STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 82- 233

Steven R. Zieber
Prosecuting Attorney
City of Olathe
100 West Santa Fe
P. O. Box 768
Olathe, Kansas 66061

Re: Automobiles and Other Vehicles -- Serious Traffic Offenses -- Driving While Under Influence of Alcohol; Assessment For Alcohol and Drug Safety Action Program

Cities and Municipalities -- Municipal Court Procedure -- Prohibition of Assessment of Costs

Synopsis: Section 10 of L. 1982, ch. 144 establishes a state alcohol and drug safety action program, which is funded through an $85 assessment against any person who is convicted of, pleads nolo contendere to, or participates in, a diversion program stemming from a violation of K.S.A. 1981 Supp. 8-1567 (as amended by L. 1982, ch. 144, §5). As subsection (n) of the statute (contained in Section 5) provides that a city ordinance on this subject must contain minimum penalties equal to those of the statute, the fee must be assessed against the above three groups of persons in municipal court, as well as in district court, proceedings. While K.S.A. 12-4112 prohibits the assessment of costs in municipal court cases, this general prohibition has been repealed by implication insofar as the specific assessment imposed by the 1982 act is concerned. Attorney General Opinion No. 78-237 is affirmed. Cited herein: K.S.A. 1981 Supp. 8-1567 (as amended by L. 1982, ch. 144, §5), K.S.A. 12-4112, L. 1978, ch. 323.

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Dear Mr. Zieber:

As Prosecuting Attorney for the City of Olathe, Kansas, you request our opinion on a question concerning the effect of recent amendments to K.S.A. 1981 Supp. 8-1567 and related statutes which concern the offense of operating a vehicle under the influence of alcohol. Specifically, you inquire as to a potential conflict between section 10 of L. 1982, ch. 144, which establishes an assessment on violators for a new state program, and the statutory prohibition against assessment of costs in municipal court cases. In view of the wording of the statute which proscribes such costs (K.S.A. 12-4112), you wish to know whether an impermissible conflict is created.

As was noted in an earlier opinion of this office, No. 82-157, section 10 of the act creates a new program under the direction of the secretary of social and rehabilitation services. Designated as the state alcohol and drug safety action program, the purpose of the program is to provide, through community based agencies, presentence evaluation reports on persons convicted of, or pleading nolo contendere to, a violation of K.S.A. 1981 Supp. 8-1567 (as amended). The program also provides for follow-up services designed to assist such a person with treatment and educational programs or other conditions of probation. The program is funded [pursuant to subsection (d)] by the imposition of an $85 fine against any person who is convicted of, or pleads nolo contendere to, such a violation. Pursuant to subsection (h), the assessment is also made on persons who participate in a diversion program in lieu of being sentenced. As was noted in Attorney General Opinion No. 82-157, the $85 is collected for cases in municipal, as well as district, court.

It is the section's application to municipal courts such as that in Olathe which gives rise to an apparent conflict with K.S.A. 12-4112. That statute, a part of the Code of Procedure for Municipal Courts, states:

> "No person shall be assessed costs for the administration of justice in any municipal court case, except for witness fees and mileage as set forth in K.S.A. 12-4411."

While this section is uniformly applicable to all cities having municipal courts, it is contained in an act (L. 1973, ch. 61) which has been held to be non-uniform. City of Junction City v. Griffin, 227 Kan. 332 (1980). Hence, many cities have, by charter ordinance, imposed court costs in their municipal courts. You advise us, however, that Olathe has not yet done so.

As you note in your letter, the question of a conflict between K.S.A. 12-4112 and a statute imposing costs on a municipal court defendant has been considered before by an Attorney General's opinion. That opinion, No. 78-237, considered the effect of L. 1978, ch. 323, which authorized certain assessments for the benefit of the law enforcement training center fund. Although the act creating such a fund was later declared to be unconstitutional [State ex rel., Stephan v. Thiessen, 228 Kan. 136 (1980)], the presence of any conflict between the assessments contained therein and K.S.A. 12-4112 was not an issue.

The opinion concluded that while a conflict did in fact exist, the legislature had the power to carve out exceptions to the general prohibition of K.S.A. 12-4112. Finding that a limited repeal by implication had occurred, the opinion quoted the decision of Hicks v. Davis, 97 Kan. 312, 317-318 (1916) at page 3-4:

> "'The constitution plainly instructs the legislature as to its procedure when it deliberately sets out to amend or repeal a specific statute or a section of a statute. Of course, when the legislature is legislating directly on any subject, it may close its eyes, and frequently does, to all earlier legislation, and a later act, as the last expression of the legislative will, will supersede and repeal by implication all inconsistent earlier legislation. But when the legislature has a direct and special purpose in view, as it had when it attempted to revoke and expunge item 106 in the act of 1913, it was bound to amend the section in which it was incorporated.'"

As no "direct and special purpose" to amend the Code of Procedure for Municipal Courts was found, the law enforcement training center assessments were allowed to stand, as being limited exceptions to the otherwise intact prohibitions of K.S.A. 12-4112.

In our opinion, the same result should occur here. The act containing the new $85 assessment was not intended as a measure amending the Municipal Procedure Code, and is accordingly not in conflict with any constitutional provision directing how legislation may be amended. Tecumseh School Dist. No. 7 v. Throckmorton, 195 Kan. 144 (1965). While it would have perhaps been better to expressly amend K.S.A. 12-4112 to allow such assessments, it was not necessary to do so for the new $85 assessment to be legal. Accordingly, the city of Olathe may properly collect this amount from each violator who is sentenced, pleads nolo contendere or enters a diversion

program. Indeed, pursuant to section 5(n) of the new act, a city must adopt the minimum penalties set by the act in any ordinance it enacts on the subject of driving under the influence of alcohol.

In conclusion, section 10 of L. 1982, ch. 144 establishes a state alcohol and drug safety action program, which is funded through an $85 assessment against any person who is convicted of, pleads nolo contendere to or participates in a diversion program stemming from a violation of K.S.A. 1981 Supp. 8-1567 (as amended). As subsection (n) of the statute (contained in Section 5) provides that a city ordinance on this subject must contain minimum penalties equal to those of the statute, the fee must be assessed against the above three groups of persons in municipal court, as well as in district court, proceedings. While K.S.A. 12-4112 prohibits the assessment of costs in municipal court cases, this general prohibition has been repealed by implication insofar as the specific assessment imposed by the 1982 act is concerned. Attorney General Opinion No. 78-237 is affirmed.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Jeffrey S. Southard

Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:hle