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ATTORNEY GENERAL OPINION NO. 81- 222

Joseph Bribiesca, Esq.
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Re: Cities and Municipalities -- Penal Ordinances -- Conflict with State Law

Synopsis: For criminal conduct which the State has declared to constitute a felony, municipalities may not exercise concurrent jurisdiction by redefining such offense as a misdemeanor in violation of municipal ordinance. Cited herein: K.S.A. 21-3707, 21-3102, 21-3108, K.S.A. 1980 Supp. 12-4104, 22-2601.

* * *

Dear Mr. Bribiesca:

You ask our opinion whether a person, whose conduct would constitute a violation of the felony worthless check statute, K.S.A. 21-3707, may be prosecuted in municipal court if the prosecution is brought as a misdemeanor city ordinance, rather than a felony as defined by State law. K.S.A. 12-4104, which defines the jurisdiction of municipal courts in Kansas, provides in part:

> "The municipal court of each city shall have jurisdiction to hear and determine cases involving violations of the ordinances of the city." (Emphasis added.)

Similarly, K.S.A. 1980 Supp. 22-2601, provides, relating to district courts:

> "The district court shall have exclusive jurisdiction to try all cases of felony and other criminal cases under the laws of the state of Kansas." (Emphasis added.)

Also of relevance are the provisions of K.S.A. 21-3707(4), which provide the jurisdictional amount of a misdemeanor worthless check shall be less than fifty dollars ($50) and that of a felony violation is fifty dollars ($50) or more.

Thus, apparently we are presented with a question of first impression. That question being whether a city may pass a penal ordinance identical or substantially identical to a state criminal law, but providing a less severe penalty for such conduct. The Supreme Court, on a number of occasions, has discussed the concept of conflict between state statutes and municipal ordinances. The Court has considered and rejected the argument that municipalities are powerless to enact criminal ordinances in light of K.S.A. 21-3102, which states in relevant part:

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

The Court has held municipalities may enact criminal-like statutes as a proper exercise of the police power of a city governing body, absent preemption by the state or actual conflict with state law. City of Lyons v. Suttle, 209 Kan. 735 (1972); City of Junction City v. Lee, 216 Kan. 495 (1975); Garten Enterprises, Inc. v. City of Kansas City, 219 Kan. 620 (1976).

Thus, it must be conceded municipalities are empowered with authority to enact penal ordinances. However, such ordinances may not conflict with state law. In City of Junction City v. Lee, supra at 501, the Court has stated:

> "A test frequently used to determine whether conflict in terms exists is whether the ordinance permits or licenses that which the statute forbids or prohibits that which the statute authorizes; if so, there is conflict, but where both an ordinance and a statute are prohibitory and the only difference is that the

> ordinance goes further in its prohibition but not counter to the prohibition in the statute, and the city does not attempt to authorize by the ordinance that which the legislature has forbidden, or forbid that which the legislature has expressly authorized there is no conflict." [Citations omitted.]

Additionally, in Garten Enterprises, Inc. v. City of Kansas City, supra at 625, the Court held that "a municipality may legislate on the same subject so long as the municipal ordinance does not conflict with the state law." [Citations omitted.]

It also must be asked whether the state has clearly preempted municipalities from enacting ordinances such as above described by means of legislative fiat. The Court has stated in Hutchinson Human Relations Comm. v. Midland Credit Management, Inc., 213 Kan. 308:

> "An intent on the part of the legislature to retain exclusive jurisdiction to legislate in a given area must be clearly shown, and where such an intent cannot be gathered from the statutes themselves, whatever extrinsic evidence there may be of such an intention must be clear and convincing before the power to regulate can be said to have been withdrawn from the cities."

Our research has failed to discover any specific preemptive language in the criminal code and, in fact, certain provisions of the criminal code, e.g. K.S.A. 1980 Supp. 21-3108(3), make reference to the prosecution of a defendant in a municipal court.

We must, however, conclude that the Kansas Supreme Court would clearly find conflict between a felony state statute prohibiting certain conduct and a municipal ordinance prohibiting the same conduct but providing misdemeanor sanctions. Such an ordinance cannot be considered merely an enlargement on the provisions of a statute which would require more than is required by a statute, nor is it an ordinance which concurrently regulates conduct with state statutes providing substantially identical penalties. Carrying the proposed ordinance to a logical extreme, if such a situation were not a conflict, municipalities would be empowered to enact ordinances regulating such conduct as first degree murder, rape, burglary and various and sundry felony offenses as defined by state law, and provide misdemeanor sanctions for the same. Thus, in light of K.S.A. 1980 Supp. 21-3108(3), should an individual be charged by city ordinance and convicted of first degree murder, receive a thirty-day jail sentence

for the same, prosecution by the state would be barred, as the same would place the defendant in "double jeopardy." Such a situation clearly conflicts with the Kansas criminal code and would render the same largely ineffective. Thus, it is our opinion, should the State of Kansas declare an act or omission by law to be a felony, municipalities are without authority to proscribe misdemeanor sanctions for the same conduct.

Very truly yours,

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