

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 91-08

Date issued: June 12, 1991
Requested by: Wayne O. Solberg
Fargo City Attorney

- QUESTIONS PRESENTED -

I.

Whether a municipal court may impose house arrest as an alternative to incarceration under the minimum sentencing provisions of N. D. C. C. ' 39-08-01(4) (b).

II.

Whether a municipal court may impose house arrest as an alternative to incarceration under the minimum sentencing provisions of N. D. C. C. ' 39-06-42(2).

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that a municipal court may not impose house arrest as an alternative to incarceration under the minimum sentencing provisions of N. D. C. C. ' 39-08-01(4) (b).

II.

It is further my opinion that a municipal court may not impose house arrest as an alternative to incarceration under the minimum sentencing provisions of N. D. C. C. ' 39-06-42(2).

- ANALYSIS -

I.

N. D. C. C. ' 39-08-01(4) (b) provides:

4. A person convicted of violating this section, or an equivalent ordinance, must be sentenced in accordance with this section.

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- b. For a second offense within five years, the sentence must include

at least four days' imprisonment of which forty-eight hours must be served consecutively, or ten days' community service; a fine of at least five hundred dollars; and an order for addiction evaluation by an appropriate licensed addiction treatment program.

This section establishes mandatory minimum sentences for second offenders. State v. Nelson, 417 N.W.2d 814 (N.D. 1987). Although N.D.C.C. ch. 12.1-32 sets forth general sentencing provisions which may be applicable to N.D.C.C. tit. 39 offenses, the application of these sentencing provisions will be subject to the specific provisions governing the sentencing of N.D.C.C. ' 39-08-01 offenders. N.D.C.C. ' 12.1-32-02(1).

N.D.C.C. ' 39-08-01(4)(b) sets forth specific limits to sentencing alternatives available to a court. As to the specific sentence of a second offender, N.D.C.C. ' 39-08-01(4)(b) will prevail over the general sentencing provisions of N.D.C.C. ch. 12.1-32 to the extent such provisions are in conflict. N.D.C.C. ' 1-02-07.

The term "imprisonment" found in N.D.C.C. ' 39-08-01(4)(b) is not defined. The underlying question presented is whether the term "imprisonment" includes house arrest which may be accomplished by restriction of an offender's movements by order of the court and, possibly, by the use of electronic monitoring.

The term "imprison" has been defined as:

1. To put or keep in prison; jail.
2. To restrict, limit, or confine in any way.

Webster's New World Dictionary of the American Language, 707 (2nd College Ed. 1982).

Although there is little case law addressing this issue, the Pennsylvania court in Commonwealth v. Kriston, 588 A.2d 598 (Pa. 1991), held that house arrest was not imprisonment under the Pennsylvania driving under the influence laws. The Pennsylvania laws provided for a minimum term of imprisonment of 30 days if the offender had been convicted of an offense in the previous seven years. The court construed the language of the mandatory minimum imprisonment statute according to common and ordinary usage. The court specifically held that the plain and ordinary meaning of "imprisonment" is the lawful confinement of an individual to a correctional or similar institution. Participation in an electronic home monitoring program did not constitute imprisonment.

N.D.C.C. ' 39-08-01(4)(b) may be ambiguous as to whether the term "imprisonment" includes alternatives other than actual incarceration in a correctional facility. The goal of statutory construction of a provision must be to ascertain and determine the intention of the Legislature and to carry such intention into effect to the fullest degree so as not to nullify or defeat the Legislative intent. Coulter v. Ramberg, 55 N.W.2d 516 (N.D. 1952).

In addition, the object sought to be attained, the circumstances under which

the statute was enacted, and the legislative history may be considered in determining the intention of the Legislature. N. D. C. C. ' 1-02-39.

The mandatory sentencing provisions of N. D. C. C. ' 39-08-01(4)(b) were adopted as a part of a major revision to the driving while intoxicated laws in the 1983 legislative session as Senate Bill No. 2373. This legislation was the result of the work of many diverse groups coordinated by the Governor's Task Force on Drinking and Driving.

A review of the legislative history fails to disclose any discussion regarding house arrest as an alternative to imprisonment in a correctional facility. Rather, all legislative history indicates that the mandatory sentencing provisions of the 1983 law related to incarcerations in jail. In a summary of legislation proposed by the Governor's Task Force on Drinking and Driving submitted to the House Judiciary Committee on March 2, 1983, reference was specifically made to a mandatory minimum penalty for alcohol traffic-related offenses which included incarceration "in jail" for multiple offenders. Representative Patrick Conmy, in a subcommittee report to the House Judiciary Committee, stated that amendments to Senate Bill No. 2373, the DUI revision legislation, "were not to attempt to change the mandatory jail sentence provision, or to shorten or lengthen the periods of suspension." Hearing on S. 2373 Before the House Judiciary Comm., 48th N.D. Leg. (March 15, 1983) (Statement of Rep. Conmy). At that same meeting, Representative Conmy questioned whether mandatory sentences, without a method to assist counties in jail costs, would place a potential financial burden on the counties. A general overview of the entire legislative history of the 1983 enactment discloses the goals of uniformity of sentencing and the establishment of mandatory jail sentences for repeat offenders.

Senate Bill No. 2373 contained other provisions imposing mandatory sentences for alcohol-related offenses. N. D. C. C. ' 39-08-01.2, which was adopted as a part of that bill, imposed minimum mandatory sentences of either 90 days or one year, depending upon the offense involved, when injury or death has occurred while operating a motor vehicle under the influence of alcohol. The sentence must be served in its entirety, without benefit of parole or pardon.

These mandatory sentencing provisions prohibit the court from suspending the sentence unless a manifest injustice results. The legislative history of this specific provision also discloses a clear intent of the Legislature that "imprisonment" means "incarceration." The summary of the legislative provisions provided to the House Judiciary Committee on March 2, 1983, by the Governor's Task Force on Drinking and Driving also refers to additional "jail" penalties for persons who cause death or injury while operating a motor vehicle under the influence of alcohol.

The legislative history discloses a clear intent that the specific mandatory minimum sentencing provisions of N. D. C. C. ' 39-08-01(4)(b) requires the imposition of "imprisonment" in the form of incarceration or jail. The only two alternatives to incarceration or jail set forth in N. D. C. C. ' 39-08-01 for a second time offender are 10 days of community service or in-patient treatment for which the offender will receive credit toward the sentence of imprisonment. N. D. C. C. " 39-08-01(4)(b) and (4)(g).

In addition to the intent evidenced by the legislative history, I also conclude that the ordinary and common meaning of "imprisonment" does not include, for purposes of N. D. C. C. ' 39-08-01(4)(b), house arrest. Words are to be given their plain, ordinary, and commonly understood meaning when interpreting a statute. This process considers the ordinary sense of statutory words, the context in which they are used, and the purpose which prompted their enactment. N. D. C. C. ' 1-02-02; Coldwell Banker - First Realty, Inc. v. Meide & Son, 422 N. W. 2d 375 (N. D. 1988). The expressed intent of the Legislative Assembly in 1983 to impose stiff incarceration penalties for repeat offenders and the goals to provide uniformity of sentencing and a deterrent to drinking and driving do not warrant a conclusion that the term "imprisonment" includes lesser restraints than incarceration in a correctional facility subject to the incarceration alternatives authorized by N. D. C. C. ' 39-08-01(4)(b) and (4)(g).

II.

N. D. C. C. ' 39-06-42(2) provides:

2. If the suspension or revocation was imposed for violation of section 39-08-01 or equivalent ordinance or was governed by section 39-06-31 or chapter 39-20, the sentence must be at least four consecutive days' imprisonment and such fine as the court deems proper. The execution of sentence may not be suspended or the imposition of sentence deferred under subsection 3 or 4 of section 12.1-32-02. Forfeiture of bail is not permitted in lieu of the defendant's personal appearance in open court for arraignment on a charge under this subsection.

This section was originally adopted as a part of Senate Bill No. 2373, the DUI revision bill adopted by the 1983 Legislative Assembly. As originally enacted, this section required that an offender receive a sentence of at least 15 consecutive days of imprisonment. This mandatory minimum sentence was reduced by the 1985 Legislative Assembly to at least four consecutive days of imprisonment.

As in the case of N. D. C. C. ' 39-08-01(4)(b), the Legislature manifested its clear intent that the term "imprisonment" in N. D. C. C. ' 39-06-42(2) means incarceration or jail. As mentioned in the previous discussion, the legislative history to Senate Bill No. 2373 contained no mention of house arrest as an alternative to incarceration.

A summary of provisions of Senate Bill No. 2373 provided by the Governor's Task Force on Drinking and Driving to the House Judiciary Committee on March 2, 1983, specifically refers to a "mandatory minimum incarceration" for those who violate drivers license restrictions imposed as a result of alcohol-related traffic offenses.

Based upon the legislative history and the general principles of

Attorney General's Opinion 91-08
June 12, 1991
Page 28

interpretation set forth earlier in the opinion, I conclude that the term "imprisonment" in N. D. C. C. ' 39-06-42(2), in its plain, ordinary, and commonly understood meaning, means incarceration or jail. House arrest is not an authorized alternative to the minimum sentence of imprisonment mandated by that section.

- EFFECT -

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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Attorney General

Assisted by: Robert P. Bennett
Assistant Attorney General

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