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ATTORNEY GENERAL OPINION NO. 82- 82

Alan F. Alderson
General Counsel
Department of Revenue
State Office Building
Topeka, Kansas 66625

Re: Automobiles and Other Vehicles -- Drivers' Licenses --
Habitual Violators; Effect of Prior Conviction Based on
Plea of Nolo Contendere

Synopsis: A person's prior conviction of one of the offenses
enumerated in K.S.A. 1981 Supp. 8-285, based on a
plea of nolo contendere, may properly be considered
by a court in determining whether such person is an
habitual violator pursuant to K.S.A. 8-284 et seq.
Cited herein: K.S.A. 8-284, K.S.A. 1981 Supp. 8-285,
K.S.A. 8-286, 22-3209.

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Dear Mr. Alderson:

You seek our opinion on whether the district court can properly consider a defendant's prior conviction of one of the offenses enumerated in K.S.A. 1981 Supp. 8-285 that was based on a plea of nolo contendere in determining whether the defendant is "an habitual violator" of the motor vehicle laws of the State of Kansas in a prosecution commenced under K.S.A. 8-286. This statute provides:

"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, as prescribed by K.S.A. 8-285 the division forthwith shall certify a full and complete abstract of such person's record of convictions to the district or county attorney of the county where such person resides, as disclosed by the records of the division, or if such person is a nonresident, to the district attorney of Shawnee county. Upon receiving said abstract, the district or county attorney forthwith shall commence prosecution of such person in the district court of such county, alleging such person to be an habitual violator. Such court shall cause a summons to be served on the accused, ordering the accused to appear before the court at a time and date stated therein to show cause why he or she should not be convicted of being an habitual violator. At the time and date stated in the summons, the court shall hold a hearing to determine the identity of the accused and the accuracy of the abstract of such person's record of convictions.

"If the court finds that such accused person is not the same person as the accused named in such records, or that the convictions are not such as to constitute the accused 'an habitual violator' under this act, the prosecution shall be dismissed; but if the court finds that 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' of the motor vehicle laws of Kansas and shall direct such person by appropriate order not to operate a motor vehicle on the public highways in this state. The clerk of the court shall file with the division a copy of such order which shall become a part of the permanent records of the division."

Under the criminal laws of the State of Kansas, the criminal defendant who does not wish to plead guilty to the charges contained in a criminal complaint, indictment or information has the alternative of entering a plea of nolo contendere. K.S.A. 22-3209(2) provides:

"A plea of nolo contendere is a formal declaration that the defendant does not contest the charge. When a plea of nolo contendere is accepted by the court, a finding of guilty may be adjudged thereon. The plea cannot be used against the defendant as an admission in any other action based on the same act."

Nolo contendere is a Latin phrase meaning " I will not contest it." Black's Law Dictionary (5th Edition, 1979). This plea is used primarily to avoid civil sanctions and other liabilities which might accompany a plea of guilty. Hicks v. Oliver, 523 F.Supp. 64 (D. Kan. 1981); Lastelic, Pleas of Guilty, 18 K.L.R. 730 (1970). With respect to the case in which it is entered, it has the same effect as a guilty plea. Zebelman v. United States, 339 F.2d 484 (10th Cir. 1964). The plea of nolo contendere constitutes an admission of every essential element of the offense contained in a well-pleaded charge, and it is essentially an admission of guilt. Lott v. United States, 367 U.S. 421, 6 L.Ed.2d 940, 81 S.Ct. 1563 (1961); Zebelman v. United States, supra. The legal effect of a plea of nolo contendere is as conclusive as to a defendant's guilt as a plea of guilty. Carnes v. United States, 279 F.2d 378 (10th Cir. 1960), cert. denied, 364 U.S. 846, 5 L.Ed.2d 69, 81 S.Ct. 88; United States v. L'Aquarius, 418 F.Supp. 887 (D. Okl. 1976). See also, United States v. William, 642 F.2d 136 (5th Cir. 1981).

The Kansas Supreme Court in State v. Holmes, 222 Kan. 212 (1977), considered the effect of a conviction based on a plea of nolo contendere and stated:

"Under this statute [K.S.A. 22-3209(2)] when a court accepts a tendered plea of nolo contendere and adjudges a finding of guilt thereon, the defendant at that point has been convicted of the offense covered by the plea of nolo contendere." Id. at 214.

The Court also held:

"While a plea of nolo contendere, unlike a plea of guilty, may not be used as an admission in any other action based on the same act, for all other purposes a conviction based on a plea of nolo contendere is just like any other conviction." Id. at 213.

The use of a plea of nolo contendere in a proceeding other than the matter in which the defendant tendered the plea of nolo contendere is discussed in the annotation at 89 A.L.R.2d 540 (1963), as follows:

"In a number of jurisdictions a distinction has been drawn in regard to the effect of the plea of nolo contendere outside the case, as between the defendant's guilt and his conviction. This distinction is that while a conviction of the defendant

upon the plea of nolo contendere is not an admission of his guilt, so that the defendant is not estopped in a civil proceeding from denying the facts to which he pleaded nolo contendere, the fact of his conviction upon the plea may be shown in a later proceeding, and such a conviction subjects the defendant to all the consequences of a conviction in the same way as if it were after a plea of guilty or not guilty." Id. at 604.

This distinction is also discussed in Tempo Trucking and Transfer Corp. v. Dickson, 405 F.Supp. 506, 516-17 (E.D. N.Y. 1975).

In reviewing the cases of numerous jurisdictions we find that a majority of states permit the introduction of the former judgment to show the fact of conviction, as distinguished from an admission. In our opinion a conviction under a nolo plea is regarded in the same manner as a conviction under a guilty plea for purposes of multiple offense statutes. See, e.g., United States ex rel. Bruno v. Reimer, 98 F.2d 92 (2nd Cir. 1938).

In United States v. Bagliore, 182 F.Supp. 714 (E.D. N.Y. 1960), the court discussed the distinction of a conviction based on a nolo plea being used for purposes of an admission in another proceeding and the fact that a conviction based on a nolo plea can be introduced simply to show that the prior conviction exists. The court related in pertinent part:

"[T]hough [a plea of nolo contendere] . . . does not constitute an admission of guilt in subsequent actions, it is of no help to a defendant if the conviction (regardless of how obtained), rather than admission of guilt, is the basis for the subsequent action." Id. at 716.

Similarly, when a prosecution under an habitual criminal statute is commenced, the general rule is recognized in 39 Am.Jur.2d Habitual Criminals, Etc. §7:

"Where followed by judgment or sentence, however, a plea of guilty or of nolo contendere is generally held to amount to a conviction under habitual criminal statutes." (Footnotes omitted.)

It is well accepted that the operation of a motor vehicle on the public highways is a privilege, not a right, and is subject to reasonable regulation under state police power in the interest of public safety

and welfare. State v. Garner, 227 Kan. 566, 571 (1980); Lee v. State, 187 Kan. 566, 570 (1961). The stated purpose of the habitual violator act (K.S.A. 8-284 et seq.) is to provide maximum safety for all people who use the public highways by depriving habitual violators of the privilege of operating motor vehicles on the public highways of this state. State v. Garton, 2 Kan. App.2d 709, 710, 711 (1978). The objectives of the statute are necessary and proper within the police power of the state.

Additional support for the proposition that previous convictions based on pleas of nolo contendere can be considered in an habitual violator proceeding lies in the Kansas Court of Appeals decision of State v. Skeen, 3 Kan.App.2d 231 (1979), in which the court determined that an abstract of the original court record of conviction could be introduced by the prosecution as evidence to show that an accused was an habitual violator under the then existing provisions of K.S.A. 1981 Supp. 8-285. In reaching this conclusion, the court noted that the record of the accused's past convictions indicated "that in two instances the convictions were based on pleas of nolo contendere." Id. at 233. The court then found: "The record in this case is sufficient to have made at least a prima facie case against the accused as an habitual violator as that term is defined by K.S.A. 1978 Supp. 8-285." Id. at 233, 234.

From the foregoing, it is clear that, if a person is accused of violating one of the offenses described in K.S.A. 1981 Supp. 8-285(a), and the trial court accepts that person's plea of nolo contendere and subsequently enters an order of conviction, such person is deemed to have been fully and properly "convicted" of the offense charged. It is our opinion that, during the course of a prosecution of an individual as "an habitual violator," the defendant's prior convictions of crimes enumerated in K.S.A. 1981 Supp. 8-285, including a conviction pursuant to a plea of nolo contendere can be properly considered in determining whether an individual is "an habitual violator" as prescribed in K.S.A. 8-286. The individual's past conviction is not being considered as an admission against interest, but simply offered in the subsequent proceeding to show the fact of conviction.

In summary, therefore, it is our opinion that a person's prior conviction of one of the offenses enumerated in K.S.A. 1981 Supp. 8-285, based on

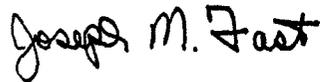
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a plea of nolo contendere, may properly be considered by a court in determining whether such person is an habitual violator pursuant to K.S.A. 8-284 et seq.

Very truly yours,



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