

Opinion No. 60-95

May 18, 1960

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

TO: Mr. D. K. Kelly Traffic Safety Administrator P. O. Box 1686 Santa Fe, New Mexico

QUESTION

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Is the jail sentence provided under Sec. 64-13-68, Subsec. (a), N.M.S.A., 1953 Comp. (PS), mandatory or may such sentence be deferred or suspended by a justice of the peace?

CONCLUSION

The imprisonment is mandatory by the justice of the peace with one exception.

OPINION

{*461} ANALYSIS

The statute provides:

"Any person who drives a motor vehicle on any public highway of this state at a time when privilege so to do is suspended or revoked **shall** be guilty of a misdemeanor and upon conviction **shall be punished by imprisonment** for not less than two (2) days nor more than six (6) months and there may be imposed in addition thereto a fine of not more than \$ 500.00."

The word "shall" has been construed by the Supreme Court of this State on many occasions as mandatory and not as permissive. Such a proposition needs no citation of authority in this State. Consequently, from a reading of the statute, it is clear that a person who is convicted of a violation under this section must be given at least two days' imprisonment and may be given up to six months. The discretionary portion of the punishment prescribed is that part which provides that an additional fine up to \$ 500.00 may be levied. The justice of the peace may therefore, in his discretion, refrain from imposing a fine but he has not authority to refrain from imposing at least the minimum imprisonment prescribed thereunder.

In connection with this duty imposed on the justice of the peace court, I refer you to Sec. 5-6-16, N.M.S.A., 1953 Comp., which reads as follows:

"When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every wilful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, shall be deemed a misdemeanor, punishable by imprisonment in the county jail for not less than ten (10) nor more than sixty (60) days or by a fine of not less than \$ 100.00 nor more than \$ 500.00."

An exception to the mandatory language of Sec. 64-13-68 will be found in Sec. 36-12-4, N.M.S.A., 1953 Comp., wherein the justice of the peace may suspend sentence during good behavior of a minor violator. We recognize the fact that the justice of the peace under our Juvenile Code, has no jurisdiction over minors under the age of 18 years since these persons are classed as juveniles. He does, however, have jurisdiction over minors between the ages of 18 and 21 years of age and, in this instance, the justice of the peace is authorized to suspend sentence.

The duty of the justice of the peace to commit to jail any person violating Sec. 64-13-68, supra, is clearly imposed upon him by that statute, with the one exception set out above, he has no discretion except discretion as to the period of imprisonment which shall be not less than two (2) days nor more than six months. Failure to exercise this legally imposed duty would subject a justice of the peace to a charge of wilful neglect of duty as outlined above under Sec. 5-6-16, supra.

It should be pointed out that the conclusion of this opinion will apply to a person operating a motor vehicle on the highways of this State in violation of an order of the division suspending his privilege to operate a private vehicle even though the suspension order may permit said person to operate business vehicles for the purpose of earning his livelihood. In other words, the statute contemplates providing punishment for the violation of any suspension order whether it is a complete suspension or revocation of all driving privileges or whether the suspension or revocation is only of certain specified driving privileges.

By: B. J. Baggett

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