

Opinion No. 59-155

September 30, 1959

BY: HILTON A. DICKSON, JR., Attorney General

TO: Mr. George T. Reynolds District Attorney Eighth Judicial District Taos, New Mexico

{*242} This is in response to your recent request for our opinion on the following question:

Does a Justice of the Peace, pursuant to § 36-2-5, N.M.S.A., 1953 Compilation, have jurisdiction to hear a first offense for family abandonment or non-support under Chapter 108, §§ 1-3, Laws of 1959, (§§ 40-2-4 and 5, N.M.S.A., 1953 Compilation (P.S.), § 40-2-5 providing that such first offense is a misdemeanor punishable by imprisonment for a period not exceeding one year?

Our answer to your question is that a Justice of the Peace does not have jurisdiction to hear a first offense under §§ 40-2-4 and 5, supra.

Section 36-2-5, supra, gives Justices of the Peace jurisdiction in all cases of misdemeanors where the punishment may be a fine of \$ 100 or less, or imprisonment for six months or less, or both such fine and imprisonment. In our opinion, this section limits the jurisdiction of Justices of the Peace to cases wherein the maximum allowable punishment is either a fine of \$ 100 or less or six months imprisonment, or both at his discretion. Clearly, § 40-2-5, supra, provides for a punishment which may be greater than six months imprisonment. Further, there is no provision providing for a fine at the Justices' discretion. Therefore, a Justice of the Peace may not hear a family abandonment or non-support case punishable pursuant to this section.

Our position is supported by the great weight of authority. See 22 C.J.S., Criminal Law, § 125 (c), at page 208, which states that the rule is well recognized in most jurisdictions that a justice of the peace or other inferior magistrate has no jurisdiction to try one accused of a crime, the **maximum penalty or punishment** for which exceeds the power of his court to impose. To the same effect see our Opinions Nos. 5594 and 6034, copies of which are enclosed. However, this opinion should not be extended to cases where the Justice of the Peace has discretion to impose punishment in the alternative (fine or imprisonment or both) and where the misdemeanor in question allows a maximum of one of the alternatives less than or up to the limits of his jurisdiction. For our views on this situation see our opinion No. 2497.

Philip R. Ashby

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