



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

July 12, 1988

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

ATTORNEY GENERAL OPINION NO. 88- 98

Keith E. Martin
SMITH, SHAY, FARMER & WETTA
830 Olive W. Garvey Bldg.
200 West Douglas
Wichita, KS 67202

Re: Automobiles and Other Vehicles--Uniform Act
 Regulating Traffic; Rules of the Road; Serious
 Traffic Offenses--Driving Under the Influence;
 DUI Diversion with Prior Expunged Offense

Cities and Municipalities--Code for Municipal
Courts; Proceedings after Arrest and Prior to
Trial--DUI Diversion with Prior Expunged Offense

Synopsis: A person who has a prior conviction for driving
 under the influence (DUI) which has been expunged
 is ineligible for DUI diversion in municipal
 court. Cited herein: K.S.A. 1987 Supp. 8-1567;
 12-4415; 21-4619.

*

*

*

Dear Mr. Martin:

As city attorney for the City of Haysville, you request our
opinion whether an individual who has been convicted of
driving under the influence (DUI), but had that conviction
expunged, is eligible for DUI diversion in municipal court.

K.S.A. 1987 Supp. 12-4415(a) provides as follows:

"In determining whether diversion of a defendant is in the interests of justice and of benefit to the defendant and the community, the city attorney shall consider at least the following factors among all factors considered:

. . .

(3) Whether the defendant is a first time offender of an alcohol related offense and if the defendant has previously participated in diversion, according to the certification of the Division of Vehicles of the State Department of Revenue."

K.S.A. 1987 Supp. 12-4415(b) states:

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

(1) Has previously participated in diversion of an alcohol or related offense;

(2) has previously been convicted of or pleaded nolo contendere to an alcohol related offense in this state or has previously been convicted of or pleaded nolo contendere to a violation of K.S.A. 8-1567 and amendments thereto or of a law of another state, or of a political subdivision thereof, which prohibits the acts prohibited by that statute; or

(3) 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).

K.S.A. 1987 Supp. 21-4619(f)(1) states that:

"When the court has ordered a conviction expunged, the order of expungment shall state the information required to be contained in the petition. The clerk of the court shall send the certified copy of the order of expungment to the federal bureau of investigation, the Kansas bureau of investigation, secretary of corrections and any other criminal justice agency which may have a record of the conviction. After the order of expungment is entered, the petitioner shall be treated as not having been convicted of the crime, except:

(1) Upon conviction for any subsequent crime, the conviction that was expunged may be considered as a prior conviction in determining the sentence to be imposed."
(Emphasis added).

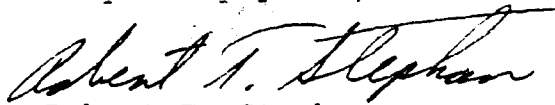
In our opinion, these statutes make one convicted of a prior DUI ineligible for diversion of a subsequent DUI, notwithstanding the expungment of the prior DUI.

The expungment of a conviction for DUI does not alter the fact of the conviction nor remove the disability from obtaining a subsequent DUI diversion. In Attorney General Opinion No. 84-120, we concluded that a person who has pleaded guilty and has been convicted of a charge of driving under the influence of intoxicating liquor under the laws of another state is ineligible to be nominated, elected or appointed to the office of sheriff in this state. The opinion stated that K.S.A. 1983 Supp. 19-801b disqualified persons who had been convicted or had pleaded guilty to a violation of any federal or state laws or city ordinances relating to gambling, liquor or narcotics from holding the office of sheriff. The Attorney General opined that the expungment of such a conviction does not alter the fact of the conviction nor remove the disability from office holding occasioned by such a conviction as provided by K.S.A. 1983 Supp. 19-801b.

Keith E. Martin
Page 4

Given the above Kansas statutes, and the substantial similarity between your question and that addressed in Attorney General Opinion No. 84-120, we conclude that a person who has a prior conviction for DUI which has been expunged is ineligible for DUI diversion in municipal court on a subsequent DUI.

Very truly yours,



Robert T. Stephan
Attorney General of Kansas



Gregory G. Hough
Assistant Attorney General

RTS:RLN:GGH:cy