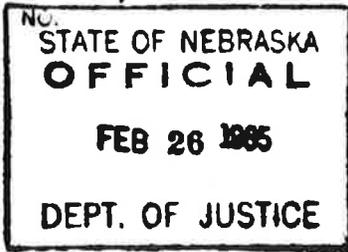


*Charlie Adams*

DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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



February 22, 1985

A. EUGENE CRUMP  
Deputy Attorney General

John R. Thompson  
Deputy Attorney General

Senator R. Wiley Remmers  
1st District  
State Capitol  
Lincoln, NE 68509

Dear Senator Remmers:

This is in reply to your inquiry concerning the constitutionality of LB 504.

Said bill provides in part:

(9) Any person convicted of violating subsection (1), (2), (3), or (8) of this section shall not be eligible for probation or suspension of sentence and shall only become eligible for parole upon the satisfactory attendance and completion of appropriate treatment and counseling on drug abuse.

The violations referred to involve manufacture, possession, and other acts relating to controlled substances and counterfeit controlled substances.

Other sections of said bill also provide that on conviction of certain other drug violations, if the offender is placed on probation, a condition of probation shall be mandatory treatment and counseling on drug abuse.

As a general rule, the Legislature has the power to fix the punishment for crime, including probation, provided it is within the U.S. constitutional prohibition against cruel and unusual punishment. See, generally 24(B) C.J.S., Criminal Law, Sections 1975 et seq.

Assistants

Bernard L. Packett  
Mel Kammerlohr  
Harold I. Mosher  
Terry R. Schaefer  
Marilyn B. Hutchinson  
J. Kirk Brown

Royce N. Harper  
Sharon M. Lindgren  
Lynne R. Fritz  
Ruth Anne E. Galter  
Dale A. Comer  
Martel J. Bundy

Mark D. Starr  
Dale D. Brodkey  
Linda L. Willard  
John B. Boehm  
Henry M. Grether III  
Calvin D. Hansen

Timothy E. Divis  
L. Jay Bartel  
Jill Gradwohl  
LeRoy Sievers

In State v. Muggins, 192 Neb. 416, 222 N.W.2d 289 (1974), the Supreme Court of Nebraska approved an order of probation requiring the defendant, who had been convicted of driving while intoxicated, to attend the Alcohol Safety Action Program, sometimes referred to as the Alcohol Abuse Course. While the court was not considering the constitutionality of the order, it approved the same in the following language:

There is certainly nothing in the nature of a course of study described as an "Alcohol Abuse Course," or in the record of this case, that would cause us to conclude that a condition of probation requiring a probationer convicted of driving while intoxicated to undertake and complete such a course would not be a proper condition of probation under the foregoing statutes specifying proper terms and conditions of probation.

In State v. Nuss, 190 Neb. 755, 212 N.W.2d 565, the Supreme Court of Nebraska invalidated a condition of probation which required a defendant, who was placed on probation, to also serve 14 days in a county jail, because this condition was not authorized by statute. In doing so, the court stated: "Although the trial court's motivation was admirable, imprisonment as a condition of probation must rest on statutory authority."

While this does not answer the question of whether the Legislature may mandate the exact course of action the court must take, it evidences a recognition by the court that it has no inherent authority to devise probationary conditions. This supports the argument that the Legislature may make such mandatory restrictions as provided in LB 504.

In the recent case of State v. Havorka, 218 Neb. 367, \_\_\_\_\_ N.W.2d \_\_\_\_\_ (1984), the Supreme Court of Nebraska construed a recent statute concerning convictions for driving under the influence of alcohol or drugs which required the court to order such person not to drive any motor vehicle for any purpose for a period of six months from the date of the order. The court held that under this statute, the trial court could not interrupt the six month period to permit the probationer to drive during part of that period and then impose the restriction on the balance of the six month period. The court based this decision on the fact that the legislative provision was clear and unambiguous but specifically declined to determine "whether the Legislature may, under any circumstance, limit a court's authority to suspend a sentence and impose probation under such conditions as it may prescribe," because neither party had raised that issue.

Other state supreme courts have faced similar questions and have upheld the authority of the Legislature. In State v. Sittig, 75 Wis.2d 497, 249 N.W.2d 770 (1977), the Supreme Court of Wisconsin held that a mandatory sentence statute requiring a jail sentence for a person driving while his drivers license was under suspension did not violate the doctrine of separation of powers or, in other words, was not an invasion of the authority of the judiciary.

Like Nebraska, the court had previously recognized that the determination of the punishment to be imposed for violation of crimes was within the province of the Legislature. The court stated:

Specifically, this court is committed to the doctrine that courts have no inherent power to stay or suspend execution of a sentence in a criminal case in the absence of statutory authority. . . .

In the absence of this inherent right, a court's refusal to impose a mandatory sentence or a sentence within limits prescribed by the legislature, constitutes an abuse of discretion by the court and also the usurpation of the legislative field.

In State v. Holmes, 276 N.W.2d 823, Supreme Court of Iowa, (1979), the court stated as to a similar argument:

Defendant asserts that statutory preclusion of probation violates separation of powers by limiting the authority of the judiciary to exercise discretion in granting or denying probation. We have held, however, that our judiciary holds no inherent power to grant probation. State v. Wright, 202 N.W.2d 72, 76 (Iowa 1972); see State v. Drake, 259 N.W.2d 862, 864 (Iowa 1977). The power to grant probation is statutorily conferred; therefore, statutory preclusion of probation cannot infringe on judicial authority to exercise discretion in the matter. Accord State v. Motley, 546 S.W.2d 435, 437 (Mo. App. 1976); State v. King, 330 A.2d 124, 128 (Me. 1974); Black v. State, 509 P.2d 941, 942-943 (Okla. Cr. 1973); State v. Morales, 51 Wis.2d 650, 187 N.W.2d 841, 843 (1971).

There are cases from other jurisdictions to the same effect.

Senator R. Wiley Remmers  
February 22, 1985  
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Attached hereto is an Opinion of Attorney General No. 169 issued in 1982 concerning legislation similar to that here in question. It concludes that such legislation is constitutional.

Also enclosed is a copy of a previous Opinion from this office expressing the opinion that certain mandatory conditions as to parole were constitutional.

In view of the various statements of the Supreme Court of Nebraska and other courts as discussed above, although the Supreme Court of Nebraska has not specifically determined the separation of powers issue, we see no reason to retreat from our position that such mandatory requirements, being reasonably related to the crime involved, are constitutional.

Very truly yours,

A. EUGENE CRUMP  
Deputy Attorney General



Mel Kammerlohr  
Assistant Attorney General

MK:bmh

Enclosure

cc: Mr. Patrick J. O'Donnell  
Clerk of the Legislature

Superintendent. When Sections 39-1504 and 39-1506 R.R.S. 1943, are read together, we believe it becomes obvious why the Legislature included the word "other" in Section 39-1504. The Legislature clearly provided that someone other than a County Board member be appointed as the County Highway Superintendent. To be designated as the person to perform the powers and duties of the County Highway Superintendent comes very close to being the County Highway Superintendent.

We conclude that by the use of the words "some other qualified person" in Section 39-1504, R.R.S. 1943, the Legislature intended that someone other than a member of the County Board be designated to perform the powers and duties of the County Highway Superintendent, when the Board does not choose to perform these powers and duties.

No. 169

January 16, 1978

Dear Senator:

In a letter dated January 9, 1978, you ask this office whether or not the Chambers' amendment to LB 64, found on pages 193 and 194 of the Legislative Journal, are constitutional and secondly, whether or not the language in that amendment insures that one convicted of a Class I felony would serve at least a minimum of thirty years. In a letter addressed to Senator Chambers this day, we have opined that his amendment would accomplish the goal of insuring that one convicted of a Class I felony would serve at least a minimum of thirty years, subject to the power of the Pardon Board to pardon or commute. A copy of that opinion is attached hereto.

Your second question is whether or not the language of the amendment to LB 64, found on page 194 and relating to the restrictions on parole and mandatory discharge from custody, is constitutional. We believe that the amendment and its language is constitutional. In Official Opinion No. 65, dated April 11, 1977, this office indicated in an opinion addressed to Senator Ernest Chambers that a substantially similar amendment to that which you now question was constitutionally defensible. We indicated in that letter, as we do now, that while we cannot reach the categorical conclusion, we do feel that such a condition prescribed by the Legislature would be constitutionally defensible and would not violate Article IV, Section 13, of the Constitution of Nebraska.

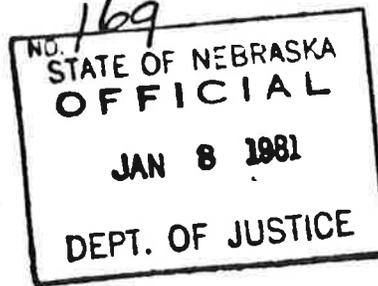
To sum up the above, we believe that if the purpose and intent of Senator Chambers' amendment to LB 64, found on pages 193 and 194 of the Legislative Journal, is to guarantee that a person convicted of a Class I felony serve a minimum of thirty years in prison that that purpose and intent is accomplished by that amendment. Secondly, we believe that an attempt by the Legislature to restrict eligibility for parole and final discharge in the case of persons convicted of a Class I felony would be constitutionally defensible.

DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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

January 6, 1982



PAUL L. DOUGLAS  
Attorney General  
GERALD S. VITAMVAS  
Deputy Attorney General  
JOHN R. THOMPSON  
Deputy Attorney General

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,

Assistant  
Bernard L. Pacretti  
Mel Kammerlrich  
Harold I. Mosher  
Ralph H. Gian

Marilyn B. Hutchinson  
Patrick T. O'Brien  
J. Kirk Brown  
Royce N. Harper

Ruth Anne E. Gater  
John M. Boehm  
G. Roderic Anderson  
Dale A. Comer

Marte J. Bundy  
Mark D. Starr  
Dee D. Brodkey  
Frank J. Huffless

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

Senator ROX Haberman  
January 6, 1982  
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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  
Attorney General

Ruth Anne E. Galter  
Assistant Attorney General

REG:pjs

cc: Patrick O'Donnell  
Clerk of the Legislature