

MINUTES

KANSAS CRIMINAL CODE RECODIFICATION COMMISSION

May 28, 2008
Room 519-S—Statehouse

Members Present

Prof. Tom Stacy, Chairman
Mr. Ed Klumpp, Co-Chairman
Senator John Vratil
Senator David Haley
Representative Lance Kinzer
Representative Jan Pauls
Judge Christel Marquardt
Judge Richard Smith
Mr. Tim Madden
Mr. Steve Opat
Ms. Debra Wilson

Staff Present

Judge John W. White, Reporter
Brett Watson, Staff Attorney
Jill Wolters, Office of the Revisor of Statutes
Jerry Ann Donaldson, Kansas Legislative Research Department
Athena Andaya, Kansas Legislative Research Department
Jason Thompson, Office of the Revisor of Statutes
Sean Ostrow, Assistant to the Staff Attorney

Others Present

Katie Firebaugh, Kearney and Associates
Scott Schultz, Securities Commission
Ed Britton, Sentencing Commission
Linden Appel, Department of Corrections

Prof. Tom Stacy called the meeting to order at 9:55. He discussed the progress of the recodification sub-committee, which met the day before. He was pleased with the work done by the sub-committee thus far, and that the sub-committee had served the purpose of expediting the recodification process. He expected the sub-committee to present drafts on upcoming recodification issues in August.

Mr. Tim Madden reported that fundraising initiatives were continuing as planned, and that outside sources of funding for the commission were still being sought.

Brett Watson introduced Sean Ostrow, from KU Law School, as the new assistant to the staff attorney.

Prof. Stacy moved approve the minutes from the April meeting. The motion was seconded and passed unanimously. Prof. Stacy moved to approve the minutes of the January meeting. The motion was seconded and passed unanimously.

Mr. Watson discussed his memorandum from May 19, 2008 regarding the Commission's proposals based on policies adopted at previous meetings. He said that the objective is to make specific legislative proposals. He began with the drug policy recommendations, which included separating manufacture of drug statutes from statutes dealing specifically with the manufacture of methamphetamine. He said that research on this topic will continue, and that a survey had been sent to all Kansas District Attorneys.

Mr. Watson then spoke about creating a drug quantity proposal with statutory language that would provide sentencing based in part on the quantity of drugs, and added that more research on this issue was needed.

Mr. Watson also discussed merging the drug and non-drug grids for sentencing purposes, changing the statute dealing with drug offenses conducted "within 1000 feet of a school", and changing the recidivism aspects of some drug statutes.

Prof. Stacy opened discussion by stating that most people agree that meth sentences should be higher than most other drug offenses due to the nature of the drug and the unique problems it presents. He also noted that most meth offenders are given downward departures at sentencing.

Mr. Watson discussed the potential aggravating factors that the prosecutors he had surveyed found important. He said that many prosecutors currently thought that meth penalties are disproportionately high, and that none surveyed had ever seen an upward departure in a meth case. Some prosecutors expressed the view that meth offences may not warrant such heavy sentencing, especially in light of other violent crime sentences. The results of the survey of the prosecutors will be organized and presented at a future meeting.

Mr. Watson opened up the discussion on quantity by stating that many federal crime labs use a "projected yield" system to determine how much meth the perpetrator could actually produce. The projected yield is based on the ingredients or "precursors" present at the manufacturing locale. 50% of this projected yield quantity is used to determine the severity level of the sentence for federal meth offenders.

Senator Vratil expressed his concern that a meth manufacturer could intentionally keep a small amount, or not keep any amount, of one of many precursor ingredients at the site of the manufacturing operation, and thereby circumvent the projected yield provision. Mr. Watson responded by saying that federal crime labs agreed this is the most effective way to determine the projected quantity of a meth manufacturing operation. He said the federal system is still superior to the Kansas system, which makes no distinction between large and small quantities of meth. Judge Marquardt asked if the projected yield, for sentencing purposes, should be determined based on the presence of just one precursor. Mr. Watson responded that this could lead to disproportionate sentencing, because many of the precursors to meth are also household items. A large amount of

household items not intended for meth manufacture could potentially be used to disproportionately increase the severity of the sentence under that system.

Representative Kinzer noted that meth penalties are intentionally higher than penalties for other drugs, as it is the legislative intent to keep harm resulting from meth use and manufacture to a minimum. His concern was that the new statutory guidelines may decrease meth sentence severity, and he cautioned the members of the commission that new guidelines must be well-determined based on suitable and proportional criteria.

Mr. Klumpp said that the law enforcement interest was in not changing meth legislation. He stated that legislation that deals with large quantity producers is not suitable for use in Kansas because of the high number of low-volume meth producers in this state. His primary concern was with the health hazards associated with the chemical ingredients and processes involved in meth manufacture. He said he would like to see the level of danger created as an aggravating factor. He also noted that these same dangers are inherent in big or small production operations.

Senator Vratil proposed making numerous sentencing recommendations to the legislature, with alternative sentencing guidelines and aggravating factors to choose from. Prof. Stacy agreed that presenting a "menu of options" might be useful in their recommendations to the legislature.

Mr. Watson opened discussion by asking whether the revisions should be made to existing statutes on this topic, or whether recommended changes should be implemented through legislative amendments. Ms. Wolters stated that the method chosen should depend on the desired approach of the commission.

The proposed amendment would change the language of "within 1000 feet of school property" to "in the presence of a minor." Prof. Stacy noted his concern with the word "presence", and whether this required actual knowledge of the minor's presence.

Mr. Klumpp said that all law enforcement officers know what area is within 1000 feet of a school, and often set up controlled buys within this area to obtain the sentence enhancement. He was in favor of the flexibility of the "presence" amendment because it provides protection to children beyond the school to locations like parks and athletic events.

Representative Pauls stated her concern with the possibility of artificial situations where law enforcement may actually cause the presence of a minor to get the sentence enhancement. But she also said that the definition of "presence" should not be too limited; it should be left to the court's interpretation.

Representative Kinzer noted the public interest in having schools be considered a safe place with special protection. He said the school element should remain in the statute, even if it is just for public piece of mind, but would also like to add "presence of a minor" to the statute.

Senator Vratil liked the "school" provision because it protected the public's view of the school as a safe place. He was concerned that proving the element of "presence" may cause frequent situations where a minor must testify in court.

Mr. Opat was concerned with potential disparities in how the courts will treat "presence."

Judge Marquardt moved to keep the provision of "1000 feet of school property" but to not preclude further elements involving "presence of a minor." The motion was seconded, but did not pass, with Prof. Stacy, Mr. Klumpp, Senator Vratil, Ms. Wilson, and Mr. Madden opposing.

Judge Smith said that he often, nearly always, sees instances where cops bring drugs close to schools in order to get the sentencing enhancement. He said the statute should protect children in all places, not just schools, and adamantly opposed leaving the statute as it currently stands. He opined that more harm than good was being done under the statute as it exists, and would like to reduce the possibility that police will use potentially harmful techniques to procure aggravating factors.

Prof. Stacy moved to construe the element of "presence of a minor" as strict liability. The motion was seconded and passed unanimously.

Judge Marquardt added that she would like to see some added protection; in particular she would like to see the "presence of a minor" section added to the existing statute. Prof. Stacy explained that too much area would be encompassed by such an addition. As it currently stood, a large portion of many city areas was already covered by the statute, so to add even more area subject to this statute would be tantamount to making a blanket sentencing increase.

Ms. Wilson made the point that issues that have been discussed at previous meetings should not be further discussed. Her concern was that further conversation would not be productive, and could effectively undo prior progress.

Mr. Watson brought up the issue of "presence of a minor" as defined in Iowa. The definition in Iowa, I.C.A. §124.401C, dealt with presence of a minor in meth manufacturing statutes. The Iowa definition was found problematic in that it was subject to the same pitfalls as the current Kansas statute, it was potentially too broad, and it may leave too much room for varying judicial interpretation. A Webster's and Black's Law Dictionary were consulted. The Black's definition, which essentially boiled down to "proximity coupled with awareness" gathered some attention. The matter was set aside for determination at a future Commission meeting.

Finally, there was discussion on adding the language "to a minor" in addition to "in the presence of." This was felt necessary to cover circumstances where the ultimate buyer, while not a present minor, was a minor acting through an intermediary. No motion was made on this alteration, but it seemed largely agreed upon.

Mr. Watson began by discussing the changes proposed in the memo, starting with the recidivism statute for marijuana offenses in §21-506. He explained that this statute was retained to keep multiplicitous marijuana convictions from remaining misdemeanors. This was felt to be mandatory, despite the removal of most other recidivism statutes.

Prof. Stacy expressed concern that this may not have been the goal of the Proportionality Subcommittee, and that such a change by the Commission should be reviewed by them first. The relevant recommendation of the sub-committee was found on page 6, #16, of the sub-committee's report.

The next recidivism issue was in §21-506, page 6, lines 44-46 of the memo. Representative Kinzer said that removing this recidivism aspect would be problematic in that there would be no enhancements for subsequent offenders.

The next discussion involved treating possession of drug paraphernalia, as defined in §21-509, as a crime of intent. Ms. Wilson raised the question of what the effects of such a change would be. At this point the meeting was adjourned for lunch.

The meeting resumed at 1:40 p.m., with Mr. Watson calling the commission's attention to the property crime amendments, as listed on page 16 of the memo. The first question was whether "loss" should be construed as the loss of value or property to the victim, or whether other factors should be used in determining loss. Prof. Stacy noted that the Federal system often treats loss as the intended amount of loss of the perpetrator. Such an example would be the embezzlement statute; should this amount be considered the net loss of value to the victim. Prof. Stacy thinks that determining the proper calculation of "loss" is important for determining proper sentencing.

21-2012. Senator Vratil moved to treat theft of property valued at more than \$1000 and less than \$2000 as a severity level 10 nonperson felony and make each subsequent value one step higher on the sentencing grid, ending with theft of property valued at \$100,000 or more as a level 5 nonperson felony. This motion was seconded, and passed, with Mr. Opat opposing on the grounds that breach of fiduciary duty should be an aggravating factor. Prof. Stacy noted that such a breach is nearly always associated with the crimes listed in §21-2012, and that adding breach of fiduciary duty as an aggravating factor would be applicable to all property crimes, including theft under §21-3701. Ms. Wilson asked if the statute would retain its proportionality in regards to bank employees, who would be subject to higher penalties than other people. Representative Kinzer stated that he believed the severity levels should remain proportional, giving the example of a school official who had been embezzling funds from school fundraisers. Senator Vratil said he believed that embezzlement crimes may carry disproportionately high penalties in comparison to other theft statutes, and that the commission should refrain from such value judgments. Judge Smith supported Senator Vratil's suggestion that the subcommittee's recommendations should remain. Mr. Klumpp, also a member of the proportionality subcommittee, said that the subcommittee had considered the same issues, and that their recommendations had been carefully constructed to handle such problems. The reason why so many levels of severity exist was to ensure proportional sentencing, and the subcommittee made its recommendations to be used in tandem with the new sentencing grid.

Judge Marquardt moved to change the statutory language from "resulted in a loss" to "involved an amount." The motion was seconded, and passed unanimously.

16-305. Mr. Watson proposed that the same "involved an amount" language should be applied uniformly amongst all applicable statutes. *Judge Marquardt moved to use this language in all applicable statutes, and to also apply the increasing severity levels, beginning with level 10 nonperson felony for values more than \$1000 but less than \$2000 and ending with a level 5 nonperson felony penalty for amounts of more than \$100,000, uniformly to all theft of property statutes. The motion was seconded and passed unanimously.*

17-12a508. Judge White began discussion by stating that he found it problematic that the result of applying the new guidelines to this statute would lessen the penalty for securities fraud as it currently stands. Mr. Klumpp stated that the proportionality subcommittee had the intention of lessening the penalties for certain crimes. He also noted that this statute is very

infrequently used in actual practice. Prof. Stacy asked why the securities fraud statute should depart from the original sentencing grid proposed by the subcommittee. *At this point Judge Marquardt moved to adopt the formerly agreed upon severity levels for this statute. Mr. Klumpp seconded, and the motion passed unopposed.*

17-1311(a). Prof. Stacy noted that this statute is generally used in the situation of misuse of a cemetery maintenance fund. He also said that this would be an example involving breach of fiduciary duty as an aggravating factor. *He moved to approve the previously agreed upon severity levels. The motion was seconded by Judge Marquardt and passed unanimously.*

19-3519. This statute involves fraudulent claims against a water district. Prof. Stacy said that he was generally unfamiliar with this statute and felt uncomfortable making a recommendation without more information. Judge Smith said that the crime described in this statute could be covered by existing general taking by deception and theft statutes. Representative Pauls noted that there are provisions that may be unique to a water district and industry regulations, and felt that these should be considered before revising the statute.

Mr. Klumpp noted that this is not a criminal statute and said that he believed the commission should only be concerned with the criminal code, chapter 21. He explained that the proportionality subcommittee has a larger scope than the commission, and that while they have examined the statute and made recommendations, this commission need not do the same. Judge Marquardt agreed with this. *Senator Vratil moved to make no new recommendations on §19-3519, and to support the recommendation of the proportionality subcommittee. This motion was seconded and passed with Mr. Opat dissenting.* Watson then asked whether the commission should adopt the same approach for all non-chapter 21 statutes. *Senator Vratil then made a new motion to support the recommendations of the proportionality subcommittee for all non-chapter 21 statutes listed in the memo. This motion was also seconded and passed, with Mr. Opat dissenting.*

21-3419(a). Mr. Klumpp stated that this statute had been recently changed by legislative amendment, which eliminated the dollar amount elements of this crime. In light of these changes, *Mr. Klumpp moved to leave this statute as it was most recently amended by the legislature. The motion was seconded and passed unanimously.*

21-3437. Prof. Stacy noted that the recommendation for this statute should also read “involves an amount” instead of “resulted in a loss” in accord with the previous motion. Mr. Opat voiced his concern that crimes against a dependent adult can also be considered an aggravating factor in many other statutes, and that this statute would provide lesser penalties for the same general act. Prof. Stacy referenced §21-4716(h)(3) which essentially says that factual elements of the crime cannot simultaneously be used as aggravating or mitigating factors, and since the victim in this statute must be a dependent adult, this cannot also be an aggravating factor. Mr. Madden stated that this statute could be changed to remove the theft

elements, because sections (1) and (3) describe crimes not categorized as theft. Prof. Stacy said that this statute is broader than general theft provisions because taking unfair advantage isn't necessarily theft. *Judge Marquardt moved to change the language to "involves an amount" and increase the severity levels 1 level from the general theft provisions. This motion was seconded, but did not pass with Prof. Stacy, Senator Vratil, Mr. Klumpp, Judge Smith, and Mr. Madden opposing. Prof. Stacy then moved to keep the existing severity levels intact, but to amend the statute to include a section instructing that this statute does not preclude prosecution under the general theft statute.* Prof. Stacy explained that this would allow prosecutors to use dependency of the victim as an aggravating factor in theft cases, while ensuring proportionate sentencing for acts falling under this statute. *Judge Smith seconded, and the motion passed, with Mr. Opat, Representative Kinzer, and Judge Marquardt opposing.* Judge Smith called the commission's attention to the absence of the 2 highest value amount provisions for this crime. This was determined to be a mere oversight of the commission, which would be fixed before the next meeting.

- 21-3701. Senator Vratil moved to change the statutory language from "valued between" to "valued up to" and "but no less than" in regards to the amount provisions. Representative Kinzer asked if previous subsection (4), dealing with three mercantile establishments within 72 hours, should be eliminated from the statute, and if this was the subcommittee's recommendation. After agreeing that this was not part of their recommendation, *Senator Vratil made a motion to keep subsection (4) intact, and change the language of the value provisions to "up to" and "but no less than." The motion was seconded by Judge Smith and carried unanimously.*
- 21-3704. *Judge Smith made a motion to change the value provision language to comport with the changes made to §21-3701. The motion was seconded and passed unanimously.*
- 21-3707. This statute, dealing with giving a worthless check, differs in its use of the term "total loss." Judge Marquardt believed the word "check" should be changed to "check or checks" to cover multiple offenses totaling in a given severity grid amount. Prof. Stacy, citing numerous uncertainties in this statute, recommended sending this recommendation back to the proportionality subcommittee for further revision.
- 21-3720. *Mr. Klumpp made a motion to accept the language "loss in value of the property" as recommended by the subcommittee. The motion was seconded and passed unanimously.*
- 21-3729. Prof. Stacy recommended sending this statute back to the subcommittee for further revision for the same reasons as §21-3707. The commission agreed.
- 21-3734. Senator Vratil suggested the term "value" should be changed to "fair market value" for this statute. *Mr. Klumpp moved to accept the statute as*

written and use the language of the existing statute. This motion was seconded and passed unanimously.

21-3761. Mr. Klumpp moved to keep page 34, line 5 of the memo intact, providing that the penalty for the acts described in subsection (a) would be a class A nonperson misdemeanor. This motion was seconded and passed unanimously. Mr. Klumpp then stated that this statute needed some revision. Prof. Stacy moved to adopt the property value amounts and severity levels recommended by the subcommittee, but to use the statutory language of the existing provisions. This motion was seconded by Mr. Klumpp and passed unanimously.

At 4:15 p.m., Senator Vratil made a motion to adjourn, which passed unanimously.

Judge White announced the next meeting will occur on the 4th Wednesday of June, June 23rd. The recodification subcommittee will also continue to meet the Tuesday prior to that date, June 22nd. In November and December the meetings will be moved ahead one week as to not conflict with holidays.

Meeting adjourned.

Submitted by Brett Watson, Staff Attorney

Approved by Commission on:

June 25, 2008

(date)