STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

March 7, 1984

ATTORNEY GENERAL OPINION NO. 84- 23

Charles F. Lay
Attorney at Law
104 E. Main
P.O. Box 6
Gardner, Kansas 66030

Re: Automobiles and Other Vehicles -- Serious Traffic Offenses -- Driving While Under Influence of Alcohol; Prohibition on Parole Until Minimum Sentence Served

Synopsis: K.S.A. 1983 Supp. 8-1567 (c), (d) and (e) provide that a person convicted of a violation of the statute is not eligible for probation or suspension or reduction of sentence until the minimum time of imprisonment has been served. While the term "parole" is not specifically used, the statute must be construed to include parole within those actions which are not allowed before the minimum sentence is served. Cited herein: K.S.A. 1983 Supp. 8-1567, K.S.A. 12-4511.

* * *

Dear Mr. Lay:

As city prosecutor for Gardner, Kansas, you request our opinion on a question concerning the penalty provisions of K.S.A. 1983 Supp. 8-1567, which statute proscribes driving a motor vehicle while under the influence of alcohol or drugs. Specifically, you inquire whether a court may grant a defendant parole prior to the latter having served the minimum sentence provided by statute. In that Gardner has adopted the provisions of the statute pursuant to K.S.A. 1983 Supp. 8-1567(n), the same penalties exist

in the city ordinance. Accordingly, although it is the effect of the city ordinance which concerns you, for the sake of simplicity we will refer only to the statute, since the identical language found in both warrants the same construction.

Subsection (e) of the statute concerns those persons who are convicted three or more times of the offense of DUI. Upon such a conviction, the subsection states that

> "A person shall be sentenced to not less than 90 days' nor more than one year's imprisonment and fined not less than $1,000 nor more than $2,500. The person convicted shall not be eligible for release on probation or suspension or reduction of sentence." (Emphasis added.)

Similar wording is found in subsections (c) and (d), which deal with first and second-time offenders, respectively.

In that the wording of the subsection does not specifically list parole among those options which are foreclosed to a defendant convicted thereunder, you inform us that some defense counsel have successfully argued that parole may be granted. Although you do not so state, we presume that this is under the authority of K.S.A. 12-4511, which is contained in the Code of Procedure for Municipal Courts. The relevant language contained therein states:

> "The municipal judge may parole any person confined to jail as a result of a conviction of a violation of a city ordinance. The judge may set such conditions and restrictions as he or she sees fit to impose for a term not exceeding one year and may at any time discharge such person for good cause shown."

In determining whether K.S.A. 1983 Supp. 8-1567 extends to parole as well as probation and suspension or reduction of sentence, the principle rule of statutory construction concerns the intent of the legislature, and where that intent is clearly expressed, it must be given effect. Szoboszlay v. Glessner, 233 Kan. 475 (1983). However, in so doing, one is not limited to a mere consideration of the statutory language, but may look also to the historical background of the enactment, circumstances attending its passage, the purpose to be accomplished and the effect the statute may have under the various different constructions. Matter of Reed's Estate, 233 Kan. 531 (1983). Further, if adherence to the strict letter of the statute would lead to injustice or absurdity, or result in contradictory provisions, the general design and purpose of the statute should be kept in mind, and reflected in the ultimate construction. Lincoln American Corp. v. Victory Life

Insurance Co., 375 F.Supp. 112 (D. Kan. 1974). Finally, if necessary to achieve legislative intent, words, phrases or clauses may be omitted or inserted in appropriate places to reach that result. Baker v. R. D. Andersen Construction Co., 7 Kan.App.2d 568 (1982). Accordingly, the absence of the word parole in the statute is not determinative of the question.

K.S.A. 1983 Supp. 8-1567 was significantly amended in 1982 toward the end of strengthening the penalties which those in violation of the statute would be subjected to. In construing the effect of one of the numerous changes made that year (namely the prohibition on plea bargaining), the Kansas Supreme Court held as follows in the case of State v. Compton, 233 Kan. 690 (1983):

> "The objective sought to be attained by the legislature is to deter drunken driving and thus to reduce the injuries, deaths and property damage attributable to it by making the penalties for DUI certain and severe. This objective is consistent with the legitimate aims of both the legislative and executive branches of government, and more particularly of the prosecutor. It is also an objective of the judiciary. Deterrence, the discouragement of potential offenders, has long been recognized as one of the legitimate goals of sentencing. See Guides for Sentencing, published by the Council of Judges of the National Council on Crime and Delinquency, p. 3 (2d ed. 1974), and The State Trail Judge's Book, pp. 288-89 (2d ed. 1969). That the problem is a serious one is well illustrated in the opening paragraph of a recent Note in the Washburn Law Journal, The New Kansas DUI law: Constitutional Issues and Practical Problems, 22 Washburn L.J. 340-41 (1983):
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> 'More than half of all highway accidents are a direct result of drunk drivers. In 1980, the Kansas Highway Patrol arrested 2,733 people for driving while under the influence of alcohol (DUI) and attributed 195 deaths and 5,350 injuries to the abuse of alcohol, yet the judiciary has been reluctant to apply the maximum penalties in many DUI cases where the social drinker is concerned, because of the strictness of the penalties. Additionally, current sanctions imposed on offenders have not had an adequate impact on the serious problem drinker.'"
> 233 Kan. at 699-700.

With the above in mind, the specific amendment at issue here may be examined. In addition to prohibiting plea bargaining, the legislature also added language which required a defendant to serve

the minimum term of imprisonment, without recourse to probation, suspension or reduction of sentence. This clearly had the effect, as the court noted in Compton, of "making the penalties for DUI certain and severe." 233 Kan. at 699. To allow parole would effectively negate this new approach, for under K.S.A. 12-4511 a defendant could be paroled after serving only one day of a 90 day minimum sentence. Further, at the municipal court level, the terms parole and probation are often used interchangeably. City of Junction City v. Griffin, 226 Kan. 516 (1979). Indeed, there is no section in the Code of Procedure for Municipal Courts which provides for probation, K.S.A. 12-4511 acting to cover all such situations.

Accordingly, it is our opinion that K.S.A. 8-1567(c), (d) and (e) should be read so as to include a ban on parole for defendants who have not served the minimum time of imprisonment set by law. To reach the opposite conclusion would be to defeat the purpose of the change made in 1982, and so would frustrate legislative intent. Additionally, given the almost identical nature of probation and parole in a municipal court, it would be absurd to prohibit one and yet allow the other. We therefore conclude that in prohibiting probation, along with the suspension and reduction of sentence, the legislature clearly intended to eliminate all means by which a sentence could be avoided, except as otherwise specifically provided, i.e. community service time, alcohol abuse treatment program, etc. This would include the grant of parole under K.S.A. 12-4511.

In conclusion, K.S.A. 1983 Supp. 8-1567 (c), (d) and (e) provide that a person convicted of a violation of a statute is not eligible for probation or suspension or reduction of sentence until the minimum time of imprisonment has been served. While the term "parole" is not specifically used, several factors, including legislative intent and the use of words having the same effect, require the statute to be construed to include parole within those actions which are not allowed before the minimum sentence is served.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Jeffrey S. Southard

Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:crw