



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 82- 175

Karen Barefield
Ottawa County Attorney
Ottawa County Courthouse
Minneapolis, Kansas 67467

Francis E. Meisenheimer
Assistant Reno County Attorney
Law Enforcement Center
210 West First Street
Hutchinson, Kansas 67501

Re: Automobiles and Other Vehicles -- Serious Traffic
 Offenses -- Driving While Under Influence of
 Alcohol; Discretion of Court in Sentencing First
 Time Offenders

Synopsis: K.S.A. 1981 Supp. 8-1567(c), as amended by section 5 of Senate Bill No. 699, establishes penalties for persons convicted of their first violation of the statute. Prior to the 1982 amendment, the subsection authorized a court to punish first time violators by imposing a specified jail sentence or a specified fine, "or by both such fine and imprisonment." In the amended statute, the word "and" replaces the word "or" between the term of imprisonment and the amount of the fine, although the phrase "or by both such fine and imprisonment" is retained. In that the intent of the legislature in altering the disjunctive "or" to the conjunctive "and" was to require both forms of punishment, the additional phrase allowing such is now mere verbiage, and adds nothing to the statute. Cited herein: K.S.A. 1981 Supp. 8-1567, as amended by L. 1982, ch. 144, §5.

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Dear Ms. Barefield and Mr. Meisenheimer:

By way of two separate letters, you request our opinion on a question regarding K.S.A. 1981 Supp. 8-1567. That statute, as amended by 1982 Senate Bill No. 699 (L. 1982, ch. 144, §5), imposes new penalties for the offense of operating a vehicle while under the influence of alcohol, as well as establishing new procedures for diversion, license revocation and alcohol and drug safety programs. You both specifically inquire regarding the effect of changes made to the subsection dealing with penalties for first time offenders.

This subsection, K.S.A. 1981 Supp. 8-1567(c), was significantly amended by the 1982 measure. Prior to the effective date of the bill on July 1, 1982, the subsection stated:

"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."
(Emphasis added.)

As amended, the subsection now reads:

"Upon a first conviction of a violation of this section, a person 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, or by both such fine and imprisonment." (Emphasis added.)

It is the continued presence of this latter phrase, despite other changes, which has prompted your inquiry.

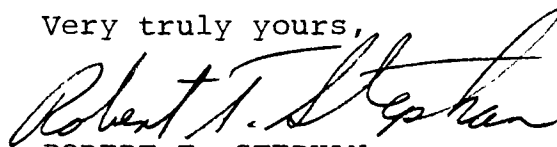
A plain reading of the prior statute indicates that a court was authorized to do one of three things in the case of a first time offender convicted under the statute, *i.e.* impose a fine, a term of imprisonment or both. As each of these possible dispositions was linked by the word "or," it is clear that the disjunctive sense was intended whereby the court possessed various options. See, *e.g.*, State v. Teeslink, 177 Kan. 268, 273 (1955), 82 C.J.S. Statutes, §335. In the 1982 amendments, however, the first "or" was replaced by the word "and," which signifies that both a fine and a term of imprisonment must be imposed. While the phrase "or by both such fine and imprisonment" is retained, it no longer adds anything to the statute, and may be seen as merely excess language.

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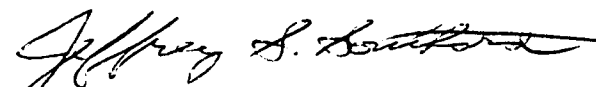
While such a conclusion is not easily reached [American Fidelity Ins. Co. v. Employers Mutual Casualty Co., 3 Kan.App.2d 245 (1979)], if the intent of the legislature can be given expression only by such a deletion, it will be made. Parker v. Continental Casualty Co., 191 Kan. 674 (1963). Here, one may continue to give force to the phrase only by ignoring the recent action of the legislature in substituting the word "and" for "or" earlier in the same sentence, thereby continuing to read the sentence using "or." While such a result has sometimes been reached [State ex rel. Stephan v. Martin, 230 Kan. 747 (1982)], to do so here would undercut the legislative intent behind Senate Bill No. 699, i.e. to stiffen the penalties for the offense of drunk driving. Further, it should be noted that the change leaves subsection (c) having an effect consistent with the penalties contained in subsections (d) and (e) for second and third offenders. Given these considerations, we cannot conclude that a court still possesses the authority to impose either a fine or a term of imprisonment on first-time offenders of K.S.A. 1981 Supp. 8-1567, as amended. We believe both a fine and term of imprisonment (or public service) must be imposed.

In conclusion, K.S.A. 1981 Supp. 8-1567(c), as amended by section 5 of Senate Bill No. 699, establishes penalties for persons convicted of their first violation of the statute. Prior to the 1982 amendment, the subsection authorized a court to punish first time violators by imposing a specified jail sentence or a specified fine, "or by both such fine and imprisonment." In the amended statute, the word "and" replaces the word "or" between the term of imprisonment and the amount of the fine, although the phrase "or by both such fine and imprisonment" is retained. In that the intent of the legislature in altering the disjunctive "or" to the conjunctive "and" was to require both forms of punishment, the additional phrase allowing such is now mere verbiage, and adds nothing to the statute.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:jm