Approved: 3-19-02
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE.

The meeting was called to order by Vice-Chairperson Ward Loyd at 3:30 p.m. on February 13, 2002 in Room 313-S of the Capitol.

All members were present except:
Representative Karen DiVita-Johnson - Excused
Representative Andrew Howell - Excused
Representative Judy Morrison - Excused
Representative Clark Shultz - Excused

Committee staff present:
Jerry Ann Donaldson, Department of Legislative Research
Jill Wolters, Department of Revisor of Statutes
Sherman Parks, Department of Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:
David Zabel, Assistant Douglas County Attorney
Kevin Graham, Assistant Attorney General, Criminal Division
Eric Rucker, Dickinson County Attorney
Representative Bob Bethell
Jerry Hereden, Williams Companies
Jack Glaves, Duke Energy Corporation

Vice-Chairperson Loyd announced Representative Long would replace Representative Newton on the subcommittee on **HB 2469.**

Hearings on **HB 2735 - Aggravated battery includes unintentionally causing bodily harm while driving under the influence**, were opened.

David Zabel, Assistant Douglas County Attorney, informed the members that the proposed bill would mirror the current involuntary manslaughter statute. By doing so it would be consistent with the Legislatures stance on strengthen DUI statutes.(Attachment 1) The change is necessary due to the Kansas Court of Appeals ruling in *State of Kansas v. Huser* (Attachment 2), which states that the offense of reckless driving is a distinct offense and is established by different evidence than the crime of driving while under the influence of intoxicating liquor. He proposed making the sentence be a severity level 5 so not to impact prison beds.

Kevin Graham, Assistant Attorney General, Criminal Division, reminded the committee that the FATAL Task Force recommended the proposed change. (Attachment 3)

Hearings on **HB 2735** were closed.

Hearings on **HB 2753 - Burglary & Ag Burglary include entering a structure with intent to commit a person misdemeanor**, were opened.

Eric Rucker, Dickinson County Attorney, stated that the proposed bill would not allow a distinction between entering structures with the intent to commit sexual battery, criminal restraint, or simple battery. If a person enters a structure with the intent to commit one or more of these acts it would burglary or ag burglary. (Attachment 4)

Hearings on **HB 2753** were closed.

Hearings on **HB 2752 - crimes of tampering with pipelines and theft of products from pipelines**, were opened.

Representative Bob Bethell appeared before the committee as the sponsor of the bill which would created the crime of tampering with pipelines, a level 3, nonperson felony. He requested an amendment which would strike "natural gas gathering lines". (Attachment 5)

Jerry Hereden, Williams Companies, commented that tampering with the lines is dangerous and could be considered to be a homeland security issue. However, most pipeline tampering is to get the anhydrous ammonia to make methamphetamines. Currently, there are no statutes to prosecute under for those who tap into such lines. (Attachment 6)

Jack Glaves, Duke Energy Corporation, requested that the committee strike "natural gas gathering lines".

Propane Marketers Association of Kansas did not appear before the committee. See (Attachment 7) for their support of the proposed bill.

Hearings on **HB 2752** were closed.

The committee meeting adjourned at 5:00 p.m. The next meeting was scheduled for February 14, 2002.

House Judiciary Committee
Testimony 2/13/2001
In Support of House Bill 2735
Kansas County and District Attorneys Association
David P. Zabel
Douglas County Assistant District Attorney
785-841-0211

I appreciate the opportunity to appear before this committee on behalf of the Kansas County and District Attorneys Association to support this legislation. House Bill 2735 would fix a gap in the Aggravated Battery Statute that was created when the statute was amended in 1992. Without House Bill 2735, persons who cause bodily harm to other individuals while they drive under the influence of alcohol cannot be effectively prosecuted as felons. The current state of the law is inconsistent with Kansas's tough stance on DUI related offenses.

INTENT OF HOUSE BILL 2735

House Bill 2735 would create an additional theory in which a defendant could be criminally liable for the crime of Aggravated Battery. In Kansas, an aggravated battery (always a felony although the "severity level" varies depending on the theory) is distinguished from a simple battery (always a B misdemeanor) by the added element of "great bodily harm." If great bodily harm actually occurs, then the offense is considered a severity level four (4) felony if the act was intentional, or a severity level five (5) felony if the act was reckless. If great bodily harm did not actually occur, but a deadly weapon was used (like a vehicle), or the act was committed in a manner whereby great bodily harm could occur, the offense is considered a severity level seven (7) felony if intentional or a severity level eight (8) felony if the act was reckless. House Bill 2735 would create a situation where a person would be guilty of Aggravated Battery if the crime of Driving Under the Influence of Alcohol (DUI) resulted in bodily harm or great bodily harm to another. The former would be a severity level four (4) felony and the latter would be a severity level seven (7) felony.

HOUSE BILL 2735 IS CONSISTENT WITH PUBLIC POLICY AND EXISTING STATUTES

Kansas has recently taken legislative measures to more aggressively prosecute persons who drive under the influence of alcohol. This is evident in the amendments to the DUI statute, which increased the minimum mandatory penalties and abolished any time frame in which prior DUI convictions could be used to enhance penalties. Kansas also recognizes that a DUI that results in death should be considered more serious than a non-fatal DUI. A DUI that results in death constitutes the crime of Involuntary Manslaughter. A showing that the act itself was intentional or reckless is not required. House Bill 2735 simply seeks to apply that same standard to situations where a DUI results in bodily harm or great bodily harm to another person. Like the crime of Involuntary Manslaughter, there would be no requirement that the harm be done intentionally or even recklessly if a DUI was proven.

WHY THE CURRENT AGGRAVATED BATTERY STATUTE DOES NOT ADEQUATELY ADDRESS A DUI THAT RESULTS IN BODILY HARM.

Prior to 1993, a DUI that resulted in bodily harm would have been prosecuted under the Vehicular Battery Statute. This statute was nearly identical to the proposed amendments of House Bill 2735. However, in 1993, the Aggravated Battery statute was amended to include reckless conduct. Prior to the 1993 amendments, an aggravated battery could only be proven if the act was intentional. Simultaneously with amending the Aggravated Battery statute, the Legislature repealed the Vehicular Battery Statute. Presumably, this was done because the Legislature contemplated that a DUI that resulted in bodily harm to another could be effectively prosecuted as a Reckless Aggravated Battery. The rational being that a person who consumes enough alcohol to be over the legal limit and then chooses to drive a car has acted recklessly. Unfortunately the Kansas Supreme Court has not agreed with this rational and has held that "reckless" conduct cannot be proven simply by the act of driving while intoxicated.

THE EFFECT OF STATE v. HUSER

On August 18, 1996, a drunk driver struck two pedestrians as they crossed the street in Manhattan, Kansas. The pedestrians were injured but not killed. There was ample evidence that the defendant was intoxicated and he was charged with Reckless Aggravated Battery. The theory was that the reckless act was the decision to drive after becoming intoxicated. The Kansas Supreme Court stated that the recklessness had to be specifically related to driving behavior such as weaving, crossing the center line of the roadway, speeding, etc. Because there was no evidence of such driving behavior, they concluded that the defendant could not be charged with an Aggravated Battery. The Court considered the argument that the reckless behavior was the decision to drink to the point of intoxication and then operate a motor vehicle. However, the Court squarely rejected this argument. Given how the term "reckless" had been legislatively defined and judicially interpreted, the Court did not think it had a choice. "Reckless" is defined by Kansas law as "conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger." "Reckless" has also been defined as "wanton and willful disregard for human life."

IRONY OF CURRENT LAW

The result of the *Huser* Court's interpretation of "recklessness" is that it is nearly impossible to effectively prosecute a drunk driver for Aggravated Battery unless their driving behavior is reckless. Even if reckless driving behavior is present, the more intoxicated a driver is the less likely he/she is going to be found to have driven "recklessly." For example, a driver who consumes enough alcohol that he/she is slightly over the legal limit may purposely speed, weave, and otherwise drive in a "reckless" manner. If another person was injured because of that behavior then that person could be prosecuted for Reckless Aggravated Battery because the erratic driving was consciously done and, therefore, that driver acted with willful disregard of human life. However, if a driver consumed so much alcohol that he/she was well over the legal

limit, that driver may be so intoxicated that he/she simply passes out while driving and hits another vehicle or a pedestrian. Given that "reckless" requires a conscious disregard for human life, the more intoxicated a person is, the less that person meets the definition of "reckless." Ironically, the slightly-intoxicated driver may be found guilty for a Reckless Aggravated Battery, but the extremely-intoxicated driver definitely will not be. Neither driver will have committed an Aggravated Battery unless there is reckless driving behavior.

HOUSE BILL 2735 WOULD FILL THE GAP

The amendments to the Aggravated Battery Statute that House Bill 2745 proposes would merely return Kansas to the pre-1993 law where an intoxicated driver who injured another person was criminally liable. Although the Legislature apparently assumed that amending the Aggravated Battery statute to include reckless behavior would abrogate the need for the vehicular battery statute, the *Huser* case shows that there is a need for this legislation. This Legislature would not tolerate a situation where a drunk driver could kill another person and not be liable for a felony offense and it should not tolerate the current situation where a drunk driver can injure another person and not be criminally liable for a felony offense.

Respectfully,

David P. Zabel

David P. Zabel
Douglas County Assistant District Attorney

265 Kan. 228
(959 P2d 908)

No. 80,128

STATE OF KANSAS, *Appellant*, v. DALENE GAIL HUSER, *Appellee*.

SYLLABUS BY THE COURT

1. A judge may determine that a felony has been committed, based on the evidence presented at the preliminary hearing, if there is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief that a felony has been committed.

2. While the judge at a preliminary hearing must determine that there is some evidence to support a finding that a felony has been committed and the person charged committed it, the evidence need not prove guilt beyond a reasonable doubt, only probable cause. In order to prove probable cause, there must be evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt.

3. This court is to conduct a de novo review of the evidence when considering the trial court's probable cause finding. Therefore, this court should not give deference to the trial court's finding when it considers the evidence presented by the State and the defendant and evaluates the credibility and competency of the witnesses.

4. Reckless conduct is conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger. The terms gross negligence, culpable negligence, wanton negligence, and wantonness are included within the term recklessness as used in this code.

5. The offense of reckless driving is a distinct offense and is established by different evidence than the crime of driving under the influence of intoxicating liquor, so that a conviction or acquittal of one offense will not bar prosecution for the other.

6. Additional evidence, beyond evidence that an accused was driving under the influence of alcohol, is necessary to create probable cause for reckless aggravated battery charges. Simply driving under the influence of alcohol does not, standing alone, amount to reckless behavior.

Appeal from Riley district court; WILLIAM J. DICK, assigned judge. Opinion filed May 29, 1998. Affirmed.

Stephen D. Maxwell, assistant attorney general, argued the cause, and *Carla J. Stovall*, attorney general, was with him on the brief for appellant.

Ted E. Smith, of Myers, Pottroff & Ball, of Manhattan, argued the cause, and *Robert L. Pottr*

House Judiciary
Attachment 2
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same firm, was on the brief for appellee.

The opinion of the court was delivered by

ABBOTT, J.: This is an appeal by the State from the trial court's dismissal of two counts of reckless aggravated battery at the conclusion of the preliminary hearing. The defendant, Dalene Gail Huser, was bound over for trial on one count of driving under the influence (DUI) and one count of refusal to submit to a preliminary screening alcohol test. The State dismissed the two remaining counts of DUI and refusal to submit to an alcohol test and appealed the trial court's ruling to this court.

At approximately 1:45 a.m. on August 18, 1996, the defendant was driving a vehicle near the Kansas State University campus in Manhattan. The bars were closing and a group of six people were crossing a street. Four of them had already crossed the street, and the last two were crossing when the car driven by the defendant struck them. The two pedestrians struck by the car were crossing the street at an angle and they were not in a marked crosswalk.

Both pedestrians testified that they did not see the defendant's car until after it hit them. Evidence was presented that the pedestrians were two or three steps past the center line when they were struck. No skid or brake marks were left, and the defendant's car traveled 1 to 3 feet after it struck the pedestrians. Ample evidence was introduced to bind the defendant over on the driving under the influence charge. In so holding, the trial court stated:

> "So really the charge is recklessly causing this--these injuries by Mrs. Huser. Mr. Pottroff has provided the Court with his brief. In it [he] cites the definition from K.S.A. 21-3201c of reckless conduct. It reads reckless conduct is conduct done under circumstances that show a realization of the [imminence] of danger to the person of another, and a conscious . . . disregard of that danger. The terms gross negligence, culpable negligence, wanton negligence, and wantonness are included within the term of recklessness as used in this code. I think there is merit to Mr. Huser's statement and his argument that we do not have evidence from the operation of the vehicle or the vehicle of itself of--of reckless conduct in the handling and driving of the vehicle. And to find that there is probable cause to believe that this crime was committed from the facts presented to the Court, the Court would have to presume that Mrs. Huser was in fact intoxicated, and the fact that she was driving a vehicle in an intoxicated state would then equate into being reckless to be guilty of this offense. The Court does not make that jump and so the Court [implies] that there is not probable cause from the evidence presented that--that there is--that the two offenses of reckless aggravated battery were committed, so the Court does find that there is not probable cause on those two offenses. We do have the driving under the influence charge and Count 4 of the refusal to submit to a preliminary alcohol screening test."

Instead of proceeding to trial on the DUI charge and the preliminary breath test infraction, the State filed a motion to dismiss the remaining charges. The trial court granted this motion. With the dismissal of these charges, the trial court's ruling was a final judgment, and the State appealed the trial court's ruling to this court, pursuant to K.S.A. 22-3602.

Preliminary examinations are authorized by K.S.A. 22-2902. K.S.A. 22-2202(16) defines a preliminary examination as "a hearing before a magistrate on a complaint or information to determine [1] if a felony has been committed and [2] if there is probable cause to believe that the person charged committed it."

Under step one, a judge may determine that a felony had been committed based on the evidence

presented at the preliminary hearing if "there is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief that it appears a felony has been committed." *State v. Engle*, 237 Kan. 349, 350, 699 P.2d 47 (1985). If a preliminary hearing judge determines a felony has been committed, then the judge must determine whether there is probable cause to believe that the person charged committed the crime. "In order to prove probable cause, there must be evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. *State v. Green*, 237 Kan. 146, Syl. ¶ 3, 697 P.2d 1305 (1985)." *State v. Bockert*, 257 Kan. 488, 492, 893 P.2d 832 (1995).

While the judge at a preliminary hearing must determine that there is some evidence to support a finding that a felony has been committed and that the person charged committed it, the evidence need not prove guilt beyond a reasonable doubt, only probable cause. *Bockert*, 257 Kan. at 492; *State v. Sherry*, 233 Kan. 920, 935, 667 P.2d 367 (1983). According to *In re Mortimer*, 192 Kan. 164, 166-67, 386 P.2d 261 (1963),

> "[t]here is a difference between the quantum of proof essential to a binding over for trial and that required to convict at the trial. The guilt or innocence of a defendant is not adjudged at a preliminary examination, and it is not necessary that evidence upon which a defendant is held for trial should be sufficient to support a conviction. It is enough if it shows that an offense has been committed and that there is probable cause to believe the defendant is guilty. *State v. Pfeifer*, 109 Kan. 232, 233, 198 Pac. 927 [1921]; *In re Danton*, 108 Kan. 451, 195 Pac. 981 [1921]."

Furthermore, a judge at a preliminary hearing should not evaluate the prosecutor's decision to file criminal charges against the defendant. The judge should not dismiss the case simply because the judge has determined that the State should not have prosecuted the case due to the remote or nonexistent possibility of a conviction. *Bockert,* 257 Kan. at 492 (citing *State v. Puckett,* 240 Kan. 393, Syl. ¶ 3, 729 P.2d 458 [1986]).

The trial court found that the State had failed to meet its burden of proof for establishing that a crime of reckless aggravated battery had been committed. In appeals by the prosecution from an order discharging the defendant for lack of probable cause, this court follows the same standard for weighing the evidence as the judge at the preliminary examination. See *Bockert,* 257 Kan. at 492-93. This court is to conduct a de novo review of the evidence when considering the trial court's probable cause finding. *State v. Martinez*, 255 Kan. 464, 465, 874 P.2d 617 (1994). Therefore, this court should not give deference to the trial court's finding when it considers the evidence presented by the State and the defendant and evaluates the credibility and competency of the witnesses. The end result is that instead of one magistrate judge conducting a preliminary hearing, seven Supreme Court justices conduct a preliminary hearing on the record and issue an opinion that the State is free to ignore if it can produce additional evidence.

For the defendant to be held over for trial and tried for reckless aggravated battery as charged, pursuant to K.S.A. 21-3414(a)(2)(B), the trier of facts must find probable cause that the following elements existed and could be proved at trial: The defendant acted "[1] recklessly [2] causing bodily harm to another person [3] with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted."

From the testimony presented at the preliminary hearing, the trial court had probable cause to find that the victims had suffered bodily harm at the hands of the defendant. Further, the evidence presented at the preliminary hearing provided probable cause for the trial court to find that the manner in which the

bodily harm was inflicted--being struck by a car--was a manner whereby great bodily harm, disfigurement, or death can be inflicted. However, the trial court found that there was no evidence to support a probable cause finding that the defendant caused such harm with her car *recklessly*. Thus, the trial court refused to bind the defendant over on these two charges of reckless aggravated battery.

"Reckless" is defined under K.S.A. 21-3201 as follows:

> "(c) Reckless conduct is conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger. The terms 'gross negligence,' 'culpable negligence,' 'wanton negligence' and 'wantonness' are included within the term 'recklessness' as used in this code."

State v. Mourning, 233 Kan. 678, 664 P.2d 857 (1983), discusses the relationship between driving under the influence and reckless driving. In that case, the defendant was charged with speeding, failure to drive within marked lanes, reckless driving, and driving under the influence of alcohol or drugs. The defendant pled guilty to all charges except driving under the influence of alcohol or drugs. A trial date was set for this last charge. At that time, the defendant moved to dismiss the charge on double jeopardy grounds because he had been convicted previously of reckless driving, which he alleged was a lesser included offense of the DUI charged in the same complaint. The trial court agreed with the defendant and dismissed the DUI charge. The State successfully appealed to this court. 233 Kan. at 678-79. This court found that the trial court erred in barring the DUI prosecution based on the defendant's previous conviction for reckless driving which was alleged in the same complaint and arising out of the same conduct. This court reversed the trial court and remanded the case for trial on the DUI charge. 233 Kan. at 684.

In so ruling, this court stated:

> "Does the offense of driving under the influence of alcohol or drugs require proof of an additional element which is not necessary to prove reckless driving, and vice-versa? Under K.S.A. 8-1567(a) three things must be established to support a conviction for driving under the influence of alcohol or drugs: (1) that the defendant operated the vehicle; (2) that the defendant was under the influence of alcohol or drugs while operating the vehicle, and (3) that the operation took place within the jurisdiction of the court. See *State v. Reeves*, 233 Kan. 702, 664 P.2d 862 (1983); *State v. Hall*, 1 Kan. App. 2d 730, 731, 573 P.2d 635 (1977). In *Reeves* 'under the influence of alcohol' was defined to mean that the defendant's mental or physical function was impaired by the consumption of alcohol to the extent that he was incapable of safely driving a vehicle. 233 Kan. at 704.
>
> "K.S.A. 8-1566(a) provides:
>
> "'Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.'
>
> "The gist of the proscribed conduct is driving a vehicle in reckless disregard for the safety of others. PIK Crim. 2d § 70.04 defines 'reckless' under K.S.A. 8-1566 to mean 'driving a vehicle under circumstances that show a realization of the imminence of danger to another person or the property of another where there is reckless disregard or complete indifference and unconcern for the probable consequences of such conduct.'
>
> "The two offenses require different evidence for a conviction. To violate 8-1567 one needs

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only to operate a vehicle while his mental or physical capacity to function is impaired by alcohol or drugs to the extent he is no longer capable of safely driving the vehicle. It is unnecessary to prove, in addition, that the vehicle was driven in a reckless manner, although such driving may constitute circumstantial evidence the driver was under the influence of alcohol or drugs. On the other hand, to obtain a conviction for reckless driving under 8-1566 it is only necessary to establish that the vehicle was driven in willful or wanton disregard for the safety of others; in other words, under circumstances that show a realization of the imminence of danger and a reckless disregard or complete indifference for the probable consequences of such conduct. Proof is not required that the driver was under the influence of alcohol or drugs.

"An argument can be advanced that any time a person under the influence of alcohol or drugs operates a vehicle he does so in willful or wanton disregard for the safety of others. Under such reasoning any time a person was guilty of driving under the influence of alcohol or drugs he would also necessarily be guilty of reckless driving and therefore the offense of reckless driving would constitute a 'crime necessarily proved if the crime charged were proved.' (K.S.A. 21-3107[2][d].) However, it is merely the *driving* of a vehicle while under the influence of alcohol or drugs which is proscribed by 8-1567. One does not need to swerve all over the road or drive through another's yard to be guilty of driving under the influence of alcohol or drugs. While a person under the influence of alcohol may actually drive in a straight line in the proper lane of traffic down the street, although incapable of safely operating the vehicle in accordance with traffic regulations that may be encountered, a person guilty of reckless driving is able to safely control his vehicle but, in willful or wanton disregard for the safety of others, does not do so. It is evident that a person guilty of driving under the influence of alcohol is not necessarily guilty of driving in reckless disregard for the safety of others.

. . . .

"This holding is in accord with authority from other jurisdictions. In 7A Am. Jur. 2d, Automobiles and Highway Traffic § 389, the general rule is stated:

"'The offense of reckless driving is a distinct offense and is established by different evidence tha[n] the crime of driving while intoxicated or under the influence of intoxicating liquor, so that a conviction or acquittal of one offense will not bar prosecution for the other.'

"See also 22 C.J.S., Criminal Law § 295(2), p. 771; *Rea v. Motors Ins. Corporation*, 48 N.M. 9, 14, 144 P.2d 676 (1944); *State v. Sisneros*, 42 N.M. 500, 507, 82 P.2d 274 (1938); *Akron v. Kline*, 165 Ohio St. 322, 59 Ohio Op. 414, 135 N.E.2d 265 (1956); *State v. Amaral*, 109 R.I. 379, 382-83, 285 A.2d 783 (1972); *Usary v. State*, 172 Tenn. 305, Syl. ¶ 10, 112 S.W.2d 7 (1938); *McMillan v. State*, 468 S.W.2d 444, 445 (Tex. Crim. 1971); *Hundley v. Commonwealth*, 193 Va. 449, 451, 69 S.E.2d 336 (1952); *State ex rel. Foley v. Yuse*, 191 Wash. 1, 5, 70 P.2d 797 (1937). *Cf. State v. Johnson*, 273 Minn. 394, 141 N.W.2d 517 (1966)." 233 Kan. at 681-83.

Here, additional evidence, beyond evidence indicating the defendant was driving under the influence of alcohol, was necessary to create probable cause for recklessness so that the trial court could bind the defendant over on the reckless aggravated battery charges. Under *Mourning*, simply driving under the influence does not, standing alone, amount to reckless behavior. One's behavior is only reckless if he or she realizes that his or her conduct creates imminent danger to another person but consciously and unjustifiably disregards the danger. K.S.A. 21-3201(c) (defining reckless conduct). There was no evidence that this occurred here--no evidence of weaving, speeding, or a failure to stop quickly after the

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accident occurred. The State did not submit enough evidence to support a probable cause finding that the defendant committed reckless aggravated battery by recklessly driving her car.

Prior to 1993, the appropriate charge in a case of this nature would have been vehicular battery, under K.S.A. 21-3405b. A conviction under that statute required a showing that the defendant unintentionally caused bodily harm to another while driving under the influence of alcohol, driving recklessly, or eluding an officer. However, this statute was repealed effective July 1, 1993. L. 1992, ch. 298, § 97.

At the same time that K.S.A. 21-3405b was repealed, the legislature amended both the misdemeanor battery statute and the general aggravated battery statute to include reckless acts as well as intentional acts. L. 1992, ch. 298, § 11 and § 12. The legislative history of these amendments contains no specific discussion of the legislature's intent regarding the inclusion of harm caused by driving under the influence. However, the State argues that the fact that these statutes were amended simultaneously creates a clear implication that the inclusion of reckless conduct in the new battery statutes was intended to replace the former vehicular battery statute.

In addition, the State points to the Summary of Legislation, p. 126 (June 1992), which provides:

> "The crimes of battery and aggravated battery are expanded to include reckless acts. Previously, reckless acts causing bodily harm or great bodily harm were not adequately covered by law, *e.g.,* drive by shootings into a house. Vehicular battery, under K.S.A. 21-3405b, is repealed under the rationale that this criminal act is covered under the revised battery statute under K.S.A. 21-3412."

Thus, based on this language, the State claims that the legislature repealed the vehicular battery statute, believing that all forms of this crime were covered by the new aggravated battery statute.

Since a person could be convicted of vehicular battery prior to 1993 by unintentionally causing bodily harm to another while driving under the influence, regardless of independent or additional evidence of recklessness, the State claims a person can be convicted of reckless aggravated battery today based on this same conduct because the criminal acts punished by vehicular battery are now covered under the revised battery statutes.

The State is reading the Summary of Legislation too broadly. When the vehicular battery statute was in effect, it punished a defendant for unintentionally causing bodily harm to another while driving under the influence, or driving recklessly, or eluding an officer. It treated each of these types of driving as a different method to prove vehicular battery. It did not equate driving under the influence with reckless driving.

When the vehicular battery statute was repealed, the legislature enacted the misdemeanor battery statute and the aggravated battery statute to include reckless acts, not just intentional acts. Thus, unintentionally causing bodily harm to another by driving a car recklessly is now punishable under the aggravated battery statute. However, this statute continues to use the term reckless in the same manner in which it has been used previously--a realization of imminent danger to another person *and* a conscious and unjustifiable disregard of that danger. K.S.A. 21-3201(c). As such, driving under the influence of alcohol does not equal driving recklessly, without additional evidence of reckless conduct. It can be argued that merely driving under the influence of alcohol amounts to reckless behavior because one should realize the imminent danger that driving in an impaired condition places another person in. However, in *Mourning*, this court specifically rejected that argument. Thus, to convict the defendant of reckless aggravated battery, the State had to prove that she caused bodily harm to the victims by driving

recklessly. Since the State did not introduce any independent evidence of the defendant's recklessness, beyond evidence that she was driving under the influence of alcohol, the trial court properly did not bind the defendant over on the aggravated battery charges.

When the legislature repealed the vehicular battery statute in 1993, it knew that reckless driving did not equate to DUI because the *Mourning* case had been decided in 1983. Thus, the legislature knew that if it repealed a criminal statute which punished a defendant who caused bodily injury to a victim while driving under the influence of alcohol, this criminal act would not be covered by a statute which punishes recklessness without independent evidence that the drunk driver also drove recklessly. We hold that there was no probable cause to bind the defendant over on the reckless aggravated battery charges. The trial court properly dismissed these charges. The State's appeal fails.

Affirmed.

END

 | Keyword | Name » SupCt - CtApp | Docket | Date |

Comments to: WebMaster, kscases@kscourts.org.
Updated: May 29, 1998.
URL: http://kscourts.org/kscases/supct/1998/19980529/80128.htm.

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State of Kansas
Office of the Attorney General
120 S.W. 10TH AVENUE, 2ND FLOOR, TOPEKA, KANSAS 66612-1597

CARLA J. STOVALL
ATTORNEY GENERAL

MAIN PHONE: (785) 296-2215
FAX: (785) 296-6296

TESTIMONY OF
ASSISTANT ATTORNEY GENERAL KEVIN A. GRAHAM
BEFORE THE HOUSE JUDICIARY COMMITTEE
RE: HOUSE BILL 2735
February 13, 2002

Chairperson O'Neal and Members of the Committee:

Thank you for the opportunity to appear before you today on behalf of Attorney General Carla Stovall to express support for House Bill 2735.

House Bill 2735 proposes amending the aggravated battery statute, K.S.A. 21-3414, to include unintentionally causing great bodily harm or bodily harm while driving under the influence of alcohol or drugs. This change in law is necessary as a result of the Kansas Supreme Court's decision in the case of *State v. Huser*, 265 Kan. 228 (1998), where the Court held that simply driving while intoxicated and causing an injury does not necessarily equate to reckless conduct as currently required under the aggravated battery statute. Attorney General Stovall feels very strongly that there should be appropriate felony penalties for individuals who seriously injure innocent victims while in the commission of the crime of driving under the influence and that the crime of aggravated battery should apply to those cases.

There is absolutely no denying the fact that drunk driving is a serious and deadly problem in our State and our nation. Drunk driving is the number one cause of injury nationwide of young people. As you may be aware, in 1998 Attorney General Stovall convened the Far-Reaching Alteration of Traffic and Alcohol Laws Task Force (FATAL), to conduct a comprehensive examination of current traffic and alcohol laws and provide recommendations to change those laws. One of the FATAL Task Force's original recommendations for legislative change was to amend the aggravated battery statute, K.S.A. 21-3414, in the manner the statute is amended by House Bill 2735.

On behalf of Attorney General Stovall I urge your favorable consideration of House Bill 2735.

House Judiciary
Attachment 3
2-13-02

OFFICE OF THE DICKINSON COUNTY ATTORNEY

Eric K. Rucker, Dickinson County Attorney
P.O. Box 696
Abilene, KS 67410

February 12, 2002

Chairman O'Neal and Members of the Judiciary Committee:

When state legislative bodies have historically dealt with what constitutes a burglary the principal issue has always been; what specific intention did the criminal have when entering the structure to commit a crime. If the criminal entered to commit a felony, a burglary always resulted. Later, many legislative bodies expanded the crime of burglary to include not only intended felonies but thefts and sexual batteries as well.

HB2753 asks the historical burglary question: "What specific behavior did the criminal intend upon entering the structure?" But this question is asked in light of the Kansas sentencing guideline's distinction between person and non-person crimes. The rephrased question posed is: "If at the time of entering a structure a criminal intends to commit a felony, a theft or a misdemeanor crime against a person, should a burglary result under Kansas law? The legislation proposes that it should.

HB22753 draws no distinction between entering structures intending to commit sexual battery, domestic battery, criminal restraint, simple battery or even battery against a law enforcement officer. If a criminal enters a structure intending to commit one or more of these acts against a person, a burglary would result.

This legislation would also effect those who enter structures to assault others or to accost those who have obtained restraining orders against them. Those who enter a structure with the intention of intimidating victim/s or witness/es in pending court proceedings would also be classified as having committed burglary.

Aggravated Burglary is also addressed by this proposal. The crime of aggravated burglary requires a person be within a structure when a burglary occurs. Logic dictates that if a person is within a structure and a criminal intends to commit criminal acts against a person or persons within the same structure, there is a greater likelihood of harm to people.

Finally, this proposal does not change the severity level for either burglary or aggravated burglary.

The Kansas County and District Attorneys Association respectfully requests your favorable consideration of HB2753.

House Judiciary
Attachment 4
2-13-02

BOB BETHELL
STATE REPRESENTATIVE, 113TH DISTRICT
104 E. THIRD, P.O. BOX 186
ALDEN, KS 67512
(316) 534-3085
FAX 316-534-3086
bethell@ink.org

STATE OF KANSAS

TOPEKA

COMMITTEE ASSIGNMENTS
VICE-CHAIR: KANSAS FUTURES
MEMBER: APPROPRIATIONS
SOCIAL SERVICES BUDGET

STATE CAPITOL—ROOM 175-W
TOPEKA, KS 66612-1504
785-296-7693

Testimony on HB 2752

Thank you Chairman O'Neal and members of the House Judiciary Committee, I am Bob Bethell and I represent the 113th District of Kansas. The 113th District covers many square miles of Kansas, not as many as some in the western part of the State and not as many today as it will in the future. My interest in HB 2752 is because with the vastness of the District comes the opportunity to have many miles of pipelines carrying various products from points of production to the point of final usage of these products.

The miles of pipeline in Dist 113 are a small portion of the miles in Kansas, and the concern about Security the pipelines and the safety of the residents becomes foremost. The happenings of September 11, 2002 have brought to the minds of many Americans how truly free we have been. Freedom that has allowed us to have little or no thought or worry about the damage that could be done to property but more importantly the lives of our citizens if someone were to tamper with or damage these pipelines.

It is at times like these that we must as a society consider the crime of tampering with the property of others and also the consequences of such tampering, both of those who may be injured by the actions of others as well as those who are doing the tampering. The severity of the action brings with it the necessity of making an impression on those who have little regard for their own safety, the property of others or the general welfare of the residents of Kansas. HB 2752 would make tampering with the pipelines of Kansas a "level 3, nonperson felony."

Chairman O'Neal and members of the committee may say that this bill is designed to provide a penalty for the tampering with only some of the pipelines, namely those carrying anhydrous ammonia. That position is real but is only a portion of the concern that is addressed by HB 2752. Anhydrous ammonia is a component in the manufacture of Methamphetamine, which is illegal, and a concern of many of the people of Kansas. The passage of HB 2752 will add needed security to all pipelines in Kansas and will have a positive impact on reducing the illegal production of Meth.

Thank you again for allowing me to come before you today, and I will stand for any questions.

House Judiciary
Attachment 5
2-13-02

Gaches, Braden, Barbee & Associates

Governmental Affairs & Association Management

300 SW EIGHTH • THIRD FLOOR • TOPEKA, KANSAS 66603-3912 • 785-233-4512 • FAX 785-233-2206

Testimony of Williams Companies
Presented by Jerry Hereden
House Judiciary Committee
HB 2752 – Pipeline Security
Wednesday, February 13, 2002

Questions and Answers for HB2752

1. How many miles of pipeline does Williams have in Kansas?

Williams has 3,244 miles of transportation pipe, 1,829 miles of natural gas liquids pipe, 1907 miles of gathering pipe, 1,407 miles of petroleum pipe and 357 miles of anhydrous ammonia line.

2. Where are Williams pipelines located in Kansas?

Williams has pipelines that span Kansas from as far west as Liberal and as far northeast as Atchison.

Williams has pipelines that run through large communities such as Topeka, Lawrence, Independence, Coffeyville and near Wichita.

Williams' anhydrous ammonia lines runs through the center to the eastern section of the state, encompassing Salina, Langdon, Hutchinson and McPherson.

Additionally, Williams has 7 terminals in Kansas and 24 compressor stations.

3. Has Williams had trouble with people tampering with its pipelines?

Yes. In 2001, there were at least 31 known incidents of theft and vandalism from Williams' ammonia pipeline in Kansas. These thefts have occurred in the day and night. There were 13 incidents in Salina; 4 in Langdon; 8 in Hutchinson; and 6 in McPherson.

4. Why are thieves stealing anhydrous ammonia?

They use the ammonia to make methamphetamines.

5. How are thieves stealing the ammonia?

They are opening the valves of the pipeline and then filling cylinders with the ammonia.

6. What are the dangers of tampering with pipelines?

- The loss of lives can occur.
- There are risks to property.
- Crucial services to communities can possibly be lost. This could impact residents or an industry's ability to create products.
- A pipeline rupture could impact several square miles.

7. Does your company monitor its pipelines?

Yes. We patrol our pipelines by air and through a computer system.

8. As for ammonia, are there dangers in stealing it from pipelines?

The pipelines have extremely high pressure and an unintended release of anhydrous ammonia vapors is possible. This could result in serious burns to the skin. Anhydrous ammonia vapors also are lethal if inhaled. Anhydrous ammonia actually displaces oxygen when breathing.

Additionally, anhydrous ammonia vapors are attracted to moisture. A vapor cloud could get into a stream or river, contaminating fish.

It's important to note that anhydrous ammonia is not an explosive product.

9. Has Williams tried to stop the thieves from stealing anhydrous ammonia from its pipelines?

Williams has attempted deterrents, such as enclosing the valves with locked metal boxes. It also has placed fences around theses areas and posted warning signs. However, the thieves have become bolder using cutting torches and drills on the high pressure pipeline.

Williams expertise is in operating pipelines – not catching criminals.

10. How is HB2752 good for Kansas?

It provides tools to punish people who tamper with and steal products from pipelines. Tampering with pipelines is dangerous, risky business and should be a serious crime.

11. What are the goals of this bill?

The goals are to:

- Set criminal penalties, making it worthwhile for law enforcement to arrest those people who tamper or steal from pipelines.
- Prevent serious injuries.
- Decrease the development of methamphetamines.
- To protect Williams' employees and the public.

12. What is a severity level 3, nonperson felony?

A person with no record will receive a minimum punishment of 46 months in prison to a maximum of 51 months.

A person who receives a single, nonperson felony will receive a minimum punishment of 57 months in prison to a maximum of 64 months.

A person who receives a single, person felony will receive a minimum punishment of 74 months in prison to a maximum of 83 months.

PMAK

Propane Marketers Association of Kansas

214 S.W. 6th Avenue, Suite 305 Topeka, KS 66603-3719 Phone 785-354-1749
Fax 785-354-1740
e-mail: jkholstin@pmak.net

Justin K. Holstin
Executive Vice President

Written Testimony
House Bill 2752
Judiciary Committee

Mr. Chairman, and Members of the Committee:

I appreciate the opportunity to present you with written testimony about HB 2752 concerning crimes of tampering with pipelines.

The Propane Marketers Association of Kansas has a membership of almost 300 business representing every aspect of the propane industry including exploration, transportation, manufacturing, and local marketer service. The Propane Marketers Association of Kansas supports HB 2752.

Pipelines are important to the people and economy of Kansas and the United States. The ability to transport various products, including but not limited to, LP-Gas, natural gas, petroleum products, and anhydrous ammonia through pipelines is imperative to the smooth workings of the energy and agricultural related sectors. For example, propane is not only a home and farm energy and fuel source, but must also be transported around the country as an integral part in the manufacturing of plastics, propellants, and other products. Tampering with a pressurized pipeline of any type is extremely dangerous to both those tampering with the lines and the public. In addition there is economic harm for the company that owns a line that has been rendered unusable by tampering with down time and loss of product. Although companies take many safety precautions to insure that products are handled in the safest fashion possible, pipeline companies are unable to guard against all unforeseen actions of individuals.

Therefore, the Propane Marketers Association of Kansas supports HB 2752 and believes that defined actions and published penalties should be in place that will deter and deal with anyone tampering with pipelines.

Thank you for your time, and if you have any question that I may answer, please do not hesitate to call upon me.

Respectfully Submitted,

Justin K. Holstin

House Judiciary
Attachment 7
2-13-02