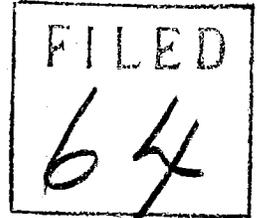


CRIMINAL LAW: Construction of Section 4854, R. S. Mo. 1939,
known as Habitual Criminal Act.

October 16, 1947



Honorable Roscoe E. Moulthrop
Prosecuting Attorney
Harrison County
Bethany, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"An official opinion is respectfully requested from your office covering the following question:

"May Section 4900 (g) of the Revised Statutes of Missouri for 1939 form the basis of a prosecution under the Section 4854 of the Revised Statutes of Missouri for 1939, commonly known as the "Habitual Criminal Act"?"

"This question has been raised by Circuit Judge V. C. Rose wherein a motion for a new trial is involved following a conviction in this Court under the sections outlined above. That portion of Section 4854, which reads as follows; 'If such subsequent offense be such that, upon a first conviction, the offender would be punished by imprisonment for a limited number of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense;' ***, is questioned in this case because Section 4900 (g) of the Revised Statutes of Missouri for 1939 provides a minimum penalty of a fine and the Circuit Judge is inclined to believe that the Habitual Criminal Statute may apply only where the crime charged comes within the meaning of a statute setting forth imprisonment in the penitentiary only as the penalty."

Originally, the second offense statute, or what has been referred to so often as the Habitual Criminal Act, will be found in the Revised Statutes of 1835, page 211, i.e. 212. Section 7 of that act reads:

"If any person convicted of any offence, punishable by imprisonment in the penitentiary, or of petit larceny, or any attempt to commit an offence, which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offence committed after such pardon or discharge, he shall be punished as follows:

"First, If such subsequent offence be such, that, upon a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which, under this act, might extend to imprisonment for life, then such person shall be imprisoned in the penitentiary during life.

"Second, If such subsequent offence be such, that, upon a first conviction, the offender would be punishable by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction of such first offence.

"Third, If such subsequent conviction be for petit larceny, or for an attempt to commit an offence, which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offence shall be punished by imprisonment in the penitentiary for a term not exceeding five years."

We shall not show every amendment to the foregoing provision since it is not necessary. However, Section 3959, R. S. Mo. 1889, reads:

"If any person convicted of any offense punishable by imprisonment in the penitentiary, or of petit larceny, or of any attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows: First, if such subsequent offense be such that, upon a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which, under the provisions of this law, might extend to imprisonment for life, then such person shall be punished by imprisonment in the penitentiary for life; second, if such subsequent offense be such that upon a first conviction the offender would be punishable by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense; third, if such subsequent conviction be for petit larceny, or for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offense shall be punished by imprisonment in the penitentiary for a term not exceeding five years."

Subsequent to the enactment of Section 3959, supra, the 38th General Assembly amended that provision and it will be found on pages 153-154, Laws of Missouri, 1895, which was approved on April 11, 1895, and reads:

"AN ACT to amend section 3959, of article 9, of the Revised Statutes of Missouri, in relation to crimes and punishments.

SECTION I. SECOND OFFENSE, HOW PUNISHED.

Be it enacted by the General Assembly of the State of Missouri, as follows:

"SECTION I. That section 3959, of article 9, of the Revised Statutes of Missouri, be amended by striking out the words commencing on second line, 'or of petit larceny,' and the words commencing on the fifteenth line, 'third, if such subsequent conviction be for petit larceny;' so that said section, when amended, shall read as follows:

"Section 3959. If any person convicted of any offense punishable by imprisonment in the penitentiary, or of any attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows: First, if such subsequent offense be such that, upon a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which under the provisions of this law might extend to imprisonment for life, then such person shall be punished by imprisonment in the penitentiary for life; second, if such subsequent offense be such that, upon a first conviction, the offender would be punished by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense; third, if such subsequent conviction be for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offense shall be punished by imprisonment in the penitentiary for a term not exceeding five years.

Approved April 11, 1895."

One of the primary rules of construction of statutes is to ascertain and give effect to lawmakers' intent and this should be done from words used, if possible, considering the

language honestly and faithfully. See *City of St. Louis vs. Senter Commission Company*, 85 S.W. (2d) 21, 377 Mo. 238.

It is somewhat easier to determine the legislative intent in amending Section 3959, R. S. Mo. 1889, by reading that section along with the title and Section 1 of the amendment to said section as passed by the 38th General Assembly. Section 1 of that amendment merely deletes in the second line the words "or petit larceny," and the words commencing on the fifteenth line, "third, if such subsequent conviction be for petit larceny;", which would designate the only amendments intended to be enacted at that time. If this be true, then Section 3959, R. S. Mo. 1889, as amended in the Laws of 1895, should read as it did prior to said amendment with the exception of the underscored hereinabove deleted therefrom. But that is not the case. Following the word "second" in the amendment of 1895, we find the word "punishable" has been changed to "punished." We are inclined to believe that such a change was never contemplated by the Legislature and that in all probability, it is a stenographic error, or to say the least, an error in printing same. For your information, we attempted to find the engrossed bill as passed by the 38th General Assembly, but same was apparently destroyed by a fire in 1912, so we have no sure way of determining if the amendment of 1895 was actually passed in its present form as Section 4854, R. S. Mo. 1939.

In *State vs. Dalton*, 23 S.W. (2d) 1, l.c. 3, the defendant was charged under the Habitual Criminal Act of a prior conviction and an alleged offense of transporting hootch, moonshine. The punishment under the law at that time for such an alleged offense was imprisonment in the penitentiary or jail or fine or both jail and fine. The jury in that case returned a verdict assessing punishment at five years in the penitentiary, and while the information was never attacked for the reason that the alleged offense merely constituted a graduated felony and the defendant might not receive a penitentiary sentence, the Supreme Court did in fact uphold said information.

However, in *State vs. Brinkley*, 189 S.W. (2d) 314, l.c. 334-335, the Supreme Court said:

"He contends first that Sec. 4854 has reference only to such prior offenses as were in contemplation when it was originally passed in substantially the present form, as R. S. 1835, Section 7, p. 212; and contends larceny from the person of less than \$30 in value was unknown in that day as an offense punishable by imprisonment in the penitentiary. This contention

is wholly without merit. The habitual criminal statute, Sec. 4854, is not limited to prior convictions punishable by imprisonment in the penitentiary in 1835, but covers offenses since created by statute for which penitentiary punishment was enforceable at the time of conviction. People ex rel. Kruger v. Snyder, 261 App. Div. 352, 25 N.Y.S. 2d 644, 645 (2).

"As we understand, appellant further contends the statute declaring the prior crime must impose penitentiary punishment absolutely, and not merely make it punishable that way. Sec. 4460, the larceny statute, supra, fixes the punishment at imprisonment in the penitentiary not exceeding 7 years, or in the county jail not exceeding one year; and defendant in this instance received a jail sentence of only five months. But the crime is covered by the habitual criminal statute because penitentiary punishment is authorized. In this connection is should be noted that the habitual criminal statute, Sec. 4854, in clause 'second' thereof does use the word 'punished' instead of the word 'punishable,' which appears everywhere else in the section. But this evidently was an inadvertence. The word 'punished' first appeared in the amendment of the statute by Laws Mo. 1895, p. 153. But Section I of that Act shows its sole purpose was to eliminate the offense of petit larceny therefrom." (Underscoring ours.)

You will note the underscoring follows our line of reasoning in the foregoing decision, that it was evidently an inadvertence in inserting the word "punished" instead of the word "punishable."

CONCLUSION

Therefore, in view of the foregoing, it is the opinion of this department that we must answer your request in the

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affirmative, that a person charged under Section 4900 (g), R. S. Mo. 1939, may be also charged under Section 4854, R. S. Mo. 1939, known as the Habitual Criminal Act.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH;VLM