Opinion No. 73-67

September 24, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Larry D. Coughenour, Director Administrative Office of the Courts Supreme Court Building Santa Fe, New Mexico 87501

QUESTIONS

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1. Under § 36-3-4, N.M.S.A., 1953 Comp., as amended by Laws of 1973, Ch. 206, § 2 do magistrates have jurisdiction to try criminal offenses, defined by statute as misdemeanors, for which the maximum penalties exceed those provided by § 40A-29-4, N.M.S.A., 1953 Comp., in particular the offense of leaving the scene of an accident causing injury or death under § 64-17-1(B), N.M.S.A., 1953 Comp.?

2. Where would the place of imprisonment be, the county jail or the state penitentiary, under sentences imposed by magistrates, in the following situations:

(a) If the answer to Question No. 1 is affirmative, and a maximum sentence of imprisonment for one year is imposed under § 64-17-1(B), **supra** ?

(b) If a defendant is convicted of more than one offense and the court imposes consecutive sentences of six months or more but less than one year for each offense but more than one year in the aggregate?

(c) If a defendant is convicted of more than one offense and the court imposes consecutive sentences of less than six months for each offense but more than one year in the aggregate?

ANSWERS

1. Yes.

2. (a) The state penitentiary.

(b) The county jail.

(c) The county jail.

OPINION

*{*131}* **ANALYSIS**

1. The criminal jurisdiction of magistrates, formerly limited to petty misdemeanors and certain other specific offenses, was enlarged to include the classification of offenses commonly called "high" misdemeanors by Laws of 1973, Ch. 206, § 2, which amended § 36-3-4, N.M.S.A., 1953 Comp. (2d Repl. Vol. 6), to read in part:

"A. Magistrates have jurisdiction in **all cases of misdemeanors.** Magistrates also have jurisdiction in any other criminal action where jurisdiction is specifically granted by law . . ." (Emphasis supplied)

Prior to amendment, the same portion of § 36-3-4 read as follows:

"A. Magistrates have jurisdiction in all cases of misdemeanors where the punishment prescribed by law is a fine of one hundred ($ 100) or less, or imprisonment for six [6] months or less, or where fine or imprisonment or both are prescribed but neither exceeds these maximums. Magistrates also have jurisdiction in any other criminal action where jurisdiction is specifically granted by law . . ."

By eliminating the provisions of § 36-3-4 regarding the maximum fine and imprisonment, the Legislature conferred jurisdiction of **all** misdemeanors on the magistrates. There are two classifications of "high" misdemeanors, those which come under the Criminal Code and those created by statutes which are not part of the Criminal Code. **State v. Sawyers,** 79 N.M. 557, 445 P.2d 978 (Ct.App. 1968). Criminal Code misdemeanors are defined by § 40A-1-6, N.M.S.A., 1953 Comp. (2d Repl. Vol. 6), which reads in part:

"Classified crimes defined. -- . . . A crime is a misdemeanor if it is so designated by law or if upon conviction thereof a sentence of imprisonment in excess of six [6] months but less than one [1] year is authorized."

Penalties for Criminal Code misdemeanors are specified by § 40A-29-4, N.M.S.A., 1953 Comp. (2d Repl. Vol. 6), which provides in part:

"A. Where the defendant has been convicted of a crime constituting a misdemeanor, the judge shall sentence such person to be imprisoned in the county jail for a definite term less than one [1] year, or to the payment of a fine of not more than one thousand dollars ($ 1,000), or to both such imprisonment and fine in the discretion of the judge."

However, the non-Criminal Code misdemeanors of which § 64-17-1 is an example, frequently provide their own penalties, which may be more or less than those of § 40A-29-4. Thus § 64-17-1 provides in part:

"Accidents involving death or personal injuries. --

(a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at

the scene of the accident until he has fulfilled the requirements of section 41[64-17-3]. Every such stop shall be made without obstructing traffic more than is necessary.

(b) Any persons failing to stop or to comply with said requirements under such circumstances shall upon conviction be punished by imprisonment for not less than 30 days nor more than 1 year or by fine of not less than $ 100 nor more than $ 5,000, or by both such fine and imprisonment."

Even though the maximum penalties of § 64-17-1 exceed those of § 40A-29-4 by one day as to imprisonment and by $ 4,000 as to fine, leaving the scene of an accident causing injury or death is still a misdemeanor under § 64-10-7, N.M.S.A., 1953 Comp., the pertinent portion of which follows:

"A. It is a misdemeanor for any person to violate any provision of the Motor Vehicle Code unless the violation is declared a felony."

*{*132}* Since § 64-17-1 is part of the Motor Vehicle Code and not declared a felony, it is our considered opinion that magistrates have jurisdiction of this misdemeanor offense and can impose the maximum penalty of imprisonment for one year and/or a fine of $ 5,000. The same is true of any other statutory misdemeanors the penalties for which exceed those of § 40A-29-4, **supra.**

Incidentally, there is another statutory definition of "misdemeanor" found in § 41-1-2, N.M.S.A., 1953 Comp. (2d Repl. Vol. 6), as amended by Laws of 1973, Ch. 73, § 2, which reads in part:

"DEFINITIONS. -- Unless a specific meaning is given, as used in the Criminal Procedure Act:

* * * *

K. 'misdemeanor' means any offense for which the authorized penalty upon conviction is imprisonment in excess of six months but less than one year; * * *"

As may be seen, this definition is substantially the same as that in § 40A-1-6, **supra,** and in any event it applies only to the Criminal Procedure Act, which does not include the jurisdiction of magistrate courts. Therefore, it does not affect our opinion.

2. The question of where a one-year sentence for a violation of § 64-17-1(B) would be served is answered directly by **State v. Sawyers, supra,** which also involved a Motor Vehicle Code violation under § 64-10-1, N.M.S.A., 1953 Comp. (2d Repl. Vol. 9, Pt. 2), for fraudulent application to register a motor vehicle, the maximum imprisonment for which is one year, together with a maximum fine of $ 1,000. The district court sentenced the defendant to a year in the county jail, but the Court of Appeals held that he must serve the sentence in the state penitentiary. We see no reason for a different result for a magistrate court sentence for the same offense. While the Legislature may not have

realized that it was giving magistrates the power in this restricted class of cases to send offenders to the penitentiary and levy fines up to $ 5,000, the language used in amended § 36-3-4, "Magistrates have jurisdiction in all cases of misdemeanors," is perfectly clear and leaves no room for construction. In misdemeanor cases magistrates have concurrent jurisdiction with the district courts, and this jurisdiction by nature includes sentencing power.

Another example of a misdemeanor for which a magistrate might send an offender to the penitentiary for one year is a second (or subsequent) offense of operating a motor vehicle while under the influence of intoxicating liquor or drugs, under § 64-22-2(C), N.M.S.A., 1953 Comp. (2d Repl. Vol. 9, Pt. 2). In this instance, however, the magistrate courts are specifically granted concurrent jurisdiction with the district courts.

A different problem is posed if a magistrate, in a non-Criminal Code misdemeanor case in which he might send the offender to the penitentiary for one year, imposes a lesser sentence. Suppose, for instance, the magistrate imposed nine months' imprisonment. Would this sentence be served in the county jail or in the penitentiary? Two statutes are involved, § 40A-29-13 and 42-1-37, N.M.S.A., 1953 Comp. (2d Repl. Vol. 6), which are set forth in pertinent part:

"Place of imprisonment -- Commitments. -- A. Persons sentenced to imprisonment for a term of one [1] year or more shall be imprisoned in the state penitentiary, unless a new trial is granted or a portion of such sentence is suspended so as to provide for imprisonment for less than one [1] year, then such imprisonment may be in such place of incarceration as the sentencing judge, in his discretion, may prescribe."

"Prisoners -- Who to be received and confined -- Subject to rules. -- * * * persons convicted of any crime, where the punishment is imprisonment for a term or time exceeding six [6] months, shall be imprisoned in the penitentiary, and all courts in which such convictions shall be had, shall give judgment accordingly . . ."

There is a possibility, noted by the compiler, that § 40A-29-13, enacted by Laws of 1963, Ch. 303, § 29-12, superseded § 42-1-37, enacted by Laws of 1889, Ch. 76, § 11. The Court of Appeals recognized this problem in **State v. Sawyers, supra,** but found it unnecessary to "consider the relationship" of the two sections since in that case the defendant had been sentenced to the full year. It should be noted that under § 40A-29-13 the sentencing magistrate would have the option of sending *{*133}* the offender to the penitentiary or to the county jail for nine months in the example given, and the same would be true of any sentence of less than the one-year maximum. But § 42-1-37 says sentences exceeding six months **shall** be served in the penitentiary. This would apply to Criminal Code as well as non-Criminal Code misdemeanors where the sentence imposed exceeds six months, were it not for the provision in § 40A-29-4, **supra,** that persons convicted of Criminal Code misdemeanors be "imprisoned in the county jail." Since § 40A-29-4 was likewise enacted by Laws of 1963, Ch. 303 (§ 29-4), it may have superseded § 42-1-37.

Repeal by implication is not favored. As said in **Sawyers,** at p. 559 of 79 N.M.,

"State v. Valdez, 59 N.M. 112, 279 P.2d P.2d 868 (1955) states the doctrine of repeal by implication as follows:

* * * where two statutes have the same object and relate to the same subject, if the later act is repugnant to the former, the former is repealed by implication to the extent of the repugnancy, * * *.

See State v. Lujan, 76 N.M. Ill, 412 P.2d 405 (1966); In re Sosa's Petition, 74 N.M. 182, 392 P.2d 14 (1964)."

It is our opinion that there is such a repugnancy between § 40A-29-13 and § 42-1-37, and between § 40A-29-4 and § 42-1-37, and that § 42-1-37 has been repealed insofar as it provides that sentences exceeding six months (but less than one year) must be served in the state penitentiary.

Questions 2(b) and (c) both involve the "tacking" of sentences of less than a year to reach a total of more than one year and inquire whether such a combined sentence would then be served in the penitentiary in view of § 42-1-59, N.M.S.A., 1953 Comp. (2d Repl. Vol. 6), which provides:

"Separate sentences construed as cumulative. -- Whenever any convict shall have been committed under several convictions with separate sentences, they shall be construed as one continuous sentence for the full length of all the sentences combined."

This statute is also a part of Laws of 1889, Ch. 76 (§ 49), which provided in considerable detail for the administration of the territorial prison. It should be read together with § 42-1-37, part of the same act. It applied when enacted to convicted persons who arrived at the penitentiary with more than one sentence exceeding six months each, for different offenses. In 1889 there was no indeterminate sentence law in New Mexico, nor parole or suspended sentence laws, for that matter, so the calculation of time off for good behavior no doubt was simplified by combining multiple sentences into one. Section 42-1-37 apparently has never been used to combine short jail sentences to make the convicted person eligible to serve his time in the penitentiary, desirable as that might be from the standpoint of eligibility for parole, work release, education and rehabilitation. We cannot justify the utilization of this section for such a purpose now. Also, if any of the sentences were for Criminal Code misdemeanors there would be the added impediment of § 40A-29-4's requirement that such sentences be served in the county jail. For all these reasons, it is our opinion that jail sentences cannot be combined so that the recipient can be sent to the penitentiary.

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