



STATE OF KANSAS

## Office of the Attorney General

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Curt T. Schneider  
Attorney General

November 14, 1977

ATTORNEY GENERAL OPINION NO. 77- 356

Mr. Dale McFarland  
Thomas County Sheriff  
225 North Court  
Colby, Kansas 67701

Re: Traffic Offenses--Driving Under Influence of Intoxicating Liquor or Drugs

Synopsis: The phrase "to operate" as used in K.S.A. 1976 Supp. 8-1567(a) has a broader meaning than the phrase "to drive." Operating not only includes the process of moving the vehicle from one place to another but also includes starting the engine, or manipulating the mechanical or electrical equipment of the vehicle without actually putting the vehicle in motion.

\* \* \*

Dear Sheriff McFarland:

As Sheriff of Thomas County you request an opinion as to the interpretation of the phrase "to operate" as it is used in K.S.A. 1976 Supp. 8-1567, driving under the influence of intoxicating liquor or drugs. You state that your department interprets such phrase to mean the ability to drive, possession of the vehicle and opportunity to drive. In other words, it is not necessary that the subject be seen driving, only have the opportunity to drive.

The phrase "to operate" can be found at K.S.A. 8-1567(a) which states:

"It is unlawful and punishable as provided in subsection (c) of this section

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for any person who is under the influence of intoxicating liquor to operate any vehicle within this state."

Our research has indicated no Kansas Supreme Court cases interpreting the phrase "to operate." However, other jurisdictions have had the occasion to do so. For example, the Court in William v. City of Petersburg, 217 S.E.2d 893 (Va.) (1975) said:

"Driving an auto means putting it in motion but operating a vehicle has a broader meaning. Operating not only includes the process of moving the vehicle from one place to another but also includes starting the engine, or manipulating the mechanical or electrical equipment of the vehicle without actually putting the car in motion. It means engaging the machinery of the vehicle which, alone or in sequence will activate the motive power of the vehicle."

In Jacobson v. State, 551 P.2d 935 (1976), the Alaska Supreme Court in interpreting Alaska's drunk driving statute said the following:

"Term to 'operate' as used in the drunk driving statute includes a larger class of activities than the term 'drive'; although one who drives a vehicle must necessarily in that process operate it, the reverse is not necessarily true."

A summary of the cases in other jurisdictions can be found at 47 A.L.R.2d 570. In that annotation the author had this to say:

"Although statutes prohibiting 'driving' a motor vehicle while under the influence of intoxicating liquor and those prohibiting 'operating' a motor vehicle while in a similar condition exist for the same general purpose of protecting the users of the highways from the hazard of vehicles controlled by persons under the influence of alcohol, a certain distinction between the two terms is nevertheless recognized. Of the two terms 'driving' is given the

stricter construction, and in numerous cases it has been held that to be guilty of driving a vehicle while intoxicated, the defendants must have had the vehicle in motion at the time in question. While in a few cases the term 'operating' has been given a similar limited construction, 'operating' has been more liberally construed in other cases to include starting the engine or manipulating the mechanical or electrical agencies of a vehicle."

As indicated by the above cases and comment, it is evident that the term "to drive" necessitates movement of the vehicle while the majority of cases interpret the term "to operate" as including starting the engine, manipulating the mechanical or electrical equipment of the vehicle without putting the vehicle in motion. Examples of the type of situations in which courts have upheld a conviction for "operating" a vehicle while under the influence of alcohol are as follows:

- (1) Defendant clearly intoxicated, key in ignition switch turned to "on" position but motor not running, gearshift lever in drive position with emergency brake on.
- (2) Defendant sleeping in vehicle parked on shoulder of interstate highway in early morning hours with headlights on and engine running.
- (3) Defendant slumped over steering wheel, motor running and when aroused by police officer attempted to shift gear.

Examples of circumstances in which courts have held the driver was not "operating" a motor vehicle under the influence of alcohol are:

- (1) Motorist found lying on seat of truck with his head toward right door and feet on floor without any part of his body touching truck's operating controls, motor running and lights on.
- (2) Driver found merely behind wheel of auto without motor running.

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With respect to the situation described above where an intoxicated motorist is merely behind the wheel of an auto without the motor running, a few courts have held that if the circumstances surrounding the particular case indicate that the car could not have been where it was found unless driven there by the intoxicated motorist, and the motorist is found in such a position in the driver's seat that would not allow another person to drive, such motorist could be convicted of "operating" a vehicle under the influence of alcohol because all the above factors would necessitate a finding that the motorist had driven the auto to the area where the police made the arrest.

It should be noted that in subsection (b) of K.S.A. 1976 Supp. 8-1567, concerning a motorist under the influence of a narcotic, hypnotic, somnifacient or stimulating drug, the legislature used the phrase "to drive" and not "to operate". Thus, in order to obtain a conviction of a motorist for driving under the influence of drugs as provided by subsection (b) the element of movement of the vehicle must be shown. However, when seeking to obtain a conviction of the same motorist for "operating" a vehicle under the influence of alcohol, movement of the vehicle need not be shown.

I trust that the above discussion of the terms "to operate" and "to drive" will be of benefit to you and your department.

Yours very truly,

  
CURT T. SCHNEIDER  
Attorney General

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