STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-01

Date issued: January 8, 1998

Requested by: Dwight F. Kalash, Grand Forks City Prosecutor

- QUESTIONS PRESENTED -

I.

Whether an on-site alcohol screening device may be used to enforce the zero tolerance law established in House Bill 1111 by the 1997 Legislative Assembly.

II.

Whether the zero tolerance law established in House Bill 1111 creates a criminal per se violation of the driving under the influence laws when an operator of a motor vehicle is under the age of 21 years and has an alcohol concentration of at least .02 percent but less than .10 percent.

- ATTORNEY GENERAL'S OPINIONS -

I.

It is my opinion that an on-site alcohol screening device may be used to enforce the zero tolerance law established in House Bill 1111 but that the use of such device will be subject to the requirements of N.D.C.C. § 39-20-14.

II.

It is my further opinion that the zero tolerance law established in House Bill 1111 by the 1997 Legislative Assembly does not create a criminal per se violation of driving under the influence laws when an operator of a motor vehicle is under the age of 21 years and has an alcohol concentration of at least .02 percent but less than .10 percent.

- ANALYSES -

I.

The 1997 Legislative Assembly amended several provisions of North Dakota Century Code Title 39 to establish procedures to permit

administrative action against the driving privileges of a person under the age of 21 years who operates a motor vehicle with a blood alcohol content of at least .02 percent. These statutory provisions, commonly referred to as the zero tolerance law, were adopted in House Bill 1111.

On-site alcohol screening devices have been used for many years in this state by law enforcement officers as a tool to determine whether reasonable grounds exist to arrest an individual for driving under the influence of intoxicating liquor and to determine whether a further chemical test should be given. Nichols v. Backes, 461 N.W.2d 113 (N.D. 1990); State v. Schimmel, 409 N.W.2d 335 (N.D. 1987). The authorization and requirements for the use of an on-site screening test are established in N.D.C.C. § 39-20-14. Refusal to submit to the test, if the requirements of N.D.C.C. § 39-20-14 are met, could result in a revocation of that driver's driving privileges for up to three years.

House Bill 1111 did not amend N.D.C.C. § 39-20-14. Regardless of the age of the driver of a motor vehicle, the use of the on-site alcohol screening device and application of its implied consent provisions will therefore depend on compliance with the requirements of that section.

Generally, these requirements are:

1. The person to be tested must have been operating a motor vehicle upon the public highways of the state;

2. The on-site screening test must have been requested by a law enforcement officer; and

3. Before the request can be made and the implied consent provisions of N.D.C.C. § 39-20-14 apply, the officer must have reason to believe that the operator of the motor vehicle has committed a moving traffic violation or was involved in a traffic accident as a driver and, in conjunction with the violation or the accident, the officer has, through the officer's observations, formulated an opinion that the person's body contains alcohol.

N.D.C.C. § 39-20-14 will govern the use of an on-site alcohol screening device and the conditions under which such device may be used regardless of the age of the operator of a motor vehicle. The age of the operator is irrelevant for purposes of administering the test. If a person, regardless of age, refuses to take an on-site alcohol screening test, and does not cure that refusal by taking a

subsequent chemical test, such a refusal may result in administrative revocation of driving privileges. Absent compliance with the statutory requirements, however, sufficient grounds may not exist to warrant such a revocation for refusal to take an on-site test.

In addition to imposing requirements for the taking of the test, N.D.C.C. § 39-20-14 also places significant limitations on the use of the results of that on-site alcohol screening test. N.D.C.C. § 39-20-14, states in part:

> The results of such screening test must be used only for determining whether or not a further test shall be given under the provisions of section 39-20-01. . . . No provisions of this section may supersede any provision of chapter 39-20, nor may any provision of chapter 39-20 be construed to supersede this section except as provided herein.

Based on this specific statutory language, and assuming that the conditions precedent for the giving of the on-site alcohol screening test have been met, the results of the on-site alcohol screening test of an operator of a motor vehicle who is under the age of 21 years may be used, as in the case of operators who are over the age of 21 years, only for the purpose of determining whether a further test should be given or to provide reasonable grounds to warrant an arrest. N.D.C.C. § 39-20-14.

If the operator of the motor vehicle refuses to take the on-site alcohol screening test and has not cured refusal by taking a subsequent test, notice can be given to the commissioner of the Department of Transportation to permit administrative revocation of that person's driving privileges. If, after taking an on-site alcohol screening test, an operator who is under the age of 21 years takes a chemical test pursuant to N.D.C.C. § 39-20-01 and the test discloses a blood alcohol content of at least .02 percent, this fact may then be reported to the commissioner of the Department of Transportation in the same manner as though the operator was over the age of 21 years and had a blood alcohol chemical test result of at least .10 percent.

In summary, use of an on-site alcohol screening device or test pursuant to N.D.C.C. § 39-20-14 is no different for operators of a motor vehicle who are under the age of 21 years and those operators of a motor vehicle who are over that age.

II.

House Bill 1111 amended subsection 3 of N.D.C.C. § 39-20-07, which refers to the chemical test result and its effect on an operator of a motor vehicle being "under the influence of intoxicating liquor." Prior to this amendment, N.D.C.C. § 39-20-07(3) declared that a person with a blood alcohol concentration of at least .10 percent at the time of the performance of a chemical test within two hours after driving or being in physical control of a vehicle was under the influence of intoxicating liquor at the time of driving or being in physical control of that vehicle. That subsection now reads:

> A person having an alcohol concentration of at least ten one-hundredths of one percent by weight or, with respect to a person under twenty-one years of age, an alcohol concentration of at least two one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after driving or being in physical control of a vehicle is under the influence of intoxicating liquor at the time of driving or being in physical control of a vehicle.

With this amendment, House Bill 1111 extended the scope of this subsection to include operators of motor vehicles who are under the age of 21 years and who have a blood alcohol concentration of at least .02 percent. This section does not, however, create a "per se" criminal violation of the driving under the influence laws of this state.

State v. Vogel, 467 N.W.2d 86 (N.D. 1991), may present an issue regarding whether N.D.C.C. § 39-20-07(3) creates a per se criminal offense. In Vogel, the Court concluded that the history of amendments to this subsection by the 1983 Legislative Assembly indicated that the intention of the enactment was to establish a "'per se,' strict liability crime in two ways, one of which was the definition of "under the influence." State v. Vogel, at 89.

As applied to drunk driving litigation and statutes, the term "per se" is a term of art. Distinct differences exist between "per se" criminal violations and violations involving proof that an operator of a motor vehicle drove while "under the influence." Both Richard E. Erwin and Donald H. Nichols, in their respective authoritative treatises, have recognized that the "per se" criminal violation looks solely to the chemical test result as the determining factor of whether the operator of a motor vehicle would be guilty of an offense. The per se offense is based solely on the defendant's blood alcohol content and the other physical effects of alcohol consumption are irrelevant. In the ordinary driving under the influence case, the results of the chemical analysis of the defendant's blood, breath, or urine do not prove guilt but are merely one piece of

evidence on which the jury may rely in determining whether a defendant was under the influence of alcohol at the time of driving. In the per se drunk driving case, the defendant's blood alcohol content is not just one factor to be considered in determining the guilt of the defendant; it is the determinative factor. Evidence that a defendant's blood alcohol content exceeds the statutory minimum is sufficient, in and of itself, to sustain the prosecutor's burden of proof in a per se criminal statute. 1 Richard E. Erwin, Defense of Drunk Driving Cases, 3rd ed., § 2.01(2) (1997); Donald H. Nichols, Drinking/Driving Lit. § 2.17. North Dakota Supreme Court cases subsequent to State v. Vogel have recognized that N.D.C.C. § 39-08-01(1)(a) is the "per se" criminal offense distinguishing it from N.D.C.C. § 39-08-01(1)(b). Pavek v. Moore, 562 N.W.2d 574 (N.D. 1977); State v. Steinmetz, 552 N.W.2d 358 (N.D. 1996); City of Grand Forks v. Risser, 512 N.W.2d 462 (N.D. 1994).

If Vogel would be literally applied to N.D.C.C. § 39-20-07(3) as that section relates to an operator of a motor vehicle under the age of 21 who has an alcohol concentration of at least .02 percent, it could be argued that it created a conclusive presumption that an operator was under the influence of intoxicating liquor in violation of N.D.C.C. § 39-08-01(1)(b) merely as the result of that operator's alcohol concentration of at least .02 percent or above. Such a conclusion would create a clear conflict with the provisions of N.D.C.C. § 39-20-07(1) and (2) which provide:

> Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor, drugs, or a combination thereof, evidence of the amount of alcohol, drugs, or a combination thereof in the person's blood at the time of the act alleged as shown by a chemical analysis of the blood, breath, saliva, or urine is admissible. For the purpose of this section:
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> 1. A person having, at that time, an alcohol concentration of not more than five one-hundredths of one percent by weight is presumed not to be under the influence of intoxicating liquor. This presumption has no application to the administration of chapter 39-06.2.
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> 2. Evidence that there was at that time more than five one-hundredths of one percent by weight alcohol concentration in a person is relevant evidence, but it is not to be given prima facie effect in

> indicating whether the person was under the influence of intoxicating liquor.

On the one hand, N.D.C.C. § 39-20-07(3) would provide that any operator of a motor vehicle under the age of 21 years with an alcohol concentration of .02 percent or greater would be under the influence. However, N.D.C.C. § 39-20-07(1) would declare that the same operator was conclusively presumed not to be under the influence. Penal statutes are to be strictly construed against the government. State v. Hogie, 424 N.W.2d 630 (N.D. 1988). This statutory conflict and the legislative history of House Bill 1111, as more fully discussed later, support the conclusion that the 1997 Legislative Assembly did not intend to create criminal liability and a "per se" criminal offense upon an operator under the age of 21 years based solely on that operator's alcohol concentration of .02 percent up to .10 percent. State v. Vogel reviewed the application of N.D.C.C. § 39-20-07(3) to an operator's alcohol concentration of .10 percent or above. No statutory conflict existed between that subsection and N.D.C.C. § 39-20-07(1) and (2). State v. Vogel, insofar as it may permit the conclusion to be drawn that a "per se" criminal offense was created by House Bill 1111, is inapplicable to those cases in which the operator of a motor vehicle who is under the age of 21 years has a blood alcohol concentration of at least .02 percent up to .10 percent.

N.D.C.C. § 39-08-01(1)(a) sets forth the "per se" criminal violation of the driving under the influence laws. That section provides:

> 1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:
>
> a. That person has an alcohol concentration of at least ten one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after the driving or being in actual physical control of a vehicle.

House Bill 1111 did not amend N.D.C.C. § 39-08-01(1)(a) to create a per se criminal violation by operators of motor vehicles who are under the age of 21 years and who have a blood concentration of at least .02 percent. The "per se" violation of N.D.C.C. § 39-08-01(1)(a) continues to require that a blood alcohol concentration of .10 percent exist regardless of the age of the offender.

Although N.D.C.C. § 39-20-07(3) as amended by House Bill 1111 might provide a basis for an officer to arrest an individual under the age of 21 years with a chemical test result of at least .02 percent for a violation of N.D.C.C. § 39-08-01(1)(b) by alleging that the operator was "under the influence", such a violation would not be under the "per se" law of N.D.C.C. § 39-08-01(1)(a) but, rather, would require proof at trial, beyond a reasonable doubt, that the operator was under the influence of intoxicating liquor.

It is possible that an operator of a motor vehicle who is under the age of 21 years and who has a blood alcohol concentration of at least .02 percent but less than .10 percent may not be under the influence of intoxicating liquor. Whether the operator is "under the influence" is not dependent upon the amount of alcohol involved but, rather, the effect of that alcohol. When a person is "under the influence", that person has consumed intoxicating liquor which would tend to deprive that person of the clearness of intellect and control which he would otherwise possess. State v. Glavkee, 138 N.W.2d 663 (N.D. 1965).

Even though N.D.C.C. § 39-20-07(3) may allow a conclusion to be drawn that the operator of a motor vehicle who is under the age of 21 with a blood alcohol concentration of at least .02 percent is under the influence, the actual facts may show that the operator is not under the influence. A law enforcement officer may very well conclude, by observing the actions of the operator, that the operator is not under the influence, that he could not testify to facts establishing that the operator is under the influence, or provide an opinion that the operator was under the influence of intoxicating liquor. If the physical evidence establishes that the driver is not under the influence of intoxicating liquor, the prosecutor may very well decline to proceed with any prosecution even if a chemical test shows that the under 21 years of age operator had a blood alcohol concentration of at least .02 percent. This matter should be addressed with each individual prosecutor to determine what proof and evidence the prosecutor needs to support a successful prosecution.

If an operator of a motor vehicle, because of the consumption of intoxicating liquor, does not possess that clearness of intellect and control which he would possess if he had not been drinking, that operator is "under the influence" and may be convicted of an N.D.C.C. § 39-08-01(1)(b) violation regardless of the test result or the age of the alleged offender. House Bill 1111 amendments to subsection 3 of N.D.C.C. § 39-20-07 did not create a "per se" criminal violation of North Dakota's driving under the influence laws but, rather, merely applied that provision to an operator of a motor vehicle under the age of 21 years who has a chemical alcohol test result of at

least .02 percent. Whether sufficient evidence exists to support the charging or conviction of an offender will be dependent, as in all cases involving "under the influence" prosecutions, on the particular facts and circumstances of each individual case.

Although N.D.C.C. § 39-20-07(3) has been referred to as a "per se statute" rather than a "presumption statute" (State v. Vogel, 467 N.W.2d 86 (N.D. 1991)), there is no criminal penalty imposed in N.D.C.C. § 39-08-01(1)(a) for a person who is under the age of 21 years and operating a motor vehicle with a blood alcohol concentration of .02 percent to .10 percent unless that person is "under the influence of intoxicating liquor." It would have been easy for the Legislative Assembly to amend N.D.C.C. § 39-08-01(1)(a) had it intended to impose criminal liability under the "per se" statute for a person under the age of 21 years to operate or be in physical control of a motor vehicle with a blood alcohol concentration of at least .02 percent. This conclusion is consistent with the hearing testimony by Keith Magnusson, Director of Driver and Vehicle Services of the Department of Transportation. Testimony before both the House and Senate Transportation Committees discloses that House Bill 1111 would affect only the administrative process and not the criminal law which would remain at .10 percent blood alcohol content. (Testimony of Keith Magnusson before the House Transportation Committee January 17, 1997, and the Senate Transportation Committee February 27, 1997.)

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the questions presented are decided by the courts.

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ATTORNEY GENERAL

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