

Shelley

Double Jeopardy: Failure to support children is a continuing offense and one conviction therefor will not prevent subsequent conviction for some offense on another day, and will not subject person charged to double jeopardy.

June 17th, 1948.

FILED

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6-26

Hon. Robert P.C. Wilson, III,
Prosecuting Attorney,
Platte County,
Platte City, Missouri.

Dear Mr. Wilson:

This will acknowledge receipt of your letter of May 25th, 1948, in which you request an opinion of this department. Your letter, omitting caption and signature, is as follows;

" I respectfully request the opinion of your office on the following:

A, the husband of B, is arrested and convicted under the provisions of Section 4420, Laws Missouri, 1947. He receives a jail sentence, is released, and thereafter, without good cause fails and refuses to provide adequate food and clothing for his small children. May another prosecution be carried to a conviction, or double jeopardy?"

For a solution to this problem, the provisions of Section 4420, Laws of Missouri, 1947, must be examined. This statute prescribes the following;

" If any man shall, without good cause, fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for such wife; or if any man or woman shall, without good cause, fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for his or her child or children, born in or out of wedlock, under the age of sixteen years, or if any other person having the legal care or custody of such minor child, shall without good cause, fail, refuse or neglect to provide adequate food, clothing, lodging, medical or surgical attention for such child, whether or

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not, in either such case such child or children by reason of such failure, neglect or refusal shall actually suffer physical or material want or destitution; or if any man shall leave the State of Missouri and shall take up his abode in some other state, and shall leave his wife, child or children, in the State of Missouri, and shall, without just cause or excuse, fail neglect or refuse to provide said wife, child or children, with adequate food, clothing, lodging, medical or surgical attention, then such person shall be deemed guilty of a misdemeanor; and it shall be no defense to such charge that some person or organization other than the defendant has furnished food, clothing, lodging, medical or surgical attention for said wife, child or children and he or she shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars (\$1,000) or by both such fine and imprisonment. No other evidence shall be required to prove that such man was married to such wife than would be necessary to prove such fact in a civil action."

In your request for an opinion you state that the husband was arrested and convicted under the provisions of the above statute. You did not state whether he was convicted of the crime of abandonment or of failure to support his wife and children. This section of the statutes regulates two separate and distinct crimes, that of abandonment of wife or children and that of failing to provide the necessary food, clothing, lodging and medical and surgical attention for his wife or children. In the case of Miller vs Gerk, 27 SW (2) 444, 1 c 445, the Court stated as follows;

"As re-enacted by the Legislature in 1921 when the disjunctive was substituted for the conjunctive, the statute now in effect denounces two offenses, though they are not usually regarded as being wholly separate, distinct and disassociated: the first being the crime of abandonment and the second of failure to support."

However, in your present state of facts, the subsequent violation is that of failing to provide adequate food and clothing for his small children. If the offense for which he had been convicted was that of abandonment, then a prosecution in which he was charged with failing to provide food and clothing could not subject him to double jeopardy since the offenses are separate. The only question then remaining is, if the conviction was based on a charge of failure to provide

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support, food or clothing for his children, then will a subsequent charge for the same offense subject him to double jeopardy.

We will assume for the purposes of this opinion that he is charged on each occasion with the same crime, of failing to provide food and clothing for his children. Such a state of facts was discussed in the case of Miller vs Gerk, supra. The Court in discussing that case made the following statement:

" Abandonment in its strict sense occurs whenever the parent separates from or deserts the child; and once the offense has been committed, it would seem that there could be no second offense, unless the parent returns to the discharge of his parental duty and again deserts his child. (Citing cases) Not so, however, with the offense of failure to support, for inasmuch as the parent's obligation to support his child is a continuing one so also is his offense for failure to meet his obligation, within the age limits fixed by the statute which defines the offense."

Under the above decision this department must find that the offense of failure to support children is a continuing one and the fact that a person has been convicted once for that offense will not act as a bar to another prosecution and conviction.

But the question arises as to how often the offense can occur. In 16 Corpus Juris 268 we find the following statement with reference to continuing offenses;

*** But it is not a bar to a subsequent prosecution for continuing the offense thereafter. Each day during which it continued, constitutes a separate offense and will support a separate prosecution, provided the information or indictment alleges such specific day, and the state confines its proof to the date alleged."

There seems to be no authority in this state which passes on this particular point but under the above statement, it is the opinion of this department that each day that a parent fails to provide clothing, lodging, food and medical and surgical attention to his children constitutes a separate and distinct offense.

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CONCLUSION.

It is therefore the opinion of this department, that the failure of a parent to provide food, clothing, lodging or medical and surgical attention to his children is a continuing offense and the fact that one conviction has been had against an individual on such a charge will not prevent a subsequent prosecution and conviction on the same charge on another subsequent date, each day the offense continues constituting a separate and distinct offense.

Respectfully submitted,

JOHN S. PHILLIPS,
Assistant Attorney General.

APPROVED:

J.E. TAYLOR. *JTB*
Attorney General.