

CRIMINAL LAW:

Under the so-called habitual criminal act, prior conviction and sentence to Intermediate Reformatory at Algoa is sufficient to satisfy its terms.

December 14, 1939

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of December 12th, 1939, which reads as follows:

"W. C. was convicted of a felony about five years ago, and was sentenced to The Intermediate Reformatory at Algoa. That was his first felony offense.

"Now he is up for another felony charge in the circuit court. It is my intention to charge this defendant under the terms of section 4461, relating to the second offense. I have examined the statutes and I cannot find wherein the fact that defendant was sent to the Intermediate Reformatory would keep me from filing against this man under section 4461. I want an opinion as to whether the fact the defendant was sent to the Intermediate Reformatory would keep him from being liable for additional punishment under section 4461?"

Under your above set of facts, doubtless the sentence in the prior conviction was imposed under the provisions of Section 8474, R. S. Missouri, 1929, which reads thus:

"If any male person seventeen years of age and less than twenty-five years of age be convicted of a felony for the first time, and he be not guilty of treason or murder in the first or second degree, or any offense for which capital punishment is provided, the court trying such person may sentence him to the custody of the officials of the intermediate reformatory to be confined at said reformatory for the term prescribed by the statutes of this state and fixed by the court or jury as a punishment for such offense. It shall be the duty of the officials in charge of said reformatory to receive all such convicted persons."

Section 4461 R. S. Missouri, 1929, reads 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."

Your question, then, resolves itself to whether, in order for the provisions of Section 4461 R. S. Missouri, 1929, to apply it is necessary that there was actual confinement in the penitentiary as result of the prior conviction alleged.

In the case of State v. Marshall, 34 S. W. (2d) 29, 326 Mo. 1141, the appellant presented that precise point to the court and the court held:

"The defendant contends that section 3702, R. S. 1919, known as the habitual criminal act, 'only applies to those persons who have actually be imprisoned in the penitentiary,' and that the allegations of the information are not sufficient to bring this case within the provisions of section 3702, because, according to the allegations of the information, the defendant, though previously convicted of stealing a motor vehicle, was punished therefor by imprisonment in the city workhouse of the city of St. Louis for one year and not by

imprisonment in the penitentiary.

"Section 29(a) of the Motor Vehicle Act of 1921, provides that: 'Any person who shall be convicted of feloniously stealing, taking or carrying away any motor vehicle, * * * shall be guilty of a felony and shall be punished by imprisonment in the penitentiary for a term not exceeding twenty-five years or by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars (\$1,000) or by both such fine and imprisonment.' Laws of 1921, 1st Ex. Sess., p. 105.

"Section 3702, R. S. 1919, provides that: 'If any person convicted of any offense 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,' etc. (Our italics.) * * "

The court in the Marshall case, supra, in construing the so-called habitual criminal act held that the emphasis was to be placed on the words "punishable by imprisonment in the penitentiary." In the case set forth by you, an analogous situation to that in the Marshall case is presented, and it appears from your facts as given that there was a prior conviction of an offense "punishable by imprisonment in the penitentiary."

CONCLUSION

It is therefore the opinion of this Department, in view of the above authorities, that in order to satisfy the provisions of the so-called habitual criminal act, Sec. 4461 R. S. Missouri, 1929, it is not necessary that there shall have been actual confinement in the penitentiary under the prior conviction, but that a sentence to the Intermediate Reformatory at Alcoa is sufficient.

Respectfully submitted,

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APPROVED:

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(Acting) Attorney General

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