

Opinion No. 61-91

September 25, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E. Payne, Assistant Attorney General

TO: Mr. James W. Musgrove, Assistant District Attorney, 112 N. Behrend, Farmington, New Mexico

QUESTION

QUESTION

Is a sentence of imprisonment mandatory upon a second conviction of driving while under the influence of intoxicating liquor?

CONCLUSION

Yes.

OPINION

ANALYSIS

Section 64-22-2(a), N.M.S.A., 1953 Comp., makes it unlawful for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of any vehicle within this State.

The punishment provisions for violation of the above-quoted statute are contained in Section 64-22-2(c), N.M.S.A., 1953 Comp. For a first offense, the required punishment is "imprisonment in the county jail for not less than 30 days nor more than 90 days, **or** by a fine of not less than \$ 100 nor more than \$ 200, **or** by both such fine and imprisonment." (Emphasis added).

In the case of a second or subsequent conviction, the statute provides that the offender "**shall** be punished by imprisonment for not less than 90 days nor more than one year, and, in the discretion of the court, a fine of not more than \$ 1,000." (Emphasis added).

The use of the disjunctive "or" in the case of a first conviction makes it clear that within the limits prescribed the offender may be imprisoned or he may be fined, or both.

The provision in regard to second and subsequent convictions does not vest a discretion in the court to impose either a sentence of imprisonment or a fine as in the case of a first conviction. It makes the imposition of a jail term mandatory and gives the court discretion as to whether a fine is to be imposed in addition thereto.

Before concluding, we would point out that under Section 40-1-11, N.M.S.A., 1953 Comp. (PS), the court may, upon a second conviction for violating Section 64-22-2(a), supra, suspend the sentence in whole or in part and place the defendant on probation.