

OPINION NO. 75-064**Syllabus:**

Points accumulated by a licensee for offenses committed prior to the effective date of R.C. 4507.40(K)(2), may be considered for purposes of driver's license suspension pursuant to said statute, without violating the Ohio constitutional prohibition against retrospective legislation contained in Article II, Section 28.

To: Jerry Petersen, Geauga County Pros. Atty., Chardon, Ohio
By: William J. Brown, Attorney General, September 19, 1975

I have before me your request for my opinion regarding the application of R.C. 4507.40(K)(2) which reads as follows:

"(K) When, upon determination of the registrar, any person has charged against him a total of not less than twelve points within a period of two years from the date of the first conviction within said two-year period, or a total of not less than twenty-four points within a period of ten years from the date of the first conviction within said ten-year period, the registrar shall notify such person by registered mail to the licensee's last known address, that his driver's license shall be suspended effective on the twentieth day after mailing the notice unless the licensee files a petition in the municipal court or the county court, or in case such person is under the age of eighteen years to the juvenile court, in whose jurisdiction such person resides, agreeing to pay the cost of the proceedings and alleging that the licensee can show cause why his driving privileges should not be suspended for a period of time determined as follows:

"(2) Five years, if such person has charged against him a total of not less than twenty-four points within a period of ten years from the date of the first conviction within said ten-year period."

R.C. 4506.40(K)(2) became effective on September 22, 1972. Inasmuch as a five year suspension under this section requires consideration of points accumulated during the preceding ten years, the registrar considers traffic offense convictions which may have occurred prior to the effective date of R.C. 4506.40(K)(2). Your question, then, is whether this statutory provision violates Article II, Section 28 of the Ohio Constitution, which reads as follows:

"The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as may be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this State."

Upon careful consideration of your question, it is my opinion and you are so advised that points accumulated by a licensee for offenses committed prior to the effective date of R.C. 4507.40(K)(2) may be considered for purposes of driver's license suspension pursuant to said statute and such procedure is not violative of Article II, Section 28 of the Ohio Constitution.

Retroactive legislation has been defined to mean any statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. This definition has met with judicial approval in Ohio and it is clear that if a statute does not come within the terms of the foregoing definition it is free from constitutional objection on the ground of retroactivity. See Rairden v. Holden, 15 Ohio St. 207 (1865); Outcalt v. Guckenberger, 134 Ohio St. 457 (1938); Kilbreath v. Ruby, 16 Ohio St. 2d 70 (1968).

There also exists a substantial body of case authority holding that Article II, Section 28 refers to substantive rights and has no reference to laws of a remedial nature providing rules of practice, courses of procedure, or methods of review. State ex rel. Slaughter v. Industrial Commission, 132 Ohio St. 537 (1937); Kilbreath v. Ruby, *supra*. Moreover, the Ohio Supreme Court has consistently drawn a distinction between remedial laws and those affecting substantive rights in determining the applicability of Article II, Section 28. Unless vested rights are affected, retrospective legislation is valid. State ex rel. Michaels v. Morse, 75 Ohio L. Abs. 537, *aff'd* 165 Ohio St. 599 (1956).

The determinative issue is, then, whether consideration of points accumulated prior to the effective date of R.C. 4507.40(K)(2) affects a vested right or creates a new obligation or duty respecting past transactions. Similar statutes have been held constitutionally valid in other jurisdictions. For example, in Washington v. Scheffel, 514 P.2d 1052 (1973), the Supreme Court of Washington addressed a statute providing for the license revocation of anyone who, within a five-year period, receives three or more convictions of driving while intoxicated. The defendants had accrued two convictions prior to the effective date of the act and they contended that license revocation due to a third conviction was unconstitutional on the ground that the act as applied to them constituted retrospective legislation. In holding the statute constitutional the court stated at 1056:

"We find no vested right which has been taken away. The act does not impose any new duty, and it does not attach any disability on either of the defendants in respect to transactions. The defendants could have avoided the impact of the act by restraining themselves from breaking the law of this state.

"A statute is not retroactive merely because it relates to prior facts or transactions where it does not change their legal effect. It is not retroactive because some of the requisites for its actions are drawn from a time antecedent to its passage or because it fixes the status of a person for the purposes of its operation."

In Cooley v. Texas Dept. of Public Safety, 348 S.W. 2d 267 (Tex. Civ. App. 1961), the Texas Court held that suspension of a

driver's license based on convictions recorded prior to the amendment of the statute defining an habitual violator, did not deprive the licensee of any right by ex post facto or retroactive law in violation of the Constitution.

Stating that the amendment merely defined the term "habitual" and that it did not give a right where none had existed, nor did it take away one that had existed, the court held that acts which were purely remedial and which did not disturb vested rights were not within the constitutional prohibition against ex post facto and retroactive laws.

In Sturgill v. Beard, 303 S.W. 2d 908 (Ky., 1957), the Court of Appeals of Kentucky rejected the contention of the licensee that some of the convictions contributing to his point total occurred before the establishment of the point system, and thus were wrongfully considered. The court held at page 911 that,

"[T]he license was suspended under the statute upon determination by the department that the licensee was a habitually reckless driver, and that the mere fact that the department utilized the point system in making this determination did not make the application of the regulations invalidly retroactive."

In other words, the fact that certain violations were not grounds for suspension of an operator's motor vehicle license when he was convicted of them in 1954, 1955 and 1956 did not preclude the Department of Public Safety from considering such prior convictions in ordering the suspension of his license under the "point system". The suspension did not constitute a retroactive application of the regulations and ex post facto law.

Finally, your attention is directed to Wilsch v. Bencar, 7 Ohio App. 2d 165 (1966) wherein the court was confronted with an analogous situation in determining the correct application of R.C. 4507.162. That section provides for revocation of a probationary driver's license when an individual holding such a license has been convicted of three or more separate violations during any two-year period. The court held that:

"1. Traffic law convictions which occurred before the effective date of Section 4507.162, Revised Code, can be added to those after said date in determining the number of traffic law violations in any two-year period necessary to revoke a probationary operator's license pursuant to said section.

"2. A license to operate a motor vehicle is a privilege and not a property right.

"3. The issuance of a driver license conveys no greater authority than the statute or statutes authorizing the issuance of such license. When such statute or statutes authorizing the issuance of a driver license are amended, the effect would be to amend the privilege to operate a motor vehicle as evidenced by a driver license."

See also 1964 Op. Att'y Gen. No. 64-867.

It should also be pointed out that it is almost universally held that the suspension or revocation of a driver's license is not intended as added punishment for the offense committed as a result of which points are accumulated. But rather, suspension and revocation legislation is designed solely for the protection of the public in the use of the highways. See Durfee v. Ress, 81 N.W.2d 148 (Neb. 1957); Davison v. State, 313 S.W.2d 883 (Texas 1958); Barbieri v. Morris 315 S.W.2d 711 (Mo. 1958); Anderson v. Commissioner of Highways, 126 N.W.2d 778 (Minn. 1964); Cooley v. Texas Dept. of Public Safety, supra; Washington v. Scheffel, supra. It is also well established that a proceeding to revoke a driver's license is a civil action and not penal in nature. Huffman v. Commonwealth, 172 S.E.2d 788 (Va. 1970); Barbieri v. Morris, supra; Cooley v. Texas Dept. of Public Safety, supra; Accordingly, the fact that R.C. 4507.40(K)(2) relies upon convictions prior to its effective date for purposes of suspension of driving privileges, does not impose a new penalty nor does it constitute an increase in previously imposed punishment.

In specific answer to your request it is my opinion, and you are so advised that points accumulated by a licensee for offenses committed prior to the effective date of R.C. 4507.40(K)(2), may be considered for purposes of driver's license suspension pursuant to said statute, without violating the Ohio constitutional prohibition against retrospective legislation contained in Article II, Section 28.