



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

October 4, 1977

ATTORNEY GENERAL OPINION NO. 77- 321

Mr. Ron Svaty
City Attorney
126 North Douglas
Post Office Box 83
Ellsworth, Kansas 67439

Re: Municipal Courts--Annulment--Discretion

Synopsis: Under K.S.A. 1976 Supp. 12-4515, a municipal court has discretion to permit or refuse to permit withdrawal of a guilty plea, or to set aside a judgment of guilty after a plea of not guilty, and may thus grant or deny applications for annulment of a conviction for violation of a municipal ordinance.

* * *

Dear Mr. Svaty:

K.S.A. 1976 Supp. 12-4515 states thus, in pertinent part:

"In every city in this state every person convicted of a violation of a city ordinance who has satisfied the sentence imposed, or who has fulfilled the conditions of his or her parole or suspension of sentence for the entire period thereof, may at any time thereafter be permitted by the court to withdraw his or her plea of guilty and enter a plea of not guilty; or if he or she has been convicted after a plea of not guilty, the court may set aside the judgment of guilty; and in either case, the court shall thereupon

Mr. Ron Svaty
Page Two
October 4, 1977

dismiss the complaint against such person,
who shall thereupon be released from the penal-
ties and disabilities resulting from the of-
fense of which he or she has been convicted
. . . ." [Emphasis supplied.]

You request my opinion whether the court has discretion to grant or deny permission to withdraw a plea of guilty or to set aside a judgment of guilty, when an application therefor has been filed by the offender.

The underscored language clearly directs, in my judgment that the court had discretionary authority to grant or deny an application for annulment of a conviction under this section. The court "may" at any time after satisfaction of the sentence, fulfillment of the conditions of parole or suspension of the sentence for the entire period thereof, permit a guilty plea to be withdrawn, and the court "may" set aside the judgment of guilty. Once the court has granted a request and permitted withdrawal of a plea, or set aside a judgment of guilty, the legal consequences of that action are mandatory, i.e., the court must dismiss the complaint, and the offender "shall" thereupon be released from any penalties and disabilities resulting from the offense and conviction. The decision to permit withdrawal of a guilty plea, or to set aside a judgment of guilty, is in the first instance discretionary.

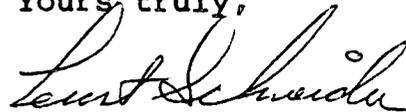
In *State ex rel. Jackson v. School District No. 1*, 80 Kan. 667 (1909), the court stated thus:

"Primarily and as ordinarily used in a statute the word 'may' is permissive rather than peremptory. It is sometimes regarded as synonymous with must, as for instance 'where public authorities are authorized to perform an act for the benefit of the public, or for an individual who has a right to its performance.' . . . It should be given its ordinary meaning, however, unless the terms and provisions of the statute compel the other view. As was said in *In re McCort, Petitioner*, 52 Kan. 18, 'the sense in which the word is used must always be determined from the context of the act.' (Page 20.)" 80 Kan. at 669.

Mr. Ron Svaty
Page Three
October 4, 1977

There is nothing to suggest that the words "may" were not used in their ordinary and customary sense in this provision. Nothing in the context suggests that the term should have other than its ordinary meaning. If there were ambiguity which required resort to legislative intention for resolution, it is unlikely that the legislature did intend that annulments of convictions in municipal court should be a matter of right. The grant of annulment is widely recognized as a useful device to assist convicted persons whose conduct and demeanor indicates rehabilitation or at least a lack of disposition to return to criminal conduct. However, it is useful only when it is used selectively, and with due consideration to the host of facts and circumstances which are pertinent to every individual application. Both the plain language of the statute, and the clear legislative intention, in my judgment, suggest that the decision to grant or withhold annulment under this provision is entirely discretionary.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj