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ATTORNEY GENERAL OPINION NO. 85-133

Judge Herb Rohleder, Chairman
Kansas Interdepartmental Coordinating Committee
on Alcohol and Drug Abuse
P.O. Box 4052
Topeka, Kansas 66604

Re: Automobiles and Other Vehicles -- Act Regulating Traffic: Serious Traffic Offenses -- Driving Under Influence of Alcohol; "Per Se" Violation

Synopsis: In cases in which a defendant is charged with violating the "per se" provision of the statute prohibiting driving under the influence of alcohol [K.S.A. 1984 Supp. 8-1567, as amended by L. 1985, Ch. 48, §9], evidence regarding the validity of the blood alcohol test is relevant and admissible. Cited herein: K.S.A. 8-1567 as amended by L. 1985, Ch. 48, §9; K.S.A. 60-407(f).

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Dear Judge Rohleder:

On behalf of the Kansas Interdepartmental Coordinating Committee on Alcohol and Drug Abuse, you request our opinion regarding several evidentiary questions relevant to the new "per se" DUI law.

Through its action in the 1985 session, the legislature created a new crime with the "per se" law. K.S.A. 1984 Supp. 8-1567(a), as amended by L. 1985, Ch. 48 states in part: "No person shall operate or attempt to operate any vehicle within this state while: (1) The alcohol

concentration in the person's blood or breath is .10 or more, as measured from samples taken within two hours after the person operated or attempted to operate the vehicle." We further note that while it was amended by the 1985 Legislature, the prima facie rule is also still applicable to show a violation of K.S.A. 1984 Supp. 8-1567(a)(2), as amended. See K.S.A. 8-1005, as amended by L. 1985, Ch. 48, §7.

In response to your questions, the state has the duty and burden of proving each element of the crime charged. State v. Wood, 188 Kan. 833, 840 (1961). The elements which must be proved in a charge based on the "per se" portion of the statute are: (1) the defendant drove or attempted to drive a vehicle; (2) that at the time the defendant had a blood or breath alcohol concentration of .10 or more and, (3) the test was done within two hours of the time the defendant drove or attempted to drive.

The Kansas Supreme Court in State v. Egbert, 227 Kan. 266, 269 (1980) said: "Under our rules of evidence, K.S.A. 60-407(f), all relevant evidence is admissible." Therefore, any evidence which is relevant to one of the elements of the crime is admissible. For a "per se" charge, this would include any questions concerning the validity of the testing machinery, the qualifications of the person doing the testing, and the like, for each challenges the second element of the offense as set out above. These questions can be raised in a pre-trial hearing, at trial, or both. In our opinion, such a result is consistent with legislative intent, as well as the prima facie rule, which still exists. In order to avoid basing an entire case on the blood alcohol test results, a prosecutor may wish to charge a defendant under both subsections.

We are enclosing a copy of the most recent revision of the P.I.K. criminal instructions dealing with the new drunk driving laws.

In conclusion, in cases in which a defendant is charged with violation the "per se" provision of the statute

prohibiting driving under the influence of alcohol [K.S.A. 1984 Supp. 8-1567, as amended by L. 1985, Ch. 48, §9], evidence regarding the validity of the blood alcohol test is relevant and admissible.

Very truly yours,

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