

MINUTES OF THE SENATE COMMITTEE ON JUDICIARYThe meeting was called to order by Senator Elwaine F. Pomeroy at  
Chairperson10:00 a.m./p.m. on March 7, 1983 in room 514-S of the Capitol.All members were present ~~except~~: 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

Conferees appearing before the committee:

Senate Bill 258 - Wrongful life or birth actions prohibited.The chairman requested the committee to reconsider action taken on the bill. Senator Feleciano moved to reconsider the action taken on the bill, that the bill be referred back to committee; Senator Werts seconded the motion, and the motion carried.Senate Bill 232 - Treatment act for drug abusers.The chairman reviewed the bill and discussed requesting an interim study. Following committee discussion, Senator Feleciano moved to report the bill favorably; Senator Mulich seconded the motion. During committee discussion, a committee member inquired about the fiscal note on the bill. The chairman requested staff to call Dr. Phillipps to ask about a fiscal note. The motion to report the bill favorably was withdrawn.Senate Bill 113 - Forfeiture of property used for manufacture or to facilitate the sale of controlled substances.The chairman explained the bill. Senator Steineger moved to report the bill adversely; Senator Mulich seconded the motion, and the motion carried.Senate Bill 170 - Penalties established for failure of persons to report abuse or neglect of residents of certain institutions.The chairman reviewed the bill. Following committee discussion, Senator Gaar moved to amend the bill in line 51 by striking "and willfully"; Senator Winter seconded the motion, and the motion carried. Senator Feleciano made a conceptual motion to amend the bill by including aides as part of the licensed people listed to have reasonable cause to report abuse; Senator Winter seconded the motion. Considerable committee discussion followed. Senator Winter made a substitute motion to amend the bill to change the penalty from class B to class C misdemeanor; Senator Feleciano seconded the motion, and the motion carried. Senator Feleciano moved to amend the bill to include aides as part of the licensed people listed in the bill; Senator Winter seconded the motion, and the motion carried. Senator Winter moved to report the bill favorably as amended; Senator Feleciano seconded the motion. With five voting in favor and four opposed, the motion carried. The chairman did not vote.Senate Bill 141 - Driving under the influence of alcohol or drugs.A copy of a memorandum prepared by a staff member showing persons or organizations supporting the bill, and a list of suggested amendments and problem areas raised by various conferees is attached (See Attachment #1). Following committee discussion, Senator Gaines moved to amend the bill by deleting Section (1); Senator Werts seconded the motion, and the motion carried. Senator Hess requested his "no" vote be recorded in the minutes. Senator Gaar moved to amend the bill by inserting the public service language; Senator Hess seconded the motion. Following committee

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,  
room 514-S, Statehouse, at 10:00 a.m./~~p.m.~~ on March 7, 1983.

Senate Bill 141 continued

discussion, the motion was withdrawn. Senator Gaar moved to amend the bill to provide that public service be covered by same source as employees are or by tort immunity; Senator Feleciano seconded the motion, and the motion carried. Senator Feleciano moved to amend the bill conceptually regarding the diversion program, strike all of the remaining portions of the bill other than the section dealing with that and the section to accommodate Senator Gaar's motion; Senator Winter seconded the motion. Following committee discussion, Senator Winter made a substitute motion to amend the bill by incorporating a particular portion of House Bill 2132 and also include certification, which is language in Substitute House Bill 2132; Senator Feleciano seconded the motion, and the motion carried. Senator Gaines moved to report the bill favorably as amended; Senator Werts seconded the motion. Committee discussion followed concerning the per se rule. Senator Hess made a substitute motion to include the per se rule. The motion failed for lack of a second. Following further committee discussion, Senator Winter made a substitute motion to amend the bill on page 8, to strike lines 299 and 300 to make out of state convictions and any convictions prior to the effective date of the act apply; Senator Hess seconded the motion, and the motion carried. Senator Winter then moved to amend the bill to provide that a machine reading can be introduced into evidence which creates a presumption for intoxication.

The hour for adjournment had arrived, and the meeting adjourned until 12:00 P.M. in Room 519-S.

A copy of a letter to the chairman from Richard A. Pinaire, Chairman of the KILA Criminal Law Committee is attached (See Attachment #2).

3-7-83

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Marilyn Bradt	Lawrence	KINH
Ed Johns	Tyler	Kan. Assoc of Psychol. Ed.
Moynihan	Lawrence	ICAADPO
Gene Johnson	Jopoka	Ks. ASAP
James Clark	"	KC DAA
Michael F. ...	"	AIA
John Peters	Tyler	Ks Assoc of Prof Psychol.

MEMORANDUM

March 4, 1983

TO: Senate Judiciary Committee  
FROM: Kansas Legislative Research Department  
RE: S.B. 141

The following persons or organizations expressed support for S.B. 141 without offering any amendments:

- SRS Commissioner of Alcohol and Drug Abuse Services
- Kansans for Life at its Best
- Kansas Association of Alcohol and Drug Program Directors
- Kansas Citizens Advisory Committee on Alcohol and Other Drug Abuse
- Kansas Community Alcohol Safety Action Project
- Kansas Alcoholism Counselors Association

The following is a list of suggested amendments to S.B. 141 and problem areas raised by various conferees:

1. Section 1(b) on page 1, deals with preliminary chemical breath testing by law enforcement officers who have probable cause to believe a DUI violation has occurred.

Judge Buchele of the Third Judicial District Court noted that the "probable cause" for an investigative stop was a stiffer requirement than the current "articulable and specific" suspicion

An assistant district attorney in Shawnee County opposed the preliminary breath test. The Division of Motor Vehicles expressed doubt about the value of the test. The Department of Health and Environment expressed concern that someone may agree to the preliminary test and then refuse the regular test.

2. A representative of the Kansas Trial Lawyers Association (KTLA) suggested line 43 be amended to add "or lack thereof" after the word "cause."
3. Section 1(c) on page 2, deals with chemical tests of blood or breath. The KTLA suggested lines 62 through 72 be deleted which grants civil and criminal immunity to persons performing these tests.

*Alch. 1*



4. Section 1(d) on page 2 allows the admission into evidence at any trial a person's refusal to submit to the chemical tests. The KTLA suggested this provision be deleted.
5. Section 1(e) on page 3 deals with Division of Motor Vehicle driver's license suspension or revocation hearings.

The Kansas Highway Patrol suggested lines 92-93 be deleted which makes the reasonableness of a law enforcement officer's requiring the test, if the person submitted, an issue at these hearings.

The Division of Motor Vehicles expressed concern regarding the requirement for a hearing on the "reasonableness" issue and estimated this would increase the hearing load requiring more staff for a total annual cost increase of \$151,601. The Division also predicted confusion will arise over the Division's "reasonableness" hearings since courts also may impose driver's license penalties in these cases which apparently will supercede the Division's orders. Judge Buchele expressed reservations about allowing the Division to suspend licenses as a result of a "reasonableness" hearing also.

The Division noted line 115 requires the Division to suspend a person's license for not less than one year while K.S.A. 8-256 limits the period the Division may impose to a maximum of one year.

6. Section 3(e) on page 9 establishes penalties for a first conviction of a DUI offense. The current provision allowing an alternative of 100 hours of public service in lieu of the mandatory 40 hours imprisonment is deleted. The Governor objected to this deletion and otherwise offered his strong support for the bill.
7. Section 3(k) page 12 deals with determination as to whether a conviction is a first, second or third conviction for sentencing. A Shawnee County Assistant District Attorney suggested the following:

"Each conviction had under any statute or ordinance of any state or city which substantially conforms to K.S.A. 8-1567 or K.S.A. 8-1566 shall be counted as a prior conviction for purposes of sentencing under K.S.A. 8-1567 or K.S.A. 8-1566, if the date of the commission of the offense or offenses occurs within five years of the date of the commission of the present offenses."

8. The Shawnee County Assistant District Attorney also suggested the following:

at page 2, line 0051: strike word "may" and insert word "shall";

at page 13, line 0464: after the word "revoking" add the words "or suspending";

at page 13, line 0470: add "or suspending"; and

at page 14, line 0508: strike word "revoked" and insert the word "suspend."

9. The KTLA also suggested the following:

Line 0137 - Delete the following: "who pleads nolo contendere to or";

Line 0141 through;

Line 0142 - Delete: "who plead nolo contendere to or";

Line 0177 through;

Line 0178 - Delete: "who pleads nolo contendere to or";

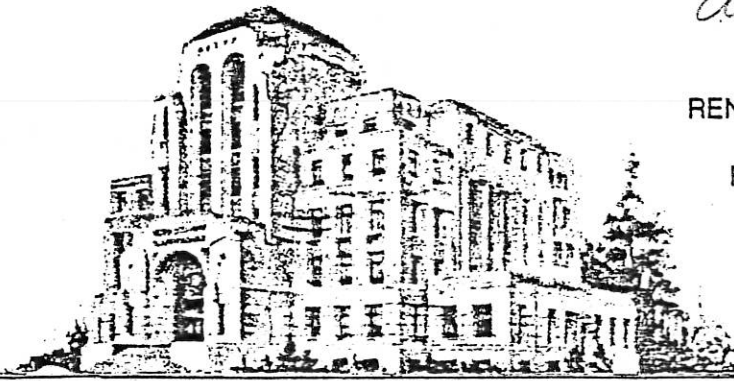
Line 0359 through;

Line 0367 - Delete the last two sentences.

10. Associate District Judge Steven Becker from Hutchinson suggested clarifications be made to the open container law to provide it applies only to drivers. This would reverse a recent Kansas Court of Appeals decision. See Attachment I.
11. A Concordia municipal judge has held the mandatory jail sentences do not apply to cities and are void due to K.S.A. 12-4511. See Attachment II.

STEVEN R. BECKER  
ASSOCIATE DISTRICT JUDGE  
POSITION I

ELIZABETH F. KELLOGG,  
C.S.R.  
OFFICIAL REPORTER



*Attachment 1*

RENO COUNTY COURT HOUSE  
206 WEST FIRST  
HUTCHINSON, KANSAS  
67501  
Phone 316 662-4411

R E N O C O U N T Y C O U R T H O U S E

February 17, 1983

Senator Bert Chaney  
State Senate  
State Capital Building  
Topeka, KS 66612

Dear Senator Chaney:

To the best of my knowledge this is my first correspondence to a legislator expressing my concern over legislation. However, since I confront this particular problem on an almost daily basis, I feel some action is necessary, although some may see it as being of little consequence.

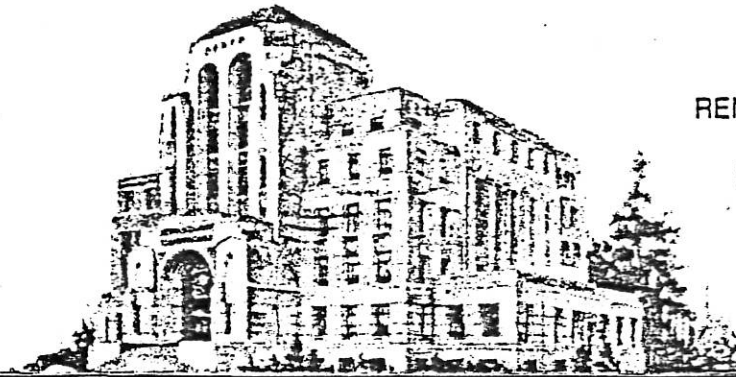
My concern is with K.S.A. 41-2719 and related statutes. This statute prohibits the transportation of an open container of cereal malt beverage in any vehicle with certain exceptions. I have always interpreted the statute as applying only to drivers and not to passengers, regardless who was in actual physical custody of the open container. My reasoning was two-fold: (1) The word "transport" applied only to someone in control of the vehicle, the one operating the vehicle, and (2) the mandated punishment included action against the defendant's driving privileges which logically would be related to improper driving.

However, my above reasoning was negated by the Kansas Court of Appeals in State v. Erbacher 8 Kan. App. 2d 169 (Oct. 1982). The court held that the above cited statute applies equally to passengers as to drivers of vehicles. I assume that this interpretation must be applied to K.S.A. 41-804 which is a comparable statute dealing with liquor.

I am now confronted with cases in which complaints are issued by law enforcement officers to all occupants of a vehicle and varying combinations of them. In addition, I am confronted

STEVEN R. BECKER  
ASSOCIATE DISTRICT JUDGE  
POSITION I

ELIZABETH F. KELLOGG,  
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206 WEST FIRST  
HUTCHINSON, KANSAS  
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Phone 316 662-4411

R E N O C O U N T Y C O U R T H O U S E

with taking mandatory action against the driving privileges of a passenger for something that is unrelated to his or her driving actions or abilities. To me, this seems totally inappropriate and should be changed. The Kansas Department of Revenue will not accept an abstract of conviction unless the sentence includes specific action on driving privileges within the statutory guidelines. Suspending the driving privileges of a passenger for three months to one year is ludicrous.

Also, I fail to see the purpose of a related statute, K.S.A. 41-2720. I don't believe this statute has ever been before my court since it's adoption. A reading of subparagraph (a) makes it obvious that it applies to drivers only. Considering K.S.A. 41-2719, I keep wondering why it is needed.

It is my hope that you give these matters some consideration. I feel some amendments or repeals would be in order. I am uncomfortable in imposing sentences on an almost daily basis which I feel are inappropriate and overly burdensome. However, I am controlled by the statutes and the Court of Appeals' interpretation of them.

I would be happy to visit with you about this if you desire. Thank you for your time and consideration. I remain,

Sincerely yours,

Steven R. Becker  
Associate District Judge

SRB/br

cc: John Myers  
Steve Ediger  
Jesse Harder



CITY OF CONCORDIA  
CONCORDIA, KANSAS 66901

February 1, 1983

THOMAS M. TUGGLE  
ASSISTANT CITY ATTORNEY,  
P. O. BOX 676

Hon. Elwaine F. Pomeroy  
Kansas State Senate  
Kansas Statehouse  
Topeka, Kansas 66612

Re: Driving Under Influence  
of Alcohol Statute.

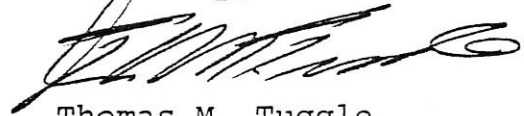
Dear Senator Pomeroy:

Assistant Attorney General Jeffrey S. Southard has advised me that the Judiciary Committee will be considering "clean up legislation" in connection with the driving under the influence of alcohol or drugs statute.

I have previously written Representative Bill Fuller concerning the statute as it pertains to the driving under the influence of alcohol or drugs ordinance of the City of Concordia, Kansas, and I am enclosing to you a copy of my letter to Representative Fuller of January 28, 1983. The letter to Representative Fuller sets out the problem which exists as a result of the ruling by the Municipal Judge.

I would appreciate it if the Judiciary Committee would give consideration to this problem. If you have any questions, please contact me.

Sincerely,



Thomas M. Tuggle  
Assistant City Attorney

TMT:an

cc: Mr. Jeffrey S. Southard  
Assistant Attorney General  
Office of the Attorney General  
Second Floor-Kansas Judicial Center  
Topeka, Kansas 66612

Mr. Carl M. Metzger  
City Manager  
City Hall  
Sixth and Lincoln  
Concordia, Kansas 66901

January 28, 1983

Hon. Bill Fuller  
Kansas House of Representatives  
Kansas Statehouse  
Topeka, Kansas 66612

Re: Driving Under Influence of  
Alcohol Statute/City of Con-  
cordia Driving Under Influ-  
ence of Alcohol Ordinance.

Dear Bill:

I am writing in connection with your conversation with Mr. Carl M. Metzger, Concordia City Manager, concerning a portion of the City of Concordia driving under influence of alcohol ordinance which has been held void by the Municipal Judge.

K.S.A. 8-1567 provides for mandatory jail sentences upon conviction of driving under the influence of alcohol or drugs. Subsection (n) of this statute provides that cities may enact ordinances making unlawful driving while under the influence of alcohol or drugs, but the minimum penalty in any such ordinance shall not be less than nor exceed the minimum penalty prescribed by the statute for the same violation, nor shall the maximum penalty in any such ordinance exceed the maximum penalty prescribed for the same violation by the statute. In other words, the penalty provisions of a city ordinance must be identical to the penalty provisions under the statute. K.S.A. 12-4511 (which is a section of the Kansas Code of Procedure for Municipal Courts) states:

"12-4511. Parole. The municipal judge may parole any person confined to jail as a result of a conviction of a violation of a city ordinance. The judge may set such conditions and restrictions as he or she sees fit to impose for a term not exceeding one year and may at any time discharge such person for good cause shown.

COPY

"After notice and hearing, the municipal judge may terminate such parole for violation of conditions by directing the chief of police to execute the sentence and again confine the accused person to jail for the time specified by the court, which shall not exceed the initial sentence imposed, less the time served."

The Kansas Supreme Court in City of Junction City vs. Griffin, 226 Kan. 516, 601 P.2d 684 (1979) held that a city ordinance requiring upon conviction a mandatory 30 day jail sentence was void because it conflicted with K.S.A. 12-4511, quoted above, which states that the municipal judge may parole any person confined to jail as a result of a conviction of a city ordinance. The latter opinion was withdrawn in City of Junction City vs. Griffin, 227 Kan. 332, 607 P. 2d 459 (1980), when it came to the attention of the Kansas Supreme Court that the City of Junction City had enacted a charter ordinance opting out from under the Code of Procedure for Municipal Courts.

The Municipal Judge has held that the mandatory sentencing provisions of the city ordinance are void because they are in conflict with K.S.A. 12-4511 and he has relied upon the earlier case above noted as authority for his decision.

It is my understanding that you anticipate bills will be introduced to take care of certain problems that have arisen as a result of the enactment of the current driving under influence of alcohol statute. The City would appreciate it if you would consider introducing a bill to rectify this problem. On the one hand the State statute states that city ordinances must have the same penalty provisions which include mandatory jail sentences and on the other hand the Judge of the Municipal Court has said that the mandatory jail provisions of the ordinance conflict with the above stated provision of the Kansas Code of Procedure for Municipal Courts.

Based upon the ruling of the court, no jail sentences will be imposed. Accordingly, the City would appreciate prompt attention to this matter.

Sincerely,

Thomas M. Tuggle  
Assistant City Attorney

TMT:an

cc: Mr. Carl M. Metzger  
City Manager  
City Hall  
Sixth and Lincoln  
Concordia, Kansas 66901

#2

LAW OFFICES OF  
HOOVER, SCHERMERHORN, EDWARDS & PINAIRE  
811 N. WASHINGTON  
JUNCTION CITY, KANSAS 66441

C. L. HOOVER  
R. A. SCHERMERHORN (1911-1975)  
S. M. EDWARDS  
RICHARD A. PINAIRE

TELEPHONE  
AREA CODE 913  
238-3126

February 18, 1983

The Honorable Elwaine Pomeroy  
Kansas Senate  
State House  
Topeka, KS 66612

Re: Senate Bill No. 141

Dear Senator Pomeroy:

In addition to the comments and the written testimony which I presented to the Senate Judiciary Committee on February 17, 1983, I would also like to have you consider the following matters while you are preparing the final draft of this bill, to-wit:

1. Certain judges do not know whether or not work release is authorized whenever mandatory jail sentence is imposed. We think it would be appropriate to clarify this issue by adding language to the bill which would authorize work release while an individual is serving a mandatory sentence.

2. The provisions of the bill allow for the reduction of a mandatory sentence from 90 days to 5 days for a second offender if the offender receives treatment. We think it would be appropriate to include some language in this bill specifying that the court has discretion to require in-patient or out-patient treatment.

3. This bill appears to require a pre-sentence investigation for all DUI cases. This is often a waste of time, effort and money and the language regarding pre-sentence investigation should be amended to require one unless the court makes a finding that sufficient information is available to proceed with sentencing without a report.

4. There are many individuals who can safely operate a motor vehicle with a .10 blood alcohol level. If you choose to make a certain blood alcohol level a per se violation of the law, I would suggest that you set the level at .15 or above.

5. If you choose to authorize use of a preliminary

Atch. 2

The Honorable Elwaine Pomeroy  
February 18, 1983  
Page 2

breath test, the results of this test should not be admissible at a hearing by the Division of Vehicles. As you will recall, Colonel Hornbaker assured the committee that the preliminary breath test was very accurate. If these devices are so accurate, please tell me why police forces are spending \$5,000 to \$10,000 on these exotic machines instead of buying these small hand held units.

5. The provision prohibiting plea bargaining by public prosecutors is an insult to their integrity, is unnecessary, and violates good public policy. A duly elected or appointed public prosecutor should have the discretion to negotiate a proper resolution of a case.


6. Finally, we feel it is unwise to eliminate the 100 hours public service as an option to the mandatory sentence. Although this option has not been widely used, nonetheless, it should be available to be used under certain circumstances.

Thank you very much for giving the Criminal Law Committee of the Kansas Trial Lawyers the opportunity to provide you with input on this legislation. The members of this committee look forward to working with you in the future on other legislation.

Respectfully submitted,

HOOVER, SCHERMERHORN, EDWARDS & PINAIRE

By

  
Richard A. Pinaire,  
Chairman of the KTLA Criminal  
Law Committee

RAP: ae