

Opinion No. 58-43

March 3, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Hilton A. Dickson, Jr.,
Assistant Attorney General

TO: Mr. Joe Roach, Chief, New Mexico State Police, Santa Fe, New Mexico. Attention:
Officer M. L. Cordova

QUESTION

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1. May a Justice of the Peace, upon failure of a jury to return a verdict, and with consent of the parties, render a judgment in the trial of a D.W.I. charge?
2. May a Justice of the Peace find a defendant, charged with D.W.I., guilty of reckless driving?

CONCLUSIONS

1. Yes.
2. No.

OPINION

ANALYSIS

Response to the first question stated is specifically found by reference to Sec. 36-5-18:

"Whenever a justice shall be satisfied that a jury, after having been kept together a reasonable time, cannot agree on their verdict, he may discharge them and issue a new venire, unless the parties consent that the justice may render judgment."

The second inquiry involves, under the laws of this state, a determination of whether "reckless driving" is a lesser included offense in the trial of a D.W.I. charge.

In **State v. Sisneros**, 42 N.M. 500, 82 P. 2d 274, the New Mexico Supreme Court said:

"The crime of reckless driving and that of driving an automobile while under the influence of intoxicating liquor, are distinct offenses and are established by different evidence. A conviction of one would not be a bar to a prosecution for committing the other offense . . ."

And this holding was relied on in **Rea v. Motor Ins. Corp.**, 48 N.M. 9, 144 P. 2d 676.

Sec. 41-13-1, generally provides that in cases where an offense consists of different degrees a jury may find the defendant not guilty of the offense charged, but may find him guilty of any degree of such offense inferior to that charged. Since the J. P. in the instantly put situation becomes the trier of the facts, it is our opinion that he also has authority to make a finding founded on an inferior included offense. But, from the authorities cited, *supra*, it would appear that "reckless driving" is not an inferior included offense in the trial of D.W.I.

Specifically, the offenses of driving while under the influence of alcoholic beverages and reckless driving are defined, respectively, by Secs. 64-22-2 and 64-22-3. There is no suggestion that either offense is considered or subject to prosecution as a lesser or inferior included offense of the other.

Accordingly it is our opinion that a Justice of the Peace, sitting as the trier of facts, may not render a "guilty of reckless driving" judgment on the trial of a **charge** of D.W.I.