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October 15, 1979

ATTORNEY GENERAL OPINION NO. 79- 232

Mr. Otis W. Morrow
City Attorney
P.O. Box 1146
Arkansas City, Kansas 67005

Re: Juvenile Code -- Traffic Offenders -- Arrest and
Incarceration

Synopsis: Any juvenile who is between the ages of fourteen (14) and eighteen (18) years may be incarcerated in connection with such juvenile's arrest and prosecution for a traffic offense, excluding the six serious traffic offenses designated by subsection (e) of K.S.A. 1978 Supp. 38-802 (as amended by L. 1979, Ch. 122, §2), but such juvenile may not be incarcerated upon conviction thereof.

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Dear Mr. Morrow:

You have inquired whether a police officer, when making an arrest for a common traffic offense, where the arrested person is between the ages of fourteen (14) and eighteen (18) years, may incarcerate such person.

Certain provisions of the Kansas Juvenile Code are pertinent to your inquiry, including the Code's definition of "traffic offender." Subsection (e) of K.S.A. 1978 Supp. 38-802 (as amended by L. 1979, Ch. 122, §2) defines "traffic offender" as "a child under fourteen (14)

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years of age who does an act which if done by a person fourteen (14) years of age or older would make such person liable to be arrested and prosecuted for the violation of any of the following traffic offenses." (Emphasis added.) The balance of this provision identifies the traffic offenses encompassed by this definition, specifically excluding six "serious" offenses.

The following provisions of K.S.A. 1978 Supp. 38-815(b) also are relevant:

"Whenever a child fourteen (14) years of age or older is charged with a traffic offense described in subsection (e) of K.S.A. 1978 Supp. 38-802, the prosecution of such offense shall not be heard pursuant to the juvenile code but shall be commenced in a court of competent jurisdiction in the same manner as prosecutions involving adults, subject to the provisions of K.S.A. 1978 Supp. 8-2117." (Emphasis added.)

From the foregoing, it is abundantly clear that the Kansas Juvenile Code specifically provides that when a child between fourteen (14) and eighteen (18) years of age is alleged to have violated a traffic law, not to include any of the six serious offenses enumerated in K.S.A. 1978 Supp. 38-802(e), as amended, such child is subject to arrest and prosecution in the same manner as an adult who is similarly charged. Thus, statutory provisions governing arrest and prosecution of adult offenders bear upon your inquiry.

An "arrest," as defined in the Code of Criminal Procedure by K.S.A. 1978 Supp. 22-2202(3), is "the taking of a person into custody in order that such person may be forthcoming to answer for the commission of a crime. The giving of a notice to appear is not an arrest." It is important to note that this provision makes custody necessary to effect an arrest.

Also, it is important to note that K.S.A. 22-2301 provides, in part, that "[u]nless otherwise provided by law, a prosecution shall be commenced by filing a complaint with the magistrate." A "complaint" is defined in K.S.A. 1978 Supp. 22-2202(6), as follows:

"A written statement under oath of the essential facts constituting a crime, except that a notice to appear issued by a law enforcement officer

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pursuant to and in compliance with K.S.A. 1978 Supp. 8-2106 shall be deemed a valid complaint if signed by said law enforcement officer."

Similar language is contained in K.S.A. 1978 Supp. 8-2108, which establishes a criteria for the commencement of prosecution in cases involving common traffic offenses:

"In the event the form of citation provided for in K.S.A. 1977 Supp. 8-2106 includes information required by law and is signed by the officer preparing the same, then such citation when filed with the court having jurisdiction shall be deemed to be a lawful complaint for the purposes of prosecution under this act."

When the foregoing provisions applying to adult offenders are read in concert with the Juvenile Code requirement that juvenile violators of traffic laws between the ages of fourteen (14) and eighteen (18) years be dealt with as adults, it would appear that such juveniles are subject to incarceration incidental to arrest and prosecution for the prescribed traffic offenses. However, the apparent catalyst for your inquiry is K.S.A. 1978 Supp. 8-2117, the pertinent provisions of which are as follows:

"Subject to the provisions of this section, the court of competent jurisdiction may hear prosecutions of traffic offenses as permitted by subsection (b) of K.S.A. 1978 Supp. 38-815 involving any child fourteen (14) years of age or more but who is less than eighteen (18) years of age. The court hearing any such prosecution may impose any fine authorized by law for such offense, but no child under the age of eighteen (18) years of age shall be incarcerated for any such offense." (Emphasis added.)

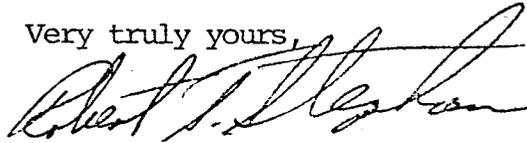
We believe that the foregoing emphasized portion of § 2117 is in harmony with our previous determination that a juvenile between the ages of fourteen (14) and eighteen (18) years may be incarcerated in connection with arrest and prosecution for traffic offenses. In our judgment, when these provisions are read in context with the other provisions of §-2117 quoted above, and are construed together with the other statutes previously discussed herein, these provisions proscribe incarceration only as a means of punishing a juvenile under

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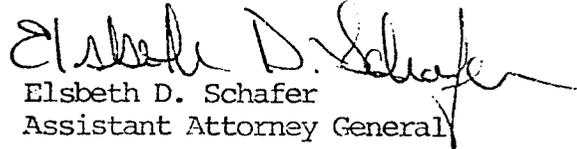
the age of eighteen (18) years who is convicted of a traffic offense thereunder. We believe that the legislature intended incarceration to be precluded only after conviction, and we are compelled to give paramount consideration to this intent. Hunter v. Haun, 210 Kan. 11 (1972).

In summary, it is our opinion that any juvenile between the ages of fourteen (14) and eighteen (18) years may be incarcerated in connection with the arrest and prosecution for a traffic offense, excluding the six serious traffic offenses designated in K.S.A. 1978 Supp. 38-802(e) (as amended by L. 1979, Ch. 122, §2); but pursuant to K.S.A. 1978 Supp. 8-2117, such juveniles may not be incarcerated upon conviction of such offense.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Elsbeth D. Schafer
Assistant Attorney General

RTS:TDH:EDS:may