

August 9, 1967



OPINION NO. 86(1967)
510(1966)
Answered-by-letter (McFadden)

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

Dear Mr. Baker:

This is in reply to your request for advice concerning a charge under the Habitual Criminal Act in view of the unusual nature of the previous convictions in Arkansas of the people you propose to charge.

You have forwarded a copy of the Arkansas judgment against one of these people (Leland Miller) wherein it is indicated that he was sentenced to a term of ten years in the Arkansas State Penitentiary for "charges of burglary" and " * * * such sentence to be suspended during his good behavior * * * ".

The question presented is: Will the quoted judgment qualify as a prior offense under Section 556.280, RSMo 1959, which requires in part that the individual " * * * shall be sentenced and subsequently placed on probation, paroled, fined or imprisoned * * * ? "

You inquire if State v. Gordon, 344 SW2d 69, may have some bearing. In that case "imposition" of sentence was suspended on the prior conviction and the Missouri Supreme Court held that the Habitual Criminal Act did not apply because no sentence was actually meted out and therefore the requirement of the law had not been met.

It is the view of this office, however, that the individual in this case has been placed on probation under the Arkansas Statutes. It is true, that in this case there was a plea of nolo contendere and not a plea of guilty but sentence in this case was passed and "suspended" under provisions of Section 43-2324, Arkansas Statutes, Official Edition 1964, Replacement.

Honorable Charles H. Baker

We are advised by Howard A. Mayes, Deputy Prosecuting Attorney for the Second Judicial Circuit of Arkansas, that the effect of the sentence passed relative to this individual is that "the court may, at any time during the period of suspension, revoke the suspension for any conduct which the court deems not to be 'good behavior'... Arkansas does not have probation in the same sense that most states do and it is usually reserved to action by the Pardon and Parole Board and our [Arkansas] probation is considered as a form of parole."

It can be seen, therefore, that when a person is given a "suspended sentence" conditioned upon good behavior under Arkansas Statute 43-2324, he has been placed on probation as such term is used in Section 556.280, supra. Such section provides that when a plea of guilty has been accepted or a verdict of guilty rendered, the judge can postpone the pronouncement of final sentence and judgment upon such conditions as he shall determine proper and reasonable as to probation, restitution of the property involved and payment of the costs. In the present judgment, restitution was required as was payment of court costs and the individual was placed on probation by the setting out of the requirement of "good behavior."

By the terms of such section, the individual was placed on probation as the term is used by our courts and such judgment would, therefore, authorize a filing of an information in this state under the Habitual Criminal Law.

Yours very truly,

NORMAN H. ANDERSON
Attorney General

HLM:ag