



STATE OF KANSAS

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May 24, 1991

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ATTORNEY GENERAL OPINION NO. 91- 57

Linda P. Jeffrey
Shawnee County Counselor
Shawnee County Courthouse
Room 203, 200 E. 7th
Topeka, Kansas 66603-3922

Re: Automobiles and Other Vehicles--Uniform Act
Regulating Traffic; Rules of the Road; Serious
Traffic Offenses--Driving Under Influence of
Alcohol or Drugs; Penalties; Work Release

State Departments; Public Officers and
Employees--Department of Corrections; Community
Corrections Act--Required Participation by Counties
in Community Corrections; Powers of Counties or
Groups of Counties Under Act; Work Release Programs

Synopsis: A conviction for a third or subsequent violation of
K.S.A. 1990 Supp. 8-1567 requires that the offender
serve a 90-day sentence. The offender must serve
48 consecutive hours imprisonment. Any subsequent
time served in a work release program may be
counted towards fulfilling the 90-day sentence
provided the work release program requires such
offender be confined at the end of each day. A
planning unit may enter into an agreement with a
private agency for the purpose of operating a work
release program identified in the planning unit's
comprehensive plan for community correctional
services programs. Cited herein: K.S.A. 1990
Supp. 8-1567; 21-4602; 21-4603; K.S.A. 75-5291;
75-5294; 75-52,100; K.A.R. 44-11-111; 44-11-113;
44-11-114; 44-11-119.

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Dear Ms. Jeffrey:

As counselor for Shawnee county, you request our opinion regarding whether time served in a work release program may be counted as part of the sentence mandated by K.S.A. 1990 Supp. 8-1567(g) and (h). You also ask whether a county may contract with a private facility for the purpose of providing confinement for individuals participating in work release programs.

The Kansas Court of Appeals determined in State v. Martin, 14 Kan.App.2d 138 (1989) that:

"[T]he purpose and intent of the legislature in promulgating K.S.A. 1988 Supp. 8-1567(f) was to ensure that on the third or subsequent conviction of DUI the defendant would serve at least 90 consecutive days' imprisonment. A fair reading of the statutory language that the 'person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment' excludes work release programs from the definition of imprisonment." Id. at 140.

The court concluded that the legislature intended for those individuals who were convicted of three or more DUI's to be incarcerated. State v. Walbridge, 14 Kan.App.2d 483, 486 (1990). The decision of the court was based in part on the fact that the statute did not specifically mention work release and did not expressly define imprisonment. Martin, 14 Kan.App.2d at 139.

Subsequent to the court's decision in Martin, the legislature amended K.S.A. 1989 Supp. 8-1567 to read in part:

"(g) 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 five days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours'

imprisonment, provided such work release program requires such person to confinement [sic] at the end of each day in the work release program. Except as provided in subsection (i), the person convicted must serve at least five consecutive days' imprisonment before the person is granted probation, suspension or reduction of sentence or parole or is otherwise released. . . .

"(h) On the third or a 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. Except as provided in subsection (i), the person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment. . . . The 90 days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to confinement [sic] at the end of each day in the work release program."
L. 1990, ch. 47, § 3 (Emphasis denotes new language.)

A court is required to impose a sentence of imprisonment when the violated statute itself prescribes such a sentence. State v. Harpool, 246 Kan. 226, 229 (1990). It is clear that K.S.A. 1990 Supp. 8-1567(h) requires that a person convicted for a third or subsequent time for DUI serve 48 consecutive hours' imprisonment. It is also clear that, subsequent to serving 48 consecutive hours' imprisonment, the time served by an individual in a work release program may be counted towards fulfilling the 90-day imprisonment mandated by K.S.A. 1990 Supp. 8-1567(h) provided the individual is confined at the end of each day of the work release program.

A third or subsequent conviction for violation of K.S.A. 1990 Supp. 8-1567 is classified as a misdemeanor, K.S.A. 1990 Supp. 8-1567(f), and may result in the individual's assignment to a

community correctional services program. K.S.A. 1990 Supp. 21-4603(2)(e). "A defendant assigned to a community correctional services program . . . in no event shall be considered to be in the custody of or under the supervision of the secretary of corrections." K.S.A. 1990 Supp. 21-4602.

Pursuant to K.S.A. 75-52,110, each county in the state is to have established a corrections advisory board and adopted a comprehensive plan for the development, implementation, operation and improvement of correctional services, including preventive or diversionary correctional programs, community corrections centers and facilities for the detention or confinement, care, or treatment of adults charged with or convicted of crime. K.S.A. 75-52,110; see also K.S.A. 75-5291. The comprehensive plan must include background information as designated in K.A.R. 44-11-113 and describe proposed programs to meet the primary correctional needs identified by the corrections advisory board and the secretary of corrections. K.A.R. 44-11-114. The comprehensive plan may include proposed secondary programs. Id. (Primary programs are those services which directly reduce the existing or prison bound population; secondary programs are those services which do not directly impact upon the prison bound population. K.A.R. 44-11-111.) Work release programs may be among the correctional services implemented. See Martin, supra; State v. Garrett, 235 Kan. 768 (1984).

The secretary of corrections is authorized to adopt rules and regulations necessary for implementation of the community corrections act. K.S.A. 75-5294.

"A comprehensive plan may provide for community corrections programs to be administered by public or private agencies. A planning unit may enter into a contractual or other written agreement with a private agency to operate programs identified in the comprehensive plan or to provide specialized services to program participants." K.A.R. 44-11-119(a).

Regulations have the full force and effect of law if they are duly adopted pursuant to statutory authority for the purpose of carrying out the policy declared by the legislature in the statutes of the state. State v. Pierce, 246 Kan. 183, 189 (1990). The regulation clearly permits a planning unit to enter into an agreement with a private agency to operate programs identified in the comprehensive plan. (A planning

unit is any county or group of cooperating counties that has established a local corrections advisory board for the purpose of developing a comprehensive plan. K.A.R. 44-11-111.) Therefore, if Shawnee county constitutes a planning unit, Shawnee county would have the authority to enter into an agreement with a private agency for the purpose of conducting a work release program for individuals assigned to the Shawnee county community correctional services program.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Richard D. Smith
Assistant Attorney General

RTS:JLM:RDS:jm