



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

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

ATTORNEY GENERAL OPINION NO. 86- 126

Robert J. Watson  
City Attorney  
Justice Center  
8500 Antioch  
Overland Park, Kansas

Re: Cities and Municipalities--Code for Municipal  
Courts; Proceedings After Arrest and Prior to  
Trial--Municipal Court Diversion; Driving Under the  
Influence

Synopsis: Because the 1986 repeal of the prohibition of  
diversion for drivers having a blood-alcohol  
concentration of .20 or higher is remedial  
legislation, it is to be given retrospective  
effect. In determining whether diversion is in the  
interests of justice and the community, the factors  
to be considered by the city prosecutor are not  
affected by L. 1986, ch. 185, §1. Cited herein:  
K.S.A. 12-4414; K.S.A. 1985 Supp. 12-4415(b) (3),  
as amended by L. 1986, ch. 185, §1.

\* \* \*

Dear Mr. Watson:

You have requested our opinion concerning the offering of  
diversion programs to defendants who were arrested for alcohol  
related offenses and whose blood alcohol concentrations  
(BAC) were .20 or more. Specifically you inquire whether  
defendants charged with alcohol related offenses after June  
30, 1985, but before July 1, 1986, may be offered diversion.  
K.S.A. 1985 Supp. 12-4415(b) (3) provided that a defendant

whose BAC was .20 or greater was not eligible for diversion. This provision became effective July 1, 1985. However, L. 1986, ch. 185, §1 repeals K.S.A. 1985 Supp. 12-4415(b)(3). The dispositive question therefore is whether §1 of L. 1986, ch. 185 is to be given retrospective application. In our opinion, it is.

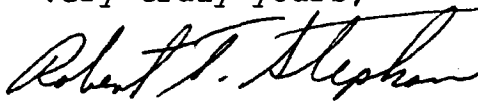
The availability of diversion is a privilege. No right to diversion exists by statute or by common law. See, e.g., State v. Greenlee, 228 Kan. 712, 720 (1980). The provisions of K.S.A. 12-4412 through K.S.A. 12-4418 merely establish procedures by which a diversion program may be offered if, in the judgment of the city prosecutor, it would benefit the interests of justice and the community. K.S.A. 12-4414. In State v. Augustine, 197 Kan. 207 (1966), it was noted that substantive law is "that which declares what acts are crimes and prescribes the punishment therefore." Id. at 209. In contrast, remedial legislation is defined as that which provides methods or procedures, abridges superfluities of former laws, and which remedies defects therein. Remedial statutes are distinguished from substantive statutes in that the latter confers a substantive right. In re Estate of Brown, 168 Kan. 612, 617 (1950). The legislative action in prohibiting diversion for those defendants whose BAC was .20 or greater was substantive in nature because the legislature was dictating the punishment for a D.U.I. offense. In repealing this prohibition, however the legislature is no longer prescribing the punishment, but rather leaving it to the discretion of the prosecuting attorney and providing procedural mandates. The purpose of the 1986 amendment is to retract a cumbersome law which has proven difficult to administer. See III Journal, Senate Committee on the Judiciary, April 2, 1986, att. III. There is no indication that the repealing statute was enacted to affect substantive rights. Accordingly, we believe that, as opposed to substantive legislation, the amended section of K.S.A. 1985 Supp. 12-4415 is remedial in nature.

Generally, a statute operates prospectively, unless the language of the statute itself clearly indicates a contrary legislative intent. Tew v. Topeka Police & Fire Civil Serv. Comm'n, 237 Kan. 96, 103 (1985). In this instance, there is no indication in the statute that the legislature intended retrospective application. However, the general rule of construction is modified where the statutory change is remedial and does not prejudicially affect the substantive rights of the parties. Davis v. Hughes, 229 Kan. 91, 101-103 (1982). Where the change merely affects

the procedure, as in this instance, based on the foregoing rules of statutory construction the statute should be given retrospective effect. Additionally, in this particular situation the amendment serves as a benefit to the parties involved rather than a detriment, thus there is no prejudicial effect.

In conclusion, it is our opinion that the 1986 amendments to K.S.A. 1985 Supp. 12-4415 apply to alleged offenders charged after June 30, 1985. Drivers who have a BAC of .20 or higher may be offered diversion if, in the judgment of the city prosecutor, the interests of justice and the community would be benefited. Factors which are to be considered appear in K.S.A. 1985 Supp. 12-4415(a), and are unchanged by the 1986 amendments.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Julene L. Miller  
Deputy Attorney General

RTS:JLM:jm