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ATTORNEY GENERAL OPINION NO. 82- 155

E. A. Mosher, Executive Director
League of Kansas Municipalities
112 West Seventh Street
Topeka, Kansas 66603

Re: Automobiles -- Serious Traffic Offenses -- Driving While Under Influence of Alcohol; Imposition by Municipal Courts of Penalties for Second, Third and Subsequent Violations

Criminal Procedure -- Method of Trial in Municipal Court -- Trial to the Court; Right to De Novo Jury Trial at District Court Level

Synopsis: K.S.A. 1981 Supp. 8-1567, as amended by 1982 Senate Bill No. 699, establishes stricter penalties for those persons who are convicted a second, third or subsequent time for driving a vehicle under the influence of alcohol. The new penalties can involve maximum imprisonment of up to one year and fines of up to $2,500, both of which are beyond the penalties which may be imposed without a right to a jury trial being afforded to a defendant. As trials for violations of municipal ordinances are to the court, a potential conflict is created. However, as the legislature has authorized cities to adopt lesser maximum penalties than those of the statute, this problem may be avoided by a city when it drafts an ordinance on this subject. Furthermore, even if the maximum penalties of the statute are adopted by a city, a defendant's right to a de novo trial before a jury at the district court level sufficiently protects the constitutional right to trial by jury.

K.S.A. 1981 Supp. 8-262 (driving while license canceled, suspended or revoked) and 8-1568 (fleeing or attempting to elude a police officer) provide that persons convicted of a third offense shall be guilty of a class E felony. In the absence of any statutory provision to the contrary, a city is without the power to classify such conduct by ordinance as a misdemeanor. Again, however, the right to a trial de novo by a jury at the district court level avoids any denial of a constitutional right of the defendant to a jury trial. Attorney General Opinion No. 81-222 is reaffirmed. Cited herein: K.S.A. 1981 Supp. 8-262, 8-1567, as amended by 1982 Senate Bill No. 699, 8-1568, K.S.A. 12-4501, 22-3609, 22-3610, both as amended by 1982 Senate Bill No. 699, 1982 Senate Bill No. 699.

* * *

Dear Mr. Mosher:

As Executive Director of the League of Kansas Municipalities, you request our opinion on two inter-related questions concerning the imposition of penalties by municipal courts. Specifically, you inquire whether such a court may impose sentences of up to a year for misdemeanors (under K.S.A. 1981 Supp. 8-1567, as amended by 1982 Senate Bill No. 699) and sentences of up to five years for a class E felony (K.S.A. 1981 Supp. 8-262 and 8-1568) without providing the right to a jury trial. In that the first of these three statutes contains provisions which set it apart from the latter two, our response will address it separately.

Prior to July 1, 1982, K.S.A. 1981 Supp. 8-1567 imposed certain penalties upon those persons who were convicted of driving while under the influence of alcohol. Under subsection (c), the statute provides:

> "Every person who is convicted of a violation of this section shall be punished by imprisonment of not more than one (1) year, or by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500), or by both such fine and imprisonment. On a second or subsequent conviction he or she shall be punished by imprisonment for not less than ninety (90) days nor more than one (1) year, and, in the discretion of the court, a fine or not more than five hundred dollars ($500)."

As set forth in the Standard Traffic Ordinance for Kansas Cities (1979) (at Article 6, Section 30), the maximum term of imprisonment is reduced to 6 months. Although dicta in the case of City of Junction City v. Lee, 216 Kan. 495 (1976) would indicate that such a reduction creates an impermissible conflict between the statute and an ordinance employing such language, this problem is now moot in light of a statutory change, as discussed hereinbelow.

Following the effective date of 1982 Senate Bill No. 699 on July 1, 1982, the penalty for a second conviction under the statute is increased to a sentence of imprisonment of not less than 90 days nor more than 1 year and a fine of not less than $500 nor more than $1,000. Upon a third or subsequent conviction, the fine is increased to not less than $1,000 nor more than $2,500, with the jail sentence remaining the same. The presence of these increased sentences creates a potential conflict between K.S.A. 22-3404(3), which provides that trials in municipal court are to the court, and judicial decisions which require the right of a defendant to a trial by jury where imprisonment for more than six months or a fine greater than $500 is authorized. State v. Irving, 216 Kan. 588, 589 (1975). In our opinion, this conflict can be resolved in one of two ways.

First, it should be noted that subsection (n) of Section 5 of the bill, amending K.S.A. 1981 Supp. 8-1567, provides that:

> "Nothing contained in this section shall be construed as preventing any city from enacting ordinances declaring acts prohibited or made unlawful by this act as unlawful or prohibited in such city and prescribing penalties for violation thereof, but the minimum penalty in any such ordinance shall not be less than nor exceed the minimum penalty prescribed by this act for the same violation, nor shall the maximum penalty in any such ordinance exceed the maximum penalty prescribed for the same violation." (Emphasis added.)

By this subsection, the legislature has expressly allowed a city to impose maximum sentences less than those of the statute, thus avoiding the conflict noted in City of Junction City v. Lee, supra. Therefore, a city could enact an ordinance which contains a maximum term of imprisonment of six months and a maximum fine of $500. Accordingly, under Kansas and Federal court decisions, no right to a jury trial would be present, leaving a city free to continue trying such cases to the court.

Should a city desire to impose the new maximum penalties now authorized, it is our opinion that it still would not be required to afford defendants the right to a jury trial. We base this conclusion on the holding of Ludwig v. Massachusetts, 427 U.S. 618, 96 S.Ct. 2781, 49 L.Ed.2d 732 (1976). In this case, the Supreme Court addressed the issue of whether the denial of a jury trial at the municipal level denied a defendant of rights under the Sixth and Fourteenth Amendments where, on appeal, he or she was entitled to a trial de novo before a jury. Similar to Kansas, the Massachusetts court system affords only trial to the court at what the Court termed the "first-tier" of the system. Upon appeal, a de novo trial before a 6 person jury is provided as a matter of right. In rejecting the argument that such a system was constitutionally impermissible, the Court stated:

> "It is indisputable that the Massachusetts two-tier system does afford an accused charged with a serious offense the absolute right to have his guilt determined by a jury composed and operating in accordance with the Constitution. Within the system, the jury serves its function of protecting against prosecutorial and judicial misconduct. It does so directly at the second tier of the Massachusetts system." 427 U.S. at 625-626.

In this state, a defendant convicted in municipal court is granted a right to appeal to the district court by K.S.A. 12-4501. Procedure for such appeals is governed by K.S.A. 22-3609 and 22-3610, both of which have been amended by 1982 Senate Bill No. 699, Sections 18 and 20. The former provides that a jury trial is available if requested by the defendant in writing, while the latter requires the case to be tried de novo at the district court level. This is not the case only when a diversion agreement was previously entered into but violated. Trial of such cases is upon a stipulated set of facts arrived at as part of the diversion agreement. 1982 Senate Bill No. 699, Section 15(b). In view of the close similarity between the Massachusetts and Kansas court systems, it is our opinion that the Ludwig holding is applicable to municipal courts in this state, leaving them free to impose sentences in excess of the limits traditionally set for "petty" offenses, for which no right to a jury exists. Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970).

Our response to your inquiry concerning the remaining two statutes, K.S.A. 1981 Supp. 8-262 and 8-1568, is somewhat

different, given the different language contained in the statutes. As noted above, K.S.A. 1981 Supp. 8-1567 has been amended through the addition of subsection (a), which provides that the maximum penalties of a city ordinance dealing with the same offense need not equal those of the statute. No such language appears in the other two statutes, however, which contain the following penalties for violation.

K.S.A. 1981 Supp. 8-262(a).

> "Any person who drives a motor vehicle on any highway of this state at a time when such persons' privilege so to do is canceled, suspended or revoked shall be guilty of a class B misdemeanor on the first conviction, a class A misdemeanor on the second conviction and for third and subsequent convictions shall be guilty of a glass E felony."

K.S.A. 1981 Supp. 8-1568.

> "(a) Any driver of a motor vehicle who willfully fails or refuses to bring such driver's vehicle to a stop, or who otherwise flees or attempts to elude a pursuing police vehicle, when given visual or audible signal to bring the vehicle to a stop, shall be guilty as provided by subsection (b). . . .
>
> "(b) Every person convicted of violating subsection (a), upon a first conviction, shall be guilty of a class B misdemeanor. Every person convicted of violating subsection (a), upon a second conviction of such subsection shall be guilty of a class A misdemeanor. Every person convicted of violating subsection (a), upon a third or subsequent conviction of such subsection, shall be guilty of a class E felony."

In the absence of any language similar to that of subsection (n), a city cannot, in our opinion, impose lesser penalties than those provided by these two statutes. While alluded to in City of Junction City v. Lee, supra, this question was directly addressed by a recent opinion of this office, No. 81-222. There, we concluded 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."

We affirm the conclusion reached therein, with the result that a city ordinance covering the offenses proscribed by K.S.A. 1981 Supp. 8-262 and 8-1568 must contain the same penalties found in the statutes. However, we see no reason why the principles enunciated in Ludwig v. Massachusetts, supra, would not apply to convictions in municipal court on either K.S.A. 1981 Supp. 8-262 or 8-1568. While the imposition of a sentence commensurate with a class E felony would clearly exceed the six month limit of Baldwin v. New York, supra, the availability of a de novo trial by jury as a matter of right removes the constitutional defects from the proceedings.

In conclusion, K.S.A. 1981 Supp. 8-1567, as amended by 1982 Senate Bill No. 699, establishes stricter penalties for those persons who are convicted a second, third or subsequent time for driving a vehicle under the influence of alcohol. The

new penalties can involve maximum imprisonment of up to one year and fines of up to $2,500, both of which are beyond the penalties which may be imposed without a right to a jury trial being afforded to a defendant. As trials for violations of municipal ordinances are to the court, a potential conflict is created. However, as the legislature has authorized cities to adopt lesser maximum panalties than those of the statute, this problem may be avoided by a city when it drafts an ordinance on this subject. Furthermore, even if the maximum penalties of the statute are adopted by a city, a defendant's right to a de novo trial before a jury at the district court level sufficiently protects the constitutional right to trial by jury.

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Very truly yours,

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