



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 89- 58

Mark A. Burghart
General Counsel
Kansas Department of Revenue
2nd Floor, Docking State Office Building
Topeka, Kansas

Re: Crimes and Punishments--Kansas Criminal Code;
Sentencing--Expungement of Certain Convictions

Synopsis: A prosecuting attorney has no authority to waive statutory requirements for the passage of time before an individual is eligible to petition the court for expungement of conviction records. Further, we do not believe the court may disregard such limitations except in extreme circumstances. Cited herein: K.S.A. 8-249; K.S.A. 1988 Supp. 12-4516; KS.A. 21-4619.

* * *

Dear Mr. Burghart:

As general counsel for the Department of Revenue you request our opinion regarding the authority of a prosecutor to waive the time limitations set out by statute for expungement of conviction records. This is of interest to the Department in that it is the custodian of certain conviction records pursuant to K.S.A. 8-249.

K.S.A. 1988 Supp. 12-4516 and K.S.A. 21-4619 authorize expungement of certain convictions. These statutes specifically require the passage of a specified number of years, depending upon the type of crime committed, before a

petition for expungement may be filed. See Meyer, "the New Kansas Expungement Laws," 2 J.K.T.L.A. 22 (1979). For example, K.S.A. 21-4619 provides in part:

"(a) Except as provided in subsections (b) and (c), any person convicted in this state of a traffic infraction, misdemeanor or a class D or E felony may petition the convicting court for the expungement of such conviction if three or more years have elapsed since the person: (1) Satisfied the sentence imposed; or (2) was discharged from probation, a community correctional services program, parole, conditional release or a suspended sentence.

"(b) Except as provided in subsection (c), no person may petition for expungement until five or more years have elapsed since the person satisfied the sentence imposed or was discharged from probation, a community correctional services program, parole, conditional release or a suspended sentence, if such person was convicted of a class A, B or C felony or: [list of specified criminal offenses omitted]

. . . .

"(c) There shall be no expungement of convictions for the following offenses:

. . . ."

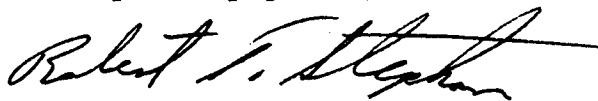
K.S.A. 1988 Supp. 12-4516 contains parallel provisions for expungement of convictions for violation of city ordinances. Both statutes direct the court to notify the prosecuting attorney of the date set for hearing the petition to expunge. K.S.A. 1988 Supp. 12-4516(c); K.S.A. 21-4619(d). Both grant the court some discretion in determining whether a particular offender's circumstances and behavior warrant expungement, K.S.A. 1988 Supp. 12-4516(d) and K.S.A. 21-4619(e), and both would appear to allow the prosecutor to make a recommendation in this regard. However, neither statute allows either the prosecuting attorney or the court discretion to alter or waive the qualifications necessary to file a petition.

There is authority indicating the court has some inherent powers to expunge records without express statutory authority, but such powers are limited to "extreme circumstances" where intervention of the court is necessary to protect basic legal rights. State v. Haugh, 237 Kan. 390, 392 (1985); Attorney General Opinion No. 80-60; Annot. 46 A.L.R.3d 900 (1972); Annot. 11 A.L.R.4th 957, 965 (1982). In most instances, however, the question whether and when criminal records should be expunged is exclusively for legislative determination. Annot. 11 A.L.R.4th at 966. We have found no authority to support the theory that a prosecutor has any power to authorize an expungement not provided for by statute. To the contrary, case law indicates that the granting or denial of a properly filed petition for expungement is a judicial function:

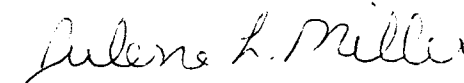
"Such power contemplates a judicial inquiry and the exercise of judicial discretion in the same way a court exercises discretion in the granting of probation, in the setting of conditions of probation, and in deciding whether probation should be revoked, subject, however, to those limitations imposed by the annulment or expungement statute." State v. Underwood, 228 Kan. 294, 299 (1980) (emphasis added).

Again, the procedure to be followed in filing a petition, including requirements for passage of time, is to be determined legislatively. It is therefore our opinion that a prosecuting attorney has no authority to waive statutory requirements for the passage of time before an individual is eligible to petition the court for expungement of conviction records. Further, we do not believe the court may disregard such limitations except in extreme circumstances.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
Deputy Attorney General