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ATTORNEY GENERAL OPINION NO. 81- 198

Mr. Edwin H. Bideau III
Neosho County Attorney
123 West Main
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Re: Criminal Procedure -- Procedure After Arrest -- Diversion from Prosecution

Synopsis: Where a judicial district has adopted district court rules pursuant to K.S.A. 1980 Supp. 22-2912 to administer a diversionary program, the court may adopt any rules necessary to regulate the program insofar as such are in accordance with applicable statutes and rules of the Supreme Court. There are no statutory provisions which state expressly that there must be a diversion program in every county.

The county or district attorney is without authority to require probation officers to participate in diversion programs without express approval by the court. Cited herein: K.S.A. 1980 Supp. 20-342, 21-4602, 22-2906 et seq.

* * *

Dear Mr. Bideau:

You have inquired if there are any statutory restrictions that would prevent a probation officer from conducting a review or investigation of a criminal defendant's background to determine or make recommendation as to whether such defendant is a suitable candidate for a diversionary program.

Additionally, you inquire whether under the diversion procedure statutes, K.S.A. 1980 Supp. 22-2906 et seq., a prosecutor is required to have such a program.

A diversionary program is implemented before or actually in lieu of adjudicative proceedings. K.S.A. 1980 Supp. 22-2906 states in part:

> "(3) 'Diversion' means referral of a defendant in a criminal case to a supervised performance program prior to adjudication.
>
> "(4) 'Diversion agreement' means the specification of formal terms and conditions which a defendant must fulfill in order to have the charges against him or her dismissed." (Emphasis supplied.)

The remainder of the statutes regarding this subject all refer to the district attorney as the officer with principal authority over the implementation and control of any diversionary programs. Pursuant to K.S.A. 1980 Supp. 22-2906(1) "district attorney" means district attorney or county attorney.

The only exception made to this express authority granted to the district attorney comes under K.S.A. 1980 Supp. 22-2912 which states:

> "The provisions of this act shall not be applicable in judicial districts that adopt district court rules pursuant to K.S.A. 1978 Supp. 20-342 for the administration of diversion procedures by the district court. In judicial districts where the district court adopts such rules for diversion procedures, the court in considering whether or not to allow diversion to a defendant shall consider, but is not limited to, the factors enumerated in K.S.A. 1978 Supp. 22-2908."

In State of Kansas v. Greenlee, 228 Kan. 712 (1980), the Supreme Court of Kansas upheld the statutory discretion granted to the district attorney under K.S.A. 1980 Supp. 22-2906 et seq., by stating:

> "The discretion whether or not to prosecute has long been sacred domain of the prosecution and stems from the common law nolle prosequi. It has generally been held that 'in the absence of a controlling statute or rule

> of court, the power to enter a nolle prosequi before the jury is impaneled and sworn lies in the sole discretion of the prosecuting officer.' 21 Am.Jur.2d, Criminal Law §514, p. 504." 228 Kan. at 717.

Additionally, the Court stated that the practical effect of the diversion statutes is that "the decision to grant diversion still rests largely with the prosecutor." Id. at 719. The Court also noted in Greenlee:

> "K.S.A. 1979 Supp. 22-2912 provides that the courts may adopt a diversion plan and if they do, the court is then required to follow the guidelines of 1979 Supp. 22-2908. If the program were established by court rule and administered by the courts then, of course, the proceedings would be a judicial function. However, the exercise of a similar function by the prosecutor under 1979 Supp. 22-2907 does not necessarily constitute an unconstitutional delegation of judicial power to the executive branch or an unconstitutional restriction on its executive powers which violates the separation of powers doctrine." Id. at 718.

See, also, Keith G. Meyer, Survey of Kansas Law: Criminal Law and Procedure, 27 Kan.L.Rev. 391, 401 (1979), which states:

> "The key factor to this [pretrial diversionary] program seems to be the prosecutor, and there are only general guidelines for the development of the criteria to be used in determining eligibility for diversion in the statute."

In this same article, Professor Meyer states:

> "The statute provides that 'each district attorney shall adopt written policies and guidelines for the implementation of the diversion program in accordance with this act.' Thus, it appears that the legislature contemplated that the district would have some kind of diversion program available." Id. at 400, 401.

From the authorities cited, it is clear that the district attorney is the moving force regarding any diversionary program, unless the program is adopted pursuant to K.S.A. 1980 Supp. 22-2912 authorizing a district court to prescribe the program by court rule. Pursuant to a court

adopted diversion program, the court would certainly be acting within its authority to appoint a probation officer to administer the program. Should the court decline to allow its employees to serve in such capacity, however, the county attorney is wholly without authority to countermand the court's decision. We can find no statutory authority mandating this function be performed by a probation officer.

Thus, read against the discussion in State v. Greenlee, supra, pursuant to K.S.A. 1980 Supp. 22-2912, the court essentially implements the diversionary program by promulgating its own rules. Since, in the present situation the court has permitted the decision to withdraw probation officers from participating in Neosho County's diversionary program, you must comply with this decision until changed by the court. As prosecuting attorney, you are without authority to alter this decision of the court.

Thus, although the provisions of K.S.A. 1980 Supp. 22-2912 appear to authorize the court to adopt rules establishing a diversion program which would negate the provisions of K.S.A. 1980 Supp. 22-2901 through 22-2911 in their entirety the same in effect would be but a hollow program. Although we are unaware of the specific court rules applicable in Neosho County, we assume the court has established administrative guidelines and rules for diversion procedures, as contemplated by K.S.A. 1980 Supp. 22-2912. As a practical matter, however, we note the effect of a "diversion" from criminal prosecution is contractual in nature. It cannot effectively be administered without agreement between the judicial and executive branches of government. For although the district court may establish guidelines, it has often been stated:

> "In the conduct of his office, the county attorney need acknowledge no master but the law. He may close his ears to every kind of constraining clamor, so long as he pursues no policy except that which duty prescribes. He must be accorded a reasonable discretion in directing the business of his office and some scope must be conceded to him for the exercise of his best judgment in respect to the many matters committed to his charge, including even the commencement and dismissal of cases; . . ." State v. Trinkle, 70 Kan. 396, 401 (1904).

Additionally, the Court has related in State v. Wilson, 24 Kan. 188, 192 (1880):

> "A criminal prosecution is a state affair, and the control of it is the public prosecutor. . . . The purpose of a public prosecutor is to prevent the use of criminal law to gratify private malice or accomplish personal gain. This purpose is fully served when the control of the case is with the county attorney."

And, in State v. Kilpatrick, 201 Kan. 6, 17 (1968), the Court further stated that:

> "The County Attorney is the representative of the State in criminal prosecutions, and as such he controls these prosecutions. He has the authority to dismiss any charge or reduce any charge. He can prosecute against one defendant if he so chooses, and he can decide not to prosecute against another defendant."

Thus, when one considers the inherent powers of the court and prosecutor, a diversion program cannot practically be undertaken without the agreement and cooperation of both branches, one with the other. The county attorney is powerless to control the court docket concerning the setting of trials, preliminary hearings and other judicial proceedings, enforce orders of restitution, court costs and specific conditions of a diversion without acquiescence by or specific order of the court. Additionally, the court is without authority to direct the county attorney to "divert" either a particular defendant or particular type of case.

Any court-ordered diversion program or county attorney-devised program is frought with potential conflicts regarding the separation of powers doctrine. As noted in Greenlee, supra, unless such branches' functions are clearly delineated in written guidelines or procedures, whether initiated by the district attorney or by local court rule, there exists the possibility of infringement by one branch of the government on the powers of another. It would, however, be inappropriate at this time to opine as to what may happen at such future time; rather, we simply note this area of concern.

This leaves the District Attorney's Office with several alternatives: (1) select and employ a qualified person as a "probation-like" officer for your own office to act in the capacity of a diversion investigation officer, who will be wholly under the supervision of the district attorney, and either "plugging" such a position into the current diversion program; or (2) request the court to withdraw its orders pursuant to K.S.A. 1980 Supp. 22-2912 and implement a new program in light of K.S.A. 1980 Supp. 22-2906 et seq.

It has already been stated that the pertinent diversion statutes suggest that every county establish a diversion program of some sort. (Survey of Kansas Law, supra.) However, nowhere in these statutes is there any express language stating that a county must have a diversionary program. Such a directive by the legislature would, as previously indicated, face a serious challenge as violating the separation of powers doctrine by infringing upon the inherent powers of the court or prosecuting attorney. Unfortunately, this means that since the district court has already approved the decision of the probation officers to withdraw from the diversion program under the district court plan you had previously adopted, if you cannot (for budgetary or similar reasons) employ your own staff member to work in the capacity of pre-trial diversion officer, or obtain withdrawal of the court-adopted diversion program, you must comply with the court's decision and, thus, operate functionally without a diversionary program.

Very truly yours,

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