

MINUTES

KANSAS CRIMINAL CODE RECODIFICATION COMMISSION

February 22, 2008
Kansas Judicial Center, Room 269

Members Present

Professor Tom Stacy, Chairperson
Ed Klumpp
Kim Parker
Tim Madden
Debra Wilson
Steve Opat
Honorable Christel Marquardt

Staff Present

Judge John W. White, Reporter
Brett Watson, Staff Attorney

Others Present

Edward F. Britton Kansas Sentencing Commission
Tom Drees, Kansas Sentencing Commission, Ellis County Attorney

Judge White called the meeting to order at 10:00 a.m. He asked Tom Drees to address the Commission. Mr. Klumpp introduced Mr. Drees as the chair of the Kansas Sentencing Commission's Proportionality Subcommittee and also noted that he prepared a memo that had been circulated for discussion that day.

Professor Stacy began discussion of Mr. Klumpp's memo. He noted that the departures for D1 felonies were under 50 percent which still seemed high, but were different than the previous rate of 85 percent. He stated that the 2006 departure rate might have been a fluke. He noted that in May 2004, Patty Biggs told the Recodification Subcommittee that the departure rate for D1 felonies was 50 percent, which means that the range of departure is between 50-85 percent. The problem is that the guideline is departed from over half of the time. Prof. Stacy suggested dividing the manufacture offense into two offenses, one for the 50 percent of cases that get the departure and one for the cases where no departure is granted. He recognized that the problem is how to determine which offense is which.

Mr. Opat suggested that they could be the same cases but they are just treated differently among the judicial districts. Prof. Stacy asked why departures are not granted when they are requested. Mr. Opat said it depends on the judge in many cases. Mr. Drees suggested that it is based on quantity. Those who manufacture an amount for personal use are likely to get a departure, those who manufacture for sale are not. Trying to make enough for him and his friend its likely to depart. Mr. Drees also noted that, since pseudoephedrine is behind the counter a number of the small time people are not in the system any more.

Mr. Drees suggested using quantity to grade the manufacturing offense and he claimed that most prosecutors use that factor to determine how a case should be pursued. Kim Parker concurred.

Mr. Klumpp said that he saw a problem with that approach because law enforcement usually do not discover the amount of meth manufactured, but rather, they find the remnants of a makeshift meth lab.

Kim Parker suggested making mass distribution a sentencing factor, as an upward departure.

Judge White asked how often do judges depart on own motion. Mr. Drees and Ms. Parker agreed that it happens very rarely. Judge White noted that most departures are the result of plea negotiations. Mr. Drees agreed, he speculated that 95 percent of all departures are agreed upon by both sides. Judge White noted that upward departures are more difficult, unless agreed upon.

Mr. Klumpp noted that the reason for the sever punishment in meth manufacturing cases is because of the danger of the manufacturing process itself, regardless of the amount produced. He reminded the Commission of cases where toxic chemicals were left behind in hotel room carpet fibers and the danger they posed to unsuspecting guests.

Mr. Opat asked if judicial discretion was necessarily bad. He noted that in certain situations, having a harsh punishment available is wise but, on balance, he was in favor of allowing judicial discretion in sentencing.

Mr. Klumpp and Mr. Drees agreed that much judicial discretion is currently being exercised.

Debra Wilson said that the law needed some kind o deterrent and that the current law did not serve this purpose. She noted that those with a severe drug addiction would not be deterred by such a criminal penalty.

Judge White noted that Kansas has returned to indeterminate sentencing, but now the discretion is more with prosecutors rather than judges. He noted that the purpose of the guidelines are defeated when the departure rate is so high.

Mr. Opat said that prosecutors naturally have a lot of discretion because they have the power to decide what charges are brought. .

Mr. Drees said that, under the guidelines, the plea controls the sentence and the judge is minimized to do nothing.

Judge White agreed and noted that the guidelines were supposed to remove discretion in sentencing from all sides.

Ms. Parker said that the defense bar wants the prosecution to have that discretion so they can get good plea deals for their clients. Defense attorneys can get better negotiations with the prosecutor than with the judge.

Mr. Drees, turned the discussion to the “1,000 feet of a school” provision of the current drug code. Prof. Stacy said that it seemed like legislative excess and it would be better if the provision involved the actual endangerment of a child. Mr. Drees explained that the Proportionality Subcommittee was in favor of a provision that would change the provision to one where children actually had to be present.

Prof. Stacy asked if quantity were to be used in the manufacturing offense, would there be any objection by the crime lab chemists. Mr. Watson explained that the chemists from the KBI, Sedgwick County, and Johnson County had all expressed concern about using quantity for the manufacturing offense. Because of the way meth is manufactured they are concerned that determining quantity from the leftover materials will be a difficult task. In one example, a KBI chemists noted that there is meth left over in the sludge that builds up in a meth manufacturing lab. The chemist asked whether it would be necessary to determine the meth inherent in this sludge and, if so, that would be burdensome on the lab.

Prof. Stacy asked if it is possible to rely on the testimony of the police officers to determine quantity.

Ms. Parker noted that the police will often find the defendant who manufactures for personal use with more meth than the one who manufactures to sell.

Mr. Drees also noted that most evidence regarding quantity is anecdotal and the police do not want to burn a confidential informant in order to take down one lab. Officers who work the case can give an indication of what is going on better than what is found on site, but this usually serves as a guide for prosecutors not sufficient evidence to take to a jury.

Prof. Stacy said that one way to deal with the severity issue is to use quantity and another is the have an element or factor involving the exposure of harm to others.

Mr. Drees said that the Proportionality Subcommittee adopted a proposal to separate meth manufacturing from other kinds of manufacturing and to make manufacturing a person offense. Under that proposal serious offenders would move across the sentencing grid instead of up the grid.

Prof. Stacy complimented Mr. Drees on his hard work. He noted that there are high downward departure rates for significant levels of criminal history. Since that is the case, moving offenders across the grid will not solve the problem, there would still be a need for separate manufacturing offenses.

Mr. Madden noted that two offenses might help work with Senate Bill 123 issues. Under current law, any sale or any manufacturing disqualifies the defendant for substance abuse treatment. A separate offense could facilitate other sentencing dispositions, if defendants were not barred from treatment under one of the manufacturing offenses.

Mr. Drees said he was unsure how to divide the offense and what the cut-off would be between small vs. medium manufacturers.

Ms. Wilson asked if law enforcement can tell the difference between personal use and enterprise. Mr. Drees said the can sometimes, based just on what they find. Mr. Klumpp, noted that law enforcement can do a financial investigation, but that takes a lot of resources.

Ms. Parker said that is why these issues should be part of a departure statute, because it is difficult to put them all into a single substantive statute.

Mr. Klumpp noted that if a confidential informant tells you that a defendant is doing something that is not a sufficient standard of proof for a jury trial.

Mr. Drees turned the discussion to the distribution offense. He noted that his group favors using quantities to grade the offense severity of drug distribution, but they are waiting for the Commission to determine the quantities.

Prof. Stacy stated that the Commission has done some work on quantities and Mr. Klumpp pointed out that the quantity memo had been distributed to Proportionality Subcommittee members.

Mr. Drees explained that the Proportionality Subcommittee proposal also involved changing the presumptive probation boxes on the grids to provide judges with more discretion.

Mr. Watson noted that, before the sentencing guidelines, Kansas used to have a drug quantity statute but it was only for Schedule I and II substances and it set a threshold for a mandatory jail sentence. He asked if any of the Commission members had any experience with this statute. Mr. Opat said that he remembered it but it was not around for long before the sentencing guidelines were enacted. He also remembered that one case from the Tenth Circuit reversed a sentence because purity was not proven. Mr. Drees noted that a proposed statute should explicitly reject purity.

Prof. Stacy and Mr. Drees complimented the work of each other's group and both agreed that they should work together on these proposals. Mr. Drees noted that it would be more effective if both groups provided a single proposal.

Mr. Klumpp asked if the Commission should go through chapter 21 then work on sentencing issues or if they should be addressed in the next legislative session. He said that the Commission should develop some policy positions on sentencing issues in case members of the legislature have questions during the current session.

Mr. Drees said that he hoped that the Commission would take the material from the Proportionality Subcommittee and use it in its next report.

Mr. Klumpp noted that the drug code revisions will help gauge the legislative response to the Commission work. He also noted that if the D1 departure rate remains at 50 percent, it is unlikely that the Legislature will see a pressing need to act in the next session.

Ms. Parker said the Proportionality Subcommittee material is an excellent place to focus the Commission's work. She said that these policy changes are so necessary we probably can't wait.

Judge White asked if there are other things that need attention. Mr. Drees said that the homicide statute is a problem but it is a special crime and should be treated differently.

The Commission broke for lunch and returned at 1:30 p.m.

Judge White began a discussion of the property crimes revisions. He noted that, based on past experience with the drug code, he has made efforts to avoid substantive changes. He began with the issue of definitions and asked the Commission whether the property crimes section should have its own subsection on definitions, as the drug code does. Noted that there are several definitions of the term tampering and the term dwelling is different under the property crimes section than it is under 21-3110. Mr. Opat, Ms. Wilson, Ms. Parker, and Judge Marquardt agreed that a separate definitions section was wise.

On format, Mr. Madden said it was helpful to use the session laws method of italicizing new

language and striking through old language.

On the theft statute, Judge White noted that it would be reworded to comply with the format of the drug code. He suggested combining the value of theft of property and theft of services. He noted that some states simply define services as property.

Mr. Opat said that the terms in the substantive statute should reflect the definitions in the definition section. He noted that theft of services began when people spliced into the TV cable lines and the cable companies wanted those cases prosecuted.

Judge White suggested that defining services as property should not be considered a substantive change.

Mr. Opat asked if the welfare fraud statute should be incorporated into the property crime section. He said it was a theft crime but it is not in the theft section.

Ms. Wilson asked if government benefits can be defined as property.

Ms. Parker stated that there should not be multiple statutes covering the same conduct.

Mr. Opat said that computer crimes, counterfeiting statutes, trademark patent, identity theft, and fraud should all be in the same place because they are property related.

Ms. Parker said that did not seem like a substantive change, it was merely a matter of making the statutes easier to use.

Prof. Stacy said that moving these offenses to the property crime section would be coherent and would help proportionality. He asked why an upper level insurance fraud should be treated differently than workers compensation fraud. He asked if you can be convicted of welfare fraud and theft by deception. Combining the offenses might also help to avoid the litigation over general versus specific intent. Prof. Stacy noted that securities fraud is an outlier and should be treated separately, because it relies on concepts that are different than traditional criminal concepts. Otherwise, there is no need for a special offense unless the penalties are different.

Prof. Stacy asked if the theft of motor fuel offense could be part of the theft statute. Judge White said that maybe it could with the appropriate language regarding storage containers. He noted that the driver's license material is relevant to the Department of Revenue and should be in Chapter 8.

Mr. Klumpp said that it must be kept separate from the theft offense because there must be a unique subsection in order to alert the Department of Revenue to the charge. If it is all part of the theft statute then it will interfere with the driver's license penalty. He also noted that there are too many license suspensions that are not for traffic violations.

Prof. Stacy noted that there should be a section that clarifies that a defendant cannot be convicted of theft of fuel and theft. He asked if it is possible to grade motor fuel by value.

On 37-102, regarding theft of mislaid property, Judge White suggested that it could be made part of the general theft statute. Mr. Opat pointed out that the current law is not aggravated based on a dollar amount. Prof. Stacy suggested that the failure to return mislaid property seems less serious than theft. Judge Marquardt said that she preferred the "failure to return mislaid property" language. Mr. Madden asked, what is the difference between finding a big bag of money and stealing it? Prof. Stacy answered that the defendant did not take affirmative steps to get the money.

On 37-103, regarding criminal deprivation of property, Mr. Opat said the current law provides a mandatory sentence for those who deprive people of automobiles but a defendant can outright steal a car, with the right criminal history, and not get any jail time. He said this is disproportional.

Ms. Parker asked if there should be a distinction between permanent or temporary deprivation in the law. Judge White said that the deprivation statute has no value element attached to it.

Mr. Klumpp pointed out that most cases of joyriding are drug dealers or users in the drug trade who trade vehicles in exchange for drugs. Often the same vehicle will be exchanged several times.

Prof. Stacy asked if temporary deprivations should be punished based on the value of the property itself or the value of the deprivation. Mr. Watson said that the current penalty section in the theft statute was based on the value of the property itself. He said that if the distinction between permanent and temporary deprivations were removed it would essentially decriminalize temporary deprivation of property as permanency is an element of the main theft offense.

Mr. Klumpp suggested looking at the value of the damage done to the victim.

Judge White mentioned that in Texas the unauthorized use of a vehicle is the intentional use of the vehicle without the consent of the owner. This results in a "state jail sentence." Judge White promised to review the matter further.

On 37-104 and 37-105, Mr. Opat asked if the language regarding replacement of the nozzle and hose from a gas pump needed to be in both statutes. Mr. Opat also pointed out that 105(e) is currently part of the theft of services statute but it is not part of the prima facie evidence statute. He also pointed out that 105(e) should be revised to reflect that defendants do not connect to TV meters, but rather, they bypass them. Judge White said he would review this section.

On 37-106, Prof. Stacy asked if the removal of a theft detection device should include language indicating that the removal is illegal if it is done by an unauthorized person. Judge Marquardt said no, the point is to catch defendants who collude with store clerks.

Mr. Klumpp pointed out that the use of the phrase "prior to purchase" was unnecessary if the defendant intends to commit a theft. He said the entire statute seems like a special attempt statute.

Prof. Stacy said that it is disproportionate because if the defendant actually steals they commit a misdemeanor, but if they remove the device they commit a felony. He suggested a recommendations to treat the crime as an attempt and to eliminate the offense.

Judge White, said the use of the term "intentionally" seems unnecessary regarding the manufacturing portion of the statute, because it is impossible to unintentionally manufacture.

On 37-107, regarding unlawful recordings, Judge White noted that no significant change had been made.

On 37-108, regarding forfeiture of recorded devices, Prof. Stacy suggested putting it into 107 as a statement of policy for police and district attorneys.

Mr. Klumpp addressed current legislation including Senate Bill 409 which provides greater sentences for DUI offenders. Prof. Stacy suggested that the Commission should say that it has no position right now on Senate Bill 409 or other sentencing issues because it effects the overall issue

of sentencing proportionality.

Judge Marquardt reminded the Commission that it could not act without a quorum. Prof. Stacy said that he may have to testify on the drug code revision bill and he wanted some guidance from the members about what to say on other sentencing issues. Judge Marquardt suggested that he tell the Legislature to not take action on anything that might effect what the Commission is doing. Mr. Parker agreed.

Prof. Stacy said that he did not want to create opposition in the legislature, but he would like them to know that what they do might effect the Commission's work. He suggested that revising the decay rule for convictions might improve bed space. Ms. Wilson agreed and said that when someone gets a conviction at 20 then at 65, the judge should have leeway to reduce their sentence or give them a dispositional departure.

Mr. Opat said the favored telling the legislature that the Commission does not have a position on sentencing issues because it has not looked at them yet.

Mr. Klumpp said that the Commission could use the DUI bed impact report from the Proportionality Subcommittee at future meetings. Judge Marquardt said that the Commission would have to work the Proportionality Subcommittee on the issue of changing offense severity levels. Mr. Madden said that he opposed changing severity levels year after year. He suggested that if the Legislature knows that it will change the severity level next year, it should not be changed in the current year.

Judge White told the Commission that at the next meeting there would be minutes to approve from the January meeting as well as the November meeting.

Mr. Madden distributed a letter written to the Pew Trust for additional funds.

Judge White informed the Commission that he and Mr. Watson had solicited interviews for an administrative assistant who could take the minutes at the monthly meetings.

The Commission agreed to meet next on March 26.

Submitted by Brett Watson, Staff Attorney

Approved by Commission on:

April 16, 2008

(date)