

MINUTES

KANSAS CRIMINAL CODE RECODIFICATION COMMISSION

April 16, 2008

Kansas Judicial Center, Court of Appeals Courtroom

Members Present

Prof. Tom Stacy, Chairperson
Ed Klumpp, Co-Chairperson
Senator John Vratil
Representative Lance Kinzer
Representative Paul Davis
Representative Jan Pauls
Judge Christel Marquardt
Ms. Jackie Spradling
Ms. Debra Wilson
Mr. Steve Opat
Mr. Tim Madden

Staff Present

Judge John W. White, Reporter
Brett Watson, Staff Attorney
Jill Wolters, Office of the Revisor of Statutes
Jerry Ann Donaldson, Kansas Legislative Research Department
Athena Andaya, Kansas Legislative Research Department
Jason Thompson, Office of the Revisor of Statutes

Others Present

Helen Pedigo, Kansas Sentencing Commission
Scott Schultz, Securities Commission

Judge White called the meeting to order at 9:30. He asked if the members preferred to receive materials via email or regular mail. He passed around a sign up sheet for those who wished to have materials mailed to them.

Judge White turned to the minutes from the previous meetings. *Prof. Stacy moved to adopt the November, 2007 minutes. The motion was seconded and passed unanimously. Prof. Stacy moved to adopt the January, 2008 minutes. The motion was seconded and passed unanimously.*

Prof. Stacy moved to adopt the February, 2008 minutes. The motion was seconded and passed unanimously.

Tim Madden gave a report from the fundraising committee. He reported that letters had been sent to the Lambe Foundation and the Pew Trust. However, the Lambe foundation called and informed the Commission that it does not make donations to government entities. Mr. Madden said he had not yet heard anything from the Pew Trust. He also reported that the committee planned to send a letter of inquiry to the Jett Foundation.

Mr. Klumpp addressed the Commission regarding the budget. He reported that there was to be a surplus of about 8-10 thousand dollars at the end of the year and that it would carry over to the next year's budget if the Governor signed the relevant legislation. The additional funds would be helpful in conducting subcommittee work. Mr. Klumpp suggested it might be useful to travel around the state and speak to prosecutors, judges, and defense attorneys about the Commission's work.

Ms. Spradling mentioned that the state convention of county and district attorneys meets in June and October and it would be good to make a presentation before that group. She said the next meeting would be in Topeka. Mr. Klumpp said that it would be better to have a meaningful amount of work done by that point so that the Commission could elicit feedback.

On the drug code revisions, Senate Bill 640, Mr. Klumpp noted that the legislation passed the Senate but it did not pass the House due to time constraints and it would not pass during the current legislative session. Senator Vratil noted that his committee and the full Senate gave the bill immediate consideration and if it was reintroduced in the next session it would likely pass. Ms. Wolters noted that some of the references in the bill had to be changed and there was not enough time to check all the references.

Senator Vratil said that, although the bill did not pass, it was a good reflection upon the progress of the Commission. On substantive policy changes, he recommended drafting separate bills so that they could be considered by the Legislature.

Prof. Stacy thanked Senator Vratil for his attention on the bill. He noted that Tom Drees addressed the Commission at the last meeting and they agreed to coordinate the Commission's work with the Kansas Sentencing Commission (KSC) Proportionality Subcommittee's work so there could be a united front on policy recommendations.

The discussion turned to committees. Prof. Stacy suggested establishing a committee to deal primarily with non-substantive revisions of the code. He suggested the Commission should work on two tracks, the first being recodification, the second being policy recommendations. The committee could provide feedback for Judge White and allow the recodification work to move more quickly. The committee would meet once per month and would, because of its size, more easily achieve a quorum. Prof. Stacy asked if there were any objections to this procedure. There were none.

Prof. Stacy said he would appoint a subcommittee in the next few days. He asked Commission members to let him know if they wanted or did not want to be on the committee. Senator Vratil pointed out that the Commission members should be prepared to show some amount of deference to the decisions of this committee, as the point of such a group is to divide the labor of the Commission. He also recognized that no member would forfeit their right to object or debate certain provisions, but the primary focus on the code revisions should take place in the committee.

Representative Pauls said that the people on the committee should be focused on details and she would volunteer to be a member.

Judge White moved the discussion to the KSC report. He called on Helen Pedigo. She explained that the most significant recommendation was merging the drug and non-drug grids. The Proportionality Subcommittee looked at Vera study and saw a large number of downward departures so it made changes regarding drug severity levels. Proportionality also adopted a proposal on drug quantities and decided to defer to the Commission on determining what those quantity levels should be. Proportionality decided to establish four distribution offenses based on four separate quantity levels. Proportionality voted to change the definition of manufacture to remove repackaging and to remove the recidivism provisions from the drug offenses.

Ms. Pedigo also noted that Proportionality voted to amend the "1,000 feet of school property" enhancement to a provision based on the actual presence of a minor.

Mr. Klumpp pointed out that was the approach taken by many states rather than use distance from a school.

Representative Kinzer asked if the school and minor provisions were mutually exclusive. He asked if drugs were distributed or manufactured within 1,000 feet of a school, did that not create an additional social harm because it creates a dangerous environment? Prof. Stacy noted that Mr. Drees told the Commission that the punishment was disproportionate because much of the cities and towns of the state are within the radius of school property and the KBI arranges controlled buys within the radius to ensure the enhancement.

Mr. Madden commented that he would like to see Senate Bill 123 expanded to those offenders who have some history of drug sales. Ms. Pedigo said that was something Proportionality wanted to consider.

Mr. Opat asked how the law would define personal use possession. He said that if possession remained a misdemeanor then the penalty would be disproportionately low.

On the issue of renaming border boxes Mr. Madden said that he preferred that term. The phrase "presumptive imprisonment box" did not seem right because judges give probation 80 percent of the time when the sentence falls into that box. Mr. Klumpp pointed out that the name change was meant to prompt judges to consider that the presumed sentence in such cases is imprisonment and emphasize that probation is not the presumed punishment. Mr. Madden suggested that probations are granted because they are warranted and not because of the name of the box.

Judge White pointed out that there are three circumstance when probation can be granted. The first two are restrictive, but the third is a catch-all provision that opens the floodgates. Mr. Klumpp said that is why Proportionality recommended the name change, i.e. to reinforce the legislative intent.

Mr. Madden said that the public would likely see probations as departures and the current rate of probations are not departures. Mr. Klumpp said that the name change might cause judges to pause and avoid giving a probation sentence when the defendant does not deserve it.

Representative Davis said that he was discomforted by the prospect of putting judges into a difficult position and making the assumption that the large number of probations are bad decisions. He said that the name change might lead to public disapproval of sentencing decisions and adversely effect the judiciary. Senator Vratil countered that current law is that the sentences should presumptively be imprisonment but the statistics suggest that the presumptive sentence is probation.

Judge White said that the name change does not pressure the judge, but rather, it puts the pressure on the prosecutor and defense counsel. They have the responsibility for making a case for either disposition.

*Prof. Stacy moved to adopt the name change. The motion was seconded and **passed** on a divided vote.* Representative Pauls asked if there should be a finding on the record. Ms. Pedigo pointed out that current law requires a finding.

On the proposal to combined the two sentencing grids, Prof. Stacy pointed out that the Commission should first vote on whether it should adopt the general principle of merger, then consider the specifics later.

Representative Kinzer asked if anyone knew why there were two grids. Judge White said that the 3Rs committee asked that question and nobody knew the answer.

Representative Pauls said there were two because the drug sentences were long and the Legislature did not want them to effect the other non-drug sentences. Now the situation is reversed, the non-drug sentences are generally longer.

Senator Vratil asked what the bed space impact would be with merger. Ms. Pedigo said that without DUI changes, in year one the impact would be approximately 200 beds and similar number in year 10. The drug changes would lessens the need for beds and that would be made up with other recommendations.

*Prof. Stacy moved to adopt the principle of merging the two grids. The motion was seconded and **passed unanimously**.*

Mr. Klumpp said that many jurisdictions have similar provisions in other venues such as parks or daycare centers, but the problem is that within a city everything is within the radius of those things. He said the real question is whether children are present.

Ms. Spradling asked how presence of a minor would be defined. Senator Vratil said that other states use that phrase and there should be a case law definition.

*Representative Pauls moved to amend the "1,000 feet of school property" to "to a minor of in the presence of a minor" and increase the enhancement one severity level. The motion was seconded and **passed** on a divided vote. Representative Kinzer, Mr. Opat, and Ms. Spradling noted their objection.*

Mr. Klumpp asked the Commission members if they endorsed the general policy of aggravating the distribution offense based on drug quantity. Prof. Stacy stated that he believed the offense could be divided into two levels based on the statements of KBI agent Brandau. He noted that the largest distributors would likely go into the federal criminal justice system.

Senator Vratil said that it was sensible to have four levels to maintain proportionality.

Mr. Klumpp said that there is discussion at the federal level on cutting back on some drug cases.

Representative Kinzer endorsed the quantity scheme but cautioned the Commission that there must be a sensible way of dividing the quantities and it should not adopt an arbitrary system. He said that the Commission must articulate why the levels are set where they are.

Mr. Watson stated that he spend a considerable amount of time speaking with law enforcement officers and other experts to determine what the appropriate quantity levels should be.

Representative Kinzer pointed out that the drug trade may change in relation to the code and that should be taken into account. Representative Pauls suggested delegating authority to an agency, such as the KBI, the authority to establish the quantity thresholds. Mr. Klumpp agreed that might be a good idea for some of the less common drugs.

Prof. Stacy moved to adopt the policy of aggravating drug distribution into four severity levels based on quantity. The motion was seconded and passed unanimously.

Mr. Klumpp moved to adopt the recommendation regarding eliminating the recidivism provisions from the drug offenses and designating drug offenses as person offenses. The motion was seconded. Representative Kinzer asked the prosecutors present if there was an advantage to the current system. Mr. Opat responded that it was hard to say, but in theory the repeat offenders receive a more sever punishment. Mr. Klumpp pointed out that under the proposal possession would still be treated as a felony upon a subsequent conviction. The motion passed unanimously.

Mr. Klumpp stated that more research should be done on how to deal with the manufacturing offense. He noted the high rate of downward departures and said that if the sentence ranges are decreased across the board it would create a sentence in accord with what most offenders receive, but it would give a break to other offenders who get the guideline sentence. He suggested speaking with law enforcement and prosecutors to learn more.

Prof. Stacy suggested dividing the manufacturing offense in some way, based on quantity or some other factor. Senator Vratil indicated that he was generally supportive of that approach if it was feasible, but it is unclear whether the offense can be divided properly.

Mr. Klumpp moved to conduct more research on how to revise the manufacturing offense. The motion was seconded and passed unanimously.

Mr. Klumpp explained that Proportionality proposed to uniform dollar thresholds for all property offenses. Senator Vratil noted that the disadvantage to a uniform threshold is that some offenses are inherently different and deserve different punishment. He pointed to Medicaid fraud and burglary as examples. He asked if the proposal would invite courts to engage in more upward departures.

Prof. Stacy agreed and cited the example of securities fraud which is treated more harshly because it undermines confidence in the market and has multiple victims. He also pointed out that offenses like embezzlement that are hard to detect deserve greater punishment in order to deter.

Senator Vratil moved to adopt the dollar thresholds in the Proportionality report but not the accompanying severity levels. The motion was seconded and passed unanimously.

Judge White began discussion of the property crimes materials. He proposed creating a definition section with a definition of "dwelling" and moving the definition of "services" and "tampering." *Prof. Stacy moved to adopt the definitions section. The motion was seconded and passed unanimously.*

37-101. Judge White noted that theft and theft of services had been combined in this section. *Judge Marquardt moved to adopt the section. The motion was seconded and passed unanimously.*

- 37-102. Judge White suggested that this section could also be incorporated into the theft statute. If that revision were made then value would be a factor in theft of mislaid property. Mr. Opat said that would be a substantive change. He pointed to an example of a Brooklyn bank which placed 5 million dollars into the wrong account. The account holder spent two million of it before the bank discovered its mistake. The charge in that case was grand larceny, but Mr. Opat said it seemed to fall under Kansas's theft of mislaid property.

Judge White said that the Commission should look at the Model Penal Code which includes delivery by mistake as a kind of theft. *Judge Marquardt moved to adopt two recommendations, (1) adding a value element to the section and (2) adding a delivery by mistake element. The motion was seconded and passed unanimously.*

Mr. Klumpp moved to adopt the section. The motion was seconded and passed unanimously.

- 37-103. Judge White noted there was no significant change, but suggested the Commission considered adding a value element to this offense. Mr. Opat noted that the Commission discussed a value element at a previous meeting and most were against it. There was a question regarding what value to use, the value of the property or the harm from the deprivation. Prof. Stacy suggested that a value element would lead to an unnecessary evidentiary burden. *Mr. Opat moved to adopt the section without a value element. The motion was seconded and passed unanimously.*

- 37-104. Judge White noted that the section contained language regarding a "storage container" as well as a fuel tank to cover instances where the thief does not pump gas directly into their car. He asked if that was a substantive change. Senator Vratil said that he did not consider that a substantive change because a tank is a tank.

Judge White proposed to remove the administrative material dealing with drivers licenses and move it to Chapter 8. Representative Pauls pointed out that there are several criminal and administrative provisions commingled in Chapter 8 and Chapter 21. Judge White replied that the drivers license material had nothing to do with a criminal penalty.

Mr. Opat asked why there was such a section in the code at all and why could this issue not be addressed by the general theft statute. Mr. Klumpp pointed out that separate sections are often necessary to alert the administrative agencies to take action. In this case, he said, there had to be some indication that motor fuel was stolen to trigger action on a drivers license. Senator Vratil suggested creating a special subsection in the theft offense. Judge White noted that this would subject motor fuel theft to a valuation, like other property. *Prof. Stacy moved to recommend eliminating the section, creating a subsection for motor fuel in the theft statute, and moving the drivers license material to Chapter 8. The motion was seconded and passed unanimously.*

37-105. Judge White noted that there were minor changes to subsection (d). *Mr. Opat moved to move 37-104(c) to 37-105(e). The motion was seconded and passed unanimously. Representative Kinzer moved to adopt the section. The motion was seconded and passed unanimously.*

37-106. Judge White noted that all the culpability terms may be unnecessary. He also suggested that the term “prior to purchase” may be unnecessary. Mr. Klumpp explained that the phrase was necessary to allow prosecution for shoplifting offenses that are committed by teams or where the offense is not complete. Representative Pauls noted that there was strong support for the law in the Legislature and asked if the phrase was a substantial problem. Mr. Opat suggested that removal of a theft detection device prior to purchase could be prima facie evidence of intent. *He moved to recommend moving subsection (4) to the prima facie statute. The motion was seconded and passed unanimously. Mr. Klumpp moved to adopt the section. The motion was seconded and passed unanimously.*

37-107 & 37-108. Judge White explained that he decided it was not necessary to have separate sections for these provisions. *Representative Pauls moved to adopt both sections combined into one. The motion was seconded and passed unanimously.*

Judge White noted that the next meeting would be May 28. The meeting was adjourned at 3:30 p.m.

Submitted by Brett Watson, Staff Attorney

Approved by Commission on:

May 28, 2008
(date)