

1981 S.C. Op. Atty. Gen. 81 (S.C.A.G.), 1981 S.C. Op. Atty. Gen. No. 81-53, 1981 WL 96579

Office of the Attorney General

State of South Carolina

Opinion No. 81-53

June 12, 1981

**\*1 SUBJECT: Time periods for determining number of offenses of driving under the influence cases.**

An individual arrested for DUI but not tried prior to the date upon which Act No. 76 of 1981 took effect should be tried as a first offender, if his prior violation occurred more than five years ago.

TO: Director

Motor Vehicle Division, SCDHPT

QUESTION:

Whether an individual who has been arrested for DUI but not tried prior to the date upon which Act No. 76 of 1981 took effect, should be charged with a second offense if his prior violation occurred more than five years ago?

OPINION:

Act No. 76 of 1981 amended [Code Section 56-5-2940](#) by changing the period of time for determining prior offenses from ten years to five years for penalty purposes. The amendment is silent as to the intention of the General Assembly with respect to those violations which occur before the effective date of the new act which have not yet been disposed of. The absence of such a savings clause indicates an intention that the earlier statute be repealed to the extent that it is repugnant to the new Act. [State v. Defee, 144 S.E.2d 806 \(1965\)](#).

A change of the elements of the offense or in the elements of the penalty will destroy the identity of the offense and effect a repeal to the extent of the repugnance. [State v. Defee, supra](#); [State v. Moore, 122 S.E. 672 \(1924\)](#). The changes enacted, in the opinion of this office, directly affect the elements of the offense. The Supreme Court has previously determined that the allegation of a prior DUI offense is appropriate, as an element of the offense, to establish the jurisdiction of the circuit court. [Tyler v. State, 247 S.C. 34, 145 S.E.2d 434 \(1965\)](#). Since the General Assembly has determined that a previous violation is only to be considered if it occurred within the last five years, one charged with a DUI, with a previous conviction which is over five years old, must be tried as a first offense because one of the jurisdictional elements of the offense has been removed by the amendment. The effect of a repeal of a statute is to consider that it was never enacted. In this case, the offense itself was not repealed, but only a portion of the statute concerning the penalty provisions. One charged prior to the effective date of the act, but not yet tried, should be subject to the provisions of the new act.

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