

Opinion No. 35

MOTOR VEHICLES; Drivers License revocation; LICENSES: Drivers Licenses; revocation—Sections 31-146, 31-149, 32-2142, Revised Codes of Montana, 1947.

Held: 1. Although Section 31-149 did not become effective until July 1, 1961, the Montana Highway Patrol Board must consider an offense of driving while under the influence of intoxicating liquor within five years prior to the effective date of Section 31-149.

February 2, 1962

Mr. Willis M. McKeon
County Attorney
Phillips County
Malta, Montana

Dear Mr. McKeon:

You have asked me how Section 31-149, Revised Codes of Montana 1947, as amended in 1961, is to be applied. The amended law reads in part as follows:

“. . . Provided, however, when any person is convicted or forfeits bail or collateral not vacated for the offense of operating or being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or narcotic drug or combination thereof, the board shall, upon receiving a report of such conviction or forfeiture of bail or collateral not vacated, suspend or revoke the license or driving privilege of such person for a period of (60) days. Upon receiving a report of a conviction or forfeiture of bail or collateral for a subsequent such offense, within five (5) years thereof, the board shall suspend or revoke the license or driving privilege of such person for a period of one (1) year.”

The factual situation you have presented is as follows: One "A" was convicted after July 1, 1961, the effective date of the amended law quoted *supra*, and the Montana Highway Patrol Board considered a prior offense that occurred in 1958. The specific question is whether the board could consider the prior offense that occurred in 1958 when the law did not become effective until July 1, 1961. For the reasons that follow it is my opinion that the board may consider the offense that occurred in 1958.

Section 12-201, RCM, 1947, expresses the following rule of statutory construction: "No law contained in any of the codes of Montana is

retroactive unless expressly so declared." This section, however, was intended to protect vested or similar rights and not a mere privilege. A license to drive a motor vehicle is a privilege and not a right. (33 Am. Jur. p. 381 § 65; Com. v. Cronin, 125 ALR 1455 366 Pa. 469, 9 A 2d. 408.) Our court has said that the rule against retroactive laws was designed to protect one against a law that would deprive or impair one's vested rights, acquired under existing laws, one which creates a new obligation, imposes a new duty or attaches a new disability, in respect to transactions already past. (Butte & Superior Mining Co. v. McIntyre, 71 Mont. 254, 263, 239 Pac. 730.)

An examination of the factual situation you have presented shows that the retroactive application of the law in question violates none of the interests protected by the statute prohibiting retroactive laws.

Moreover, it is essential that one distinguish punishment for a crime from the removal of a license as an exercise of the police power to protect the public safety. In the case you present the action is the revocation of a license for the protection of the motoring public. While the person found to be an incompetent motorist under 31-149 is incidentally harmed thereby, the primary intent of the statute is protection of the competent driver, not punishment of the incompetent.

You will note that both 31-146 and 31-149 refer to revocation upon the board receiving a report of conviction or forfeiture of bail not vacated, and revocation is mandatory. The conviction or forfeiture of bail means for an offense as defined by Section 32-2142 which is the criminal penalty imposed for violation of the law. Section 31-146 makes revocation mandatory upon conviction or forfeiture of bail for "driving" while under the influence of intoxicating liquor or narcotic drug or combination thereof, while 31-149 makes revocation mandatory upon conviction or forfeiture of bail for "operating or being in actual physical control" of a motor vehicle while under the influence of intoxicating liquor or narcotic drug or combination thereof. It is apparent that one who is "driving" is "operating or in actual physical control," so Section 31-149 has a broader application and is the controlling statute. Consequently, Section 31-149 not only partially supersedes 31-146, it makes revocation of the license mandatory and sets the minimum and maximum period of revocation. It further provides for consideration of a prior offense within a five year period.

It is therefore my opinion that though the amended law did not take effect until July 1, 1961, the Montana Highway Patrol Board must consider an offense within five years of this effective date. This is the revocation of a privilege and consequently not retroactive legislation.

Very truly yours,
FORREST H. ANDERSON
Attorney General