by a magistrate in the county from which the criminal escaped, and have him apprehended thereon and sent before some magistrate of the county in which the offense was committed, for trial." (Emphasis supplied)

The narrow issue is whether or not there has been an "escape" within the meaning of the above section so that arrest may be effected in Eddy County under an endorsed warrant issued in Sierra County.

The question is close. It is our opinion, however, that there may well be an "escape" within the meaning of this section. We reason as follows:

"An escape has been broadly defined as the voluntary departure of a person without force from the lawful custody of an officer or from any place where he is lawfully confined, or as it is more tersely stated, the unlawful departure of a prisoner from the limits of his custody or the act of a prisoner in regaining his liberty before released in due course of law." 19 Am. Jur. 361.

And an element of escape, generally, is intent.

"The prisoner ordinarily is not guilty of the crime of escape unless he departs from lawful custody with intent to evade the due course of justice." 30 C.J.S. 1146.

Since there was an agreement between this person and the officer that the person would appear in Eddy County to answer the citation and upon this the officer voluntarily released him, it would appear, at first blush, that the person did not entertain an intent to evade the due course of justice. However, his subsequent conduct in refusing to appear in Eddy County could be taken as evidence and could show that when this person made his agreement with the officer that he did not, in fact, intend to answer the processes of the law. If such would prove to be the case, we believe that a court would hold that this person would have gained his release by guile, which, in our opinion, would constitute "escape".

It should be observed that the officer who arrested this person in Sierra County had no authority to permit this person to answer the citation in Eddy County. The venue for a criminal action is the county in which the offense occurs. Section 41-8-1, N.M.S.A., 1953, and Section 64-22-8 (c), N.M.S.A., 1953 (Pocket Supplement). We realize that in traffic cases the State Police, as well as other law officers, are faced with a difficult problem with travelers who are going from one county to another. But there is just no authority for citing to appear in a county other than that one in which an offense is committed.

Now, in spite of our opinion on the factual situation and the statute which you have presented, and since the question is so close, it is suggested that the charges made in the Justice of the Peace Court in Sierra County be dismissed and that the charge be filed in the District Court for Sierra County and a warrant issued therefrom for this person's arrest. This would insure that no suit for false arrest would be brought against the arresting officers.

By Santiago E. Campos

Assistant Attorney General