



OFFICES OF THE

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

JOHN C. DANFORTH
ATTORNEY GENERAL

January 28, 1976

OPINION LETTER NO. 14

Honorable Jim Arnold
Representative, District 131
c/o House Post Office, Capitol Building
Jefferson City, Missouri 65101

Dear Representative Arnold:

This letter is issued in response to your questions regarding the construction of Section 564.439 (S.B. 32, 78th General Assembly) effective September 28, 1975, and the relation of this statute to Section 564.440, RSMo 1969.

The questions posed in your opinion request letter dated November 14, 1975, as modified by telephone conversation on December 9, 1975, are as follows:

"a. Is the maximum punishment for the third offense of driving with a blood-alcohol content of .10 percent or more a misdemeanor or a felony?

"b. If the second or third offense of driving with a blood-alcohol content of .10 percent or more is not within a period of three years, is this offense again considered a first offense?

"c. Would a person arrested and convicted for the third offense of driving while intoxicated prior to September 28, 1975, but sentenced after this date, be entitled to the more liberal punishment of Section 564.439, RSMo?

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- "d. Does enactment of Section 564.439, RSMo, in effect, repeal Section 564.440, RSMo?"

Your first question:

"a. Is the maximum punishment for the third offense of driving with a blood-alcohol content of .10 percent or more a misdemeanor or a felony?"

Section 564.439-2 provides in part:

"Any person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, shall be punished as follows:

* * *

(3) For the third and subsequent offenses within a period of three years, by confinement in the county jail for a term of not less than forty-five days and not more than one year." (Emphasis supplied)

Additionally, Section 556.040, RSMo 1969, provides that offenses punishable by imprisonment in the county jail shall be deemed misdemeanors. It is, therefore, the opinion of this office that the third offense of driving with a blood-alcohol content of .10 percent or more is a misdemeanor.

Your second question is:

"b. If the second or third offense of driving with a blood-alcohol content of .10 percent or more is not within a period of three years, is this offense again considered a first offense?"

Section 564.439-2 states:

"Any person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, shall be punished as follows:

(1) For the first offense, by a fine of not less than fifty dollars or by confinement in the county jail for a term of not

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- more than three months, or by both such fine and confinement;

(2) For the second offense within a period of three years, by confinement in the county jail for a term of not less than seven days and not more than six months;

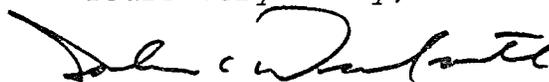
(3) For the third and subsequent offenses within a period of three years, by confinement in the county jail for a term of not less than forty-five days and not more than one year."

The meaning of a statute is determined by the legislative intent, taking the words used in their plain and ordinary meaning. State ex rel. Dravo Corporation v. Spradling, 515 S.W.2d 512 (Mo. 1974). The varying penalties prescribed by Section 564.439-2 evidence a legislative intent to punish the multiple violations thereof more severely in connection with the frequency of such violations within a three-year period. The words of the statute, given their plain and ordinary meaning, indicate the following:

The statute provides that the increased punishment for a second offense is applicable only when it is committed within a period of three years from the first offense. Thus, it is the opinion of this office that a second offense committed outside the three-year period will be punishable as a first offense. The statute further provides that the increased punishment for a third offense is applicable only when it is committed within three years from the first offense. It is, therefore, the opinion of this office that a third offense committed outside that period would be punishable as a first offense, unless it is within a three-year period from the offense immediately preceding it, in which case it is punishable as a second offense.

A case is now pending in the Supreme Court of Missouri in which the contention is made that the enactment of Section 564.439 repealed Section 564.440 on the date Section 564.439 became effective. It has long been the practice of this office to decline to render an opinion on a question which is pending in a case that is being litigated in court and which question must be decided by the court. We must, therefore, decline to issue an opinion covering your third and fourth questions.

Yours very truly,



JOHN C. DANFORTH
Attorney General