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December 15, 1983

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ATTORNEY GENERAL OPINION NO. 83- 181

Phillip Harris
City Attorney
Law Department
Justice Center
8500 Antioch
Overland Park, Kansas 66212

Re: Cities and Municipalities -- Municipal Courts --
Diversion Agreements; Driving While Under Influ-
ence of Alcohol

Synopsis: K.S.A. 12-4415(b) precludes a city attorney from entering into a diversion agreement with a defendant accused of driving a vehicle while under the influence of alcohol or drugs if the defendant has previously been convicted of such an offense or been diverted from prosecution. This statute should be read in pari materia with K.S.A. 8-1567(i), which establishes a five year limit on consideration of prior offenses. Therefore, if a defendant has been convicted of or diverted from a DUI offense in the preceeding five years, he or she is ineligible for diversion on a subsequent offense. Cited herein: K.S.A. 8-1567, as amended by L. 1983, ch. 37, K.S.A. 12-4413, 12-4415, L. 1982, ch. 144.

* * *

Dear Mr. Harris:

As City Attorney for Overland Park, Kansas, you request our opinion on a question concerning the diversion of persons accused of violating a city ordinance patterned after K.S.A. 8-1567, as amended by L. 1983, ch. 37. This statute, which deals with the offense of driving a motor vehicle while under the influence of alcohol or drugs, provides [at subsection (n)] that cities may adopt ordinances which make

such conduct an offense, provided that the minimum penalties are the same and the maximum penalties do not exceed those of K.S.A. 8-1567, as amended. The City of Overland Park has done so, and offers diversion to certain offenders as an alternative to prosecution. Your inquiry arises out of the wording of one of the diversion statutes for municipal courts found at K.S.A. 12-4413 et seq.

Specifically, K.S.A. 12-4415 sets forth the factors which a city prosecutor shall consider in determining whether to offer diversion to a defendant accused of an "alcohol related offense," which is defined by K.S.A. 12-4413(3) as a violation of K.S.A. 8-1567 or a city ordinance modeled thereafter. After enumerating the non-exclusive list, the statute states [at subsection (b)]:

"A city attorney shall not enter into a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of an alcohol related offense if the defendant has previously participated in diversion of an alcohol related offense or has previously been convicted of or plead nolo contendere to a violation of an alcohol related offense in this state."

In view of the fact that the language of the subsection is open-ended, and imposes no time limit beyond which a diversion or conviction shall not be considered, you ask whether a defendant can be rendered ineligible for diversion by virtue of any previous conviction or diversion, no matter how far in the past.

It should first be noted that the statutes governing diversion in municipal court were a part of the 1982 act (ch. 144 of the session laws of that year) which also significantly amended K.S.A. 8-1567. As part of the latter amendments, a new subsection (i) was added which defined what constituted a "conviction" under the statute. As further amended by L. 1983, ch. 37, the subsection provides:

"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 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 being convicted of a violation of a law of another state or an

ordinance of any municipality which prohibits the acts that this section prohibits, or entering into a diversion agreement in lieu of further criminal proceedings in a case alleging a violation of such a law or ordinance. For the purpose of this section, only convictions occurring in the immediately preceding five years, including prior to the effective date of this act, shall be taken into account." (Emphasis added.)

As construed by a prior opinion of this office, the underscored language above imposes a five year limit upon those convictions or diversions which may be considered when an individual is again the subject of a DUI prosecution. Attorney General Opinion No. 82-185. As clarified by the 1983 amendment, prosecutors may only look back to the five year period immediately preceding the present violation, but may include violations which occurred prior to the effective date of the act (July 1, 1982).

In our opinion, this five year limit should be considered when applying the provisions of the municipal diversion statutes, including K.S.A. 12-4415. Both that statute and K.S.A. 8-1567 were part of the same act in 1982, and additionally reference the same subject matter. As such, they should be read in pari materia with one another. Capital Electric Line Builders, Inc. v. Lennen, 232 Kan. 379, affm. as modif., 232 Kan. 652 (1982). The use of the same time period throughout the statutes allows them to be in harmony with one another, which result is always to be achieved if reasonably possible to do so. Callaway v. City of Overland Park, 211 Kan. 646 (1973). It also avoids the inconsistency of allowing an individual to start with a clean record after 5 years for purposes of sentencing, yet deny him that opportunity for purposes of diversion. Given the reasonable alternative, such an inconsistent result should not be found to be the intent of the legislature. See, e.g., Taylor v. Department of Health and Environment, 230 Kan. 283 (1981).

In conclusion, K.S.A. 12-4415(b) precludes a city attorney from entering into a diversion agreement with a defendant accused of driving a vehicle while under the influence of alcohol or drugs if the defendant has previously been convicted of such an offense or been diverted from prosecution. While the statute would appear to preclude diversion if a

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defendant had ever been convicted or diverted, it should be read in pari materia with K.S.A. 8-1567(i), which establishes a five year limit on consideration of prior offenses. Therefore, if a defendant has been convicted of or diverted from a DUI offense in the preceding five years, he or she is ineligible for diversion on a subsequent offense.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:hle