

CRIMINAL LAW:
REPEAL OF RSMO 1949
CRIMINAL STATUTES:
HABITUAL CRIMINAL STATUTES:
SENATE BILL NO. 27
68th GENERAL ASSEMBLY:

Charges under subsection 3 o. tion
560.161, RSMo Supp. 1955, relating to
stealing by persons with prior convic-
tions, cannot be based upon prior con-
victions obtained under statutory
provisions which were repealed by the
bill which enacted Section 560.161.



January 28, 1957

Honorable Edward W. Garnholz
Prosecuting Attorney
St. Louis County
Clayton 5, Missouri

Dear Sir:

This department is in receipt of your request for a legal opinion, reading as follows:

"It would be greatly appreciated if you would advise this office when R.S. Mo. 560.161 Sec. 3 (fourth offense) can be applied.

"May it be used if any of the three prior convictions were under a statute enacted and repealed by the enactment of this present law, or must all of the convictions have taken place subsequent to the enactment of this new law?"

The pertinent provisions of Section 560.161, RSMo Supp., 1955, read as follows:

"1. Any person convicted of stealing as provided in subsection 2 of section 560.156 shall be punished as follows:

(1) If the value of the property stolen is less than fifty dollars, unless otherwise provided herein, by a fine of not more than one thousand dollars or by imprisonment in the county jail for not more than one year or by both such fine and imprisonment;

(2) If the value of the property stolen is at least fifty dollars, by imprisonment in the penitentiary for not

Honorable Edward W. Garnholz

more than ten years nor less than two years, or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment.

* * * * *

"3. Every person who has been previously convicted of stealing or of larceny as defined in subsection (1) of subsection 1 of this section, three times, and who shall subsequently be convicted of stealing within the meaning of said section, shall be deemed guilty of a felony regardless of the value of the stolen property, and shall be punished as provided by subdivision (2) of subsection 1 of this section."

Subsections 1 and 2 of Section 560.156, RSMo Supp., 1955, read as follows:

"1. As used in sections 560.156 and 560.161, the following words shall mean:

(1) 'Property', everything of value whether real or personal, tangible or intangible, in possession or in action, and shall include but not be limited to the evidence of a debt actually executed but not delivered or issued as a valid instrument and all things defined as property in sections 556.070, 556.080 and 556.090, RSMo 1949;

(2) 'Steal', to appropriate by exercising dominion over property in a manner inconsistent with the rights of the owner, either by taking, obtaining, using, transferring, concealing or retaining possession of his property.

"2. It shall be unlawful for any person to intentionally steal the property of another, either without his consent or by means of deceit."

Honorable Edward W. Garnholz

Sections 560.161 and 560.156 were enacted as part of Senate Bill No. 27 of the 68th General Assembly (Laws 1955, p. 508) which became effective on August 29, 1955. This bill repealed the then existing statutory provisions relating to larceny, embezzlement, and certain other offenses against property; and the new legislation, dealing generally with the same subject matter, created a new offense, "stealing," to replace the offenses defined in the repealed provisions.

Subsection 3 of Section 560.161, quoted above, replaced Section 556.285, RSMo Supp., 1951 (Laws 1951, p. 455), which read as follows:

"Every person who shall have been convicted three times of larceny in any degree and who subsequently shall steal, take and carry away any goods, wares or merchandise or other personal property, regardless of the value thereof, shall be guilty of grand larceny and, upon conviction, shall be punished by imprisonment in the penitentiary not exceeding five years or in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment."

In *State v. King*, Mo. Sup., 275 SW2d 310, the court held that a person could be convicted under Section 556.285 although the prior convictions for petit larceny alleged as a basis for applying Section 556.285 had occurred prior to the effective date of that section. The court's opinion read, in part, as follows:

"One does not violate Laws 1951, p. 455, unless he commits a larceny subsequent to its effective date. The statute applies to 'Every person who shall have been convicted three times of larceny in any degree and who subsequently' commits another larceny. It is similar in this respect to §556.280, our habitual criminal act. All are charged with knowledge of the provisions of the statute. The allegations of the prior convictions are not charges of distinct crimes but are merely to disclose facts bringing the new offense within the statute and for determining the criminality of the new offense. In ruling that prior convictions aggravating a new offense need not

Honorable Edward W. Garnholz

occur subsequent to the effective date of the statute, the cases hold that prior convictions of crime constitute a reasonable basis for the classification of offenders with respect to the severity of the punishment to be imposed.
* * *

Under the principles of this decision, if subsection 3 of Section 560.161 in fact so provided, a person might be convicted under said subsection 3 on the basis of prior convictions obtained before the enactment of said section and under statutes which have been repealed.

In subsection 3 of Section 560.161, by mentioning prior convictions of larceny, the Legislature attempted to provide expressly for the use of certain convictions prior to the enactment of said section as basis for action under said subsection. In view of the simultaneous repeal of statutes making larceny, as such, a crime, the reference to larceny in said subsection 3 could have had no other purpose. However, for the reasons set forth below, it is believed that the Legislature failed in its purpose.

Section 560.161 was Section 5 of Senate Bill No. 27. As the bill was introduced and passed by the Senate, subsection 3 of Section 5 provided that prior convictions "of stealing or of larceny in any degree" should be a basis for convictions thereunder. By a House amendment, the quoted words were amended to read, "of stealing or of larceny as defined in Section 5, (1)," and the bill was enacted in this form (Laws, 1955, page 509). The Reviser of Statutes construed "Section 5, (1)," to mean subdivision (1) of subsection 1 of Section 5 (Section 560.161, RSMo Supp. 1955). This was not the only possible construction, but it was the most logical one and it will be accepted for the purposes of this opinion.

Subdivision (1) of subsection 1 of Section 560.161 does not define larceny or any other term. Instead, it states the penalty for stealing where the value of the property stolen is less than \$50.00. It might be argued that the language "larceny as defined in subdivision (1) of subsection 1 of this section," appearing in subsection 3 of Section 560.161, is intended to mean larceny as defined by prior statutes and involving property having a value of less than \$50.00. However, the fact remains that that larceny is not defined in said subdivision (1) and, following the rule of strict construction of criminal statutes (which is particularly applicable to highly penal habitual

Honorable Edward W. Garnholz

criminal statutes), it is believed that one cannot properly indulge in speculation concerning the intent of this ambiguous language and give effect thereto.

It should also be noted that, if the language in question should be given the meaning suggested in the third sentence of the preceding paragraph, the statute would produce an absurd result, which would be a basis for holding that there was unwarranted discrimination which would invalidate the statute as a denial of equal protection of the laws. Under such interpretation, a person who was convicted of stealing property having a value of less than \$50.00 and who had three prior convictions of larceny involving amounts less than \$50.00 would be subject to greater punishment than one who was convicted of a like offense and who had three prior convictions of larceny involving amounts of \$50.00 or more. There is no imaginable basis for such differentiation; and while legislatures have broad discretion in the matter of penalties for crimes and the courts seldom interfere and will not do so except in extreme cases, it is difficult to think of a more extreme case than this would be if the statute were so construed. See 83 A.L.R. 1362; 15 Am. Jur., Criminal Law, Sec. 507.

If subsection 3 of Section 560.161 mentioned only prior convictions of "stealing" it might be contended that convictions prior to the enactment thereof of offenses which would constitute "stealing" under the new statute could be used as a basis for convictions under said subsection. However, it is believed that the fact that the Legislature attempted to deal expressly with certain convictions under the old law (i.e., certain convictions of larceny) makes it clear that it was not the intent that convictions under the old law should be regarded as convictions of "stealing."

CONCLUSION

Upon the basis of the foregoing, it is the opinion of this office that charges under subsection 3 of Section 560.161, RSMo Supp., 1955, cannot be based upon prior convictions obtained under statutory provisions which were repealed by the bill which enacted Section 560.161.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John C. Baumann.

Yours very truly,

JOHN M. DALTON
Attorney General

JCB:ml