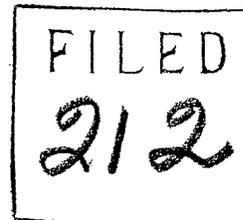


MOTOR VEHICLES: Operation of motor vehicle over city
INTOXICATED OPERATORS: streets, whether marked or unmarked as
STATUTORY VIOLATION: WHEN: state highway, by one in an intoxicated
CITY ORDINANCE ON: condition, a violation of Section 564.440,
RSMo 1959, defining and fixing punishment
for operating motor vehicle by intoxicated person, regardless of fact
said city had ordinance in effect at time of alleged act, prohibit-
ing operation of motor vehicle in city while one was intoxicated and
city failed to charge such person with ordinance violation.

OPINION NO. 212

June 27, 1967

Honorable Dan Bollow
Prosecuting Attorney
Shelby County
Shelbyville, Missouri



Dear Mr. Bollow:

This office is in receipt of your request for a legal opinion which reads as follows:

"Please advise me whether or not it is a violation of Section 564.440 to operate a motor vehicle on a city street while intoxicated when that city has a municipal ordinance providing penalties for operating the vehicle while intoxicated, but does not charge the person violating the ordinance with the violation of the ordinance. Does it make any difference whether or not the city street is a marked state highway?"

Section 564.440, RSMo 1959, defines and fixes the range of punishment for the criminal offense of driving a motor vehicle while one is intoxicated, and reads in part 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 conviction for the third and subsequent violations thereof, and, on conviction thereof, shall be punished as follows:

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(1) For the first offense, by a fine 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 * * *".

From the provisions of Section 564.440 supra, it clearly appears that one who operates a motor vehicle over the streets of a city while he is in an intoxicated condition would violate said section, for which he could be prosecuted criminally. If he were tried and convicted, he would be deemed guilty, and punished for a misdemeanor or graded felony, depending on how many previous violations of said section he had been convicted of, as provided by paragraphs 1, 2, 3 of same.

The fact that the particular city through which one operated a motor vehicle while intoxicated did, or did not have an ordinance prohibiting the operation of a motor vehicle within the city while one was intoxicated, and if such city did have such an ordinance in force and did not charge and try the person for a violation of same would be immaterial and of no consequence. Inaction on the part of the city in that instance would not estop the prosecuting attorney of the county in which the city was located from bringing a criminal prosecution under said Section 564.440, and said prosecution could be brought, as noted, if the city did nothing about the ordinance violation, or in the event the city did bring a suit for ordinance violation, the criminal prosecution by the prosecuting attorney could be brought at the same time, or subsequent to the city ordinance violation proceeding.

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The essentials of the crime of driving a motor vehicle while one is intoxicated, although contained in the first sentence of Section 564.440 supra, are clearly and fully stated in plain language so there can be no doubt as to what acts constitute the offense, and which we repeat here for emphasis:

"No person shall operate a motor vehicle while in an intoxicated condition".

It is noted that the above quoted definition does not include as one of the essential elements of the crime that the operation of the motor vehicle (by intoxicated operator) shall be over a certain described or otherwise designated public road or highway, or over the streets of a city marked as a state highway. While such descriptions, designation or other identification of the public road, highway or city street over which the motor vehicle was operated could be included in an indictment or information drawn under Section 564.440, without it affecting the legality of the charge, it would be unnecessary and mere surplusage. In the case of State v. Pike, 278 S.W.725, the defense contended that an information charging operation of a motor vehicle while one was intoxicated was fatally defective as not alleging the operation was done over a public highway. The court rejected this construction of the statute, and at l.c. 726, said:

"It is further complained in the motion in arrest that the information is fatally defective because it does not set forth the defendant was driving a motor vehicle on a public highway. The statute in the paragraph quoted above, does not require as an element of the offense, that the driving should be done on a public highway. Circumstances of aggravation were in the legislative contemplation, as indicated by the wide range of punishment for the offense * * *".

Our answer to the inquiry in the last sentence of your letter is in the negative.

CONCLUSION

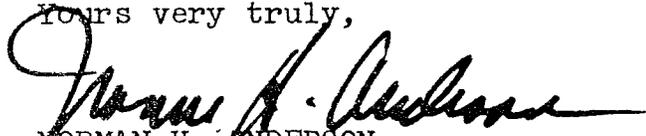
Therefore, it is the opinion of this office that the operation of a motor vehicle over the streets of a city, whether marked or unmarked as a state highway by one while in an intoxicated condition, is a violation of Section 564.440 RSMo 1959, defining and fixing the punishment for operating a motor vehicle by a person while in

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an intoxicated condition, regardless of the fact said city had an ordinance in effect at the time of the alleged act prohibiting the operation of a motor vehicle within the city by one while intoxicated and the city failed to charge such person with a violation of the ordinance.

The foregoing opinion which I hereby approve was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,



NORMAN H. ANDERSON
Attorney General