

1978 S.C. Op. Atty. Gen. 95 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-69, 1978 WL 22550

Office of the Attorney General

State of South Carolina

Opinion No. 78-69

April 11, 1978

***1 SUBJECT: Habitual Offenders Act**

- (1) That the Habitual Offenders Act is not unconstitutional on the theory that it is an ex post facto law.
- (2) Prosecutions against habitual offenders under Section 56–1–1100 may be brought in addition to the underlying traffic offense.

TO: Honorable William T. Jones
Solicitor
Eighth Judicial Circuit

QUESTIONS:

1. Does consideration of traffic convictions which occurred prior to the enactment date of the Habitual Offenders Act render that act in such situations unconstitutional as an ex post facto law?
2. In enforcing the penalties provided for violations of the Habitual Offenders Act, are separate prosecutions contemplated for the offense committed while under suspension as an habitual offender and also for violation of the Habitual Offenders Act itself?

AUTHORITIES:

[Section 56–1–1010, et seq., 1976 Code of Laws of South Carolina;](#)

[Section 56–1–1120, 1976 Code of Laws of South Carolina;](#)

[Section 56–1–1100, 1976 Code of Laws of South Carolina;](#)

[Section 56–1–1110, 1976 Code of Laws of South Carolina;](#)

[Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648, 650;](#)

[Bouie v. Columbia, 378 U.S. 347, 353, 84 S.Ct. 1697, 1702, 12 L.Ed.2d 894 \(1964\);](#)

[Cooley v. Texas Department of Public Safety, 348 S.W.2d 267 \(Tex. 1961\);](#)

[Huffman v. Com., 210 Va. 530, 172 S.E.2d 788 \(1970\);](#)

[Zarsky v. State, 281 So.2d 553 \(Fla. 1973\);](#)

[State v. Scheffel](#), 82 Wash.2d 872, 514 P.2d 1052 (1973);

[Casci v. State](#), 293 So.2d 403 (Fla. 1974);

[Fowler v. State](#), 235 Ga. 535, 221 S.E.2d 9 (1975);

[Johnston v. State](#), 236 Ga. 370, 223 S.E.2d 808 (1976);

[State v. Callaway](#), 236 Ga. 613, 225 S.E.2d 230 (1976);

[Cross v. State](#), 119 So. 380 (Fla. 1928);

[Craig v. State ex rel. Van Natta](#), 322 N.E.2d 400 (Ind. 1975);

[Wilkins v. Taylor](#), 268 S.C. 371, 274 S.E.2d 212 (1977).

DISCUSSION:

I.

You have asked whether consideration by the courts of previous traffic convictions arising before the effective date of the Habitual Offenders Act ([Section 56–1–1010](#), *et seq.*) serves to render that act in those situations unconstitutional as an *ex post facto* law. It is our opinion that it does not.

The United States Supreme Court, quoting from [Calder v. Bull](#), 3 Dall. 386, 390, 1 L.Ed. 648, 650, has defined an *ex post facto* law as one ‘that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action,’ or ‘that *aggravates a crime*, or makes it *greater* than it was, when committed.’ [Bouie v. Columbia](#), 378 U.S. 347, 353, 84 S.Ct. 1697, 1702, 12 L.E.2d 894 (1964).

Although the South Carolina Supreme Court to date has not had occasion to address this question, challenges to Habitual Offender Acts on this ground in other jurisdictions have consistently been rejected. [Cooley v. Texas Department of Public Safety](#), 348 S.W.2d 267 (Tex. 1961); [Huffman v. Com.](#), 210 Va. 530, 172 S.E.2d 788 (1970); [Zarsky v. State](#), 281 So.2d 553 (Fla. 1973); [State v. Scheffel](#), 82 Wash.2d 872, 514 P.2d 1052 (1973); [Casci v. State](#), 293 So.2d 403 (Fla. 1974); [Fowler v. State](#), 235 Ga. 535, 221 S.E.2d 9 (1975); [Johnston v. State](#), 236 Ga. 370, 223 S.E.2d 808 (1976); [State v. Callaway](#), 236 Ga. 613, 225 S.E.2d 230 (1976). The reasoning of the courts was well-expressed in [Cross v. State](#), 119 So. 380 (Fla. 1928):

*2 The statute is in no sense retroactive. It is prospective in its operation. It imposes enhanced punishment for none but future crimes committed after its enactment. It deals with offenders only for offenses committed after its passage, but provides that in fixing the punishment for the later offense, the condition into which the offender has brought himself by his previous conduct shall be taken into consideration. In punishing offenders for a criminal habit, the existence of which cannot be established without showing their former convictions as well as the conviction for which the enhanced punishment is imposed, the increased severity of the punishment for the second or subsequent offense is not a punishment of the person a second time for his former offenses but is a more severe punishment for the last offense, the commission of which is a manifestation of a criminal habit which may be taken into account in determining the adequacy of punishment to be imposed upon habitual offenders for offenses committed subsequent to the enactment of the statute. But for the commission of the subsequent offense, the enhanced penalty would not be imposed. [Cits.] [Id.](#) at 385.

Our statute similarly imposes no more severe penalty for prior conduct. It merely looks back to that conduct without imposing additional sanctions thereon. So long as at least one of the specified offenses occurred on or after the effective date of the Act (July 1, 1974), the statute, in our opinion, would not be vulnerable to successful attack as an ex post facto law. See [Craig v. State ex rel. Van Natta](#), 322 N.E.2d 400 (Ind. 1975); [Section 56-1-1120](#). The fact that the statute provides that ‘the provisions of this article shall not apply to convictions which occurred prior to June 14, 1973,’ is of no legal consequence in determining the ex post facto nature of the Act inasmuch as the effective date of the Act is the determining point in such an analysis.

Therefore, it is the opinion of this Office that the Habitual Offender's Act is not unconstitutional on the theory that it is an ex post facto law.

II.

You have also asked whether one who has been adjudged an habitual offender and who thereafter operates a motor vehicle in apparent disregard of the court's previous order may be prosecuted for the underlying traffic offense as well as for violation of the Habitual Offenders Act. It is our opinion that the offenses are separate and distinct and, therefore, may be prosecuted individually in the appropriate courts.

[Section 56-1-1100](#) provides:

It shall be unlawful for any person to operate any motor vehicle in this State while the judgment of the court prohibiting the operation remains in effect. Any person found to be an habitual offender under the provisions of this article, who is thereafter convicted of operating a motor vehicle in this State while the judgment of the court prohibiting such operation is in effect, shall be guilty of a misdemeanor and shall be imprisoned for not less than one year nor more than five years.

*3 For the purpose of enforcing this section, in any case in which the accused is charged with driving a motor vehicle while his driver's license or permit is suspended or revoked or is charged with driving without a license, the court before hearing such charges shall require the solicitor or Attorney General to determine whether such person has been adjudged an habitual offender and by reason of such judgment is barred from operating a motor vehicle on the highways of this State. If the solicitor or Attorney General determines that the accused has been so held, he shall cause the appropriate criminal charges to be lodged against the accused.

The declared purpose of the Habitual Offenders Act is to promote safety upon the highways by imposing additional penalties upon habitual offenders of the traffic laws. [Wilkins v. Taylor](#), 268 S.C. 371, 274 S.E.2d 212 (1977). Having disregarded the order of the court declaring him an habitual offender and barring him from operating a motor vehicle on the highways of the State, that person faces further penalties independent of the particular driving offense committed during the time of his license suspension. It is a separate and distinct offense apart from any violation of existing traffic law committed by the accused. [Section 56-1-1110](#) expressly provides, ‘Nothing in this article shall be construed as affecting any existing law of this State . . . relating to the operation of motor vehicles, the licensing of persons to operate motor vehicles or providing penalties for the violation thereof.’ Accordingly, it is the opinion of this Office that prosecutions against habitual offenders under [Section 56-1-1100](#) may be brought in addition of the underlying traffic offense.

Furthermore, violations of the Habitual Offenders Act, in our opinion, could be brought upon an indictment in the court which originally declared the individual an habitual offender, for it is the order of that court which has been transgressed.

CONCLUSION:

I.

It is the opinion of this Office that the Habitual Offenders Act is not unconstitutional on the theory that it is an ex post facto law.

II.

It is also the opinion of this Office that prosecutions against habitual offenders under [Section 56-1-1100](#) may be brought in addition to the underlying traffic offense.

Richard P. Wilson
Assistant Attorney General

1978 S.C. Op. Atty. Gen. 95 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-69, 1978 WL 22550

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.