



STATE OF KANSAS

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August 9, 1982

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ATTORNEY GENERAL OPINION NO. 82-169

Jim Pringle
Sumner County Attorney
County Courthouse
Wellington, Kansas 67152

Re: Automobiles and Other Vehicles -- Serious Traffic
Offenses -- Driving While Under Influence of
Alcohol; Effect on Prosecutions Instituted Prior
to Effective Date of Amendments

Synopsis: As amended by L. 1982, ch. 144, K.S.A. 1981 Supp.
8-1567 contains new provisions for the sentencing
of persons who are convicted of operating a vehicle
while under the influence of alcohol. Additionally,
the act amends K.S.A. 1981 Supp. 8-1001 to admit
into evidence the defendant's refusal to take a
chemical test for the presence of alcohol. While
the act does not specifically provide that these
changes will apply only to offenses committed
after its effective date of July 1, 1982, such a
result is necessary in view of the substantive,
as opposed to merely procedural, nature of these
two amendments. Accordingly, the above-referenced
amendments are applicable only to offenses committed
after the effective date of the act. Cited herein:
K.S.A. 1981 Supp. 8-1001, 8-1567, both as amended
by L. 1982, ch. 144, K.S.A. 21-3102, 22-4618.

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Dear Mr. Pringle:

As County Attorney for Sumner County, you request our opinion
on two questions concerning the recent revisions of K.S.A.
1981 Supp. 8-1567 and related statutes concerning the offense
of operating a vehicle while under the influence of alcohol.
Specifically, you inquire as to the effect of L. 1982, ch. 144

on those persons who were arrested prior to July 1, 1982, the effective date of the act. Of the amendments which became effective at that time, you are particularly interested in those which alter the sentences that may be imposed and those regarding the admissibility of certain evidence concerning chemical tests for alcohol.

Prior to its amendment in 1982, K.S.A. 1981 Supp. 8-1567(c) established the following penalties for violation of the statute:

"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 of not more than five hundred dollars (\$500)."

Under subsections (c), (d) and (e) of the amended statute, the penalty provisions have been greatly changed, both as to the severity of the sentences and the extent of other restrictions which are to be imposed. For example, first-time offenders "shall be sentenced to not less than 48 hours' imprisonment or 100 hours of public service nor more than 6 months' imprisonment and fined not less than \$200 nor more than \$500." Additionally, certain restrictions shall be placed on the individual's driver's license and he or she is required to enroll in, and successfully complete, an alcohol and drug safety action program. Similar new penalties are imposed on second-time, third-time and subsequent offenders, with plea bargaining eliminated in all cases. Diversion programs are allowed only for first-time offenders.

Unlike some other statutes concerning criminal procedure or crimes and punishments, K.S.A. 1981 Supp. 8-1567, as amended, does not contain any provision as to offenses committed prior to its effective date. For example, K.S.A. 21-3102(4), concerning the application of the Kansas Criminal Code, provides:

"This code has no application to crimes committed prior to its effective date. [July 1, 1970] A crime is committed prior to the effective date of the code if any of the essential elements of the crime as then defined occurred before that date. Prosecutions for

prior crimes shall be governed, prosecuted and punished under the laws existing at the time such crimes were committed."

Likewise, K.S.A. 22-4618, which establishes minimum sentences for certain crimes committed with the aid of a firearm, provides at subsection (1) that it shall apply only to crimes committed after the effective date of the act.

In our opinion, due to the substantive nature of the changes made by the act in the sentencing provisions of K.S.A. 1981 Supp. 8-1567 a similar result must be reached, even in the absence of a specific statute so providing. While this issue has arisen in numerous prior Kansas cases, perhaps the best analysis of this issue (i.e. the retroactive effect of a criminal statute) is found in State v. Hutchison, 228 Kan. 279 (1980) at p. 287. Therein, the court stated:

"Regarding the retroactive argument, the general rule of statutory construction is that a statute will operate prospectively unless its language clearly indicates that the legislature intended that it operate retrospectively. Nitchals v. Williams, 225 Kan. 285, 590 P.2d 582 (1979). The foregoing rule of statutory construction is modified where the statutory change is merely procedural or remedial in nature and does not prejudicially affect the substantive rights of the parties. Nitchals v. Williams, 225 Kan. 285. As related to criminal law and procedure, substantive law is that which declares what acts are crimes and prescribes the punishment therefor; whereas procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished. State v. Augustine, 197 Kan. 207, Syl. ¶1, 416 P.2d 281 (1966).

"Changes in the length of sentences for criminal acts have been given prospective application only. In State v. Ogden, 210 Kan. 510, Syl. ¶10, 502 P.2d 654 (1972), it is held:

"'The sentencing of convicted criminals pursuant to K.S.A. 1971 Supp. 21-4504 is applicable only to those initially sentenced for offenses committed after the effective date of the new criminal code, July 1, 1970.'

"In State v. Henning, 3 Kan. App. 2d 607, 609, 599 P.2d 318 (1979), the Court of Appeals with regard to multiple sentences stated:

"Further, the effective date of the amendment to K.S.A. 21-4608(5), L. 1978, ch. 120, §8, which extended permissible authorized sentencing to include direction that an imposed Kansas sentence run concurrently with another state's sentence for an offense committed prior to the defendant's Kansas sentence, was not effective until January 1, 1979. Retroactive application of the amendatory statute would be improper. The penalty for a criminal offense is the penalty provided by statute at the time of the commission of the offense. Kelsey v. State, 194 Kan. 668, 400 P.2d 736 (1965). Here it was necessary that the penalty imposed for the February 8, 1976, burglary by defendant be within the sentencing statutorily authorized as of that date.' Emphasis supplied."

See also State v. Ralls, 213 Kan. 249, 252 (1973) ("The Kansas Criminal Code, effective July 1, 1970, has no application to crimes committed prior to its effective date") and State v. Henning, 3 Kan.App.2d 607, 609 (1979) ("The penalty for a criminal offense is the penalty provided by statute at the time of the commission of the offense").

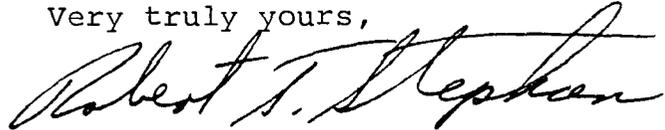
It is furthermore our opinion that the act's amendment of K.S.A. 1981 Supp. 8-1001 (relating to the admissibility of a defendant's failure to take a breath or blood test for sobriety) is likewise a substantive change. Accordingly, it has application only to those offenses committed on or after July 1, 1982. Prior to the change, the evidence of a person's refusal to be so tested was inadmissible in the criminal proceeding. State v. Wilson, 5 Kan.App.2d 130 (1980). Given the potentially prejudicial effect of the introduction of such evidence, the amendment which allows such admission affects the rights of a defendant in a material way, and cannot therefore be found to be merely procedural in nature. See, e.g., State v. Augustine, 197 Kan. 207 (1966). By allowing the state to introduce evidence which was previously inadmissible, a defendant tried under the new statute is in a less favorable position than before, a key factor in determining whether the statute should be given retroactive effect. Weaver v. Graham, 450 U.S. 24, 67 L.Ed.2d 17, 101 S.Ct. 960 (1981).

In conclusion, as amended by L. 1982, ch. 144, K.S.A. 1981 Supp. 8-1567 contains new provisions for the sentencing of persons who are convicted of operating a vehicle while under the influence of alcohol. Additionally, the act amends K.S.A. 1981 Supp. 8-1001 to admit into evidence the defendant's refusal to take a chemical test for the presence of alcohol.

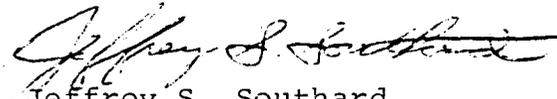
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While the act does not specifically provide that these changes will apply only to offenses committed after its effective date of July 1, 1982, such a result is necessary in view of the substantive, as opposed to merely procedural, nature of these two amendments. Accordingly, the above-referenced amendments are applicable only to offenses committed after the effective date of the act.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:hle