Approved: August 3, 2005
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 A.M. on March 17, 2005, in Room 123-S of the Capitol.

All members were present except:
Barbara Allen- excused

Committee staff present:
Mike Heim, Kansas Legislative Research Department
Jill Wolters, Office of Revisor of Statutes
Helen Pedigo, Office of Revisor of Statutes
Nancy Lister, Committee Secretary

Conferees appearing before the committee:
Sue Lockett
Judge Daniel Mitchell
Gary Daniels, Acting Secretary, Department of Social and Rehabilitation Services
Pamela Johnson-Betts, Department on Aging
Barbara Hinton, Legislative Post Auditor
John Badger, Chief Legal Counsel, Department of Social and Rehabilitation Serivces
Jared S. Maag, Deputy Attorney General
Julene Miller, Attorney General's Office

Others attending:
See attached list.

Chairman Vratil opened the meeting and continued the hearing on **Sub HB 2038**.

Sub HB 2038 Multidisciplinary teams for adults

Chairman Vratil stated that two questions were before the Committee: 1) why do we need to pass this legislation, and 2) is it not possible, under current law, for the Secretary of Social and Rehabilitation Services (SRS) or the Secretary of the Department on Aging to appoint multidisciplinary teams (MDTs) now.

Sue Lockett, Board President of Prairie Advocacy Center, gave testimony before the Committee regarding these questions. Ms. Lockett suggested that the reason the bill was drafted was so that credibility would be given to the team and to ensure that the team is neutral and does not represent any particular state entity. Ms. Locket stated that there are approximately 15-20 states that have MDTs through legislation.

Judge Dan Mitchell stated that to have specific statutory authorization gives more credibility to an adult MDT. The MDT should have a level of independence that is validated by statute and should be able to make recommendations that would be appropriate, notwithstanding whether a social service agency agreed with their position. Chairman Vratil asked the Judge why the Mayor of Topeka, or city or county commissioners could not appoint an MDT. Judge stated that he wasn't sure that any of these officials would have a real interest to participate in the delivery of services to infirm or disabled persons other than from a general overview. However, on a case by case basis, they may not be familiar with the court systems and what needs to be done, in guardianships or conservatorships, or applications for mental illness. Those are judicial proceedings, and not subject to mayorial monitoring or monitoring by the commissions. He questioned why Kansas would not want statutory parameters set as to how an MDT should work, who is going to monitor, and what their powers are. Judge Mitchell stated that judges do not want to be tagged as proactive judges out doing and creating things that the law has not empowered them to do. Judge Mitchell stated that, personally, he would wait for statutory authority before he appointed an MDT.

Senator Goodwin asked how much contact does the Judge has with the children's MDT now. Judge Mitchell stated that he gets a report that comes from the chairman of the team before the team takes any action on cases. The court cannot do anything until there is a case filed, which then gives the court jurisdiction to be able to do something.

MINUTES OF THE Senate Judiciary Committee at 9:30 A.M. on March 17, 2005, in Room 123-S of the Capitol.

Senator Donovan asked how this bill varies from children's statute, and could not the children's statute be amended to add "adults". The Judge stated that the primary thing is the informed consent aspect, when dealing with children.

Senator Bruce stated he was looking at K.S.A. 38-1523 (a) the MDT childrens task force, and there are some striking differences between the statute and and the statutory structure of **Sub HB 2038**. The children's MDT establishes subpoena powers and access to certain confidential records. A children's MDT gets together and looks at specific alleged cases of child abuse and child molestation, and brainstorms how to prove a case, or what type of services can be provided to protect children.

Gary Daniels, Acting Secretary of SRS, stated that yes, he does have some authority to appoint groups informally and formally. However, SRS views the bill as beneficial, as it creates a more formal authority to establish a team and provide a model that could be adapted to any community. The judge, as the authority to appoint team members, would provide a degree of oversight. (Attachment 1)

Secretary Pamela Johnson-Betts, stated that she could appoint teams outside of statutory authority. However, one of the barriers about placing this MDT is that there is no staff to accomplish this. The Department on Aging supports adult MDTs conceptually because there is a need for advocacy and it appears that more safegards might be established to care for the infirm, disabled and elderly

Chairman Vratil closed the hearing on **Sub HB 2038** and opened the hearing on **HB 2128**.

HB 2128 Expansion of SRS access to criminal history records

Chairman Vratil stated that, upon the recommendation of Barb Hinton, Legislative Post Auditor, an amendment would be added at the end of the bill, and would indicate that nothing in this bill would "prohibit the disclosure of any information to the post auditor in accordance with and subject to the provisions of the Legislative Post Audit Act." Chairman Vratil handed out copies of the proposed change. (Attachment 2). A motion was made to adopt the amendment. Senator Donovan moved, seconded by Senator Schmidt, and the motion carried.

John Badger, Chief Legal Counsel for SRS, stated that this was a bill that SRS had requested. Under current law SRS is generally able to obtain criminal history information relating primarily to convictions occurring within the state of Kansas. This bill would clarify what SRS may obtain and expand access to include information involving such things as arrests, expungements, juvenile offenses, diversions and other criminal history record information in possession by the KBI. Mr. Badger offered a balloon amendment deleting the inconsistent language by striking "relating to criminal convictions" on page 1, line 21. Also, "juvenile expungements" would be added to the list of records to which the Secretary of SRS is given access in subsection (b). (Attachment 3).

Chairman Vratil closed the hearing on **HB 2128** and opened the hearing on **Sub HB 2261**.

Sub HB 2261 Statute repealed relating to searches incident to lawful arrest includes evidence of the crime

Jared Maag, Deputy Attorney General, stated that this bill was initially drafted to change a word, from "the" crime to "a" crime. There are six states, including Kansas, that prescribe limits of a law enforcement officer's right to search, subsequent to the arrest of a suspect. Searches basically are allowed to protect the officers from attack, to prevent the detained persons from escaping, and to discover the fruits of the crime.

Mr. Maag stated that *Thornton vs United States* was a case where a car was stopped and the suspect left the car and scene. The question arose whether the officer could still search the car. The court found the officer could still search the car. This is known as a "Belton" search. Justice Scalia, in a concurring opinion, argued that the "Belton" searches should be limited to instances where it is reasonable to believe that evidence relevant to "the" crime of arrest might be found in the vehicle. Chairman Vratil stated that the existing Kansas statute, K.S.A. 22-2501, makes reference to evidence of "the" crime, not "a" crime. Mr. Maag stated that he

and the Attorney General's office recommends repealing the statute because it causes confusion and because law enforcement relies on developing case law rather than the statute. (Attachment 4) Mr. Maag stated that even the Kansas Supreme Court has questioned the very reach of the statute finding that the statute "may possibly be more restrictive than prevailing case law on the Fourth Amendment would permit" in *State v Anderson.*

Senator Journey questioned that if the statute was repealed, would not the Kansas courts interpret under the U.S. Constitutional protections rather than the State Constitutional protections, which are drafted quite differently than the federal constitution. Mr. Maag stated that Kansas courts have specifically said that in the area of Fourth Amendment law, they will generally follow the U.S. Supreme Court's guidance.

Kyle Smith, Special Agent, Kansas Bureau of Investigation, and on behalf of the Kansas Peace Officers Association, stated support for the repeal of K.S.A. 22-2501. Mr. Smith cited examples of problems with leaving the statute in place. (Attachment 5)

Chairman Vratil closed the hearing on **Sub HB 2261** and opened the hearing on **HB 2380**.

HB 2380 Duties of the attorney general and assistants

Julene Miller, Deputy Attorney General, stated two issues in the bill are important to the Attorney General. The first issue regards removing the requirement from K.S.A. 75-704 (a) that their office prepare an annual index of Attorney General Opinions. All current opinions are now available on-line through outside entities, and the Attorney General's website provides links to these services. The second request is to amend the statute to allow the Attorney General to delegate certain functions that he is statutorily required to perform, particularly sitting on certain boards and commissions. There are over 500 statutes that provide some role for the Attorney General to play; some specifically state that this can be either the Attorney General or his designee; others do not. An Opinion issued recently dealing with the Governor's authority to do this brought the tradition into question for all state-wide elected officials. This bill would clarify and codify that tradition that has been established in the Attorney General's Office.
(Attachment 6)

Chairman Vratil questioned if all of the Attorney General's opinions were on their website. Ms. Miller stated that the current opinions, back to 1982, are on their website, and that the index is being maintained, but is no longer published.

Chairman Vratil closed the hearing on **HB 2380** and asked the Committee to turn its attention to **Sub HB 2457**.

Sub HB 2457 Civil procedure; service of process, by return receipt delivery

Chairman Vratil stated that a member of the Committee had a proposed amendment that would radically alter the bill, and he wanted the Committee to have time to review it over the next few days. Senator Schmidt stated that he did have the amendment but would like to distribute copies to the Committee members later in the day. The amendment sets appeals bond caps: for a judgement from $1 million to $100 million dollars, the appeals bond cap would be $1 million dollars; for judgements in excess of $100 million, the appeals bond cap would be $25 million dollars. Senator Schmidt stated there would also be authority for a court to adjust the bond higher if there was a showing that there was actual dissipation of assets, or there is a likelihood that assets were going to dissipate. Chairman Vratil asked the Committee members to look at the amendment today so that they could take final action on the bill after the weekend.

Chairman Vratil adjourned the meeting at 10:30 A.M. The next meeting is scheduled for March 21, 2005.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3/17/2005

NAME	REPRESENTING
KEVIN GRAHAM	AG
JARED MAAG	AG
JULENE MILLER	AG
DAN Mitchell	District Court
Sue W Lockett	Prairie Advocacy Center
Bill Brady	KGC
Dennis Priest	SRS
Paula Ellis	SRS
Greg Skinner	KDHE

Kansas Department of

Social and Rehabilitation Services

Gary Daniels, Acting Secretary

Senate Judiciary Committee
March 17, 2005

Sub HB 2038 - Adult Multi-Disciplinary Team

Office of the Secretary
Gary Daniels, Acting Secretary
785.296.3271

For additional information contact:
Public and Governmental Services Division
Kyle Kessler, Director of Legislative and Media Affairs

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915 SW Harrison, 6th Floor North
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Senate Judiciary
3-17-05
Attachment 1

Kansas Department of Social and Rehabilitation Services
Gary Daniels, Acting Secretary

Senate Judiciary Committee
March 17, 2005

Sub HB 2038 - Adult Multi-Disciplinary Team

Mr. Chairman and members of the Committee, thank you for the opportunity to provide additional testimony regarding Substitute for HB 2038 establishing multi-disciplinary team for adults in need of protective services.

During yesterday's hearing the Committee expressed concerns about the necessity of the legislation. I understand these concerns and agree the Secretary of SRS currently has the authority to create an advisory committee which could serve the same purpose as the multi-disciplinary team. This authority could not however, mandate participation on the team and does not provide operational structure for the team as is envisioned by this bill. Similarly, a judge could authorize a team but could not mandate participation and the establishment of the team would also likely be based on a particular case before the court.

SRS views the following provisions of the bill as beneficial:

- Creates a formal authority to establish a standing team, providing a uniform model which could be adopted by any community.

- Establishes the judge as the authority to appoint team members and provide some degree of oversight.

- Ensures the team functions independently and is not linked to any one agency or interest. By contrast, if SRS were to sanction such a team, it would be viewed as a vehicle of the agency rather than of the community at large. Independence is important in order to maintain objectivity.

- Provides guidelines under which the team must operate. Guidelines include: establishment of procedures and referral process, necessity of consent, free exchange of information, protection of records and privacy, and penalties for violating confidentiality.

For these reasons SRS is supportive of the bill proposed by this group of community partners.

Proposed amendment
Barb Hinton, Legislative Post
March 15, 2005 Audit

Senate Judiciary
3-17-05
Attachment 2

As Amended by House Committee

Session of 2005

HOUSE BILL No. 2128

By Committee on Corrections and Juvenile Justice

1-21

AN ACT concerning the department of social and rehabilitation services; creating access to criminal history records.

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

Section 1. ~~(a) The secretary of social and rehabilitation services, or a designee of the secretary, shall be authorized to conduct a records check of employees and other individuals for the purpose of determining initial and continuing qualifications to participate in any program administered by the secretary for the placement, safety, protection or treatment of vulnerable children or adults.~~ **(a) The secretary of social and rehabilitation services shall upon request receive from the KBI such criminal history record information relating to criminal convictions as necessary for the purpose of determining initial and continuing qualification for employment or for participation in any program administered by the secretary for the placement, safety, protection or treatment of vulnerable children or adults.**

(b) The secretary shall have access to any court orders or adjudications of any court of record, any records of such orders, adjudications, arrests, nonconvictions, convictions, expungements, juvenile records, diversions and any criminal history record information in the possession of the Kansas bureau of investigation **concerning such employee or individual.**

(c) If a nationwide criminal records check of all records noted above is necessary, as determined by the secretary, the secretary's request will be based on the submission of fingerprints to the Kansas bureau of investigation and the federal bureau of investigation for the identification of the individual and to obtain criminal history record information, including arrest and nonconviction data.

(d) Fees for such records checks ~~may~~ **shall** be assessed to the ~~employee, the individual or the~~ secretary.

(e) Disclosure or use of any such information received by the secretary or a designee of the secretary or of any record containing such information, for any purpose other than that provided by this act is a class A misdemeanor and shall constitute grounds for removal from office or

termination of employment. Nothing in this act shall be construed to make unlawful or prohibit the disclosure of any such information in a hearing or court proceeding involving programs administered by the secretary.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

or prohibit the disclosure of any such information to the post auditor in accordance with and subject to the provisions of the legislative post audit act

2-2

Kansas Department of

Social and Rehabilitation Services

Gary Daniels, Acting Secretary

Senate Judiciary Committee
March 17, 2005

House Bill No. 2128 - Access to Criminal History Records

Legal Division
John Badger, Chief Counsel

For additional information contact:
Public and Governmental Services Division
Kyle Kessler, Director of Legislative and Media Affairs

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Kansas Department of Social and Rehabilitation Services
Gary Daniels, Acting Secretary

Senate Judiciary Committee
March 17, 2005

House Bill No. 2128 - Access to Criminal History Records

Chairman Vratil and members of the Committee, I am John Badger, Chief Counsel with Social and Rehabilitation Services (SRS). Thank you for the opportunity to appear before you today in support of HB 2128, which was introduced at the request of SRS. The bill would allow SRS to have increased access to state and national criminal history information in order to help insure the safety of children and vulnerable adults being cared for or served by the agency.

Under current law, SRS is generally able to obtain criminal history information relating primarily to convictions occurring within the state of Kansas. This bill would clarify what we can get, and expand access to include information involving such things as arrests, expungements, juvenile offenses, diversions and other criminal history record information in the possession of the KBI. Additionally, this legislation would allow SRS, if the Secretary determines it necessary, to access many of these same records on a nationwide basis. Having authority to obtain this additional information would add an important tool in protecting children and vulnerable adults by more accurately determining the qualifications of individuals providing care and services to them.

In implementing subsection (c) of this bill involving a nationwide criminal records check, SRS intends to develop specific policy defining when this expanded access will be utilized. The primary need will occur when an employee or other individual has recently come to Kansas from another state and a thorough background check is needed to determine if he or she has committed a prohibited crime in another jurisdiction.

In developing this legislation, the agency worked closely with the KBI to make sure it met all requirements for accessing the intended information. Further, the language in the original bill was approved by the FBI for purposes of obtaining nationwide criminal records information. However, when the KBI reviewed the amendments made by the House Committee on Corrections and Juvenile Justice, a concern was raised about the new language in subsection (a) being inconsistent with language in subsection (b). In order to correct this inconsistency, I would like to offer the balloon attached to the written testimony for your consideration. The proposed amendment to subsection (a) deletes the inconsistent language by striking "relating to criminal convictions" on page 1, line 21.

The KBI further suggested adding "juvenile expungements" to the list of records to which the Secretary is given access in subsection (b). The balloon also contains this change.

For the reasons stated, it is respectfully requested the Committee adopt the suggested amendments and act favorably on HB 2128.

Thank you for your consideration.

As Amended by House Committee

Session of 2005

HOUSE BILL No. 2128

By Committee on Corrections and Juvenile Justice

1-21

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

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(c) If a nationwide criminal records check of all records noted above is necessary, as determined by the secretary, the secretary's request will be based on the submission of fingerprints to the Kansas bureau of investigation and the federal bureau of investigation for the identification of the individual and to obtain criminal history record information, including arrest and nonconviction data.

(d) Fees for such records checks ~~may~~ **shall** be assessed to the ~~employee, the individual or the~~ secretary.

(e) Disclosure or use of any such information received by the secretary or a designee of the secretary or of any record containing such information, for any purpose other than that provided by this act is a class A misdemeanor and shall constitute grounds for removal from office or

termination of employment. Nothing in this act shall be construed to make unlawful or prohibit the disclosure of any such information in a hearing or court proceeding involving programs administered by the secretary.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

STATE OF KANSAS
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March 17, 2005

TESTIMONY
BEFORE THE SENATE JUDICIARY COMMITTEE

JARED S. MAAG
DEPUTY ATTORNEY GENERAL
CRIMINAL LITIGATION DIVISION

CONCERNING HB 2261

Chairman Vratil and Members of the Committee:

Thank you for the opportunity in allowing the Office of the Attorney General to give brief testimony related to HB 2261.

Codification of procedures involving searches incident to arrest are rare. Apart from Kansas, only five other states (Florida, Georgia, Illinois, Montana, and Wisconsin) statutorily prescribe the limits of a law enforcement officer's right to search subsequent to the arrest of a suspect. I have attached each state's law for your review. Though the six laws have minor differences, each is drafted in a consistent fashion allowing for searches to occur in order to (1) protect the officer(s) from attack, (2) prevent the detained person(s) from escaping, and (3) discover the fruits of the crime. It is the latter of these three purposes that HB 2261 seeks to amend. The Office of the Attorney General, however, respectfully submits that K.S.A. 22-2501 should be repealed rather than amended.

In the area of criminal justice, search and seizure law is seemingly in a state of flux. To be sure, in virtually every term the United States Supreme Court will address an issue related to the Fourth Amendment. In the Court's last term alone a decision was reached involving an

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Attachment 4

officer's right to search the passenger compartment of a vehicle as a contemporaneous incident of arrest. In *Thornton v. United States*, 541 U.S. 615 (2004), the Court expanded the reasoning of its prior decision in *New York v. Belton*, 453 U.S. 454 (1981) to include the right of an officer to search the passenger compartment of a vehicle as an incident to arrest even when an officer does not make contact until the person arrested has left the vehicle. It is important to note that in this decision, Justice Scalia, in a concurring opinion, argues that "*Belton* searches" should be limited to instances where it is reasonable to believe that evidence relevant to *the* crime of arrest might be found in the vehicle. The majority, however, found that *Thornton* was the wrong case to decide that particular issue.

This exchange amongst the Justices is important if only to demonstrate that in the area of search incident to arrest there is an apparent concern over the extent to which *Belton* applies. *Thornton* certainly indicates that the issue of whether an officer may search for evidence of *the* crime of arrest versus what Justice Scalia refers to as "general rummaging" is one that is yet unanswered by the Court.

Our own Supreme Court has questioned the very reach of K.S.A. 22-2501 finding that the statute "may possibly be more restrictive than prevailing case law on the Fourth Amendment would permit." *State v. Anderson*, 259 Kan. 16 (1996).

In short, codifying this area of search and seizure law only breeds conflict with prevailing case law. Law enforcement officers around the State of Kansas are routinely updated on recent changes involving the Fourth Amendment and apply those changes accordingly. Allowing K.S.A. 22-2501 to remain on the books will simply add confusion to an area of law that continues to evolve. Consequently, it must be repealed.

Again, I thank you for the opportunity in presenting this brief testimony concerning HB 2261. Our office stands ready to answer any questions that this committee and other legislators might have concerning this bill.

Jared S. Maag
Deputy Attorney General
Criminal Litigation Division

The 2004 Florida Statutes

Title XLVII
CRIMINAL PROCEDURE AND CORRECTIONS

Chapter 901
ARRESTS

View Entire Chapter

901.21 Search of person arrested.--

(1) When a lawful arrest is effected, a peace officer may search the person arrested and the area within the person's immediate presence for the purpose of:

(a) Protecting the officer from attack;

(b) Preventing the person from escaping; or

(c) Discovering the fruits of a crime.

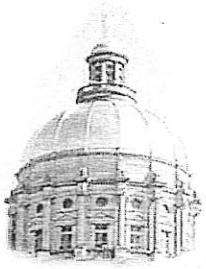
(2) A peace officer making a lawful search without a warrant may seize all instruments, articles, or things discovered on the person arrested or within the person's immediate control, the seizure of which is reasonably necessary for the purpose of:

(a) Protecting the officer from attack;

(b) Preventing the escape of the arrested person; or

(c) Assuring subsequent lawful custody of the fruits of a crime or of the articles used in the commission of a crime.

History.--s. 21, ch. 19554, 1939; CGL 1940 Supp. 8663(21); s. 10, ch. 70-339



Georgia General Assembly

Georgia Code Title List

Current through 2004 Regular Session of the General Assembly

Unannotated Georgia Code - Titles

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27
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17-2	17-5-2
17-3	17-5-20
17-4	17-5-21
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17-16	17-5-50
17-17	17-5-51
17-18	17-5-52
	17-5-53
	17-5-54
	17-5-55
	17-5-56

17-5-1.

(a) When a lawful arrest is effected a peace officer may reasonably search the person arrested and the area within the person's immediate presence for the purpose of:

(1) Protecting the officer from attack;

(2) Preventing the person from escaping;

(3) Discovering or seizing the fruits of the crime for which the person has been arrested; or

(4) Discovering or seizing any instruments, articles, or things which are being used or which may have been used in the commission of the crime for which the person has been arrested.

(b) When the peace officer is in the process of effecting a lawful search, nothing in this Code section shall be construed to preclude him from discovering or seizing any stolen or embezzled property, any item, substance, object, thing, or matter, the possession of which is unlawful, or any item, substance, object, thing, or matter, other than the private papers of any person, which is tangible evidence of the commission of a crime against the laws of this state.

4-4

(725 ILCS 5/Art. 108 heading)

ARTICLE 108. SEARCH AND SEIZURE

(725 ILCS 5/108-1) (from Ch. 38, par. 108-1)

Sec. 108-1. Search without warrant.

(1) When a lawful arrest is effected a peace officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of:

(a) protecting the officer from attack; or

(b) preventing the person from escaping; or

(c) discovering the fruits of the crime; or

(d) discovering any instruments, articles, or things which may have been used in the commission of, or which may constitute evidence of, an offense.

(2) (Blank).

(3) A law enforcement officer may not search or inspect a motor vehicle, its contents, the driver, or a passenger solely because of a violation of Section 12-603.1 of the Illinois Vehicle Code.

(Source: P.A. 93-99, eff. 7-3-03.)

4-5

Montana Code Annotated 2001

MCA Contents Search

Part Contents

46-5-102. Scope of search incident to arrest. When a lawful arrest is effected, a peace officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of:

(1) protecting the officer from attack;

(2) preventing the person from escaping;

(3) discovering and seizing the fruits of the crime; or

(4) discovering and seizing any persons, instruments, articles, or things which may have been used in the commission of or which may constitute evidence of the offense.

History: En. 95-702 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-702.

Previous Section Help

Next Section

4-6

(c) The accused appears to represent a danger of harm to himself or herself, another person or property.

(d) The accused can show sufficient evidence of ties to the community.

(e) The accused has previously failed to appear or failed to respond to a citation.

(f) Arrest or further detention appears necessary to carry out legitimate investigative action in accordance with law enforcement agency policies.

(3) CONTENTS. The citation shall do all of the following:

(a) Identify the offense and section which the person is alleged to have violated, including the date, and if material, identify the property and other persons involved.

(b) Contain the name and address of the person cited, or other identification if that cannot be ascertained.

(c) Identify the officer issuing the citation.

(d) Direct the person cited to appear for his or her initial appearance in a designated court, at a designated time and date.

(4) SERVICE. A copy of the citation shall be delivered to the person cited, and the original must be filed with the district attorney.

(5) REVIEW BY DISTRICT ATTORNEY. If the district attorney declines to prosecute, he or she shall notify the law enforcement agency which issued the citation. The law enforcement agency shall attempt to notify the person cited that he or she will not be charged and is not required to appear as directed in the citation.

(6) CITATION NO BAR TO CRIMINAL SUMMONS OR WARRANT. The prior issuance of a citation does not bar the issuance of a summons or a warrant for the same offense.

(7) PREPARATION OF FORM. The judicial conference shall prescribe the form and content of the citation under s. 758.171.

History: 1983 a. 433.

968.09 Warrant on failure to appear. (1) When a defendant or a witness fails to appear before the court as required, or violates a term of the defendant's or witness's bond or the defendant's or witness's probation, if any, the court may issue a bench warrant for the defendant's or witness's arrest which shall direct that the defendant or witness be brought before the court without unreasonable delay. The court shall state on the record at the time of issuance of the bench warrant the reason therefor.

(2) Prior to the defendant's appearance in court after the defendant's arrest under sub. (1), ch. 969 shall not apply.

History: 1971 c. 298; 1993 a. 486.

A bench warrant may be directed to all law enforcement officers in the state without regard to whether the defendant is charged with a violation of a state statute or county ordinance. The form of the warrant should be as suggested by s. 968.04 (3) (a) 7. 62 Atty. Gen. 208.

968.10 Searches and seizures; when authorized. A search of a person, object or place may be made and things may be seized when the search is made:

(1) Incident to a lawful arrest;

(2) With consent;

(3) Pursuant to a valid search warrant;

(4) With the authority and within the scope of a right of lawful inspection;

(5) Pursuant to a search during an authorized temporary questioning as provided in s. 968.25; or

(6) As otherwise authorized by law.

NOTE: See the notes to Article I, section 11 of the Wisconsin constitution.

968.11 Scope of search incident to lawful arrest. When a lawful arrest is made, a law enforcement officer may reasonably search the person arrested and an area within such person's immediate presence for the purpose of:

(1) Protecting the officer from attack;

(2) Preventing the person from escaping;

(3) Discovering and seizing the fruits of the crime; or

(4) Discovering and seizing any instruments, articles or things which may have been used in the commission of, or which may constitute evidence of, the offense.

An automobile search consistent with *Belton* does not violate this section. This section does not require proof of an officer's subjective intent when conducting a search incident to an arrest. State v. Fry, 131 Wis. 2d 153, 388 N.W.2d 565 (1986).

NOTE: See also the notes to Article I, section 11 of the Wisconsin constitution.

968.12 Search warrant. (1) DESCRIPTION AND ISSUANCE. A search warrant is an order signed by a judge directing a law enforcement officer to conduct a search of a designated person, a designated object or a designated place for the purpose of seizing designated property or kinds of property. A judge shall issue a search warrant if probable cause is shown.

(2) WARRANT UPON AFFIDAVIT. A search warrant may be based upon sworn complaint or affidavit, or testimony recorded by a phonographic reporter or under sub. (3) (d), showing probable cause therefor. The complaint, affidavit or testimony may be upon information and belief.

(3) WARRANT UPON ORAL TESTIMONY. (a) *General rule.* A search warrant may be based upon sworn oral testimony communicated to the judge by telephone, radio or other means of electronic communication, under the procedure prescribed in this subsection.

(b) *Application.* The person who is requesting the warrant shall prepare a duplicate original warrant and read the duplicate original warrant, verbatim, to the judge. The judge shall enter, verbatim, what is read on the original warrant. The judge may direct that the warrant be modified.

(c) *Issuance.* If the judge determines that there is probable cause for the warrant, the judge shall order the issuance of a warrant by directing the person requesting the warrant to sign the judge's name on the duplicate original warrant. In addition, the person shall sign his or her own name on the duplicate original warrant. The judge shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony shall be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(d) *Recording and certification of testimony.* When a caller informs the judge that the purpose of the call is to request a warrant, the judge shall place under oath each person whose testimony forms a basis of the application and each person applying for the warrant. The judge or requesting person shall arrange for all sworn testimony to be recorded either by a stenographic reporter or by means of a voice recording device. The judge shall have the record transcribed. The transcript, certified as accurate by the judge or reporter, as appropriate, shall be filed with the court. If the testimony was recorded by means of a voice recording device, the judge shall also file the original recording with the court.

(e) *Contents.* The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(f) *Entry of time of execution.* The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(4) LOCATION OF SEARCH. A search warrant may authorize a search to be conducted anywhere in the state and may be executed pursuant to its terms anywhere in the state.

History: 1971 c. 298; 1983 a. 443; Sup. Ct. Order, 141 Wis. 2d xiii (1987).

Judicial Council Note, 1988: Sub. (2) is amended to eliminate the preference for written affidavits as the basis for search warrants. Telephoned testimony allows faster response and the transcribed record is no less adequate for review.

Sub. (3) (a) is amended to eliminate the preference for written affidavits as the basis for search warrants. Telephoned testimony allows faster response and the transcribed record is no less adequate for review.

Sub. (3) (c) is amended to eliminate the preference for written affidavits as the basis for search warrants. Telephoned testimony allows faster response and the transcribed record is no less adequate for review.

Sub. (3) (d) is amended to authorize that the testimony be recorded either by a stenographic reporter or a voice recording device. [Re Order effective Jan. 1, 1988]

NOTE: See the notes to Article I, section 11 of the Wisconsin constitution.

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Kansas Bureau of Investigation

Larry Welch
Director

Phill Kline
Attorney General

Testimony in Support of HB 2261
Before the Senate Judiciary Committee
Kyle G. Smith
On behalf of the Kansas Bureau of Investigation
And the Kansas Peace Officers Association
March 17, 2005

Chairman Vratil and Members of the Committee,

On behalf of the Kansas Bureau of Investigation and the Kansas Peace Officers Association, I appear in support of HB 2261 or, more accurately, the repeal of K.S.A. 22-2501.

A Kansas court decision, *State v* Anderson, 259 Kan. 16, (1996) caused Kansas law enforcement officers to be unduly restricted in searching suspects after their arrest, merely due to one unintentional word choice in the statue. As a result, evidence of crimes other than the one for which the person was arrested, is being suppressed.

While legislative guidance is usually a good thing, when codifying constitutional law one of three things can happen:

1. The statutory language is broader than the constitutional rule and the statute is unconstitutional and causes errors by cops who realy on it.
2. The statutory language is narrower than the constitutional rule and the stature unnecessarily restricts cops while trying to their job. Or
3. The statutory language gets the constitutional rule right, but then it is merely redundant and doomed to eventually become wrong when the Supreme court modifies the rule in a later case.

This legislation deals with what is commonly called "search incident to an arrest". I will try not to bore you with more than you want to know about search and seizure law, but as a prosecutor for 20 years, as a law enforcement officer and court certified expert witness in search and seizure, I feel a little history would be helpful.

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When a law enforcement officer arrests a person there are legitimate concerns for both the safety of the officer and the loss and possible destruction of evidence. These concerns for officer safety and loss of evidence, coupled with reduced expectations of privacy in an arrested person has resulted in the U.S. Supreme Court creating a "bright-line" rule as to how such searches should be done. The bright-line rule states that when an arrest is made, it is constitutional, as well as prudent, for the officer to search, not just the individual arrested, but the area immediately surrounding that person.

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize ***any*** evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area within his immediate control - construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence. *Chimel v. California*, 395 U.S. 752, 762-63 (1969). (*Emphasis added).*

In *Chimel v. California*, that ruling was expanded by the Supreme Court to include arrests occurring inside automobiles in the case of *New York v. Belton.*

> [W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have. *New York v. Belton*, 453 U.S. 454, 460-61 (1981).

That is still the law of the United States Constitution as interpreted by the highest court in the land, the United States Supreme Court. The Kansas Supreme Court has always held that constitutional rights under the Kansas Constitution are the same as those under the Federal Constitution. *State v. Bishop*, 242 Kan. 647, 656 (1987). Every law enforcement agency, every sheriff's department, every police department, every state law enforcement agency have all trained their officers since 1969 on these basic premises so they can use this "bright-line" rule in rapidly determining how far they may search in an arrest situation.

What we refer to as "bright-line" rules are set up by the courts to make it easy to apply constitutional law, an admittedly complex subject, under the pressures of actual police work. As one court put it:

> The underlying rationale of *Belton* was to provide a bright-line rule while balancing privacy and law enforcement interests: The protection of the Fourth . . . Amendment can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement . . . . Such rules are necessary because police officers engaged in an arrest on the highway have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront . . . . Because it is a bright-line rule that may be invoked regardless of whether the arresting officer has an actual concern for safety or evidence, we have held that the applicability of the *Belton* rule does not depend upon a defendant's ability to grab items in a car but rather upon whether the search is roughly contemporaneous with the arrest. *United States v. McLaughlin*, 170 F.3d 889, 891-92 (9th Cir. 1999).

In 1970, the Kansas Criminal Code was codified and a well-intentioned effort was made to reduce into statute all the Supreme Court rulings. This rule of searches being conducted incident to arrest was incorporated in the Kansas statute K.S.A. 22-2501. However, sometimes bills are drafted with slight variances from court cases. Sometimes those variances in word choice matter and sometimes they don't. From 1970 to 1996, it didn't matter. But, in 1996, the Kansas Supreme Court made a ruling in a case called *State v. Anderson*, 259 Kan. 16 (1996), that because of one word in K.S.A. 22-2501(c) officers can search for fruits, instrumentalities or evidence of "the" crime, not "any"

crime. That was a more narrow interpretation based on one word being different in the Kansas statute, not the Constitution. So, in *Anderson*, the meth lab that was discovered during a search conducted pursuant to an arrest for a different offense was suppressed.

The ruling in *Anderson* not only lets criminals go free, but also caused training problems for every city, county and state officer. This suppression of evidence is not because of any violation of constitutional rights, but because some revisor in 1970 picked the word "a" instead of "the".

In a 1996 case, US v Kennedy, attached, another defendant tried to argue that *St. v Anderson's* holding should apply and suppress the evidence in his felon in possession of a handgun federal charge. The judge in that case noted this Kansas quirk from prevailing case law and concluded **"Bound to apply the Fourth Amendment as construed by the Supreme Court first, and the Tenth Circuit next, this court not only has no reason to follow the *Anderson* decision but considers it error to do so."** Footnote 2..

On behalf of the KBI and the peace officers of Kansas, I would suggest the committee simply repeal K.S.A. 22-2501 and avoid having innapropriate suppression of evidence, criminals wrongfully going free and let law enforcement be guided by the constitutional restraints set down by the United State's supreme court. And we won't have to keep coming back here tweaking this unnecessary statute each year.

Thank you for your time and consideration. I'd be happy to address any questions.

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March 17, 2005

TESTIMONY
BEFORE THE SENATE JUDICIARY COMMITTEE

JULENE L. MILLER
DEPUTY ATTORNEY GENERAL
LEGAL OPINIONS AND GOVERNMENT COUNSEL DIVISION

HOUSE BILL 2380

Chairman Vratil and Members of the Committee:

Attorney General Phill Kline has asked me to appear before you today in support of House Bill No. 2380. This bill was introduced at the request of the Attorney General to address two issues of importance to our office.

The first involves removing a requirement from K.S.A. 75-704a that the office prepare an annual index of Attorney General Opinions. While this provision made sense when it was originally enacted, several things have happened over the years that render the requirement unnecessary and thus an inefficiency. The main reason it is no longer needed is that all current opinions are now available on-line through other, outside entities. These entities' services allow key-word searching; thus an index wherein opinions are referenced by number is no longer necessary and not particularly useful. The Attorney General's website does provide links to these services. Secondly, the system on which we created and maintained the cumulative index for Opinions was the AS400. We have been making a concerted effort to move databases off of this system in anticipation of it no longer being supported, and this is one database that it does not make sense to spend the time and funds to move. Finally, it has been several years now since the Legislature removed our authority to print bound volumes containing all synopses of the Attorney General Opinions (the last volume was printed in 1997 and contained opinions from 1996). Therefore, the index of opinions by number is no longer needed for purposes of printing those volumes. Because it is no longer useful to our office, it would an expense to re-create and maintain, and because there has been no demand for such an index for years, we respectfully request that the requirement be removed from the statute.

The second issue we bring to you in this bill involves the ability of the Attorney General to assign to Assistant Attorneys General any task he is statutorily responsible for

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performing. By statute, the Attorney General (like most other state-wide elected officials) is to serve on several boards and commissions; additionally, there are over 500 statutes that provide some role for the Attorney General to play. Some specifically state that this can be either the Attorney General or his designee; others do not. Because of the difficulty, and often physical impossibility, of the Attorney General to be personally present at every meeting of every board and committee of which he is statutorily a member, Attorneys General have historically allowed Assistant Attorneys General to act on their behalf. An Opinion we issued recently dealing with the Governor's authority to do this brought the tradition into question for all state-wide elected officials. This bill would clarify and codify that tradition that has been established in the Attorney General's Office. We believe this is a prudent and effective use of State resources and other state-wide elected officials may wish to consider doing something similar if they have not already.

We respectfully ask that you act favorably on these proposed amendments.