

Senate Judiciary Committee
February 12, 2018
Testimony of the Kansas Association of Criminal Defense Lawyers
in opposition to SB 374
(Proposed DUI Legislation)

The Kansas Association of Criminal Defense Lawyers is a 350-person organization dedicated to justice and due process for those accused of crimes. For the reasons set forth below, **KACDL is opposed to Senate Bill 374 which would substantially alter the DUI laws in Kansas.**

1. Criminalizing the Refusal of a Breath Test

Section 12 of SB 374 would amend KSA 8-1025, which was recently struck down by the Kansas Supreme Court as unconstitutional in State v. Ryce, 303 Kan. 899 (2016), *affirmed on rehearing*, 306 Kan. 682 (2017). I testified before this committee in 2011 as an opponent to criminalizing refusals, in part, because of the constitutional problems with the bill. It did not pass that year, but became law in 2012 without much opportunity for opposition. As a result, a 4th Amendment right to refuse consent to a test was enshrined in Kansas law in Ryce. The amendments in SB 374 are an attempt to get around the 4th Amendment and statutory issues. However, the 4th Amendment is not the only problem with criminalizing breath test refusals. The Supreme Court in Ryce said, because they were striking down the statute as facially unconstitutional for 4th Amendment reasons, that it was not considering (1) whether the statute violates 5th Amendment rights, (2) whether Miranda warnings have to be given prior to requesting a test, nor (3) whether the statute was unconstitutional under the doctrine of unconstitutional conditions. Ryce, 306 Kan. at pp. 963-964. These constitutional problems with criminalizing refusals loom just as large as the 4th Amendment problem once did, as well as issues concerning the 6th Amendment and other constitutional and statutory rights which are violated by this statute. KSA 8-1025 should be repealed. Attempting to amend this statute will only provoke additional litigation and extend and exacerbate the uncertainty in Kansas DUI law.

Additionally, KSA 8-1025 was aimed at recidivists who had prior DUI charges and refused a test in order to “game the system”. SB 374 would eliminate the requirement of a predicate DUI diversion, conviction or refusal and apply the crime of a refusing a breath test to first-time offenders who may refuse due to inexperience with the legal system or some other reason. Thus, the original intent of the statute has been lost.

2. *Criminalizing driving with Any Measureable Amount of Drugs*

SB 374 contains both criminal and driver's license penalties for driving a car with any "measureable amount" of a drug or its "pharmacologically active" metabolite. This aspect of the bill seeks to punish the ingestion/bodily possession of drugs on a previous date, as opposed to prevent driving under the influence of drugs which is what our concern should be. The bill fails to take into account the legal use of some drugs without a prescription, and fails to take into account people who might obtain or ingest a drug legally in another state in the US (recreational use of marijuana is legal in 9 states and Washington, D.C), in Mexico (where no prescription is needed), or Canada (where marijuana is legal) or any other country. Finally, who is it that determines whether a metabolite is "pharmacologically active"? This would be the subject of endless debate and litigation. Whether any one of the scores of potential metabolites is pharmacologically active, a concept which is very loosely defined, is an enormous Pandora's box that the legislature should not open.

3. *The Implied Consent Advisories*

Section 6 of SB 374 materially changes the "Implied Consent Advisories" which are to be given to drivers before a test is requested and, in fact, essentially eliminates it in criminal cases. That would be terrible policy. Kansas appellate courts have made it clear that the implied consent advisories are given to ensure that Kansas drivers are made aware of their statutory rights and responsibilities, and so that the driver can make an informed choice about whether to submit to a test or not. In fact, it was the Kansas Supreme Court in Standish v. Kansas Dept. of Revenue, 235 Kan. 900 (1984) that first set out several of the implied consent advisories that were later incorporated into our statute. The implied consent advisories are necessary to afford Due Process to drivers and encourage an informed decision to consent to a test with knowledge of the consequences for failing to do so.

4. *Enhancement of DUI Penalties Based on Other States' Dissimilar Laws*

Finally, Section 1 of SB 374 attempts to incorporate the DUI laws from all of the 50 states to act as predicate offenses to enhance the penalties for a DUI in Kansas. Many states have vastly different DUI statutes than does Kansas. In Wisconsin, a DUI is a civil offense and not a criminal offense. In some states, like New Jersey, there is no option for a jury trial in a DUI case. Thus, cases which were not proven beyond a reasonable doubt, or in which there was no Due Process right to a jury trial, and criminal offenses not substantially similar the DUI offense in Kansas would be used to enhance the penalties for a subsequent Kansas DUI. It goes without saying that statutes change, and the interpretation of statutes by courts change. As we have seen, DUI statutes also occasionally get struck down as unconstitutional. It will be nearly impossible to keep up with such changes and unwieldy to attempt to apply different statutes from various states and account for the yearly changes to such statutes. This is entirely impractical, especially given the tiny number of people which this complicated scheme would actually impact. There is currently nothing stopping a judge in a DUI case from considering prior convictions for any crime from other states in fashioning a sentence for a

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subsequent Kansas DUI conviction.

For all of these reasons, SB 374 should be rejected by this committee. Thank you for your consideration of this testimony.

Respectfully submitted



Jay Norton
jay@nortonhare.com
(913) 906-9633
On behalf of KACDL