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ATTORNEY GENERAL OPINION NO. 82-185

The Honorable Pauline Schwarm
District Magistrate Judge
Kiowa County Courthouse
Greensburg, Kansas 67054

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

Synopsis: K.S.A. 1981 Supp. 8-1567, relating to the operation of a motor vehicle while under the influence of alcohol, was extensively amended by Section 5 of L. 1982, ch. 144. Changes made included increasing the penalties for those convicted of a violation, eliminating plea bargaining, standardizing diversion programs, authorizing community service in lieu of a fine and revising the procedures for license revocation. Despite such changes, the behavior proscribed by the statute prior to July 1, 1982 (the effective date of the amended statute) remains proscribed after that date. Accordingly, a person found to have violated the section subsequent to that date should be regarded as a second-time or multiple offender if a prior conviction or convictions occurred under the statute within five years prior to the 1982 amendments. Cited herein: K.S.A. 1981 Supp. 8-262, 8-1567 (as amended by L. 1982, ch. 144, §5), K.S.A. 77-201.

* * *

Dear Judge Schwarm:

As District Magistrate Judge for Kiowa County, Kansas, you request our opinion on a question arising out of the recent amendments to the statute which proscribes driving a motor

vehicle while under the influence of alcohol. Specifically, you inquire whether prior convictions under K.S.A. 1981 Supp. 8-1567 may be considered in sentencing violators of the statute, as amended by L. 1982, ch. 144, §5. We note that the effective date of the amendments was July 1, 1982.

Prior to the effective date of the amendments, subsection (c) of the statute provided the following penalties for first-time violators:

> "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." (Emphasis added.)

As amended, the subsection now reads:

> "Upon a first conviction of a violation of this section, a person shall be sentenced to not less than 48 hours' imprisonment or 100 hours of public service nor more than 6 months' imprisonment and fined not less than $200 nor more than $500, or by both such fine and imprisonment." (Emphasis added.)

In view of the repeal of K.S.A. 1981 Supp. 8-1567 and its replacement by Section 5 of Chapter 144 of the Laws of 1982, you inquire concerning the effect of the underscored language. You are particularly concerned that the language "a violation of this section" may require previous violators to be treated as first-time offenders when they are convicted of a violation of the statute as it reads following July 1, 1982.

In our opinion, this result is not required by either rules of statutory construction or analagous case law. It has long been the law in this state that the provisions of an amended statute which are the same as those of a prior statute should be construed as a continuation of those provisions and not as a new enactment [City of Troy v. Atchison and Nebraska Railroad Co., 11 Kan. 519 (1873)], unless such construction is contrary to the intent of the Legislature. City of Emporia v. Norton, 16 Kan. 236 (1876). More recent cases have continued to apply this rule, which has now been codified at K.S.A. 77-201, First. See Curless v. Board of County Commissioners, 197 Kan. 580 (1966), Kirchner v. Kansas Turnpike Authority, 336 F.2d 222 (10th Cir. 1964).

In the latter case, the court found that a legislative reorganization of the KTA in 1961 did not wipe out all existing employment contracts of the agency, and stated:

> "Moreover, the former Turnpike Authority was not abolished. It was in reality only reconstituted. The original language creating the Authority and establishing its powers and functions was re-enacted by the 1961 amendment and many related sections of the original Act were left intact. As to future transactions, the provisions introduced by the amendatory Act should be read together with the privisions of the original section that were reenacted in the amendatory act or left unchanged thereby, as if they had been originally enacted as one statute. Provisions of the original Act which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law. (Citations omitted.) This rule of interpretation is applicable even though the original Act or section is expressly declared to be repealed. (Citations omitted.)"

In the situation presented here, the wording "a violation of this section" occurred both in the statute prior to and following the 1982 amendments. Accordingly, a person who was convicted of a violation in 1981 is properly considered as a second-time offender upon any conviction under the statute as amended after July 1, 1982. The opposite conclusion (i.e., that all past violators start off with a clean slate as of July 1, 1982) is so inconsistent with the legislative purpose behind the new, tougher amendments that we cannot conclude the Legislature intended such a result.

Furthermore, we believe the facts here to be analogous to those presented in a decision which construed K.S.A. 1981 Supp. 8-262 (relating to operating a motor vehicle with a cancelled license), State v. Jones, 214 Kan. 568 (1974). There, the defendant received a misdemeanor conviction for a violation of the statute as it appeared in 1970. He was convicted again in 1972 and for a third time in 1973, with both convictions coming after the statute was amended in 1972 to provide for increased penalties for repeat offenders. (Under the statute prior to that time, all offenses were treated as misdemeanors.) Following the imposition of Class E Felony penalties upon the third violation, the defendant attacked the amendments to the statute as establishing retroactive penalties and thus being unconstitutional as denying due process, equal protection and being ex post facto.

In rejecting these arguments, the court found that each violation of the statute must be proven separately, using statutory elements which remained unchanged throughout the amendatory process. While a showing of prior convictions subjected

the violator to "sequentially increased punishment," such enhanced sentences were within the power of the Legislature. 214 Kan. at 570. There, as in the instant case, the defendant was on notice that actions of the type described were a violation of the law, and the fact that the statute was amended so as to punish his second and third offenses more severely did not punish what was formerly legal nor impose a double penalty for the same offense. [Citing State v. Woodman, 127 Kan. 166 (1928)].

However, we note that a court may not look to any prior convictions under this statute or a similar city ordinance in determining whether a violator is a second-time or multiple offender. Pursuant to new subsection (i) of K.S.A. 1981 Supp. 8-1567, as amended, a court is limited to considering only "convictions occurring ih the next preceding five years." (In this context, the word "next" has the meaning of being nearest in time or place, and not the more common usage of something which succeeds another.) Accordingly, while a court may consider convictions prior to July 1, 1982, it may not look farther back than 5 years in so doing.

In conclusion, K.S.A. 1981 Supp. 8-1567, relating to the operation of a motor vehicle while under the influence of alcohol, was extensively amended by Section 5 of L. 1982, ch. 144. Changes made included increasing the penalties for those convicted of a violation, eliminating plea bargaining, standardizing diversion programs, authorizing community service in lieu of a fine and revising the procedures for license revocation. Despite such changes, the behavior proscribed by the statute prior to July 1, 1982 (the effective date of the amended statute) remains proscribed after that date. Accordingly, a person found to have violated the section subsequent to that date should be regarded as a second-time or multiple offender if a prior conviction or convictions occurred under the statute within five years prior to the 1982 amendments.

Very truly yours,

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