



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

November 4, 1976

ATTORNEY GENERAL OPINION NO. 76-335

Mr. Lowell F. Hahn
Phillips County Attorney
Phillips County Courthouse
Phillipsburg, Kansas 67661

RE: Public Health - Uniform Controlled Substances Act -
Penalties

SYNOPSIS: A foreign conviction shall not be utilized to increase
the penalty upon subsequent conviction in Kansas under
the Uniform Controlled Substances Act.

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Dear Mr. Hahn:

You inquire whether for the purposes of K.S.A. 1975 Supp. 65-4127b an offense is considered a second or subsequent one if prior to his conviction of the offense the offender had a foreign conviction relating to controlled substances.

K.S.A. 1975 Supp. 65-4127b provides:

"Any person who violates this subsection shall be guilty of a class A misdemeanor, except that upon conviction for a second or subsequent offense, such person shall be guilty of a class D felony."

Kansas does not have any case law defining "second or subsequent offense" and the only similar statute, the Habitual Criminal Act, K.S.A. 21-4504, specifically states that foreign convictions are to be considered pursuant to the act. The best approach to the problem is to look at authority from other jurisdictions which have enacted the Uniform Controlled Substances Act.

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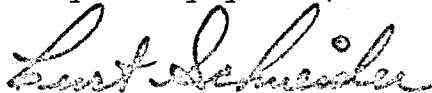
Illinois, Missouri, California, Iowa and Michigan have similar statutes regarding the possession, manufacture and/or sale of specified substances and the penalty for violation thereof. Each of the above states have specifically defined a second or subsequent offense as an offense which if prior to his conviction of the present offense, the offender had at any time been convicted under the Uniform Controlled Substances Act or of any law of the United States or of any state relating to controlled substances. Thus, a foreign conviction in the above jurisdictions would be taken into consideration for determination of a subsequent offense.

It is the opinion of this office that if the Kansas legislature had intended to include foreign convictions within the scope of subsequent offenses as per K.S.A. 1975 Supp. 65-4127b they would have specially defined it therein.

Two reasons can be given for this conclusion: First, the legislature in enacting the Habitual Criminal Act specifically included a clarification that foreign convictions would be defined within the scope of subsequent offenses for the enforcement of the act itself.

Second, by deleting language used by other jurisdictions adopting the Uniform Controlled Substances Act, i.e. that subsequent offenses include foreign convictions, the legislature must have intended to exclude such language. Thus, foreign convictions should not be considered when imposing a penalty under K.S.A. 1975 Supp. 65-4127b.

Very truly yours,



CURT T. SCHNEIDER
Attorney General

CTS:DLW:BAR:en