STATE OF KANSAS

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May 4, 1976

ATTORNEY GENERAL OPINION NO. 76-143

Honorable H. Michael Nichols
Probate, Juvenile and County Judge
Franklin County Court Building
Ottawa, Kansas 66067

RE: Criminal Procedure -- Appeals -- Effect of Plea on Right to Trial De Novo in the District Court.

SYNOPSIS: The defendant in a criminal case is entitled to a trial de novo in the district court regardless of the nature of his plea in a court of limited jurisdiction. The trial de novo permits a completely fresh determination of guilt or innocence.

RE: Criminal Procedure -- Aid to Indigent Defendants -- Entitlement to Counsel at Arraignment.

SYNOPSIS: Acceptance of a guilty plea from a defendant, indigent or otherwise, who has not made a voluntary, knowing and intelligent waiver of his right to representation by counsel, appointed or retained, may render any conviction based upon such a plea subject to collateral attack.

RE: Criminal Procedure -- Probation and Parole -- Revocation

SYNOPSIS: A defendant's probation or parole may not be revoked without notice and an opportunity to be heard.

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Dear Judge Nichols:

You have asked a variety of questions in your request of February 20, 1976. This letter is a response to those questions

dealing generally with criminal procedure. I hope the delay in preparing this response has not caused undue inconvenience.

Initially you have asked whether a defendant in a criminal case is entitled to a trial de novo in the district court even though he entered a plea of guilty or nolo contendre in a court of limited jurisdiction. The right to appeal is statutorily granted and the statutes under consideration here are K.S.A. 22-3601, 3609(1) and 3610.

K.S.A. 22-3601 provides in part:

> "An appeal to the supreme court may be taken by the defendant as a matter of right from any judgment against him in the district court and upon appeal any decision of the district court or intermediate order made in the progress of the case may be reviewed, except: No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendre."

K.S.A. 22-3609(1) provides:

> "The defendant shall have the right to appeal to the district court of the county from any judgment of a court of limited jurisdiction or a municipal or police court which adjudges the defendant guilty of a violation of the laws of Kansas or the ordinances of any municipality of Kansas or which imposes a sentence of fine or confinement or both. The appeal shall stay all further proceedings upon the judgment appealed from."

K.S.A. 22-3610 provides:

> "When a case is appealed to the district court, such court shall hear and determine the cause on the original complaint, unless the complaint shall be found defective, in which case the court may order a new complaint to be filed and the case shall proceed as if the original complaint had not been set aside. The case shall be tried de novo in the district court."

The statute governing a defendant's right to appeal to the Supreme Court from the decision of a district court, 22-3601, clearly does not control, bestow, abridge or restrict the right to appeal to a district court from the decision of a court of limited jurisdiction.

The extent and nature of an appeal to a district court from a lower court decision was considered in State v. Parker, 213 Kan. 229, 234, 516 P.2d 153 (1973). In that case the defendant appealed from a district court conviction which was the result of a trial de novo on an appeal from the decision of a city court. The alleged error was that the sentence imposed by the district court was unconstitutional in that it exceeded that imposed by the city court. The Supreme Court observed that the defendant is entitled to a trial de novo in the district court regardless of lack of error or the nature of his plea in the lower court. The trial de novo permits a completely fresh determination of guilt or innocence. The record of the lower court is irrelevant to the de novo proceedings.

It is my opinion that upon an appeal to a district court from a conviction of a court of limited jurisdiction, the defendant is entitled to a completely fresh determination of his guilt or innocence regardless of his plea in the lower court. Please note that from and after January 10, 1977, the provisions unifying the district court as accomplished by H.B. 2729 will govern the procedure for taking appeals within the district.

Secondly, you have asked whether it is error for the arraigning court to accept the defendant's plea of guilty to a misdemeanor if the defendant has not employed an attorney or if in cases of indigency, the court has not appointed one for him absent a knowing and intelligent waiver where there is a strong possibility of imprisonment upon conviction.

K.S.A. 22-4503 provides in part:

> "A defendant charged by the state of Kansas in a complaint, information or indictment with any felony is entitled to have the assistance of counsel at every stage of the proceedings against him. If such a defendant appears before any court or magistrate without counsel to assist him and conduct his defense, it shall be the duty of the court or magistrate to inform the defendant that he is entitled to counsel and that

> counsel will be appointed to represent him if he is not financially able to employ an attorney. The court or magistrate shall give the defendant an opportunity to employ counsel of his own choosing if he states he is able to do so; and if the defendant asks to consult with counsel of his own choosing, he shall be given a reasonable opportunity to do so. If it is determined that the defendant is not able to employ counsel, as provided in section 4 [22-4504], the court or magistrate shall appoint an attorney from the panel to aid indigent defendants to represent him."

This statute was enacted in 1969, prior to the United States Supreme Court's decision in Argersinger v. Hamlin, 407 U.S. 25, 32 L.Ed.2d 530, 92 S.Ct. 2006 (1972).

The Argersinger opinion held that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at his trial. That decision recognized that there are many stages in the proceeding where the right to counsel is necessary other than the formal trial itself. The court said:

> "Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as in felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution." (at 34).

It is obvious that the state by statute may not infringe upon the right to counsel as extended to defendants by the Sixth and Fourteenth Amendments.

The classification of an offense as felony or misdemeanor is not determinative with respect to the right to counsel, and the United States Supreme Court has recognized that the right extends to all critical stages of the proceedings. Acceptance of a guilty plea from a defendant, indigent or otherwise, who has not made a voluntary, knowing and intelligent waiver of his right to representation by counsel, appointed or retained, may render any conviction based upon such a plea subject to collateral attack.

Also, you have asked whether the revocation of a defendant's parole or probation under the provisions of K.S.A. 20-820 without notice or an opportunity to be heard is permissible.

K.S.A. 20-820 provides in part:

> "In misdemeanor cases the judge of the county court, when satisfied that the defendant, if permitted to go at large will not again violate the law, may parole such person or place him on probation upon such conditions and under such restrictions as the judge shall see fit to impose. Such judge may at any time, without notice to such person, terminate such parole or probation by simply directing execution to issue on the judgment, or, in case the person shall have been actually confined in jail, the parole may be terminated by directing the sheriff to retake such person under the commitment already in his hands."

In Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972) the Court held that in parole revocations the parolee must be afforded due process. The minimum process requirements include notice of the claimed violation, disclosure of the evidence thereof, opportunity to be heard and present evidence, the right to cross examine, a neutral hearing officer and findings of fact and reasons for the revocation in writing.

Any revocation of probation or parole not affording the due process mandated by Morrissey is, of course, defective. If a county court were to revoke a defendant's parole or probation under the authority of K.S.A. 20-820 without providing the required procedural safeguards as outlined in Morrissey, such a revocation would be subject to attack.

It should be noted that K.S.A. 20-820 has been repealed by H.B. 2729. The repeal is not effective until January 10, 1977.

Very truly yours,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

CTS:TWR:JAW:en