

VOLUME NO. 38

OPINION NO. 63

ALCOHOL - Prosecution for driving under the influence third offense, sentence for conviction of driving under the influence;

MOTOR VEHICLES - Prosecution for driving under the influence third offense, sentence for conviction of driving under the influence;

MONTANA CODE ANNOTATED - Sections 61-8-401, 61-8-714,

HELD: Only those prior convictions which have occurred within five years of a current DWI offense may be counted in determining whether the current prosecution is for a third offense.

18 January 1980

Richard A. Simonton, Esq.
Dawson County Attorney
Hagenston Building
Glendive, Montana 59330

Dear Mr. Simonton:

You have requested my opinion regarding the following question:

During what period of time must previous convictions for driving under the influence of alcohol (DWI) have occurred before they may be counted in determining whether a current DWI prosecution is one for a third offense pursuant to section 61-8-714, MCA?

Section 61-8-401, MCA, makes it unlawful for any person who is under the influence of alcohol to drive or to be in actual physical control of a motor vehicle upon the highways of this State. Criminal penalties for violations of this statute are set forth at section 61-8-714, MCA:

(1) Every person who is convicted of a violation of 61-8-401 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 to which may be added, in the discretion of the court, imprisonment for a term not more than 30 days. 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.

As can readily be seen, the severity of the sanction is dependent upon the number of previous convictions for the same offense. Section 61-8-714(3), MCA, requires that in order to be counted for purposes of computing the number of convictions, "previous" convictions must fall within a particular time frame:

An offender is considered to have been previously convicted for the purpose of this section if less than 5 years have elapsed between the commission of the present offense and a previous conviction.

That section appears ambiguous as to whether, in order to prosecute and punish a third offense, both "previous" convictions must have occurred within five years of the current offense.

Ambiguous statutes must be construed in accordance with the cardinal rule of statutory construction concerning legislative intent. In determining legislative intent, the language of the statute must be taken as a whole. Haker v. Southwestern Ry. Co., ___ Mont. ___, 578 P.2d 724 (1978); State v. Stewart, 53 Mont. 18, 161 P. 309 (1916). Thus, the later portion of the statute can be interpreted by referring to a prior subsection.

Section 61-8-714(1), MCA, is clear and unambiguous. The first ten days of a sentence may not be suspended for a third offense that occurred within five years of the first offense. If the apparently ambiguous subsection (3) were read as requiring less than that required by subsection (1), a conflict would arise. Every part of a statute should be construed with reference to the whole to avoid conflict and

give effect to every provision. State v. Bawden, 51 Mont. 357, 152 P. 761 (1915).

Construing the statute to require all three offenses to occur within a five year period is in accord with the universally recognized precept that penal statutes must be strictly construed. State ex rel. Juhl v. District Court, 107 Mont. 309, 315, 84 P.2d 979 (1938).

The language employed in the title of the statute is often helpful in determining the intent of the Legislature and thus the meaning of the language of the statute. Barney v. Bd. of R.R. Commissioners, 93 Mont. 115, 128, 17 P.2d 82 (1932).

1979 Montana Laws, chapter 56, amended section 61-8-714, MCA, by adding the entire language of subsection (3) relating to the computation of previous convictions. Its title reads as follows:

An act to amend section 61-8-714, MCA, by defining conviction, as used in that section, as a final conviction or a forfeiture of bail or collateral deposited to secure the defendant's appearance, which forfeiture has not been vacated and which conviction or forfeiture occurred within five years of the commission of the present offense. (Emphasis added.)

When viewed in this context, the intent of the Legislature-- and therefore the meaning of the statute-- becomes clear. The purpose of the amendment to section 61-8-714, MCA, is to supply a comprehensive definition of the term "conviction" for the purposes of applying the penalties of that section.

The use of the conjunctive "and" in the underlined clause of the title indicates that any DWI conviction which was secured more than five years previous to the commission of the current offense cannot meet the definition of a "conviction" in section 61-8-714, MCA. It therefore is not recognized for purposes of applying that section.

THEREFORE, IT IS MY OPINION:

Only those prior convictions which have occurred within five years of a current DWI offense may be counted in

determining whether the current prosecution is for a third offense.

Very truly yours,

MIKE GREELY
Attorney General