

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 92-18

Date issued: November 23, 1992

Requested by: Dennis Edward Johnson, McKenzie County
State's Attorney

- QUESTION PRESENTED -

Whether a court must impose the 90-day imprisonment penalty of N.D.C.C. ' 39-08-01.2 upon persons convicted either of N.D.C.C. ' 39-08-01 as a first or second offender or of N.D.C.C. ' 39-08-03.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a court must impose the 90-day imprisonment penalty of N.D.C.C. ' 39-08-01.2 upon persons convicted either of N.D.C.C. ' 39-08-01 as a first or second offense or of N.D.C.C. ' 39-08-03.

- ANALYSIS -

N.D.C.C. ' 39-08-01.2 provides:

39-08-01.2. Special punishment for causing injury or death while operating a vehicle while under the influence of alcohol.

1. The penalty provided in this section applies when:
 - a. A person is convicted of an offense under chapter 12.1-16 and the conviction is based in part on the evidence of the person's operation of a motor vehicle while under the influence of alcohol or drugs;

- b. A person is convicted of violating section 39-08-03 based in part on the evidence of the person's operation of a motor vehicle while under the influence of alcohol or drugs and the violation caused serious bodily injury, as defined in section 12.1-01-04, to another person; or
 - c. A person is convicted of violating section 39-08-01 and the violation caused serious bodily injury, as defined in section 12.1-01-04, to another person.
2. If the defendant was at least eighteen years of age at the time of the offense under chapter 12.1-16, the sentence under that chapter must be at least one year's imprisonment. If the defendant was at least eighteen years of age at the time of the violation of section 39-08-01 or 39-08-03, the sentence under either section must be at least ninety days' imprisonment. The sentence under chapter 12.1-16 or section 39-08-01 or 39-08-03 may not be suspended unless the court finds that manifest injustice would result from imposition of the sentence. The sentence must be served in its entirety, without benefit of parole or pardon.
3. If the defendant was less than eighteen years of age at the time of the offense, the punishment may be in accordance with subsection 2 or chapter 27-20.

N.D.C.C. ' 39-08-01, which prohibits the operation of a motor vehicle while under the influence of intoxicating liquor or drugs, classifies the offense as a class B misdemeanor for the first or second conviction of that section in a five-year

period. N.D.C.C. ' 39-08-01(2). Unless a motor vehicle operator has been charged and convicted of aggravated reckless driving, classified as a class A misdemeanor, the offense of reckless driving in N.D.C.C. ' 39-08-03 is classified as a class B misdemeanor. Class B misdemeanors are punishable by a penalty of up to 30 days imprisonment, a fine of \$500, or both. N.D.C.C. ' 12.1-32-01(6).

In cases in which a person has violated N.D.C.C. ' 39-08-01 and the violation caused serious bodily injury, or when a violation of N.D.C.C. ' 39-08-03 is based in part on the evidence of the person's operation of a motor vehicle while under the influence of alcohol or drugs and the violation caused serious bodily injury, N.D.C.C. ' 39-08-01.2 requires that the court sentence the offender to at least 90 days imprisonment. A limited exception exists for defendants who were under eighteen years of age at the time the offense occurred. This term of imprisonment exceeds the maximum term of imprisonment for a class B misdemeanor. Thus there would appear to be a conflict between N.D.C.C. " 12.1-32-01 and 39-08-01.2.

In construing penal statutes, it is well settled that any ambiguities should be resolved in favor of the defendant. State v. Sheldon, 312 N.W.2d 367, 369 (N.D. 1981). This rule of leniency, however, does not apply where the legislative intent is clear. See State v. Rambousek, 479 N.W.2d 832, 835 (N.D. 1992). Ordinarily, legislative intent is presumed clear from the face of the statute. Milbank Mut. Ins. Co. v. Dairyland Ins. Co., 373 N.W.2d 888, 891 (N.D. 1985); N.D.C.C. ' 1-02-05.

In this case, the clear language of N.D.C.C. ' 39-08-01.2 applies to a violation of N.D.C.C. " 39-08-01 and 39-08-03, without reference to the classification of the offense. Merely because the North Dakota legislature has set forth a classification of an offense for punishment purposes does not prohibit the legislature from declaring or allowing the imposition of a specific punishment for violation of an offense defined by North Dakota law. As a valid exercise of

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its police power, the North Dakota legislature may define what acts will constitute criminal offenses and set maximum and minimum sentencing guidelines for violation of those offenses.

A trial court has both the power and duty to impose a particular sentence within the limits of the maximum and minimum penalty prescribed by statute for the particular offense. State v. Brandon, 413 N.W.2d 340 (N.D. 1987). The general rule of statutory construction, codified in N.D.C.C. ' 1-02-07, is that a particular provision controls over a general.

An examination of the legislative history of N.D.C.C. ' 39-08-01.2 discloses a clear legislative intent that the enhanced punishment imposed by that section would be an enhanced penalty in those cases in which serious bodily injury is caused by an operator of a motor vehicle while in violation of N.D.C.C. " 39-08-01 or 39-08-03.

N.D.C.C. ' 39-08-01.2 was introduced in the 1983 Legislative Session as Senate Bill No. 2373. This section was one of many revisions to the driving while under the influence law presented by the Governor's Task Force on Drinking and Driving. In a summary of the provisions of Senate Bill No. 2373 presented to the House Judiciary Committee on March 2, 1983, an explanation was given of that portion of Senate Bill No. 2373, later codified as N.D.C.C. ' 39-01-01.2. Reference is made in the summary of Senate Bill No. 2373 that the 90 days in jail was to be a mandatory minimum penalty. In addition, the summary also provided that the special penalties for causing injury or death are to be in addition to any penalties imposed for a "DWI offense."

Under the pre-1987 version of N.D.C.C. ' 39-08-01.2, the enhanced penalty provisions were only applicable whenever a defendant was convicted of driving under the influence (N.D.C.C. ' 39-08-01) and convicted of manslaughter (N.D.C.C. ' 12.1-16-02), negligent homicide (N.D.C.C. ' 12.1-16-03), or reckless driving involving serious bodily injury, if both convictions arose from the same occurrence. During the 1987 Legislative Session, Senate Bill 2468 was passed amending

N.D.C.C. ' 39-08-01.2. Deputy Attorney General Bruce Quick, in his written testimony before the Senate Judiciary Committee on Senate Bill No. 2468, summarized the pertinent amendments as follows:

. . . .

"Revise the provisions mandating minimum jail sentences for a DUI offender causing injury or death. While the minimum sentences would remain 90 days and one year respectively, the offender would no longer need to be charged and convicted for both DUI and manslaughter, negligent homicide, or aggravated reckless driving. Instead of consolidating several offenses into one trial, raising concerns over "double jeopardy," the amended provisions would apply the special penalties in a conviction of a single offense if the evidence shows that the resulting death or injury is partly attributable to the driver being under the influence."

By including N.D.C.C. ' 39-08-01, without reference to any classification, as one of the "single offenses" to which the enhanced mandatory minimum sentences would apply, the legislature clearly contemplated a mandatory sentence which would otherwise exceed the statutory maximum. See generally State v. Clark, 367 N.W.2d 168, 170 (N.D. 1985) (legislature is presumed to know the law when it enacts legislation).

If the statutory conditions of N.D.C.C. ' 39-08-01.2 have been met, the legislature has established a mandatory sentence to be imposed upon persons convicted of violating N.D.C.C. " 39-08-01 or 39-08-03 when the violations caused serious bodily injury to another person. Although persons convicted of a first or second N.D.C.C. ' 39-08-01 offense may still be considered to have been convicted of a class B misdemeanor, those persons will be subject to the 90-day mandatory minimum imprisonment if the N.D.C.C. ' 39-08-01 violation caused serious bodily injury to another person. In these situations,

the sentence required by N.D.C.C. ' 39-08-01.2 would be both a mandatory minimum sentence as well as a statutory maximum.

Although the 90-day imprisonment provision may also be applicable to a class B misdemeanor of reckless driving committed in violation of N.D.C.C. ' 39-08-03, it is likely that the enhanced penalty of N.D.C.C. ' 39-08-01.2 will have little actual interrelation between that section and the general classification of reckless driving as a class B misdemeanor. N.D.C.C. ' 39-08-03 also includes the offense of aggravated reckless driving in cases in which a person who, by reason of reckless driving as defined in that statute, causes or inflicts injury upon the person of another. Aggravated reckless driving is classified as a class A misdemeanor with a maximum punishment of one year imprisonment, a \$1,000 fine, or both imprisonment and fine. If it can be established that a person operated a motor vehicle recklessly in violation of N.D.C.C. ' 39-08-03 and caused serious bodily injury thereby invoking the enhanced penalty of N.D.C.C. ' 39-08-01.2, the prosecutor would likely charge the offense of aggravated reckless driving, a class A misdemeanor, rather than reckless driving, a class B misdemeanor. If a person is convicted of aggravated reckless driving under N.D.C.C. ' 39-08-03, the 90-day mandatory minimum jail sentence would be well within the general penalty classification of a class A misdemeanor.

Therefore, it would appear that the enhanced 90-day imprisonment mandatory minimum penalty imposed by N.D.C.C. ' 39-08-01.2 would, in the most practical sense, have the effect of increasing the penalty of a classified offense in those cases where the offender is a first or second violator of N.D.C.C. ' 39-08-01 and such violation caused serious bodily injury to another person. As I have concluded, the legislature has the authority to define an offense and the penalties for that offense. The courts have the power and duty to impose a sentence in accordance with the penalties mandated by the legislative assembly.

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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.

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