Approved: 14 June 1991
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Senator Wint Winter Jr. at

5:00 p.m. on March 11, 1991 in room 359-E of the Capitol.

All members were present except: Senator Gaines who was excused.

Committee staff present:
Mike Heim, Legislative Research Department
Gordon Self, Revisor of Statutes Office
Judy Crapser, Secretary to the Committee

Conferees appearing before the committee:

Chairman Winter called the meeting to order by recognizing the pending motion to amend SB 356 made by Senator Petty and seconded by Senator Rock.

SB 356 - written policies for law enforcement officers regarding domestic violence calls.

After further discussion, Senator Petty withdrew her motion to amend and Senator Rock withdrew his second.

Senator Martin moved to recommend SB 356 favorable for passage. Senator Petty seconded the motion. The motion carried.

SB 333 - records of incidents and reporting of crimes by law enforcement agencies.

Senator Moran reported the Subcommittee on Criminal Procedures and Consumer Protection had heard the bill but had no recommendation to offer on SB 333. It was noted that the requirement of reporting was included in SB 356. No action was taken on SB 333.

SB 103 - statute of limitation provision regarding 10-year limitation, does not affect liability claim.

A letter on behalf of the Home Builders Association of Kansas addressing SB 103 was distributed to the Committee. (ATTACHMENT 1)

Senator Parrish, having voted on the prevailing side to not adopt the motion of Senator Rock to amend SB 103, moved to reconsider the Committee's action. Senator Petty seconded the motion. The motion carried.

The question reverted to the motion of Senator Rock to amend SB 103 by applying an absolute cap of 25 years and to add the suggestions of Professor Westerbeke.

Senator Bond made a substitute motion to amend SB 103 by applying an absolute cap of 20 years and to add the suggestions of Professor Westerbeke. Senator Morris seconded the motion. The motion carried.

Senator Bond moved to conceptually amend SB 103 to add language to exempt real property and to make sure product liability does not include items affixed to homes by the builders. Senator Morris seconded the motion. The motion carried.

Senator Rock moved to recommend SB 103 favorable for passage as amended. Senator Bond seconded the motion. The motion carried.

It was noted that it was not the intent of the Committee that SB 103 as amended would affect claims of negligence against design professionals, the only intent of the Committee was to expand the right to bring claims for negligence with respect to original defects as to tangible personal property not affixed to real estate.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 359-E, Statehouse, at 5:00 a.m. on March 11, 1991.

SB 233 - eliminating voluntary intoxication as defense.

An information memorandum on SB 233, prepared by Kristy Lambert, Legislative Intern to Senator Gaines and to the Committee, was distributed to the Committee members. (ATTACHMENT 2)

Senator Martin moved to recommend SB 233 favorable for passage. Senator Kerr seconded the motion. The motion carried.

SB 195 - blood alcohol content lowered to .08 for DUI

Senator Kerr moved to amend SB 195 to make .08 apply only to presumption. Senator Moran seconded the motion. The motion was declared lost, a division was called for. Six having voted in favor of the motion, the motion carried.

It was noted that there are two references in the statutes to .10. This measure does not affect the section that says .10 evidence makes per se violation. Senator Kerr stated that was his intention. He further noted that SB 195 does not include commercial drivers license holders or minors, which was also his intention.

Senator Kerr moved to recommend SB 195 favorable for passage as amended. Senator Yost seconded the motion. On a call for a division, the motion carried with seven voting in the affirmative.

The meeting was adjourned.

(No guest log was completed at this meeting.)

CROCKETT, KEELEY & GILHOUSEN
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A PARTNERSHIP INCLUDING
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March 11, 1991

Senate Judiciary Committee
Kansas Senate
State Capitol
Topeka, Kansas 66612

Re: Senate Bill 103

Dear Mr. Chairman and Members of the Committee:

This letter is written on behalf of the Home Builders Association of Kansas.

During the 1987 Session, HBAK strongly supported the remedial legislation which is now K.S.A. (1990 Supp.) 60-513(b).

The reason this remedial legislation was then so important and remains so important today is the decision of the Supreme Court of Kansas in Ruthrauff, Administratrix v. Kensinger, 214 Kan. 185, 519 P.2d 661 (1974). The effect of Ruthrauff was to strip builders of any statute of limitations protection. A claimant could sue a builder 25, 50, or 75 years after the builder's work was complete, as long as the claimant did so within two years of the date of any injury.

Before the 1987 remedial legislation, builders were exposed to liability into the distant future. Under Senate Bill 103, we would return to the same situation.

This is because the Bill provides the 10 year limitation in the remedial legislation will not apply to a product liability claim as defined by the Kansas Product Liability Act, K.S.A. 60-3301, et. seq. The definitions under the Kansas Product Liability Act include in the definition of "Manufacturer" one who "constructs" the product or component part of the product. K.S.A. 60-3302(b). The Act encompasses property damage claims as well as personal injury claims. K.S.A. 60-3302(d). There is no provision in the Act which excludes construction from its coverage. Therefore all a claimant need argue is that his case against a builder is a product liability claim, and the builder would be deprived of protection under the 10 year limitation.

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The complexity of this issue is exceeded only by its importance to the many individuals and groups who will be impacted by your decision. HBAK does not believe any change is warranted. If a change is to be made, the language proposed by the Kansas Association of Defense Counsel is certainly less damaging than the language contained in the Bill. As Professor Westerbeke has suggested, perhaps a provision should be studied which would exclude construction claims from the definition of product liability claims, or which would otherwise avoid the wholly unintended result of exposing builders to claims arising far in the future.

We urge that this matter be given the further study which it deserves. If further remedial legislation is in fact needed, a thorough study would ensure that the remedy is appropriate and that it does not have its own set of unintended results.

Respectfully submitted,

David G. Crockett
Counsel for Home Builders
Association of Kansas

DGC/cd

MEMORANDUM

To: Senator Wint Winter
From: Kristy Lambert
Date: March 11, 1991
Re: Voluntary Intoxication Defense

I. INTRODUCTION

Voluntary intoxication is commonly regarded as a partial defense to specific intent crimes. State v. Sterling, 235 Kan. 526, 680 P.2d 301 (1984). This memorandum reviews the general differences between voluntary and involuntary intoxication, the rationale for the elimination of the voluntary intoxication defense, and the constitutionality of that action.

Voluntary intoxication should be distinguished from the complete defense of involuntary intoxication, where a defendant must have yielded to an "irresistible force" in first drinking, amounting to more than a "compulsion." State v. Seely, 212 Kan. 195, 510 P.2d 115 (1973). Examples of involuntary intoxication include consumption of intoxicants under duress or without knowledge of their intoxicating effects. The primary distinction between involuntary and voluntary intoxication is that involuntary intoxication occurs in a defendant through the fault of another, while voluntary intoxication occurs when a defendant knowingly, voluntarily consumes the intoxicants.

Voluntary intoxication is considered a partial defense because, although it will not excuse criminal conduct, it can negate the state of mind requisite for conviction of a particular offense. See Boettcher, Voluntary Intoxication: A Defense to Specific Intent Crimes, 65 U. Detroit L. Rev. 33 (1987). The result is not to acquit but to convert a specific intent crime into a lesser form. For example, the defense could convert burglary into breaking and entering or larceny into criminal conversion. By negating state of mind, the defense is regarded as "a 'failure of proof' defense where the defendant has a defense because the prosecution is unable to prove all of the required elements of the offense." Robinson, Criminal Law Defenses, § 65(a), at 286.

The difference between specific and general intent crimes is vague and ambiguous. The best explanation of this ill-defined distinction is that "general intent" is the minimum mens rea element present in all common law crimes, and that "specific intent" is a particular criminal intent beyond the act done. Boettcher, at 34.

II. RATIONALE FOR ELIMINATING THE DEFENSE

At early common law, voluntary intoxication was no defense in any situation. "The law's distrust of intoxication as a defense seems to have been premised both on the belief that it could be easily feigned and that a man should not be able to use a personal

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vice to shield himself from criminal liability." O'Neill, Illinois' Latest Version of the Defense of Voluntary Intoxication: Is it Wise? Is it Constitutional?, 39 De Paul L. Rev. 15, 18 (1989). Those rationales continue today; they are joined by the argument that the general versus specific intent dichotomy is not a legally sound distinction.

Assuming for the moment that the law should trust the trier of fact to be able to identify any evidence of feigned intoxication, concern for the other two policies remains. As to the distinction between general and specific intent crimes, it is often unclear under which category a particular crime should be classed. California Supreme Court Justice Traynor has criticized this ambiguous dichotomy by showing that a particular crime could be classified both a specific and a general intent crime. People v. Hood, 1 Cal. 3d 444, 463 P.2d 370, 82 Cal. Rptr. 618 (1969). One commentator has described the distinction as "a slippery concept." Boettcher, at 41. As a matter of policy, the voluntary intoxication defense should be available to all or none, instead of on this tenuous distinction. See O'Neill, at 17-20.

Perhaps more importantly, this defense can allow the guilty to escape responsibility for their crimes. According to Justice Traynor, an intoxicated criminal should not be able to evade the consequences of his crime by voluntarily getting drunk. Hood, 1 Cal. 3d at 455. Allowing such a defense is to allow "a criminal to commit a crime with a revolver in one hand to commit the deed and a quart of intoxicating liquor in the other hand with which to create his defense." People v. Rosas, 102 Ill. App. 3d 113, 116, 429 N.E.2d 898, 900 (1981). In a time where much crime is related to alcohol or other drugs, this prospect is frightening and irresponsible. Fortunately, it can be avoided by eliminating the voluntary intoxication defense (while leaving involuntary intoxication available as a defense).

III. THE CONSTITUTIONALITY OF THE ELIMINATION

Several states have already eliminated the defense of voluntary intoxication. See Annot., 8 A.L.R.3d 1236, 1240-42 (1966) for a list of states, which includes Arkansas, Delaware, Georgia, Idaho, Illinois, Missouri, and Texas. Under the due process clause, a defendant has a constitutional right not to be convicted of a crime unless the state has proven guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197 (1977). This right, however, is not violated--nor is any other constitutional right--by the elimination of the voluntary intoxication defense.

In Wyant v. State, 519 A.2d 649 (Del. Supr. 1986), the Delaware Supreme Court found no constitutional violation in the legislature's elimination of the defense. It stated:

[D]efendant's intoxication does not alter the State's

> burden of proof beyond a reasonable doubt of each element of the offenses with which he was charged, including state of mind and intent . . . The trier of fact is simply precluded from using defendant's intoxication as a basis for finding defendant to lack the requisite intent for conviction to the several offenses.

Id., at 652. The court noted that voluntary intoxication has never been accorded constitutional recognition as a defense to any criminal offense. Id., at 651. In doing so, it cited United States v. Vaughn, 614 F.2d 929 (3d Cir. 1980), cert. denied, 449 U.S. 844 (1980). In that case, the Third Circuit stated that Delaware had "provided for the affirmative defense of voluntary intoxication, although it was not required either constitutionally or at common law." Id., at 935. Thus, when Delaware eliminated the defense, the Delaware Supreme Court determined that no recognized constitutional right was implicated. Wyant, 519 A.2d at 660.

A similar outcome was reached in Hindman v. Wyrick, 531 F. Supp. 1103 (W.D. Mo. 1982), where the federal district court stated that the Missouri statute eliminating the voluntary intoxication defense, § 562.076 R.S. Mo. (1979), was constitutional. Id., at 1112. But see Terry v. State, 465 N.E.2d 1085 (Ind. 1984) (Indiana statute found void and without effect).

Criminals should not be able to escape the consequences of their crimes by using the voluntary intoxication defense. Therefore, the defense can and should be constitutionally eliminated.