

CRIMINAL LAW:
NARCOTIC DRUG ACT:
HABITUAL CRIMINAL ACT:

Phrase "any subsequent offense" used in Sec. 195.200, RSMo 1949, refers only to offenses defined, charged and found under Chapter 195, RSMo 1949, Missouri's Narcotic Drug Act. Missouri's Habitual Criminal Act, Secs. 556.280 and 556.290, RSMo 1949, covers convictions in Federal courts.



September 8, 1955

Honorable Frank D. Connett, Jr.
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

The following opinion is rendered in reply to your request reading as follows:

"We would like to have your opinion on the following proposition.

"I have charged a man, one G. E. "Bud" Fischer, with the violation of Section 195.020 relating to the sale of narcotic drugs. Fischer was previously convicted on January 10, 1955, by the United States District Court, St. Joseph, of a violation of Title 26, United States Code 2554A, relating to the illegal sale of narcotic drugs. He was sentenced to a year and one day, served that sentence, was paroled and discharged.

"My question is this: May I prosecute him under Section 195.200 as if this offense was a subsequent offense so that the punishment will be moved up to two to seven years or may he be tried under Section 556.280, second offense act."

Missouri's Narcotic Drug Act is found at Chapter 195, RSMo 1949. The "penalties" section of such law is Section 195.200, RSMo 1949, which provides:

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"Any person violating any provision of this chapter shall be deemed guilty of a felony, and upon conviction thereof shall be punished, for the first offense, by imprisonment in the state penitentiary for a term of two years, or by imprisonment in the county jail for a term of not more than one year or by a fine of not more than one thousand dollars or by both such fine and imprisonment; and for any subsequent offense, by imprisonment in the state penitentiary for a term of not less than two years nor more than seven years, or by a fine of not more than five thousand dollars or less than two hundred and fifty dollars."

With reference to the above, quoted statute it is of interest to note the following comment in relation thereto made by Honorable Roy F. Proffitt, Associate Professor of Law, University of Missouri Law School, in his paper entitled "An Analysis of the Missouri Narcotic Drug Law", Missouri Law Review, Vol. 17 (1952), page 253, l.c. 271:

"The writer has been unable to find a single case in which the penalties now provided by Section 192.200 have been applied."

In the case of *Sparkman v. State Prison Custodian*, 154 Fla. 688, 18 So. 2d 772, decided by the Supreme Court of Florida in 1944, that State's Uniform Narcotic Drug Law was being reviewed. The "penalties" section of Florida's law read as follows:

"Punishment for violations. Any person violating any provisions of this chapter shall be deemed guilty of a felony and upon conviction be punished, for the first offense, by a fine not exceeding five thousand dollars, or by imprisonment in the state prison for not exceeding five years; and for any subsequent offense, by a fine not exceeding ten thousand dollars, or by imprisonment in the state prison for not exceeding ten years." (Emphasis supplied.)

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The similarity between the Florida statute and Section 195.200, RSMo 1949, is evident. At 18 So. 2d 772, l.c. 773, the Supreme Court of Florida spoke as follows in construing the Florida "penalties" section:

"This statute provides that any person violating any of the provisions of the Uniform Narcotic Law shall be guilty of a felony and upon conviction shall be punished for the first offense by a fine not exceeding five thousand dollars or by imprisonment in the state prison for a period of not exceeding five years; and 'for any subsequent offense' (any person convicted for the second time of any violation of the Narcotic Law) shall be punished by a fine not exceeding ten thousand dollars or by imprisonment for a period of not exceeding ten years in the State Prison."

The Uniform Narcotic Drug Act of Illinois has specifically defined what is a "subsequent offense" within the meaning of such Act, and we find that definition quoted in the case of *People v. Hightower* (1953) 112. N. E. 2d 126, 414 Ill. 537, l.c. 542, as follows:

"Any offense under this Act shall be deemed a subsequent offense if the violator shall have been previously convicted of a felony under any law of the United States of America, or of any State or Territory or of the District of Columbia relating to narcotic drugs".

Missouri's Narcotic Drug Act does not attempt to define "any subsequent offense" as such language is used in Section 195.200, RSMo 1949, and until the statute is expanded to embrace a definition of "any subsequent offense" to include an offense against the Federal narcotic law, we conclude that the subsequent offense must be one defined, charged and found under Chapter 195, RSMo 1949. It then follows that when one is charged for the first time, and convicted under Chapter 195, RSMo 1949, the added penalties provided in Section 195.200, RSMo 1949, for a "subsequent offense" may not be employed if the person has not had a former conviction under Chapter 195, RSMo 1949.

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Your second inquiry goes to the application of penalties set forth in Sections 556.280 and 556.290, RSMo 1949, Missouri's Habitual Criminal Act, under the facts set forth in the request for this opinion. In *State v. Brinkley*, 189 S.W. (2d) 314, 354 Mo. 337, 1.c. 367, the Supreme Court of Missouri spoke as follows:

"Appellant's most sweeping contention is that the habitual criminal statute, Sec. 4855, does not cover prior convictions in the Federal courts but refers only to convictions in a court of another state of the United States. The question seems to be one of first impression in Missouri. The words of the section are, convictions--"in any of the United States, or in any district or territory thereof, or in a foreign country." The opening phrase of the quoted language undoubtedly does mean, in any of the several states, but it also connotes the Union of States and the government thereof, as indicated by the words next following, "or in any district or territory thereof." And these are supplemented by the phrase, "or in any foreign country." Certainly the lawmakers did not intend to exclude the courts of the United States though including those of foreign countries with different and unfamiliar laws. We have found no other statute closely resembling ours, but it is all-comprehensive in scope and the language used is more like that found in several states, "in any other state, government or country." The authorities are gathered in successive annotations in A. L. R. We overrule the assignment."

CONCLUSION

It is the opinion of this office that penalties prescribed in Section 195.200, RSMo 1949, to be assessed for "any subsequent offense", affect only offenses defined, charged and found under Missouri's Narcotic Drug Act, Chapter 195, RSMo 1949, and do not comprehend offenses against the Federal narcotic law. It is further ruled that Missouri's Habitual Criminal Act, Sections 556.280 and 556.290, RSMo 1949, covers convictions in Federal courts.

Honorable Frank D. Connett, Jr.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

JOHN M. DALTON
Attorney General

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