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November 25, 1985

ATTORNEY GENERAL OPINION NO. 85-163

Phillip L. Harris
City Attorney
Justice Center
8500 Antioch
Overland Park, Kansas 66212

Re: Cities and Municipalities -- Municipal Courts;
Proceedings After Arrest -- Diversion; Factors to
be Considered

Synopsis: K.S.A. 12-4415(b), as amended by L. 1985, ch. 48, §1, sets forth factors which a city prosecutor must consider in determining whether a person is eligible for diversion for the offense of driving while under the influence of alcohol. One of the factors which precludes the offering of diversion is the occurrence of an accident involving personal injury at the time of the offense. Given the lack of any legislative language to the contrary, such personal injury may be to either the defendant or another passenger, driver or third-party. In that the legislature intended to restrict a prosecutor's discretion in the offering of diversion to DUI offenders, even minor injuries not involving hospitalization are sufficient to preclude the use of diversion, which itself is a privilege and not a right. Cited herein: K.S.A. 12-4415, as amended by L. 1985, ch. 48, §1; K.S.A. 1984 Supp. 22-2908; K.S.A. 40-3103.

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Dear Mr. Harris:

As City Attorney for the City of Overland Park, Kansas, you request our opinion on the authority of your office to enter into diversion agreements in cases involving the offense of driving under the influence of alcohol (DUI). Specifically, you wish us to address three questions:

1. "Does K.S.A. 12-4415(b)(4) pertain to personal injuries suffered by the defendant as well as second parties involved in alcohol related accidents?"
2. "What is the definition of personal injury as conceived by the legislature in K.S.A. 12-4415(b)(4)?"
3. "To what extent can a prosecutor use his discretion to define personal injury?"

The 1985 Kansas Legislature amended Kansas law with regard to diversion program eligibility in DUI cases. These amendments were a part of a comprehensive act on alcohol-related offenses and enforcement which appeared at Laws of 1985, chapter 48. K.S.A. 12-4415(b) was amended by section 11, and now provides:

"A city attorney shall not enter into a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of an alcohol related offense if the defendant:

. . . .

"(4) during the time of the alleged alcohol related offense was involved in a motor vehicle accident or collision resulting in personal injury or death."
(Emphasis added.)

The term "personal injury" was not defined by the Kansas Legislature when the language underscored above was added in 1985, and neither the House or Senate Federal and State Affairs Committees heard any testimony attempting to define these words or determine their concrete applications. Accordingly, it would be helpful to examine other statutes in which the term appears.

Other Kansas statutes have interpreted the term "injury" and "injured person." The most analogous statutes to do so are contained in the Automobile Injury Reparations Act, K.S.A. 40-3101 et seq. "Injured person" means "any person suffering injury," while "injury" is defined as "bodily harm, sickness, disease or death resulting from an accident arising out of the ownership, maintenance or use of a motor vehicle." K.S.A. 40-3103(h), (i). Common law definitions of the term are essentially the same. Strictly applying those definitions to K.S.A. 12-4415(b)(4) would automatically preclude diversion in any case where the defendant or other party received bodily harm, no matter how slight or severe. While arguments can be made for a liberal interpretation of these terms, in our opinion such a reading would not give full effect to the intent of the legislature in restricting the use of diversion as an alternative to sentencing and conviction.

The legislative objective with respect to diversion in DUI cases is to encourage an alternative to formal conviction. See, e.g., State v. Greenlee, 228 Kan. 712, 718 (1980) ("The intent is one of rehabilitation . . ."). However, diversion cannot be offered to everyone who is accused of a DUI violation. Second-, third- and multiple-offenders are barred by K.S.A. 12-4415(b) (municipal courts) and K.S.A. 1984 Supp. 22-2908(2)(a) (district courts). These restrictions were added in the 1982 overhaul of the DUI laws.

The 1985 amendments to K.S.A. 12-4415 were designed to further prevent drunk drivers involved in an injury accident from escaping punishment by qualifying for diversion. By its actions, the legislature clearly intended to put more teeth in the DUI laws, and to make more violators experience the penalties of the law. By precluding diversion in cases where "personal injury" occurred, the legislature has limited a prosecutor's discretion in applying the statute's provisions to each individual case. The need for this result can be demonstrated by referring to concrete examples. Specifically, an accident in which persons required hospitalization would preclude diversion eligibility under even a liberal interpretation. However, one prosecutor might determine that a small abrasion suffered by the offending driver or someone else was not sufficient to cause an otherwise-qualified offender to be ineligible for diversion, while another prosecutor would reach the opposite result. Through a uniform interpretation of the concept of "personal injury," the intent of the legislature (i.e. to limit the use of diversion in some DUI cases) will be given a more full effect than if the

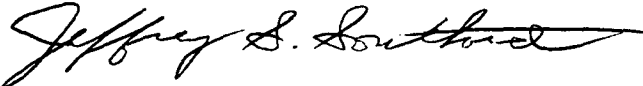
definition was left up to each prosecutor on a case-by-case basis.

In conclusion, K.S.A. 12-4415(b), as amended by L. 1985, ch. 48, §1, sets forth factors which a city prosecutor must consider in determining whether a person is eligible for diversion for the offense of driving while under the influence of alcohol. One of the factors which precludes the offering of diversion is the occurrence of an accident involving personal injury at the time of the offense. Given the lack of any legislative language to the contrary, such personal injury may be to either the defendant or another passenger, driver or third-party. In that the legislature intended to restrict a prosecutor's discretion in the offering of diversion to DUI offenders, even minor injuries not involving hospitalization are sufficient to preclude the use of diversion, which itself is a privilege and not a right.

Very truly yours,



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