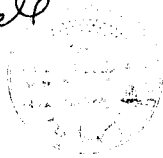


FILE  
Subject Group - Motor Vehicle  
Safety Resp. Act  
Copy to \_\_\_\_\_



STATE OF KANSAS

*Office of the Attorney General*

State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

VERN MILLER  
Attorney General

January 21, 1974

Opinion No. 74-22

Honorable Richard C. "Pete" Loux  
House of Representatives  
State House  
Topeka, Kansas 66612

RE: K.S.A. 8-722

Dear Representative Loux:

Your letter of November 16, 1973, inquires as to the possible retroactive effect of our opinion concerning the Kansas Motor Vehicle Safety Responsibility Act, K.S.A. 8-722. We find that any orders of suspension occurring prior to May 24, 1971, are valid and that Bell v. Burson, 402 U.S. 535 (1971) should not be given retroactive effect.

The precise question has yet to be answered definitely although we are aware that a Texas case, Gonzales v. Cassidy, 474 Fed. 67 (1973), does raise such an issue. Our opinion is based upon the interpretation of current law on the general question of retroactivity.

The Supreme Court of the United States has often recognized that retroactive application of its new rules is neither compelled nor prohibited by the Federal Constitution, Desist v. United States, 394 U.S. 244 (1969). In exercising the power to grant or deny retroactivity, the Supreme Court has developed three relevant criteria:

- (1) the purpose to be served by the new rule
  - (2) the extent of reliance upon the old rule
  - (3) the effect on the administration of justice if retroactive application is ordered.
- Stovall v. Denno, 388 U.S. 293 (1967).

It has been recognized that retroactive application will be provided if it is necessary to effectuate the purpose of the new rule, but not if the purpose can be achieved without such retroactivity. Thus, in Robert v. Russell, 392 U.S. 293 (1968) retroactivity was applied to the new rule

announced in Burton v. U.S., 391 U.S. 123 (1968) because the purpose of the rule was to "correct serious flaws in the fact finding process." Retroactivity was not applied in Desist v. U.S., 394 U.S. 244 (1969) because the purpose of the new exclusionary rule would not be served by retroactive application. The pivotal concept has been whether the integrity of the fact finding process is effective by noncompliance with the new rule. If it is, then retroactivity to some degree has been ordered.

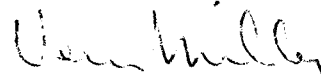
Applying the above to Bell v. Burson, supra, the court noted that it was not a question of jeopardizing the integrity of the fact finding process, but rather that the licensee was not afforded the opportunity for a fact finding process before suspension was applied. Additionally, the purpose of the new rule [to provide a due process hearing before suspension] is adequately served by applying prospective effect only to Bell.

A second factor in the determinations has been the good faith reliance upon the old rule. It cannot be said that the Department was not justified in relying upon the old rule, as it had been adjudicated in Kansas and found constitutional. State v. Finley, 198 Kan. 585. Additionally, similar laws in other states prior to Bell were consistently challenged and all found to be constitutional in every case. Such reliance was therefore both justifiable and reasonable.

A final factor is the effect that retroactivity would have upon the administration of justice. Retroactivity was refused in Tehan v. U.S., 382 U.S. 406 (1966) because of the "very grave impact" that it would have upon the states that had acted in reliance upon the old rule. Likewise, in Stovall v. Denno, supra, retroactivity would "seriously disrupt" the administration of criminal justice and that the "processing of current criminal calendars would be disrupted". We have been advised by the department, that it would be possible to retrieve the names of all the individuals whose licenses were revoked ex parte but such a procedure would require the manual search of all records, considerable additional man-hours of labor, the disruption of normal work patterns, and possibly the need to hire additional workers. The administrative burden would be great.

Accordingly it is our opinion that Bell should not be given retroactive effect. We are hopeful the foregoing will be of assistance.

Very truly yours,



VERN MILLER  
Attorney General