**OPINION**
**55-30**

September 6, 1955 (OPINION)

CONVICTIONS

RE: Foreign Convictions - Second Offense

We have received your request for an opinion dated August 26, 1955.

You state that a certain person was convicted under section 39-0801 of the 1953 Supplement to the North Dakota Revised Code of 1943. This person had been convicted of a similar offense in Minnesota in 1951, and you ask the following questions:

1. Does the North Dakota law contemplate convictions in other states of the United States as a basis for imposing the higher sentence or does the statute contemplate merely two convictions in North Dakota?

Where the crime is a felony there is no question that convictions in other states are to be considered in determining punishment. See sections 12-1620 and 12-1621 of the 1943 Revised Code. See also Ryan v. Nygaard, 70 N.D. 687; Rickter v. Severson 63 N.W. 2nd 265. The case in question being a misdemeanor and there being no statute authorizing the court to consider convictions in other states, we doubt that the court may use such out-of-state convictions as basis for sentence as a second offense.

2. Is the ninety-day sentence mandatory, that is, must the court impose it and then require the defendant to serve ninety days, or can be suspend all or any portion thereof?

We believe that a court in assessing of punishment for a crime where the penalty is fixed by law cannot assess less than the minimum nor more than the maximum. We believe the court has the inherent power to suspend sentences, although there are authorities to the effect that a court cannot suspend a sentence unless so empowered by statute.

3. For what period of time may a court refer back in order to say that a present conviction is a second offense?

It would seem that the court ordinarily may go back as far as it chooses in saying that a present conviction is a second offense, although we believe a court should exercise good judgment in this matter. In the case of People v. Millar, 5 N.W. 2nd 455, a Michigan case, the court held in a prosecution for drunken driving that a second offense charge was not barred by a six-year statute of limitations. The court said the prior offense is merely a circumstance to be considered in imposing a more severe penalty for second offenders. We believe that subsection 5 of section 30 of Chapter 251 of the 1955 Session Laws, which deals with mandatory revocation of licenses, refers to two convictions or forfeiture of bail within this state and applies only if two convictions are had

within any given eighteen-month period.

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