STATE OF KANSAS

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Curt T. Schneider
Attorney General

August 25, 1976

ATTORNEY GENERAL OPINION NO. 76- 270

Mr. Perry Warren
Sherman County Attorney
Sherman County Courthouse
Goodland, Kansas 67735

Re: Motor Vehicles--Offenses--Unauthorized Drivers

Synopsis: K.S.A. 8-264 provides that no person shall "authorize or knowingly permit" an unlicensed driver to operate a motor vehicle under the lender's ownership or control. Knowledge that the bailee is unlicensed is not an element of the offense if the charge is based on unlawful authorization.

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Dear Mr. Warren:

You inquire whether *scienter* is an element of the offense prescribed by K.S.A. 8-264, which states thus:

> "No person shall authorize or knowingly permit a motor vehicle owned by him or her or under such person's control to be driven upon any highway by any person who is not licensed under the provisions of this act."

The statute thus makes it an offense for one who owns or controls an automobile to "authorize" or "knowingly permit" an unlicensed driver to operate such vehicle. The terms "authorize" and "permit" are used disjunctively, and the term "knowingly" modifies only the latter verb. When the term "knowingly" is placed *before* the first verb, "authorize," it is commonly held to modify both terms,

"authorize" and "permit." *See, e.g., People v. Shapiro*, 4 N.Y.S.2d 597, 152 N.E.2d 65 (1958), and *People v. Crean*, 206 Misc. 311, 136 N.Y.S.2d 688 (1954).

Where, as in the Kansas statute, the adverb "knowingly" is placed only after the second verb, "permit," the question arises whether a distinction is to be made between authorization and permission.

The analogous Indiana statute, Burns Ind.Stat.Ann 9-1-4-51, employs identical language, *i.e.*, no person "shall authorize or knowingly permit" an unlicensed driver to operate a vehicle. In *Ellsworth v. Ludwig*, 223 N.E.2d 764 (Ind.App.Ct. 1967), a civil action involving liability of a bailor for injuries caused by the bailee while driving while intoxicated, the court implied, *in dicta*, that knowledge must be shown to establish a violation of this statute, and that no legal distinction was to be made between authorization and permission, *i.e.*, both must be granted "knowingly."

In *State v. Miller*, 211 N.E.2d 102 (Cincinnati Mun.Ct. 1965), a prosecution for violation of a statute which was identical to the Kansas provision, insofar as pertinent here, the court took the view that knowledge need not be shown to establish a violation:

> "[M]ust the State prove that the defendant 'knowingly' permitted operation of his vehicle by an unlicensed operator? In view of the clear way in which the statute is construed, the answer must be no. The statute states that 'no person shall authorize or knowingly permit,' . . . . There can be no obscurity about the meaning of the word "authorize." For the purpose of this statute, it is simply the lending of a motor vehicle to another with permission, voluntarily and purposely, to be driven by the borrower. Since the Legislature has used the disjunctive 'or', the prosecution is not required to prove both authorization and knowledgeable permission, proof of authorization only being sufficient. To prove 'knowingly permit' ordinarily would seem to place a heavier burden upon the prosecuting authority than to prove simply authorization. However, assuming only for the sake of argument, that the state has to prove knowledgeable permission in prosecutions under this section, I think the Legislature's intent is plain that a defendant should not be allowed successfully to defend

> by putting on a blindfold, as it were, and making no reasonable attempt to learn whether the borrower has a valid operator's license.
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> Defendant urges that the statute should be read as if it were written 'knowingly authorize or knowingly permit'. I cannot subscribe to this interpretation. The Legislature has only used the word 'knowingly' once and it is before 'permit' and not before 'authorize.' To add the word 'knowingly' before 'authorize' would amount to judicial legislation." 211 N.E.2d at 103, 104.

In *State v. Campbell*, 16 Ohio Misc. 163, 241 N.E.2d 303 (1968), the court took a similar view of a statute which provided that no person shall "cause or knowingly permit" an unlicensed minor to operate a motor vehicle. The court took the view that "knowingly' modified only "permit," and did not apply to "cause."

A conviction cannot, of course, be based on acts which the legislature intended to, but did not, expressly proscribe. As a matter of technical statutory construction, the language of K.S.A. 8-264 which is in question here is not ambiguous. The operative acts, to "authorize" and to "knowingly permit," are stated in the disjunctive as clearly stated, alternative acts, and knowledge is required only of the latter as an element of the offense. As a practical matter, of course, it may be argued that authorization and permission are substantially synonymous terms. Indeed in *Webster's Third New International Dictionary* (G. & C. Merriam Co. 1966), each is used in the course of defining the other. Thus, it may be argued that by arbitrarily charging authorization under the statute rather than permission, the prosecutor may avoid the burden of proving *scienter*, although there may be no material difference between authorization and permission in the facts on which the prosecution is based. If the legislature intended to require "knowing" permission, it must surely have intended to require, also, "knowing" authorization, it may be suggested. While that may well have been the intention of the legislature, it chose, in its wisdom and for reasons it may be deemed to have duly considered, to distinguish between permission and authorization, and to require knowledge to be shown as an element of the offense when prosecution is based on permission, as distinguished from authorization.

There are obvious policy considerations which can be resolved only by the legislature. Strict liability may be desirable, both from the standpoint of enforcement and prosecution, and also to impose a responsibility upon owners of motor vehicles to entrust them only to persons they know to be licensed to operate them. On the other hand, some may take the position that strict liability is onerous, imposing unrealistic and impractical burdens on owners of motor vehicles. It may be that in some fashion not readily apparent from the language of this provision, the legislature sought to balance these and other competing considerations, by requiring knowledge in one instance, and omitting it in the other.

The difference may seem a slight one. However that may be, the legislature choose to make the distinction, and did so in relatively unambiguous language fairly calculated to apprise the average person of those acts prohibited by the statute. It is unlawful to authorize another to operate one's motor vehicle if the person so authorized is not licensed to do so. The statute does not require that the authorization which is granted be shown to have been granted by the accused with knowledge that the operator was not licensed to operate the vehicle. If, on the contrary, it is charged that the accused did permit an unlicensed person to operate his or her motor vehicle, it must be shown that the permission was granted with the knowledge that the permittee was not licensed to do so.

The elements of the offense thus may vary, depending upon whether authorization or permission is charged. The difference seems largely semantical, and may appear to permit the prosecutor to lighten the burden of proof by merely verbal distinctions in the charge. Nonetheless, the distinction exists in the statute, and there seems to be no compelling reason to ignore it. To recapitulate, in my judgment, in a charge filed under K.S.A. 8-264, knowledge must be shown if the accused is charged with "permitting" an unlicensed person to operate a motor vehicle, but knowledge need not be shown if only "authorization" is charged. If the legislature did in fact intend that scienter be shown as an element of any prosecution under this statute, it may, of course, easily correct the language to conform with its intention.

Yours very truly,

Curt Schneider

CURT T. SCHNEIDER
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