



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 86- 59

Michael G. Glover
City Prosecutor
Municipal Court
111 East 11th Street
Lawrence, Kansas 66044

Re: Automobiles and Other Vehicles -- Driving Under
Influence of Alcohol or Drugs; Related Provisions
-- Tests for Alcohol or Drugs; Weight to be Given
Evidence

Automobiles and Other Vehicles -- Uniform Act
Regulating Traffic; Rules of the Road -- Driving
Under the Influence of Alcohol or Drugs; Conviction
Defined

Synopsis: Kansas laws pertaining to driving under the
influence of alcohol allow conviction when the
accused's blood or breath alcohol test (BAT)
registers less than .10 as long as other supporting
evidence is available. A conviction under a
similar statute in another state may be considered
for sentencing purposes. Cited herein: K.S.A.
1985 Supp. 8-1005; 8-1567.

* * *

Dear Mr. Glover:

As prosecutor for the City of Lawrence, you request our
opinion concerning the laws pertaining to driving under the
influence of alcohol (DUI). Specifically, you inquire as to
whether an Oklahoma DUI conviction, with a blood or breath
alcohol test (BAT) of less than .10, would count as a first

offense for sentencing purposes when a subsequent DUI conviction is obtained in Kansas.

In Kansas, driving under the influence of alcohol is a criminal offense. K.S.A. 1985 Supp. 8-1567(a) provides:

"No person shall operate or attempt to operate any vehicle within this state while:

"(1) The alcohol concentration in the person's blood or breath, at the time or within two hours after the person operated or attempted to operate the vehicle, is .10 or more;

"(2) under the influence of alcohol;
. . . .

Evidentiary standards for these offenses are set forth in K.S.A. 1985 Supp. 8-1005. In short, a BAT of .10 or more is prima facie evidence of being under the influence of alcohol to a degree that renders the person incapable of driving safely. Conversely, a BAT of .10 or less may be considered with other evidence in determining whether the defendant is under the influence of alcohol. K.S.A. 1985 Supp. 8-1005(a)(1) and (2). K.S.A. 1985 Supp. 8-1567(d) imposes the same penalty for driving under the influence (less than .10 plus other evidence) as it does for driving with a blood-alcohol content of more than .10. Thus, the stronger penalties of a second conviction may be invoked even though the BAT levels involved in the prior conviction may have required different evidentiary treatment.

Additionally, prior DUI convictions do not have to occur in Kansas to be considered for sentencing purposes. In Kansas, the definition of a DUI conviction includes:

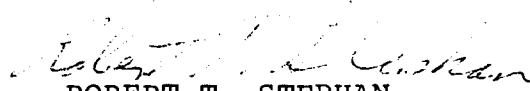
"[B]eing convicted of a violation of a law of another state or ordinance of any municipality which prohibits the acts that this section prohibits"
K.S.A. 1985 Supp. 8-1567(j)(2). (Emphasis added.)

Thus, an Oklahoma DUI conviction may be the premise for invoking the second conviction provisions of K.S.A. 1985 Supp. 8-1567. Much like K.S.A. 1985 Supp. 8-1005(a)(1) and (2),

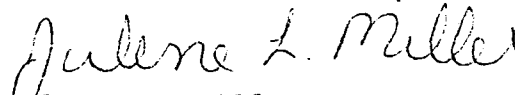
Oklahoma statutes provide for a conviction based upon a BAT of less than .10 when other supporting evidence is available, as well as upon a BAT of more than .10. See, Okla. Stat. Ann. tit. 47, §§11-902 and 761, and Perry v. State, 561 P.2d 112 (Okla. Crim. App., 1977). Although a conviction based on a BAT of less than .10 carries a lesser penalty in Oklahoma and is labeled as "driving while impaired", the impact for sentencing purposes in Kansas would be the same as if the act leading to the conviction had occurred in Kansas. It is the act that is prohibited which is of importance, not the terminology or the penalty imposed. K.S.A. 1985 Supp. 8-1567(j) (2).

In conclusion, Kansas laws pertaining to driving under the influence of alcohol allow convictions when the accused's blood alcohol test (BAT) registers less than .10 as long as other supporting evidence is available. A conviction under a similar statute in another state may be considered for sentencing purposes.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Julene L. Miller
Deputy Attorney General