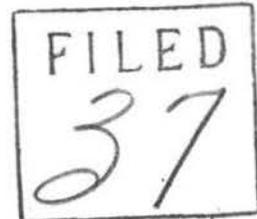


HABITUAL CRIMINAL ACT: For prosecution under Habitual Criminal Act it is only required that previous crime be punishable by imprisonment in the penitentiary.

February 8, 1944

Hon. Leo J. Harned
Prosecuting Attorney
Pettis County
Sedalia, Missouri

2.14



Dear Sir:

This is to acknowledge receipt of your letter in which you request the opinion of this department on two questions therein submitted. Your letter is as follows:

"Section 4854, R. S. 1939, provides that if a subsequent offense with which a defendant is charged be such that upon a first conviction defendant would be punished by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense.

"My problem upon which I would like to have your opinion is whether or not such statutory provision applies to offenses such as a violation of the motor vehicle act, which may be punished by a maximum of twenty-five years in the penitentiary but yet grades down to a fine and jail sentence.

"In State v. English, 274 S. W. 474, 1.c. the Supreme Court said: 'The section under which the defendant was charged provides that if one has been convicted and has served a term in the penitentiary his punishment for the second offense shall be the longest term prescribed for such con-

viction as if it were the first offense. You will note that the statute quoted refers to a punishment 'by imprisonment for a limited term of years'. If the defendant were charged, we will say, with grand larceny which has a punishment of from two to five years in the penitentiary, then, of course, the punishment would be five years in the penitentiary, but I am not sure whether the provision of the statute apply to a case as above mentioned, such as stealing a motor vehicle, where the punishment grades down from a term in the penitentiary to a fine and jail sentence. It is on this point I would appreciate your opinion and ruling. There are, of course, some decisions which seem to indicate that even in a case like the one mentioned for motor car theft, that under this habitual criminal act, the punishment shall be the maximum provided, in the penitentiary, but it does seem that that holding and the holding set out in State v. English is not in accordance with the express provisions of the statute.

"Another thing that I would like to have your opinion upon, is this: Does the Section 4854 apply in the case where the defendant was convicted of an offense punishable by imprisonment in the penitentiary and yet the defendant was never incarcerated in the penitentiary or even the jail, but assessed a fine and complied with that sentence, namely, paid a fine and costs. Of course, under State v. Marshall, 34 S. W. (2d) 29, the Supreme Court has held that the Section 4854 applies to offenses punishable by imprisonment in the penitentiary, although the defendant was actually imprisoned in a work house.

"It would seem that the same reasoning would apply where the defendant was convicted, say for felonious assault, under Section 4409, which carries punishment by imprisonment in the penitentiary not exceeding five years or in jail or a fine.

"I would appreciate your writing me relative to the above."

We restate your questions as we understand them.

First. May a person be charged under the Habitual Criminal Act, Section 4854, R. S. Mo. 1939, where the first offense for which he was convicted is a graded felony. For example, a prosecution under the Motor Vehicle Act, where the maximum penalty is twenty-five years and the punishment and the penalties run down to a fine and jail sentence.

Second. You desire to know whether there may be a prosecution under the Habitual Criminal Act, Section 4854, supra, where the defendant has been convicted of an offense and only paid a fine and was not incarcerated in a jail or penitentiary, although the offense was punishable by imprisonment in the penitentiary.

We think your first question may be answered by what was said by the Supreme Court in State v. Marshall, 326 Mo. 1141, 34 S. W. 29, 1. c. 31:

"While it is alleged in the information that the defendant was punished, for his previous offense of stealing a motor vehicle, by imprisonment in the city workhouse of the city of St. Louis, said offense was 'punishable by imprisonment in the penitentiary,' and therefore the allegations of the information are clearly sufficient to invoke the provisions of section 3702. Had the framers of this section intended that it should apply only to persons who have been punished, for a previous offense, by imprisonment in the penitentiary, undoubtedly they would have said so. They did say, in plain and unmistakable language, that it should apply 'to any person convicted of any offense punishable by imprisonment in the penitentiary,' and it cannot be construed otherwise. * * * * *

The gist of the quotation from the above case is that all that is necessary is that the offense be punishable by imprisonment in the penitentiary and not that he was punished by imprisonment in the penitentiary. The liability to a punishment in the penitentiary is all that the statute requires. What was said by the court in State v. English, 274 S. W. 470,

was criticized in the Marshall case, supra, and the court did not follow said case, saying that what was said in the English case was obiter dictum.

Replying then, to your second question we would say that it is not necessary that the defendant be actually incarcerated in a jail or penitentiary, in order to be prosecuted under the Habitual Criminal Act. It is necessary, however, that it be alleged and proven in a prosecution under the Habitual Criminal Act that he has been convicted of a crime punishable by imprisonment in the penitentiary, and not what he actually received by way of punishment.

It will be observed, upon a reading of Section 4854, supra, that said section provides that "the person convicted * * * shall be discharged, either upon pardon or upon compliance with the sentence," of a crime punishable by imprisonment in the penitentiary.

CONCLUSION

It is our opinion that a person may be prosecuted under the Habitual Criminal Act if he has previously been convicted and shall have been discharged, either upon pardon or upon compliance with the sentence although the penalties under the prior conviction scale down to a fine or jail sentence, if the offense is punishable by imprisonment in the penitentiary.

And, further, it is our opinion that it is not essential that the defendant be actually incarcerated in a jail or penitentiary to be subject to the provisions of the Habitual Criminal Act. However, he must be convicted of a crime punishable by imprisonment in the penitentiary.

Respectfully submitted,

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APPROVED:

ROY MCKITTRICK
Attorney-General

CRH:CP