

May 4, 1955.

HON. FREDERICK J. GASSERT, JR.,
Director, Division of Motor Vehicles,
State House,
Trenton, New Jersey.

MEMORANDUM OPINION P-10.

DEAR DIRECTOR GASSERT:

You have requested our opinion as to whether you have the power under R. S. 39:5-32 to grant a new motor vehicle driver's license to a person whose driver's license was permanently revoked in 1948 upon a second conviction for drunken driving. You inform us that the "first" conviction occurred in the State of North Carolina under the motor vehicle or criminal laws of that State.

R. S. 39:5-32 authorizes the Director of the Division of Motor Vehicles to issue a new driver's license at any time to any person whose license previously was revoked. R. S. 39:4-50 imposes mandatory penalties for drunken driving, as follows:

"A person who operates a motor vehicle while under the influence of intoxicating liquor or a narcotic or habit producing drug, or permits another person who is under the influence of intoxicating liquor or a narcotic or habit producing drug to operate a motor vehicle owned by him or in his custody or control, shall be subject, for a first offense, to a fine of not less than two hundred nor more than five hundred dollars (\$500.00), or imprisonment for a term of not less than thirty days nor more than three months, or both, in the discretion of the magistrate, and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of two years from the date of his conviction. For a subsequent violation, he shall be imprisoned for a term of three months and shall forfeit his right to operate a motor vehicle over the highways of this State for a period of ten years from the date of his conviction and, after the expiration of said period, he may make application to the Director of the Division of Motor Vehicles for a license to operate a motor vehicle, which application may be granted at the discretion of the director. A magistrate who imposes a term of imprisonment under this section may sentence the person so convicted either to the county jail or to the workhouse of the county wherein the offense was committed.

"A person who has been convicted of a previous violation of this section need not be charged as a second offender in the complaint made against him in order to render him liable to the punishment imposed by this section on a second offender."

The Superior Court, Appellate Division, held in *Mac Kinnon v. Ferber*, 16 N. J. Super. 390 (1951) that the grant of power contained in R. S. 39:5-32 is confined to cases where the Director or a magistrate has revoked a driver's license in the exercise of a discretionary authority and, specifically, not to a case of forfeiture pursuant to R. S. 39:4-50. By amendment in P. L. 1952, c. 286, the penalty under R. S. 39:4-50 for second offenses was reduced from permanent forfeiture to forfeiture for ten years.

Thus, you raise the question whether you as Director can disregard the penalty of forfeiture imposed by a magistrate purportedly pursuant to R. S. 39:4-50, by an independent determination that the applicant for a new license was punishable only as a first offender because his previous conviction was sustained in another jurisdiction.

By the express terms of R. S. 39:4-50, a person who has been convicted of a previous violation of that section may be liable for penalties as a second offender,

although the complaint against him for drunken driving fails to charge him as a second offender. The fact of the first drunken driving conviction in New Jersey is therefore not an issue in determining guilt or innocence of the second charge.

In *MacKinnon v. Ferber, supra*, a magistrate imposed a sentence for a first drunken driving violation. Upon report of the conviction, the then Commissioner of Motor Vehicles discovered a prior conviction in New Jersey and notified the motorist that his license was permanently forfeited. This action by the Commissioner was sustained. Judge Bigelow wrote for the court:

"The act of operating an automobile while intoxicated does not of itself work a forfeiture, but a conviction effects a forfeiture by force of R. S. 39:4-50, whether or not the judgment expresses the forfeiture. And if the conviction is, in fact, a second one, the forfeiture is permanent . . ."

The former Court of Errors and Appeals in *State v. Mowel*, 116 N. J. L. 354 (1936) quoted with approval the language in *State v. Rowe*, 116 N. J. L. 48 (Sup. Ct. 1935) that a former conviction for drunken driving in New Jersey "was relevant . . . on the question of punishment only."

Nevertheless, the Supreme Court in *State v. Myers*, 136 N. J. L. 288 (1947) set aside a sentence imposing the penalties for a second conviction under R. S. 39:4-50 on the ground that the accused had no opportunity to be heard on the truth or accuracy of the certification of a previous conviction. Chief Justice Case said at p. 291:

"We do not hold that those factors need be introduced at the trial, but we do find that the defendant should be given knowledge of the contents of the certification of earlier conviction by virtue of which he is to be sentenced and an opportunity to address himself thereto before sentence is pronounced. There was, therefore, error in the fixing of sentence."

The conviction in *State v. Myers* was in the Court of Special Sessions on appeal and trial de novo. The then Department of Motor Vehicles submitted the certification of the prior drunken driving conviction in New Jersey between the trial and the imposition of sentence.

State v. Myers is not cited in *MacKinnon v. Ferber, supra*; according to the *MacKinnon* decision, the forfeiture is automatic and the function of the Director of the Division of Motor Vehicles in refusing a new license is ministerial upon discovery of the record of an earlier conviction.

The opportunity to be heard prior to the imposition of sentence is a requirement of procedural due process of law according to the rationale of *State v. Myers, supra*. The constitutional right presumes that an adjudication of the issue will ensue. *Stanley v. Board of Chosen Freeholders*, 60 N. J. L. 392 (Sup. Ct. 1897); *Callen v. Gill*, 7 N. J. 312 (1951); *Hyman v. Muller*, 1 N. J. 124 (1948).

Reconciling *MacKinnon v. Ferber* and *State v. Myers*, the motorist must be granted a hearing on the validity of the first conviction of drunken driving prior to the imposition of the additional sentence for a second offense, with a right of judicial appeal. If the sentence fails to impose the mandatory penalty for a second offense, the Director must nevertheless treat this an automatic ten year revocation case upon notice to the convicted motorist and an opportunity for him to be heard relative to the validity of the first conviction. Notification of permanent revocation was made to the accused according to the recital of facts in *MacKinnon v. Ferber*. Under the State Constitution and Rules of Court, adverse action by the Director is reviewable by a proceeding in lieu of prerogative writ. *MacKinnon v. Ferber* recognizes the practicality that magistrates may not be apprised of earlier drunken driving convictions prior to disposition of such cases.

The question whether a conviction of drunken driving in another State is a first offense, as this term is used in R. S. 39:4-50, is a matter for judicial determination. While there is no authority directly in point in this State, we point out that R. S. 39:4-50 specifies that a person who has been convicted of "a previous violation of this section" need not be charged in the complaint as a second offender. In addition, as an established rule of construction, penal statutes must be strictly construed. See *State v. Mundet Cork Corp.*, 8 N. J. 359 (1952). There are no guiding precedents under the Habitual Criminal Act (N. J. S. 2A:85-8 et seq.) or the Uniform Narcotic Drug Law (R. S. 24:18-1 et seq.), both of which expressly authorize the imposition of more severe penalties for second offenses after conviction of comparable crimes under the laws of the United States or of another State.

Hinnekens v. Magee, 135 N. J. L. 537 (Sup. Ct. 1947) and *Tichenor v. Magee*, 4 N. J. Super. 467 (App. Div. 1949), which uphold the discretionary authority of the Director of the Division of Motor Vehicles to revoke a license because of an out of State drunken driving conviction are not in point. The statutes governing these two decisions are R. S. 39:3-10 and R. S. 39:5-30. The former sets forth that:

"the director in his discretion may refuse to grant a license to drive motor vehicles to a person who is, in his estimation, not a proper person to be granted such a license . . .",

while R. S. 39:5-30 empowers the Director to suspend or revoke any license for a violation of the Motor Vehicle Title or

"on any other reasonable grounds."

The Appellate Division said in the *Tichenor* decision at p. 471:

"We are satisfied that plaintiff's conviction in Maryland is reasonably comprehended within the term 'other reasonable grounds' (R. S. 39:5-30) justifying defendant's revocation of plaintiff's New Jersey license. Upon conviction of a person for operating an automobile while under the influence of intoxicating liquor over the highways of this State, his right to operate a motor vehicle is forfeited for a period of two years. R. S. 39:4-50. It reasonably follows that one holding a New Jersey driver's license, upon proof of a conviction for that offense in another State, should not be permitted to continue to operate a motor vehicle in New Jersey."

In response to your specific inquiry therefore, we advise you that the determination of the magistrate in 1948, imposing sentence for a second drunken driving conviction, is binding upon you and cannot, in effect, be collaterally set aside. No appeal was taken and the magistrate's decision stands invulnerable to collateral attack.

On the broader question, we advise you that you may in your discretion regard a drunken driving conviction preceded by a similar out of State offense as grounds for revocation of the driving privilege. In the absence of a judicial decision to the contrary, you are not compelled to but may revoke a New Jersey driver's license for ten years upon ascertaining that a drunken driving violator had sustained a conviction for that offense in another jurisdiction.

Yours very truly,

GROVER C. RICHMAN, JR.,
Attorney General.

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