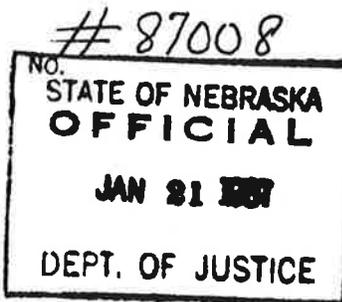


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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



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

DATE: January 16, 1987

SUBJECT: Constitutionality of proposed legislation which would prohibit a court from sentencing a defendant convicted of a felony to serve a term of probation or imprisonment in a municipal or county owned intermediate care facility or a state owned Veteran's Home.

REQUESTED BY: Senator Marge Higgins

WRITTEN BY: Lynne R. Fritz  
Assistant Attorney General

Dear Senator Higgins:

You have requested the opinion of this office regarding the constitutionality of certain proposed legislation which provides as follows:

An individual convicted of a felony, under §§28-101 to 28-1348 of the Nebraska Criminal Code, shall not be ordered to serve a sentence of probation or imprisonment, under any circumstances, in a municipal or county owned intermediate care facility, or a state owned Veterans' Home operated by the Department of Public Institutions.

Pursuant to Neb.Rev.Stat. §28-105 (Reissue 1985), sentences to imprisonment upon conviction of a felony are served in institutions under the jurisdiction of the Department of Correctional Services unless the sentence is less than one year in which case the term of imprisonment may under some circumstances be served in the county jail. Pursuant to Neb.Rev.Stat. §83-1380 (Reissue 1981), and consistent with Eighth Amendment guarantees, the Department of Correctional Services may transfer a prisoner to health care facilities when medically necessary, however the proposed legislation which

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solely addresses sentencing orders would not, in our opinion, modify this grant of authority. Thus, the proposed legislation would appear to have no effect on sentences to imprisonment currently imposed for adult felony convictions.

However, Neb.Rev.Stat. §29-2260 (Cum.Supp. 1986) authorizes a court to withhold a sentence of imprisonment under specified circumstances and impose instead a sentence to probation. Further, Neb.Rev.Stat. §29-2262 (Cum.Supp. 1986) enumerates conditions which the court may in its discretion attach to the grant of probation to try to insure that the offender will lead a law abiding life. One such condition which may be imposed is a requirement that the offender ". . . undergo medical or psychiatric treatment and to enter and remain in a specified institution for such purpose." Neb.Rev.Stat. §29-2262(e) (Cum.Supp. 1986). The above quoted proposed legislation would withdraw the named institutions as possible locations for court ordered treatment as a condition of a felony probationary period.

It is well established in this jurisdiction that the legislature is clothed with the power of defining crimes and fixing their punishment; and its discretion in this respect, exercised within constitutional limits, is not subject to review by the courts. State v. Stratton, 220 Neb. 854, 374 N.W.2d 31 (1985); State ex rel. Nelson v. Smith, 114 Neb. 653, 209 N.W. 328 (1926). The nature and scope of penal sanctions, including conditions of probation, are for determination by the Legislature; a court has no power to impose a condition of probation which is not authorized by statute. State v. Nuss, 190 Neb. 755, 212 N.W.2d 565 (1973).

Because of the broad legislative authority to determine the penalties which attach upon conviction of a felony, we perceive no constitutional impediment to the proposed legislation on its face. We do, however, have reservations about the proposed legislation as applied in a hypothetical situation involving an indigent defendant who may be an appropriate candidate for probation but for the potential unavailability of an adequate treatment facility. While our court has recognized that no defendant is entitled to probation as a matter of law, there is a long line of cases which prohibit discriminatory treatment based solely on a defendant's indigency as violative of the equal protection clause. Griffin v. Illinois, 351 U.S. 12 (1955); State v. Goodpasture, 215 Neb. 341, 347, 338 N.W.2d 446 (1983).

Senator Marge Higgins  
January 16, 1987  
Page -3-

In summary, it is our opinion that the legislature may generally limit the institutions to which a court may order a felon for treatment as a condition of probation, unless as applied in a particular factual situation said limitation operates to discriminate on the basis of indigency.

Sincerely,

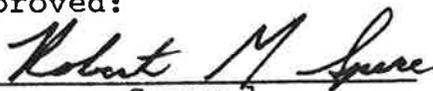
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LRF/kb

Approved:

  
Robert M. Spire  
Attorney General