

**Opinion 08-06**

**OPINION OF: GARY K. KING** Attorney General

November 6, 2008

**BY:** Steven Suttle, Special Counsel to the Attorney General

**TO:** The Honorable Leonard Lee Rawson, New Mexico State Senator, P.O. Box 996, Las Cruces, NM 88004

**QUESTIONS:**

1. May a municipal peace officer refer criminal charges to a magistrate or district court or is the officer required to enforce concurrent violations of state law and municipal ordinances in municipal courts?
2. Does a state “comprehensive legislative scheme” encouraging the use of local courts preempt a municipal attorney from prosecuting concurrent violations of state law and municipal ordinances in magistrate courts?
3. Does a district attorney have the authority to cross-designate municipal prosecutors as special assistant district attorneys for the purposes of assisting the district attorney in prosecuting violations of state law in magistrate court?
4. Does the state statute that provides a full misdemeanor penalty for certain acts of domestic violence preempt the enforcement of a concurrent municipal ordinance that provides only a petty misdemeanor penalty?

**CONCLUSIONS:**

1. A municipal peace officer may refer criminal charges to any prosecutor at any level for evaluation and prosecution in municipal, magistrate, or district court. Nothing in the law binds an officer to file charges in municipal court where the charges stem from activities that allegedly violate a municipal ordinance and a state law or a county ordinance.
2. No. The legislature has never adopted a “comprehensive legislative scheme” that requires a municipal peace officer to file and prosecute violations of municipal ordinances only in municipal court where a concurrent state law or county ordinance also applies to the alleged offense.
3. Yes. A district attorney has the statutory authority to appoint “special assistant district attorneys” and may do so even where there is no conflict of interest or other disability that prevents him or her from prosecuting an individual case.

4. No. The state statute providing a full misdemeanor penalty for certain acts of domestic violence does not preclude prosecution of an offense under a municipal ordinance that only provides a petty misdemeanor penalty.

#### **FACTS:**

Reportedly, there may be a dispute regarding whether the Las Cruces Municipal Court has exclusive jurisdiction over misdemeanor cases where driving while intoxicated or acts of domestic violence that violate state and municipal law are alleged to have occurred within the municipal limits. The Third Judicial District Attorney has appointed various Las Cruces assistant city attorneys as special assistant district attorneys for the purpose of assisting her office in prosecuting charges of driving while intoxicated and domestic violence in magistrate and district courts. The stated goal is to provide greater uniformity in the prosecution and sentencing of these crimes. Officers of the Las Cruces Police Department are apparently choosing to refer such charges to the district attorney for prosecution under state law in magistrate or district court rather than to the city attorney's office for prosecution under a municipal ordinance in municipal court.

#### **ANALYSIS:**

The proper venue for the trial of a criminal offense is determined by the state constitution. See N.M. Const. Art. II §§ 14. Jurisdiction, that is the power to hear and act in a particular matter, is conferred by the constitution and statutes, but can be created or abrogated by a simple act of the legislature. See N.M. Const. art. VI, §§ 2, 3, 16, 23, 26, 28. "The district court shall have original jurisdiction in all matters...." N.M. Const. art. VI, § 13. "The legislature shall establish a magistrate court to exercise limited original jurisdiction as may be provided by law." N.M. Const. art. VI, § 26. NMSA 1978, Section 35-15-2(A) states: "Each municipal court has jurisdiction over all offenses and complaints under ordinances of the municipality...."

The statutes confer general jurisdiction on magistrates. The applicable provision, NMSA 1978, Section 35-3-4(A) states: "Magistrates have jurisdiction in all cases of misdemeanors and petty misdemeanors, including offenses and complaints under ordinances of a county." That the offenses are also violations of municipal ordinances and could be prosecuted in municipal court has no bearing on the magistrate's jurisdiction. See NMSA 1978, § 35-3-4(B) (granting jurisdiction to magistrates to adjudicate violations of municipal ordinances).

#### **1. Power of Municipal Police Officers to Refer Criminal Charges**

We have found nothing in our law that requires a peace officer to refer a concurrent offense for prosecution in any particular court. The statutes provide: "Whenever a peace officer makes an arrest without a warrant for a misdemeanor within magistrate trial jurisdiction, he shall take the arrested person to the nearest available magistrate court without unnecessary delay." See NMSA 1978, § 35-5-1 (1968). Additionally, in *State v. Russell*, 113 N.M. 121, 823 P.2d 921 (Ct. App. 1991), the court of appeals analyzed the

respective jurisdiction that municipal courts, magistrate courts, and district courts exercise over violations of both municipal ordinances and state statutes proscribing acts of driving while intoxicated. The court concluded, “When the legislature expanded the magistrate’s courts’ jurisdiction by amending Section 35-3-4(A) to include all misdemeanors, it must have envisioned that the magistrate courts and district courts would be called upon to exercise the new, concurrent jurisdiction in a manner that promoted judicial economy and served the ends of justice.” *Id.* at 125, 823 P.2d at 925.

## 2. Comprehensive Legislative Scheme

Nothing in the statutes establishes a “comprehensive legislative scheme” or encourages the use of municipal courts to the exclusion of other courts. In fact, the opposite would seem to be true as municipalities and counties are prohibited by statute from enacting ordinances proscribing driving while intoxicated that are in conflict with state law. See NMSA 1978, § 66-8-102.2 (1993). The legislature is, of course, free to alter the system of prosecution in New Mexico and could provide for such a “comprehensive scheme.” However, it has not yet chosen to do so.

## 3. Designation of Special Assistant District Attorneys

Nothing in NMSA 1978, Sections 35-14-1(B) or 35-15-1, prohibits the designation by the district attorney of an assistant city attorney as a special assistant district attorney. Those provisions do not speak to either the district attorney’s authority to appoint or an assistant city attorney’s authority to act under such an appointment. The district attorney is a constitutional officer elected by the people to exercise nearly unbridled discretion to decide what to prosecute and whom to prosecute. See *State v. Brule*, 1999-NMSC-026, ¶ 14, 127 N.M. 368, 981 P.2d 782. The law recognizes that a district attorney’s office may occasionally be burdened by a lack of resources or an unexpected increase in caseload and empowers him or her to appoint a practicing member of the bar to act as a special assistant district attorney when the office cannot prosecute for ethical reasons or “other good cause.” NMSA 1978, § 36-1-23.1 (1984). By supreme court rule, city attorneys have a similar power. Rule 8-111(D) NMRA.

Our court of appeals acknowledged the district attorney’s power in this regard in *State v. Hollenbeck*, 112 N.M. 275, 278, 814 P.2d 143, 146 (Ct. App. 1991), stating:

The reason that the district attorney “cannot prosecute” a case need not be a legal or ethical reason; it could be a matter of lack of resources.... We might be hard pressed to interpret the statute, as the state apparently does, so narrowly as to allow appointment of special prosecutors only where a conflict or other impediment prevents the district attorney from prosecuting.

## 4. Preemption of Municipal Domestic Violence Ordinance

We believe that state law does not preempt enforcement of municipal domestic violence ordinances. The fact that the state statute provides a full misdemeanor penalty for

certain acts of domestic violence does not preclude or preempt prosecution of an accusation under a city ordinance that carries a petty misdemeanor penalty. This, however, has no bearing on where a municipal peace officer may refer a case for prosecution. As discussed above, an officer may file the charge in either municipal or magistrate court and depending on that choice, either the city attorney or the district attorney has the authority to prosecute.

In conclusion, our review of the applicable statutes, case law, city charter, and municipal ordinances reveals nothing that grants the Las Cruces Municipal Court exclusive jurisdiction where driving while intoxicated or acts of domestic violence are alleged to have occurred within the city limits and to violate both state laws and municipal ordinances. The cast of the state's power to enforce its criminal statutes does not end at any municipal boundary.

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