

Criminal Law:
Misdemeanors:
Felony:
Driving While
Intoxicated:
Drunk Drivers:
Motor Vehicles:
Habitual
Criminals:
Informations:

(1) A person charged under DWI statute before its repeal may be tried thereunder after its repeal. However, the maximum punishment cannot exceed that imposable under the new DWI statute (Section 564.440, RSMo Cum. Supp. 1963), and the minimum punishment may be imposed under the repealed DWI statute (Section 564.460, RSMo 1959).
(2) Felony convictions for DWI obtained prior to October 13, 1963, may be pleaded and proved against a defendant to punish him as a subsequent offender under Section 564.440, RSMo Cum. Supp. 1963.
(3) The information or complaint should recite the necessary elements of DWI and the prior convictions should be pleaded in the same manner as priors under Section 556.280, RSMo 1959.

January 31, 1964

OPINION NO. 450-1963
NO. 28-1964

Honorable Charles H. Baker
Prosecuting Attorney
Dunklin County
Kennett, Missouri

FILED
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Dear Mr. Baker:

This is in reply to your opinion request of November 9, 1963, in which you ask for certain legal interpretations under the new "driving while intoxicated" statute, known as Section 564.440, RSMo Cum. Supp. 1963.

I.

Your first inquiry is as follows:

"Is a pending felony charge for DWI under the prior law affected by the new law, and if so, to what extent?"

Under Sections 564.440 and 564.460, RSMo 1959, driving while intoxicated was a felony punishable by imprisonment in the penitentiary, by confinement in the county jail, or by a fine or both. These sections, however, were repealed by Section 564.440, RSMo Cum. Supp. 1963, whereby the first and second offenses of driving while intoxicated were deemed misdemeanors and punishable as such. However, a third and subsequent offense was deemed a felony and punishable as such.

Section 564.440, RSMo Cum. Supp. 1963, provides as follows:

"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

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conviction for the third and subsequent violations thereof, and, on conviction thereof, be punished as follows:

"(1) 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;

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

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

"(4) 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;

"(5) 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."

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Section 1.160, RSMo 1959, provides as follows:

"No offense committed and no fine, penalty or forfeiture incurred, or prosecution commenced or pending previous to or at the time when any statutory provision is repealed or amended, shall be affected by the repeal or amendment, but the trial and punishment of all such offenses, and the recovery of the fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended, except (1) that all such proceedings shall be conducted according to existing laws; and (2) that if the penalty or punishment for any offense is reduced or lessened by any alteration of the law creating the offense, the penalty or punishment shall be assessed according to the amendatory law."

In view of this section, if an individual, prior to the effective date of Section 564.440, RSMo Cum. Supp. 1963, was charged by information or indictment with the violation of the felony of driving while intoxicated under Section 564.440, RSMo 1959, but was not convicted therefor prior to the effective date of Section 564.440, RSMo Cum. Supp. 1963, he may presently be prosecuted for the violation of Section 564.440, RSMo 1959, but the maximum punishment upon conviction shall not be greater than that authorized by Section 564.440, RSMo Cum. Supp. 1963.

However, the minimum punishment provided by Section 564.440, RSMo Cum. Supp. 1963, is not applicable to such a conviction, and punishment authorized by Section 564.460, RSMo 1959, less than the minimum punishment authorized by Section 564.440, RSMo Cum. Supp. 1963, may be imposed. The increased minimum punishments authorized by Section 564.440, RSMo Cum. Supp. 1963, are not applicable in such a situation because application of such increased minimum punishments for a crime committed before October 13, 1963, would be unconstitutional because it would be in violation of Section 13, Article I, of the Constitution of Missouri, which

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provides that no ex post facto law can be enacted, and in violation of Section 10, Article I, of the United States Constitution, which provides that no state shall pass any ex post facto law.

In the case of Lindsey v. Washington, 301 U.S. 397, 57 Sup.Ct. 797, 81 L. Ed. 1182, the United States Supreme Court stated, at l.c. U.S. 401:

"The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer."

II.

Your second inquiry states:

"Are the prior convictions referred to in the statutes in the state only under the new law, or would prior convictions of DWI in this state or any other jurisdiction be taken under consideration?"

A recent opinion of this office, issued on January 6, 1964, to Mr. Donald Burrell, Prosecuting Attorney, Greene County, Springfield, Missouri, fully covers this question.

This opinion advised that any person who is convicted of operating a motor vehicle in an intoxicated condition under Section 564.440, RSMo Cum. Supp. 1963 (for the commission of such offense after October 13, 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.

A copy of said opinion is attached hereto.

III.

Your third inquiry states as follows:

"What is the appropriate wording of an information or complaint under each of the three subsections of 564.440?"

An information or complaint drawn under subsection 1 should merely recite the necessary elements of driving while

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intoxicated. However, an information or complaint drawn under subsections 2 and 3 should recite not only the elements setting forth the present charge of driving while intoxicated but, in addition thereto, should set forth the fact that the defendant has been previously convicted of driving while intoxicated. As stated in State v. McClay, 78 A. 2d 347, 350 [5]:

"When a statute imposes a higher penalty upon a second and third conviction, respectively, it makes the prior conviction of a similar offense a part of the description and character of the offense intended to be punished; and therefore the fact of such prior conviction must be charged as well as proved. * * *"

See also State v. Eickler, 248 Iowa 1267, 83 N.W. 2d 576; 42 Corpus Juris Secundum, Indictments and Informations, Section 145 B, page 1059.

In essence the prior conviction should be pleaded in the same manner as priors pleaded under our so called Habitual Criminal Act (Section 556.280, RSMo 1959). By way of procedure, however, these prior convictions alleged in the information must be proven in the same manner as other prior convictions and heard by the judge out of the hearing of the jury, and the judge must make his finding thereon prior to the submission of the case to the jury [Section 564.440(4), RSMo Cum. Supp. 1963]. This is necessary in order that the jury may be correctly directed as to the punishment to be imposed in the event the jury finds the defendant guilty. For, unlike our habitual criminal statute, the jury and not the judge determines defendant's punishment for the violation of this statute.

Conclusion

I. Although an individual charged with driving while intoxicated under Section 564.440, RSMo 1959, prior to its repeal date of October 13, 1963, may still be prosecuted under this repealed statute after October 13, 1963, the maximum punishment cannot be greater than that authorized by Section 564.440, RSMo Cum. Supp. 1963, but the minimum punishments provided in Section 564.440, RSMo Cum. Supp.

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1963, are not applicable and punishment less than the minimum authorized by Section 564.440, RSMo Cum. Supp. 1963, may be imposed as authorized by Section 564.460, RSMo 1959.

II. An individual's felony convictions for driving while intoxicated obtained prior to October 13, 1963, may be used to punish him as a subsequent offender under Section 564.440, RSMo Cum. Supp. 1963, for the commission of an offense after October 13, 1963.

III. An information or complaint should recite the necessary elements of driving while intoxicated.

A prior conviction should be pleaded in the same manner as priors under our so called Habitual Criminal Act (Section 556.280, RSMo 1959).

The foregoing opinion, which I hereby approve, was prepared by my assistant George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GD:BJ
Enclosure