



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

April 27, 1977

ATTORNEY GENERAL OPINION NO. 77-135

Honorable Vern Miller
District Attorney
Sedgwick County Courthouse
Wichita, Kansas 67203

RE: Criminal Code - Sentencing - Probation and sentencing
for certain crimes involving use of firearms

SYNOPSIS: K.S.A. 1976 Supp. 21-4618 relating to mandatory sentencing is not applicable to an accomplice in a case as defined by Article 34 of Chapter 21 of the Kansas Statutes Annotated in which the perpetrator and not the accomplice uses a firearm in the commission of said crime.

* * *

Dear Mr. Miller:

You inquire whether K.S.A. 1976 Supp. 21-4618, relating to mandatory sentencing would be applicable to an accomplice in a case as defined by Article 34 of Chapter 21 of the Kansas Statutes Annotated in which the perpetrator uses any firearm in the commission of said crime.

K.S.A. 1976 Supp. 21-4618 entitled probation and sentencing for certain crimes involving use of firearms provides:

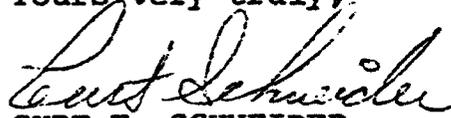
"Probation shall not be granted to any defendant who is convicted of the commission of any crime set out in article 34 of chapter 21 of the Kansas Statutes Annotated *in which the defendant used any firearm* in the commission thereof and such defendant shall be sentenced to not less than the minimum sentence of imprisonment authorized by law for that crime. This section shall apply only to crimes committed after the effective date of this act."
[Emphasis supplied.]

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Construing the above statutory provision relative to the phrase "in which the defendant used any firearm" within the statute, two interpretations may be applicable. First, Kansas has held in a number of cases that penal statutes are to be strictly construed. *State v. Howland*, 153 Kan. 352, 356, 110 P.2d 801 (1941); *Bayley Investment Co. v. Merrick*, 122 Kan. 734, 735 (1927); *State v. Chapman*, 33 Kan. 134, 5 Pac. 768 (1885).

When the law imposes a punishment which acts upon the offender alone, and it is not a reparation to the party injured, it will not be presumed that the legislature intended the punishment to extend farther than is expressly stated. 3 Sutherland Statutory Construction §59.03. It is a fundamental concept of individual rights that a criminal statute should not be extended by the courts to include acts of conduct not clearly within the provisions of the state. *Redding v. Slaughter*, 208 Kan. 206, 491 P.2d 897 (1971); *State v. Waite*, 156 Kan. 143, 131 P.2d 708 (1942). Thus, by the language used within K.S.A. 1976 Supp. 21-4618, the defendant (1) must have been convicted of the commission of any crime set out in Article 34 of Chapter 21 of Kansas Statutes Annotated and (2) he must have used a firearm in the commission thereof. Under this interpretation the statute would not apply to an accomplice unless he met the above qualifications, i.e., he must have used a firearm himself in the commission of the crime.

Yours very truly,


CURT T. SCHNEIDER
Attorney General

CTS:DLW:en