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ATTORNEY GENERAL OPINION NO. 80- 60

Mr. Bruce E. Wasinger
Kansas Department of Revenue
State Office Building
Topeka, Kansas 66625

Re: Crimes and Punishments -- Sentencing -- Expungement of Certain Convictions

Synopsis: The expungement provisions of K.S.A. 1979 Supp. 21-4619 and 12-4516 are not applicable to the records of the Division of Vehicles which record a motorist's refusal to submit to chemical test pursuant to K.S.A. 1979 Supp. 8-1001 unless such expungement is necessary to preserve a basic constitutional right of the individual.

* * *

Dear Mr. Wasinger:

You inquire whether a motorist who has been convicted of a violation of K.S.A. 1979 Supp. 8-1567 (driving under the influence) can utilize the expungement provisions of K.S.A. 1979 Supp. 21-4619 or 12-4516 to expunge not only the conviction records, but also the records which document his refusal to submit to a chemical test to determine the alcoholic content of blood in accordance with K.S.A. 1979 Supp. 8-1001. It is our understanding that both of these records are maintained in the Department of Revenue, Division of Vehicle files.

Before proceeding with our discussion it may be helpful to define expungement and to ascertain the purpose of such statutes.

> "The term expungement denominates certain statutes that attempt, by various methods, to redefine a criminal offender's social status by erasing the legal event of conviction. In an absolute sense, expunge means to obliterate or to make void and of no effect. Criminal record expungement theoretically destroys the record, withdraws it from public view and prevents it from hampering an individual's future endeavors."
> 13 Washburn L.J. 93, 94 (1974) (Emphasis by author.)

In Kansas expungement has been statutorily recognized in different forms since 1971. The first statute classified individuals to whom it applied by age, and was complemented by the now repealed annulment statute, K.S.A. 21-4616. The existing statutes, K.S.A. 1979 Supp. 21-4619 and 12-4516, which are in question, apply to classes of crimes, not individuals. It should be noted that K.S.A. 1979 Supp. 12-4516 is an identical counterpart to K.S.A. 1979 Supp. 21-4619, and the former pertains to municipal courts, while the latter relates to district courts. These statutes provide in pertinent part:

> "(e) When the court has ordered a conviction expunged, the order of expungement shall state the information required to be contained in the petition. The clerk of the court shall send a certified copy of the order of expungement to the federal bureau of investigation, the Kansas bureau of investigation, the secretary of corrections and any other criminal justice agency who may have a record of the conviction. After the order of expungement is entered, the petitioner shall be treated as not having been convicted of the crime, except that:
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> "(1) Upon conviction for any subsequent crime the conviction that was expunged may be considered as a prior conviction in determining the sentence to be imposed;
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> "(2) in any application for employment: (A) as a detective with a private detective agency, as defined by K.S.A. 75-7b01; (B) as security personnel with a private patrol operator, as defined by K.S.A. 75-7b01; or (C) with a criminal justice agency, as defined by K.S.A. 1979 Supp. 22-4701, the petitioner, if asked about previous convictions, must disclose that the conviction took place;

> "(3) the court, in the order of expungement, may specify other circumstances under which the conviction is to be disclosed; and
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> "(4) the conviction may be disclosed in a subsequent prosecution for an offense which requires as an element of such offense a prior conviction of the type expunged.
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> . . . .
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> "(g) Subject to the disclosures required pursuant to subsection (e), in any application for employment, or any appearance as a witness, a person whose conviction of a crime has been expunged under this statute may state that he or she has never been convicted of such crime, but the expungement of a felony conviction does not relieve an individual of complying with any state or federal law relating to the use or possession of firearms by persons convicted of a felony."

As you have observed, it is significant to note that the Supreme Court of Kansas has considered the administration of a chemical test in compliance with K.S.A. 1979 Supp. 8-1001 to be a civil proceeding entirely separate from the criminal prosecution for driving while under the influence of intoxicating liquor or drugs. In Marbut v. Motor Vehicle Department, 194 Kan. 620 (1965) the court states:

> "The nature of the two proceedings are entirely separate. One [the driving while intoxicated statute] is a criminal prosecution for the violation of a criminal statute prohibiting driving while under the influence of intoxicating liquor. The other (8-1001, supra) is a civil proceeding to determine whether the appellee acted reasonably in refusing to submit to a blood test as a prerequisite to the privilege of using the public streets and highways." Id. at 622.

When this case is read in conjunction with K.S.A. 1979 Supp. 21-4619 or 12-4516 it is clear that the test administered under K.S.A. 1979 Supp. 8-1001 is part of a civil proceeding and is not, by definition, a conviction subject to expungement under 21-4619 or 12-4516. As in other areas of legislative action, "[i]n the absence of express legislative authority, there has been reluctance to grant expungement or sealing in any form." 58 Neb. L. Rev. 1087, 1099 (1979).

The Kansas Supreme Court has traditionally maintained a restrictive application of expungement statutes as can be seen in Bradford v. Mahan, 219 Kan. 450 (1976). In Bradford the court considered the application

of the Kansas expungement statutes to records other than those dealing with criminal convictions.

> "In Kansas specific authority for expungement of police records is found in only two statutory provisions. . . . No statute grants the courts authority to expunge arrest records or other police reports.
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> "Some courts have stated that in the absence of statutory authority it is beyond the power of a court to order the expungement or restriction of a public record which reflects police action, even though the individual named in the report has been exonerated of all charges and the charges are determined to have been false and groundless in their inception. (See Sterling v. City of Oakland, 208 Cal. App.2d 1, 24 Cal. Rptr. 696; People v. Municipal Court [Blumenshine], 51 Cal. App. 3d 796, 124 Cal. Rptr. 484; Kolb v. O'Connor, 14 Ill. App. 2d 81, 142 N.E.2d 818; and Weisberg v. Police Dept. of Village of Lynbrook, 46 Misc. 2d 846, 260 N.Y.S. 2d 554.)
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> "Most jurisdictions, however, recognize that a court through its equitable powers may order inaccurate police records corrected or expunged when unwarranted adverse consequences to a citizen are shown to outweigh the public interest in the right of law enforcement agencies to maintain and disseminate reports useful for the purpose of identification, apprehension, and arrest of individuals for criminal activity. (See Sullivan v. Murphy, 478 F.2d 938 [D.C. Cir. 1973]; United States v. McLeod, 385 F.2d 734 [5th Cir. 1967]; Hughes v. Rizzo, 282 F.Supp. 881 [E.D. Pa. 1968]; Mulkey v. Purdy, 234 So. 2d 108 [Fla. 1970]; Doe v. Comdr., Wheaton Police Dep't, 273 Md. 262, 329 A.2d 35; State v. Bellar, 16 N.C. App. 339, 192 S.E.2d 86; State v. Pinkney, 33 Ohio Misc. 2d 183, 62 Ohio Ops. 2d 330, 290 N.E.2d 923; and Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211.) We join these jurisdictions in recognizing such equitable powers to correct or expunge.
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> "Expungement or correction of police reports should be limited to cases involving extreme circumstances where such relief is necessary and appropriate to preserve basic legal rights, where for example arrests or false reports are made without probable cause for purposes of harassment

> and under circumstances which constitute police misconduct. (Sullivan v. Murphy, supra; United States v. McLeod, supra; Kowall v. United States, 53 F.R.D. 211, [W.D. Mich. 1971]; and United States v. Kalish, 271 F.Supp. 968 [D.P.R. 1967].)" 219 Kan. at 459.

The United States Court of Appeals for the Tenth Circuit has recognized that certain records which are not expressly subject to expungement by any particular statute may be expunged after a balancing test is conducted. In Bromley v. Crisp, 561 F.2d 1351 (10th Cir. 1977) the court states:

> "We have recognized that the power to order the expunging of such records exists. See United States v. Linn, 513 F.2d 925, 927 (10th Cir.). It has been exercised to remove the effects of unconstitutional prosecution. United States v. McLeod, 385 F.2d 734, 750 (5th Cir.). Nevertheless the power is a narrow one, reserved for extreme cases. See United States v. Linn, supra at 927; United States v. Seasholtz, 376 F.Supp. 1288, 1289 (N.D. Okl.). There should be a balancing of the interests of the State in maintaining records for law enforcement against the individual's rights." 561 F.2d at 1364.

The Second Circuit in United States v. Schnitzer, 567 F.2d 536, (2nd Cir. 1977), cert.denied, 435 U.S. 907, 55 L.Ed.2d 499, 98 S.Ct. 1456 (1978) discussed the field of expungement statutes as they apply on the federal level. The court's analysis of the factors considered in determining whether to expunge a document not subject to expungement by a specific statute may provide some insight to the question at hand. The court states:

> "No federal statute provides for the expungement of an arrest record. Instead, expungement lies within the equitable discretion of the court, and relief usually is granted only in 'extreme circumstances.' United States v. Rosen, 343 F.Supp. 804, 807 (S.D. N.Y. 1972). In determining whether such circumstances exist, courts have considered the 'delicate balancing of the equities between the right of privacy of the individual and the right of law enforcement officials to perform their necessary duties.' Id. at 806.
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> . . . .
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> "In considering these equities, courts must be cognizant that the power to expunge 'is a narrow one, and should not

> be routinely used whenever a criminal prosecution ends in an acquittal, but should be reserved for the unusual or extreme case.' United States v. Linn, 513 F.2d 925, 927 (10th Cir.), cert. denied, 423 U.S. 836, 96 S.Ct. 63, 46 L.Ed.2d 55 (1975)." 567 F.2d at 539-540.

In conclusion, it is our opinion that the records maintained by the Department of Motor Vehicles which document a driver's refusal to submit to a chemical test intended to ascertain the alcoholic content of the driver's blood are not subject to expungement under the provisions of K.S.A. 1979 Supp. 21-4619 or 12-4516. It should be noted, however, that we recognize the power of the court to order expungement of records in selected circumstances where protection of an individual's constitutional rights clearly outweighs the interests of the State in preserving the record in question. In our judgment, the circumstances in which a court may properly expunge official records without express statutory authority are quite limited. We do not contemplate, except in a most unusual situation, that records reflecting a motorist's refusal to submit to a chemical test pursuant to K.S.A. 1979 Supp. 8-1001, would raise the requisite extenuating circumstances for such expungement.

Very truly yours,

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