Approved January 24, 1983
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Elwaine F. Pomeroy at
Chairperson

10:00 a.m./~~p.m.~~ on January 21, 19 83 in room 514-S of the Capitol.

All members ~~were~~ present ~~except~~ were: Senators Pomeroy, Winter, Burke, Feleciano, Gaar, Gaines, Hein, Hess, Mulich, Steineger and Werts.

Committee staff present: Mary Torrence, Revisor of Statutes
Mike Heim, Legislative Research Department
Mark Burghart, Legislative Research Department

Conferees appearing before the committee:

Jim Clark, Kansas County and District Attorneys Association
Nick A. Tomasic, Wyandotte County District Attorney
Marjorie Van Buren, Office of the Judicial Administrator
John Brookens, Kansas Bar Association
Fred Allen, Kansas Association of Counties
Sister Dolores Brinkel, Criminal Justice Ministry

Senator Gaines moved that the minutes of January 19 and 20, 1983, be approved; Senator Werts seconded the motion, and the motion carried.

Senate Bill 25 - Victim's input on criminal defendant's release on bond.

Senator Steineger, the sponsor of the bill, explained the purposes of the bill.

Jim Clark stated his association supports the bill, but has some suggested amendments (See Attachments #1 and #2). Mr. Clark explained the suggested amendments to the committee. He recognized that notification to the victim or family is important, but a number of members of his association had contacted his office inquiring why a bill would specify that the victim had to be notified when the prosecutor was not being notified. Committee discussion with him followed.

Nick A. Tomasic testified in support of the concept contained in the bill; a copy of his statement is attached (See Attachment #3). He stated there might be serious constitutional questions, and urged the committee be careful in the drafting of such a proposal. He suggested that it is very important for proper information to be obtained by someone so that full information is presented to the judge when the judge sets the amount of the bond.

Marjorie Van Buren testified that the Office of Judicial Administrator feels it would be more appropriate that notice be given by either the sheriff or the prosecutor. She stated she is also concerned with the prospect of adding one more job to an already over-burdened court staff. She also expressed concern with the constitutionality question mentioned by Mr. Tomasic.

John Brookens testified that the bar association is in support of the concept of the bill, and generally supports the statements of Mr. Tomasic. He suggested an amendment to include the crime of aggravated sodomy along with the crime of rape. He stated the bar association supports the suggestion that law enforcement personnel supply the proper information to the judge. He also discussed the provisions of the Kansas Bill of Rights, and urged the committee to consider whether an amendment to the state constitution might be necessary.

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./~~p.m.~~ on January 21, 1983

SB 25 continued

Fred Allen testified that counties have no argument with the concept of the bill, but are concerned with the potential fiscal impact of the bill. He stated that the bill could result in the holding of a defendant an additional three to five days prior to the release of the defendant, in order to complete the notification process. In response to a question, he stated that although it would be perhaps a good idea to require law enforcement personnel to obtain additional information prior to the setting of the bond, there would be a problem of additional expense involved.

Sister Dolores Brinkel testified that her group supports the rights of victims to know when the accused is being released on bond. In response to potential fiscal impacts of the bill, she suggested a program that had been implemented in the Chicago area, where volunteers assist in obtaining the necessary verfication of employment and similar background information, and also suggested that volunteers could be used to notify the victims. This concluded the hearings on SB 25.

The chairman explained a request for a committee bill which would make mandatory the repayment of costs incurred when an attorney is appointed for indigent defendants; presently such a provision is permissive, but the bill would make it mandatory, unless the court found that there would be undue financial burden on the defendant. Senator Gaines moved that such a bill be introduced; Senator Mulich seconded the motion, and the motion carried.

The chairman asked if committee members or anyone present wished to request the introduction of a committee bill; there were no such requests.

The meeting adjourned.

1/21/83

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Jeff Sharp		Sen. Steineger
Larry Homes		"
Marjorie Van Buren		Office Jud. Adm.
[illegible] Brookens		Kansas Bar assn
Fred Allen		Ks. Assoc. of Counties
Sandra Johnson		KTWU
Gerry Cullen		KTWU
Carol Lester		KTWU
Ben Bauman		KTWU
Bryan Krantz		ACLU
Manuel Barahan		Real Estate
DAVID CALOVICH		KIN
Annette Badwey		Sen. Gaines
NICK A TOMASIC		WY CO. D.A.
M. Hawver		Topeka Cap-Journal
Sister Dolores Brinkel		Criminal Justice Ministry
Scott E. Moran		Sen. WINTER
Bert Cantwell		Gov. Carlin

1-21-83

#1

SUGGESTED AMENDMENTS

TO

SENATE BILL NO. 25

1) Line 0041. Insert:

"(c) place restrictions on the defendant prohibiting the intimidation of a witness or victim."

"Intimidation is the preventing or dissuading, or attempting to prevent or dissuade any witness from attending or giving testimony at any court proceeding involving the defendant."

"Victim means any individual against whom any crime has been committed."

"Witness means any individual who is named on any criminal complaint, indictment or information which has been filed against the defendant."

2) Line 0096. Insert:

"Section 2. K.S.A. 22-2804 is hereby amended to read as follows: 22-2804 (1) A person who has been convicted of a crime and is either awaiting sentence or has filed a notice of appeal may be released by the district court under the conditions provided in K.S.A. 22-2802 if the court or judge finds that the conditions of release will (1) reasonably assure that the person will not flee, ~~or~~ pose a danger to any other person or to the community, *and is not likely to commit an additional crime or crimes."*

Atch. 1

1-21-83

#2

History: L. 1970, ch. 129, § 22-2802; L. 1976, ch. 163, § 6; Jan. 10, 1977.

Source or prior law:

62-613, 62-620, 62-628, 62-630, 62-1206, 62-1207, 62-1211, 62-1217.

Judicial Council, 1969: Adapted from 18 U.S.C. 3146.

A wide range of discretion to impose alternative pretrial release conditions is conferred upon committing magistrate. While in every case an appearance bond will be executed by the accused as a condition of release, the requirement of sureties may be dispensed with when it is determined that other conditions will assure the presence of the accused when needed.

It should be noted that the failure of the accused to appear is made a crime by section 21-3813, as amended. This article draws heavily on the Federal Bail Reform Act of 1966 (18 U.S.C. secs. 3141-3152) and the implementing rule (Rule 46, F.R.Cr.P.).

Cross References to Related Sections:

Failure to appear after release on appearance bond, see 22-2615.

Law Review and Bar Journal References:

Money bail as criteria for pre-trial release, symposium on criminal procedure, Robert L. Looney, 18 K.L.R. 715, 719, 720, 721, 722 (1970).

"Constitutional Law: Equal Protection for Indigents in the Bail System," Michael K. Johnston, 17 W.L.J. 648, 656 (1978).

22-2803. Review of conditions of release. A person who remains in custody after review of such person's application pursuant to subsection (6) or (7) of K.S.A. 22-2802, as amended, by a district magistrate judge, may apply to a district judge or associate district judge of the judicial district in which the charge is pending to modify the order fixing conditions of release. Such motion shall be determined promptly.

History: L. 1970, ch. 129, § 22-2803; L. 1976, ch. 163, § 7; Jan. 10, 1977.

Judicial Council, 1969: Adapted from 18 U.S.C. 3147 (*a*).

Law Review and Bar Journal References:

Review of release decision, symposium on criminal procedure, Robert L. Looney, 18 K.L.R. 715, 722 (1970).

22-2804. Release after conviction. (1) A person who has been convicted of a crime and is either awaiting sentence or has filed a notice of appeal may be released by the district court under the conditions provided in K.S.A. 22-2802 if the court or judge finds that the conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community.

(2) A person who has been convicted of a crime and has filed a notice of appeal to the supreme court or court of appeals shall make his or her application to be released to the court whose judgment is appealed from or to a judge thereof. If an application to such court or judge has been made and denied or action on the application did not afford the applicant the relief to which said applicant considers himself or herself entitled, such person may make an application for release to the appellate court. An application to the appellate court or a justice or judge thereof shall state the disposition of the application made by the district court or judge. Any application made under this subsection shall be heard after reasonable notice to the prosecuting attorney. Such notice shall be given not less than one (1) day prior to the hearing. Any appearance bond which may be required under this subsection shall be filed in the court from which the appeal was taken.

(3) A person who has been convicted of a crime before a district magistrate judge may, upon taking an appeal to a district judge or associate district judge, apply to be released as provided herein. If the application is made before the case has been referred to the administrative judge for assignment, the conditions of release shall be determined by the district magistrate judge from whom the appeal is taken. If the application is made thereafter, the administrative judge or the district judge or associate district judge to whom the case has been assigned shall determine the conditions of release. Any appearance bond which may be required under this subsection shall be deposited in the court where it is fixed.

History: L. 1970, ch. 129, § 22-2804; L. 1971, ch. 115, § 1; L. 1976, ch. 163, § 8; L. 1977, ch. 112, § 6; May 14.

Source or prior law:

62-619.

Judicial Council, 1969: 18 U.S.C. 3148 supplies the point of beginning for this proposal. However, the section has been expanded in drafting the proposal.

CASE ANNOTATIONS

1. Subsection (3) compared with 22-3609 and 13-611 which are construed to be complementary statutes. City of Overland Park v. Nikias, 209 K. 643, 647, 498 P.2d 56.

2. Mentioned in holding that a defendant is to be considered convicted of a crime even though not yet sentenced. State v. Holmes, 222 K. 212, 214, 563 P. 2d 480.

22-2805. Release of material witness. If it appears by affidavit that the testimony

Atch. 2

1-21-83

Office of The
DISTRICT ATTORNEY
Of The 29th Judicial District of Kansas
Wyandotte County Court House, First Floor
710 N. 7th Kansas City, Kansas 66101
(913) 573-2851

DISTRICT ATTORNEY
Nick A. Tomasic

#3

B A I L B O N D S

K.S.A. 22-2801 provides:

"Declaration of Purpose. The purpose of this article is to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges or to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest."

Attorney General Opinion 78-284 (Date: August 28, 1978) states:

"The primary purpose of bail is not to beef up public revenues or to punish the bail, or surety. (State v. Wynne, 356 Mo. 1095, 204 SW2d 927). Rather it is to permit a person accused of crime, but whose guilt has not been established, to remain at large pending trial while ensuring so far as possible, that he will be present in court to meet the charges directed against him. (In re Application of Shetsky for Return of Bail Money, 239 Minn. 463, 60 N.W. 2d 40). . .

Upon entering into a recognizance the defendant, as principal, is in effect released to the surety and is so far placed in the hands of the latter that he may be taken into custody by the surety and surrendered to the court. (K.S.A. 1971 Supp. 22-2809; Craig v. Commonwealth, 228 Ky. 157, 155 S.W.2d 768)" State v. Midland, supra, p. 889.

Atch. 3

The Constitution of the State of Kansas, Article Nine, provides:

> "9. Bail. All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."

The Kansas Constitution and the applicable statutes specifically provide that all persons, except those charged with capital offenses, are guaranteed the right to bail in an amount which, in the opinion of the magistrate, would assure the presence of the defendant at the next court hearing. Nowhere does the constitution or the statutes state that the welfare of the community or the victims should be considered as a factor. A reading of the entire law reveals repeated reference to the words "conditioned upon the appearance of the person before a magistrate when ordered."

There might be serious constitutional questions concerning the detention of someone prior to the commission of a crime. Section 10 of Senate Bill Number 25 provides that twenty-four hours notice be given to the victims and/or victim's family when certain crimes are charged and before bail is set. I do not know if there is any authority to allow the detention of a person for twenty-four hours before bail is set. K.S.A. 22-2901 entitled "Appearance Before a Magistrate" provides that after an arrest is made, the person arrested should be taken, without unnecessary delay, before the magistrate. Subsection 3 provides that the magistrate shall fix the terms and conditions of the appearance bond upon which the defendant may be released.

The Kansas law fails to provide some uniform method by which necessary personal information on the accused is made available to the magistrate for his consideration.

Robert L. Looney, writing in the Kansas Law Review, Volume 18, beginning at page 715 entitled "Pre-trial Release" and following at page 722 discusses a "Pre-first Appearance Inquiry." He goes on to state that there should be a specific provision stating exactly who is to make the requisite personal information on the defendant available to the magistrate, and he emphasizes that the information must be made available before the defendant's first appearance in court. At page 723, he states that the jailer or someone with the Police Department could very easily verify the

background information necessary to present it to the magistrate so that an informed decision can be made. I would suggest that the probation office of the local court system be assigned the responsibility of doing the Pre-first Appearance Investigation. At page 723 of the Law Review, the author states that the entire interview and verification process should take less than one hour and the end results would be that the magistrate would be more likely to find suitable conditions for the release of the invidivudal.

Attached you will find Exhibit A which is a copy of the ABA Standard dealing with the subject matter, Pre-first Appearance Inquiry. This standard might be worked into the concept as proposed in Section 10 of Senate Bill Number 25.

The concept of preventive detention raises a constitutional question. The magistrate must set a bail amount at the first appearance. There is no authority now to allow him to continue the case for twenty-four hours. Under the ABA Standard system, the court would be allowed to consider not only the probability of the defendant's appearance for the next court hearing, but also his possible danger to the community in imposing the conditions of the release. What might be a viable alternative and acceptable to all parties would be a provision that would require that after an arrest is made pursuant to a warrant and prior to the first court appearance, the arrested person would be interviewed by members of the Probation Office to obtain the necessary information as set out in the ABA Standard which is attached. This probation officer could contact the victims by telephone, if possible, or by any other means and report the attitude of the victim to the court so that upon the first appearance, the court will have a sufficient amount of evidence upon which to base a decision.

PROCEDURE:

(1) Crime occurs.

(2) Warrant issued.

(3) Suspect arrested.

(4) Suspect booked - photographs and fingerprints taken. Other information required can be gathered either by the sheriff's office or the probation office.

(5) Taken for first time before the magistrate. Necessary information is furnished to the magistrate.

(6) Bond set.

EXHIBIT "A"

KANSAS CODE

No comparable code provision.

COMMENT

Kansas has no particular provisions which comply with this Standard. However, see K.S.A. 1971 Supp. 22-2801 and 22-2802 cited at 1.1 and 1.2 respectively supra for the Kansas policy on pretrial release.

ABA STANDARD

4.5 PRE-FIRST APPEARANCE INQUIRY.

(a) IN ALL CASES IN WHICH THE DEFENDANT IS IN CUSTODY AND THE MAXIMUM PENALTY EXCEEDS ONE YEAR, AN INQUIRY INTO THE FACTS RELEVANT TO PRETRIAL RELEASE SHOULD BE CONDUCTED PRIOR TO OR CONTEMPORANEOUS WITH THE DEFENDANT'S FIRST APPEARANCE. HOWEVER, NO SUCH INQUIRY NEED BE CONDUCTED IF THE PROSECUTION ADVISES THAT IT DOES NOT OPPOSE RELEASE ON ORDER TO APPEAR OR ON HIS OWN RECOGNIZANCE.

(b) THE INQUIRY SHOULD BE UNDERTAKEN BY AN INDEPENDENT AGENCY OR BY AN ARM OF THE COURT ALTHOUGH, IF THESE MEANS ARE IMPRACTICABLE, THE DUTY MAY BE ASSIGNED TO THE PUBLIC OR OTHER DEFENDER AGENCY, TO THE PROSECUTING ATTORNEY, OR TO A LAW ENFORCEMENT AGENCY.

(c) IN APPROPRIATE CASES, THE INQUIRY MAY BE CONDUCTED IN OPEN COURT. INQUIRY OF THE DEFENDANT SHOULD CAREFULLY EXCLUDE QUESTIONS CONCERNING THE DETAILS OF THE CURRENT CHARGE.

(d) THE INQUIRY SHOULD BE EXPLORATORY AND MAY INCLUDE SUCH FACTORS AS:

(i) THE DEFENDANT'S EMPLOYMENT STATUS AND HISTORY AND HIS FINANCIAL CONDITION;

(ii) THE NATURE AND EXTENT OF HIS FAMILY RELATIONSHIPS;

(iii) HIS PAST AND PRESENT RESIDENCES;

(iv) HIS CHARACTER AND REPUTATION;

(v) NAMES OF PERSONS WHO AGREE TO ASSIST HIM IN ATTENDING COURT AT THE PROPER TIME;

(vi) THE NATURE OF THE CURRENT CHARGE AND ANY MITIGATING OR AGGRAVATING FACTORS THAT MAY BEAR ON THE LIKELIHOOD OF CONVICTION AND THE POSSIBLE PENALTY;

(vii) THE DEFENDANT'S PRIOR CRIMINAL RECORD, IF ANY AND, IF HE PREVIOUSLY HAS BEEN RELEASED PENDING TRIAL, WHETHER HE APPEARED AS REQUIRED;

(viii) ANY FACTS INDICATING THE POSSIBILITY OF VIOLATIONS OF LAW IF THE DEFENDANT IS RELEASED WITHOUT RESTRICTIONS; AND

(ix) ANY OTHER FACTS TENDING TO INDICATE THAT THE DEFENDANT HAS STRONG TIES TO THE COMMUNITY AND IS NOT LIKELY TO FLEE THE JURISDICTION.

(e) WHERE APPROPRIATE, THE INQUIRING AGENCY SHOULD MAKE RECOMMENDATIONS TO THE JUDICIAL OFFICER CONCERNING THE CONDITIONS, IF ANY, WHICH SHOULD BE IMPOSED ON THE DEFENDANT'S RELEASE. THE RESULTS OF THE INQUIRY AND THE RECOMMENDATIONS SHOULD BE MADE KNOWN TO ALL PARTIES AT THE FIRST APPEARANCE.