Approved January 28, 1986
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Robert Frey at
Chairperson

10:00 a.m./p.m. on January 23, 1986 in room 514-S of the Capitol.

All members were present except were: Senators Frey, Hoferer, Burke, Feleciano, Gaines, Langworthy, Parrish, Steineger, Talkington and Winter.

Committee staff present:

Mike Heim, Research Department
Jerry Donaldson, Research Department
Mary Hack, Office of Revisor of Statutes

Conferees appearing before the committee:

Jim Sullins, Kansas Motor Car Dealers Association
Randy Hearrell, Kansas Judicial Council
Judge Donald Allegrucci, Pittsburg
Marjorie Van Buren, Office of Judicial Administrator

Jim Sullins, Kansas Motor Car Dealers Association, presented a request for a committee bill to increase the time limit for filing a lien on personal property from 45 to 90 days (See Attachment I).

Senate Bill 298 - Duties and powers of administrative judges.

Randy Hearrell, Kansas Judicial Council, stated the council supports the bill.

Judge Donald Allegrucci testified this bill is a result of a Court Unification Advisory Committee study (See Attachment II). He explained problems were pointed out to this committee which seemed to indicate that the administrative judge's authority needs to be clarified, in the areas of budgeting, personnel and supervision of judicial employees. The problems may not exist in a majority of the judicial districts, but where such problems do exist, they are disruptive. He said if you want to have unification, give the administrative judge the authority to do it. The supreme court has approved the bill, and all administrative judges in the state agree something needs to be done. Judge Allegrucci suggested in line 43 of the bill, administrative assistant be included.

Senate Bill 311 - Hiring of retired judges to serve as judge.

Marjorie Van Buren, Office of Judicial Administrator, testified her office had concerns about both the need and working of this proposal. She said this bill is not something that we need, since we can use retired judges throughout the state. With the exception of three counties, they feel they don't have a problem. They have requested in their budget five district magistrate judges and one district judge. They have three one-county districts asking for judge power. She reported California is a state that has the "rent a judge" project, and the project has not been a notable success in that state. If the bill passed, the office has questions about staffing of proceedings and location of proceedings. A committee member inquired how many new judges her office had requested. She replied they had requested two magis-

Senate Bill 311 continued

trate district judges in Sedgwick County, two new magistrate district judges in Shawnee County, and one district magistrate and one district judge in Johnson County. The Court of Appeals is requesting three judges.

Senator Steineger, who had requested this bill, stated this would work very well in commercial type cases, and many of the retired judges would be interested in doing that. He stated it would cut down on delay in the big districts and would have no expense to the system.

Following committee discussion, Senator Steineger moved to report the bill favorably; Senator Burke seconded the motion, and the motion carried.

Senate Bill 298 - Duties and Powers of administrative judges.

Senator Feleciano moved to amend the bill in line 43, after court reporter, by adding administrative assistant. Senator Steineger seconded the motion, and the motion carried. Senator Feleciano moved to report the bill favorably as amended. Senator Steineger seconded the motion, and the motion carried.

Senator Burke then moved to introduce a bill that was requested by Jim Sullins, Kansas Motor Car Dealers Association, in the beginning of this meeting. Senator Gaines seconded the motion, and the motion carried.

A copy of a syllabus by the supreme court in the case of Kansas vs. McNaught, was passed out to committee members. Staff summarized the supreme court decision. Following committee discussion, Senator Burke moved to introduce a bill that would allow a judge to impose the maximum sentence and restitution. Senator Parrish seconded the motion, and the motion carried. (See Attachment III)

The meeting adjourned.

Copy of the guest list is attached (See Attachment IV).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 1-23-86

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
RANDY HEARRELL	TOPEKA	JUDICIAL COUNCIL
DONALD ALLEGRUCCI	P. Hsburg	Judiciary
Sabrina Wells	Topeka	Budget Division
Marjorie Van Buren	"	O J A.
JIM SUCCINS	"	KS MOTOR CAR DEALERS ASSO
TERRY STEVENS	TOPEKA	TOPEKA POLICE DEPT.
Kelle Rosch	Lawrence	KS Trial lawyers Assoc.
RON CALBERT	NEWTON	U. J. U.
John Hanna	Topeka	Associated Press
KAREN McCLAIN	Topeka	KS. ASSOC. REALTORS

IV

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AN ACT amending the Mechanics' Lien Statute for work done on certain personal property; increasing the time limit for filing a lien on personal property after the claimant parts with possession of said property; amending K.S.A. 58-201 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 58-201 is hereby amended to read as follows: 58-201. Whenever any person at, or with the owner's request or consent shall perform work, make repairs or improvements on any goods, personal property, chattels, horses, mules, wagons, buggies, automobiles, trucks, trailers, locomotives, railroad rolling stock, barges, aircraft, equipment of all kinds, including but not limited to construction equipment, vehicles of all kinds, and farm implements of whatesoever kind, a first and prior lien on said personal property is hereby created in favor of such person performing such work or making such repairs or improvements and said lien shall amount to the full amount and reasonable value of the services performed, and shall include the reasonable value of all material used in the performance of such services.

If such property shall come into the lien claimant's possession for the purpose of having the work, repairs or improvements made thereon, such lien shall be valid as long as the lien claimant retains possession of said property, and the claimant of said lien may retain the same after parting with the possession of said property by filing within ~~forty-five (45)~~ ninety (90) days in the office of the register of deeds, under oath, a statement of the items of the account and a description

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of the property on which the lien is claimed, with the name of the owner thereof, in the county where the work was performed and in the county of the residence of the owner, if such shall be known to the claimant.

If the lien claimant was never in possession of said property, he or she may retain said lien by filing, within ~~forty-five (45)~~ ninety (90) days after the date upon which work was last performed or material last furnished in performing such work or making such repairs or improvements in the office of the register of deeds, under oath, a statement of the items of the account and a description of the property on which the lien is claimed, with the name of the owner thereof and the date upon which work was last performed or material last furnished in performing such work or making such repairs or improvements, in the county where the work was performed and in the county of the residence of the owner, if such shall be known to the claimant.

Sec. 2. K.S.A. 58-201 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

The chief justice shall submit to the ~~director of the budget~~ legislature the annual budget request for the judicial branch of state government ~~for inclusion in the annual budget document for appropriations for the judiciary~~. A copy shall be delivered to the Governor. Such budget shall be prepared and submitted in the manner provided by K.S.A. 75-3716 and K.S.A. 1980 Supp. 75-3717. Such budget shall include the request for expenditures for retired justices and judges performing judicial services or duties under K.S.A. 20-2616 as a separate item therein. ~~The director of the budget shall review and may make such recommendations to the legislature for proposed changes in such budget as the director deems necessary and appropriate.~~

2. Authority of Administrative Judge

The Committee recommends that the authority of the administrative judge be clarified. K.S.A. 20-345 relating to appointment of nonjudicial personnel for district courts and K.S.A. 20-349 relating to the preparation of the budget for the district court should both be amended. It's recommended that K.S.A. 20-345 be amended by striking the language that requires that the administrative judge to have the approval of the majority of the other district judges and associate district judges in appointing bailiffs, court reporters, court service officers, and other clerical and nonjudicial personnel. It's recommended that K.S.A. 20-349 be amended by removing the requirement that the judges of the district court approve the budget for the county in which

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those judges are regularly assigned prior to submission of that budget to the board of county commissioners. It should be noted that 1985 Senate Bill 298 contains the suggested changes.[43]

The Committee also recommends the adoption of proposed amendments to Supreme Court Rule 107 relating to duties and powers of administrative judges. A copy of the proposed amendments are attached.[44]

The problems pointed out to the Committee, which seem to indicate that the administrative judge's authority needs to be clarified, are in the three areas of budgeting, personnel, and supervision of judicial employees. The problems may not exist in a majority of the judicial districts, but where such problems do exist they are disruptive.

In the questionnaire the Committee sent to various persons involved in the judicial process the issue of "split administrative authority between the judicial administrator and administrative judge" was mentioned a number of times as a negative comment about the system. The problems that have been previously mentioned occur almost exclusively in multi-county judicial districts.

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43 Appendix, vol. 1, p.

44 Appendix, vol. 1, p.

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No. 58,052

STATE OF KANSAS,

Appellee,

v.

THOMAS R. McNAUGHT,

Appellant.

SYLLABUS BY THE COURT

1.

The record is examined in a criminal action in which the defendant was convicted of vehicular homicide (K.S.A. 21-3405) and driving under the influence of alcohol (K.S.A. 1984 Supp. 8-1567), and it is held that the district court did not err (1) in permitting photographic, audio, and television coverage of the preliminary hearing and the trial; (2) in overruling defendant's motion to prohibit spectators at the trial from wearing MADD and SADD buttons; (3) in its rulings pertaining to the admission of evidence; (4) in permitting two witnesses to testify whose names were not endorsed on the information; (5) in its instructions to the jury; and (6) in overruling defendant's motions for dismissal, judgment of acquittal, and for a new trial. The trial court erred in the sentence imposed.

2.

The propriety of granting or denying permission to the news media to broadcast, record, or photograph court proceedings

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dismissal because of insufficiency of the evidence, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact therefrom, a reasonable mind or a rational trier of fact might fairly conclude guilt beyond a reasonable doubt. *State v. Falke,* 237 Kan. 668, 703 P.2d 1362 (1985). We have no hesitancy in holding that the record reflects sufficient evidence to show that the defendant was driving under the influence of alcohol and in a manner which deviated from the standard of care of a reasonable person. The jury was undoubtedly impressed by the fact that, following the impact of the deceased's body with defendant's windshield, he failed to stop and drove a mile down the highway, even though the deceased's bicycle was being dragged under defendant's car. The evidence presented at the trial was sufficient to satisfy the legal requirements and to sustain the two guilty verdicts.

The twelfth point on appeal is that the trial court erred in denying defendant's motion for a new trial. The basis of the motion includes all of the points previously discussed and rejected in this opinion. We find no error.

The last issue raised in the brief of defendant is that the trial court imposed an illegal sentence. Prior to the sentence being imposed in this case, the trial court conducted an evidentiary hearing at which both the State and the defendant presented evidence. The trial court was also furnished a presentence report, a copy of which is not provided in the record. Counsel were then permitted to make their arguments as to what sentence would be appropriate. At the close of the hearing, the court imposed the following sentence: Defendant was sentenced to the custody of the Shawnee County jail for a period of one year for the offense of vehicular homicide (K.S.A.

21-3405) and for a period of six months for the offense of driving under the influence as defined by K.S.A. 1984 Supp. 8-1567. These terms are the maximum imprisonment authorized for these offenses. The court ordered the sentences to run consecutively. In addition, the defendant was ordered to pay a fine of $2,500 for vehicular homicide and a fine of $500 for driving under the influence. The fines imposed are the maximum fines provided as a penalty for each offense. The trial court thus imposed the maximum imprisonment and fines allowed by law for the offenses of which defendant had been convicted.

The trial court, however, did not stop at that point. The trial court ordered that, upon his release from jail, the defendant enroll and successfully complete an alcohol/drug abuse program at Ridgeview Institute in Georgia. Defendant was further ordered to pay the parents of Kathleen Bahr restitution in the amount of $13,318.08, which included the cost of the funeral, tombstone, incidental expenses, and a $5,000 fee for the special prosecutor. The trial court further ordered that the defendant's driver's license be revoked pursuant to statute and be surrendered to the court when the conviction becomes final. The trial court further ordered that completion of the program at Ridgeview Institute and complete payment of restitution were conditions to be complied with before defendant's driver's license could be returned. Finally, defendant was assessed the statutorily required alcohol and safety program fee, probation services fee, and the costs of the action. The defendant was released on bond pending his appeal.

The defendant first challenges his sentence on the basis that the court ignored the statutory mandates of K.S.A. 21-4601 and K.S.A. 21-4606. K.S.A. 21-4601 provides, in substance, that, in imposing sentence, a convicted defendant

should be dealt with in accordance with his individual characteristics, circumstances, needs, and potentialities; that dangerous offenders be correctively treated in custody for long terms as needed; and that other offenders be dealt with by probation, suspended sentence, or fine whenever such disposition appears practicable and is not detrimental to the needs of public safety and the needs of the offender. K.S.A. 21-4606 provides that the court in imposing sentence shall fix the lowest possible term of imprisonment which, in the opinion of the court, is consistent with the needs of the defendant and the seriousness of the defendant's crime. That statute then lists a number of factors to be considered by the court in fixing the term of imprisonment.

In substance, defense counsel argues that the trial court completely disregarded the requirements and the factors set forth in the two statutes. He points out that Dr. McNaught had no prior history of alcohol abuse or of any misconduct and that the jury acquitted him on the only charge involving intentional or wanton misconduct. Defendant argues that the sentence was so excessive as to amount to an abuse of judicial discretion.

We have considered the entire record of the trial, the evidence presented at the time of sentencing, and the remarks of the court when it imposed sentence. We have concluded that the trial court did not abuse its discretion in the imposition of the maximum jail sentence and the maximum fine for each of the charges for which the defendant was convicted. Generally, when a sentence is within the statutory limits set forth by the legislature, it will not be disturbed on appeal absent special circumstances showing an abuse of discretion or that the sentence is the result of prejudice, oppression, or corrupt motive. *State v. Coberly*, 233 Kan. 100, 661 P.2d 383 (1983). Prior to

the imposition of sentence, the trial court obtained all possible information about the defendant's past history, the nature of the offenses, and the defendant's personal problems. There was evidence presented that the defendant has an alcohol problem which he has refused to recognize. The trial court may well have concluded that the imposition of jail time along with the fines were necessary to get his attention so that defendant would do something about his problem because, until defendant recognized his problem, he was a potential danger to the traveling public. We must also recognize that by imposing sentence in the Shawnee County jail, the trial court in its discretion could place the defendant upon parole when a showing was made later that a parole was indicated in the case. We hold that the trial court did not abuse its discretion in imposing the maximum jail sentences and fines and in making the jail sentences to run consecutively. Revocation of defendant's driver's license was authorized by K.S.A. 1984 Supp. 8-1567(j).

At that point, the sentence was legal under the statute. However, the court, having imposed the maximum penalty provided for each offense, then, without placing defendant on probation, ordered defendant to pay restitution to the Bahr family and to enroll in and successfully complete an alcohol treatment program in the State of Georgia. Also after revoking defendant's driver's license as required by statute, the court required that defendant's driver's license be restored only after full restitution and after the alcohol treatment had been completed and paid for. The court also ordered defendant to pay the alcohol and safety program fee of $85 and the probation services fee of $25, even though the defendant had not been placed on probation at the time of sentence.

The fixing and prescribing of penalties for criminal

offenses is a legislative function, and a sentence must be imposed within the statutory authority. *State v. Freeman*, 223 Kan. 362, 369, 574 P.2d 950 (1978). K.S.A. 1984 Supp. 21-4603(2) provides:

> "(2) Whenever any person has been found guilty of a crime, the court may adjudge any of the following:
>
> "(a) Commit the defendant to the custody of the secretary of corrections or, if confinement is for a term less than one year, to jail for the term provided by law;
>
> "(b) impose the fine applicable to the offense;
>
> "(c) release the defendant on probation subject to such conditions as the court may deem appropriate, including orders requiring full or partial restitution;
>
> "(d) suspend the imposition of the sentence subject to such conditions as the court may deem appropriate, including orders requiring full or partial restitution; or
>
> "(e) impose any appropriate combination of (a), (b), (c) and (d).
>
> "In imposing a fine the court may authorize the payment thereof in installments. In releasing a defendant on probation the court shall direct that the defendant be under the supervision of a court services officer.
>
> "The court in committing a defendant to the custody of the secretary of corrections shall fix a maximum term of confinement within the limits provided by law. In those cases where the law does not fix a maximum term of confinement for the crime for which the defendant was convicted, the court shall fix the maximum term of such confinement. In all cases where the defendant is committed to the custody of the

secretary of corrections, the court shall fix the minimum term within the limits provided by law."

In *State v. Chilcote*, 7 Kan. App. 2d 685, 647 P.2d 1349, *rev. denied* 231 Kan. 801 (1982), the Kansas Court of Appeals addressed the same basic issue presented in this case and held that, under K.S.A. 21-4603(2), the trial court may not sentence a defendant to imprisonment in an institution and also require the defendant to pay restitution. In *Chilcote*, defendant argued that the trial court could not order restitution in conjunction with imprisonment and restitution may not be ordered unless the sentence is suspended pursuant to K.S.A. 21-4603(2)(d) or unless probation is granted pursuant to K.S.A. 21-4603(2)(c). The Court stated:

> "In the instant case, the judge combined K.S.A. 21-4603(2)(a) (imprisonment) with an order of restitution; restitution may only be ordered pursuant to subsection (c) of that statute, which provides for release on probation subject to restitution, or subsection (d) thereof, providing for the suspension of sentence subject to restitution. Thus, the trial court has combined all of subsection (a) with only the restitution portion of either subsection (c) or (d). Said statute, at subsection (e), gives the trial court authority to 'impose any *appropriate* combination of (a), (b), (c) and (d).' (Emphasis added.) Appellant points out that subsection (e) does not say 'or any parts thereof,' and contends that the trial court therefore lacks authority to combine only *parts* of various subsections. We conclude that appellant is correct in this contention. In applying 21-4603(2)(e), a trial court may only impose sentences which are combinations of entire subsections. The use of the

> word 'appropriate' implies that the combination of penalties under the statute should be harmonious. Thus the trial court may not impose imprisonment, which mandates incarceration, with either probation or suspension of sentence, because to do so would be to decree mutually exclusive penalties. As we construe the statute, restitution may only be ordered in conjunction with probation or suspended sentence. It follows that incarceration coupled with restitution is not an 'appropriate combination' under subsection (e)." 7 Kan. App. 2d at 689-690.

The Court of Appeals remanded the case to the trial court with orders to vacate that part of the sentence requiring the defendant to make restitution.

The principles of law applied in *State v. Chilcote*, are also applicable under the facts of this case. Here the maximum sentences of imprisonment and the maximum fines were imposed by the court. The court then, without placing the defendant on probation or suspending sentence, ordered restitution paid and in addition that defendant participate in a treatment program. The court also imposed other conditions which are usually imposed as conditions of probation. We hold that the trial court erred in ordering imprisonment, fines, restitution, and imposing the other conditions. Of course, should the trial court opt to resentence defendant within the time allowed for the revision of sentences, the court may cause the defendant to appear before it for resentencing. The trial court also has the authority to parole defendant from a portion of the sentence at some future date and impose appropriate conditions, including restitution. In view of our holding on this point, we do not consider it necessary to consider the other objections which defense counsel has raised in his brief pertaining to the

conditions imposed in sentencing.

At the oral argument, counsel for defendant raised a point which had not been raised before the trial court and which had not been raised in his brief on appeal. That point was whether the employment of an associate prosecutor pursuant to K.S.A. 19-717 and selected by the victim's family, denied defendant due process of law. We decline to consider that issue, because it was neither timely raised nor presented to the trial court for its consideration.

The judgment of conviction is affirmed. That portion of the sentence imposing imprisonment and a fine on each count is affirmed. That portion of the sentence ordering restitution and imposing other conditions is vacated and set aside.