Opinion 11-03

OPINION OF: GARY K. KING Attorney General

March 16, 2011

BY: Elizabeth A. Glenn, Deputy Attorney General

TO: The Honorable Timothy Jennings, New Mexico State Senator, P.O. Box 1797, Roswell, NM 88202

QUESTIONS:

Does a 2009 amendment to Section 66-5-33.1 of the Motor Vehicle Code, which conditions reinstatement of a driver's license that was revoked for driving while intoxicated ("DWI") on, among other things, a minimum of six months of driving with no attempts to tamper with or circumvent the use of an ignition interlock device, apply retroactively to those who have: (1) completed their license revocation period before July 1, 2009, but apply for reinstatement after July 1, 2009; (2) completed their license revocation period on July 1, 2009, but apply for reinstatement after that date; or (3) had their licenses revoked before July 1, 2009 and have not completed their revocation period on or before July 1, 2009.

CONCLUSION:

The constitutional limitations on the retroactive application of penal statutes do not apply to the 2009 amendment. Accordingly, the amendment applies to individuals whose licenses were revoked for DWI and who seek reinstatement of their driver's licenses on or after the amendment's July 1, 2009 effective date, regardless of when the individuals were convicted for DWI, their licenses were revoked or they were eligible to seek reinstatement of their licenses.

FACTS:

Some drivers whose licenses were revoked for DWI before July 1, 2009 have questioned whether the new interlock requirement unfairly imposes an additional punishment that should not be retroactively applied to them.

ANALYSIS:

In 2009, Section 66-5-33.1 of the Motor Vehicle Code was amended to impose several conditions on reinstatement of driver's licenses that were revoked "for driving while under the influence of intoxicating liquor or drugs, for aggravated driving while under the influence of intoxicating liquor or drugs or pursuant to the Implied Consent Act…." See NMSA 1978, § 66-5-33.1(B) (2009). Among the conditions was the requirement for "a minimum of six months of driving with an ignition interlock license with no attempts to

circumvent or tamper with the ignition interlock device." Id. § 66-5-33.1(B)(4).[1] The amendment's effective date was July 1, 2009. See 2009 N.M. Laws, ch. 254, § 3.

By its terms, Section 66-5-33.1(B) is not triggered until a person whose driver's license was revoked for driving while under the influence of liquor or drugs applies for reinstatement of the license. The conditions on reinstatement added in 2009, including the requirement for driving with an ignition interlock license, are retroactive to the extent that they apply to a person whose license was revoked before the conditions were in effect. This raises a question under the prohibition against ex post facto laws in the federal and state constitutions. See U.S. Const. art. I, § 10 ("no State shall … pass any … ex post facto Law"); N.M. Const. art. II, § 19 ('[n]o ex post facto law … shall be enacted by the legislature").[2]

An unconstitutional ex post facto law imposes a new punishment for a crime committed before the law was enacted. The constitutional prohibition is limited to penal statutes. See State v. Druktenis, 2004 NMCA 32, ¶ 26, 135 N.M. 223, 86 P.3d 1050. A penal statute is "intended as punitive rather than remedial." Id. at ¶ 30. If a statute is intended to be remedial or regulatory, it will not implicate the constitutional prohibition against ex post facto laws unless that intent is negated by the statute's punitive effect. See id. at ¶¶ 32-38 (concluding that the Sex Offender Registration and Notification Act was a "civil, remedial, regulatory, nonpunitive law" and was applicable retroactively without violating the New Mexico Constitution's ex post facto clause). Accordingly, the permissibility of applying the ignition interlock license requirement retroactively will depend on whether the intent or effect of the requirement is punitive.

The New Mexico Supreme Court previously evaluated whether the sanctions under the Motor Vehicle Code for DWI, including provisions for license revocation and conditioning reinstatement of revoked licenses on the payment of a fee, were punitive for purposes of double jeopardy. See State ex rel. Schwartz v. Kennedy, 120 N.M. 619, 634, 904 P.2d 1044 (1995). The Court concluded that the administrative license revocation provisions "may be fairly characterized as remedial, and therefore … not punishment…." Id. at 633. As the Court explained:

> The suspension of an individual's license to drive based on failure of a chemical test for blood-alcohol content or refusal to take the chemical test serves the legitimate nonpunitive purpose of protecting the public from the dangers presented by drunk drivers and helps enforce regulatory compliance with the laws governing the licensed activity of driving.

Id. at 632. See also id. at 634-35 (administrative license revocation was not punishment simply because it had a deterrent effect on drunk drivers).

The 2009 amendments to Section 66-5-33.1 are part of the administrative driver's license revocation process addressed in Schwartz. The additional conditions on reinstatement, including the requirement of six months of tamper-free driving while using an interlock device, serve the same remedial, nonpunitive purpose of protecting

the public from the dangers presented by intoxicated drivers. Consequently, we believe that the conditions on reinstatement of driver's licenses imposed under the 2009 amendments to Section 66-5-33.1(B) are not penal for purposes of the constitutional prohibition against ex post facto laws and apply to persons who seek reinstatement on or after July 1, 2009, regardless of when their DWI violations were committed, their licenses were revoked for DWI or they completed their license revocation period.[3]

GARY K. KING
Attorney General

ELIZABETH GLENN
Assistant Attorney General

[1] The same 2009 law that amended Section 66-5-33.1 also amended Section 66-5-503(A) of the Motor Vehicle Code to allow "[a] person who has not met the ignition interlock license requirement as a condition of reinstatement pursuant to Section 66-5-33.1" to apply for an ignition interlock license. See 2009 N.M. Laws, ch. 254, § 2.

[2] The New Mexico Supreme Court has determined that the same protection exists under the Ex Post Facto Clauses of the United States Constitution and New Mexico Constitution. See State v. Druktenis, 2004 NMCA 32, ¶ 38, 135 N.M. 223, 86 P.3d 1050.

[3] Our conclusion is supported by judicial decisions in other states concluding that ignition interlock device requirements are not punitive for purposes of the constitutional prohibition against ex post facto laws. See Gordon v. Registry of Motor Vehicles, 912 N.E.2d 9 (Mass. App. Ct.) (statute requiring DWI offenders seeking reinstatement of their driver's licenses to install an ignition interlock device was not punitive and was permissibly applied to a person who was eligible but did not apply for reinstatement of his license until after the statute's effective date), review denied, 916 N.E.2d 767 (Mass. 2009); Frederick v. Commonwealth Dep't of Transportation, 802 A.2d 701 (Pa. Commw. Ct. 2002) (because the disability imposed by a statute requiring ignition interlock systems for repeat DWI offenders was not penal, the statute was not an unconstitutional ex post facto law and was properly applied to a person who committed his second DWI offense before the statute's effective date).