

N.D.A.G. Letter to Johnson (Oct. 22, 1991)

October 22, 1991

Mr. Dennis Edward Johnson
State's Attorney
P.O. Box 1288
Watford City, ND 58854

Dear Mr. Johnson:

Thank you for your September 11, 1991, letter in which you asked if the determination of whether a person has violated N.D.C.C. § 39-08-01 a second time in five years is calculated from the date of the first offense to the date of the second offense or from the date of the first conviction to the date of the second conviction.

The pertinent portions of N.D.C.C. § 39-08-01 provide:

1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:
 - a. That person has a blood alcohol concentration of at least ten one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after the driving.
 - b. The person is under the influence of intoxicating liquor.
 - c. . . .

The penalty provision of the statute is found in subsection 4 thereof and provides, in part:

4. A person convicted of violating this section, or an equivalent ordinance, must be sentenced in accordance with this subsection.
 - a. For a first offense, the sentence must include both a fine of at least two hundred fifty dollars and an order for addiction evaluation by an appropriate licensed addiction treatment program.
 - b. For a second offense within five years, the sentence must include at least four days' imprisonment of which forty-eight hours must be served consecutively, or ten days' community

service; a fine of at least five hundred dollars; and an order for addiction evaluation by an appropriate licensed addiction treatment program.

The language employed in N.D.C.C. § 39-08-01(4) is clear. It states a legislative scheme for penalizing those individuals who have violated N.D.C.C. § 39-08-01. As part of that scheme, second and subsequent violators of the statute are subject to enhanced penalties for their offenses.

When the legislature amended N.D.C.C. § 39-08-01 in 1983 and provided for greater penalties for violating the statute, it also limited the use of prior convictions in imposing enhanced penalties. Under N.D.C.C. § 39-08-01.1 a conviction that occurred prior to July 1, 1981, could not be used in seeking an enhanced penalty under N.D.C.C. § 39-08-01(4).

In construing statutory enactments, the words therein are to be understood in their ordinary sense unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained. N.D.C.C. § 1-02-02. In this instance, the word "conviction" has been defined for purposes of N.D.C.C. title 39 as meaning a final order or judgment of conviction by the North Dakota Supreme Court or any lower court having jurisdiction provided that no appeal is pending and that the time for appeal has expired. N.D.C.C. § 39-06-30. Also, the language employed in N.D.C.C. § 39-08-01.1 convincingly indicates that the legislature considered the conviction to be the key in determining any prior violation of N.D.C.C. § 39-08-01. Consequently, it is my opinion that in determining whether a second offense has occurred under the provisions of N.D.C.C. § 39-08-04(4), the time is calculated from the date of the first conviction to the date of the second or subsequent conviction.

Sincerely,

Nicholas J. Spaeth

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