



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751

September 23, 1985

ATTORNEY GENERAL OPINION NO. 85-127

David K. Martin  
Mission City Attorney  
Payne & Jones, Chartered  
P.O. Box 25625  
Overland Park, Kansas 66225

Re: Cities and Municipalities -- Code for Municipal  
Courts; Proceedings After Arrest and Prior to Trial  
-- Municipal Court Diversion; Factors To Be  
Considered Before Diversion Offer

Synopsis: Under the provisions of K.S.A. 1984 Supp. 22-2908  
(as amended by L. 1985, ch. 48, §16) and K.S.A.  
12-4415 (as amended by L. 1985, ch. 48, §11), a  
county attorney or city attorney is not prohibited  
from entering into a diversion agreement in lieu of  
further criminal proceedings if a defendant  
(charged with an alcohol related offense) has been  
convicted of or pleaded nolo contendere to a  
violation of an alcohol related offense in a state  
other than Kansas. However, a previous conviction  
in another state must be considered in determining  
whether diversion of a defendant is in the interest  
of justice. Cited herein: K.S.A. 1984 Supp.  
8-1567 (as amended by L. 1985, ch. 50, §5), K.S.A.  
12-4415 (as amended by L. 1985, ch. 48, §11),  
K.S.A. 1984 Supp. 22-2908 (as amended by L. 1985,  
ch. 48, §16); L. 1983, ch. 37, §2.

\* \* \*

Dear Mr. Martin:

You request our opinion as to whether a municipal court  
prosecutor has discretion to grant diversion where a defendant

charged with violation of an alcohol related offense has previously been convicted of an alcohol related offense in a state other than Kansas.

In responding to your question, we first note that, for purposes of sentencing under K.S.A. 1984 Supp. 8-1567 (as amended by L. 1985, ch. 50, §5), a "conviction" includes alcohol related violations occurring in states other than Kansas. [K.S.A. 1984 Supp. 8-1567(j), as amended] As subsection (m) of the aforesaid statute prohibits cities from adopting ordinances which deviate from the minimum penalties prescribed by K.S.A. 1984 Supp. 8-1567 (as amended), convictions in states other than Kansas also constitute prior convictions for purposes of sentencing under municipal ordinances.

Although convictions in other states constitute a second or third offense for purposes of sentencing, the existence of such convictions does not prohibit a city or county attorney from entering into a diversion agreement. In this regard, K.S.A. 12-4415 (as amended by L. 1985, ch. 48, §11) provides as follows:

"(a) In determining whether diversion of a defendant is in the interests of justice and of benefit to the defendant and the community, the city attorney shall consider at least the following factors among all factors considered:

. . . .

"(3) whether the defendant is a first time offender of an alcohol related offense and if the defendant has previously participated in diversion, according to the certification of the diversion of vehicles of the state department of revenue;

. . . .

"(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:

"(1) Has previously participated in diversion of an alcohol related offense;

"(2) has previously been convicted of or pleaded nolo contendere to a violation of an alcohol related offense in this state;

"(3) at the time of the alleged alcohol related offense had an alcohol concentration of .20 or more in the defendant's blood or breath; or

"(4) during the time of the alleged alcohol related offense was involved in a motor vehicle accident or collision resulting in personal injury or death."  
(Emphasis added.)

The corresponding statute which restricts the power of county and district attorneys to enter into diversion agreements, K.S.A. 1984 Supp. 22-2908 (as amended by L. 1985, ch. 48, §16), provides as follows:

"(1) In determining whether diversion of a defendant is in the interests of justice and of benefit to the defendant and the community, the county or district attorney shall consider at least the following among all factors considered:

. . . .

"(c) whether the defendant is a first-time offender and if the defendant has previously participated in diversion, according to the certification of the Kansas bureau of investigation or the division of vehicles of the department of revenue;

. . . .

"(2) A county or district attorney shall not enter into a diversion agreement in lieu of further criminal proceedings on a complaint if:

"(a) The complaint alleges a violation of K.S.A. 8-1567 and amendments thereto and the defendant: (A) Has previously participated in diversion upon a complaint alleging a violation of that statute or an ordinance of a city in this state which prohibits the acts prohibited by that statute; (B) has previously been convicted of or pleaded nolo contendere to a violation of that statute or an ordinance of a city in this state which prohibits the acts prohibited by that statute; (C) at the time of the alleged violation had an alcohol concentration of .20 or more in the defendant's blood or breath; or (D) during the time of the alleged violation was involved in a motor vehicle accident or collision resulting in personal injury or death; or

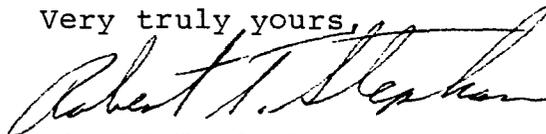
"(b) the complaint alleges that the defendant committed a class A or B felony." (Emphasis added.)

In accordance with the above-quoted statutes, it is our opinion that a county attorney or city attorney is not prohibited from entering into a diversion agreement in lieu of further criminal proceedings if a defendant (charged with an alcohol related offense) has been convicted of or pleaded nolo contendere to a violation of an alcohol related offense in a state other than Kansas. However, a previous conviction in another state must be considered in determining whether diversion of a defendant is in the interest of justice.

In passing, we would observe that the inconsistent treatment of prior convictions from other states is probably the result of legislative oversight. Specifically, the legislature neglected to amend K.S.A. 12-4415 and K.S.A. 22-2908 when K.S.A. 8-1567 was amended in 1983 so as to include convictions from other states for purposes of sentencing. See L. 1983,

ch. 37, §2. It appears that the failure to amend the diversion statutes was simple oversight, resulting in the inconsistency noted above.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF STEPHAN



Terrence R. Hearshman  
Assistant Attorney General

RTS:JSS:TRH:crw