

PENITENTIARY: Measure of punishment upon conviction as habitual criminal.

October 3, 1938

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Mr. Robert C. Edson
Director of Probation and Parole
Jefferson City, Missouri

Dear Sir:

We acknowledge your request for an opinion dated September 29 which reads as follows:

"Dan Adamson, #49625, was sentenced to the penitentiary for a term of six years from March 30, 1937, for Carrying Concealed Weapons, and was sentenced under the Habitual Criminal Act, Section #4461, Revised Statutes of Missouri, 1929.

This man served three prior sentences in the penitentiary; three years for Stealing Chickens in the Night time; two years for Stealing a Car; and two years for Stealing Chickens in the Night time.

The prisoner complains that the sentence of six years under his charge is excessive by four years and that the trial court only had jurisdiction to sentence him for a maximum of two years.

What is the legal maximum sentence which the court could impose on one convicted of Carrying Concealed Weapons under the Habitual Criminal Act?"

Section 4461, R.S. Missouri, 1929, provides as follows:

"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."

Our Supreme Court has held that the above statute does not create a separate offense, but merely subjects the second offender to heavier punishment, and in *State v. Hefflin*, 89 S.W. (2nd) 938, 103 A.L.R. 1301, the court said:

"It has been held several times, the habitual criminal statutes themselves do

not create any separate offense, but merely subjects second offenders to heavier punishment for the crimes they commit."

This additional punishment to which a second offender is subjected is based upon the offender's guilt for the subsequent offense charged after pardon or discharge for a prior crime, and said additional punishment is measured by the maximum punishment prescribed for the subsequent crime, and in *State v. Krebs*, 80 S.W. (2d) 196, l.c. 198, 336 Mo. 576, the court said:

"It will be noted that the section contains three numbered divisions. The first provides that if the subsequent offense, for which the defendant is on trial, be such that upon a first conviction he would be punishable by imprisonment in the penitentiary for life, or for a term which might extend to imprisonment for life, then the punishment to be assessed under the section shall be life imprisonment. Under the second division, if the punishment for the crime upon a first conviction would be imprisonment in the penitentiary for a limited term of years, then imprisonment under the section shall be for the maximum term thus prescribed."

Section 4029, R.S. Missouri, 1929, makes it a crime to carry concealed weapons and provides that one found guilty "be punished by imprisonment in the penitentiary not exceeding two years".

CONCLUSION

The maximum punishment for one guilty of carrying concealed weapons is two years in the penitentiary. Where one is charged as a habitual criminal with the crime of carrying concealed weapons, the trial court, on conviction, only had jurisdiction to sentence the prisoner for the

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maximum punishment of two years in the penitentiary, and any sentence of six years on such a conviction is excessive by four years.

Respectfully submitted,

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APPROVED By:

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