



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

October 7, 1977

ATTORNEY GENERAL OPINION NO. 77- 329

Mr. Geary N. Gorup
Butler County Attorney
Butler County Judicial Building
El Dorado, Kansas 67042

Re: Automobiles and Other Vehicles--Drivers' Licenses--
Habitual Violators

Synopsis: An action under K.S.A. 8-284 et seq. (Habitual Violators) is a civil action.

A conviction expunged or annulled under K.S.A. 12-4515, 21-4616, or 21-4617 cannot be used in establishing the requisite number of convictions required to be an habitual violator.

K.S.A. 60-514 would require an action under habitual violator section to be brought within one year from when it accrues. An action under that section accrues with the commission of the last offense qualifying the offender as an habitual violator.

* * *

Dear Mr. Gorup:

Your recent letter of August 24, 1977, to the Motor Vehicle Division was referred to this office. From the text of the letter I discern three questions:

1. Is an habitual violator's action under K.S.A. 8-824 et seq. a criminal or civil proceeding?

Mr. Geary N. Gorup
Page Two
October 7, 1977

2. How does the expungement of prior convictions of the defendant effect the capacity of the state to pursue the action?
3. What is the statute of limitations applicable to habitual violators actions?

You inquire first whether proceedings under K.S.A. 8-284 et seq. are civil or criminal. That section provides that if a person within the next preceding five (5) years has been convicted in this or any other state three (3) or more times of the offenses defined in subsection (a) or of three (3) or more offenses, either singularly or in combination, of any of the offenses enumerated in subsection (a), that he or she may be declared an "habitual violator" and the district court shall enter an order prohibiting that person from operating a motor vehicle on the public highways of the state of Kansas.

K.S.A. 21-3102 provides, in part, that:

"No conduct constitutes a crime against the state of Kansas unless it is made criminal in this code or in another statute of this state . . . "

Thus, criminal conduct need not be defined in the criminal code, (Chapter 21, Articles 31 to 46), but may be defined in any statutes in other chapters.

However, K.S.A. 21-3105, defines a crime thus:

"A crime is an act or omission defined by law and for which, upon conviction, a sentence of death, imprisonment, or fine or both imprisonment and fine, is authorized. Crimes are classified as felonies or misdemeanors."

As to proceedings which are considered criminal, K.S.A. 22-2102 of the Kansas Code of Criminal Procedure specifies that:

"The provisions of this code shall govern proceedings in all criminal cases in the courts of the state of Kansas, . . . "

Mr. Geary N. Gorup
Page Three
October 7, 1977

The key element in classifying criminal conduct and criminal cases is the imposition of a penalty which consists of either imprisonment or a fine, or both. Thus, most substantive traffic offenses and the related proceedings are criminal in nature because, upon conviction, the court is authorized to impose a fine, and in some circumstances imprisonment.

K.S.A. 8-286 outlines the procedure in determining whether a person is an "habitual violator" and the penalty imposed:

"Whenever the files and records of the division shall disclose that the record of convictions of any person is such that the person is an habitual violator the division forthwith shall certify a full and complete abstract of such person's record of convictions to the district or county attorney . . . Upon receiving said abstract, the district or county attorney forthwith shall commence prosecution of such person in the district court of such county . . . Such court shall cause a summons to be served on the accused, ordering the accused to appear before the court . . . to show cause why he or she should not be convicted of being an habitual violator . . . if the court finds the accused is the same person named in the records certified by the division, the court shall find such person guilty of being 'an habitual violator' . . . and shall direct such person by appropriate order not to operate a motor vehicle on public highways in this state." [Emphasis supplied.]

The language of this section is framed in the familiar criminal terms of prosecution, accused, convicted, and guilty. Also, the Revisors of Statutes has indexed the habitual violator's section under the Crimes and Punishment section in General Index volume of the Kansas statutes. In addition, the Judicial Administrator for the State of Kansas has directed, through the promulgation of the District Clerk Manual, that such actions be filed as criminal actions.

Although a strong arugment may be made that the legislature in enacting the "habitual violator" section intended to consider

the proceedings as criminal in nature, the definition of "crime" in K.S.A. 21-3105 leaves little room for ambiguity. This section does not define a crime to be an offense for which any sanction whatever is imposed, but specifically for which the punishment is death, imprisonment, or fine. Neither the use of criminal procedural terms, the index classification of the section, nor the directives of the District Clerk Manual are controlling. The habitual violator section allows only the imposition of an order prohibiting the "habitual violator" from operating his or her motor vehicle and works as an administrative revocation of a driver's license. It in no way authorizes the imposition of any fine or imprisonment. It is our opinion that proceedings thereunder are civil in nature.

Your second question relates to the effect of expungement of prior traffic convictions on the liability of the offender to proceedings under the habitual violator's section.

Three statutes authorize the expungement of criminal convictions. K.S.A. 12-4515 under certain conditions allows conviction for violations of city ordinances to be treated as not existing. In a similar fashion, K.S.A. 21-4616 allows the annulment of convictions for violations of state law where the offender was under twenty-one (21) at the time of the criminal offense, and K.S.A. 21-4616 allows the expungement of conviction records of those over twenty-one (21) when the criminal offense was committed.

Though the conditions for obtaining expungement vary with the statute, all three uniformly provide that, upon expungement, the convicted person thereafter shall be released from all penalties and disabilities of the crime for which he or she has been convicted, and shall be treated as not having ever been convicted except that on conviction of any subsequent crime (offense under K.S.A. 12-4515) the prior expunged conviction may be considered in imposing sentence. The latter qualification would allow a prosecutor to move for imposition of more severe penalties under K.S.A. 21-4504 (Habitual Criminals Act), or for that matter, to bring the prior conviction to the court's attention for consideration in the imposition of sentence when the defendant has been convicted of a subsequent offense, regardless of expungement or annulment. However, for all other purposes, the conviction is treated as not existing.

Under K.S.A. 8-284 et seq., the requisite number of prior convictions on the specified offenses is a substantive fact which must be alleged and proved by certified record as a prerequisite to "conviction" and imposition of the required penalty. This consideration of prior convictions is not incident to determining sentence for conviction of a subsequent crime, but rather is used in establishing a separate subsequent offense or status.

Mr. Geary N. Gorup
Page Five
October 7, 1977

It is incongruous that a traffic offender may avoid the sanctions of the habitual violator act by expungement, but the plain meaning of the expungement statutes dictate that result. The problem could have been avoided by an appropriate legislative amendment of the expungement statutes or by express language treating the issue under the habitual violator statute. This action is recommended. However, it is our opinion that expungement or annulment of a conviction under any of the three statutes would preclude its use in establishing the required number of offenses under Ch. 40, L. 1977.

As to your final question, regarding the statute of limitations to be applied to habitual violator actions, I agree with your conclusion. A cause of action accrues to the state when a person commits the final offense which qualifies him or her as an habitual violator as defined in K.S.A. 8-284 et seq.

One might argue that K.S.A. 8-284 et seq. provides within its own terms, a separate limitation of action, and that as long as the requirements of Ch. 40, L. 1977, under this section are met, an action is statutorily authorized. However, K.S.A. 60-510 states:

"Civil actions, other than for the recovery of real property, can only be commenced within the period prescribed in the following sections of this article, after the cause of action shall have accrued."

Further, K.S.A. 60-514 in this section provides:

"The following actions shall be brought within one (1) year . . .
(3) an action upon statutory penalty or forfeiture."

It is our opinion then, that an action under the habitual violator section must be commenced within one (1) year from the last offense qualifying the person under Ch. 40, L. 1977, or be barred by K.S.A. 60-514.

Yours truly,


CURT T. SCHNEIDER
Attorney General

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