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ATTORNEY GENERAL OPINION NO. 82-152

Robert H. Royer, Jr.
101 1/2 N.W. Third
P. O. Box 413
Abilene, Kansas 67410

Re: Automobiles and Other Vehicles -- Serious Traffic
 Offenses -- Driving While Under Influence of Alcohol;
 Effect of State Law on City Ordinances

Criminal Procedure -- Procedure After Arrest --
Prohibition of Plea-Bargaining

Synopsis: As amended by 1982 Senate Bill No. 699, K.S.A. 1981
Supp. 8-1567 provides [at subsection (n)] that a
city may enact an ordinance which prohibits or
makes unlawful the same acts as are dealt with by
the statute, provided that the ordinance's minimum
penalties are the same as the statutes for any
given violation, and the ordinance's maximum penalty
does not exceed that of the statute. Apart from
these limits, K.S.A. 1981 Supp. 8-1567 as amended
does not preempt a city from taking action in this
area. As amended by 1982 Senate Bill No. 699,
K.S.A. 1981 Supp. 8-1567(c), (d) and (e) prohi-
bit a prosecuting attorney from entering into
any plea-bargaining agreement by which a defen-
dant enters a guilty or no contest plea to a
lesser offense than that originally charged.
While no sanctions against such conduct exist
under the statute, provisions of the general
ouster law could be applied against prosecuting
attorneys who violate the prohibition against
plea-bargaining. Cited herein: K.S.A. 1981 Supp.
8-1567, as amended by 1982 Senate Bill No. 699,
K.S.A. 22-2907, 22-2908.

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Dear Mr. Royer:

As municipal judge for the cities of Solomon and Hope, Kansas, you request our opinion as to two questions concerning the recent revisions to K.S.A. 1981 Supp. 8-1567. That statute, which concerns the offense of operating a vehicle while under the influence of alcohol, was extensively amended by 1982 Senate Bill No. 699. You inquire regarding the effect of these changes upon city ordinances which presently speak to the same offense, and the scope of the bill's prohibitions against "plea bargaining" agreements.

Prior to the effective date of 1982 Senate Bill No. 699 (July 1, 1982), K.S.A. 1981 Supp. 8-1567(c) established the following penalties for violation of the statute:

"Every person who is convicted of a violation of this section shall be punished by imprisonment of not more than one (1) year, or by a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500), or by both such fine and imprisonment. On a second or subsequent conviction he or she shall be punished by imprisonment for not less than ninety (90) days nor more than one (1) year, and, in the discretion of the court, a fine of not more than five hundred dollars (\$500)."

In that the terms of the statute do not make reference to any city ordinance on the subject, many cities have adopted the statute by reference, using the model set out in the Standard Traffic Ordinance for Kansas Cities published by the League of Kansas Municipalities. The most recent version, published in 1979, reproduces the above-quoted portion of subsection (c) verbatim (at Article 6, Section 30), with one exception. That change, which reduces the maximum sentence from one year to six months, avoids any conflict with court decisions which require a jury trial when a sentence greater than six months may be imposed. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970).

As amended, K.S.A. 1981 Supp. 8-1567 contains a new subsection (n), which states:

"Nothing contained in this section shall be construed as preventing any city from enacting ordinances declaring acts prohibited or made unlawful by this act as unlawful or prohibited in such city and prescribing penalties for violation thereof, but the minimum penalty in any such ordinance shall not be less than nor exceed the minimum penalty prescribed by this act for the same violation, nor shall the maximum penalty in any such ordinance exceed the maximum penalty prescribed for the same violation."

This new language evinces a clear legislative intent that a city is still free to enact its own ordinance making it a violation to operate a vehicle while under the influence of alcohol. As a result, the field has not been totally pre-empted. City of Garden City v. Miller, 181 Kan. 360 (1957). However, the legislature has also made it clear that the ordinance of any city must contain minimum penalties equal to those of the statute, insuring that the purpose of the new, tougher drunk driving laws is not diluted by city ordinances which impose substantially weaker penalties.

Additionally, it is our opinion that, as the statute is of uniform application across the state, a city may not enforce an ordinance whose provisions conflict with those of the statute. Such a conflict has been defined as occurring where the ordinance prohibits what the statute permits or allows what the statute does not permit. City of Junction City v. Lee, 216 Kan. 495 (1975). In that the present model ordinance in the Standard Traffic Ordinance contains minimum penalties which do not equal those of subsections (c), (d) and (e) of the statute, a conflict arises which can only be resolved in favor of the statute. See, e.g., Missouri Pacific Railroad v. Board of Greeley County Comm'rs, 231 Kan. 225 (1982). Therefore, upon the effective date of 1982 Senate Bill No. 699, the penalty provisions of any city ordinance which do not meet the standard of subsection (n) are invalid. We note that this situation may be distinguished from that in City of Junction City v. Lee, *supra*, where no such express, over-riding language existed in the statute that was alleged to be in conflict with the city ordinance.

Your second inquiry concerns the effect of language contained in the amendments to subsections (c), (d) and (e) of the statute. In each case, the following prohibition appears:

"No plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with a violation of this section, or any ordinance of a city in this state which prohibits the acts prohibited by this section, to avoid the mandatory penalties established by this subsection or the ordinance."

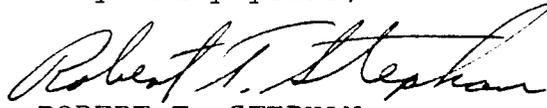
In that the term "plea bargaining agreement" is never defined in the bill, you wish to know the particular conduct which is proscribed, as well as the extent of a court's power to enforce the prohibition. We note you raise no concerns regarding the constitutionality of the prohibition.

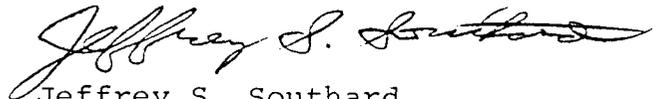
While the term "plea-bargaining" is not defined by the provisions of the amended statute, the concept is a well-established one, both in this state and nationally. In the decision of State v. Byrd, 203 Kan. 45 (1969), the court gave its official sanction to the actions of prosecuting attorneys in entering into discussions and agreements with an accused concerning the latter's plea. While the court in Byrd did not discuss the various contexts in which plea-bargaining may occur, the term is used generally to describe any discussion or agreement in which a defendant enters a guilty or nolo contendere plea to a lesser offense than that originally charged. See e.g. 9 W.L.J. 430 (1969). The Byrd decision does set forth guidelines for the use of this tool, both at the discussion (203 Kan. at 51) and the agreement (203 Kan. at 51-52) stages. Further standards are set out in Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Part IV (1971).

Under the provisions of K.S.A. 1981 Supp. 8-1567 (c), (d) and (e) as amended, prosecuting attorneys cannot enter into such agreements, nor can a judge approve them. While the decision to prosecute a specific violation is left to the prosecuting attorney [State v. Greenlee, 228 Kan. 712 (1980)], he or she cannot negotiate with a defendant for the entering of a specified plea in return for a reduction in the charge to a lesser offense such as reckless driving. While the bill provides no sanctions against such agreements, as they must be further approved by the court, it is unlikely that a prosecuting attorney could in fact achieve a reduction in the charge pursuant to an agreement with a defendant. In extreme cases, however, the general remedy of ouster would be available, as it is for any situation involving willful misconduct of a public official. K.S.A. 60-1205 et seq.

In conclusion, as amended by 1982 Senate Bill No. 699, K.S.A. 1981 Supp. 8-1567 provides [at subsection (1)] that a city may enact an ordinance which prohibits or makes unlawful the same acts as are dealt with by the statute, provided that the ordinance's minimum penalties are the same as the statute's for any given violation, and the ordinance's maximum penalty does not exceed that of the statute. Apart from these limits, K.S.A. 1981 Supp. 8-1567 as amended does not preempt a city from taking action in this area. As amended by 1982 Senate Bill No. 699, K.S.A. 1981 Supp. 8-1567(d), (d) and (e) prohibit a prosecuting attorney from entering into any plea-bargaining agreement by which a defendant enters a guilty or no contest plea to a lesser offense than that originally charged. While no sanctions against such conduct exist under the statute, provisions of the general ouster law could be applied against prosecuting attorneys who violate the prohibition against plea-bargaining.

Very truly yours,


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Jeffrey S. Southard
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RTS:BJs:JSS:jm