Approved March 6, 2000
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Emert at 10:12 a.m. on March 2, 2000 in Room 123-S of the Capitol.

All members were present.

Committee staff present:
Gordon Self, Revisor
Mike Heim, Research
Jerry Donaldson, Research
Mary Blair, Secretary

Conferees appearing before the committee:
Erich Rucker, Dickinson County Attorney
Chris Biggs, Kansas County District Attorney's Association
Joe Lee, Lyon County Attorney
Nick Tomasic, Wyandotte County Attorney

Others attending: see attached list

The minutes of the February 29th meeting were approved on a motion by Senator Goodwin, seconded by Senator Oleen. Carried.

SB 579–concerning crimes, criminal procedure and punishment; relating to arson

Conferee Rucker, testifying in support of **SB 579**, discussed criminal offense penalties for arson according to the Kansas Sentencing Guidelines which currently provides no distinction between general building or property loss and dwelling and dwelling contents. He stated that **SB 579** does away with "class distinction" by making an appropriate distinction between dwelling and commercial loss. (attachment 1) Following discussion Senator Pugh moved to pass the bill out favorably, Senator Donovan seconded. Carried. At the request of Committee, the Sentencing Commission agreed to provide an impact statement.

SB 620–concerning juvenile offenders; relating to conditional release, violations

Conferee Biggs, speaking on behalf of the Sumner County Attorney who could not be present, testified in support of **SB 620**, a bill that requires that during a juvenile's conditional release violation hearing, relevant written statements made under oath would be admitted and considered by the court along with other evidence. He discussed the circumstances which necessitated amending current law and also recommended, at the suggestion of Attorney Ed Collister, Kansas Bar Association Board of Governor's Member, changing the language on line 24 of the bill to read "may" instead of "shall." (attachments 2 and 3) Following discussion Senator Oleen moved to adopt the language change amendment, Senator Petty seconded. Carried. Senator Oleen moved to pass the bill out favorably as amended, Senator Vratil seconded. Carried.

SB 627–concerning alcohol; relating to possession by minors

Conferee Lee testified in support of **SB 627**, a bill which he stated would amend the law to make preliminary breath tests (PBT) admissible in criminal court. He elaborated on why he felt the amendment was necessary. (attachment 4) (see also attachment 3) There was a lengthy discussion on this issue including the reliability, or lack thereof, of the instrument used to do a PBT. No action was taken on this bill.

SB 628–concerning crimes, criminal procedure and punishment; relating to possession of a firearm by a felon

Conferee Tomasic presented a brief history of the current law prohibiting the possession of firearms by certain convicted felons and discussed several problems encountered in the application of this law. He discussed the technical amendments offered in **SB 628** which he stated would simplify and clarify current law regarding this issue so that there can be no misinterpretation. (attachment 5) A balloon amendment was also discussed. (attachment 6) No action was taken on the bill.

Written testimony was submitted by Gary L. Foiles, Cowley County Attorney in support of **SB 627**. (attachment 7)

The meeting adjourned at 11:01 a.m. The next scheduled meeting is March 6, 2000.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: March 2, 2010

NAME	REPRESENTING
Pat Lehman	KS Fire Service Alliance
Joe E. Lee	Lyon County Attorney
NICK A. TOMASIC	W'Y CO. DIST. ATT.
Doug IRVIN	OJA
KEVIN GRAHAM	KSC
Jan Brazier	KSC
Barb Jones	KSC
Lynn Menagh	Norton Police Dept.
Pete Bodyk	KDOR/ABC
Chris Noble	Alcohol Safety Action projects
Chris Carter	Sen Emert
Jeff Bottenberg	KSA/KPOA
STEVE KEARNEY	ICDAA
Rebecca Rice	Sen Lee
Nora Smith	Sen. Feleciano
Rebecca R	KBWA

OFFICE OF THE DICKINSON COUNTY ATTORNEY
Eric K. Rucker, Dickinson County Attorney
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March 2, 2000

Members of the Senate Judiciary Committee:

As Dickinson County Attorney I have prosecuted several arsonists. While these cases have generally resulted in convictions, the criminals convicted have either received probation for their acts or have been sentenced to the state penitentiary for other more serious offenses under Kansas Sentencing Guidelines.

Currently, under Kansas Sentencing Guidelines it is a "nonperson crime" and a "presumptive probation offense" for a person with no past criminal history to damage or destroy any building or property of another person by arson so long as the value of that person's building and/or property is below $50,000 (and no person is "in" the property at the time of the arson.) Should this same criminal be convicted of arson again at this or a lower level of monetary damage to another's building or property (so long as the criminal is not on probation), the criminal offense would again be "presumptive probation". Should the criminal subsequently be convicted of a third similar offense (so long as the criminal is not on probation) the criminal offense would once again be "presumptive probation" under "the guidelines".

Only if a criminal inflicts arson to a building or property loss in excess of $50,000 does the first time criminal offender face the potential of being sentenced to prison. Even under this circumstance it would not be a "departure" from the sentencing guidelines for a judge to grant the criminal probation.

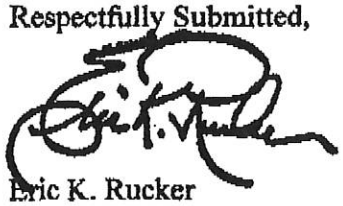
In addition, current law provides no distinction between general building or property loss and dwelling and dwelling contents. So, should a first time arsonist convicted of destroying or damaging a lower-middle class home or it's contents under $50,000, the presumptive sentence is probation. However, should the arsonist damage or destroy a more expensive residence or the contents of that residence the criminal faces presumptive imprisonment.

I do not believe this "class distinction" was intended by the legislature.

Senate Bill 579 makes an appropriate distinction between dwelling and commercial loss. Any arsonist convicted of dwelling or dwelling property loss regardless of monetary level would be guilty of a level 5 "person felony" and this offense would be presumptive imprisonment. Arson loss for commercial or other property loss would remain a

"nonperson felony" and would remain presumptive probation for the first offense, presumptive imprisonment for the second and subsequent offenses.

Respectfully Submitted,



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Lee J. Davidson
Deputy County Attorney

Sen Jud 3-2-00 att 2

March 1, 2000

Dear Chairman Emert and members of the Senate Judiciary Committee:

I am here to testify today on Senate Bill 620. As a smaller county (population 26,000-27,000), the local Community Corrections office does not have access to a local laboratory able to process toxicology screens of blood and urine samples taken from probationers in a safe, timely, and cost-effective fashion. Consequently, our community Corrections office contracted with an out of state laboratory for these services. I am sure other Community Corrections offices in smaller counties are forced to do so as well.

Normally, an attested laboratory report of a "dirty" blood or urine sample forms the basis of a motion to revoke or modify probation. As you are well aware, a probationer has the right to contest a motion to revoke probation and it is the burden of the prosecution to prove the violation of probation by a preponderance of the evidence. In adult criminal cases, the prosecution is allowed to use affidavits in lieu of the live testimony of the lab professional who performed the toxicology screen, pursuant to K.S.A. 22-3716(b) and State v. Yura, 250 Kan. 198, 825 P.2d 523 (1992). In juvenile offender proceedings, there is no such statute, nor is K.S.A. 22-3716(b) incorporated into the Kansas Juvenile Offender's Code by reference.

I have attempted to admit the laboratory reports without the presence of live testimony as a "business record" pursuant to K.S.A. 60-245a. However, K.S.A. 60-245a subsection (e) mandates that notice of intention to issue a subpoena of business records where the attendance of the custodian of business records is not required be given to all parties of the action at least ten days prior to the issuance of the subpoena. If a party objects, the subpoena will not be issued without further order of the Court. The District Court of Sumner County has interpreted K.S.A. 60-245a to require the presence of the custodian of business records if a party makes such an objection.

At this point, I am left with three options: (1) pay the lab professional who performed the toxicology screen on the blood or urine sample to travel to Sumner County and testify, (2) pay the custodian of business records to travel to Sumner County to lay the foundation for business records, or (3) dismiss the motion to revoke probation. Most times my county's budgetary constraints force me to dismiss a motion to revoke probation based solely on a "dirty" blood or alcohol test.

As you may imagine, word of my dilemma spread like wildfire among the ranks of the county's juvenile probationers. Enforcement of the condition of probation prohibiting the use of alcohol or illicit substances became much more difficult, which is problematic because alcohol and drugs are the primary risk factor among the vast majority of juveniles in the system. Community-based enforcement of the prohibition against the consumption of alcohol and illicit substances is the cornerstone of our new juvenile justice system.

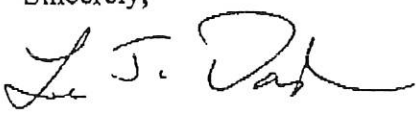
For many years, juvenile offenders were not afforded the full panoply rights available to adults. While that has changed over the years, even now alleged juvenile offenders only have the right to a trial by jury in certain circumstances. It appears to be an oversight that the legislature enacted and the Kansas Supreme

Sen Jud
3-2-00
att. 2

Court affirmed (in State v. Yura, above) a law restricting the constitutional right to confront and cross examine witnesses by allowing written affidavits to be used in adult criminal probation violation proceedings under certain circumstances but did not impose a similar restriction in juvenile offender proceedings. This oversight can be corrected easily by amending K.S.A. 38-1666.

Thank you for your time and consideration in this matter. Should any questions arise, I will be available by phone.

Sincerely,



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3-2-00 att 3

MEMORANDUM

3/2/00

TO: Chairman Tim Emert and Members of the Senate Judiciary Committee

FROM: Paul Davis, Legislative Counsel ~~PTD~~

RE: Senate Bills 620 and 627

Attached is a brief memorandum from Ed Collister that he asked me to distribute to the committee. Ed is in private practice in Lawrence and is a member of the Kansas Bar Association Board of Governors. I hope that you will find his opinions on these two bills helpful. Thank you!

Sn Jud
3-2-00
att 3

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FACSIMILE TRANSMISSION COVER SHEET

Date: March 1, 2000

To: Senator Ed Pugh, c/o Paul Davis, KBA Legislative Counsel

Fax: (785) 234-3813

From: Ed Collister

Ed: **I would hope you could support a position opposing amendatory language in two Senate bills on the agenda for hearing Thursday. They share a common objection.**

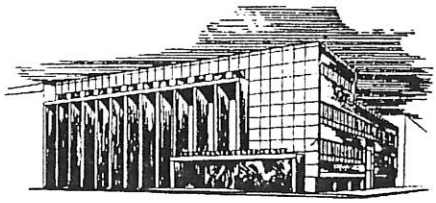
Senate Bill 620, lines 24-26: This sentence amending K.S.A. 38-1674 makes admitting certain evidence mandatory rather than subject to the standard rules of evidence.

Such a procedure is bad policy, and may violate the separation of powers principle by having a governmental branch other than the judiciary mandating receipt of evidence as a matter of law.

Senate Bill 627, lines 19-22: Violates the same principles for the the same reason.

Number of facsimile pages including this cover page: 1

CONFIDENTIALITY NOTICE



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Vernon E. Buck
Kevin K. Stephenson
Wade H. Bowie, Jr.
Asst. County Attorneys

March 2, 2000

Re: Senate Bill 627

Dear Chairman Emert and Members of the Senate Judiciary Committee:

The issue of underage drinking and how to combat it is an important one in Emporia and Lyon County. Numerous groups, agencies and individuals regularly meet to discuss and implement ways to address this problem. Enforcement of existing law obviously is one facet of the community attack.

If a law is going to be on the books and expected to be enforced, reasonable tools need to be available to assist law enforcement officers and prosecutors in performing their duties. Otherwise those who would violate it view the law in contempt and the officers are subject to ridicule. The offenders often see the investigation of minors in possession as a game. Unless the offenders are observed drinking by the officer or they make admissions, it is very difficult to hold them accountable for their actions.

Even when the law enforcement officer sees the offender with a bottle of beer in hand, successful prosecution can be difficult. In Lyon County we have seen on several occasions the person charged take the matter to trial, deny they were possessing or at least deny drinking, claiming the officer was lying or mistaken. Some individuals even request a jury trial. Valuable court time is wasted and to add insult to the situation, sometimes this is done with a court appointed attorney. The "game" is to beat the system and make the cops look ineffective or even stupid. This attitude erodes respect for the law and those paid to enforce it.

The advantage of using the preliminary breath test is obvious. A minor suspected of drinking could be given the test on the spot with very little inconvenience or expense to the suspect or the law enforcement agency. The PBT is objective, reliable and quick. The use of this test would dissuade those who might be tempted to lie about their consumption of alcohol. The innocent would just as quickly be cleared, thereby not putting them through the time and expense of a court appearance. The officers could quickly and efficiently investigate and move on to other duties.

In summary, I believe Senate Bill No. 627 is important to enforcing existing law concerning underage drinking. I believe it adds a needed tool to law enforcement to carry out the real and stated intent of the law without infringing upon the rights of the individual. The citizens in Lyon County expect enforcement of this law, law enforcement should be given this tool so they can do the job right.

Respectfully submitted,

Joe E. Lee
Lyon County Attorney

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Nick A. Tomasic

K.S.A. 21-4204 *CRIMINAL POSSESSION OF A FIREARM*

K.S.A. 21-4204 reflects a legislative intent to prohibit the possession of firearms by certain convicted felons.

HISTORY:

Prior to 1990, the statute prohibited ***any*** felon from possession of a firearm with a ***barrel less*** than ***12 inches*** long, for a ***five*** year period.

In 1990 the legislature extended the prohibition to ***ten*** years for some felons and to an ***unlimited*** period for others.

In 1994 the legislature broadened the prohibition to include ***any*** firearm.

In 1995 the legislature listed certain felonies to trigger the application of K.S.A. 21-4204:

1. Prior crime, a non-person and no weapon possessed - five year prohibitions.

2. Prior crime, a person felony and not in possession of a weapon - ten years.

3. Prior crime, a non-person and a weapon was in his/her possession - ten years.

The Kansas Supreme Court in *State v. Johnson*, 25 K.A.2d 105 (1998) discussed the statute:

> "2. In its present version, 21-4204 extends the period during which possession of a firearm is prohibited to 5 years, 10 years, or an indefinite period, depending upon the nature of the prior felony conviction and whether the defendant possessed a firearm during the prior felony. Under the scheme now established in 21-4204, the legislature clearly intended that either a 5-year or a 10-year period would apply in the absence of affirmative proof establishing that the defendant was found to have been in possession of a firearm at the time of the commission of the prior offense."

Johnson had a prior ***person felony*** burglary. If there was proof that he possessed a firearm during the prior burglary, then he has a ten year prohibition. If there is no proof that he possessed a weapon during the burglary, then only a five year prohibition applies.

EVIDENCE PROBLEMS:

The statute includes crimes from other jurisdictions which are substantially the same as a Kansas felony and juvenile offender adjudication.

We as prosecutors must prove each and every element of the charge in order to be successful. If we charge that the defendant possessed a weapon within five years of a conviction, we must prove that. If we charge that the defendant possessed a weapon within ten years of a conviction, we must prove that.

PROOF:

We need certified court records from the convicting jurisdiction on the prior felony. We cannot use the N.C.I.C. *rap sheet*.

If the prior felony was in our ***home*** county, the records usually are easily accessible. ***But***, if we have to obtain them from a foreign jurisdiction, the problem escalates.

TIME PERIODS:

If a defendant is in custody, we must file charges within forty-eight hours or the defendant is released. We do not want to release dangerous persons if we can help it.

If we can't file the charge within forty-eight hours and the defendant is released, there is the possibility that the defendant will flee and commit other crimes.

PRIOR JUVENILE CONVICTIONS:

At times, juvenile convictions are closed to inspection, and can only be opened by an order of the court - - this takes time.

PRIOR FELONY CONVICTION NOT ALWAYS CLEAR ON POSSESSION OF A WEAPON:

For example, if the prior felony was a theft or burglary, the information about the facts would only be in the police file or the prosecutor's file, and not in the court file. We must then obtain access to the police or prosecutor's file to determine if a weapon was possessed.

COMMENCEMENT OF PROHIBITION PERIOD:

The statute should be clear that the prohibition period will begin on:

(1) the date of release from prison if the defendant is actually sentenced to prison, or

(2) the date of conviction if probation is granted.

FELONY DEFINITION:

K.S.A. 21-3105 *Crimes Defined.*

> "(1) A felony is a crime punishable by death or by imprisonment in any state correctional institution or a crime which is defined as a felony by law."

The law does not make a distinction between ***high*** felonies and ***low*** felonies. The commission of the act is either a felony or it is not a felony.

Why should K.S.A. 21-4204 make a distinction? Why should the law provide that it makes a difference if the prior crime was a person or non-person felony, of ir a gun was possessed or not possessed during the commission of the prior felony?

A felony is a felony. The only reason some crimes are classified as non-person is because the victims were lucky enough to be out or away at the time.

RECOMMENDATION:

Remove all references to *distinctions*. Make it uniform that the prohibition period will be ten years from the date of conviction if probation is granted, or ten years from the date of release from prison.

Remove all references to person or non-person felonies. Statute should say ***any felony***.

Possession of a weapon should be all that is necessary for the prior felony conviction. The statute should be clear that ***possession*** and not ***use*** is all that is required.

Sections 5 and 6 should be retained. They provide for activities on school grounds.

Section (A)(1) is a problem. ***Possession of any firearm by a person who is both addicted to and an unlawful user of a controlled substance.***

Question: Who is ***addicted***? Must there be a certificate from a treatment center stating the addiction.

JUVENILE SECTION:

KEEP IT IN. We are not dealing with delinquents. We are dealing with criminals. If they have felony type crimes in the Juvenile Court, there is a strong possibility that they will have adult problems. Make the law apply to them also.

CONCLUSION:

Make the law simple and clear so that there can be no chance of misinterpretation.

Session of 2000

SENATE BILL No. 628

By Committee on Judiciary

2-11

AN ACT concerning crimes, criminal procedure and punishment; relating to possession of a firearm by a felon; amending K.S.A. 1999 Supp. 21-4204 and repealing the existing section.

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

Section 1. K.S.A. 1999 Supp. 21-4204 is hereby amended to read as follows: 21-4204. (a) Criminal possession of a firearm is:

(1) Possession of any firearm by a person who is both addicted to and an unlawful user of a controlled substance;

(2) ~~possession of any firearm by a person who has been convicted of a person felony or a violation of any provision of the uniform controlled substances act under the laws of Kansas or a crime under a law of another jurisdiction which is substantially the same as such felony or violation, or was adjudicated a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a person felony or a violation of any provision of the uniform controlled substances act, and was found to have been in possession of a firearm at the time of the commission of the offense;~~

~~(3) possession of any firearm by a person who, within the preceding five years has been convicted of a felony, other than those specified in subsection (a)(4)(A), under the laws of Kansas or a crime under a law of another jurisdiction which is substantially the same as such felony, has been released from imprisonment for a felony or was adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony, and was found not to have been in possession of a firearm at the time of the commission of the offense;~~

~~(4) possession of any firearm by a person who, within the preceding 10 years, has been convicted of: (A) A felony under K.S.A. 21-3401, 21-3402, 21-3403, 21-3404, 21-3410, 21-3411, 21-3414, 21-3415, 21-3419, 21-3420, 21-3421, 21-3427, 21-3502, 21-3506, 21-3518, 21-3716, 65-4127a or 65-4127b, K.S.A. 1999 Supp. 21-3442 or 65-4160 through 65-4164, and amendments thereto, or a crime under a law of another jurisdiction which is substantially the same as such felony, has been released from imprisonment for such felony, or was adjudicated as a juvenile of-~~

Proposed Technical Amendment to
Senate Bill No. 628

~~fender because of the commission of an act which if done by an adult would constitute the commission of such felony, was found not to have been in possession of a firearm at the time of the commission of the offense, and has not had the conviction of such crime expunged or been pardoned for such crime; or (B) a nonperson felony under the laws of Kansas or a crime under the laws of another jurisdiction which is substantially the same as such nonperson felony, has been released from imprisonment for such nonperson felony or was adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a nonperson felony, and was found to have been in possession of a firearm at the time of the commission of the offense;~~

~~(5)~~ *possession of any firearm by a person who, within the preceding 10 years, has been convicted of a felony;*

(3) possession of any firearm by any person, other than a law enforcement officer, in or on any school property or grounds upon which is located a building or structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades 1 through 12 or at any regularly scheduled school sponsored activity or event; or

~~(6)~~ *(4)* refusal to surrender or immediately remove from school property or grounds or at any regularly scheduled school sponsored activity or event any firearm in the possession of any person, other than a law enforcement officer, when so requested or directed by any duly authorized school employee or any law enforcement officer.

(b) Subsection ~~(a)(5)~~ *(a)(3)* shall not apply to:

(1) Possession of any firearm in connection with a firearms safety course of instruction or firearms education course approved and authorized by the school;

(2) any possession of any firearm specifically authorized in writing by the superintendent of any unified school district or the chief administrator of any accredited nonpublic school;

(3) possession of a firearm secured in a motor vehicle by a parent, guardian, custodian or someone authorized to act in such person's behalf who is delivering or collecting a student; or

(4) possession of a firearm secured in a motor vehicle by a registered voter who is on the school grounds, which contain a polling place for the purpose of voting during polling hours on an election day.

(c) Violation of subsection (a)(1) or ~~(a)(5)~~ *(a)(3)* is a class B nonperson select misdemeanor~~;~~. Violation of subsection (a)(2)~~; (a)(3) or (a)(4)~~ is a severity level 8, nonperson felony~~;~~. Violation of subsection ~~(a)(6)~~ *(a)(4)* is a class A nonperson misdemeanor.

or a violation of any provision of the uniform controlled substances act or a crime under a law of another jurisdiction which is substantially the same as such felony or violation, or was adjudicated a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony or violation of any provision of the uniform controlled substances act

Sec. 2. K.S.A. 1999 Supp. 21-4204 is hereby repealed.

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

Written 3-2 att 7

SB 671

Gary L. Foiles, Cowley County Attorney

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February 29, 2000

Senate Judiciary Committee
Kansas State Capitol
Topeka, Kansas 66612

Dear Chairman Emert,

I address yourself and the members of the Senate Judiciary Committee on a strange dilemma that Kansas Law puts on law enforcement: It makes a law that people under 21 years of age cannot consume alcohol, and then disallows the most logical of methods in which law enforcement can show to a court of law that a defendant has been drinking. I mean the preliminary breath test.

I. THE LAW AGAINST UNDERAGE ALCOHOL USE:

K.S.A. 41-727(a) is pretty clear that no person under 21 years of age shall consume alcoholic liquor or cereal malt beverage. The nationwide understanding is that any ethyl alcohol with any minor is a danger to society. Granted, in some brands of mouthwash or other products, some ethyl alcohol will exist. Still, a child who drinks three bottles of mouthwash is certainly as much of a danger to society as one who drank one beer.

II. THE LAW AGAINST USING A PRELIMINARY BREATH TEST

Kansas currently does not allow the use of the Preliminary Breath Test for use in court for ANY CRIMINAL OR CIVIL CASE. That is important, as Juvenile Offender Cases under Chapter 38, Article 16, are civil cases. The law concerning a preliminary breath test makes no distinction between D.U.I. and Minor in Consumption cases, nor how a court may weigh such evidence. The law simply finds no use for the P.B.T.

III. ENFORCING THE LAW AGAINST UNDERAGE DRINKING

The public officer notices a minor with alcohol breath. The officer knows under no circumstances should the minor have been drinking alcohol. As an officer required to enforce the law, he is not allowed to turn away. He MUST investigate. He must file a report upon finding probable cause to believe the child drank ethyl alcohol.

Sen Jud 3-2-00 att 7

IV. GOING TO COURT: REALISM

Must Law Enforcement take every child into court with only the following evidence, "she had bloodshot eyes, and I could smell the scent of alcohol on her"? Will it be enough if the police officer is lucky to be able to say, "she had trouble walking, slurred speech, and later she passed out"? Are we going to send a message to teenagers that, "only kids who confess to drinking are convicted"?

V. GOING TO COURT: ECONOMY

Must Law Enforcement take the following steps just to enforce K.S.A. 41-727?

A. Drive children halfway across the county to use an intoxilizer on them?

B. During a bust of 40 underage drinkers and 20 other kids who did not drink, every kid may smell like alcohol. On a weekend, likely no more than three deputies can handle the "bust". Taking an intoxilizer to the bust is impractical, and even if many intoxilizers were available the amount of time it would take to process all the kids would take half a day. Must deputies let them go, just because they can't handle the crowd?

C. Send a child's vomit to a KBI laboratory and wait on results?

D. Alleged Juvenile Offenders have a right to a speedy trial. Is the KBI going to put a rush on juvenile vomit to test for alcohol content? Is the KBI going to make it priority over clandestine methamphetamine labs? I doubt it.

VI. THE SOLUTION: THE P.B.T.

Preliminary breath testing devices test for one thing: Ethyl Alcohol. I've read many articles about how to beat the preliminary breath test, and they all point to one thing: How reliable the assessment of the AMOUNT of alcohol in the person may be. I found no article stating that the P.B.T. finds the presence of anything other than Ethyl Alcohol, that is, Alcoholic Liquor or Cereal Malt Beverage. Simply put, the P.B.T. finds the presence of ethyl alcohol in breath and nothing else.

Kansas government seems to like the Intoxilizer. Preliminary breath tests do the same thing, just with less accuracy. The underage drinking law, K.S.A. 41-727, isn't interested in how many tenths of a percent of bodily fluids are contaminated with ethyl alcohol. The element of its crime is much more simple:
ALCOHOL: Yes or No? The P.B.T. answers that question, and accurately.

However, unlike the intoxilizer, the P.B.T. can be taken and finished in under 5 minutes and is sold for a reasonably low price.

VII. ROOM TO WORK WITHIN THE LAW

I believe that the preliminary breath test shows Conclusive evidence that defendant or respondent swallowed ethyl alcohol. Faking it would be almost impossible. However, I'm not asking that the P.B.T. be considered as conclusive evidence. I want that when a Law Enforcement Officer gets a minor to blow into a P.B.T. and it registers yellow in color, that he, and I as the prosecutor, can look at the possibility that the child drank three bottles of mouthwash as beyond a reasonable doubt.

The officer, as the first line of enforcing the law, can look at the result of the test and listen to the story of the suspect, and decide if the story is plausible or not. K.S.A. 41-727 doesn't have a requirement of intent to drink alcohol. However, it is generally understood that intent be at least implied in charging someone with a misdemeanor. For example, if you have controlled substances on your person it is implied that you possess the drugs. A child may claim that they were handed an alcoholic beverage to drink, not knowing "the punch was spiked", or something to that effect. Nevertheless, with certain readings on a preliminary breath test, the law enforcement officer will know the child didn't just take "an innocent sip" like so many minors like to say upon being apprehended. It allows the officer to make the logical jump from trying to guess how much the child's breath smells like alcohol to a defined reading that alcohol is present. Therefore, it works like a yes/no test, but with the colors of green, yellow, and red, it does have a method to give a police officer probable cause to disbelieve what could be a plausible explanation for a positive result in finding ethyl alcohol.

The judge, as well, is not required to find the preliminary breath test as conclusive. The judge understands that ethyl alcohol may be in the air, and other human error may exist. Courts are certain to consider the totality of circumstances. I would ask that the judge be allowed to consider green, yellow, and red. More information allows for a clearer picture. But even if the legislature chooses not to allow that, permitting any P.B.T. evidence is a vast improvement over the present.

VIII. SUMMARY

The Records from the National Highway Traffic Safety Administration and the National Institute on Alcohol Abuse and Alcoholism show the necessity to keep underage drinking laws in place. I'm not going to discuss that, as I believe that the Great State of Kansas has bought into this premise. My concern is that Kansas has not bought into any effective method to regulate underage drinking that is also efficient. The Preliminary Breath Test is that effective and efficient method, and Kansas Law needs to reflect that.

Very Truly Yours,

Patrick R. Hrenchir
Deputy Cowley County Attorney
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