



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 92- 2

Lewis A. Heaven, Jr.
City Attorney
9000 West 62nd Terrace
Merriam, Kansas 66202

Re: Automobiles and Other Vehicles--Uniform Act
 Regulating Traffic; Rules of the Road; Serious
 Traffic Offenses--Driving Under the Influence of
 Alcohol or Drugs; Sentencing

Synopsis: Under the circumstances stated herein, municipal
 and district courts in Johnson county may sentence
 DUI offenders to a facility located in Wyandotte
 county. The mandatory imprisonment required by
 K.S.A. 1990 Supp. 8-1567, as amended, for second
 offenses may be partially served in a restrained
 environment such as the Kansas City weekend
 intervention program as long as the offender
 remains under the custody and control of law
 enforcement officials throughout the time the
 minimum sentence is being served. Cited herein:
 K.S.A. 1990 Supp. 8-1567, as amended by L. 1991,
 ch. 36, § 20; K.S.A. 12-4510; 19-1916; K.S.A.
 1990 Supp. 19-1930; 21-4603, as amended by L. 1991,
 ch. 89, § 4; L. 1990, ch. 47, § 3.

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Dear Mr. Heaven:

You request our opinion regarding the availability of a
particular program to municipal and district courts in Johnson
county. You explain that Bethany Medical Center has

established the Kansas City weekend intervention program (KCWIP) which is conducted on designated weekends at a restricted-access portion of the medical center's facility located in Wyandotte county. "The program is designed to provide drug and alcohol information and education to those individuals who have been sentenced to imprisonment pursuant to K.S.A. 8-1567 [as] an alternative to sentencing to the county jail. . . . [T]he Board of County Commissioners of Wyandotte County . . . has approved a resolution designating the portion of Bethany Medical Center utilized in the KCWIP as a confinement facility. Furthermore, the Board of County Commissioners of Wyandotte County has agreed to provide law enforcement personnel through the County Sheriff's Department. . . ." Your questions are as follows:

"1. Can municipal and district court judges in one county sentence DUI offenders to serve their sentence in a facility located within another county?

"2. Can second-time DUI offenders receive a combined sentence of 48 consecutive hours in a restrained environment (such as KCWIP below), and the balance of time in the county jail?"

K.S.A. 12-4510 and K.S.A. 1990 Supp. 21-4603(2) discuss dispositions municipal and district courts are authorized to make. K.S.A. 12-4510 provides in part:

"When a sentence of imprisonment is pronounced, the municipal judge or the clerk of the municipal court shall prepare and deliver to the chief of police a copy of the entry of judgment, duly certified by such judge or clerk, which shall be sufficient authority to such chief of police to execute the sentence and confine the accused person to jail for the time specified, or until further order of the court."

K.S.A. 1990 Supp. 21-4603(2) provides in part:

"Except as provided in subsection (3), whenever any person has been found guilty of a crime, the [district] court may adjudge any of the following:

"(a) Commit the defendant to the custody of the secretary of corrections or, if confinement is for a term less than one year, to jail for the term provided by law; . . ."

We find nothing to require "jailing" of offenders in the county where the sentencing court is located, although there is no duty for a "jail" to accept a prisoner from another county except pursuant to K.S.A. 19-1916. See also K.S.A. 1990 Supp. 19-1930. You indicate that the program in question will be provided only to individuals who request being sentenced to the program and that Bethany will consent to out-of-county offenders being sentenced to the program. Under these circumstances, it is our opinion that municipal and district courts in Johnson county may sentence DUI offenders to a facility located in Wyandotte county.

You next question whether, upon a second DUI conviction, offenders may receive a combined sentence of 48 consecutive hours in a restrained environment such as the Kansas City weekend intervention program (KCWIP), and the balance of the time in the county jail.

K.S.A. 1990 Supp. 8-1567, as amended by L. 1991, ch. 36, § 20, provides in part:

"(e) On a second conviction of a violation of this section, a person shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than \$500 nor more than \$1,000. The five days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to confinement at the end of each day in the work release program. Except as provided in subsection (g), the person convicted must serve at least five consecutive days' imprisonment before the person is granted probation, suspension or reduction of sentence or parole or is otherwise released. As a condition of any grant of probation, suspension of sentence or parole or of any other release, the person

shall be required to enter into and complete a treatment program for alcohol and drug abuse as provided in K.S.A. 8-1008, and amendments thereto."

As noted in State v. Martin, 14 Kan.App.2d 138, 139 (1989), K.S.A. 1990 Supp. 8-1567 (then K.S.A. 1988 Supp. 8-1567) does not define the term imprisonment. Applying rules of statutory construction, the court held that work release programs were excluded from the definition of imprisonment. 14 Kan.App.2d at 140. (The statute was subsequently amended to allow sentencing to work release programs after the person has served 48 consecutive hours of imprisonment. L. 1990, ch. 47, § 3). The term imprisonment, as used in K.S.A. 1990 Supp. 8-1567, was further defined by the Kansas Supreme Court in State v. Meredith, 236 Kan. 866, 868-869 (1985):

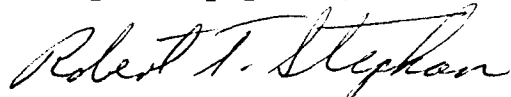
"The statute here plainly and clearly requires on a second offense of DUI the offender must spend at least five days in custody of law enforcement officials. Time spent in an alcohol treatment center where an individual is not under the custody and control of law enforcement officials, is no substitute for that minimum imprisonment." (Emphasis added.)

You advise that persons sentenced to the KCWIP will be under the custody and control of law enforcement officials.

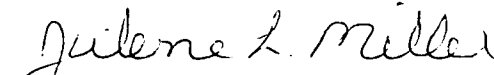
This office has previously opined that "the term 'imprisonment' includes not only actual incarceration in jail, but may refer to any situation in which the defendant's liberty is restrained and he or she is subject to additional sanctions should an escape be made." Attorney General Opinions No. 83-123, 84-9. See also State v. Pritchett, 222 Kan. 719, 720 (1977). Therefore, it is our opinion that the mandatory imprisonment required by K.S.A. 1990 Supp. 8-1567, as amended, for second convictions of DUI may be partially served in a restrained environment such as KCWIP as long as the offender remains under the custody and

control of law enforcement official throughout the time the minimum sentence is being served.

Very truly yours,



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Julene L. Miller
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RTS:JLM:jm