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February 26, 2015

Chief Pete N. Kassetas
Deputy Secretary of Operations
New Mexico Department of Safety
P.O. Box 1628
Santa Fe, NM 875804-1628

Re: Opinion Request – Magistrate Court Venue Involving Motor Vehicle Law Violations

Dear Chief Kassetas:

You have requested our advice regarding NMSA 1978, Section 35-3-6(A) (2007). Specifically, whether the authority conferred to law enforcement to initiate a cause of action in a magistrate court that neighbors the magistrate district in which the crime is alleged to have occurred violates the Constitution of New Mexico. After reviewing the relevant law, we conclude that Section 35-3-6(A) is not in conflict with the Constitution.

In relevant part, the New Mexico Bill of Rights provides that “[i]n all criminal prosecutions, the accused shall have the right to...a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.” N.M. Const. art. II, § 14. Thus, our Constitution provides a constitutional right to venue. *See State v. Lopez*, 1973-NMSC-041, ¶ 11, 84 N.M. 805, 508 P.2d 1292.

Our statutes reiterate the above constitutional right as the general venue rule—a defendant has a right, or privilege, to venue in the locality of the alleged criminal act. *Id.*; *see also* NMSA 1978, § 30-1-14 (1963) (“All trials of crimes shall be had in the county in which they were committed.”); NMSA 1978, § 35-3-5(A)(2) (1968) (“Venue of action in the magistrate courts lies...in criminal actions, in the magistrate district where the crime is alleged to have been committed.”).

However, the constitutional right to venue does not deprive a court of jurisdiction. *See Lopez* 1973-NMSC-041, ¶ 12. “The framers of our [C]onstitution sought to guarantee the right to trial by an impartial jury, rather than an absolute right to trial by a jury in the county wherein the crime is alleged to have occurred.” *Id.*, ¶ 15 (citing *State v. Holloway*, 1914-NMSC-086, 19 N.M. 528, 146 P. 1066).

As our Court of Appeals has observed:

Although the terms ‘jurisdiction’ and ‘venue’ are often used interchangeably in criminal cases, they are distinguishable. Jurisdiction refers to the judicial power to hear and determine a criminal prosecution, whereas venue relates to and defines the particular county or territorial area within a state or district in which the prosecution is to be brought or tried.

State v. Ramirez, 1976-NMCA-101, ¶ 26, 89 N.M. 635, 556 P.2d 43. Even though our Constitution affords a defendant the right of venue such right may be waived, because there is no absolute right to venue. *See Lopez*, 1973-NMSC-041, ¶ 12-15.

The State may initiate an action in any court that has jurisdiction and proper venue. *See id.*, ¶ 14. After the action is initiated, if a defendant wishes to assert his or her constitutional right to move venue to the county or district where the crime is alleged to have been committed, that defendant must affirmatively act. *See id.*, ¶ 13. If a defendant does not affirmatively act to move for a change of venue as provided by the statutes and rules of criminal procedure, then his or her constitutional right of venue has effectively been waived. *See id.*, ¶ 15. This process has not been deemed unconstitutional by our Supreme Court.

Relevant to the question you posed, the statutes governing venue in magistrate court establish that there may be multiple magistrate courts that have jurisdiction and proper venue. Section 35-5-5, cited above, which provides the general rule for venue in magistrate courts further establishes that “[t]he provisions of Section 35-3-6 or 35-3-7 NMSA, supersede this section whenever they become applicable.” Section 35-3-5(B). Thus, Section 35-5-6 (delineating jurisdiction and territorial limits of a magistrate court), the statute to which your question was addressed, may alter the general venue rule established by Section 35-3-5(A).

Generally, “[t]he territorial jurisdiction of a magistrate is coextensive with the magistrate district in which the magistrate serves.” Section 35-3-6(A). However, this general grant of territorial jurisdiction may be modified:

A magistrate also has jurisdiction in any criminal action involving violation of a law relating to motor vehicles arising in a magistrate district adjoining at any point that in which the magistrate serves and within magistrate trial jurisdiction; provided that the defendant is entitled to a change of venue to the district where the cause of action arose if the defendant so moves at, or within fifteen days after, arraignment.

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Section 35-3-6(A). Therefore, where there is a violation of a law relating to motor vehicles, law enforcement may properly initiate a criminal action in a magistrate court when the crime that is alleged to occur arose in a neighboring magistrate district. Consistent with our Supreme Court's opinion in *Lopez*, Section 35-3-6(A) further provides that a defendant may affirmatively assert his constitutional privilege to move venue "to the district where the cause of action arose." As such, if the action is filed in any magistrate court where venue is proper, unless a defendant affirmatively asserts his or her right to change venue as provided by the statutes and procedural rules of the court that right is deemed waived.

In summary, since Article II, Section 14 of the Constitution does not provide an absolute right to venue Section 35-3-6(A) does not conflict with that constitutional article when it provides that venue is also proper in a magistrate court that adjoins the magistrate district where the crime is alleged to have occurred.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore we may provide copies of this letter to the public.

Sincerely,



BRIAN PARRISH
Assistant Attorney General