



STATE OF KANSAS

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January 2, 1985

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ATTORNEY GENERAL OPINION NO. 85- 1

John A. Sparks
Assistant County Attorney
Pottawatomie County Courthouse
Westmoreland, Kansas 66549

Re: Automobiles and Other Vehicles -- Serious Traffic
Offenses--Driving While Under the Influence of Alcohol;
Diversion Agreements Involving Restriction of Driver's
License

Synopsis: A county or district attorney may, at his or her
discretion, offer a person accused of the offense
of driving while under the influence of alcohol the
opportunity to enter into a diversion agreement.
While K.S.A. 1983 Supp. 22-2909 sets forth a number
of requirements for such an agreement, it specifically
does not limit the terms of a diversion agreement to
only those items. Accordingly, a diversion agree-
ment may impose restrictions on the driving privileges
of a defendant which may be the same as or similar to
those imposed by a court under K.S.A. 1983 Supp. 8-1567(c),
as amended by L. 1984, ch. 39, §9. If a defendant
accepts such a condition in a diversion agreement, his
his or her license should be forwarded to the division
of vehicles, as provided in K.S.A. 1983 Supp. 8-1567(1),
as amended. Cited herein: K.S.A. 1983 Supp. 8-1008;
K.S.A. 1983 Supp. 8-1567, as amended by L. 1984, ch.
39, §9; K.S.A. 12-4416; K.S.A. 1983 Supp. 22-2909.

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Dear Mr. Sparks:

As Assistant County Attorney for Pottawatomie County, (you indicate
you are also the County Attorney-elect), you request our opinion

on a question concerning diversion agreements under K.S.A. 1983 Supp. 22-2909. Specifically, you inquire whether a county or district attorney may, as a condition for the offering of a diversion agreement to a defendant charged with driving under the influence (DUI) of alcohol, require that the person agree to restrictions on their license to drive. You indicate that the restrictions you contemplate would be similar to those which a district court may impose upon a person convicted of a first offense of DUI under K.S.A. 1983 Supp. 8-1567, as amended by L. 1984, ch. 39, §9.

The statute which regulates diversion agreements made by county and district attorneys, K.S.A. 1983 Supp. 22-2909, provides [at subsection (a)] that any diversion agreement shall include certain provisions, including waiver of specific constitutional rights such as the right to trial by jury, and may also include other requirements such as the payment of restitution, court costs and diversion costs, maintenance of employment and participation in rehabilitative programs.¹ However, this list is not inclusive, for as subsection (a) notes, the diversion agreement "may include, but is not limited to" these particular optional provisions.

Subsection (b) of K.S.A. 1983 Supp. 22-2909 requires the inclusion of certain biographical data which is self-explanatory and need not be further discussed here. Of more interest is subsection (c), which deals specifically with diversions for DUI. Any diversion agreement for such an offense must include: (1) a stipulation of facts regarding the offense and an agreement that, in the event of a violation of the agreement, the stipulation shall constitute the record used in any further proceedings; (2) an agreement to pay the minimum fine, or, in lieu of the fine, perform community service; and (3) enrollment in, and successful completion of, alcohol treatment or education programs of the type set forth in K.S.A. 1983 Supp. 8-1008. Again, however, there is no provision that a diversion agreement for DUI must contain only these elements, only that these elements must be contained.

From the above, it would be our conclusion that, while a county or district attorney is not required to include a provision concerning restriction or suspension of a defendant's license to drive in a diversion agreement, there is no limitation on the discretion to do so. The entire concept of diversion is governed by the premise that it is an alternative to sentencing

¹While our discussion will be confined to the diversion authority of county and district attorneys, city attorneys have virtually identical powers under K.S.A. 12-4416.

which is offered at the discretion of the prosecutor. State v. Greenlee, 228 Kan. 712 (1980). Although the legislature has imposed certain limits on the discretion of a county or district attorney through the provision of K.S.A. 1983 Supp. 22-2909, once these "procedural standards" are met, the prosecutor retains discretion as to other provisions which may be included. State v. Greenlee, supra, 228 Kan. at 718.

In this regard, a county or district attorney has more discretion concerning the driver's license of a DUI defendant than does a district judge, who is required by the terms of K.S.A. 1983 Supp. 8-1567(c), as amended, to restrict the license of any person who is convicted of a first violation of DUI. The inclusion of similar restrictions in a DUI diversion agreement, or even a provision that a license be suspended [see K.S.A. 8-1567(j), as amended], would not in our opinion constitute an abuse of a prosecutor's discretion. Should the defendant agree to such a provision, the procedure to be followed in obtaining a new, restricted license or in surrendering a suspended license may be taken from K.S.A. 1983 Supp. 8-1567(l), as amended.

In conclusion, a county or district attorney may, at his or her discretion, offer a person accused of the offense of driving while under the influence of alcohol the opportunity to enter into a diversion agreement. While K.S.A. 1983 Supp. 22-2909 sets forth a number of requirements for such an agreement, it specifically does not limit the terms of a diversion agreement to only those items. Accordingly, a diversion agreement may impose restrictions on the driving privileges of a defendant, which may be the same as or similar to those imposed by a court under K.S.A. 1983 Supp. 8-1567(c), as amended by L. 1984, ch. 39, §9. If a defendant accepts such a condition in a diversion agreement, his or her license should be forwarded to the division of vehicles, as provided in K.S.A. 1983 Supp. 8-1567(l), as amended.

Very truly yours,

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Jeffrey S. Southard
Deputy Attorney General

RTS:JSS:crw