

**OPINION
69-225**

October 27, 1969 (OPINION)

Mr. Fabian E. Noack

State's Attorney

Foster County

RE: Motor vehicles - Operator's licenses - Driving while suspended

This is in reply to your letter of October 16, 1969, with regard to driving while a license is suspended or revoked.

Your Question No. 1 is stated as:

Facts - Defendant forfeits bail on a charge of DWI and thereafter the driver's license is suspended by the Safety Responsibility Division. Subsequently, Defendant is charged with driving a vehicle while license is suspended. Shortly thereafter, defendant, through his attorney, asks for a day in court on the DWI charge and such request is granted. Thereafter, the defendant is convicted of the DWI charge. Is the procedure proper to dismiss the charge of driving while license is suspended, since the order to suspend license was apparently not legal or final after bail was forfeited on the DWI charge?"

Your Question No. 2 is stated as:

Facts - Defendant has license suspended by Safety Responsibility Division for 30 days. The Safety Responsibility Division fails to return the license for a period of 5 days after expiration of the 30-day suspension period. Prior to the return of the license, the defendant is charged with driving while license is suspended. Should the charge be dismissed, since the administrative agency failed to return the license on the due date and therefore, defendant technically had his license suspension revoked at the end of the 30 day period?"

Your Question No. 3 is stated as:

Facts - Defendant is convicted of driving while license is suspended or revoked. Is it mandatory for the County Justice to imprison the defendant for at least two days or does the County Justice have the discretion to deferring of imposition sentencing or suspend the jail sentence?"

Your letter further indicates that these questions seem to arise quite frequently.

Looking at your first question, we note that Section 39-06-30 of the 1969 Supplement to the North Dakota Century Code provides:

CONVICTION - MEANING AND EFFECT. For purposes of title 39 of

the North Dakota Century Code the term 'conviction' shall mean a final order or judgment of conviction by a trial court having jurisdiction. Also, for the purposes of this chapter a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction."

In this same regard we note that subsection 6 of Section 39-06-31 of the North Dakota Century Code provides:

MANDATORY REVOCATION OF LICENSES. The commissioner shall revoke forthwith the license of any operator upon receiving a record of such operator's conviction of any of the following offenses, when such conviction has become final: * * *

6. Conviction of driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug, or under the influence of any other drug to a degree which renders him incapable of safely driving a motor vehicle."

In this same regard we note also that subsection 1 of Section 39-06-32 of the 1969 Supplement to the North Dakota Century Code provides as follows:

39-06-32. AUTHORITY TO SUSPEND LICENSES. The commissioner may suspend the license of an operator without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee:

1. Has committed an offense for which mandatory revocation of license is required upon conviction:

* * *. "

We are not going to review herein determinations made by the commissioner, insofar as the discretion to make determinations under the quoted statutes is given to the commissioner, not this office. However, we will make further assumptions of fact as to such commissioner's determinations for the purpose of completing the question you submit for the purpose of arriving at an answer to such questions.

Under the facts you give in your Question No. 1, we would assume that the commissioner determined that revocation of the license would not be proper in that under the quoted provision of Section 39-06-31, such "conviction has not become final." We would further assume, noting that the facts in the commissioner's possession, to-wit, forfeiture of bail, are the equivalent of a conviction under the provisions of the above quoted Section 39-03-30, on which basis the commissioner determined that there was a sufficient showing by its records or other sufficient evidence that the licensee has committed an offense for which mandatory revocation of license is required upon conviction, and on which basis the commissioner suspended the license. Looking to the facts given in your Question No. 1, we note that there is no indication that the defendant has applied to have the suspension of license rescinded, continued, modified or revoked. Thus, such suspension is made upon a valid record and has continued

through the date the offense of driving while license was suspended was committed. As a matter of fact, it is possible that the vacation of forfeiture of bail was granted prior to the date of commission of the offense of driving while license is suspended, though this would not appear to invalidate the order of suspension, assuming it was made upon a proper record. On such basis, it would be our opinion that it would not be proper to dismiss the charge of driving while license is suspended, assuming the order of suspension was still in effect as of that date.

Our answer to Question No. 1 is specifically in regard to the actual question presented in your letter. It seems very possible that a different result might obtain in the instance where under similar circumstances the license was revoked instead of suspended.

Looking to your Question No. 2, it would appear to us that one of the elements of the offense specified in Section 39-06-42 of the North Dakota Century Code is suspension or revocation of the license. Assuming that the alleged offense took place during a period of time when there was no suspension order in effect, regardless of whether the licensee was in physical possession of the license, there could be no conviction on which basis we would assume that the charge should be dismissed. There might be a greater problem if the offense charged were that specified in Section 39-06-16 of the 1969 Supplement to the North Dakota Century Code, though we would assume in those circumstances the defendant would request a continuance until such date as he could physically produce the license, at which point the charge could be dismissed.

We might further point out in response to your Question No. 2 that the suspension order does not necessarily expire thirty days after the date of its issuance. The form commonly specifies that the period is for thirty days after surrender of license. On such basis the instant the license was surrendered would be relevant in determining the date that the suspension order expires.

Looking at your Question No. 3, we note the provision of Section 39-06-42 of the North Dakota Century Code that: " * * * shall be punished by imprisonment for not less than two days nor more than six months * * *." It is our opinion that the phrase quoted is designed to designate a part of the punishment that can be imposed for a violation of that statute. It does not designate when that punishment shall be imposed. On such basis, it is our opinion that the county justice does have the discretion to defer imposition of sentence or suspend a part of the sentence imposed.

HELGI JOHANNESON

Attorney General