

STATE OF NORTH DAKOTA
ATTORNEY GENERAL'S OPINION 97-F-11

Date Issued: November 12, 1997

Requested by: Michael S. McIntee, McHenry County State's Attorney

- QUESTION PRESENTED -

Whether the mandatory revocation of a driver's license following conviction of certain crimes as provided by N.D.C.C. § 39-06-31 may apply to a conviction of reckless driving.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the mandatory revocation of a driver's license provided by N.D.C.C. § 39-06-31 may be applied to a conviction of reckless driving if the record of that conviction shows that the fact finder found or must have found the elements required for a mandatory revocation under N.D.C.C. § 39-06-31.

- ANALYSIS -

The Director of the Department of Transportation is required to revoke the operator's license pursuant to the following statute:

The commissioner shall revoke forthwith, for a period of one year, or for such period as may be recommended by the trial court, the license of any operator upon receiving a record of such operator's conviction of any of the following offenses:

1. Any felony, including a violation of chapter 12.1-16, in the commission of which a motor vehicle is used.
2. Any misdemeanor resulting from the operation of a motor vehicle and causing serious bodily injury, as defined in section 12.1-01-04, to another person.

3. The making of a false affidavit or statement under oath to the commissioner under this chapter or under any other law relating to the ownership or operation of motor vehicles.

The revocation of the license under this section may be beyond any time of imprisonment or court-ordered addiction treatment.

N.D.C.C. § 39-06-31. The crimes of reckless driving and aggravated reckless driving are defined as follows:

Any person is guilty of reckless driving if he drives a vehicle:

1. Recklessly in disregard of the rights or safety of others; or
2. Without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or the property of another.

Except as otherwise herein provided, any person violating the provisions of this section is guilty of a class B misdemeanor. Any person who, by reason of reckless driving as herein defined, causes and inflicts injury upon the person of another, is guilty of aggravated reckless driving, and is guilty of a class A misdemeanor.

N.D.C.C. § 39-08-03. Although "injury" is not defined for this purpose, the phrase "serious bodily injury" is defined to mean "bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, or permanent loss or impairment of the function of any bodily member or organ." N.D.C.C. § 12.1-01-04(29). This definition may be compared to the definition of "substantial bodily injury" as "a substantial temporary disfigurement, loss, or impairment of the function of any bodily member or organ or a bone fracture." N.D.C.C. § 12.1-01-04(31). Therefore, the facts which must be shown under N.D.C.C. § 39-06-31(2) before the commissioner is required to revoke an operator's license for conviction of a misdemeanor resulting from the operation of a motor vehicle and causing serious bodily injury do not necessarily follow from a finding that the operator was convicted of the misdemeanor of either reckless driving or aggravated reckless driving because a conviction of reckless driving does not include as

a necessary element of the crime proof of injury to anyone, and a conviction of aggravated reckless driving merely requires proof of the elements of reckless driving plus proof of injury upon the person of another which does not necessarily reach the level of a serious bodily injury.

The authority to revoke or suspend a person's driver's license is vested in the Director of the Department of Transportation (Director) and not in the judicial branch of government, and this authority is exercised through the related provisions of N.D.C.C. §§ 39-06-31 and 39-06-32. Letter from Attorney General Nicholas J. Spaeth to Ward County State's Attorney Doug Mattson, April 16, 1992. There must be strict compliance with statutory requirements before driving privileges may be lost or suspended because of the hardship and inconvenience entailed by the loss. Langer v. State Highway Comm'r., 409 N.W.2d 635, 636 (N.D. 1987). N.D.C.C. § 39-06-31 provides for mandatory revocation of licenses following certain convictions of the operator. In such an instance, the Director is not required to hold a hearing before mandatory revocation because the driver's hearing on the relevant facts already occurred during the criminal trial or conviction, and also because the conviction constitutes an emergency within the emergency exception to the due process hearing requirement. Kosmatka v. Safety Responsibility Division, 196 N.W.2d 402, 405-406 (N.D. 1972); see also Gregoryk v. Safety Responsibility Division, 131 N.W.2d 97, 99 (N.D. 1964). N.D.C.C. § 39-06-32 provides the Director with authority to suspend licenses after a hearing where the evidence shows, among other items, that the operator has committed an offense for which mandatory revocation of the license would be required upon conviction. The difference between these two provisions is that if there is a record of an operator's conviction for certain offenses showing the use of a motor vehicle or other specified facts, then the license is mandatorily revoked under N.D.C.C. § 39-06-31, whereas if such items cannot be shown by the record of a conviction, the director may hold an evidentiary hearing to determine these facts and issue a suspension under N.D.C.C. § 39-06-32.

The record of the operator's conviction, required for implementation of mandatory revocation under N.D.C.C. § 39-06-31, is not restricted to just those offenses which have as a required element of proof the use of a motor vehicle or the result of serious bodily injury. For example, N.D.C.C. § 39-06-31 also requires the mandatory revocation of an operator's license upon a record of the operator's conviction of a felony, "including a violation of chapter 12.1-16, in the commission of which a motor vehicle is used." A review of N.D.C.C. ch. 12.1-16 reveals that there is no violation for which the use of a

motor vehicle is a required element for conviction under that chapter. Therefore, the record of the operator's conviction must include some other source of information for determining facts beyond the elements of the particular crime, or else the portion of N.D.C.C. § 39-06-31 referring to a violation of chapter 12.1-16 is meaningless.

A provision in the Century Code which similarly requires the determination of an extra fact beyond the elements of the crime charged can be found in N.D.C.C. § 12.1-32-02.1, providing minimum prison terms for armed offenders. By express language, N.D.C.C. § 12.1-32-02.1 requires that the minimum prison term may be only applied when the fact that the offender was armed or possessed a dangerous weapon, as defined in the statute, has been either charged and admitted or found to be true in the manner provided by law. In State v. Sheldon, 312 N.W.2d 367, 370 (N.D. 1981), the Supreme Court construed this provision as requiring either that the possession of the dangerous weapon, explosive, or firearm is an essential element of the crime committed or that the trier of fact has made a special finding of such possession by the accused in the course of committing the offense. See also State v. Clinkscapes, 536 N.W.2d 661, 665 (N.D. 1995). The Supreme Court has also upheld a determination that the defendant was an armed offender based upon the trial court's instructions which required the jury to find possession of a weapon if the jury were to find the defendant guilty. State v. Whalen, 520 N.W.2d 830, 833 (N.D. 1994). The appropriate findings may also be made by the court as part of a hearing on a plea agreement and sentencing. State v. Schweitzer, 510 N.W.2d 612, 614 (N.D. 1994).

Therefore, if the record of a misdemeanor conviction shows that the misdemeanor resulted from the operation of a motor vehicle and caused serious bodily injury, as defined in N.D.C.C. § 12.1-01-04, to another person, either by the fact being an essential element of the misdemeanor, through use of a special jury verdict form, through the trial court's charge to the jury, or through appropriate findings at a hearing on a plea agreement and sentencing, then that misdemeanor conviction will fall under the mandatory revocation provisions in N.D.C.C. § 39-06-31(2). If the record of the misdemeanor conviction does not show such additional facts, the Director of the Department of Transportation has authority to hold an administrative hearing which shows the commission of an offense for which mandatory revocation of the license would be required upon conviction in order to suspend the operator's license upon proof by a fair preponderance of the evidence. N.D.C.C. § 39-06-32(1); Gregoryk, supra.

ATTORNEY GENERAL'S OPINION 97-11
November 12, 1997
Page 5

- 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.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: Edward E. Erickson
Assistant Attorney General

vkk