

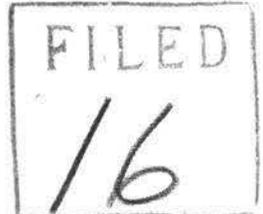
MOTOR VEHICLES:
HABITUAL CRIMINALS:
DRUNK DRIVERS:

Any person who is convicted of operating a motor vehicle in an intoxicated condition, Section 564.440, RSMo Cum.Supp. 1963, and who was previously convicted of violating Section 564.440, RSMo 1959, shall be punished as a subsequent offender under the applicable provision of Section 564.440 RSMo Cum.Supp. 1963.

January 6, 1964

OPINION NO. 362 (1963)
NO. 16 (1964)

Honorable Don E. Burrell
Prosecuting Attorney
Greene County
Springfield, Missouri 65802



Dear Mr. Burrell:

You recently wrote to this office requesting an official opinion concerning our interpretation of the recently enacted drunken driving law.

On October 13 of this year, Senate Bill No. 78, enacted by the 72nd General Assembly, became effective. This act repealed Sections 564.440 and 564.460, RSMo 1959 and enacted in lieu thereof several new sections relating to the same subject matter of crimes in connection with the operation of motor vehicles. One of the newly enacted sections is also designated 564.440 (hereinafter referred to as the new section). The two sections repealed and the new section 564.440 appear as follows:

"564.440. Driving motor vehicle while intoxicated.--No person shall operate a motor vehicle while in an intoxicated condition, or when under the influence of drugs."

"564.460. Penalty for drunken driving or leaving scene of accident.--Any person who violates the provisions of section 564.440 or 564.450 shall be deemed guilty of a felony and on conviction thereof shall be punished by imprisonment in the penitentiary for a term not exceeding five years or by confinement in the county jail for a term not exceeding one year, or by a fine not exceeding one hundred dollars, or by both such fine and imprisonment."

New Section 564.440.

"No person shall operate a motor vehicle while in an intoxicated condition. Any person who violates the provisions of this section shall be deemed guilty of a misdemeanor on conviction for the first two violations thereof, and a felony on conviction for the third and subsequent violations thereof, and, on conviction thereof, be punished as follows:

(a) For the first offense, by a fine of not less than one hundred dollars or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment.

(b) For the second offense, by confinement in the county jail for a term of not less than fifteen days and not exceeding one year.

(c) For the third and subsequent offenses, by confinement in the county jail for a term of not less than 90 days and not more than one year or by imprisonment in the department of corrections for a term of not less than two years and not exceeding five years.

(d) Evidence of prior convictions shall be heard and determined by the trial court, out of the hearing of the jury prior to the submission of the case to the jury, and the court shall enter its findings thereon.

(e) Any other provision in Section 302.309, RSMo, to the contrary notwithstanding, when a court having jurisdiction finds that a chauffeur or operator is required to operate a motor vehicle in connection with his business, occupation or employment, the court may grant such limited driving privilege as the circumstances of the case may justify if the court also finds undue hardship on said individual in earning a livelihood; provided, however, no such limited privilege shall be granted after conviction of a second offense of the crime mentioned herein." (Emphasis supplied)

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You specifically draw our attention to the underlined portion of the "new" section above and ask whether this language means that convictions under the repealed Section 564.440 are to be counted in determining the punishment for a conviction under Section 564.440, Senate Bill 78, 72nd General Assembly. We assume that you are referring to those who are convicted of offenses committed after October 13, 1963.

It is the opinion of this office that anyone who has been previously convicted of violating "old" Section 564.440 and who then is convicted of violating the "new" Section 564.440 because of an offense committed after October 13, 1963, shall be punished as a subsequent offender under the appropriate subsection of "new" Section 564.440.

In your letter you place particular emphasis upon the phrase "any person who violates the provisions of this section" which is found in the "new" Section 564.440. It is our view that the violations referred to are those resulting from the activity which the statute declares to be unlawful. *United States v. Dauphin*, 20 Fed. 625, 627 (1884). This is the same criminal activity, operating a motor vehicle while in an intoxicated condition, which was prohibited by "old" Section 564.440. The crime remains the same, only the punishment for offenses committed after October 13, 1963, has been changed. Section 1.120, RSMo 1959 fully supports our conclusions. It reads as follows:

"The provisions of any law or statute which is reenacted, amended or revised, so far as they are the same as those of a prior law, shall be construed as a continuation of such law and not as a new enactment."

The fact that "new" Section 564.440 provides for an increased minimum punishment upon conviction for subsequent offenses does not make the statute retroactive nor does it run afoul of any constitutional guaranty. *State v. King*, 365 Mo. 48, 275 SW2d 310 (1955). *State v. Morton*, Mo. Sup. 338 SW2d 858 (1960). As stated at 25 Am. Jur., *Habitual Criminals*, Section 3, page 261:

"While there are many rules of law which may seem inconsistent with the purpose of a habitual criminal statute and the procedure adopted to compass it, it is nevertheless sound in principle and sustained by reason. Aside from the offender

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and his victim, there is always another party concerned in every crime committed, namely, the state; and it does no violence to any constitutional guaranty for the state to enhance the punishment for second or subsequent offenses. The true ground upon which these statutes are sustained is that the punishment is awarded for the second offense only and that in determining the amount or nature of the penalty to be inflicted, the legislature may require the courts to take into consideration the persistence of the defendant in his criminal course."

In the King case, supra, the legislature enacted a law in 1951 which imposed a greater punishment upon those three times convicted of larceny. In that case the court sustained a punishment based upon the defendant's prior convictions of larceny which occurred before the enactment of the 1951 statute, and at 275 SW2d 312 said:

"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 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 punishments to be imposed."

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CONCLUSION

When an individual is convicted of driving while intoxicated for an offense committed after October 13, 1963, such person, if he has been previously convicted of one or more offenses under Section 564.440, RSMo 1959, shall be punished under provisions of Section 564.440, RSMo Cum.Supp. 1963, and such previous convictions will be applicable in determining the punishment to be assessed under Section 564.440, RSMo Cum.Supp. 1963.

This opinion, which I hereby approve, was prepared by my Assistant, Eugene G. Bushmann.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

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