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February 12, 1981

ATTORNEY GENERAL OPINION NO. 81- 44

The Honorable Edward F. Reilly
Senator, Third District
Room 255 E
Statehouse
Topeka, Kansas

Re: Automobiles and Other Vehicles -- Size, Weight, and Load of Vehicles -- Penalties for Weight Violations

Synopsis: Through the imposition of fines for unlawful conduct, K.S.A. 1980 Supp. 8-1901(d) imposes criminal liability. In addition, subsection (d) of that statute does not appear to violate the United States Constitution's Equal Protection Clause, although it only imposes liability upon a limited class of persons. Moreover, that subsection appears to convey a sufficiently definite warning as to the conduct proscribed therein, so as to avoid being unconstitutionally vague and uncertain. Cited herein: K.S.A. 1980 Supp. 8-1901, 8-1909, K.S.A. 8-2116, 8-2204, 21-3105, K.S.A. 1980 Supp. 21-4503, U.S. Const., Amend. XIV.

* * *

Dear Senator Reilly:

You ask our opinion on three issues concerning K.S.A. 1980 Supp. 8-1901. Your first question arises as a result of an amendment to this statute by the 1980 Kansas Legislature. (See L. 1980, ch. 44, §1.) Prior to

that amendment, 8-1901 declared certain conduct to be a misdemeanor, but such conduct is now declared to be "unlawful," and you have inquired whether violation of the proscribed conduct constitutes a crime.

To determine whether K.S.A. 1980 Supp. 8-1901 still imposes criminal sanctions, it is necessary to refer to K.S.A. 21-3105, which defines a crime as follows:

> "A crime is 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. Crimes are classified as felonies and misdemeanors.
>
> "(1) A felony is a crime punishable by death or by imprisonment in any state penal institution.
>
> "(2) All other crimes are misdemeanors." (Emphasis supplied.)

With this definition in mind, we note that subsections (b) and (c) of 8-1901 prescribe fines for persons who are convicted of violating the various provisions of Article 19 of Chapter 8 of Kansas Statutes Annotated. It is clear, therefore, that such violations constitute criminal conduct which is classified as a misdemeanor pursuant to K.S.A. 21-3105. In reaching this conclusion, we are not unmindful of the rule of statutory construction that an amendment or revision of a statute raises the presumption that a change in the law was intended. Shawnee Township Fire District v. Morgan, 221 Kan. 271 (1977). However, with respect to the 1980 amendment to 8-1901, it is apparent that the pertinent change intended by the legislature was to revise the penalties applicable to violations of Article 19, Chapter 8.

K.S.A. 1980 Supp. 8-1901 is part of the Uniform Act Regulating Traffic on Highways (see K.S.A. 8-2204), as it was revised and re-enacted in 1974 (see L. 1974, ch. 33). This act contains a general penalty provision, as follows:

> "Every person convicted of violating any of the provisions of this act for which another penalty is not provided shall be guilty of a class C misdemeanor, except that upon a second such conviction within one (1) year thereafter such person shall be guilty of a class B misdemeanor, and upon a third or subsequent conviction within one (1) year after the first conviction, such person shall be guilty of a class A misdemeanor." (Emphasis added.) K.S.A. 8-2116.

Prior to its amendment in 1980, 8-1901 declared the conduct proscribed therein to be a misdemeanor, but did not specify any penalties. Thus, the provisions of K.S.A. 8-2116 quoted above were applicable, and the penalties applicable to such violations were those set forth in the Criminal Code for the various classes of misdemeanors. (See K.S.A. 1980 Supp. 21-4503.) Therefore, it is our opinion that, rather than preclude violations specified in 8-1901 from being considered criminal, the legislative purpose in amending this statute in 1980 was merely to change the penalties for such violations.

You also ask whether K.S.A. 1980 Supp. 8-1901(d) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, by imposing liability only upon persons who cause or knowingly permit excess loading at places where "there is available a stationary scale, the accuracy of which is certified in accordance with law." In determining whether the classification in the statute violates the Equal Protection Clause, it first must be ascertained whether the classification establishes a suspect category or infringes upon a fundamental right. The classification does not appear to involve a suspect category, as it does not involve alienage, race or nationality [Graham v. Richardson, 403 U.S. 365, 29 L.Ed.2d 534 (1971)]; nor does it appear to involve a fundamental right guaranteed by the Constitution, such as voting, freedom of speech or religion. See United States v. Carolene Products, 304 U.S. 144, 82 L.Ed. 1235, 1239 at n. 4 (1937). Therefore, the appropriate test is whether the classification is rationally connected to the purpose of the statute, not whether the legislature could have established a better classification.

> "We will not overturn such a statute [not involving a suspect category or fundamental right] unless the varying treatment of different groups or persons is so unrelated to the achievements of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." Vance v. Bradley, 440 U.S. 93, 97, 59 L.Ed.2d 171, 176 (1979).

See also Zerr v. Tilton, 224 Kan. 394 (1978), and Manzanares v. Bell, 214 Kan. 589 (1974).

To satisfy the Equal Protection Clause the classification need not be perfect and may be either exclusive or nonexclusive as "perfection is by no means required." Vance v. Bradley, supra, citing Phillips Chemical Co. v. Dumas School District, 361 U.S. 376, 4 L.Ed.2d 384 (1960). Therefore,

in our judgment subsection (d) does not appear to be in violation of the Equal Protection Clause, in that it appears that imposing liability only on those having available a "stationary scale, the accuracy of which is certified in accordance with law" is related to the purpose of keeping overloaded vehicles off the highways of Kansas. Although the statute does not impose liability on all persons who "cause or knowingly permit" a vehicle to be overloaded, it is not necessary for a statute to include all areas within a field. See Vance v. Bradley, supra. We believe it is legitimate for the legislature to single out and impose liability only on those persons who are most likely to know the weight of a loaded vehicle, due to the availability of an accurate, stationary scale. Thus, in our opinion, subsection (d) satisfies the Equal Protection Clause of the United States Constitution, since the classification established therein appears to be rationally related to the purpose of the statute, and such a classification evinces a legitimate policy consideration of the legislature.

Your third question concerns whether K.S.A. 1980 Supp. 8-1901(d) is void for being unconstitutionally vague and uncertain. Specifically, you ask whether one is liable solely by reason of the vehicle being overloaded, or must the overloaded vehicle be operated on the highway before any liability exists. While we recognize that this statutory provision does not reflect the most artful draftsmanship, we do not believe that it is unconstitutionally vague. Subsection (d) of 8-1901 provides as follows:

> "It shall be unlawful for any person to cause or knowingly permit the owner or lessee of any vehicle or combination of vehicles to be loaded with gross weight of such vehicle or combination of vehicles exceeding any limitation stated in article 19 of chapter 8 of Kansas Statutes Annotated, if at the time and place of such loading there is available a stationary scale, the accuracy of which is certified in accordance with law." (Emphasis supplied.)

While a literal reading of these provisions, particularly the emphasized portion thereof, might suggest that liability attaches at the time and place where the vehicle is overloaded, such interpretation is not in harmony with the spirit of the law. As noted previously, the manifest purpose of these provisions is to prevent overloaded vehicles from being operated or moved upon the highways of this state. In fact, the entirety of Article 19 of Chapter 8 of Kansas Statutes Annotated is designed to

regulate the size and weight of vehicles operated or moved on the state's highways. Thus, to construe 8-1901(d) as imposing liability for the act of overloading itself is inconsistent with the underlying legislative intent, and in our opinion, a person's liability for causing or knowingly permitting a vehicle or combination of vehicles to be overloaded exists only if such vehicle or combination of vehicles is moved or operated on the highways.

It is to be noted that, to be overloaded, a vehicle or combination of vehicles must exceed applicable weight limitations prescribed elsewhere in Article 19. Certain of these limitations are prescribed in K.S.A. 1980 Supp. 8-1909(a), which provides in relevant part:

> "Except as provided in subsection (b) no vehicle or combination of vehicles shall be moved or operated on any highway or bridge when the gross weight thereof exceeds the limits specified below:" (Emphasis added.)

While the weight limitations which follow the above-quoted provisions exist regardless of whether a vehicle or combination of vehicles is moved or operated on the highways, such limitations have no meaning in the abstract. They have application as a regulatory provision only when the vehicle or combination of vehicles is moved or operated on the highways.

Similarly, we believe that the reference to these limitations in 8-1901(d) can have meaning only when such reference is construed as being to limitations that are applied to the movement or operation of vehicles or combinations thereof on the highways. A contrary interpretation would mean that a vehicle which is loaded in excess of such weight limitations, but which is operated only on private property, would subject the person to criminal liability for causing or permitting the vehicle to be so overloaded. We find absolutely no basis for imputing such intent to the legislature. Moreover, since violation of these provisions results in criminal liability, as previously discussed, such alternative interpretation must be rejected as being the least favorable to a person charged with liability thereunder. It is a well-established rule in this state "that penal statutes must be strictly construed against the state." State v. Mauldin, 215 Kan. 956, 959 (1974).

Although 8-1901(d) is susceptible of alternative constructions, we do not believe that renders it unconstitutionally vague. As noted in State v. Kirby, 222 Kan. 1 (1977):

> "The test to determine whether a criminal statute is unconstitutionally void by reason of being vague and indefinite is whether its language conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice. If a statute conveys this warning it is not void for vagueness. Conversely, a statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process. At its heart the test for vagueness is a commonsense determination of fundamental fairness. (Kansas City Millwright Co., Inc. v. Kalb, 221 Kan. 658, 562 P.2d 65.) This court has always held that the constitutionality of a statute is presumed, that all doubts must be resolved in favor of a statute's validity, and that before it can be stricken it must clearly appear that the statute violates the constitution. If there is any reasonable way to construe a statute to be constitutionally valid, the court should do so. (Brown v. Wichita State University, 219 Kan. 2, 547 P.2d 1015.)" Id. at 4.

Applying this test to 8-1901(d), we cannot conclude that it is unconstitutionally vauge and indefinite. Certainly the proscribed conduct of causing or knowingly permitting a vehicle or combination of vehicles to be overloaded is made abundantly clear. The only question of interpretation arises as to the point in time when such conduct results in liability. Even here, however, we believe that "persons of common intelligence" must recognize the legislature's manifest purpose of regulating the weight of vehicles and combinations of vehicles moved or operated on the highways. This purpose is clearly expressed in subsection (a) of this statute, and it is clearly expressed in other sections of Article 19 of Chapter 8. Recognizing such manifest legislative intent, we do not believe that persons of common intelligence must guess as to this statute's meaning. We believe it conveys a sufficiently definite warning as to the proscribed conduct.

In summary, it is our judgment that K.S.A. 1980 Supp. 8-1901 does impose criminal (misdemeanor) sanctions through imposition of the fines provided in subsections (b) and (c). Moreover, subsection (d) of that statute does not appear to be in violation of the Equal Protection Clause of

the United States Constitution, although liability is imposed only upon a limited class of persons; and in our judgment, subsection (d) conveys a sufficiently definite warning as to the proscribed conduct so as to avoid being unconstitutionally vague and uncertain.

Very truly yours,

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RTS:TDH:may