



STATE OF KANSAS

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June 18, 1980

ATTORNEY GENERAL OPINION NO. 80-139

Mr. M. Moran Tomson, Esq.
Stanton County Attorney
P.O. Box 310
North Main Street
Johnson, Kansas 67855

Re: Automobiles and Other Vehicles -- Serious Traffic
Offenses -- Second or Subsequent Convictions of
Driving While Intoxicated

Synopsis: It is within the discretion of the court to grant
probation or to suspend the sentence for a second
or subsequent conviction of driving while intoxicated.
Cited herein: K.S.A. 8-262(a) and K.S.A. 1979 Supp. 8-1657,
21-4603(2)(d), 21-4618(1) and 21-3101.

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Dear Mr. Tomson:

You request our opinion as to whether a sentence for a second or
subsequent conviction for driving while under the influence of
intoxicants, as proscribed by K.S.A. 1979 Supp. 8-1567, may be
suspended by the court or a defendant probated from the imposition
thereof.

Initially, we note that a second or subsequent conviction pursuant to
K.S.A. 1979 Supp. 8-1567(c) requires imprisonment of not less than
ninety days, nor more than one year. However, the statute is silent
as to the power of the trial court to grant probation or suspend all
or part of the sentence.

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Subsection (c) of this statute relates in relevant part:

"On a second or subsequent conviction . . . [the defendant] shall be punished by imprisonment for not less than ninety (90) days nor more than one (1) year. . . ."

The above statutory provisions must be considered as being in pari materia with the provisions of the Kansas Criminal Code, K.S.A. 21-3101 et seq., establishing the general authorized dispositions for criminal cases within the state. These latter provisions are applicable, in that K.S.A. 21-3102(2) provides that the Code is applicable to crimes defined by statute other than those contained within the Criminal Code. Thus, K.S.A. 1979 Supp. 21-4603(2) is pertinent, providing in relevant part:

"Whenever any person has been found guilty of a crime, the court may adjudge any of the following:

. . . .

"(c) Release the defendant on probation subject to such conditions as the court may deem appropriate;

"(d) suspend the imposition of the sentence subject to such condition as the court may deem appropriate. . . ."

We note the legislature has on at least two occasions mandated actual imprisonment upon conviction without the opportunity for probation from or suspension of an imposed sentence. K.S.A. 1979 Supp. 21-4618(1), commonly referred to as the "mandatory firearms sentence," is one such enactment; it states in relevant part:

"Probation or suspension of sentence shall not be granted to any defendant who is convicted of the commission of the crime . . . and such defendant shall be sentenced to not less than the minimum sentence of imprisonment imposed by law for that crime." [Emphasis supplied].

Additionally, K.S.A. 8-262(a) provides for actual imprisonment upon a second or subsequent conviction for operating a motor vehicle by a person whose drivers license has been canceled, suspended or revoked; and relates in pertinent part:

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"Every person convicted under this section shall be sentenced to at least five (5) days imprisonment and fined at least one hundred dollars (\$100) and upon a second conviction shall not be eligible for parole until completion of five (5) days imprisonment."
[Emphasis supplied.]

From the foregoing, it is apparent that the provisions of both 21-4618 and 8-262 quoted above clearly restrict a court's discretion as to disposition of the cases encompassed by these respective statutes. Unfortunately, the scope and effect of the pertinent language of 8-1567(c) is not as apparent, being susceptible of more than one interpretation. As a result, we must rely upon a determination of legislative intent to resolve your inquiry.

"The fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature governs when that intent can be ascertained from the statutes." Southeast Kansas Landowners Ass'n v. Kansas Turnpike Auth., 224 Kan. 357, 367 (1978). Ordinarily, that intent is to be gleaned from the plain and unambiguous language of the statute itself [City of Kiowa v. Central Telephone & Utilities Corporation, 213 Kan. 169, 176 (1973)], but where as here, the language of the statute does not provide a readily-discernible indication of such intent, it is appropriate to look beyond the language of the statute to obtain that construction which will give expression to its intent and purpose. State v. V.F.W. Post No. 3722, 215 Kan. 693, 697 (1974).

When these rules are applied to the language of 8-1567(c), we are drawn to the conclusion that the provisions thereof do not restrict a court's discretion in the manner accomplished by the respective provisions of 21-4618(1) and 8-262(a). In the first place, it does not include specific restrictions on the courts' authority to grant probation or suspend the sentence of a convicted intoxicated driver for a second or subsequent conviction of that same offense. More importantly, such a restriction cannot be read into this statute; a penal statute must be strictly construed, especially those statutes which provide for increased punishment due to subsequent convictions. As succinctly stated by the Kansas Supreme Court:

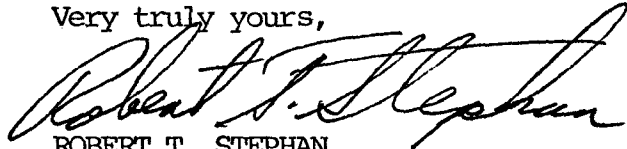
"The rule of strict construction is to be applied in construing statutes which provide a more severe punishment for habitual criminals or subsequent offenders than for those convicted of a crime for the first time." State v. Floyd, 218 Kan. 764, 766, 767 (1976).

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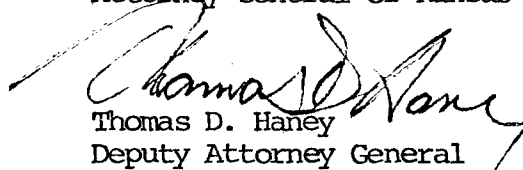
"It is a fundamental rule that penal statutes must be strictly construed in favor of persons sought to be subjected to their operations. . . . Such a statute should not be read to add that which is not readily found therein or to read out what as a matter of ordinary English language is in it." State, ex rel., v. American Savings Stamp Co., 194 Kan. 297, 300 (1965).
[Emphasis added.]

Thus, we must conclude that the granting of probation or suspension of the sentence of one convicted for a second or subsequent time of driving while intoxicated lies within the sound discretion of the sentencing judge.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Thomas D. Haney
Deputy Attorney General

RTS:TDH:may