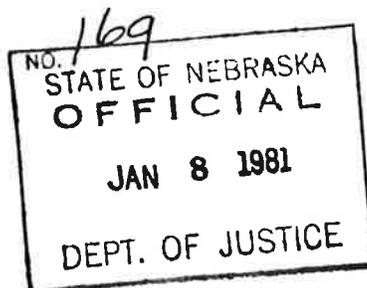


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509

January 6, 1982



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Senator Rex Haberman
District No. 44
State Capitol
Lincoln, Nebraska 68509

Re: Mandatory Jail Sentences.

Dear Senator Haberman:

You have requested several opinions from this office concerning various questions you have with reference to legislation which would impose mandatory jail sentences for conviction of driving while under the influence of intoxicating liquor. Specifically, you have asked the following:

1. Are there any constitutional difficulties with mandatory jail sentences for a conviction of driving while under the influence of intoxicating liquor?
2. Under Neb.Rev.Stat. §39-669.07 (1980 Supp.), which mandates a one year revocation of an individual's operator's license for second and third offense, if the court grants probation, will the revocation be put into effect?
3. If a mandatory jail sentence is imposed, may a judge place an individual on probation once the mandatory jail sentence has been served?

In response to question 1, it is clear that the Legislature is vested with the power to define crimes and to affix penalties for those crimes within constitutional limits. We do not perceive any constitutional infirmities with imposing a mandatory jail sentence for the offense of driving while under the influence of intoxicating liquor,

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with the caveat that the sentence imposed should not be cruel and unusual. "It has been held that while a constitutional provision prohibiting 'cruel and unusual punishment' was intended to prohibit torture and agonizing punishment, it was never intended to abridge the selection by the lawmaking power of such kind of punishment as it deemed most effective in the suppression of crime." State v. Tucker, 183 Neb. 577, 162 N.W.2d 774 (1968).

Questions 2 and 3 are related in that both deal with the situation in which a court suspends a sentence and places an individual on probation. It is important to note that in the event a person is placed on probation, that individual is then subject to the terms and conditions of §29-2262 (Reissue 1979), which sets out the various conditions of probation, it is clear that the court may impose a period of confinement in the county jail not to exceed 90 days. Further, under the broad provisions of subsection 1 of §29-2262, the court may impose "such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law abiding life." This would necessarily include a condition of probation that an individual would be prohibited from operating a motor vehicle during his period of probation.

The ability of a court to impose, as a condition of probation, the restriction that an individual be prohibited from operating a motor vehicle is to be distinguished from a period of "revocation" ordered by a court as part of a sentence. Neb.Rev.Stat. §60-421 (Reissue 1979) provides in part that:

Whenever any person is convicted of any offense for which this act or Chapter 39, article 7 authorizes the revocation or suspension of the motor vehicle operator's license, the court in which such conviction is had, shall, if revocation or suspension is adjudged, require the surrender to it of all operator's licenses then held by the person so convicted. The court shall thereupon forward the same together with the action and findings of the court, . . . to the director.

Therefore, in response to question 2, if a court places an individual on probation for a second or third offense, the one year period of revocation to which you refer will not necessarily be imposed. Rather, the court can place whatever restrictions it deems appropriate on the offender. That may

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include a restriction of the individual's operating privileges, but that decision rests in the discretion of the court. Question 3 is somewhat contradictory. The court may impose a period of confinement not to exceed 90 days as a condition of probation. However, if a mandatory jail sentence is imposed as the judgment of conviction, then the court no longer retains the ability to place that individual on probation.

Very truly yours,

PAUL L. DOUGLAS
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REG:pjs

cc: Patrick O'Donnell
Clerk of the Legislature