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ATTORNEY GENERAL OPINION NO. 86-172

Timothy J. Chambers
Reno County Attorney
Law Enforcement Center
210 West First Street
Hutchinson, Kansas 67501

Re: Automobiles and Other Vehicles--Uniform Act Regulating Traffic; Rules of the Road; Serious Traffic Offenses--Restrictions on Plea Bargaining in Prosecutions for Driving Under the Influence of Alcohol or Drugs

Synopsis: K.S.A. 1985 Supp. 8-1567(o) provides that no plea bargaining agreement may be entered into "for the purpose of permitting a person charged with a violation of" K.S.A. 8-1567 and amendments, or any parallel city ordinance, "to avoid the mandatory penalties established by [that] section." A plea negotiation agreement to reduce the charge from driving under the influence (K.S.A. 1985 Supp. 8-1567) to reckless driving (K.S.A. 1985 Supp. 8-1566) in exchange for a guilty plea would be in violation of this section if the purpose of the agreement is to allow avoidance of the mandatory penalties established for a DUI conviction. The conviction for a violation of K.S.A. 1985 Supp. 8-1567 is itself part of the mandatory penalties imposed under that section because of the effect such a conviction has on enhancing the sentence of a subsequent DUI conviction. Cited herein: K.S.A. 1985 Supp. 8-1566; 8-1567; 12-4415, as amended by L. 1986, ch. 185, §1; 22-2908, as amended by L. 1986, ch. 185, §2.

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Dear Mr. Chambers:

As County Attorney for Reno County, you request our opinion regarding the K.S.A. 1985 Supp. 8-1567(o) restriction on plea negotiations in certain cases involving driving under the influence of alcohol or drugs (DUI). In your request letter you describe a specific situation in which, pursuant to plea negotiations, the charge was amended from "driving under the influence" to "reckless driving," though the defendant was sentenced to the penalties required for driving under the influence. In view of the fact that this defendant will not have the conviction for driving under the influence on his record, and that a subsequent conviction for driving under the influence cannot be enhanced by the present conviction for reckless driving, you question whether K.S.A. 1985 Supp. 8-1567(o) has been violated.

K.S.A. 1985 Supp. 8-1567(o) provides as follows:

> "No plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with a violation of this section, or any ordinance of a city in this state which prohibits the acts prohibited by this section, to avoid the mandatory penalties established by this section or by the ordinance. For the purpose of this subsection, entering into a diversion agreement pursuant to K.S.A. 12-4413 et seq., and amendments thereto, shall not constitute plea bargaining."

Three elements must be met before this subsection will be deemed to have been violated. First, there must have been plea negotiations. Second, these negotiations must lead to an agreement the purpose of which is to permit the person charged with a violation of driving under the influence of alcohol or drugs to avoid the mandatory penalties established for such violation. Third, the agreement must actually permit avoidance of the mandatory penalties. A 1983 Kansas Supreme Court case discusses K.S.A. 1985 Supp. 8-1567(o):

> "Let us consider what this provision does and what it does not do. It prohibits plea bargaining for the purpose of permitting one charged with DUI to avoid the mandatory penalties established by the act.

"It does not prohibit plea bargaining in any other type of case, nor does it prohibit plea bargaining in cases where DUI is charged when the purpose of the plea bargain--and its ultimate effect--is not to permit the accused to avoid the mandatory DUI penalties. It does not interfere with or curtail the power of the prosecutor to review the evidence in good faith and determine what charges should be filed, or to amend or reduce the charges as initially filed, or to dismiss the prosecution.

"As an example, assume that a defendant is charged with DUI, driving left of center, failing to signal and failing to stop at a stop sign. If the prosecutor reviews the evidence and concludes that the evidence is adequate to sustain convictions on all charges, the plea bargaining prohibition could work two different ways.

"(1) Defense counsel offers to enter a plea of guilty to all charges except DUI if the State will dismiss (or reduce) that one. The prosecutor may not accept and the court may not approve such a plea bargain as it would permit the defendant to avoid the mandatory penalties established by the statute.

"(2) Defense counsel offers to enter a plea of guilty to the DUI charge if the State will dismiss the remaining traffic charges. The prosecutor may, if he or she wishes, accept, and the court may approve such a plea bargain, since the accused would not thereby avoid the penalties established by the DUI law.

"Let us assume that upon the filing of the same four charges, the prosecutor reviews the evidence and concludes that the evidence is <u>not</u> sufficient to sustain a conviction of DUI since the breath test results were negative and the arresting officer's testimony alone is insufficient. A plea bargain is

> unnecessary because charges which cannot reasonably by proven should not be maintained or used for 'leverage.' The prosecutor should voluntarily dismiss or reduce the DUI charge. Once this has been done, there is no prohibition upon plea bargaining as to the remaining traffic charges." State v. Compton, 233 Kan. 691, 695, 696 (1983).

Plea bargaining is "the process whereby the accused and the prosecutor negotiate a mutually satisfactory disposition of the case." Gifis, Law Dictionary, p. 153 (1975).

> "Plea negotiations can center around the defendant's pleading guilty to a lesser offense, or to only one or some of the counts in a multi-count indictment. In return, the defendant seeks to obtain concessions as to the type and length of his sentence or reduction of counts against him." Id., at 154.

The reduction of a charge, however, does not necessarily signify the existence of plea bargaining. It may be that the prosecutor has reviewed the evidence and determined that it is insufficient for a conviction of driving under the influence, and that the charge of reckless driving is more appropriate under the circumstances. If this is done without negotiating with the defendant for a plea in return for the reduction, it is not a result of plea bargaining. A reduction of the charge in this situation would not be a violation of K.S.A. 1985 Supp. 8-1567(o) because it does not constitute a plea bargaining agreement.

You have indicated in your request letter that the reduction from DUI to reckless driving was done pursuant to a plea agreement. The question becomes, therefore, whether the plea agreement was entered into for the purpose of permitting the person charged to avoid the mandatory DUI penalties and whether these penalties were actually avoided.

It is important to note three rules of criminal procedure relevant to your particular inquiry. First, a prosecutor cannot promise that a defendant will receive a specific sentence in return for a plea. He may only promise to recommend a particular sentence. Second, there must be a factual basis to support the guilty plea. In other words, the defendant cannot plead guilty to a crime wholly different than the one he is charged with having committed. Finally, the

sentence must conform to the crime; the judge cannot exceed the statutory guidelines in sentencing the defendant for the crime to which he has plead guilty. In answering your specific question, we are assuming that none of these standards have been breached.

The term "penalty" has been variously defined by the different courts in this country. It has been restricted to refer only to deprivation of property or some right, such as the enjoyment of liberty, in some instances [see Levy Motor Vehicle Operator's License Case, 194 Pa.Super. 390, 169 A.2d 596, 597 (1961); State v. Cowen, 231 Iowa 1117, 3 N.W.2d 176, 179, 182 (1942)], and used loosely in others "to embrace all the consequences visited by law on the heads of those who violate police requirements." Burrows v. Delta Transp. Co., 106 Mich. 582, 64 N.W. 501, 507 (1895). See also State v. Finley, 199 Kan. 615, 620 (1967). Reading K.S.A. 1985 Supp. 8-1567(o) in pari materia with the other subsections in that statute and those of related statutes, it is our opinion that the term "penalty," as used in K.S.A. 1985 Supp. 8-1567(o), should be read broadly to include the effects of having a DUI conviction on the individual's record and possible use of that conviction to enhance the sentence of a subsequent DUI conviction.

It is the paramount rule of statutory construction that the purpose and intent of the legislature governs when that intent may be ascertained from the statute. In re Estate of Estes, 239 Kan. 192, 195 (1986); State v. Thompson, 237 Kan. 562, 563 (1985). Reading K.S.A. 1985 Supp. 8-1567 in its entirety and giving effect to all its various provisions, it is apparent to us that the legislature has intended a mandatory scheme of sentencing, which includes an enhanced sentence for second, third and subsequent convictions. For example, in certain circumstances diversion may be granted to a first time offender under K.S.A. 1985 Supp.8-1567. See K.S.A. 1985 Supp. 22-2908, as amended by L. 1986, ch. 185, §2; K.S.A. 1985 Supp. 12-4415, as amended by L. 1986, ch. 185, §1. However, under K.S.A. 1985 Supp. 8-1567(j)(1), a diversion is to be considered as a conviction "[f]or purposes of determining whether a conviction is a first, second, third or subsequent conviction in sentencing under [that statute]." This illustrates the legislature's intent to enhance sentencing for multiple violations of driving while under the influence, even if the offender is given a "break" the first time around. To allow the reduction of the charge from DUI to reckless driving, and in so doing to allow the person charged to avoid an enhanced sentence upon a subsequent conviction, would be contrary to the intent of the legislature.

Thus, it is our opinion that K.S.A. 1985 Supp. 8-1567(o) precludes a plea bargaining agreement in which the charge is reduced from driving under the influence to reckless driving in exchange for a plea of guilty to the reckless driving charge. This is so even if it is possible to sentence under the DUI law and such penalties are actually imposed, because part of the "mandatory penalties" established by K.S.A. 1985 Supp. 8-1567 are the fact that the DUI conviction goes on the individual's record and may be used in the future to enhance the sentence of a subsequent DUI conviction.

Very truly yours,

Robert T. Stephan

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