Opinion No. 64-147

December 15, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General James V. Noble, Assistant Attorney General

TO: K. K. Miller, Chief, New Mexico State Police Dept. 1220 Cerrillos Road, Santa Fe, New Mexico

QUESTION

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1. Does Section 64-18-1.1, N.M.S.A., 1953 Compilation, (P.S.) cover the offense of failure to use due care?

2. May a person be cited for both failure to use due care under Section 64-18-1.1, N.M.S.A., 1953 Compilation (P.S.), and also be cited for reckless driving under Section 64-22-3, N.M.S.A., 1953 Compilation for the same action?

CONCLUSIONS

1. Yes, but see analysis.

2. See analysis.

OPINION

ANALYSIS

Section 64-18-1.1, N.M.S.A., 1953 Compilation (P.S.) is Section 1, Chapter 145, New Mexico Session Laws 1963 and pertains to the establishment of speed regulations on New Mexico Highways. After setting forth maximum speed limits in terms of miles per hour under varying conditions or for various types of motor vehicles, the section reads in part as follows:

"C. In every event, speed shall be so controlled as may be necessary:

(1) To avoid colliding with any person, vehicle or other conveyance **on,** or **entering the highway;** and

(2) To comply with legal requirements **and the duty of all persons to use due care."** (Emphasis added.)

The 1963 Act, supra, amended a 1957 Act. The language of the 1957 Act, insofar as the questions here are concerned, was substantially the same as the present language. This language was construed by this office in Opinion No. 59-148. That opinion discussed the authorities and concluded that a person could validly be cited, under the section, for failure to use due care, **provided that the act, or acts constituting the offense were set out in the complaint.** Although, that opinion did not say so in so many words, the necessary inference is that such a charge could be made even though the driver was not exceeding a posted speed limit and even though no accident resulted from such overt actions. Examples might be where **other** vehicles had, by their acts, avoided the collision with offending vehicle; where the driver of the offending vehicle was stopped by officers before such accident could occur; or where one was driving in such manner as to cause an accident if some other vehicle or person had happened to be on, or entering the highway and the offending driver could not reasonably know that no such vehicle or person was in fact on or entering the highway.

However, under Opinion No. 59-148, supra, sufficient details of the act or acts alleged to constitute careless driving must be set forth to apprise the defendant of the same and to enable him to defend himself.

In **Honocks v. Rounds,** 70 N.M. 73, 370 P. 2d 799 the court cited the above section as standing for the proposition that a motorist must exercise such caution as is commensurate with the situation confronting him and without regard to posted speed limits. The case involved a collision at the scene of an accident where warning signals were placed, where visibility was apparently not seriously obstructed, and where the wet pavement was extremely slippery. Although, this was a civil case of negligence it helps establish the standard required by Section 64-18-1.1, supra.

Your next question asks whether a person may be charged or tried, under the same facts, for failure to use due care and also for reckless driving. An answer to your question depends in part on whether the offense of failure to use due care is a "lesser included offense" in the offense of reckless driving. It is generally held that if the facts present in order to convict of the lesser offense would also be sufficient to sustain a conviction of the greater offense, that the lesser offense is included in the greater. **Wharton's Criminal Law and Procedure,** Vol. I, Sec. 135, **State v. Goodson,** 54 N.M. 184, 217 P. 2d 262; **State v. Sandoval,** 59 N.M. 85, 279 P. 2d 850. It is noted that, for the purpose of this opinion, the offense of failure to use due care is considered a lesser offense and that of reckless driving is considered a greater offense.

If therefore, there is concurrent jurisdiction over either offense, prosecution for one would be a bar to prosecution for the other, assuming that both are misdemeanors, with either a justice court or a district court able to exercise jurisdiction. The "lesser included offense" rule would prevail and be a bar to prosecution for both offenses under the same state of facts.

If however, a conviction of one such offense is a conviction of a misdemeanor, and a conviction of the other offense is a conviction of a felony, there is no bar to a

prosecution for both offenses, even though based on the same facts, under the rule set forth in **State v. Goodson,** supra, and **State v. Sandoval,** supra, since there would not be concurrent jurisdiction.

If the driver charged has previously been convicted of reckless driving, the statutory penalty for a second conviction exceeds the jurisdiction of the justice court and is triable only in the district court. There is no longer concurrent jurisdiction. Under the rule above cited, there would be no legal bar to a prosecution, under the same facts, of both offenses. There is no concurrent jurisdiction of both offenses in the justice and district courts of this State. Necessarily, therefore, an answer to your second question must depend upon the particular facts of each case.

In summary there is authority under Section 64-18-1.1, supra, for filing a charge of failure to use due care.

Secondly, it is possible that the same facts would justify filing charges of either failure to use due care or reckless driving. If the facts of a particular case could justify filing of a charge of reckless driving, the facts necessary to sustain a charge of failure to use due care would also be present so that either charge would be justified.

Thirdly, under the same facts, the offense of failure to use due care would be a lesser offense included within the greater offense of reckless driving. So long as there is concurrent jurisdiction in both the justice and district courts over both offenses, a prosecution for one would be a bar to a prosecution for the other if it has proceeded to the point where jeopardy has attached. If, however, there is not such concurrent jurisdiction, there is no bar to a prosecution for both such offenses.