

OPINION 65-104**Syllabus:**

1. The Municipal Court should credit the suspension under authority of Section 4507.40, Revised Code, to that suspension ordered under authority of Section 4507.16, Revised Code, so long as the points used in Section 4507.40, supra, are obtained in part from the conviction and suspension enumerated in Section 4507.16, supra.

2. The suspension of a driver's license pursuant to Section 4507.40, Revised Code, is a civil proceeding and as such the defendant is not required to be advised of his right to counsel as guaranteed by Amendment VI, United States Constitution.

To: Thomas R. Spellerberg, Seneca County Pros. Atty., Tiffin, Ohio
 By: William B. Saxbe, Attorney General, June 24, 1965

I have before me your request for my opinion which reads as follows:

"In prosecution of twelve-point violations pursuant to Ohio Revised Code Section 4507.40, the question has come up as to the effect of Paragraph M of said statute which provides that credit can be given for any suspension previously given. For example, a defendant comes into court and his driver's license has been suspended from February 18, 1965, to February 17, 1966, by a Municipal Court. However, at the time of this violation, the violation is such that it gives him sufficient points to put it under the twelve-point statute. At the time the man is brought into Municipal Court under 4507.40, the Judge orders that he will suspend the man's driver's license for six months, and believes that by virtue of Paragraph M the six months should start at the time the other twelve months suspension is started. Would you please advise if this is the correct interpretation of this statute.

"A second question I have is, in view of the wording of the Sixth Amendment of the United States Constitution which states 'In all criminal prosecutions, an accused shall enjoy . . . and to have the assistance of counsel for his defense,' is it your opinion that these defendants in twelve point cases should be advised to retain counsel to represent them or to waive counsel; that is, is this to be construed as being a 'criminal proceeding?'"

Section 4507.40 states in pertinent part:

"* * * * *"

"(M) When the driving privileges of any person are suspended by any trial judge of any court of record pursuant to section 4507.16 of the Revised Code, and points are charged against such person under this section for the offense which resulted in said suspension, that period of suspension shall be credited against the time of any subsequent

suspension under this section for which such points were considered in making such subsequent suspension.

" * * * * * "

Section 4507.16 states:

"The trial judge of any court of record shall, in addition to, or independent of all other penalties provided by law or by ordinance, suspend for any period of time not exceeding three years or revoke the license of any person who is convicted of or pleads guilty to any of the following:

"(A) Manslaughter resulting from the operation of a motor vehicle;

"(B) Operating a motor vehicle while under the influence of intoxicating liquor or narcotic drug;

"(C) Perjury or the making of a false affidavit under sections 4507.01 to 4507.39, inclusive, of the Revised Code, or any other law of this state requiring the registration of motor vehicles or regulating their operation on the highway;

"(D) Any crime punishable as a felony under the motor vehicle laws of this state or any other felony in the commission of which a motor vehicle is used;

"(E) Failing to stop and disclose identity at the scene of the accident when required by law to do so.

" * * * * * "

I assume for the purpose of this opinion the defendant has been convicted of one of the charges enumerated in Section 4507.16, supra, and his license to drive has been suspended according to Section 4507.16, supra; thereafter, the license holder has been ordered into municipal court pursuant to Section 4507.40, supra, to show cause why his license should not be suspended. I further assume the license holder was assessed points for the conviction of the charge enumerated in Section 4507.16, supra, which said points are included in the twelve points required to order the license holder before the Municipal Court under Section 4507.40, Revised Code.

I conclude, by virtue of Section 4507.40 (M), Revised Code, that part of the suspension pursuant to Section 4507.40 (M), Revised Code, is credited against the suspension ordered under Section 4507.16, Revised Code. Therefore, it is my opinion and you are advised that the Municipal Court should credit the suspension under authority of Section 4507.40, Revised Code, to that suspension ordered under authority of Section 4507.16, Revised Code, so long as the points used in Section 4507.40, supra, are obtained in part from the conviction and suspension enumerated in Section 4507.16, supra.

In answer to your second question, your attention is directed to Amendment VI, United States Constitution, which states in pertinent part:

"In all criminal prosecutions,
the accused shall enjoy the right
* * *to have the assistance of
counsel for his defense."

While your question has never been answered by the courts in Ohio, I deem decisions in other states to be pertinent to your question.

In Prichard v. Battle, 17 S.E. 2d 393, Va. (1941) the court said in the seventh paragraph of the syllabus, as follows:

"7. The revocation of a license to operate an automobile because of an offense for which licensee has been convicted is not part of punishment fixed by jury or by court wherein licensee is tried and not an added 'punishment' for offense committed, but is civil and not criminal in nature. Code 1936, Section 2154 (186), as amended by Acts 1938, c. 188." (Emphasis added)

In Parker v. State Highway Department, 78 S.E. 2d 382, S.C. (1953) the court said in the second paragraph of the syllabus:

"2. Under statutes requiring report to be made within ten days to state highway department of every conviction for driving motor vehicle while under influence of intoxicating liquor, and imposing mandatory duty upon department to suspend driver's license of person so convicted, the suspension constitutes no part of the punishment fixed by the court for the offense, nor is it an added punishment for the offense committed, but suspension is civil and

not criminal in nature. Code 1952 Section 46-348." (Emphasis added)

It has been held in Ohio the right to operate an automobile is a privilege and not a property right. See Smith v. Hayes, 73 Ohio Law Abs., 33 and Paduehik, Jr. v. Mikoff, 64 Ohio Law Abs. 150. The taking away of a privilege is civil in nature as opposed to the taking away of a right which is criminal in nature. I conclude, in view of the fact Ohio has held the right to operate an automobile is a privilege, the holdings of other states to the effect the suspension of a driver's license is a civil action, that Ohio would so hold.

A case in point is one that arises from the District of Columbia's Municipal Court of Appeals. In Ritch v. Department of Vehicles & Traffic of D. of C., 124 Atl. 2d 301 (1956) the court held in paragraph three of the syllabus:

"3. Where motorist was granted a hearing to show cause why his motor vehicle operator's permit should not be revoked and orally stated at the hearing that the revocation would deprive him of his means of livelihood in that his occupation was that of a truck driver, motorist could not claim that he was deprived of due process on the ground that the director of vehicles and traffic failed to advise him that he was entitled to the assistance of counsel at the hearing. D.C. Code 1951, Section 11-722."

The court in the Ritch case, supra, at page 303 stated the following:

"* * * * *"

"It is apparent that a hearing of this type does not require the testimony of adverse witnesses. The motorist is presented with his own traffic record reflecting the specific violations of which he has been found guilty or on which he has forfeited collateral. The purpose of the hearing is not to retry these violations; it is merely to afford the motorist an opportunity to show why, notwithstanding the violations, he should be entitled to retain his permit. In the instant case petitioner in his application for a hearing and for review clearly and cogently stated why he thought his permit should

not be revoked, namely, that his occupation was that of a truck driver and without his permit he would be deprived of his means of livelihood, and he orally stated the same reasons at the hearing. We cannot rule that he was prejudiced by the failure to be advised that he was entitled to assistance of counsel.

"* * * * *"
(Emphasis added)

Therefore, it is my opinion and you are advised the suspension of a driver's license pursuant to Section 4507.40, Revised Code, is a civil proceeding and as such the defendant is not required to be advised of his right to counsel as guaranteed by Amendment VI, United States Constitution.