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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

February 29, 1980

Honorable John L. Martin
Speaker of the House
State House
Augusta, Maine 04333

Dear Speaker Martin:

You have asked us to investigate whether the Secretary of State's Division of Motor Vehicles is applying retroactively certain provisions of Maine's habitual offender law. P.L. 1979, c. 10, "AN ACT to Strengthen and Streamline the Habitual Offender Law" repealed and replaced the former law and made substantial changes in the process of determining a person to be an habitual offender. This act was enacted as an emergency measure and became effective March 2, 1979. Among other things, the new act changed the definition section of the law (29 M.R.S.A. § 2292) so that it included in its list of enumerated offenses the offense of driving to endanger.

The Secretary of State asked for our advice on the issue of whether persons who had convictions for driving to endanger before March 2, 1979, which brought them within the definition of habitual offenders (because of the change in the definition section), should be declared to be habitual offenders. After extensive research, we orally advised the Secretary of State that a conviction for driving to endanger, arising out of conduct occurring before March 2, 1979, could be used in the habitual offender determination only if the person were also convicted of one of the listed offenses for conduct occurring on or after March 2, 1979. In other words, pre-March 2, 1979 driving to endanger convictions could not be used against persons who were not convicted of one of the

listed offenses because of conduct occurring on or after that date. Only if a person had such a subsequent conviction would the pre-March 2, 1979 offense of driving to endanger become applicable to the habitual offender determination.

This advice is based on a substantial body of case law holding that a statute is not retroactive merely because it draws on antecedent facts for its operation. The application of the habitual offender law as described above does not impose a more severe penalty on a person because of his prior conviction of driving to endanger. On the effective date of the new statute, anyone whose record contained two or more violations listed in the definition of an habitual offender was placed on notice that any additional conviction of one of the listed violations within five years of his first conviction would subject him to the habitual offender law and a license suspension. Absent such new conviction, the pre-March, 1979 convictions would not affect the individual's right to operate a motor vehicle on the highways of the State.

My office has defended this position in various Superior Courts throughout the State, and the majority of Superior Court Justices have agreed and have held that the application of the law as enunciated above is not retrospective or retroactive. Although two cases have been decided against the State, neither of these was based on the ground that the law was being applied in an unconstitutional manner.1/ I have enclosed a copy of a recent Superior Court opinion on this issue. Since that opinion recites the relevant legal analysis, along with the supporting case law, I have not set forth that analysis in my letter.

I hope this information is helpful. If you have any additional questions on this matter, please contact me.

Sincerely,

RICHARD S. COHEN
Attorney General

RSC/ec
Enclosure

1/ We would note that we are appealing one of these decisions to the Law Court at the present time.

STATE OF MAINE
KENNEBEC, SS

SUPERIOR COURT
CIVIL ACTION
Docket No. CV79-591

PATRICK F. KELLEY,

Plaintiff

v.

RODNEY S. QUINN, SECRETARY OF STATE OF THE STATE OF MAINE,

Defendant

DECISION

On July 24, 1979 the Secretary of State determined that the plaintiff's driving record brought him within the definition of an habitual offender. 29 M.R.S.A. §2292. In accordance with 29 M.R.S.A. §2293 the plaintiff's license to operate an automobile was revoked. Pursuant to 29 M.R.S.A. §2294 the plaintiff requested a hearing to show cause why his license should not be revoked. The request for a hearing stayed the revocation of the plaintiff's drivers license. At the hearing which was held on September 29, 1979, the plaintiff stipulated that he was Patrick F. Kelley, and that the driving record relied upon by the Secretary of State was accurate. The hearing examiner held that the plaintiff did fit within the definition of an habitual offender, and he ordered that the plaintiff's license be revoked immediately. The plaintiff has appealed the decision of the hearing examiner to this Court pursuant to 29 M.R.S.A. §2297 and 5 M.R.S.A. §11001 et seq. For the reasons given below, the plaintiff's appeal is denied.

The plaintiff's driving record indicates that he was convicted of operating under the influence (29 M.R.S.A. §1312) on January 1, 1976 and of driving to endanger (29 M.R.S.A. §1314) on June 23, 1977 and again on

July 19, 1979. According to 29 M.R.S.A. §2292(1)(B) and (C) convictions on these three moving violations within a five year period brings the plaintiff within the definition of an habitual offender. However, the habitual offender statute was amended effective March 2, 1979. By virtue of these amendments, driving to endanger was for the first time included within the group of moving violations, three of which makes a driver an habitual offender. The plaintiff claims that because his conviction of driving to endanger on June 23, 1977 occurred prior to the effective date of these amendments, use of that conviction for a declaration of habitual offender status amounts to a retroactive application of the amended statute.

The Court disagrees with the plaintiff. It is true that the legislature is prohibited from passing laws which effect vested rights in a retroactive manner. Sebastenski v. Pagurko 232 A.2d 524 (Me. 1967). However, it is clear that what was done in this case does not amount to a retroactive application of the law. A law is said to be applied retroactively when it "takes away or impairs vested rights, or creates a new obligation, imposes a new duty, or attaches a new disability to transactions or considerations already past." Barbieri v. Morris, 315 S.W.2d 711, 714 (Mo. 1958), State v. Malone, 9 Wash. App. 122, 511 P.2d 67, 72 (Wash., 1973). The plaintiff has no vested right in either his driver's license or in the statutory definition of an habitual offender which existed prior to the effective date of the amended habitual offender statute. Opinion of the Justices, 255 A.2d 643 (Me. 1969) Barbieri v. Morris, supra. 715.

The plaintiff claims that the facts of this case fit within the definition of retroactivity in that this application of the new definition of an habitual offender imposes a new disability to the June 23, 1977 conviction for driving to endanger. This argument is without merit. The State has not

sought to declare the plaintiff an habitual offender on the basis of only convictions which occurred prior to the effective date of the new law. A statute is not retroactive merely because it draws on antecedent facts for its operation. This statute does not impose a more severe penalty on the plaintiff for his prior conviction of driving to endanger; it merely looks to prior conduct without imposing additional sanctions thereon. On the effective date of the amended statute the plaintiff had two convictions listed in the definition of an habitual offender, and he was on notice that if he was convicted of another moving violation listed in the definition within five years of his first conviction, he would become an habitual offender and lose his driver's license. Until that third conviction occurred after the effective date of the new statute, the plaintiff had a right to continue driving. State v. Malone, supra. 73. Therefore, the Secretary of State did not apply the new habitual offender statute retroactively in this case, so the plaintiff's appeal must be dismissed.

The entry will be: Appeal DENIED.

Dated: February 8, 1980

Roland J. Poulin

ROLAND J. POULIN-Active Retired Judge
of the District Court assigned to
sit in Superior Court

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