



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

August 18, 1977

ATTORNEY GENERAL OPINION NO. 77-277

Mr. Edwin H. Bideau III
Neosho County Attorney
Neosho County Courthouse
Erie, Kansas 66733

Re: Crimes and Punishment -- Crimes Affecting Family Relationships and Children -- Meaning and Definiteness of Term "Intoxicating Liquor".

Synopsis: The term "intoxicating liquor", in K.S.A. 21-3610, carries the same definition given the term "alcoholic liquor" found in the Kansas Liquor Control Act, K.S.A. 41-101 et. seq., and does not include beer or cereal malt beverage containing not more than 3.2% of alcohol by weight.

When measured by common understanding and practice, the language found in K.S.A. 41-3610 is sufficiently explicit in its description of the conduct forbidden to survive constitutional challenge for vagueness and uncertainty.

* * *

Dear Mr. Bideau III:

K.S.A. 21-3610 states the following:

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"(1) Furnishing intoxicants to a minor is directly or indirectly, selling to, buying for, giving or furnishing any intoxicating liquor to any person under the age of twenty-one (21) years. (2) Furnishing intoxicants to a minor is a class B misdemeanor." (Emphasis added.)

You ask an opinion of this office concerning the meaning of the phrase "intoxicating liquor" in the statute, and whether the phrase is sufficiently definite to withstand constitutional challenge.

The meaning given the term in question by the legislature cannot be ascertained without consideration of the historical background surrounding the intoxicating liquor legislation of this state.

After 68 years of prohibition, the Kansas voters in 1948 modified Art. 15, § 10 of the Constitution by providing that the legislature could regulate, license and tax the manufacturer and sale of "intoxicating liquors". The following year the legislature passed the Kansas Liquor Control Act, K.S.A. 41-101 et. seq. (L. 1949, ch. 242 § 1; March 9.) which authorized the manufacture, transportation and sale of "alcoholic liquor" by the package by licensed dealers. The term "alcoholic liquor" was defined in the Act, at that time, as it is today, to include:

"The four varieties of liquor as defined herein, namely, alcohol, spirits, wine, and beer, and every liquid or solid, patented or not, containing alcohol, spirits, wine or beer, and capable of being consumed as a beverage by a human being, but shall not include any beer or cereal malt beverage containing not more than three and two-tenths percent (3.2%) of alcohol by weight." (Emphasis added.)

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"Alcohol" was defined as:

"The product of distillation of any fermented liquid, whether rectified or diluted, whatever may be the origin thereof, and includes synthetic ethyl alcohol, but does not include denatured alcohol or wood alcohol."

"Spirits" was defined to mean:

"Any beverage which contains alcohol obtained by distillation, mixed with water or other substance in solution, and includes brandy, rum, whisky, gin, or other spirituous liquors, and such liquors when rectified, blended or otherwise mixed with alcohol or other substances."

"Wine" was defined to include:

"Any alcoholic beverage obtained by the normal alcoholic fermentation of the juice of sound, ripe grapes, fruits or berries, or other agricultural products, including such beverages containing added alcohol or spirits, as above defined, or containing sugar added for the purpose of correcting natural deficiencies."

"Beer" was defined as:

"A beverage, containing more than three and two-tenths percent (3.2%) of alcohol by weight, obtained by alcoholic fermentation of an infusion or concoction of barley, or other grain, malt and hops in water, and includes, among other things, beer, ale, stout, lager beer, porter and the like having such alcoholic content."

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The original Act also provided at G.S. 41-715 that:

"No person shall knowingly or unknowingly sell, give away, dispose of, exchange or deliver, or permit the sale, gift or procuring of any alcoholic liquor to or for any minor; and no such minor shall represent that he is of age for the purpose of asking for, purchasing or receiving alcoholic liquor from any person except in cases authorized by law . . . Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one hundred dollars (\$100) or by imprisonment for not to exceed thirty (30) days, or by both such fine and imprisonment in the discretion of the court, and any license issued under this act to such person or his employer shall be revoked upon conviction of sale, gift or delivery to or for a minor." (Emphasis added.)

In 1963, K.S.A. 41-715 was amended with the addition of the following:

"No minor shall attempt to purchase or purchase alcoholic liquor from any person. No minor shall possess alcoholic liquor. No person over twenty-one (21) years of age shall purchase alcoholic liquor from any person for, on behalf of or at the request of any minor." (L. 1963 ch. 267 § 1.)

In 1965, the legislature enacted Senate Bill No. 109 (L. 1965 ch. 277) which concerned crimes affecting children. Section 7 of the Bill contained the following language:

"Any person who shall knowingly or unknowingly sell to, buy for, give to, furnish, either directly or indirectly any intoxicating liquor to any person under the age of twenty-one (21) years

shall be deemed guilty of a misdemeanor and when convicted thereof shall be subject to punishment by a fine of not more than two-hundred dollars (\$200) or by imprisonment for a term not exceeding thirty (30) days or both. Any retail liquor license issued under K.S.A. 41-308 to such person or his employer shall be revoked upon the conviction of sale, gift to, or furnishing to or for a minor." (Emphasis added.)

In section 8 of the same law, the legislature amended K.S.A. 41-715 to its present form, which is:

"No minor shall represent that he is of age for the purpose of asking for, purchasing or receiving alcoholic liquor from any person except in cases authorized by law. No minor shall attempt to purchase or purchase alcoholic liquor from any person. No minor shall possess alcoholic liquor ... Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than two-hundred dollars (\$200) or by imprisonment for not to exceed thirty (30) days, or by both such fine and imprisonment in the discretion of the court." (Emphasis added.) [K.S.A. 41-102 (11) defines "minor" as any person under twenty-one years of age.]

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The present Kansas Criminal Code was enacted in 1969 with the passage of Senate Bill No. 9. This same bill repealed K.S.A. 38-715 (see L. 1969, ch. 180, § 21-4701) and recodified the same provision with the enactment of K.S.A. 21-3610 as it presently appears.

The above historical review indicates that the legislature as early as 1949 interchanged the term "alcoholic beverage" with the term "intoxicating liquor" found in the Constitution. The legislature again interchanged the terms when it enacted K.S.A. 38-715 in 1965 with the passage of Senate Bill No. 109 relating to crimes against children. While the term "intoxicating liquor" is undefined in the statute, it is clear in view of the contemporaneous amendment to K.S.A. 41-715, that the 1965 legislature intended that the terms "intoxicating liquor" and "alcoholic liquor" carry identical meanings. As fashioned, the amendment to both statutes occasioned by Senate Bill No. 109 was not intended to change the character of the beverage that could not be sold or given a person under the age of twenty-one, but was a repositioning of the prohibition in the article entitled "Crimes Affecting Children". The subsequent restatement of the prohibition in K.S.A. 21-3610 also did not change the substance of the statute, since the change was made only to shift the prohibition into article of the Criminal Code entitled "Crimes Affecting Family Relationships and Children". (See Judicial Council note accompanying statute.)

Construing the present language of K.S.A. 41-715 and K.S.A. 21-3610 together, as statutes in pari materia, it is seen that the liquor which the legislature prohibited individuals under the age of twenty-one from purchasing, receiving and possessing, is the same substance that no person could sell to, buy for, or furnish to a person under the age of twenty-one. Accordingly, the term "intoxicating liquor" as used by the legislature in K.S.A. 21-3610 carries the same definition given "alcoholic liquor" in K.S.A. 41-102 (2), but does not include any beer or cereal malt beverage containing not more than 3.2% of alcohol by weight.

A criminal statute which forbids or requires an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application lacks the first essential of due process of law. (State v. Bleser, 138 Kan. 447; State v. Rodgers, 142 Kan. 841; and State v. Carr, 151 Kan. 39.) As stated by the Supreme Court in State v. Gungleman, 210 Kan. 481:

"In creating an offense which was not a crime at common law the legislature must make the statute sufficiently certain to show what was intended to be prohibited

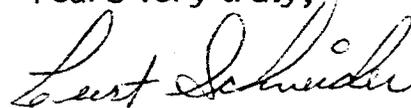
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and punished, otherwise it will be void for uncertainty. But reasonable certainty is all that is required and liberal effect is always to be given to the legislative intent in view of the evil to be corrected."
(210 Kan. 484.)

The test whether a statute is vague and ambiguous is whether the language conveys a sufficient definite warning as to prescribed conduct when measured by common understanding and practice. (Tri-State Hotel Co. v. Londerholm, 195 Kan. 748 and State v. Hill, 189 Kan. 403.)

When K.S.A. 21-3610 is considered in context with K.S.A. 41-715 and the Cereal Malt Beverage Act (K.S.A. 41-2701 et. seq.), which permits the sale of 3.2% beer to person eighteen years of age and older, it is our opinion that the language of the statute is sufficiently explicit in its description of the conduct forbidden to survive constitutional challenge for vagueness and uncertainty.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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