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April 1, 1974

DEPARTMENT OF LAW LETTER OPINION NO. 74-9-L (R-16)

REQUESTED BY: THE HONORABLE G. EUGENE NEIL
Yavapai County Attorney

QUESTION: Do subsections A and B of A.R.S. § 28-692.01, when read in conjunction, allow the sentencing court to impose a one day jail sentence coupled with an order to attend an alcohol rehabilitation program for 59 (or more) days, for a "second offense D.W.I." conviction?

ANSWER: No.

Subsection A of A.R.S. § 28-692.01 provides specific penalties for first offenders--a mandatory minimum one day in jail and, in the court's discretion, a fine of not less than \$100 nor more than \$300, or both. The court may also require the person to obtain treatment if a drug or alcohol problem exists. This would be in addition to, and not in place of, the one day in jail.

Similarly, Subsection B pertains to those persons previously convicted of specific violations. The penalties are increased and likewise mandatory. A second or subsequent conviction under A.R.S. § 28-692 (D.W.I.) within a twenty-four month period requires mandatory imprisonment for a minimum of 60 days and, in the court's discretion, a \$300 fine. Again, if drugs or alcohol are involved, the court may, in addition to the above, require treatment. It is important to note that immediately preceding or following each section allowing the court to require additional treatment is the statutory prohibition against probation or suspension of sentence.

The statutory language and legislative intent is clear and concise. Both subsections state: "No judge may grant probation to or suspend the imposition of a jail sentence."

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Further evidence in support of the Legislature's intent mandating minimum incarceration is Subsection C. Even if the person is steadily employed, the minimum sentence (one day or sixty days) must be served--on weekends, evenings and all remaining parts of the day other than actual hours of employment.

A second or subsequent conviction under A.R.S. § 28-692 allows the court to order attendance at an alcohol rehabilitation program for 59 days, or more, in addition to the minimum 60 days in jail, not in lieu of.

Respectfully submitted,

A handwritten signature in cursive script, reading "Gary K. Nelson". The signature is written in dark ink and is positioned above the typed name.

GARY K. NELSON
The Attorney General

GKN:TAJ:lf