



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 84- 9

Charles H. Apt
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P.O. Box 328
Iola, Kansas 66749

Re: Automobiles and Other Vehicles -- Serious Traffic
Offenses -- Driving Under Influence of Alcohol or
Drugs; Work Release for Multiple Offenders

Cities and Municipalities -- Municipal Courts --
Diversion Agreements; Open Public Records

Synopsis: A person convicted of the offense of driving while
under the influence of alcohol or drugs for the second,
third or more times is subject to the mandatory sen-
tencing provisions of K.S.A. 1983 Supp. 8-1567(d) and
(e). While a person so convicted shall not be eli-
gible for release on probation or suspension of sen-
tence until the minimum sentence has been satisfied,
he or she may participate in a work release arrange-
ment whereby the person may be released for the pur-
pose of working at paid employment or participating
in a job training program for a prescribed number of
hours each day.

Diversion agreements entered into between a defendant
and a city attorney are filed with the municipal court,
and include a stipulation of facts upon which the
charge is based. In that such agreements regard vio-
lations of traffic ordinances, they are not covered
by the Criminal History Record Information Act, K.S.A.
22-4701 et seq., and so are public records subject
to the provisions of the Open Records Act, K.S.A. 1983
Supp. 45-205 et seq.

Cited herein: K.S.A. 1983 Supp. 8-1008, 8-1567, K.S.A.

12-4416, K.S.A. 1983 Supp. 21-4602, K.S.A. 22-4707,
K.S.A. 1983 Supp. 45-206, 45-208, 45-211, 75-5267, K.S.A.
75-5269, K.A.R. 1982 Supp. 10-12-1, 10-12-2, 44-8-101,
44-8-103.

* * *

Dear Mr. Apt:

As City Attorney for the City of Iola, you request our opinion on two questions which deal with the enforcement of the Iola city ordinance which is patterned after K.S.A. 1983 Supp. 8-1567. That statute proscribes the operation of a motor vehicle by a person under the influence of alcohol and/or drugs, and has been incorporated into the city ordinances of Iola as provided by subsection (n) of the statute. You inquire whether persons convicted for a second or subsequent offense who face mandatory jail terms can participate in a work release program and so retain or secure gainful employment. You also inquire whether diversion agreements entered into between a defendant and the city attorney pursuant to K.S.A. 12-4413 et seq. are open to examination by the public and the news media.

The subsections of K.S.A. 1983 Supp. 8-1567 which concern multiple offenders state as follows concerning the imposition of sentence of imprisonment:

"(d) On a second conviction of a violation of this section, a person shall be sentenced to not less than 90 days' nor more than one year's imprisonment and fined not less than \$500 nor more than \$1,000. The person convicted shall not be eligible for release on probation or suspension of sentence until the minimum sentence has been satisfied, but the sentence may be reduced, but not to less than five days' imprisonment, if the convicted person enters into and completes a treatment program for alcohol and drug abuse as provided in K.S.A. 8-1008 and amendments thereto. . . ."

"(e) On the third or subsequent conviction of a violation of this section, a person shall be sentenced to not less than 90 days' nor more than one year's imprisonment and fined not less than \$1,000 nor more than \$2,500. The person convicted shall not be eligible for release on probation or suspension or reduction of sentence. The court may also require as a provision of the person's release upon completion of the term of imprisonment that such person enter into and complete a treatment program for alcohol and drug abuse as provided by K.S.A. 8-1008 and amendments thereto. . . ." (Emphasis added.)

Probation is defined in K.S.A. 1983 Supp. 21-4602(3) as:

"a procedure under which a defendant, found guilty of a crime upon verdict or plea, is released by the court after imposition of sentence, without imprisonment subject to conditions imposed by the court and subject to the supervision of the probation service of the state, county or court."
(Emphasis added.)

Suspension of sentence is defined at subsection (2) of the same statute to mean:

"a procedure under which a defendant, found guilty of a crime, upon verdict or plea, is released by the court without imposition of sentence. The release may be with or without supervision in the discretion of the court." (Emphasis added.)

Accordingly, while it is clear that the above procedures are prescribed for multiple DUI offenders, neither appears to encompass the concept of work release.

An examination of the DUI statutes indicates that nowhere is the concept of work release mentioned. The same result occurs when the Code of Procedure for Municipal Courts, K.S.A. 12-4101 et seq. is reviewed. However, reference can be made to those statutes dealing with prisoners in the custody of the Department of Corrections for assistance in describing the concept and the context in which it is used. K.S.A. 1983 Supp. 75-5267 states:

"(a) The secretary of corrections is hereby authorized to establish a work release program under which inmates committed to the custody of the secretary may be granted the privilege of leaving actual confinement for the following purposes:

. . . .

(2) To work at paid employment or participate in a program of job training"

Administrative rules and regulations promulgated by the secretary of corrections further define the concept of work release as a program by which participants may leave actual confinement to work in the community, although they remain under supervision of staff and within extended limits of confinement. K.A.R. 1982 Supp. 44-8-101(g). Participants must remain at the "facility" which is designated as their place of work except under certain specified circumstances (K.A.R. 1982 Supp. 44-8-103), with failure to do so defined as aggravated escape from custody. K.S.A. 75-5269.

From the above, it would be our opinion that work release, where-

by an individual convicted of a violation of K.S.A. 1983 Supp. 8-1567 or similar municipal ordinance would be allowed to go to his or her job during working hours, would not constitute probation or suspension of sentence, and therefore would be allowed by the statute as it presently reads. The individual, though not behind the walls of a cell, would still be imprisoned as required by the statute. As noted in a prior opinion of this office, No. 83-123, "the term 'imprisonment' includes not only actual incarceration in jail, but may refer to any situation in which the defendant's liberty is restrained and he or she is subject to additional sanctions should an escape be made." Additionally, since the individual would definitely be without a driver's license (see subsections (d) and (e) of K.S.A. 1983 Supp. 8-1567), they would have to be transported to work by others or by public transportation, and so would not present a danger to the community as regards a repeatoffense of DUI.

Your second inquiry concerns the accessibility of diversion agreements and related material (results of breath test and pre-diversion evaluation) to members of the public and the news media. By virtue of K.S.A. 12-4416(c), a diversion agreement which is entered into by a defendant and a city attorney shall be filed with the municipal court. Contained therein is a stipulation of the facts upon which the charge was based [K.S.A. 12-4416(b)], as well as other information required by the statutes. This may or may not include the pre-diversion evaluation report prepared by the local alcohol and drug safety action program, which evaluation the city attorney is required to consider before agreeing to diversion. K.S.A. 1983 Supp. 8-1008(d).

For the most part, documents relating to criminal court proceedings are covered by the Criminal History Records Information Act, K.S.A. 22-4701 et seq., which provides for only limited dissemination under certain circumstances. K.S.A. 22-4707, K.A.R. 1982 Supp. 10-12-1, 10-12-2. However, criminal history records information does not include "data pertaining to violations of the traffic laws of the state or any other traffic laws or ordinance, other than vehicular homicide." In that a DUI conviction would constitute a traffic violation, either of K.S.A. 1983 Supp. 8-1567 or a municipal ordinance, the general prohibitions of the act against disclosure would not apply. Reference must then be made to the general statutes concerning open public records, K.S.A. 1983 Supp. 45-205 et seq. While no less than 34 exceptions to the general openness requirements of K.S.A. 1983 Supp. 45-206 and 45-208 exist (at 45-211), municipal court records are not among them. In our opinion, subject to the limits of the open public records act, diversion agreements filed with the municipal court are open to public scrutiny, as are all public documents not specifically excluded by one or more of the exceptions contained in K.S.A. 1983 Supp. 45-211. Please note that certain information contained in such records may be deleted from the otherwise public record based upon the listed exceptions. For example, alcohol treatment information

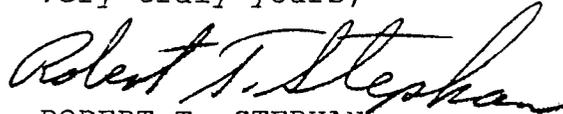
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of an identifiable patient may be closed to public scrutiny pursuant to K.S.A. 1983 Supp. 45-211(a)(3).

In conclusion, a person convicted of the offense of driving while under the influence of alcohol or drugs for the second, third or more times is subject to the mandatory sentencing provisions of K.S.A. 1983 Supp. 8-1567(d) and (e). While a person so convicted shall not be eligible for release on probation or suspension of sentence until the minimum sentence has been satisfied, he or she may participate in a work release arrangement whereby the person may be released for the purpose of working at paid employment or participating in a job training program for a prescribed number of hours each day.

Diversion agreements entered into between a defendant and a city attorney are filed with the municipal court and include a stipulation of facts upon which the charge is based. In that such agreements regard violations of traffic ordinances, they are not covered by the Criminal History Record Information Act, K.S.A. 22-4701 et seq., and so are public records subject to the provisions of the Open Records Act, K.S.A. 1983 Supp. 45-205 et seq.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:crw