

Donald L. Paillette

SUBJECT: Whether proposed statute that would make a traffic infraction a traffic crime if the offender had prior conviction for certain class of offense would be ex post facto and unconstitutional if offenses committed before the effective date of the statute were included for purpose of application of the statute.
Classes of Offenses; Disposition of Offenders;
Preliminary Draft No. 3, s 4 (1) (f), June 1974

I. INTRODUCTION

The leading American case on the subject of the ex post facto prohibition in the U. S. Constitution, Art. I, S. 9, is Calder v. Bull, 3 Dall 386, 1 L.Ed. 648 (1798), which held four types of penal legislation violative of the ex post facto provision:

"1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender."

Jerome Hall, in commenting on this case, notes that later decisions widened the area of constitutional guarantee to include laws which retroactively require certain qualifications for office, not justifiable as a proper exercise of the "police power"; laws which impose a pecuniary penalty for an act which,

when committed, was not subject to that liability; and laws which retroactively deprive a person of his right to follow a certain vocation. Hall, General Principles of Criminal Law 60 (2d ed. 1960).

II. OREGON CASES

The prohibition against ex post facto laws in Oregon Constitution, Art I, S. 21, has been held by the Oregon Supreme Court to apply only to statutes that are criminal in nature. In re Idleman's Commitment, 146 Or 13, 27 P2d 305 (1933); Fisher v. City of Astoria, 126 Or 268, 269 P 853 (1928).

Oregon's Habitual Criminal Act (ORS ch 168; repealed 1971) which provided for increased punishment on subsequent convictions of felony was upheld in numerous cases as not being an ex post facto law. E.g., State v. Smith, 128 Or 515, 273 P 323 (1929); State v. Knighten, 248 Or 465, 435 P2d 305 (1967). The rationale behind the Oregon decisions, and those of all other state supreme courts which have considered habitual criminal legislation, has been that such statutes, although they are criminal laws, do not impose a penalty for an act previously committed but, rather, provide for an increased punishment for a later offense. State v. Smith, supra, at 525.

Our U. S. Court of Appeals is in accord in upholding the constitutionality of comparable federal habitual criminal sentencing provisions. The court has held that an enhanced penalty statute, when applied to sentencing a narcotics violator or a second offender because of a prior conviction occurring

before enactment of the statute, was not an ex post facto law. Wey Him Fong v. U. S., 287 F2d 525 (9th Cir 1961), cert. denied 366 U.S. 971. This case is particularly persuasive to the question at hand because it involves an analogous legal question in dealing with a prior conviction that occurred before the enactment of the enhanced penalty statute.

III. SUMMARY and CONCLUSION

Both Oregon and federal cases have held that habitual criminal and enhanced penalty laws are not ex post facto legislation.

The proposal under consideration by the Judiciary Committee is analogous to habitual criminal and enhanced penalty legislation that has been upheld by the courts because it, too, would impose a greater penalty for a subsequent offense if the offender had a prior conviction. The proposed draft section would not impose a penalty for an act previously committed, but would merely impose an increased penalty for a later offense by making it a crime instead of an infraction.

It appears, therefore, that the proposed section would not be violative of the ex post facto prohibitions of either the U. S. or Oregon Constitution.