JUDICIARY SUBCOMMITTEE ON CRIMINAL LAW

Senator Jerry Moran, Chairman

March 3, 1992
10:00 a.m.

SB 665 - creating the crime of stalking

PROPONENTS

Senator Bill Brady (ATTACHMENT 1)
Laurie Marlowe, Lawrence (ATTACHMENT 2)

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATION: to be considered at a later date.

SB 686 appeals from municipal courts.

PROPONENTS

Bernard Hurd, City of Topeka Chief of Prosecution (ATTACHMENT 3)
written from Gene Johnson, Sunflower Alcohol Safety Action Project, for Judge William Carpenter (ATTACHMENT 4)

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATION: to be considered at a later date.

SB 687 - certain devices used for medical or psychological therapy not obscene devices.

PROPONENTS

James Clark, Kansas County and District Attorneys Assocation (ATTACHMENT 4)4

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATION: no actions taken.

SB 688 - juvenile offenders not to include those charged or convicted as an adult in any other state or federal jurisdiction.

PROPONENTS

William Kennedy, Riley County Attorney (ATTACHMENT 5)
James Clark, Kansas County and District Attorneys Association (see ATTACHMENT 4) 4

OPPONENTS

SUBCOMMITTEE RECOMMENDATION: recommended favorable for passage.

SB 742 - penalty enhancements for subsequent drug offenses to include offense from other jurisdictions.

PROPONENTS

Melanie Jack, Kansas Bureau of Investigation (ATTACHMENT 6)
James Clark, Kansas County and District Attorneys Association (see ATTACHMENT 4) 4
Helen Stephens, Kansas Police Officers Association

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATION: recommended favorable for passage as amended.

SB 735 - retention of jurisdiction by court in murder cases when person is convicted of lesser, included offense.

PROPONENTS

James Clark, Kansas County and District Attorneys Association (see ATTACHMENT 4) 4

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATION: recommended favorable for passage.

SB 734 - stipulation of facts included in diversion agreements involving offenses other than DUI.

PROPONENTS

William Kennedy, Riley ounty Attorney (ATTACHMENT 7)
James Clark, Kansas County and District Attorneys Association (see ATTACHMENT 4) A

OPPONENTS

none appeared

SUBCOMMITTEE RECOMMENDATION: recommended favorable for passage.

BILL BRADY
SENATOR, FOURTEENTH DISTRICT
LABETTE COUNTY AND PARTS OF
CRAWFORD, MONTGOMERY AND
NEOSHO COUNTIES
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State of Kansas
Senate Chamber

STATE CAPITOL
TOPEKA, KANSAS 66612
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COMMITTEES:
AGRICULTURE
ECONOMIC DEVELOPMENT
JOINT COMMITTEE ON ECONOMIC DEVELOPMENT
ELECTIONS
TRANSPORTATION AND UTILITIES
WAYS AND MEANS

March 3, 1992

TESTIMONY ON SB665
SENATE JUDICIARY COMMITTEE:

SB665 is patterned after a California Statute approved last year. I was asked by a constituent to introduce it to Kansas based on a situation she was involved in. My constituent was harassed by an ex-boyfriend for many months and suffered a great deal of emotional stress as the result. The police told my constituent that there was little that could be done. The police talked to the gentleman trying to convince him to avoid all contact with the victim. This bill is an attempt to give law enforcement personnel an ability to intervene in such situations before someone is hurt.

Obviously, legislation dealing with this type of problem is difficult to craft. I welcome your ideas, suggestions or comments.

Senator Bill Brady

Criminal Law Subcommittee
March 3, 1992
Attachment 1

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A Brief Chronology of the David Puckett Case

Aug 1980 — Harassment of Laurie Marlowe (Lagomarcino at the time) commences.

Numerous daily phone calls, requests for dates, sending flowers, following Ms. Marlowe even while on company business for employer. Entering household dwelling uninvited. Attempting to gain access to dwelling when victim refused to allow entry. Spreading rumors about an alleged affair between harassor and victim at victim's place of business, and in public places victim frequented. etc.

Oct 1982 — Victim filed a police report. Criminal charges were filed against Mr. Puckett for attempted telephone harassment, trespassing and battery. He was convicted of charges and placed on probation.

Dec 1982 — Mr. Puckett's probation was revoked as a result of violation and continued intentional contact with the victim.

Feb 1983 — Three more counts of criminal trespass were filed against Mr. Puckett. While out on bond he left the State to avoid prosecution. Mr. Puckett evidently went to Arvada, Colorado to live with his brother during this time. David Puckett returned to Lawrence almost weekly in order to try and make contact with the victim. One year later he was arrested after having attacked the victim on while she was on an air mattress at Lone Star Lake. The D.A.'s office chose not to file additional charges. It was felt the outstanding Criminal Trespass charges were adequate. Mr. Puckett was apprehended shortly after this incident and later pled guilty to Failure to Appear and the Criminal Trespass charges. Telephone harassment continued even while Mr. Puckett was incarcerated until victim requested an unlisted phone number. Harassment via phone at victim's place of employment continued.

Nov 1984 — Mr. Puckett entered State Security Hospital at Larned for the first time. Harassment via phone to victim's place of business continued.

Jun 1986 — David Puckett was civilly committed by the Douglas County District Court to Topeka State Hospital. Mr. Puckett went AWOL approximately 3 weeks after admission. Topeka State Hospital discharged him because "they did not want to be responsible for his actions" and could not locate him. Mr. Puckett aided by his family went to stay with his mother in Arkansas. During this time over 200 phone calls were made to the Quaker Oats Company by Mr. Puckett from Arkansas.

Dec 1986 — Mr. Puckett was arrested in Arkansas and extradited to the State of Kansas to face 4 counts of Telephone Harassment.

Mar 1897 — Mr. Puckett found guilty of the 4 charges of Telephone Harassment.

Criminal Law Subcommittee
March 3, 1992
Attachment 2

Apr 1987	Mr. Puckett was ordered to State Security Hospital as it was deemed he needed treatment within a secure facility. Mr. Puckett continued to make harassing phone calls to the Quaker Oats Company, specifically to Ms. Marlowe at every opportunity.
Jul 1988	Mr. Puckett was returned to the Douglas County Court for criminal sentencing as Larned Institution (Dr. William Logan) recommended. There was "no evidence which would indicate that further hospitalization would be of benefit to this patient." Judge Malone refused the request to return Mr. Puckett to the Douglas County Jail stating "He is a very sick and dangerous man and I do believe he is in the only place that can offer security as well as hope to all those involved." Mr. Puckett remained in State Security Hospital.
May 1990	Mr. Puckett charged with 5 additional counts of Telephone Harassment and sentenced to State Security Hospital for 2 years.

- Mr. Puckett's due for release June 18, 1992 from the Douglas County Jail. The Attorney General's Office will be requesting an MI.

- There was much frustration with this case in the past on behalf of the District Attorney's Office and Douglas County Law Enforcement. It was stated to me on more than one occasion since there were no laws against this type of harassment my best option was to quit my job, move away from Lawrence and leave no forwarding address to family or friends.

- I am a proponent of Senate Bill #665 Crime and Stalking, however I would like to request an amendment be made to the bill. The phrasing of the last portion of the Bill, "A credible threat", is defined as "a threat made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for such person's safety. The threat must be against the life of, or a threat to cause great bodily injury to, a person." Mr. Puckett has not verbally threatened me in such a manner, however, I believe him to be a very serious threat because of his obsession with me. Apparently other credible individuals confirm this fear. (Dr. William Logan, consulting physician from the Menninger School of Psychiatry is one such individual, Additionally a Forensic Staff Conference was held April 4, 1986 in which the following conclusions were drawn:

  Every feasible therapeutic option has been tried with little result. Mr. Puckett's thinking and fantasized relationship for the victim have remained the same, and all attempts to help reconstruct what has happened in a way that makes sense have failed. It appears that he is resistant to treatment. The staff are of the opinion that Mr. Puckett will certainly attempt to contact the victim when released, and in this sense he will pose a threat or danger to the victim, even though he has no history of assaultive or dangerous behavior.

  The staff further speculated that in view of his fantasized passion for this victim, events that have begun as relatively harmless harassment could turn violent if Mr. Puckett should substitute hate for his feelings of delusional loved based on his repeated failures to win the victim's affections.

- No individual should be pestered, badgered, intimidated or harassed by another individual in the manner in which I have been for the past 12 years. Whether or not a harassor is pledging love or hate should not be the issue. The issue should be that the law should protect an individual's basic human rights to privacy and that individual's such as myself should be free to pursue their goals in life not be forced to relocated or put up with the emotional torment and public humiliation I have as a result of a sick individual because the laws were not designed for such circumstances.

CITY OF TOPEKA

City Attorney
215 E. 7th Street Room 353
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Phone 913-295-3883

Testimony before the Senate Judiciary
Subcommittee on Criminal Law
March 3, 1992

Senator Moran and members of the subcommittee, my name is Bernard Hurd, Chief of Prosecution for the City of Topeka. I am here in support of Senate Bill 686.

On occasions when appeals are taken from the Municipal Court, there are requests for jury trials which often are made anywhere from the time the appeal is filed and up until 48 hours prior to the scheduled trial.

This has been a source of confusion in the District Court which hears Municipal Court appeals because K.S.A. 22-3404, pertaining to misdemeanor and traffic offense and infraction cases was recently amended to require that a defendant request a jury trial "not later than seven days after first notice of trial assignment is given to the defendant or such defendant's counsel".

This section, previously, had required a request by the defendant "..not later than 48 hours prior to trial".

While the legislature amended K.S.A. 22-3404, it failed to amend 22-3609(4) which has language that is almost identical to the previous language of K.S.A. 22-3404.

The City Attorney's office recommends that the language in K.S.A. 22-3609(4) be amended to require that a jury trial request be filed, "not later than seven days after first notice of trial assignment is given to the defendant or such defendant's counsel".

This recommendation is based on (1) a need for consistency and (2) convenience in planning.

First, the District Court has on occasion attempted to apply K.S.A. 22-3404 to cases appealed from the Municipal Court. The court has been reminded that K.S.A. 22-3609 is controlling and allows the defendant to request a jury trial not later than 48 hours prior to trial. The case is then rescheduled for a later date.

Second, even though the case is rescheduled, usually the witnesses are present and preparations have been made to try the case to the court. In such an instance, it is usually the witnesses of the prosecution that are inconvenienced.

The proposed amendment would reduce confusion and minimize delays caused by rescheduling.

I would be happy to stand for any questions.

Criminal Law Subcommittee
March 3, 1992
Attachment 3

Subsection (3) is adopted from sec. 95-1901, Mont. Code of Cr. Proc. It states a basic concept in jury trials. It rebuts any possible theory that might be urged in libel prosecutions that issues of law are decided by the jury (see K.S.A. 21-2406).

Law Review and Bar Journal References:

Jury's power to return a criminal verdict contrary to the law and facts, 13 W.L.J. 129, 131 (1974).

CASE ANNOTATIONS

1. Cited; parties may agree in writing to fewer than 12 members on a jury; relation to 12-member jury in civil cases. Bourne v. Atchison, Topeka and Santa Fe Railway Company, 209 K. 511, 514, 497 P.2d 110.

2. Subsection (3) cited in appeal on question reserved; function of jury discussed in disapproving patterned jury instruction. State v. McClanahan, 212 K. 208, 210, 216, 510 P.2d 153.

3. No right to have jury trial reinstated after voluntary waiver; conviction of aggravated burglary and robbery upheld. State v. Lawrence, 216 K. 27, 28, 530 P.2d 1232.

4. Failure to advise of right to trial by jury; no waiver; conviction reversed. State v. Irving, 216 K. 588, 533 P.2d 1225.

5. Mentioned; defendant after conviction not relieved from prior stipulation as to manner of selecting juror. State v. Bennett, 222 K. 358, 360, 564 P.2d 540.

6. Cited; one-day continuance during trial proceedings did not prejudice defendant's rights. State v. Nelson, 223 K. 251, 252, 573 P.2d 602.

7. Felony tried by jury unless defendant, prosecution and court agree to waiver; two of three insufficient. State v. Siver, 237 K. 569, 571, 701 P.2d 699 (1985).

8. Accused, not attorney, has right to make decision about trial by less than 12-person jury. State v. Hood, 242 K. 115, 125, 744 P.2d 816 (1987).

22-3404. Misdemeanor and traffic infraction cases; method of trial. (1) The trial of misdemeanor and traffic infraction cases shall be to the court unless a jury trial is requested in writing by the defendant not later than 48 hours prior to the trial.

(2) A jury in a misdemeanor or traffic infraction case shall consist of six members.

(3) Trials in the municipal court of a city shall be to the court.

(4) Except as otherwise provided by law, the rules and procedures applicable to jury trials in felony cases shall apply to jury trials in misdemeanor and traffic infraction cases.

History: L. 1970, ch. 129, § 22-3404; L. 1976, ch. 163, § 19; L. 1977, ch. 112, § 8; L. 1981, ch. 154, § 1; L. 1984, ch. 39, § 40; Jan. 1, 1985.

Source or prior law:

62-1401, 63-302, 63-305.

Law Review and Bar Journal References:

Traffic cases and license problems, William M. Ferguson, 39 J.B.A.K. 351, 352 (1970).

"Municipal Corporations—Home Rule—City Ordinance Concerning Weapon Control Is Within the Scope of the Kansas Home Rule Amendment," 24 K.L.R. 421, 431 (1976).

"Survey of Kansas Law: Criminal Law and Procedure," Keith G. Meyer, 27 K.L.R. 391, 393 (1979).

CASE ANNOTATIONS

1. Cited in holding district court erred in civil case in compelling appellant to submit to trial by jury of six. Bourne v. Atchison, Topeka and Santa Fe Railway Company, 209 K. 511, 514, 497 P.2d 110.

2. Section pertains to method of trial; not inconsistent with section pertaining to defendant's presence at trial. State v. Cade, 210 K. 544, 545, 546, 502 P.2d 782.

3. Failure to advise of right to trial by jury; no waiver; conviction reversed. State v. Irving, 216 K. 588, 590, 533 P.2d 1225.

4. Silent record no presumption jury trial right waived; statute inapplicable where counsel appointed moments before trial. State v. Dickson, 9 K.A.2d 425, 426, 680 P.2d 313 (1984).

5. Discussed; to waive felony jury (22-3403(1)) determined; defendant, prosecution and court must agree; two of three insufficient. State v. Siver, 237 K. 569, 571, 701 P.2d 699 (1985).

6. Cited; absence of defendant or counsel at misdemeanor appeal trial (22-3405) where untimely request for jury (22-3609) made discussed. City of Overland Park v. Barnett, 10 K.A.2d 586, 593, 705 P.2d 564 (1985).

22-3405. Presence of defendant. (1) The defendant in a felony case shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by law. In prosecutions for crimes not punishable by death, the defendant's voluntary absence after the trial has been commenced in such person's presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes.

(2) The defendant must be present, either personally or by counsel, at every stage of the trial of traffic infraction and misdemeanor cases.

History: L. 1970, ch. 129, § 22-3405; L. 1984, ch. 39, § 41; Jan. 1, 1985.

Source or prior law:

62-1411, 62-1507, 62-1508.

Judicial Council, 1969: This section incorporates parts of F.R.Cr.P. 43 and of Montana Code of Criminal Procedure, 95-1904.

CASE ANNOTATIONS

1. Dismissal of appeal from misdemeanor conviction reversed; defendant's presence by counsel sufficient under subsection (2). State v. Cade, 210 K. 544, 545, 546, 502 P.2d 782.

2. Defendant sentenced in absentia did not waive right

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Amendment

22-3403.

CASE ANNOTATIONS

9. Jury instruction and jury form not requiring unanimous decision nor theory on first degree murder (21-3401) examined. State v. Hartfield, 245 K. 431, 445, 781 P.2d 1050 (1989).

22-3404. Misdemeanor and traffic offense and infraction cases; method of trial. (1) The trial of misdemeanor and traffic offense cases shall be to the court unless a jury trial is requested in writing by the defendant not later than seven days after first notice of trial assignment is given to the defendant or such defendant's counsel. The time requirement provided in this subsection regarding when a jury trial shall be requested may be waived in the discretion of the court upon a finding that imposing such time requirement would cause undue hardship or prejudice to the defendant.

(2) A jury in a misdemeanor or traffic offense case shall consist of six members.

(3) Trials in the municipal court of a city shall be to the court.

(4) Except as otherwise provided by law, the rules and procedures applicable to jury trials in felony cases shall apply to jury trials in misdemeanor and traffic offense cases.

(5) The trial of traffic infraction cases shall be to the court.

History: L. 1970, ch. 129, § 22-3404; L. 1976, ch. 163, § 19; L. 1977, ch. 112, § 8; L. 1981, ch. 154, § 1; L. 1984, ch. 39, § 40; L. 1989, ch. 100, § 1; L. 1990, ch. 109, § 1; July 1.

22-3405.

CASE ANNOTATIONS

25. Defendant's presence not required at posttrial hearing on objections to prosecution's preemptory challenges during jury selection. State v. Hood, 245 K. 367, 376, 378, 780 P.2d 160 (1989).

22-3406.

CASE ANNOTATIONS

2. Refusal to grant continuance proper where defendant had seven months from arraignment to prepare for trial. State v. Roberts, 13 K.A.2d 485, 487, 773 P.2d 688 (1989).

22-3408.

CASE ANNOTATIONS

4. Alleged improper restriction of inquiry regarding insanity defense examined. State v. Pioletti, 246 K. 49, 54, 785 P.2d 963 (1990).

22-3412.

CASE ANNOTATIONS

13. Prosecutor's explanation of peremptory challenges of members of jury panel belonging to defendant's race examined. State v. Belnavis, 246 K. 309, 311, 787 P.2d 1172 (1990).

22-3414.

CASE ANNOTATIONS

66. Cited; propriety of jury instructions on insanity and diminished capacity examined. State v. Morris, 244 K. 22, 24, 765 P.2d 1120 (1988).

67. Definitions of dangerous weapon and deadly weapon examined. State v. Colbert, 244 K. 422, 425, 769 P.2d 1168 (1989).

68. Instructions on self-defense, defense against an aggressor, emphasizing particular portions of evidence and conclusive presumption examined. State v. Green, 245 K. 398, 408, 781 P.2d 678 (1989).

69. Jury instruction not requiring unanimous decision nor theory on first degree murder (21-3401) examined. State v. Hartfield, 245 K. 431, 446, 781 P.2d 1050 (1989).

70. Limitation of time for arguments of counsel as within sound discretion of trial judge noted. State v. Trotter, 245 K. 657, 662, 783 P.2d 1271 (1989).

71. Instruction on intent in burglary (21-3715) trial examined where accused had authority to enter premises. State v. Harper, 246 K. 14, 25, 785 P.2d 1341 (1990).

22-3416.

CASE ANNOTATIONS

1. Refusal to compel recalcitrant witness to testify where no objection registered thereto examined. State v. Gonzales, 245 K. 691, 702, 783 P.2d 1239 (1989).

22-3419.

Law Review and Bar Journal References:

"Review Proceedings," K.L.R., Criminal Procedure Edition, 37 (1989).

CASE ANNOTATIONS

22. Court has inherent power to grant motion of acquittal so long as jurisdiction retained; acquittal bars further proceedings. State v. Thomas, 12 K.A.2d 743, 755 P.2d 562 (1988).

23. Cited by dissent; self-defense instruction by battered wife absent showing of imminent danger examined. State v. Stewart, 243 K. 639, 659, 763 P.2d 572 (1988).

24. Effect of defendant's motion for acquittal prior to cross-examining and rebutting codefendant's evidence examined. State v. Copes, 244 K. 604, 606, 772 P.2d 742 (1989).

22-3421.

CASE ANNOTATIONS

6. Jury instruction and jury form not requiring unanimous decision nor theory on first degree murder (21-3401) examined. State v. Hartfield, 245 K. 431, 445, 781 P.2d 1050 (1989).

22-3422.

CASE ANNOTATIONS

5. Defendant has absolute statutory right to make a statement to the court during the proceeding known as allocution. State v. Wielgus, 14 K.A.2d 145, 783 P.2d 1320 (1990).

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defendant is guilty of a crime, although improperly charged, the appellate court shall order the defendant to be held in custody, subject to the order of the court in which he or she was convicted.

History: L. 1970, ch. 129, § 22-3607; L. 1975, ch. 178, § 26; Jan. 10, 1977.

Source or prior law:

62-1717.

Judicial Council, 1969: This is a restatement of former K.S.A. 62-1717.

CASE ANNOTATIONS

1. Applied; conviction under 21-3422 reversed; parent had equal right to custody of child. State v. Al-Turck, 220 K. 557, 559, 552 P.2d 1375.

22-3608. Time for appeal to supreme court. (1) If sentence is imposed, the defendant may appeal from the judgment of the district court not later than 10 days after the expiration of the district court's power to modify the sentence. The power to revoke or modify the conditions of probation or the conditions of assignment to a community correctional services program shall not be deemed power to modify the sentence.

(2) If the imposition of sentence is suspended, the defendant may appeal from the judgment of the district court within 10 days after the order suspending imposition of sentence.

History: L. 1970, ch. 129, § 22-3608; L. 1986, ch. 123, § 23; July 1.

Source or prior law:

62-1724.

Judicial Council, 1969: The time limitations of the section are the same as those formerly found in K.S.A. 62-1724. It is suggested that the necessary procedural standards be provided by rule. Bail and other conditions of release pending appeal are covered in section 22-2804.

Cross References to Related Sections:

Time limit for modification of sentence, see 21-4603.

Law Review and Bar Journal References:

Appeal time limits discussed in "Collateral Challenges to Criminal Convictions," Keith G. Meyer and Larry W. Yackle, 21 K.L.R. 259, 264, 319 (1973).

"Practicing Law in a Unified Kansas Court System," Linda Diane Henry Elrod, 16 W.L.J. 260, 271 (1977).

CASE ANNOTATIONS

1. Failure to file appeal within time prescribed by this section and 21-4603; appeal dismissed. State v. Thompson, 221 K. 165, 166, 167, 558 P.2d 93.

2. Applied; appeal from conviction of aggravated robbery not filed within statutory time. State v. Smith, 223 K. 47, 573 P.2d 985.

3. Appeal from order suspending imposition of sentence timely filed; denial of motion for acquittal proper. State v. Brady, 2 K.A.2d 382, 383, 580 P.2d 434. Syl ¶ 2 and corresponding statements in Brady opinion overruled. State v. Moses, 227 K. 400, 403, 607 P.2d 477.

4. Appeal dismissed; sentence must be imposed or imposition of sentence suspended in order to have a final appealable judgment. City of Topeka v. Martin, 3 K.A.2d 105, 590 P.2d 106.

5. Appeal dismissed; appeal not timely filed under this section and 21-4603. State v. Moses, 227 K. 400, 401, 404, 607 P.2d 477.

6. Cited; no right of appeal from denial of sentence modification motion filed more than 130 days after sentencing. State v. Henning, 3 K.A.2d 607, 608, 599 P.2d 318.

7. Jurisdiction lacking for appeal of conviction of involuntary manslaughter; sentence deferred, not suspended. State v. Lottman, 6 K.A.2d 741, 742, 633 P.2d 1178 (1981).

8. Filing of timely notice of appeal is jurisdictional; appeal not taken within time prescribed must be dismissed; exception to general rule noted. State v. Ortiz, 230 K. 733, 735, 640 P.2d 1255 (1982).

9. Trial court's jurisdiction ends when appeal docketed; modification of sentence only upon mandate of appellate court or upon remand. State v. Dedman, 230 K. 793, 796, 640 P.2d 1266 (1982).

10. Time limits set herein applicable to imposition of sentence not to modification of probation conditions. State v. Yost, 232 K. 370, 372, 654 P.2d 458 (1982).

11. Cited in deciding that prosecution's appeal time under 22-3602(b) covered by 60-2103. State v. Freeman, 236 K. 274, 276, 689 P.2d 885 (1984).

12. Limitation on appeal by criminal defendant linked to time court may modify sentence. State v. Myers, 10 K.A.2d 266, 269, 697 P.2d 879 (1985).

13. Appeal of conviction must be within time periods herein and 21-4603, regardless of probation and subsequent revocation. State v. Tripp, 237 K. 244, 246, 699 P.2d 33 (1985).

14. Cited; denial of motion allowing late filing of appeal where no indication to appeal found in record examined. State v. Cook, 12 K.A.2d 309, 310, 741 P.2d 379 (1987).

15. Cited; appeal times controlling with and without imposition of sentence (21-4603) determined. State v. Wagner, 242 K. 329, 747 P.2d 114 (1987).

22-3609. Appeals from municipal courts. (1) The defendant shall have the right to appeal to the district court of the county from any judgment of a municipal court which adjudges the defendant guilty of a violation of the ordinances of any municipality of Kansas. The appeal shall be assigned by the administrative judge to a district judge. The appeal shall stay all further proceedings upon the judgment appealed from.

(2) An appeal to the district court shall be taken by filing, in the district court of the county in which the municipal court is located, a notice of appeal and any appearance bond required by the municipal court. Municipal court clerks are hereby authorized to accept

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notices of appeal and appearance bonds under this subsection and shall forward such notices and bonds to the district court. No appeal shall be taken more than 10 days after the date of the judgment appealed from.

(3) The notice of appeal shall designate the judgment or part of the judgment appealed from. The defendant shall cause notice of the appeal to be served upon the city attorney prosecuting the case. The judge whose judgment is appealed from or the clerk of the court, if there is one, shall certify the complaint and warrant to the district court of the county, but failure to do so shall not affect the validity of the appeal.

(4) Hearing on the appeal shall be to the court unless a jury trial is requested in writing by the defendant not later than 48 hours prior to the trial. A jury in an appeal from a municipal court judgment shall consist of six members.

(5) Notwithstanding the other provisions of this section, appeal from a conviction rendered pursuant to subsection (b) of K.S.A. 12-4416 and amendments thereto shall be conducted only on the record of the stipulation of facts relating to the complaint.

History: L. 1970, ch. 129, § 22-3609; L. 1971, ch. 114, § 10; L. 1975, ch. 202, § 1; L. 1976, ch. 163, § 21; L. 1977, ch. 112, § 10; L. 1981, ch. 154, § 3; L. 1982, ch. 149, § 1; L. 1982, ch. 144, § 18; L. 1983, ch. 115, § 1; L. 1986, ch. 115, § 66; Jan. 12, 1987.

Source or prior law:

63-401.

Revisor's Note:

For Judicial Council commentary, see 22-3611.

Law Review and Bar Journal References:

"Practicing Law in a Unified Kansas Court System," Linda Diane Henry Elrod, 16 W.L.J. 260, 270, 271 (1977).

Constitutionality of the use of lay judges in Kansas, 25 K.L.R. 275, 276 (1977).

"A Comment on Kansas' New Drunk Driving Law," Joseph Brian Cox and Donald G. Strole, 51 J.K.B.A. 230, 242 (1982).

"The New Kansas Drunk Driving Law: A Closer Look," Matthew D. Keenan, 31 K.L.R. 409 (1983).

"An Additudinal Study of Kansas' Two-Tier Trial System," Michael Kaye, Fred Yaffe, 54 J.K.B.A. 212 (1985).

Attorney General's Opinions:

Double jeopardy; effect of former prosecution. 86-4.

Driving while under influence of alcohol; imposition by municipal courts of penalties for second, third and subsequent violations. 82-155.

CASE ANNOTATIONS

1. Subsection (2) construed; filing of written appeal notice in municipal court required to perfect criminal appeal. City of Overland Park v. Nikias, 209 K. 643, 644, 646, 647, 648, 498 P.2d 56.

2. Appeal taken hereunder from city court convictions for battery and disorderly conduct. State v. Parker, 213 K. 229, 230, 516 P.2d 153.

3. Subsection (2) mentioned; statute contemplates filing of a written notice of appeal. City of Kansas City v. Board of County Commissioners, 213 K. 777, 783, 518 P.2d 403.

4. Refusal by trial court to order a lineup did not amount to finding of guilt. State v. Porter, 223 K. 114, 115, 574 P.2d 187.

5. Cited; error to dismiss complaints because municipal court refused to appoint and compensate counsel for indigent defendants' appeals. City of Overland Park v. Estell & McDiffett, 225 K. 599, 601, 592 P.2d 909.

6. Failure to comply with section jurisdictional defect; not cured by filing notice of appeal in district court. City of Bonner Springs v. Clark, 3 K.A.2d 8, 9, 588 P.2d 477.

7. Cited; upon the filing of an affidavit of prejudice, transfer of the case to another judge is automatic. City of Neodesha v. Knight, 226 K. 416, 601 P.2d 669.

8. Cited; the right to a speedy trial is applicable to criminal cases appealed to district courts from municipal court convictions. City of Overland Park v. Fricke, 226 K. 496, 499, 502, 601 P.2d 1130.

9. Provisions of statute directory rather than mandatory; delay cannot infringe on right to speedy trial. City of Garnett v. Zweiner, 229 K. 507, 508, 509, 510, 625 P.2d 491.

10. Considered in construing 21-4603 as permitting court to retain jurisdiction and act on timely motion for probation or sentence reduction after 120-day period. State ex rel. Owens v. Hodge, 230 K. 804, 808, 641 P.2d 399 (1982).

11. Time for appeal hereunder jurisdictional; modification of existing sentence not new judgment creating new right of appeal. City of Wichita v. Mesler, 8 K.A. 2d 710, 714, 666 P.2d 1209 (1983).

12. Statute, being integral part of whole subject of act (L. 1982, ch. 144), not violative of Kan. Const., Art. 2, § 16. State v. Reves, 233 K. 972, 976, 980, 666 P.2d 1190 (1983).

13. Where appeal to district court does not comply hereunder, appellate court lacks jurisdiction over subject matter. City of Overland Park v. Barron, 234 K. 522, 526, 527, 672 P.2d 1100 (1983).

14. Demand for jury trial, oral or written, must be made of record to court at least 48 hours before trial. City of Overland Park v. Barnett, 10 K.A.2d 586, 591, 705 P.2d 564 (1985).

15. Generally held if constitutional rights are at issue, habeas corpus is available even though no direct appeal taken. In re Habeas Corpus Application of Gilchrist, 238 K. 202, 205, 708 P.2d 977 (1985).

22-3609a. Appeals from district magistrate judges. (1) A defendant shall have the right to appeal from any judgment of a district magistrate judge. The administrative judge shall be responsible for assigning a district judge for any such appeal. The appeal shall stay all further proceedings upon the judgment appealed from.

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SB 686

Sunflower Alcohol Safety Action Project, Inc.

Suite F, 112 S.E. 7th / Topeka, Kansas 66603 / Phone (913) 232-1415

February 10, 1992

Senator Wint Winter, Chairman
Senate Judicial Committee
Statehouse
Topeka, KS

Re: Request for Proposed Legislation
Amending KSA 22-3609

Dear Senator Winter:

In regards to our conversation of February 7, 1992 I am making a formal request on the behalf of Judge William R. Carpenter, Administrative Judge of the Third Judicial District, for your Committee to investigate the possibility of introducing legislation that would amend KSA 22-3609.

Two years ago when your Committee introduced successful legislation that provided assistance for the District Courts of the State of Kansas to provide speedy adjudication of jury cases. Since that time we have found another problem in this particular area, especially from appeals from Municipal Courts. It has been the tact of defense counsels to use this particular statute to delay the adjudication process in the District Courts.

Judge Carpenter has suggested that the language used in KSA 22-3404 which was introduced by the Committee in 1990, be amended into 22-3609 which relates to the appeals from the Municipal Courts.

Judge Carpenter has suggested the following language be inserted in KSA-22-3609

"The trial of misdemeanor and traffic offense cases shall be to the court unless a jury trial is requested in writing by the defendant not later than seven days after first notice of trial assignment is given to the defendant or such defendant's counsel. The time requirement provided in this subsection regarding when a jury trial shall be requested by be waived in the discretion of the court upon a finding that imposing such time requirement would cause undue hardship or prejudice to the defendant. A jury in a misdemeanor or traffic offense case shall consist of six members. The trial of traffic infraction cases shall be to the court."

Judge Carpenter feels that this language will help the District Courts of Kansas handle the ever increasing load of Municipal Court appeals, coming under their jurisdiction.

At this time, on the behalf of Judge Carpenter, of the Third Judicial District, I ask you to explore the possibility of introducing legislation in this session in order to provide assistance to our Judicial system in the State of Kansas.

Respectfully yours,

Gene Johnson
Project Coordinator

Criminal Law Subcommittee
March 3, 1992
Attachment 4

1/6

District Court of Kansas
Third Judicial District
Shawnee County, Kansas

Chambers of
William Randolph Carpenter
Administrative Judge of the District Court
Division No. One
Shawnee County Courthouse
Topeka, Kansas 66603

Officers:
Carol A. Meggison, C.S.R.
Official Reporter
291-4351
Pamela S. Patton
Administrative Assistant
913-291-4365

It is recommended that the language in K.S.A. 22-3609(4) be substituted with the following:

The trial of municipal appeal cases shall be to the court unless a jury trial is requested in writing by the defendant not later than seven days after first notice of trial assignment is given to the defendant or such defendant's counsel. The time requirement provided in this subsection regarding when a jury trial shall be requested may be waived in the discretion of the court upon a finding that imposing such time requirement would cause undue hardship or prejudice to the defendant. A jury in a municipal appeal case shall consist of six members. The trial of traffic infraction cases shall be to the court.

Senator Winter.
Judge Carpenter made further language changes on Feb 11, 1992

Gene

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District Court of Kansas
Third Judicial District
Shawnee County, Kansas

Chambers of
William Randolph Carpenter
Administrative Judge of the District Court
Division No. One
Shawnee County Courthouse
Topeka, Kansas 66603

Officers:
Carol A. Meggison, C.S.R.
Official Reporter
291-4351
Pamela S. Patton
Administrative Assistant
913-291-4365

It is recommended that the language in K.S.A. 22-3609(4) be substituted with the following:

The trial of misdemeanor and traffic offense cases shall be to the court unless a jury trial is requested in writing by the defendant not later than seven days after first notice of trial assignment is given to the defendant or such defendant's counsel. The time requirement provided in this subsection regarding when a jury trial shall be requested may be waived in the discretion of the court upon a finding that imposing such time requirement would cause undue hardship or prejudice to the defendant. A jury in a misdemeanor or traffic offense case shall consist of six members. The trial of traffic infraction cases shall be to the court.

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20. Delays caused by defendant's filing motion for competency hearing as chargeable to defendant determined. State v. Prewett, 246 K. 39, 44, 785 P.2d 956 (1990).

Article 34.—TRIALS AND INCIDENTS THERETO

22-3401.

CASE ANNOTATIONS

19. Refusal to grant continuance proper where defendant had seven months from arraignment to prepare for trial. State v. Roberts, 13 K.A.2d 485, 487, 773 P.2d 688 (1989).

22-3402.

Law Review and Bar Journal References:

"Pretrial Proceedings," K.L.R., Criminal Procedure Edition, 9, 14, 19 (1989).

CASE ANNOTATIONS

67. Right to speedy trial in criminal cases extends to appeals from municipal court to district court. City of Elkhart v. Bollacker, 243 K. 543, 546, 757 P.2d 311 (1988)

68. When misdemeanor charges dismissed then refiled, time between dismissal and subsequent first appearance (22-3205) disregarded in computing speedy trial. City of Derby v. Lackey, 243 K. 744, 763 P.2d 614 (1988).

69. Cited; person released from custody as not subject to speedy trial provisions of 22-4303 examined. State v. Julian, 244 K. 101, 103, 765 P.2d 1104 (1988).

70. Trial within original statutory limitation plus court-allowed 30-day continuance does not violate statutory right to speedy trial. State v. Clements, 244 K. 411, 415, 770 P.2d 447 (1989).

71. Admissibility of evidence stored in court computer (particularly continuances granted), regardless of compliance with 60-2601a, determined. State v. Chapman, 244 K. 471, 769 P.2d 660 (1989).

72. Applicability examined where confinement on unrelated charges alleged as subterfuge to avoid effect of statute. State v. Goss, 245 K. 189, 191, 777 P.2d 781 (1989).

73. Delays caused by defendant's filing motion for competency hearing chargeable to defendant. State v. Prewett, 246 K. 39, 41, 785 P.2d 956 (1990).

74. Obligation on prosecution to provide speedy trial, applicability of statute to municipal court, when statute commences to run determined. City of Dodge City v. Rabe, 14 K.A.2d 468, 471, 472, 794 P.2d 301 (1990).

75. Delays in obtaining and communicating with counsel chargeable to defendant in determining speedy trial. State v. Matson, 14 K.A.2d 632, 637, 798 P.2d 488 (1990).

76. Statutory right to speedy trial compared to right protected by U.S. and Kansas Constitutions. State v. Smith, 247 K. 455, 457, 799 P.2d 497 (1990).

77. Time period to satisfy speedy trial requirement examined; "brought to trial" defined. State v. Bierman, 248 K. 80, 88, 805 P.2d 25 (1991).

22-3403.

CASE ANNOTATIONS

9. Jury instruction and jury form not requiring unanimous decision nor theory on first degree murder (21-3401) examined. State v. Hartfield, 245 K. 431, 445, 781 P.2d 1050 (1989).

22-3404. Misdemeanor and traffic offense and infraction cases; method of trial.

(1) The trial of misdemeanor and traffic offense cases shall be to the court unless a jury trial is requested in writing by the defendant not later than seven days after first notice of trial assignment is given to the defendant or such defendant's counsel. The time requirement provided in this subsection regarding when a jury trial shall be requested may be waived in the discretion of the court upon a finding that imposing such time requirement would cause undue hardship or prejudice to the defendant.

(2) A jury in a misdemeanor or traffic offense case shall consist of six members.

(3) Trials in the municipal court of a city shall be to the court.

(4) Except as otherwise provided by law, the rules and procedures applicable to jury trials in felony cases shall apply to jury trials in misdemeanor and traffic offense cases.

(5) The trial of traffic infraction cases shall be to the court.

History: L. 1970, ch. 129, § 22-3404; L. 1976, ch. 163, § 19; L. 1977, ch. 112, § 8; L. 1981, ch. 154, § 1; L. 1984, ch. 39, § 40; L. 1989, ch. 100, § 1; L. 1990, ch. 109, § 1; July 1.

22-3405.

CASE ANNOTATIONS

25. Defendant's presence not required at posttrial hearing on objections to prosecution's preemptory challenges during jury selection. State v. Hood, 245 K. 367, 376, 378, 780 P.2d 160 (1989).

26. Right to confrontation not violated by ex parte hearing to set appearance bond for reluctant material witness. State v. Hamons, 248 K. 51, 61, 805 P.2d 6 (1991).

27. Time period to satisfy speedy trial requirement examined; "brought to trial" defined (22-3402). State v. Bierman, 248 K. 80, 89, 805 P.2d 25 (1991).

22-3406.

CASE ANNOTATIONS

2. Refusal to grant continuance proper where defendant had seven months from arraignment to prepare for trial. State v. Roberts, 13 K.A.2d 485, 487, 773 P.2d 688 (1989).

22-3408.

CASE ANNOTATIONS

4. Alleged improper restriction of inquiry regarding insanity defense examined. State v. Pioletti, 246 K. 49, 54, 785 P.2d 963 (1990).

22-3412.

CASE ANNOTATIONS

13. Prosecutor's explanation of peremptory challenges of members of jury panel belonging to defendant's race examined. State v. Belnavis, 246 K. 309, 311, 787 P.2d 1172 (1990).

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defendant is guilty of a crime, although improperly charged, the appellate court shall order the defendant to be held in custody, subject to the order of the court in which he or she was convicted.

History: L. 1970, ch. 129, § 22-3607; L. 1975, ch. 178, § 26; Jan. 10, 1977.

Source or prior law:

62-1717.

Judicial Council, 1969: This is a restatement of former K.S.A. 62-1717.

CASE ANNOTATIONS

1. Applied; conviction under 21-3422 reversed; parent had equal right to custody of child. State v. Al-Turck, 220 K. 557, 559, 552 P.2d 1375.

22-3608. Time for appeal to supreme court. (1) If sentence is imposed, the defendant may appeal from the judgment of the district court not later than 10 days after the expiration of the district court's power to modify the sentence. The power to revoke or modify the conditions of probation or the conditions of assignment to a community correctional services program shall not be deemed power to modify the sentence.

(2) If the imposition of sentence is suspended, the defendant may appeal from the judgment of the district court within 10 days after the order suspending imposition of sentence.

History: L. 1970, ch. 129, § 22-3608; L. 1986, ch. 123, § 23; July 1.

Source or prior law:

62-1724.

Judicial Council, 1969: The time limitations of the section are the same as those formerly found in K.S.A. 62-1724. It is suggested that the necessary procedural standards be provided by rule. Bail and other conditions of release pending appeal are covered in section 22-2804.

Cross References to Related Sections:

Time limit for modification of sentence, see 21-4603.

Law Review and Bar Journal References:

Appeal time limits discussed in "Collateral Challenges to Criminal Convictions," Keith G. Meyer and Larry W. Yackle, 21 K.L.R. 259, 264, 319 (1973).

"Practicing Law in a Unified Kansas Court System," Linda Diane Henry Elrod, 16 W.L.J. 260, 271 (1977).

CASE ANNOTATIONS

1. Failure to file appeal within time prescribed by this section and 21-4603; appeal dismissed. State v. Thompson, 221 K. 165, 166, 167, 558 P.2d 93.

2. Applied; appeal from conviction of aggravated robbery not filed within statutory time. State v. Smith, 223 K. 47, 573 P.2d 985.

3. Appeal from order suspending imposition of sentence timely filed; denial of motion for acquittal proper. State v. Brady, 2 K.A.2d 382, 383, 580 P.2d 434. Syl ¶ 2 and corresponding statements in Brady opinion overruled. State v. Moses, 227 K. 400, 403, 607 P.2d 477.

4. Appeal dismissed; sentence must be imposed or imposition of sentence suspended in order to have a final appealable judgment. City of Topeka v. Martin, 3 K.A.2d 105, 590 P.2d 106.

5. Appeal dismissed; appeal not timely filed under this section and 21-4603. State v. Moses, 227 K. 400, 401, 404, 607 P.2d 477.

6. Cited; no right of appeal from denial of sentence modification motion filed more than 130 days after sentencing. State v. Henning, 3 K.A.2d 607, 608, 599 P.2d 318.

7. Jurisdiction lacking for appeal of conviction of involuntary manslaughter; sentence deferred, not suspended. State v. Lottman, 6 K.A.2d 741, 742, 633 P.2d 1178 (1981).

8. Filing of timely notice of appeal is jurisdictional; appeal not taken within time prescribed must be dismissed; exception to general rule noted. State v. Ortiz, 230 K. 733, 735, 640 P.2d 1255 (1982).

9. Trial court's jurisdiction ends when appeal docketed; modification of sentence only upon mandate of appellate court or upon remand. State v. Dedman, 230 K. 793, 796, 640 P.2d 1266 (1982).

10. Time limits set herein applicable to imposition of sentence not to modification of probation conditions. State v. Yost, 232 K. 370, 372, 654 P.2d 458 (1982).

11. Cited in deciding that prosecution's appeal time under 22-3602(b) covered by 60-2103. State v. Freeman, 236 K. 274, 276, 689 P.2d 885 (1984).

12. Limitation on appeal by criminal defendant linked to time court may modify sentence. State v. Myers, 10 K.A.2d 266, 269, 697 P.2d 879 (1985).

13. Appeal of conviction must be within time periods herein and 21-4603, regardless of probation and subsequent revocation. State v. Tripp, 237 K. 244, 246, 699 P.2d 33 (1985).

14. Cited; denial of motion allowing late filing of appeal where no indication to appeal found in record examined. State v. Cook, 12 K.A.2d 309, 310, 741 P.2d 379 (1987).

15. Cited; appeal times controlling with and without imposition of sentence (21-4603) determined. State v. Wagner, 242 K. 329, 747 P.2d 114 (1987).

Statute to amended

22-3609. Appeals from municipal courts. (1) The defendant shall have the right to appeal to the district court of the county from any judgment of a municipal court which adjudges the defendant guilty of a violation of the ordinances of any municipality of Kansas. The appeal shall be assigned by the administrative judge to a district judge. The appeal shall stay all further proceedings upon the judgment appealed from.

(2) An appeal to the district court shall be taken by filing, in the district court of the county in which the municipal court is located, a notice of appeal and any appearance bond required by the municipal court. Municipal court clerks are hereby authorized to accept

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notices of appeal and appearance bonds under this subsection and shall forward such notices and bonds to the district court. No appeal shall be taken more than 10 days after the date of the judgment appealed from.

(3) The notice of appeal shall designate the judgment or part of the judgment appealed from. The defendant shall cause notice of the appeal to be served upon the city attorney prosecuting the case. The judge whose judgment is appealed from or the clerk of the court, if there is one, shall certify the complaint and warrant to the district court of the county, but failure to do so shall not affect the validity of the appeal.

(4) Hearing on the appeal shall be to the court unless a jury trial is requested in writing by the defendant not later than 48 hours prior to the trial. A jury in an appeal from a municipal court judgment shall consist of six members.

(5) Notwithstanding the other provisions of this section, appeal from a conviction rendered pursuant to subsection (b) of K.S.A. 12-4416 and amendments thereto shall be conducted only on the record of the stipulation of facts relating to the complaint.

History: L. 1970, ch. 129, § 22-3609; L. 1971, ch. 114, § 10; L. 1975, ch. 202, § 1; L. 1976, ch. 163, § 21; L. 1977, ch. 112, § 10; L. 1981, ch. 154, § 3; L. 1982, ch. 149, § 1; L. 1982, ch. 144, § 18; L. 1983, ch. 115, § 1; L. 1986, ch. 115, § 66; Jan. 12, 1987.

Source or prior law:

63-401.

Revisor's Note:

For Judicial Council commentary, see 22-3611.

Law Review and Bar Journal References:

"Practicing Law in a Unified Kansas Court System," Linda Diane Henry Elrod, 16 W.L.J. 260, 270, 271 (1977).

Constitutionality of the use of lay judges in Kansas, 25 K.L.R. 275, 276 (1977).

"A Comment on Kansas' New Drunk Driving Law," Joseph Brian Cox and Donald G. Strole, 51 J.K.B.A. 230, 242 (1982).

"The New Kansas Drunk Driving Law: A Closer Look," Matthew D. Keenan, 31 K.L.R. 409 (1983).

"An Additudinal Study of Kansas' Two-Tier Trial System," Michael Kaye, Fred Yaffe, 54 J.K.B.A. 212 (1985).

Attorney General's Opinions:

Double jeopardy; effect of former prosecution. 86-4.

Driving while under influence of alcohol; imposition by municipal courts of penalties for second, third and subsequent violations. 82-155.

CASE ANNOTATIONS

1. Subsection (2) construed; filing of written appeal notice in municipal court required to perfect criminal appeal. City of Overland Park v. Nikias, 209 K. 643, 644, 646, 647, 648, 498 P.2d 56.

2. Appeal taken hereunder from city court convictions for battery and disorderly conduct. State v. Parker, 213 K. 229, 230, 516 P.2d 153.

3. Subsection (2) mentioned; statute contemplates filing of a written notice of appeal. City of Kansas City v. Board of County Commissioners, 213 K. 777, 783, 518 P.2d 403.

4. Refusal by trial court to order a lineup did not amount to finding of guilt. State v. Porter, 223 K. 114, 115, 574 P.2d 187.

5. Cited; error to dismiss complaints because municipal court refused to appoint and compensate counsel for indigent defendants' appeals. City of Overland Park v. Estell & McDiffett, 225 K. 599, 601, 592 P.2d 909.

6. Failure to comply with section jurisdictional defect; not cured by filing notice of appeal in district court. City of Bonner Springs v. Clark, 3 K.A.2d 8, 9, 588 P.2d 477.

7. Cited; upon the filing of an affidavit of prejudice, transfer of the case to another judge is automatic. City of Neodesha v. Knight, 226 K. 416, 601 P.2d 669.

8. Cited; the right to a speedy trial is applicable to criminal cases appealed to district courts from municipal court convictions. City of Overland Park v. Fricke, 226 K. 496, 499, 502, 601 P.2d 1130.

9. Provisions of statute directory rather than mandatory; delay cannot infringe on right to speedy trial. City of Garnett v. Zweiner, 229 K. 507, 508, 509, 510, 625 P.2d 491.

10. Considered in construing 21-4603 as permitting court to retain jurisdiction and act on timely motion for probation or sentence reduction after 120-day period. State ex rel. Owens v. Hodge, 230 K. 804, 808, 641 P.2d 399 (1982).

11. Time for appeal hereunder jurisdictional; modification of existing sentence not new judgment creating new right of appeal. City of Wichita v. Mesler, 8 K.A. 2d 710, 714, 666 P.2d 1209 (1983).

12. Statute, being integral part of whole subject of act (L. 1982, ch. 144), not violative of Kan. Const., Art. 2, § 16. State v. Reves, 233 K. 972, 976, 980, 666 P.2d 1190 (1983).

13. Where appeal to district court does not comply hereunder, appellate court lacks jurisdiction over subject matter. City of Overland Park v. Barron, 234 K. 522, 526, 527, 672 P.2d 1100 (1983).

14. Demand for jury trial, oral or written, must be made of record to court at least 48 hours before trial. City of Overland Park v. Barnett, 10 K.A.2d 586, 591, 705 P.2d 564 (1985).

15. Generally held if constitutional rights are at issue, habeas corpus is available even though no direct appeal taken. In re Habeas Corpus Application of Gilchrist, 238 K. 202, 205, 708 P.2d 977 (1985).

22-3609a. Appeals from district magistrate judges. (1) A defendant shall have the right to appeal from any judgment of a district magistrate judge. The administrative judge shall be responsible for assigning a district judge for any such appeal. The appeal shall stay all further proceedings upon the judgment appealed from.

Kansas County & District Attorneys Association

827 S. Topeka Blvd., 2nd Floor • Topeka, Kansas 66612
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Testimony of the Kansas County and District Attorneys Association
before the
Senate Judiciary Subcommittee on Criminal Law

SENATE BILL NO. 687

Senate Bill 687 merely recognizes changes to the obscenity statute that were imposed by the Kansas Supreme Court in State v. Hughes, 246 Kan. 607. In that case, the court relied on expert testimony of a sex therapist named Dr. Mould, and held that the statute was overbroad in that some devices covered by the statute had medical or psychological value. SB 687 merely codifies those changes.

****

SENATE BILL NO. 688

Senate Bill 688 recognizes the decision in another state or federal jurisdiction that a young offender is not amenable to the juvenile offender code. Specifically, it amends K.S.A. 38-1602 by removing from the definition of a juvenile offender a person who has had two or more adjudications or has been prosecuted as an adult in another state or federal jurisdiction. The definition presently excludes those persons who have been adjudicated or convicted in Kansas courts; this bill simply gives the same full faith and credit to similar decisions from other state or federal courts.

****

SENATE BILL NO. 742

Senate Bill 742 is another full faith and credit bill. Both K.S.A. 65-4127a and 4127b have self-contained enhanced penalties for second and subsequent convictions. The bill simply recognizes convictions from other jurisdictions for purposes of enhanced sentencing. Presently, a person with several prior convictions in another state can only be sentenced as a first offender in Kansas, while a native Kansas criminal will receive the enhanced penalty.

Criminal Law Subcommittee
March 3, 1992
Attachment 4A

SENATE BILL NO. 735

Senate Bill 735 is a rather technical amendment to the statute of limitations in criminal cases. Presently, murder has no limitation. The need for this bill arises when a defendant charged with first or second-degree murder presents evidence of self-defense, intoxication or heat of passion. A trial court is required to give jury instructions on lesser included offenses if there is any evidence supporting the lesser charge. The effect would be that a defendant charged with murder more than two years after the crime, but convicted of a lesser charge, would have to be discharged. Such an occasion occurred in Emporia two years ago. The effect of this bill is that if a defendant charged with first or second-degree murder more than two years after the crime, is bound over for trial but convicted of a lesser offense, such as voluntary manslaughter, the court retains jurisdiction over the defendant, and discharge is not required.

****

SENATE BILL NO. 734

Senate Bill 734 amends the diversion statutes to allow for a stipulation of facts as part of a diversion agreement. Under the provisions of the bill, a defendant and prosecutor could enter into a diversion agreement, and stipulate to the facts of the offense. If, in the future, the diversion agreement is breached by defendant, the prosecutor may simply present the stipulation, and defendant will be found guilty of the offense. Presently, if defendant breaches an agreement, the prosecutor is required to find the witnesses and prove the case, even though months or years have passed since the offense. Such a stipulation requirement is not new, it already mandated in DUI diversions. The effect of passage of this bill is to encourage prosecutors to enter into diversion agreements, without the fear that if the agreement is breached they will be unable to prove their case due to lack of time. Diversions are much cheaper to process than a trial, and they do not contribute to prison overcrowding.

The bill does need an amendment (attached). K.S.A. 22-2910 also needs amending to reflect the addition of subsection (d) to K.S.A. 1991 Supp. 22-2902.

22-2910. Conditioning diversion on plea prohibited; inadmissibility of agreement; other matters. No defendant shall be required to enter any plea to a criminal charge as a condition for diversion. No statements made by the defendant or counsel in any diversion conference or in any other discussion of a proposed diversion agreement shall be admissible as evidence in criminal proceedings on crimes charged or facts alleged in the complaint. Except for sentencing proceedings and as otherwise provided in subsection (c) and (d) of K.S.A. 22-2909 and amendments thereto and as otherwise provided in K.S.A. 8-285 and 8-1567 and amendments to these sections, the following shall not be admissible as evidence in criminal proceedings which are resumed under K.S.A. 22-2911: (1) Participation in a diversion program; (2) the facts of such participation; or (3) the diversion agreement entered into.

History: L. 1978, ch. 131, § 5; L. 1982, ch. 144, § 8; July 1.

Law Review and Bar Journal References:

"Kansas Diversion: Defendant's Remedies and Prosecutorial Opportunities," Joseph Brian Cox, 20 W.L.J. 344, 345, 349 (1981).

"The New Kansas Drunk Driving Law: A Closer Look," Matthew D. Keenan, 31 K.L.R. 409 (1983).

"Kansas Diversion: Will Courts Become More Involved?" Michael Kaye, 56 J.K.B.A., No. 1, 8 (1986).

CASE ANNOTATIONS

1. Statute, being integral part of whole subject of act (L. 1982, ch. 144), not violative of Kan. Const., Art. 2, § 16. State v. Reves, 233 K. 972, 975, 980, 666 P.2d 1190 (1983).

2. Objection to admissibility of statements by defendant or counsel during diversion conference not available to codefendant. State v. Wilkins, 9 K.A.2d 331, 333, 676 P.2d 159 (1984).

3. Cited in holding diversion agreement in prior DUI case (8-1567) considered conviction for sentence enhancement. State v. Clevenger, 235 K. 864, 866, 683 P.2d 1272 (1984).

4. Cited; entering into diversion agreement in lieu of criminal proceedings considered conviction for DUI sentence enhancement (8-1567(i)). State v. Booze, 238 K. 551, 557, 558, 712 P.2d 1253 (1986).

Office of the Riley County Attorney

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SB 688

Testimony of William E. Kennedy III, Riley County Attorney
Presented to Senate Judiciary Committee - Criminal Subcommittee
on the 4th day of March, 1992

Concerning Proposed Revision of K.S.A. 38-1602

Currently K.S.A. 38-1602(b)(3) deals with a 16 year-old charged with what would be a felony were he an adult having been previously adjudicated in two separate prior juvenile proceedings as having committed an act which would constitute a felony if committed by an adult. The proposed amendment would modify this simply to the extent that if a person were 16 years or older and had been convicted of a felony as an adult in any other state, the person would not be a juvenile in Kansas.

The intent here is to recognize that Kansas has limited resources, and that one who has already been treated as an adult felon should not be permitted to fall back upon juvenile status in the State of Kansas. Proof of prior convictions in other states is often very difficult to attain. It not only requires appropriately certified documents with appropriate contents, but proof that the person referred to therein is the person before the court. In a recent case, I had to obtain Texas court orders to unseal Texas juvenile files and finally had to require/request the presence of a juvenile Court Services Officer from the State of Texas to identify the juvenile. Fortunately, I was able to find one Court Service Officer who could identify the juvenile to several Texas crimes. However, for a while, I was going to have to subpoena several people here from the State of Texas in order to have the same effect. The proposed amendment is a small change, but one that recognizes the problems of interstate juvenile action.

Criminal Law Subcommittee
March 3, 1992
Attachment 5

1/1

KANSAS BUREAU OF INVESTIGATION

DIVISION OF THE OFFICE OF ATTORNEY GENERAL
STATE OF KANSAS
1620 TYLER
TOPEKA, KANSAS 66612-1837
(913) 232-6000

JAMES G. MALSON
DIRECTOR

ROBERT T. STEPHAN
ATTORNEY GENERAL

TESTIMONY
MELANIE S. JACK, ASSISTANT ATTORNEY GENERAL
KANSAS BUREAU OF INVESTIGATION
BEFORE THE SENATE JUDICIARY COMMITTEE
IN SUPPORT OF SENATE BILL 742
MARCH 3, 1992

Mr. Chairman and Members of the Committee:

I appear today on behalf of the Kansas Attorney General's Office in support of Senate Bill 742. Under current Kansas law, K.S.A. 65-4127(a) and K.S.A. 65-4127(b), have enhancement provisions for persons who have previously been convicted of drug offenses. A local law enforcement agency brought to our attention the situation where a person had an out-of-state conviction for a drug offense. The court looked at the language of the statute and found that the prior must be a violation of "this subsection" and ruled that the offense was only a class A misdemeanor. As such, prior offenses, no matter how many or how flagrant, cannot serve as enhancements to bump the classification of the crime given the current language.

This is particularly unfortunate when prior federal cases are not considered because as a practical matter large scale offenders are frequently taken through federal court if certain minimums are met, for example, the feds require three ounces of cocaine before they'll prosecute a local drug bust. Under the current language a person who has previously been involved in the sale of a hundred kilograms of cocaine must be treated under Kansas law as a first time offender.

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It would also seem to be a problem which could result in an equal protection challenge if a defendant who has a prior for the exact same offense in state is treated more harshly than a similarly situated defendant who's prior happened to be across the state line or was handled in federal court.

Senate Bill 742 would address this inequity and allow the criminal justice system to properly deal with individuals who had demonstrated a track record of drug violations.

Thank you for your attention and assistance.

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SB 734

Testimony of William E. Kennedy III, Riley County Attorney
Presented to Senate Judiciary Committee - Criminal Subcommittee
on the 4th day of March, 1992

Concerning Amendments to K.S.A. 22-2909

Diversions are not popular with prosecutors in general. In Riley County, diversions are used extensively in misdemeanor cases and in lesser felony cases.

One of the reasons that diversions are not popular, is that under the current statute, the wording is nebulous at best as to whether a prosecutor can require an admission of fact, later to be admissible in court, as a prerequisite for a diversion being granted. Absent such admission, the prosecutor faces a very strong reality of evidence being lost, growing stale, or memories failing between the occasion of a diversion being granted, and defendant being brought back to court for failing a diversion.

A diversion should be given by the State out of strength, not out of weakness. The diversion should be set up so that everybody has all the cards on the table, and each person knows exactly what is being faced. If a potential divertee has a strong or reasonable defense, then that person has every right to demand a trial rather than to go on diversion. In a similar vein, if the State has a weak case, then a diversion is not appropriate because the defendant will not be invested in the diversion, the defendant will fail at his diversion, and then be brought back to trial. In such a case, the weak case of the State would be exposed, and would be further weakened by the time period between the offense and the trial.

The proposed amendment would:

(1) quickly make it obvious whether the State has an appropriately strong case;
(2) encourage a prosecutor to enter a diversion in lieu of further prosecution because the State actually loses very little thereby to the extent that a diversion program is effective;
(3) lower the prison population by decreasing recidivism, to the extent that the diversion is effective;
(4) greatly reduce court time;
(5) encourage a prosecutor to allow a first time offender a break;
(6) encourage local action;

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It is hard to understand why a DUI diversion requires such an admission, whereas other cases do not. DUI cases are most often characterized by professional witnesses such as police officers, whereas the balance of criminal cases generally rely for at least half their evidence upon unexperienced civilian witnesses.