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November 18, 1992

ATTORNEY GENERAL OPINION NO. 92-147

Steve Plummer
Sedgwick County Counselor
County Courthouse
525 North Main Street, Suite 359
Wichita, Kansas 67203-3790

Re: Minors--Kansas Juvenile Offenders Code; Detention in Jail--Prohibiting Placement or Detention of Juvenile in Jail; Detention Upon being Taken Into Custody for Acts Which Would Constitute a Felony or Misdemeanor if Committed by an Adult

Synopsis: Upon being taken into custody for commission of an act which would be a misdemeanor or felony if committed by an adult, a juvenile may be detained for booking up to six hours in a jail or adult lock-up if there is sight and sound separation from adult prisoners. A juvenile taken into custody for commission of a traffic offense or violation of wildlife and parks statutes may be so detained as well. Cited herein: K.S.A. 8-2117; K.S.A. 1991 Supp. 32-1040; 38-1602; 38-1691; 42 U.S.C. 5633; 28 C.F.R. 31.301; 31-304.

* * *

Dear Mr. Plummer:

As county counselor for Sedgwick county you ask our opinion whether counties are prohibited from temporarily placing a person under the age of eighteen in adult detention facilities (jails or lockups) when the person has been charged with

traffic offenses including driving under the influence of alcohol and driving on a suspended license.

K.S.A. 1991 Supp. 38-1691 provides in relevant part:

> "(a) On and after January 1, 1993, no juvenile shall be detained or placed in any jail pursuant to the Kansas juvenile offenders code except as provided by subsections (b) and (c).
>
> "(b) Upon being taken into custody, an alleged juvenile offender may be temporarily detained in a jail, in quarters with sight and sound separation from adult prisoners, for the purpose of identifying and processing the juvenile and transferring the juvenile to a youth residential facility or juvenile detention facility. If a juvenile is detained in jail under this subsection, the juvenile shall be so detained only for the minimum time necessary, not to exceed six hours, and in no case overnight. Prior to January 1, 1994, if a juvenile is detained in a jail under this subsection, the juvenile may be detained for no more than 24 hours, excluding Saturdays, Sundays and legal holidays, from the time the initial detention was imposed if all of the following criteria are met: . . ."

You express concern that although K.S.A. 1991 Supp. 38-1691 expressly permits six hour temporary detention of juveniles in jails (isolated from adult prisoners), other statutes might be interpreted to prohibit such detention.

"Juvenile offender" is defined in K.S.A. 1991 Supp 38-1602, which provides in relevant part:

> "(a) 'Juvenile' means a person 10 or more years of age but less than 18 years of age.
>
> "(b) 'Juvenile offender' means a person who does an act while a juvenile which if done by an adult would constitute the commission of a felony or misdemeanor as defined by K.S.A. 21-3105 and amendments

thereto or who violates the provisions of K.S.A. 41-727 or subsection (j) of K.S.A. 1989 Supp. 74-8810, and amendments thereto, but does not include:

"(1) A person 14 or more years of age who commits a traffic offense in violation of chapter 8 of the Kansas Statutes Annotated or any city ordinance or county resolution which relates to the regulation of traffic on the roads, highways or streets or the operation of self-propelled or nonself-propelled vehicles of any kind;

"(2) a person 16 years of age or over who commits an offense defined in chapter 32 of the Kansas Statutes Annotated;

"(3) a person 16 years of age or over who is charged with a felony or with more than one offense of which one or more is a felony after having been adjudicated in two separate prior juvenile proceedings as having committed an act which would constitute a felony if committed by an adult and the adjudications occurred prior to the date of the commission of the new act charged;

"(4) a person who has been prosecuted as an adult by reason of subsection (b)(3) and whose prosecution results in conviction of a crime;

"(5) a person whose prosecution as an adult is authorized pursuant to K.S.A. 38-1636 and amendments thereto; or

"(6) a person who has been convicted of aggravated juvenile delinquency as defined by K.S.A. 21-3611 and amendments thereto."

First, you inquire about K.S.A. 8-2117. This statute concerns minors charged with traffic offenses. Minors charged with traffic offense are excluded from the definition of juvenile offenders. K.S.A. 1991 Supp. 38-1602(b)(1). K.S.A. 1991 Supp. 8-2117 provides, in revelant part:

> "Subject to the provisions of this section, a court of competent jurisdiction may hear prosecutions of traffic offenses involving any child 14 or more years of age but less than 18 years of age. The court hearing the prosecution may impose any fine authorized by law for a traffic offense, including a violation of K.S.A. 8-1567 and amendments thereto, and may order that the child be placed in a juvenile detention facility, as defined by K.S.A. 38-1602 and amendments thereto, for not more than 10 days. If the statute under which the child is convicted requires a revocation or suspension of driving privileges, the court shall revoke or suspend such privileges in accordance with that statute. . . ."

As an aside, we note that while driving under the influence, K.S.A. 8-1567, is a traffic offense for which a juvenile is tried as an adult driving while suspended, K.S.A. 8-262, is not a "traffic offense" as defined by K.S.A. 8-2204, and a minor must be prosecuted as a juvenile. See State v. Frazier, 248 Kan. 963 (1991); State v. D.L.P., 13 Kan.App.2d 647 (1989).

You also ask about K.S.A. 1991 Supp. 32-1040 which concerns violations of wildlife and parks statutes by juveniles. Again, such violators are also excluded from the definition of juvenile offenders in K.S.A. 1991 Supp. 38-1602(b)(2). K.S.A. 1991 Supp. 32-1040 provides:

> "The court hearing the prosecution of any child 16 or 17 years of age who is charged with a violation of any provision of the wildlife and parks laws of this state or rules and regulations adopted thereunder may impose any fine authorized by law for the offense, but no child under 18 years of age shall be incarcerated in a jail for more than 10 days for such an offense. If the child is incarcerated in a jail, the child shall be in quarters separate from adult prisoners. In lieu of incarceration in a city or county jail, the court may order that a child be placed in a juvenile

> detention facility if the operator of the facility is willing to accept the child."

Both K.S.A. 8-2117 and K.S.A. 1991 Supp. 32-1040, by their express terms, concern disposition of persons under 18 once a court has determined they have violated the law -- once there has been conviction. Neither statute mentions, limits, or allows pretrial detention.

This interpretation is strengthened by reading the Kansas statutes in light of the federal juvenile justice and delinquency prevention act of 1974 (JJDPA), 42 U.S.C.A. §§ 5601 et seq. This act authorizes grants to states which comply with certain mandates, including removing juveniles from adult jails.

41 U.S.C.A. § 5633 (1991 Supp.) sets forth requirements states must meet to obtain the grants. Of particular relevance are subsections (a)(13) and (a)(14) which provide:

> "(a) In accordance with regulations which the administrator shall prescribe, such plan shall --
>
> . . . .
>
> "(12)(A) provide within three years after submission of the initial plan that juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult or offenses which do not constitute violations of valid court orders, or such nonoffenders as dependent or neglected children, shall not be placed in secure detention facilities or secure correctional facilities; and
>
> "(B) provide that the State shall submit annual reports to the Administrator containing a review of the progress made by the State to achieve the deinstitutionalization of juveniles described in subparagraph (A) and a review of the progress made by the State to provide that such juveniles, if placed in facilities, are placed in facilities which (i) are the least restrictive alternatives

> appropriate to the needs of the child and the community; (ii) are in reasonable proximity to the family and the home communities of such juveniles; and (iii) provide the services described in section 103(1) [42 USCS § 5603(1)];
>
> "(13) provide that juveniles alleged to be or found to be delinquent and youths within the purview of paragraph (12) shall not be detained or confined in any institution in which they have regular contact with adult persons incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges;
>
> "(14) provide that, beginning after the five-year period following December 8, 1980, no juvenile shall be detained or confined in any jail or lockup for adults, except that the Administrator shall, through 1993, promulgate regulations which make exceptions with regard to the detention of juveniles accused of nonstatus offenses who are awaiting an initial court appearance pursuant to an enforceable State law requiring such appearances within twenty-four hours after being taken into custody (excluding weekends and holidays) provided that such exceptions are limited to areas which--
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> "(A) are outside a Standard Metropolitan Statistical Area,
>
> "(B) have no existing acceptable alternative placement available, and
>
> "(C) are in compliance with the provisions of paragraph (13);

The limiting subsection for the question at hand is subsection (14). The first portion of this subsection prohibits juveniles from being detained in any jail or adult lockup. There is an exception for juveniles accused of "nonstatus offenses" which means offenses would be "a crime if committed by an adult." 28 C.F.R. § 31.304(h). This exception for

non-status offenders does not apply, however, because it is limited to specific areas meeting the requirements of (A), (B), and (C).

While the JJDPA does not contain an express exception allowing six hour temporary detention, the department of justice has issued regulations which do seem to permit this statutory authorization. The regulations detail what information states must report to the federal government. They provide in part:

> "(iv) To demonstrate the progress toward and extent of compliance with section 223(a)(14) of the JJDP Act the report must at least include the following information for the baseline and current reporting periods:
>
> . . . .
>
> "(b) Total number of juvenile criminal type offenders held in adult jails in excess of six hours.
>
> "(H) total number of juvenile criminal-type offenders held in an adult lockup in excess of six hours." 28 C.F.R. 31.301(i)(5)(iv).

By way of explanation, the federal office of juvenile justice and delinquency prevention issued a policy statement explaining exceptions to 42 U.S.C.A. § 5633(a)(14). The statement says,

> "Exception:
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> "For the purpose of monitoring compliance with Section 223(a)(14), OJJDP has adopted a '6-hour' grace period which would permit a secure detention in an adult jail or lockup of those juveniles accused of committing criminal-type offenses (i.e., offenses which would be a crime if committed by an adult). This six hours is limited to temporary holding for the purposes of identification, processing, release to parent(s) or guardian(s) or transfer to juvenile court officials or juvenile shelter or detention facilities.

> Any such holding of juveniles should be limited to the absolute minimum time necessary to complete this action, not to exceed six hours but in no case overnight. Section 223(a)(13) would prohibit such accused juvenile criminal-type offenders from having regular contact with adult offenders during this brief holding period. A status offender or nonoffender cannot be securely detained, even temporarily, in an adult jail or lockup.
>
> "Adjudicated delinquents may not be held for any length of time in adult jails or lockups, e.g., as a disposition, or while awaiting transfer to a juvenile correctional facility." OJJDP Policy No. 89-1401 (April 1989).

We note that under the federal statutes, for states to be in compliance, the only exception for trying minors as adults is for felony-type offenses. See C.F.R. § 31.303(d)(2). There is no exception for traffic offenders or wildlife and parks offenders. As such, we are of the opinion that the legislature's intent is that the detention limits in K.S.A. 1991 Supp. 38-1691 apply to alleged minor traffic and wildlife and parks offenders, despite the express exclusion of such offenders from the definition of juvenile offenders.

We conclude that based upon federal law which permits six hour temporary detention, the intent of K.S.A. 1991 Supp. 38-1691 is to allow juveniles charged with a traffic offense, wildlife and parks violations, or offenses which would constitute a crime if committed by an adult, to be temporarily detained for less than six hours upon being taken into custody. They must be detained in quarters with slight and sound separation from adult prisoners. The other statutes you ask about, K.S.A. 8-2117 and K.S.A. 1991 Supp. 32-1040, do not speak to preadjudication or preconviction detention and do not change

K.S.A. 1991 Sup. 38-1691. (See K.S.A. 38-1691(c) for detention of felony type juvenile offenders charged as adults).

Very truly yours,

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Steve Phillips
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