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ATTORNEY GENERAL OPINION NO. 84- 44

E. Edward Johnson
City Attorney
Legal Department
215 E. 7th Street
Topeka, Kansas 66603-3979

Re: Automobiles and Other Vehicles -- Driving Under Influence of Alcohol or Drugs -- Elements of Offense

Synopsis: K.S.A. 1983 Supp. 8-1567, as amended by 1984 Senate Bill No. 490, provides [at subsection (a)] that no person shall operate a vehicle within this state while under the influence of alcohol. While it is necessary to show that a defendant was "under the influence of alcohol" in order to prove a violation, this phrase means that the defendant's mental or physical function was impaired to the extend that he or she was incapable of safely driving a vehicle. Such incapability may be presumed if it is shown that there was .10% or more by weight of alcohol in the defendant's blood, and need not be accompanied by any showing that the actual operation of the vehicle was erratic or that the driver failed to exercise due care. Cited herein: K.S.A. 8-1005, K.S.A. 8-1566, as amended by 1984 Senate Bill No. 490, §8, K.S.A. 1983 Supp. 8-1567, as amended by 1984 Senate Bill No. 490, §9.

* * *

Dear Mr. Johnson:

As City Attorney for the City of Topeka, Kansas, you request our opinion on a question involving the offense of driving a vehicle while under the influence of alcohol. Specifically, you

inquire concerning the elements of the offense, and whether it is necessary to show that a defendant drove in a reckless manner or in some way deviated from the standard of due care which a reasonable person would use.

The offense of DUI is set forth by K.S.A. 1983 Supp. 8-1567(a), as amended by 1984 Senate Bill No. 490, Section 9. Therein, it is stated: "No person shall operate any vehicle within this state while under the influence of alcohol." While this subsection does not contain any elaboration on the phrase "under the influence of alcohol," it is noteworthy that the following subsection (b), which concerns operating a vehicle while under the influence of drugs, defines the offense as being under the influence "to a degree which renders such person incapable of safely driving a vehicle." The same language appears in K.S.A. 8-1005(a)(2), which is contained in the statute establishing various presumptions to be attached to the results of chemical tests to determine the alcohol content of the driver's blood. There, it is provided:

> "[I]f there was at the time .10% or more by weight of alcohol in the defendant's blood, it shall be prima facie evidence that the defendant was under the influence of alcohol to a degree that renders the person incapable of driving safely." (Emphasis added.)

Accordingly, it appears that the legislature intended to tie the concept of "under the influence" with some level of impairment on the part of the driver. State v. Reeves, 233 Kan. 702 (1983).

However, in our opinion the courts have drawn a clear difference between the elements of the offense of DUI and the definition of "under the influence," which is but one of the elements. A recently revised jury instruction for the offense of DUI states as follows:

> "The defendant is charged with the crime of operating a vehicle while under the influence of alcohol. The defendant pleads not guilty.
>
> "To establish this charge, each of the following claims must be proved:
>
> "1. That the defendant drove a vehicle;
>
> "2. That the defendant while driving was under the influence of alcohol, or any drug, or a combination of alcohol and any drug;

> "3. That this act occurred on or about the _____ day of _____, 19_____, in _____ County, Kansas.
>
> "As used in this instruction, the phrase "under the influence of alcohol, or any drug, or a combination of alcohol and any drug" means that defendant's mental or physical function was impaired by the consumption of alcohol or any drug or a combination of alcohol and any drug to the extent that he was incapable of safely driving a vehicle." PIK Crim.2d. 70.01

The revised pattern instruction incorporates changes which were suggested by the Kansas Supreme Court in State v. Reeves, supra, where the state argued that the instruction given improperly made the definition of "under the influence" an element of the offense. The court, while declining to reverse the decision on this ground, agreed, and ruled that the definition of the phrase "under the influence" should be set forth at the end of the instruction, rather than included as part of the offense itself. To do otherwise, the court held, "might very well be confusing to the jury in a close case." 233 Kan. at 704.

In those cases where a defendant takes a breath or blood test pursuant to K.S.A. 8-1005, a reading of .10% or more constitutes prima facie evidence that the driver was incapable of driving safely. In the language of PIK Criminal 2d. 70.02:

> "If a test shows there was .10 percent or more by weight of alcohol in the defendant's blood, you may assume the defendant was under the influence of alcohol to a degree that [he][she] was rendered incapable of driving safely. The test result is not conclusive, but it should be considered by you along with all other evidence in this case." (Emphasis added.)

Therefore, it appears that the mere presence of a blood-alcohol test reading of .10% or more could, by itself, be sufficient to allow a court or jury to find that the defendant was guilty of DUI, without any showing that the vehicle was being operated in an unsafe or negligent manner.

Further support for this conclusion is found in the case of State v. Mourning, 233 Kan. 678 (1983), where the defendant argued that the offense of reckless driving (K.S.A. 8-1566, as amended by 1984 Senate Bill No. 490, §8) is a lesser included offense of DUI. In rejecting this contention, the court stated:

"The two offenses required different evidence for a conviction. To violate 8-1567 one needs only to operate a vehicle while his mental or physical capacity to function is impaired by alcohol or drugs to the extent he is no longer capable of safely driving the vehicle. It is unnecessary to prove, in addition, that the vehicle was driven in a reckless manner, although such driving may constitute circumstantial evidence the driver was under the influence of alcohol or drugs. On the other hand, to obtain a conviction for reckless driving under 8-1566 it is only necessary to establish that the vehicle was driven in willful or wanton disregard for the safety of others; in other words, under circumstances that show a realization of the imminence of danger and a reckless disregard or complete indifference for the probable consequences of such conduct. Proof is not required that the driver was under the influence of alcohol or drugs.

"An argument can be advanced that any time a person under the influence of alcohol or drugs operates a vehicle he does so in willful or wanton disregard for the safety of others. Under such reasoning any time a person was guilty of driving under the influence of alcohol or drugs he would also necessarily be guilty of reckless driving and therefore the offense of reckless driving would constitute a "crime necessarily proved if the crime charged were proved." (K.S.A. 21-3107[2][d].) However, it is merely the driving of a vehicle while under the influence of alcohol or drugs which is proscribed by 8-1567. One does not need to swerve all over the road or drive through another's yard to be guilty of driving under the influence of alcohol or drugs. While a person under the influence of alcohol may actually drive in a straight line in the proper lane of traffic down the street, although incapable of safely operating the vehicle in accordance with traffic regulations that may be encountered, a person guilty of reckless driving is able to safely control his vehicle but, in willful or wanton disregard for the safety of others, does not do so. It is evident that a person guilty of driving under the influence of alcohol is not necessarily guilty of driving in reckless disregard for the safety of others." (Emphasis added.) 233 Kan. at 681-682.

In view of the above, we see no support for the addition of any element to the offense of DUI that the driver actually operated his vehicle in an erratic manner or in some way deviated from a standard of care which a reasonable person would use.

In conclusion, K.S.A. 1983 Supp. 8-1567, as amended by 1984 Senate Bill No. 490, provides [at subsection (a)] that no person shall operate a vehicle within this state while under the influence of alcohol. While it is necessary to show that a defendant was "under the influence of alcohol" in order to prove a violation, this phrase means that the defendant's mental or physical function was impaired to the extent that he or she was incapable of safely driving a vehicle. Such incapability may be presumed if it is shown that there was .10% or more by weight of alcohol in the defendant's blood, and need not be accompanied by any showing that the actual operation of the vehicle was erratic or that the driver failed to exercise due care.

Very truly yours,

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RTS:BJS:JSS:crw