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March 28, 1979

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ATTORNEY GENERAL OPINION NO. 79- 42

Mr. William M. Malcolm
Clay County Attorney
Clay Center, Kansas 67432

Re: Automobiles and Other Vehicles--Drivers'
Licenses--Habitual Violators

Synopsis: The district court proceeding under K.S.A. 1978 Supp. 8-290(b), requiring an habitual violator of traffic laws to show cause why the court should not restrict, suspend or revoke such person's driving privileges, is civil in nature. As such, a district magistrate judge has proper jurisdiction of the action.

Since the privilege of operating a motor vehicle on the highways of this state is not a substantial right to be constitutionally protected by due process of law guarantees, and absent any statutory or case law to the contrary, a person summoned to appear at a hearing held pursuant to K.S.A. 1978 Supp. 8-290(b) does not have a right to court-appointed counsel.

* * *

Dear Mr. Malcolm:

Your letter of January 17, 1979, raises several questions regarding K.S.A. 1978 Supp. 8-290:

1. Is the prosecution under subsection (b) of this statute a civil or criminal action in nature?

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2. Is the defendant in such action entitled to appointed counsel, since subsequent violation of the court order of revocation or suspension constitutes a class E felony?

3. Does a district magistrate judge have jurisdiction over such matter, or does the fact that a felony may result require a district court judge to render the initial decision to revoke, suspend or restrict the driving privilege?

Subsection (b) of K.S.A. 1978 Supp. 8-290, provides for a "show cause" hearing for a person who allegedly is an habitual violator of laws or ordinances regulating the operation of motor vehicles, as set forth in subsection (a) of the statute. If the files and records of the division of vehicles disclose the requisite number and frequency of traffic violations by such person, an abstract of such violations is certified to the appropriate county or district attorney, who is authorized by subsection (b) to summon such person to appear at the hearing to show cause why such person's driving privileges should not be restricted, suspended or revoked.

Following the hearing, if the required findings are made by the court, as provided in said subsection (b), the court is required by subsection (c) of the referenced statute to "enter an order restricting, suspending or revoking such person's privilege of operating a motor vehicle on the highways of this state." That is the only action which the court is authorized to take under this subsection.

K.S.A. 21-3102 provides, in part, that: "No conduct constitutes a crime against the state of Kansas unless it is made criminal in . . . [the Kansas criminal] code or in another statute of this state" Under the Kansas Criminal Code, a crime is defined in K.S.A. 21-3105 as "an act or omission defined by law and for which, upon conviction, a sentence of death, imprisonment or fine, or both imprisonment and fine, is authorized."

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Even though the hearing under K.S.A. 1978 Supp. 8-290(b) is prompted by a person's repeated violation of traffic laws, the purpose of the hearing is not to impose criminal sanctions for such conduct. The hearing is held as a consequence of convictions of traffic law violations for which, presumably, criminal sanctions already have been imposed. Thus, since no penalty, in the form of either a fine or imprisonment, attaches to the order issued under K.S.A. 1978 Supp. 8-290(c), it is apparent that the proceeding pursuant to which such order is issued is not criminal in nature. Therefore, such proceeding must be viewed as civil in nature.

This conclusion also dictates the answer to your second question. By virtue of an order entered by the court pursuant to K.S.A. 1978 Supp. 8-290(c), the person subjected thereto may lose or suffer limitation of such person's "privilege" of operating a motor vehicle on the highways of this state. We are unaware of any Kansas statutory or case law requiring that due process considerations necessitate the appointment of counsel for any person subject to a potential loss or restriction of driving privileges. As stated in Popp v. Motor Vehicle Department, 211 Kan. 763 (1973):

"It is elementary that the right to operate a motor vehicle upon a public street or highway is not a natural or unrestrained right but a privilege which is subject to reasonable regulations under the police power of the state in the interest of the public's safety and welfare. (Lee v. State, 187 Kan. 566, 358 P.2d 765.) The driver's license is not a contract or a property right in the constitutional sense, and therefore its revocation does not constitute the taking of property. The privilege is granted to those who are qualified, who comply with reasonable police power requirements in the interest of public safety and welfare, and is withheld from those who do not." (Emphasis added by court.)
Id. at 766.

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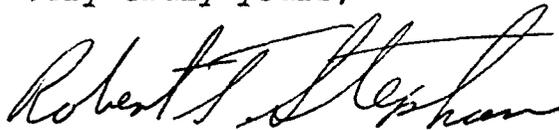
Of similar import is Manzanares v. Bell, 214 Kan. 589, 600 (1974).

It has been held in State v. Love (La. App.) 312 So.2d 675, cert. denied (La.) 317 So.2d 627, that, "the state, in a civil proceeding . . . may have a person declared an habitual offender on the basis of prior uncounseled convictions, even though the declaration results in the loss of his driving privileges and possibly will lead to additional proceedings of a criminal nature resulting in his imprisonment."

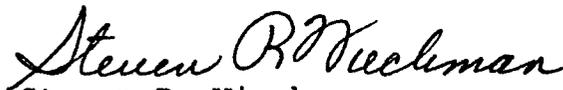
In our judgment, a person summoned to appear at a hearing held pursuant to K.S.A. 1978 Supp. 8-290(b) may choose to be represented by counsel at the expense of that person. However, failure of such person to retain counsel does not obligate the court to appoint counsel for such person.

It is also our opinion that a district magistrate judge has jurisdiction of the proceeding authorized by K.S.A. 1978 Supp. 8-290(b). The proceeding is civil in nature. Nothing in K.S.A. 1978 Supp. 20-302b, defining a district magistrate judge's civil and criminal jurisdiction warrants a contrary conclusion. Even though K.S.A. 1978 Supp. 8-290(e) makes it a class E felony for a person to be convicted of operating a motor vehicle while such person's operating privileges have been suspended or revoked by court order, pursuant to K.S.A. 1978 Supp. 8-290(b), we find no reason why this should oust a district magistrate judge from exercising jurisdiction over the hearing contemplated by subsection (b) of that statute.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Steven R. Wiechman
Assistant Attorney General

RTS:ALR:SRW:gk