



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

August 19, 1982

MAIN PHONE (313) 296-2215
CONSUMER PROTECTION 296-3751

ATTORNEY GENERAL OPINION NO. 82- 182

Alan F. Alderson
General Counsel
Kansas Department of Revenue
State Office Building
Topeka, Kansas 66625

Re: Automobiles and Other Vehicles -- Serious Traffic Offenses -- Driving While Under Influence of Alcohol; Use of Prior Convictions in Determining Sentence

Synopsis: As amended by Laws of 1982, Chapter 144, K.S.A. 1981 Supp. 8-1567(h) provides that a court shall, prior to sentencing a person who has been convicted of a violation of the statute or who has entered a plea of nolo contendere, request and receive from the department of revenue, division of vehicles, a record of all prior convictions of that person for violations of any of the motor-vehicle laws of Kansas. Additionally, the sentencing provisions found in subsections (c), (d), (e) and (i) of the amended statute make reference to convictions of a violation of only the statute or an ordinance which prohibits the same acts. In view of this specific language, convictions under a statute of another state are excluded from consideration at time of sentencing. While the Legislature has included reference to the laws of other states in some Kansas statutes (see, e.g. K.S.A. 1981 Supp. 8-285, as amended by L. 1982, ch. 144), it did not choose to do so in the statute governing driving under the influence of intoxicating liquor or drugs. Cited herein: K.S.A. 1981 Supp. 8-285 (as amended by L. 1982, ch. 144), K.S.A. 8-286, 8-287, K.S.A. 1981 Supp. 8-1567 (as amended by L. 1982, ch. 144).

*

*

*

Dear Mr. Alderson:

As General Counsel for the Kansas Department of Revenue, you request our opinion on a matter involving the recent amendments to K.S.A. 1981 Supp. 8-1567, which proscribes the operation of a motor vehicle by any person who is under the influence of alcohol. Certain of the amendments, contained in L. 1982, ch. 144, also alter K.S.A. 1981 Supp. 8-285, which contains definitions for the habitual violator act. In view of what appear to be inconsistencies in the way these two statutes were amended, you seek our opinion as to whether a conflict exists.

Under the terms of K.S.A. 1981 Supp. 8-1567 as it existed prior to July 1, 1982 (the effective date of L. 1982, ch. 144), a court was required to use the following procedures in sentencing any person convicted of a violation:

"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). The court shall report every plea of guilty or conviction of a violation of this section to the division. Prior to sentencing under the provisions of this section, the court shall request and shall receive from the division a record of all prior convictions obtained against such person for any violations of any of the motor-vehicle laws of this state."
(Emphasis added.)

It should be noted that the penalty provisions, both for the initial and subsequent violations of the statute, were premised in terms of "a violation of this section" (i.e. K.S.A. 1981 Supp. 8-1567). To determine which sentence to impose, a court was required to obtain a record of the individual's prior violations "of the motor-vehicle laws of this state" from the division of vehicles.

This procedure may be contrasted with that found at K.S.A. 1981 Supp. 8-285, again prior to the effective date of L. 1982, ch. 144. That statute, the definitional section for the habitual violator act, provided that a person could be

so classified if he or she had been convicted, within the preceding five years, three or more times of various offenses. Among these offenses was

"[d]riving while under the influence of intoxicating liquor or drugs, as prohibited by K.S.A. 1977 Supp. 8-1567, or as prohibited by an ordinance of any city in this state or by any law of another state, which ordinance or law declares to be unlawful the acts prohibited by said statute" K.S.A. 1981 Supp. 8-285(a)(2) (Emphasis added.).

If the records of the division of vehicles indicated such violations, the county or district attorney of the individual's county was directed to initiate proceedings which, if successful, resulted in a judicial determination that the person was an habitual violator. (K.S.A. 8-286). While such determination by the court remained in effect, the person adjudged to be an habitual violator could not legally operate a motor vehicle. (K.S.A. 8-287).

From the above, it appears that, prior to the enactment of L. 1982, ch. 144, all convictions received by an individual for driving under the influence of alcohol, including violations occurring in other states and violations of city ordinances, could be considered for the purposes of determining his or her status as an habitual violator under K.S.A. 1981 Supp. 8-285 et seq. However, in determining whether an individual was a first time violator or a subsequent offender under K.S.A. 1981 Supp. 8-1567, the Legislature provided that only violations of the statute could be considered, with nothing said regarding consideration of previous convictions under a city ordinance or the laws of another state. Although we do not know the precise rationale for such distinctions, we suspect that because of the difference in the effects of the two statutes (loss of driver's license versus fine and/or imprisonment in addition to loss of license), the Legislature may have felt a more limited approach should be taken under K.S.A. 1981 Supp. 8-1567, the statute carrying the more severe penalties.

Regardless of the rationale, this distinction remains in effect following the effective date of L. 1982, ch. 144. The subsections which set forth the penalties for first-time, second-time and subsequent violators continue to retain the phrase "on . . . conviction of a violation of this section." Additionally, the court still receives a record of prior convictions of "motor-vehicle laws of this state" before imposing sentence. This language may be contrasted with that of K.S.A. 1981 Supp. 8-285 (as amended by section 2 of the act), which retains the more inclusive language quoted above.

This is not to say that a court's power to consider prior convictions for driving while under the influence of alcohol has not been broadened somewhat. At new subsection (i) of K.S.A. 1981 Supp. 8-1567, it is stated:

"For the purpose of determining whether a conviction is a first, second or third or subsequent conviction for the purpose of sentencing under this section, the term 'conviction' includes pleading guilty to a violation of this section, pleading nolo contendere to a violation of this section, being convicted of a violation of this section or entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of this section. For such purpose 'conviction' also includes pleading guilty to an ordinance which prohibits the acts that this section prohibits, being convicted of such an ordinance or entering into a diversion agreement in lieu of further criminal proceedings in a case alleging a violation of such an ordinance. For the purpose of this section, only convictions occurring in the next preceding five years shall be taken into account."

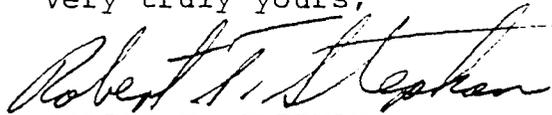
In our opinion, a court shall now consider violations of any ordinance of a Kansas city which prohibits the acts which are also prescribed by the statute. Although this is a step beyond the previous statute, it still does not extend to convictions rendered under the laws of other states. Given the language of K.S.A. 1981 Supp. 8-285, as amended, which allows such convictions to be used, it is clear that the Legislature chose to use different language here, and thus a different intent must be presumed. Cf. Williams v. Board of Education, 198 Kan. 115 (1967). Accordingly, regarding sentencing under K.S.A. 1981 Supp. 8-1567, as amended, the division of vehicles is not required to provide courts with records of all prior conviction's of a defendant, but rather those rendered by state and municipal courts in this state.

In conclusion, as amended by Laws of 1982, Chapter 144, K.S.A. 1981 Supp. 8-1567(h) provides that a court shall, prior to sentencing a person who has been convicted of a violation of the statute or who has entered a plea of nolo contendere, request and receive from the department of revenue, division of vehicles, a record of all prior convictions of that person for violation of any of the motor-vehicle laws of Kansas. Additionally, the sentencing provisions found in subsections (c), (d), (e) and (i) of the amended statute make reference to convictions of a violation of only the statute or an ordinance which prohibits the same acts. In view of this

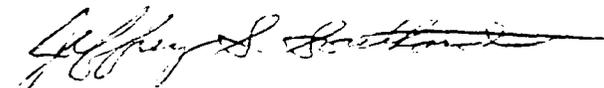
Alan F. Alderson
Page Five

specific language, convictions under a statute of another state are excluded from consideration at time of sentencing. While the Legislature has included reference to the laws of other states in some Kansas statutes (see, e.g. K.S.A. 1981 Supp. 8-285, as amended by L. 1982, ch. 144), it did not choose to do so in the statute governing driving under the influence of intoxicating liquor or drugs.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:hle