

**FORMAL OPINION
2003-F-01**

DATE ISSUED: January 13, 2003

REQUESTED BY: Timothy Priebe, Dickinson City Attorney

QUESTION PRESENTED

Whether a violation of a municipal ordinance equivalent to N.D.C.C. § 39-06-42(1) is an “offense” permitting its use to invoke the enhanced penalty imposed by that section against repeat offenders.

ATTORNEY GENERAL’S OPINION

It is my opinion that a violation of a municipal ordinance equivalent to N.D.C.C. § 39-06-42(1) is an “offense” permitting its use to invoke the enhanced penalty imposed by that section against repeat offenders.

ANALYSIS

Prior to its amendment in 1997, N.D.C.C. § 39-06-42(1) imposed a maximum sentence of a class B misdemeanor upon any person who drove a motor vehicle on a highway or any public or private area to which the public had a right to access for vehicular use in this state while that person’s license or privilege to do so was suspended or revoked in any jurisdiction. An amendment to N.D.C.C. § 39-06-42(1) by the 1997 Legislative Assembly established an enhanced maximum penalty of a class A misdemeanor upon any person who had committed a fourth or subsequent offense within a five year period. 1997 Sess. Laws ch. 335, § 1. Subsection 39-06-42(1), N.D.C.C., now provides:

Except as provided in chapters 39-16 and 39-16.1 and section 39-06.1-11, any person who drives a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state while that person's license or privilege so to do is suspended or revoked in any jurisdiction is guilty of a class B misdemeanor for the first,

second, or third offense within a five-year period. Any subsequent offense within the same five-year period is a class A misdemeanor.

A city has the concurrent power to enact ordinances regulating streets, traffic, and the operation of motor vehicles in the exercise of its police power. N.D.C.C. § 40-05-02(14). Other state statutes clearly anticipate and recognize that a municipality may adopt an ordinance equivalent to N.D.C.C. § 39-06-42. See, e.g., N.D.C.C. §§ 39-06-43, 39-06.1-05.

The addition of the enhanced class A misdemeanor penalty is invoked if the violator has three prior offenses within five years preceding the most recent violation. Unlike other statutory provisions imposing enhanced penalties, the 1997 amendment to N.D.C.C. § 39-06-42(1) did not make reference to whether the prior offenses included "equivalent ordinance" violations. However, the amendment also did not limit the prior offenses solely to a violation of N.D.C.C. § 39-06-42(1).

The term "offense" is not defined in N.D.C.C. title 39.¹ However, unless a contrary intention plainly appears, words used in any statute are to be understood in their ordinary sense. We may look to the definition of "offense" in N.D.C.C. § 12.1-01-04(20) for guidance in defining that term in other areas of the North Dakota Century Code. N.D.C.C. § 1-02-02. N.D.C.C. § 12.1-01-04(20) defines "offense" as "conduct for which a term of imprisonment or a fine is authorized by statute after conviction." See, State v. Jones, 591 N.W.2d 135, 136 (N.D. 1999) (stating that the definition of "offense" in N.D.C.C. § 12.1-01-04(20) may be used to assist in construing that term in N.D.C.C. ch. 19-03.1).

The conduct N.D.C.C. § 39-06-42(1) makes an "offense" is driving "a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state while that person's license or privilege so to do is suspended or revoked in any jurisdiction." That conduct is an offense under N.D.C.C. § 39-06-42(1) regardless of whether it occurs within a municipality or is prosecuted pursuant to a similar municipal ordinance. Accordingly, it is my opinion that a violation of a municipal ordinance equivalent to N.D.C.C. § 39-06-42(1) is an "offense" permitting its use to invoke the enhanced penalty imposed by that section against repeat offenders.

¹ The term "equivalent ordinance" is, however, defined in N.D.C.C. § 39-06.1-01(2) as follows: "'Equivalent ordinance' or 'equivalent ordinances' means city, state, or other jurisdiction ordinances which are comparable to the cited statute, and define essentially the same offense, despite the fact that the language of the ordinance may differ, or differing procedural points or methods of proof may be provided."

Although reference to the legislative history is not necessary to resolve this question, the legislative history is consistent with this conclusion. While the legislative history does not specifically state that equivalent municipal ordinance violations would be prior offenses for the purpose of invoking the enhanced penalty, the legislative history is clear in stating the purpose for the amendment: to increase the penalties to be imposed against persons who repeatedly violate the driving under suspension or revocation laws. District Judge Gail Hagerty provided testimony to both the House and Senate Transportation Committees that the then-existing sentence for driving under suspension did not deter repeat offenders and requested that the courts be given an option of imposing longer jail sentences to provide greater consequences for those drivers who repeatedly demonstrate unwillingness or inability to comply with the law. Hearing on H.B. 1108 Before the House Transp. Comm., 1997 N.D. Leg. (Jan. 16) (Testimony of the Honorable Gail Hagerty, District Judge); Hearing on H.B. 1108 Before the Senate Transp. Comm., 1997 N.D. Leg. (Jan. 30) (Testimony of the Honorable Gail Hagerty, District Judge).

The applicability of the statute's increased penalties to offenders with previous equivalent municipal ordinance convictions is also clear from the legislative history. In testimony before the Senate Transportation Committee, a Minot police officer referred to cases processed through the Minot municipal court in which individuals had been found guilty of three or more driving under suspension or revocation offenses. Hearing on H.B. 1108 Before the Senate Transp. Comm., 1997 N.D. Leg. (Jan. 30) (Testimony of Mike Marchus). Case reports were provided to the Senate Transportation Committee by the officer disclosing the number of repeat offenders arrested by officers of his department for a three year period. On behalf of the Minot Police Department, the officer supported the amendment to N.D.C.C. § 39-06-42(1) which enhanced the penalty for a fourth driving under suspension or revocation offense within a five year period to a class A misdemeanor. Hearing on H.B. 1108 Before the Senate Transp. Comm., 1997 N.D. Leg. (Jan. 30) (Testimony of Mike Marchus). Thus, the Legislative Assembly's clear intent in enacting the 1997 amendment to N.D.C.C. § 39-06-42(1) was to increase the potential sentence of a person who repeatedly drives a motor vehicle while that person's license or privilege to do so is suspended or revoked, regardless of whether the prior offenses were charged pursuant to N.D.C.C. §39-06-42(1) or an equivalent municipal ordinance.

EFFECT

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.²

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² See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).