



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 82-86

Mr. John Dekker
City Attorney
City Hall - Thirteenth Floor
455 North Main
Wichita, Kansas 67202

Re: Intoxicating Liquors and Beverages -- Cereal Malt
Beverages -- Possession by Persons Under Eighteen
Years of Age

Synopsis: Where a person under the age of eighteen years handles cereal malt beverages as a shelf stocker, checker or carry-out person employed by a store authorized to sell such beverages for off-premises consumption, such minor is not in "possession" of cereal malt beverages in violation of K.S.A. 41-2721. However, even though such minor does not unlawfully possess cereal malt beverages, if the minor's employment duties include the sale of these beverages, such sale would contravene the provisions of K.S.A. 41-2708(i), which preclude a person licensed to sell cereal malt beverages at retail from employing a person under eighteen years of age in dispensing such beverages. Cited herein: K.S.A. 41-2708, 41-2721.

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Dear Mr. Dekker:

You have requested our opinion as to what constitutes "possession" of cereal malt beverages within the meaning of K.S.A. 41-2721, which provides, in part:

"(a) No person under 18 years of age shall:

"(1) Claim to be 18 or more years of age for the purpose of obtaining or attempting to obtain any cereal malt beverage from any person;

"(2) purchase or attempt to purchase any cereal malt beverage from any person; or

"(3) possess or consume any cereal malt beverage.

"(b) Any person who violates this section, upon adjudication thereof, shall be deemed a wayward child under the Kansas juvenile code.

"(c) This section shall not apply to the possession and consumption of cereal malt beverage by a person under 18 years of age when such possession and consumption is permitted, and such beverage is furnished, by the person's parent or legal guardian.

"(d) This section shall be part of and supplemental to article 27 of chapter 41 of the Kansas Statutes Annotated."

Specifically, you inquire whether a person under the age of eighteen is in possession of a cereal malt beverage when such person handles such beverage in the course of his or her employment in a grocery store in the capacity of a checker, shelf stocker or carry-out person.

We believe that such handling of cereal malt beverages by these employees would not constitute possession within the meaning of K.S.A. 41-2721, since such handling is superficial and there exists no intent to control the beverages. The Supreme Court of Kansas has established a two-step test for possession under prior statutes which involved illegal possession of liquor. First, the mental attitude of the claimant, the intent to possess and to appropriate to oneself, must be considered. Second, effective realization of this attitude, which involves the relation of the claimant to other persons, amounting to a security for their non-interference, and the relation of the claimant to the material thing itself, amounting to a security for exclusive use at will, must be determined. State v. Metz, 107 Kan. 593 (1920); State v. Lolson, 134 Kan. 147 (1931). Accordingly, we conclude that the mere touching of cereal malt beverages in sacking, stocking shelves or carrying out such beverages for the purchaser thereof would not evidence sufficient intent to exclusively control the item to establish legal possession.

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Several analogous cases involving the unlawful possession of firearms support this conclusion. In determining what would constitute unlawful possession of a firearm, the Kansas Supreme Court held that more than an innocent handling must be established; there must be a willful or knowing possession of the firearm with the intent to control the use and management thereof. State v. Neal, 215 Kan. 737 (1974). Another firearm case stated in dicta that possession requires more than superficial handling.

"Although the statute in question (K.S.A. 21-2611) does require intent to do a prohibited act as a prerequisite for its application [citation omitted], yet the statute contemplates proof of possession and control which is more than an innocent handling of the pistol without intent to have, possess, or control." State v. Phinis, 199 Kan. 472, 482 (1967). See also State v. Hoskins, 222 Kan. 436 (1977).

In addition to the foregoing construction of the term "possession," we believe the language of the statute, when viewed as a whole, indicates that the activities you describe do not constitute illegal possession. "When a statute is susceptible to more than one construction, it must be given that construction which, when considered in its entirety, gives expression to its intent and purpose, even though such construction is not within the strict literal interpretation of the statute." Reeves v. Board of Johnson County Commissioners, 226 Kan. 397, 403 (1979). From a reading of K.S.A. 41-2721, it is clear that the legislature intended to prohibit the consumption of cereal malt beverages by persons under eighteen years of age and the possession of cereal malt beverages with the intent to consume. For example, subsection (1) prohibits one from falsely claiming to be over eighteen in order to obtain cereal malt beverages, and subsection (2) prohibits one under eighteen from purchasing or attempting to purchase any cereal malt beverage from any person. Thus, when subsection (3) is construed in pari materia with the remaining subsections of K.S.A. 41-2721, we believe it is clear that superficial handling of a cereal malt beverage with no intent to maintain control and use thereof would not constitute "possession" in violation of the statute.

While our research fails to reveal any Kansas case law discussing illegal possession of alcoholic or cereal malt beverages by persons under the requisite age, an Oregon case, in dicta, supports our interpretation. State v. Gordeneas, 229 Ore. 105, 366 P.2d 161 (1961), construed O.R.S. 471.430 which provided: "No person under the age of 21 years shall purchase, acquire, or have in his or her possession alcoholic liquor in a manner

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other than provided for in the Liquor Control Act." (Emphasis supplied.)
The court construed "possession" so as to exclude superficial touching
or carrying, indicating that it could not

"attribute to the legislature the intent to make a criminal
of a minor child who, though knowing there is intoxicating
liquor in a package, carries the liquor from an automobile
into the home of a neighbor at the neighbor's request."
Id. at 164.

The court further stated:

" '[P]ossession,' as used in this statute, includes
in addition to guilty knowledge the intent of the
minor to possess full control over the liquor with
the right to enjoy its consumption to the exclusion
of others." Id. at 164.

In light of these cases, it is our opinion that contact by one under
eighteen years of age with cereal malt beverage while stocking, checking
or sacking in a retail store would not constitute a violation of K.S.A.
41-2721.

You further inquire whether such activities would contravene K.S.A. 41-2708,
which provides, in part:

"The board of county commissioners or the governing body
of any city, upon five (5) days notice to the persons
holding such license, shall revoke or suspend such license
for any one of the following reasons:

. . . .

"(i) for the employment of persons under eighteen (18)
years of age in dispensing cereal malt beverages"

A threshold question is the definition of "dispensing" within the meaning
of the foregoing statute. Webster's Third New International Dictionary
defines "dispense" as meaning "to deal out in portions, distribute, give,
provide." We conclude that stocking of shelves and sacking would not
constitute "dispensing," since there is no act of giving or distributing
to another any cereal malt beverage; nor do these activities involve
dealing out in portions. A closer question, however, is whether one
checking items, including cereal malt beverages, is involved in "dispensing"

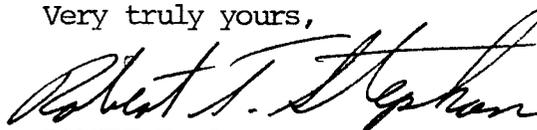
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such beverages. A previous opinion from this office issued on April 27, 1960, addressed the issue and concluded that such conduct does not constitute "dispensing" within the meaning of K.S.A. 41-2708(i). Subsequently, an opinion issued on September 7, 1972, reversed that conclusion and held that checking, as it involves a sale, does constitute "dispensing." VII Op. Att'y. Gen., 699 (1972). We believe the latter opinion supplies the better view, i.e., that the duties of a checker do involve "dispensing."

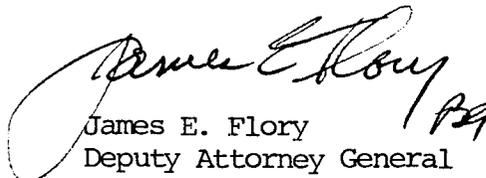
Clearly, a person who sells cereal malt beverages for consumption on the premises is dispensing such beverages. Similarly, a checker in a retail store licensed to sell these beverages for off-premises consumption receives cash for purchased cereal malt beverages and is in effect providing or dealing out such beverages in portions. In our judgment, therefore, the acts of stocking and sacking do not constitute "dispensing" cereal malt beverage. However, we believe a checker who consummates a sale of cereal malt beverage would be "dispensing" within the meaning of K.S.A. 41-2708, as would a person who works in a selling or serving capacity in an establishment which sells cereal malt beverages for consumption on premises.

In conclusion, it is our opinion that a person under eighteen years of age does not "possess" cereal malt beverages in violation of K.S.A. 41-2721(a)(3) due to incidental contact with such beverages while stocking shelves, sacking, checking, or carrying out such beverages, when such activity is done in the course of such person's employment in a retail establishment authorized to sell cereal malt beverages for off-premises consumption. Such superficial handling does not evidence an intent by the minor to maintain control over the use and management thereof. However, even though such minor does not unlawfully possess cereal malt beverages, if the minor's duties include the sale of these beverages, such sale would contravene the provisions of K.S.A. 41-2708(i) which preclude a person licensed to sell cereal malt beverages at retail from employing a person under eighteen years of age in dispensing such beverages.

Very truly yours,



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