Opinion No. 46-4843

January 28, 1946

BY: C. C. McCULLOH, Attorney General

TO: Mr. Fred J. Federici District Attorney Raton, New Mexico

*{*178}* We are in receipt of your letter of January 23, 1946, in which you ask whether or not the criminal statute of limitations, Section 42-901 etc. of the 1941 Compilation, applies to information filed under Section 42-1604; that is to say, may the state file an information to increase the sentence of a person theretofore convicted when it becomes known to the district attorney that such person was at the time of the latest conviction an habitual criminal, even though the limitation period would have run between the time of sentence and the filing of an information to extend the sentence?

Very extensive annotations on the habitual criminal acts are found in 50 A. L. R. 20, 82 A. L. R. 345, 116 A. L. R. 209, and 132 A. L. R. 91. The cases are uniform that a prosecution under an habitual criminal act is not a new criminal action but is rather a continuation or supplemental proceedings to the previous criminal action. Such acts merely increase the sentence of a particular class of persons when convicted, such class being persons previously convicted of crimes. Thus, when a person has been convicted of a crime and it later appears that such conviction was a second, third, or fourth conviction, the district attorney, on filing an information, does not file *{*179}* a new criminal proceedings; rather, he continues the old proceedings or brings a supplemental action to it.

On such hearing, the only question is the identity of the person. This fact caused the court in People v. Brennan, 220 App. Div. 378, 242 N. Y. S. 682, to hold that the statute of limitations did not run between time of conviction and the action to lengthen his term in the absence of an applicable statute of limitations.

Turning now to Section 42-901 of the 1941 Compilation, the sole question is whether this limitation of prosecution provision applies to an action to increase the punishment. This section provides in part:

"No person shall hereafter be prosecuted, tried or **punished** in any court of this state unless the indictment shall be found on information filed therefor as hereinafter limited and provided."

16 C. J. 222 states the rule for construing such limitation provisions as follows:

"Such statutes are to be given a reasonably strict construction in favor of the accused and against the prosecution."

Since the information is filed to increase the sentence of the person accused, it appears to me that such information is filed to punish the accused.

In view of the fact that this section limits not only the filing of an information to prosecute and try an individual, but also to punish him, and the fact that such statute should be construed in favor of the accused, it is my opinion that such statute is applicable to an information filed under Section 42-1604.

Your attention is also directed to the following: The cases throughout the United States decided under the habitual criminal acts split as to whether a pardon wipes out the conviction so that the pardoned offense cannot be considered as a prior conviction, the weight of authority being that a pardon has no effect. 58 A. L. R. 49, 82 A. L. R. 362, 116 A. L. R. 224.

The cases also split as to whether a sentence entered on a plea of guilty constitutes a prior conviction, the weight of authority being that it is a prior conviction. 58 A. L. R. 48. The majority of cases hold that when sentence has been suspended, it is not a final conviction. 58 A.L.R. 44, 82 A. L. R. 360, 116 A. L. R. 222.

In view of the foregoing, it appears to me that under the circumstances outlined by you, a district attorney would be justified in exercising his discretion and refusing to file an information to increase the sentence of a person last convicted in 1933.

By ROBERT W. WARD,

Asst. Atty. General