

## **Opinion No. 65-202**

October 18, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General James V. Noble, Assistant Attorney General

**TO:** Mr. Juan B. Sanchez, Assistant District Attorney, County Court House, Taos, New Mexico

### **QUESTION**

#### **QUESTIONS**

1. Is a person charged in a Justice of the Peace court with driving a motor vehicle while under the influence of intoxicating liquor (first offense) entitled to demand a jury trial?
2. Is a person charged in a Justice of the Peace Court with reckless driving (first offense) entitled to demand a jury trial?
3. If such defendant is entitled to demand a jury trial, may the Justice of the Peace demand jury fees?

#### **CONCLUSIONS**

1. Yes.
2. Yes.
3. No.

### **OPINION**

#### **{\*330} ANALYSIS**

Questions one and two involve essentially the same propositions and will be treated together. As limited by the questions presented for answer both involve intoxicating liquor. (First offenses). Section 64-22-2, N.M.S.A., 1953 Compilation (P.S.) relating to driving while under the influence of intoxicating liquor provides in pertinent part as follows:

"C. Every person who is convicted of a violation of this section shall be punished by imprisonment in the county jail for not less than thirty (30) days nor more than ninety (90) days or in the discretion of the court, by a fine of not less than one hundred dollars (\$ 100) nor more than two hundred dollars (\$ 200); or by both such fine and imprisonment; Provided, that on a first offense any time spent by such person in jail for

such offense prior to his conviction for that offense shall be credited to the term of imprisonment fixed by the court. . . . Provided, however, that in the case of a first offense under this section, justices of the peace shall have **concurrent jurisdiction** with district courts to try such offender . . ." (Emphasis added).

Section 64-22-3, N.M.S.A., 1953 Compilation relative to reckless driving, provides in pertinent part as follows:

"(b) Every person convicted of reckless driving shall be punished upon a first conviction by imprisonment for a period of not less than 5 days nor more than 90 days, or by fine of not less than \$ 25 nor more than \$ 100, or by both such fine and imprisonment. . . ."

It is apparent that the penalties prescribed are not beyond the jurisdiction of the justice of peace court and section 64-22-2, supra specifically grants concurrent jurisdiction to justices of the peace.

Section 64-10-7, N.M.S.A., 1953 Compilation (P.S.) provides that it is a **misdemeanor** for any person to violate any provision of the motor vehicle code unless the violation is declared to be a felony. The violations set forth under the questions asked are not declared to be felonies. The penalty provisions being within the range of misdemeanors the violations are misdemeanors under the provisions of § 64-10-7, supra. Unless there is language in the sections above cited (§ 64-22-2, supra and § 64-22-3, supra) or in some other provision of the motor vehicle code, and none has been found, which would require different procedures than govern other misdemeanor violations.

Section 36-5-16, N.M.S.A., 1953 Compilation, reads as follows:

"In all cases before justices of the peace, wherein the justice has original jurisdiction, the defendant shall not be deprived of the right of a trial by jury."

This section grants a defendant in justice of the peace courts the right to demand a trial by jury if the justice of the peace court has original jurisdiction. It does have such original jurisdiction under *{\*331}* the question presented. The use of the word "concurrent" in Section 64-22-2, supra, means that the justice of the peace court and the district court **each have** original jurisdiction to hear the offense. Concurrent is defined in **Words and Phrases**, Vol. 8 p. 599 as follows:

"'Concurrent jurisdiction' is that jurisdiction exercised by different courts, at the same time, over the same subject matter and within the same territory, and wherein litigants may, **in the first instance, report to either court indifferently.** Murray v. City of Roanoke, 64 S.E. 2d 804, 808, 192 Va. 321." (Emphasis added).

Since neither the justice of the peace court nor the district court has exclusive original jurisdiction and either has concurrent original jurisdiction, Section 36-5-16, supra, applies, and a defendant charged with driving under the influence of intoxicating liquor (first offense) or with reckless driving (first offense) in the justice of the peace court has

a right to demand a trial by jury in such court. See also Section 36-12-3 N.M.S.A., 1953 Compilation, which grants a jury trial under these circumstances to a defendant.

Your third question concerning deposit of jury fees has been considered and answered in Opinion No. 65-36 dated February 25, 1965 and as yet unpublished. This opinion held that no deposit of jury fees could be required of a defendant in a justice of the peace court who is entitled to and does demand a jury trial. It further held that if a willing defendant did pay a jury deposit and was subsequently determined to be not guilty, the deposit should be returned. This opinion is affirmed.