

VOLUME NO. 37

OPINION NO. 143

MOTOR VEHICLES - Sentence for conviction of driving under the influence; ALCOHOL - Sentence for conviction of driving under the influence; DRUGS - Sentence for conviction of driving under the influence; MUNICIPAL CORPORATIONS - City ordinance conflicting with state ordinance; STATUTES - State law conflicting with local ordinance; REVISED CODES OF MONTANA, 1947 - Sections 31-145, 32-2131(14), 32-2142.

- HELD: 1. The Legislature has provided that jail sentences may not be imposed for the first or second offense of driving under the influence of alcohol.
2. Municipal ordinances regarding driving under the influence of alcohol or drugs must be consistent with state law as provided in section 32-2142(5).

16 May, 1978

Jim Nugent, Esq.
City Attorney
City of Missoula
201 West Spruce
Missoula, Montana 59801

Dear Mr. Nugent:

You have requested my opinion regarding the following question:

1. Was it the intent of the legislature in amending section 32-2142, R.C.M. 1947, to preclude an individual from being given a jail sentence for either a first or second conviction of driving under the influence of alcohol?
2. Is Missoula's city ordinance regulating driving under the influence of alcohol invalid because it conflicts with state law?

The driving under the influence statute was amended by two bills during the 1977 legislative session. Prior to amendment section 32-2142 provided in pertinent part:

Persons under the influence of intoxicating liquor or of drugs. (a) It is unlawful and punishable as provided in paragraph (d) of this section for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of any motor vehicle upon the highways of this state.

...

(d) Every person who is convicted of a violation of this section shall be punished by imprisonment in the county or city jail for not more than six (6) months or by a fine of not less than one hundred dollars (\$100.00) or more than five hundred dollars (\$500.00) or by both such fine and

imprisonment. On a second conviction he shall be punished by imprisonment in the county or city jail for not less than ten (10) days nor more than six (6) months, to which may be added, at the discretion of the court, a fine of not less than three hundred dollars (\$300.00) nor more than five hundred dollars (\$500.00). On the third or subsequent conviction he shall be punished for a term of not less than thirty (30) days nor more than one (1) year, to which may be added at the discretion of the court a fine of not less than five hundred dollars (\$500.00) nor more than one thousand dollars (\$1,000.00).

(e) Each and every municipality in this state is hereby given authority to enact the foregoing paragraphs (a), (b), (c) and (d) of this section, with the word "state" in the first sentence of paragraphs (a) and (c) changed in each instance to read "municipality," as an ordinance, and is hereby given jurisdiction of the enforcement of said ordinance, and of the imposition of the fines and penalties therein provided.

(f) The board shall forthwith revoke the license or permit to drive and operating privilege and any nonresident operating privilege of any person upon receiving a record of such person's conviction or forfeiture of bail not vacated under this section.

Chapter 289, Laws of Montana 1977, approved April 5, 1977, amended section 32-2142 by requiring a mandatory minimum sentence of imprisonment of ten (10) days for persons convicted of a third or subsequent offense of driving under the influence. Chapter 430, Laws of Montana 1977, approved April 19, 1977, amended section 32-2142 by revising the penalties for driving while under the influence of alcohol and provided for the suspended execution of a sentence conditioned upon the defendant successfully completing an alcohol treatment program. As the amendments did not conflict, the code commissioner made a composite section embodying the changes made by both amendments. Statutes passed at the same time, and relating to the same general subject are to be construed together, and both given effect if possible. Bellote v. Bakken, 139 Mont. 43, 359 P.2d 372 (1962). Section 32-2142, as amended, now reads in pertinent part:

(2) It is unlawful and punishable as provided in subsection (3) of this section for any person who is under the influence of alcohol or any narcotic

drug or any other drug to a degree which renders him incapable of safely driving a motor vehicle to drive or be in actual physical control of a motor vehicle within this state. The fact that any person charged with a violation of this subsection is or has been entitled to use such a drug under the laws of this state does not constitute a defense against any charge of violating this subsection.

(3) Every person who is convicted of a violation of this section shall be punished by a fine of not less than \$100 or more than \$500. On a second conviction, he shall be punished by a fine of not less than \$300 or more than \$500. On the third or subsequent conviction, he shall be punished by imprisonment for a term of not less than 30 days or more than 1 year, to which may be added, in the discretion of the court, a fine of not less than \$500 or more than \$1,000. Notwithstanding any provision to the contrary providing for suspension of execution of a sentence imposed under this subsection, the imposition or execution of the first 10 days of the jail sentence imposed for a third or subsequent offense that occurred within 5 years of the first offense may not be deferred or suspended.

(4) Except as otherwise provided in this section, the court may, in its discretion, suspend the execution of any sentence imposed under subsection (3) on the condition that the defendant successfully complete a course in a driver improvement school approved by the court or an alcohol treatment program approved by the department of institutions. Each school or institution providing such education or treatment shall, at the commencement of the education or treatment, notify the court that the defendant has been accepted by the school or the treatment program. If the defendant fails to attend the school or the treatment program, the school or institution shall notify the court of the failure.

(5) Each municipality in this state is given authority to enact subsections (1) through (4) of this section, with the word "state" in the first sentence of subsection (2) changed to read "municipality," as an ordinance and is given jurisdiction of the enforcement of the ordinance and of the imposition of the fines and penalties therein provided.

By virtue of chapter 430, Laws of Montana, 1977, the Legislature expressly eliminated the provisions regarding jail sentence for the first and second conviction of driving under the influence.

The mere fact that the Legislature enacts an amendment indicates that it intended to change the original act. A material change in the language of the original act is presumed to indicate a change in legal rights, a change in substance rather than in mere form. Montana Milk Control Board v. Community Creamery, et. al., 139 Mont. 523, 366 P.2d 151 (1961). Here the presumption that the Legislature did not intend a useless act and intended to make a material change in section 32-2142 leads to the conclusion that a jail sentence may not be imposed upon an individual for either the first or second conviction of driving under the influence of alcohol. Kish v. Montana State Prison, 161 Mont. 297, 505 P.2d 891 (1973).

That interpretation is consistent with the legislative intent expressed in the title of the bill:

AN ACT TO REVISE THE PENALTIES FOR DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOL OR DRUGS; TO CLARIFY THAT HABITUAL USERS WHO DRIVE ARE NOT SUBJECT TO CRIMINAL PENALTIES UNLESS THEY ARE UNDER THE INFLUENCE WHEN THEY DRIVE; TO PROVIDE FOR SUSPENDED EXECUTION OF SENTENCE CONDITIONED UPON EDUCATION OR TREATMENT; AMENDING SECTIONS 31-145, 31-146, 31-149, AND 32-2124, R.C.M. 1947.
(Emphasis added.)

In passing the amendments it was the intent of the Legislature to adopt a novel and hopefully a more successful approach to the problem of alcohol and driving. The section now provides that most sentences may, in the court's discretion, be suspended on the condition that the defendant successfully complete a course in an acceptable driver improvement school or an alcohol treatment program approved by the Department of Institutions. It is clear that the Legislature determined that this approach would do more to solve a serious social problem than the imposition of jail terms for first and second offenders.

The provisions requiring mandatory revocation of a driver's license upon conviction of driving under the influence of alcohol were also amended by chapter 430, Laws of Montana 1977. Section 31-146 makes the revocation of a driver's license mandatory upon the conviction of driving while under

the influence. Section 31-149 provides that a license shall be suspended for a period of six (6) months upon first conviction and further that the license shall be revoked for a period of one year for any subsequent conviction within five (5) years of the first offense. However, consistent with the rehabilitation approach adopted by the 45th Legislative Session, section 31-145(b) was amended to provide in pertinent part:

The court may also recommend that the division issue a restricted probationary license in lieu of the suspension required in 31-149(b) on the condition that the individual attend a driver improvement school or an alcohol treatment program if one is available. The division shall issue a restricted probationary license unless the person otherwise is not entitled to a Montana operator's or chauffeur's license.

You have also asked whether Missoula's city ordinance regulating driving under the influence is invalid because it conflicts with state law. Section 20-22.1, Missoula City Code, essentially follows prior Montana law and provides for a mandatory jail sentence for conviction of driving a vehicle while under the influence of intoxicating liquor.

Local governments, even those with self-governing powers, are denied the exercise of any power in a manner inconsistent with state law in any area affirmatively subjected to state regulation or control. Section 47A-7-203. See also City of Bozeman v. Ramsey, 139 Mont. 148, 362 P.2d 206 (1961); City of Billings v. Herold, 130 Mont. 138, 296 P.2d 263 (1956). Section 32-2131(14) specifically provides that with respect to streets and highways under their jurisdictions, cities and towns may enact ordinances regulating vehicles and operators thereof which are not in conflict with state law. Section 32-2142(5), quoted above, expressly grants authority to municipalities to enact ordinances consistent with state law. Municipalities must follow the guidelines provided in the section. Any additional provisions would be in conflict with state law, and exceed the municipality's jurisdiction.

THEREFORE, IT IS MY OPINION:

1. The Legislature has provided that jail sentences may not be imposed for the first or second offense of driving under the influence of alcohol.

2. Municipal ordinances regarding driving under the influence of alcohol or drugs must be consistent with state law as provided in section 32-2142(5).

Very truly yours,

MIKE GREELY
Attorney General