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MEMORANDUM

TO: Senate Judiciary Committee
FROM: Kansas Judicial Council - Prof. Richard E. Levy
DATE: February 9, 2012
RE: Judicial Council Testimony on 2012 SB 320 Relating to Probable Cause Determinations in Juvenile Offender Proceedings

SB 320 was drafted by the Judicial Council Juvenile Offender/Child in Need of Care Advisory Committee and approved by the Judicial Council. The bill establishes procedures for making a determination of probable cause within a juvenile offender proceeding. A list of the Committee members is attached to this testimony.

BACKGROUND

In response to two recent Kansas appellate court decisions, *In re D.E.R.*, 290 Kan. 306, 225 P.3d 1187 (2010), and *In re H.N.*, 45 Kan. App. 2d 1059, 257 P.3d 821 (2011), Sen. Tim Owens requested that the Judicial Council study the issue of probable cause determinations in juvenile offender cases and to recommend amendments to the Revised Kansas Juvenile Justice Code to establish procedures for such determinations. The study was assigned to the Juvenile Offender/Child in Need of Care Advisory Committee.

In *In re D.E.R.*, 290 Kan. 306, 225 P.3d 1187 (2010), the Kansas Supreme Court held that K.S.A. 22-2902 — the provision in the adult criminal code that governs preliminary hearings — does not apply to juvenile offender cases, but juveniles do have a constitutional right to have a judicial determination of probable cause before an extended restraint of liberty. D.E.R. was not in custody when he requested a preliminary hearing, and the court declined to decide what procedure would have been required — short of a full-blown preliminary examination under K.S.A. 22-2902 — to satisfy the requirement of a judicial determination of probable cause.

The Kansas Court of Appeals, in *In re H.N.*, 45 Kan. App. 2d 1059, 257 P.3d 821 (2011), upheld a trial court's reliance on an affidavit to make the probable cause determination, but also called on the legislature to provide further guidance concerning the nature and conduct of proceedings to determine probable cause. "The legislature should address when a probable cause hearing must be held, whether affidavits or other hearsay evidence can be considered by the district court, and whether the district court must allow the juvenile respondent to present additional evidence at the hearing." *Id.*, 45 Kan. App. 2d at 1073-74.

The Committee concluded that the determination of probable cause should be made at the detention hearing already required by statute because, under *D.E.R.* and *H.N.*, it is the detention that triggers the due process requirement of a judicial probable cause determination. In adapting this hearing to include a determination of probable cause, the Committee agreed that a full evidentiary hearing similar to that required under K.S.A. 22-2902 was undesirable and might further obscure important differences between the adult and juvenile systems.

The primary amendments are to K.S.A. 38-2343, which is Section 2 of the bill. Minor amendments to K.S.A. 38-2331 (Section 1 of the bill) and 38-2354 (Section 3 of the bill) are also required. Set forth below are the Committee's comments to the amendments contained in the bill.

Section 1 - K.S.A. 38-2331

Comment

Amendment to K.S.A. 38-2331(b)(2)

This is a conforming amendment to require probable cause, rather than a mere allegation, that the juvenile committed an offense that would be a felony if committed by an adult.

Section 2 - K.S.A. 38-2343

Comment

Amendment to K.S.A. 38-2343(a)

Subsection (a) includes new language concerning the probable cause finding and incorporates current language, moved from former subsection (e), providing for the determination of whether detention is warranted.

Comment
K.S.A. 38-2343(b)

No changes to this subsection are suggested.

Comment
Amendment to K.S.A. 38-2343(c) and (d)

The only change is that subsections (c) and (d) have been combined.

Comment
Amendment to K.S.A. 38-2343(e) [now renumbered as (d)]

The language that has been stricken was moved to subsection (a).

Comment
K.S.A. 38-2343 - New subsection (e)

New language was added concerning the procedures for the detention hearing, including the court's ability to consider affidavits and other matter that would not be admissible as evidence. The language is intended to maintain the informal nature of these hearings, but allow for an opportunity to contest the existence of probable cause in the unusual case where there is a significant basis for doing so.

Comment
K.S.A. 38-2343 - New subsection (f)

The language in subsection (f)(1) was moved down from former subsection (e).

New subsection (f)(2) allows for a rehearing of the probable cause determination if there is a basis for contesting it that could not reasonably have been presented at the initial detention hearing. This new language is intended to be a compromise between competing concerns. It allows the court to make a probable cause determination promptly and without any interruption of detention when continued detention is warranted. It also provides an opportunity for a juvenile to contest the determination if, within 14 days, the juvenile presents to the court information that was not reasonably discoverable before the initial determination.

Comment

Amendment to K.S.A. 38-2343(f) [now renumbered as (g)]

“Youth residential facility” was deleted from this subsection to more accurately reflect actual practice. A juvenile placed in a residential facility is generally in the custody of the commissioner. Residential facilities accept placements, but not custody.

Comment

Amendment to K.S.A. 38-2343(g) [now renumbered as (h)]

The only change is that the section was renumbered.

Section 3 - K.S.A. 38-2354

Comment

The amendment to K.S.A. 38-2354 is intended to clarify that the rules of evidence do not apply in detention hearings. The rules of evidence are relaxed in preliminary hearings under the adult criminal code, and probable cause hearings for juveniles should be similarly exempt from the strict application of evidentiary rules. Dispositional hearings under K.S.A. 38-2360 are exempted as well, to ensure consistency with current practice and prevent a negative inference from being drawn.

JUDICIAL COUNCIL JUVENILE OFFENDER/CHILD IN NEED OF CARE
ADVISORY COMMITTEE MEMBERS

Honorable Maritza Segarra, Chair, Junction City. Judge Segarra is a district judge, is a member of the Judicial Council, and handles family court matters in Geary County.

Wade H. Bowie, Jr., Topeka. Mr. Bowie is an assistant district attorney in Douglas County who works exclusively in the juvenile area.

Charlene Brubaker, Hays. Ms. Brubaker is an assistant county attorney in Ellis County who works exclusively in child in need of care and juvenile offender matters.

Bradley Burke, Topeka. Mr. Burke is chief counsel for the Kansas Juvenile Justice Authority.

Kathryn Carter, Concordia. Ms. Carter is a practicing attorney and former district magistrate judge.

Honorable Timothy H. Henderson, Wichita. Judge Henderson is a district judge in Sedgwick County.

Donald W. Hymer, Olathe. Mr. Hymer is an assistant district attorney in Johnson County.

Honorable Jeffrey L. Jack, Parsons. Judge Jack is a district judge in Labette County.

Professor Richard E. Levy, Lawrence. Professor Levy is a professor at the University of Kansas School of Law.

Rachel Y. Marsh, Halstead. Ms. Marsh is an attorney with Saint Francis Community Services and a contract provider for family preservation, reintegration, and adoption services with the Kansas Department of Social and Rehabilitation Services.

Roberta Sue McKenna, Topeka. Ms. McKenna is Assistant Director of Children and Family Services of the Kansas Department of Social and Rehabilitation Services responsible for legal services including liaison with the judicial branch and coordination with the legislature.

Sen. Tim Owens, Overland Park. Sen. Owens is an attorney, a state senator, Chair of the Senate Judiciary Committee, and a member of the Kansas Judicial Council.

Representative Janice L. Pauls, Hutchinson. Representative Pauls is an attorney, a state representative, and is the ranking minority member of the House Judiciary Committee.

Lois Rice, Overland Park. Ms. Rice serves as the Executive Director of CASA of Johnson and Wyandotte Counties.

Honorable Steven M. Roth, Westmoreland. Judge Roth is an attorney and is a district magistrate judge in Pottawatomie County.