



STATE OF KANSAS

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October 10, 1986

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ATTORNEY GENERAL OPINION NO. 86- 148

Keith D. Hoffman
Dickinson County Attorney
325 Broadway
Abilene, Kansas 67410

Re: Automobiles and Other Vehicles--Driving Under the
Influence of Alcohol or Drugs; Related
Provisions--Search Warrants; Use in Municipal Courts

Synopsis: A search warrant may be issued by a district
magistrate judge upon the sworn oral or written
statement of a city attorney. Municipal law
enforcement officers may execute such warrant, and
property seized pursuant to the warrant may be
admissible as evidence in a municipal court.
However, K.S.A. 1985 Supp. 8-1001(f) precludes
the use of a search warrant to obtain a blood
sample from a person who has refused to submit to a
blood, breath or urine test pursuant to that
statute. An ordinance authorizing such procedure
would be in conflict with the state statute
prohibiting further testing after an informed
refusal. Cited herein: K.S.A. 1985 Supp. 8-1001,
as amended by L. 1986, ch. 40, §2; K.S.A. 1985
Supp. 8-1005, as amended by L. 1986, ch. 41, §1;
K.S.A. 1985 Supp. 8-1567(m); K.S.A. 12-4504;
K.S.A. 1985 Supp. 22-2202, as amended by L. 1986,
ch. 133, §1; K.S.A. 22-2502; 22-2503; 22-2507; L.
1986, ch. 40, §1.

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Dear Mr. Hoffman:

As attorney for Dickinson county, you have requested our opinion concerning the prosecution of driving under the influence of alcohol or drugs (DUI) in municipal court. Specifically, you inquire whether a city attorney may apply to the district magistrate judge to obtain a search warrant for use in a municipal court. Your question stems from a concern that a warrant may be necessary when a person who is charged with a DUI offense refuses to submit to a breath test, rendering a blood sample necessary for evidence of intoxication. It is our opinion that while a district magistrate judge may issue a search warrant upon application by a city attorney, such a warrant may not issue solely for the purpose of obtaining a blood sample when a person refuses to submit to a breath, blood or urine test pursuant to K.S.A. 1985 Supp. 8-1001, as amended by L. 1986, ch. 40, §2.

A search warrant may be obtained on the testimony of the city attorney, may be executed by a city law enforcement officer, and the fruits of the search pursuant to the warrant may be admitted as evidence in a municipal court. The Kansas code for criminal procedure places no limitation upon whose testimony a search warrant may issue. K.S.A. 22-2502(a) provides in relevant part:

"A search warrant shall be issued only upon the oral or written statement of any person under oath or affirmation. . . ."
(Emphasis added.)

We believe that this section limits the type of information upon which a warrant may issue, not the source of the information. A city attorney is included as "any person."

K.S.A. 22-2502 further provides that a search warrant is to be issued by a magistrate, which is defined in K.S.A. 1985 Supp. 22-2202(14), as amended, as an officer having the power to issue warrants, including supreme court justices, court of appeals judges, and district court judges. The territorial limitations of search warrants are supplied in K.S.A. 22-2503, which states:

"[s]earch warrants issued by a district magistrate judge may be executed only within the judicial district in which said

judge resides or within the judicial district to which said judge has been assigned. . . ."

A search warrant is a command to the person to search the place and seize the thing described therein. K.S.A. 22-2507. The command may be directed to any specifically named law enforcement officer, defined in K.S.A. 1985 Supp. 22-2202(13), as amended, to include a person vested with authority to make arrests for violations of municipal ordinances. We believe that this is sufficient authority to charge a city law enforcement officer with the duty to execute a search warrant. We also believe that property seized in the execution of the search warrant is admissible in a municipal court, subject to restrictions which would render the same evidence inadmissible in a district court. K.S.A. 12-4504.

Pursuant to K.S.A. 1985 Supp. 8-1001, as amended by L. 1986, ch. 40, §2, any person who exercises the privilege of operating a motor vehicle on the highways of the State of Kansas is deemed to have given consent to a test of that person's breath, blood, or urine, subject to the provisions of that act. Actual refusal of such a test may result in the suspension of the person's driver's license, and evidence of the refusal may be used against the person at any trial wherein the person is accused of driving under the influence of alcohol or drugs. K.S.A. 1985 Supp. 8-1001(f), as amended.

The act outlines a specific procedure for law enforcement officers when a driver suspected of intoxication refuses to submit to a breath, blood or urine test. The law enforcement officer must give oral or written notice that:

"(A) There is no right to consult with an attorney regarding whether to submit to testing;

"(B) Refusal to submit to and complete any test of breath, blood or urine hereafter requested by a law enforcement officer will result in six months' suspension of the person's driver's license;

"(C) refusal to submit to testing may be used against the person at any trial on a charge arising out of the operation or attempted operation of a motor vehicle

while under the influence of alcohol or drugs, or both;

"(D) the results of the testing may be used against the person at any trial on a charge arising out of the operation or attempted operation of a motor vehicle while under the influence of alcohol or drugs, or both; and

"(E) after the completion of the testing, the person has the right to consult with an attorney and may secure additional testing, which, if desired, should be done as soon as possible and is customarily available from medical care facilities and physicians. . . . If the person refuses to submit to and complete a test as requested pursuant to this section, additional testing shall not be given and the persons' driver's license shall be subject to suspension. . . ." K.S.A. 8-1001(f)(1), as amended by L. 1986, ch. 40, §2. (Emphasis added.)

The legislature has, by statute, precluded the option of obtaining a search warrant for a blood sample when a person refuses to submit to and complete a breath, blood or urine test as requested pursuant to this act. The dispositive legal question becomes, therefore, whether the procedure outlined above is uniformly applicable. In our opinion, it is.

While a city may, under the authority of K.S.A. 1985 Supp. 8-1567(m), enact an ordinance prohibiting driving under the influence of alcohol or drugs, the legislature has indicated an intent to preempt any municipal procedural ordinance concerning the introduction of evidence of blood alcohol concentration. The relevant provisions concerning such preemption are located in K.S.A. 1985 Supp. 8-1005, as amended by L. 1986, ch. 41, §1, with reference to L. 1986, ch. 40 §1. When read together, the statutes provide that, in any prosecution for a violation of a city ordinance concerning driving under the influence of alcohol or drugs, evidence of blood alcohol concentration may be admitted to show evidence of alcohol influence, prima facie alcohol influence, or drug influence. K.S.A. 1985 Supp. 8-1005(a), as amended by L. 1986, ch. 41, §1. However, such admission of evidence is subject to section 1 of 1986 House Bill No.

2752, published as L. 1986, ch. 40, §1. Section 1 of chapter 40 provides that, if a law enforcement officer believes, based on reasonable grounds, that a person has alcohol in his possession, has committed a traffic infraction, or has been involved in an accident, such law enforcement officer may request a person to submit to a preliminary screening test. The results of such preliminary screening tests are not admissible to show actual driving under the influence of alcohol or drugs, but may be used to establish the validity of a request to submit to further testing pursuant to K.S.A. 1985 Supp. 8-1001, as amended.

Further indicia of a legislative intent to preempt the field of blood-alcohol-concentration-testing procedures appears in K.S.A. 1985 Supp. 8-1001, as amended by L. 1986, ch. 40, §2. Subsection (a) of the statute provides, in relevant part:

"Any person who operates or attempts to operate a motor vehicle within this state is deemed to have given consent, subject to the provisions of this act, to submit to one or more tests of the person's blood, breath, urine or other bodily substance to determine the presence of alcohol or drugs." (Emphasis added.)

Subsection (b) is a substantial departure from K.S.A. 1982 Supp. 8-1001. The 1982 version required that for the act to apply, the alleged offender be under arrest or otherwise in custody. Thus, it was noted in State v. Prichard, 10 Kan.App.2d 293 (1985), that the provisions of K.S.A. 8-1001 could not be invoked if the suspect had not been arrested and requested to submit to a blood or breath test. Under the 1985 and 1986 amendments, arrest or involvement in a motor vehicle accident is a prerequisite to the statute's application. Subsection (b) of K.S.A. 1985 Supp. 8-1001, as amended by L. 1986, ch. 40, §2, now states in relevant part:

"A law enforcement officer shall request a person to submit to a test or tests deemed consented to under subsection (a) if the officer has reasonable grounds to believe the person was operating or attempting to operate a motor vehicle while under the influence of alcohol or drugs, or both, and one of the following conditions exists: (1) the person has been arrested or otherwise taken into custody

for any offense involving operation or attempted operation of a motor vehicle while under the influence of alcohol or drugs, or both, in violation of a state statute or a city ordinance; or (2) the person has been involved in a motor vehicle accident or collision resulting in property damage, personal injury or death. . . ." (Emphasis added.)

This mandatory language is a departure from the previous statute, which stated that consent to testing was deemed to have been given, and a law enforcement may request a chemical test of blood. The 1986 amendment specifies in part that, if a person has been arrested or is otherwise in custody for violation of a DUI offense in violation of a state statute or city ordinance, or is involved in an accident, the officer shall request submission to a test or tests.

In short, the legislature acknowledges that a city may enact ordinances relevant to driving under the influence of drugs or alcohol, but any person operating a motor vehicle in that condition will be deemed to have given consent to a blood, breath or urine test, subject to the provisions of the act. The uniform language in subsection (a), and the mandatory language of subsection (b) lead us to believe that a city may not depart from the procedural aspects of K.S.A. 1985 Supp. 8-1001, as amended. This includes the prohibition of further testing after a person has given an informed refusal to submit to a breath, blood or urine test.

We need not, conclude at this juncture, that a city may not enact its own ordinance involving consent. However, any such ordinance would be invalid if in conflict with the provisions of K.S.A. 1985 Supp. 8-1001, as amended. In City of Junction City v. Lee, 216 Kan. 495 (1975), it was noted that a test to determine whether conflict exists is whether the ordinance permits that which the statute forbids. Id. at 501. A city ordinance which would allow a taking of blood pursuant to a search warrant after a person refuses to submit to a blood, breath or urine test would be in conflict with K.S.A. 1985 Supp. 8-1001, as amended.


In conclusion, it is our opinion that a search warrant may be issued upon the sworn statement of a city attorney. Municipal law enforcement officers may execute the warrant, and evidence seized pursuant to the warrant may be admitted as evidence in

a municipal court. However, the use of a search warrant does not extend to obtaining a blood sample from a person who has refused to submit to a blood, breath or urine test. An ordinance authorizing such procedure would be in conflict with state statute.

Very truly yours,



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Attorney General of Kansas



Julene L. Miller
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RTS:JLM:jm