

Opinion No. 64-62

May 8, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Jay F Rosenthal, Assistant Attorney General

TO: Mr. E. E. Chavez, Assistant District Attorney, First Judicial District, P. O. Box 2041, Santa Fe, New Mexico

QUESTION

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Does Section 40A-29-15, N.M.S.A., 1953 Compilation, (known as the Criminal Code) which provides for deferment or suspension of sentence for a crime not constituting a capital or first degree felony, supersede or repeal by implication 54-7-15 (D), N.M.S.A., 1953 Compilation, (Narcotic Drug Act) shall not have their sentence suspended or probation or parole granted until the minimum imprisonment provided for the offense has been served?

CONCLUSION

No.

OPINION

ANALYSIS

Section 54-7-15 (D) N.M.S.A., 1953 Compilation provides in part:

"Upon conviction of any offense by an adult under the Uniform Narcotic Drug Act, the imposition or execution of a sentence shall not be suspended or probation or parole granted until the minimum imprisonment provided for the offense shall have been served."

This language was added to the statute in 1955 (Laws 1955, Ch. 41, Sec. 1) and slightly changed by amendment in 1961. (Laws 1961, Ch. 146, § 1) This article deals with narcotic drugs, providing for regulation and penalties for violations of the Act.

Section 41-17-1, N.M.S.A., 1953 Compilation (P.S.) which was specifically repealed by the Criminal Code provided:

". . . the court may, in its discretion, suspend any sentence imposed upon any person convicted of a felony involving a specific criminal intent . . ."

The new section of the Criminal Code, 40A-29-15 provides:

"Upon entry of a judgment of conviction of any crime not constituting a capital or first degree felony, any court having jurisdiction when it is satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may either:

A. enter an order deferring the imposition of sentence; or

B. sentence the defendant and enter an order suspending in whole or in part the execution of the sentence."

The question you pose is basically whether the later general statute (Criminal Code) repeals by implication the previously enacted specific statute (Narcotic Drug Act). It is well settled general law in New Mexico that repeals by implication are not favored, and such method of repeal will be used only when absolutely necessary to give a subsequent statute effect. **State v. Moore**, 40 N.M. 344, **Rader v. Rhodes**, 48 N.M. 511, **Levers v. Houston**, 49 N.M. 169.

In the **Levers** case, supra, the court citing **State v. Romero**, 19 N.M. 1 (which also is the rule stated in Am. Jur., Statutes, Sections 561 and 562) said: "A subsequent statute treating a subject in general terms, will not be held to repeal by implication an earlier statute treating the same subject specifically, unless such construction is absolutely necessary in order to give the subsequent statute effect." There is no question that the Narcotic Drug Act is a specific statute dealing with a limited area and the Criminal Code is a general statute dealing with the overall enforcement and direction of New Mexico's criminal law.

In Sutherland, **Statutory Construction**, (1943) Repeals and Repealing Acts, § 2021 it is stated:

"The enactment of a general law broad enough in its scope and application to cover the field of operation of a special statute will generally not repeal a statute which limits its operation to a particular phase of the subject covered by the general law . . ."

Without an irreconcilable conflict between the prior special statute and the later general law, the special statute continues in effect as a qualification or exception to the general law. It is basic that the Legislature is presumed to have known of the existence of the special statute and, therefore, intended only a general consideration of the area by the later statute. **Armijo v. Romero**, 32 N.M. 178, **Atchison, T & S. F. Ry. Co. v. Town of Silver City**, 40 N.M. 305.

Statutes are not presumed repealed by implication when not expressly revoked by subsequent legislation. "The bent of the rules of interpretation and construction is to give harmonious operation and effect to all of the acts upon a subject, where such a construction is reasonably possible, even to the extent of superimposing a construction

of consistency upon the apparent legislative intent to repeal, where two acts can, in fact stand together and be given a coterminous operation. Where the repealing effect of a statute is doubtful, the statute is to be strictly construed to effectuate its consistent operation with the previous legislation." Sutherland **Statutory Construction**, supra § 2014.

Considering the general law opposing repeal by implication and repeal of specific statutes by general legislation, as well as the New Mexico decisions, notably **Mallory v. Pioneer Southwestern Stages**, 54 F.2d 559, there is no doubt that Section 40A-29-15 does not repeal or supersede Section 54-7-15 (D).

Section 40A-29-11, N.M.S.A., 1953 Compilation provides:

"Sentencing authority for crimes not contained in criminal code.

A. Whenever a defendant is convicted of a crime under the Constitution, or a statute not contained in the Criminal Code, which specifies the penalty to be imposed on conviction, the court shall have the power to pronounce sentence and imposition of fine in accordance with the provisions prescribed by such statute or constitutional provision for the particular crime of which such person was convicted."

In light of this statute, the Criminal Code provides punishment for only those crimes which are expressly set forth within the code, and those which do not otherwise specify any precise penalty. The Narcotic Drug Act was not included in the Criminal Code, and it is apparent that the legislature intended its penalty and sentencing provisions to remain separate from those of the criminal code. It should be noted that under the Narcotic Drug Act the Legislature intends that one convicted be incarcerated for a certain period of time, notwithstanding any extenuating factors. The idea of suspension or defriment of sentence is to see if the intervening factors such as good behavior indicate that justice would be best served by not requiring the individual to go to jail. Since under Section 40A-29-22, N.M.S.A., 1953 Compilation as individual ends his criminal liability after period of deferment expires, and the court must thereafter enter a dismissal of the criminal charges, there is a further objection to the suspension and deferment of sentence under a narcotic conviction. The plain intent of the Legislature was to have the convicted of a narcotic offense serve at least the minimum time in jail, and in light of the above cited statutes, if sentence was allowed to be deferred, it is possible that no time at all would be served.

The sentence of one convicted under the Narcotic Drug Act may not be suspended or deferred, nor parole granted until the minimum imprisonment provided is served.