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

#87025

NO.
STATE OF NEBRASKA
OFFICIAL
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DEPT. OF JUSTICE

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: February 25, 1987

SUBJECT: Officer's Sworn Report of Refusal to Submit to a Chemical Test Pursuant to Neb.Rev.Stat. §39-669.15

REQUESTED BY: Margaret L. Higgins, Director
Department of Motor Vehicles

WRITTEN BY: Robert M. Spire, Attorney General
Yvonne E. Gates, Assistant Attorney General

QUESTION 1: In a situation where all the elements of a valid arrest and refusal have occurred, does an officer commit a crime or other violation of law by not submitting a sworn report to the Director pursuant to Neb.Rev.Stat. §39-669.15?

CONCLUSION 1: Failing to forward the sworn report to the Director subsequent to a refusal is a violation of law.

DISCUSSION

Section 39-669.15 of the Nebraska statutes states, in part, "If a person arrested pursuant to section 39-669.08 refuses to submit to the chemical test of blood, breath, or urine required by that section, the test shall not be given and the arresting officer shall make a sworn report to the Director of Motor Vehicles."

The Legislature has defined what acts constitute criminal offenses and specified punishments therefor. The Legislature has not provided any fine, penalty, or other remedy for non-compliance with this law. Since a crime is an act in violation of a penal law, failing to submit a sworn report does not constitute a crime. However, the word "shall" in a statute is generally considered mandatory. State v. Stratton, 374 N.W.2d 31, 220 Neb. 854 (1985); NC+ Hybrids v. Growers Seed Ass'n, 363 N.W.2d 362, 219 Neb. 296 (1985). Consequently, in a situation where a valid arrest and refusal has occurred, the arresting officer who fails to submit a sworn report to the Director of Motor Vehicles clearly acts in violation of his statutory obligation.

L. Jay Bartel, Martel J. Bundy, Janie C. Castaneda, Dale A. Comer, Laura L. Freppel, Lynne R. Fritz, Yvonne E. Gates, Jill Gradwohl, Royce N. Harper, William L. Howland, Marilyn B. Hutchinson, Mel Kammerlohr, Sharon M. Lindgren, Charles E. Lowe, Steven J. Moeller, Harold I. Mosher, Fredrick F. Neid, Bernard L. Packett, Lisa D. Martin-Price, LeRoy W. Sievers, James H. Spears, Mark D. Starr, John R. Thompson, Susan M. Ugai, Linda L. Willard

QUESTION 2: Does the county attorney have the authority to plea bargain that the sworn report will not be forwarded to the Director in return for a plea on the charges of DWI or criminal refusal to submit to a chemical test?

CONCLUSION 2: Criminal and civil refusal to submit are separate and distinct proceedings. Plea bargaining criminal refusal is within the county attorney's prosecutorial discretion; civil refusal is not.

DISCUSSION

When the county attorney has probable cause to believe that the accused committed an act defined by the Legislature as a chargeable offense the decision whether or not to prosecute and what charge to file rests in his or her discretion. State v. Bartlett, 210 Neb. 886, 317 N.W.2d 102 (1982); State v. Grayer, 191 Neb. 523, 215 N.W.2d 859 (1974).

Neb.Rev.Stat. §39-669.07 provides that driving while under the influence is a crime and Neb.Rev.Stat. §39-669.08(4) criminalizes refusal to submit to a chemical test. A plea agreement involving either of the two crimes is within the scope of prosecutorial discretion.

However, §39-669.08(4) in pertinent part, also provides that "[a]ny person who refuses to submit to a chemical blood, breath or urine test required pursuant to this section shall be subject to the administrative revocation procedures of the Director of Motor Vehicles . . . and shall be guilty of a crime. . . ." It is evident, therefore, that the same refusal gives rise to two separate and distinct proceedings. In acknowledging this fact the Nebraska Supreme Court expressly stated:

> One is a civil and administrative licensing procedure instituted by the Director of Motor Vehicles to determine whether a person's privilege to drive is revoked. The other is a criminal action instituted in the appropriate court to determine whether a crime has been committed. Each action proceeds independently of the other and the outcome of one action is of no consequence to the other." [Emphasis added.]

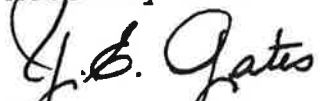
Ziemba v. Johns, 183 Neb. 644, 646, 163 N.W.2d 780, 781 (1968); Neil v. Peterson, 210 Neb. 378, 379, 314 N.W.2d 275, 276 (1982).

The Legislature has specifically provided by statute that the civil consequences of refusal " . . . shall be subject to the administrative procedures of the Director of Motor

Vehicles. . . ." As a result, the scope of the county attorney's prosecutorial discretion does not encompass a plea agreement involving the civil action. Because the civil action is initiated by the officer's submission of a sworn report the county attorney is not authorized to agree that the sworn report will not be submitted in exchange for a plea in the criminal proceeding.

Sincerely yours,

ROBERT M. SPIRE
Attorney General



Yvonne E. Gates
Assistant Attorney General

YEG/bae

APPROVED BY:

Attorney General