

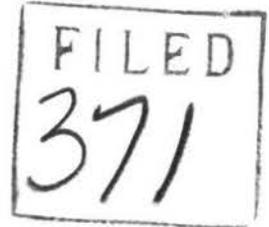
MOTOR VEHICLES:
DRUNK DRIVERS:
DRIVING WHILE
INTOXICATED:

In prosecutions for driving while intoxicated, Section 564.440, RSMo 1959, prior convictions for driving while intoxicated in other states cannot be considered in assessing punishment.

OPINION NO. 371
(Opinion No. 381 is identical)

September 19, 1968

Honorable Henry A. Keeler
Prosecuting Attorney, Pettis County
Courthouse
Sedalia, Missouri 65301



Dear Mr. Keeler:

We acknowledge your letter of August 21, 1968, in which you request an opinion from us on the following question:

"Does a recent conviction for DWI in a sister state followed by a conviction in Missouri Court for the same offense make the conviction in Missouri a first or second offense as contemplated by the terms of the above-mentioned Statute?"

It is our opinion that a sister state conviction for driving while intoxicated cannot be taken into consideration when prosecuting under Section 564.440, RSMo 1967 Cum. Supp. Section 564.-440 reads in pertinent part:

"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, be punished as follows: * * *"

We find the following general law on the question presented:

"In the absence of an express statute, it is held that conviction of a crime can have no effect by way of penalty or personal disability

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beyond the limits of the state where the judgment is rendered, and it has been held under particular statutes in some jurisdictions that the previous convictions must be within the state, and that the increased penalty under the statute cannot be imposed where the prior conviction was in another jurisdiction. Under other authority, a prior conviction in another state may be used as the basis for the enhancement of punishment for an offense committed in the state of the forum, even though the statute does not expressly so provide."
24 B CJS, 1960, p. 458.

The Oklahoma Court of Criminal Appeals considered that State's drunk driving statute which read in pertinent part:

"Any persons found guilty of a second offense under the provisions of this Act shall be deemed guilty of a felony. . ."

and held that a person with a conviction for drunk driving in the state of Texas could not be punished as a second offender under the Oklahoma law.

"* * *It has been repeatedly held that penal statutes cannot be enlarged by implication or extended by inference* * *."
Thorp v. State, 250 P 2d 66, 68 (Okla. App., 1952).

A New York Court reached a like result with that State's statute which read as follows:

"Whoever operates a motor vehicle or motorcycle while in an intoxicated condition after having been convicted of operating a motor vehicle or motorcycle while in an intoxicated condition shall be guilty of a felony."

The Court noted the strict construction to be accorded penal statutes, and that the scope of such statutes was not to be limited or extended by judicial interpretation so as to cover a case clearly not within the expressed legislative intent.

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"* * *With respect to the quoted statute in question, it is clear that it does not affirmatively appear that it was the intention of the Legislature that the prior conviction therein referred to be one other than a conviction which occurred in this State. Unless the statute otherwise commands, our court should not decree forfeitures or penalties here because of violations of the criminal laws of another state, [citing authority], but we should give to the statute 'that construction which operates in favor of life or liberty'. [citing authority]. If the quoted statute be intended to prescribe a penalty by reason of a prior conviction in another state, that end should be accomplished by an act of the Legislature expressing such an intent and not by judicial interpretation." People v. Pardee, 117 NYS 2d 515, (NY County Ct., 1952); aff'd. w/o opin. 122 NYS 2d 902 (App. Div., 1953); aff'd. on further app. w/o opin. 116 NE 2d 495 (Ct. Apps., 1953).

In interpreting the phrase "upon a second conviction," in the New Hampshire drunk driving statute, that State's Supreme Court stated:

"* * *The statute obviously refers to a public way within the State of New Hampshire. Whenever a conviction in another state is to be considered in determining whether a second offense has been committed under a local statute the Legislature has so stated in express terms. * * *" State v. Cardin, 156 A 2d 118 (N.H., 1959), l.c. 119.

A New Jersey court similarly construed its statutory phrase, "previous violation of this section."

"[5] It does not affirmatively appear that the Legislature intended the prior conviction to be one pronounced in any state other than New Jersey* * *." State v. Davis, 229 A 2d 682, 685 (N.J. County Ct., 1967).

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The court was impressed by the fact that the State's Habitual Criminal Act and Uniform Narcotics Drug Law expressly referred to out of state convictions.

"Like provision could have been easily made to apply to multiple drunken driving offenses."
State v. Davis, supra, l.c. 685.

The Missouri Habitual Criminal Act (Section 556.290, RSMo 1959) and Uniform Narcotics Drug Act (Section 195.200, RSMo 1959) also make specific mention of out of state convictions.

We have found only one jurisdiction that would impute to a subsequent offender penal statute that is silent on the point, extra-state coverage. People v. Poppe, 68 NE 2d 254, (Ill., 1946), Cert. den. 329 U.S. 728:

"The purpose of the Habitual Criminal Act is to punish people who have committed prior felonies more seriously than those who are guilty of a first offense. If plaintiff in error's contention were correct, it would result in penalizing more heavily those who have previously been convicted of offenses in this State and not penalizing as severely persons who have committed the same crimes in other States, regardless of how many times they may have been convicted in other jurisdictions." People v. Poppe, supra, l.c. 256.

Although the logic of the Illinois Court is not without appeal, we feel that such an argument is properly addressed to the legislature. Prior to amendment our Narcotics Drug Act, noted above, contained no express mention of out of state convictions and our Supreme Court ruled that such could not be read into the Act.

"It is suggested by the State, however, that defendant's prior conviction under the Federal Narcotics Act made him a second offender within the meaning of Old § 195.200, thereby subjecting him to the penalties prescribed therein for a 'subsequent offense'. If such a meaning is to be found within the wording of that section--it is explicitly so provided in New § 195.200--we ought to construe it

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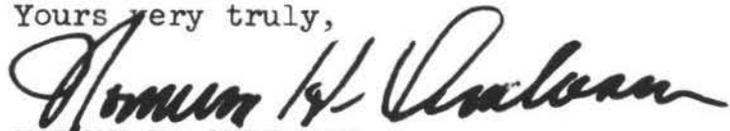
accordingly. However, a careful study of the old section leaves us convinced that in its enactment the legislature did not have in mind violations of the narcotics laws of any jurisdiction other than Missouri, else it would have so stated; as does New § 195.200." State v. Edwards, 317 SW 2d 441, 448 (banc, 1958).

CONCLUSION

Accordingly, it is the opinion of this office that in prosecutions under Section 564.440, convictions outside the State of Missouri cannot form the basis for invoking the subsequent offenses punishment provisions of this statute.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louren R. Wood.

Yours very truly,



NORMAN H. ANDERSON
Attorney General