

MINUTES

KANSAS CRIMINAL CODE RECODIFICATION COMMISSION

September 24, 2008
Room 545-N—Statehouse

Members Present

Professor Tom Stacy, Chairperson
Ed Klumpp, Co-Chairperson
Senator David Haley
Senator John Vratil
Representative Jan Pauls
Professor Michael Kaye
Jacquie Spradling
Tim Madden
Debra Wilson
Steve Opat
Kim Parker

Staff Present

Judge John White, Reporter
Brett Watson, Staff Attorney
Sean Ostrow, Assistant to the Commission
Jill Wolters, Office of the Revisor of Statutes
Jerry Donaldson, Kansas Legislative Research Department

Also Present

Tom Drees
Ed Britton
Callie Coco, Kearney and Associates
Laurel Klein Searles, Kansas Coalition Against Sexual and Domestic Violence

Preliminary Matters

Mr. Klumpp discussed the state of the budget for the coming year. He said that the Commission spent roughly \$123,000 last year, about \$18,000 under budget. He said that in the coming year, the Commission could carry-over \$10,000 of the surplus without legislative approval, and could potential use all the surplus with approval if needed. He said that in the coming year he projected the Commission would spend \$161,000 of an available \$163,000. He said he was comfortable with the status of the budget, and would continue to inform the Commission should there be any substantial changes.

Professor Kaye discussed the fundraising efforts of the Commission. The request from the Institute for Civil Justice was denied, as the Institute was unable to make grants at that time. He also said that a request would be submitted to the Anson Foundation on October 10th, and that a decision should be made by October 17th.

Mr. Madden moved to approve the minutes from the August meeting, Ms. Wilson seconded, and the motion carried unanimously.

Professor Stacy briefed the Commission on the day's objective; to finish approval of the proportionality subcommittee's recommendations.

Changes to the Drug Code

Mr. Watson said that two minor changes to the drug code had been proposed by the KBI officers, Dwain Worley, Jim Schieferecke, and Jeff Brandau, who attended last month's meeting. The first change dealt with §21-501, the drug paraphernalia statute. Mr. Watson said that the reference to phenylacetone should really be referring to phenylcyclidine. The chemists said that phenylacetone is poisonous and would cause death in a human, so for practical purposes devices to administer it would not likely exist. Phenylcyclidine is commonly known as PCP, and is clearly the drug that the statute meant to encompass. The recommendation was to change the word phenylacetone to phenylcyclidine within the drug paraphernalia statute.

The second recommendation was the use of the term "drug product" in §21-510, the methamphetamine precursor statute. The problem with the statute is that it lists some common chemicals that are not considered "drugs" within the code. The chemists proposed eliminating the term "drug" from the statute to criminalize the use of all products, even though they are not widely considered "drugs." *Ms. Spradling moved to adopt both recommendations, Mr. Klumpp seconded, and the motion carried unanimously.*

Presence of a Minor

Professor Stacy said that a vote should be taken to ensure that this statute, which had undergone numerous revisions, was ultimately approved. *Representative Pauls moved to approve, and Ms. Wilson seconded.* Professor Stacy said that he found the use of the term "actually" in terms of the defendant's awareness was superfluous, and that the word "be" should be changed to "is." *Representative Pauls adopted this as a friendly amendment to her motion, which carried unanimously.*

Prior Notice for Defendants Seeking Non-Prison Sanctions

Professor Stacy re-introduced this issue by noting that the Commission had spent considerable time on this recommendation. The Commission had entertained suggestions on a statute that would require defendants to file a request for non-prison sanctions at least ten days prior to the sentencing date, so that the prosecution had time to investigate the prison alternative. Judge White said that the staff had explored options to draft an adequate statute, but wanted to make sure that the Commission had a clear objective in mind. Senator Vratil cautioned the Commission that too much detail in a statute like this would likely create more complications than clarifications. He said that if the statute imposed additional requirements, additional arguments would arise, and the legislature would be in effect hindering the court's ability to handle such matters expediently.

Ms. Wilson said that she endorsed statutory language that would make it clear that the defense counsel will have X number of days to file a request for a non-prison sanction, and that the court shall grant a continuance of the sentencing date if the opposing party requests further time to verify that the requested non-prison sanction is available.

Mr. Opat said that most judges do not have a rigid schedule for the filing of pre-sentence investigations, and had never encountered an issue with a judge refusing to grant a continuance of the sentencing date when either party requested it. Ms. Parked echoed similar sentiments, and Senator Vratil agreed. Ms. Wilson said that she was taking the defense attorney's standpoint in that it would be very difficult and at times impossible to meet the proposed 10 day deadline, and wanted to make sure that defense attorneys would not be unduly disadvantaged by such a requirement.

Mr. Drees said that the origin of this recommendation stemmed from court service workers who had requested a more efficient procedure for dealing with these situations.

Mr. Klumpp said that in his experience, the defense attorney had always made a good-faith effort to locate a non-prison alternative, but at some point realized that the program wasn't suitable or the offender couldn't afford the costs of the program. However, he noted that the judge always has discretion to hold a re-sentencing hearing. Ms. Spradling expressed her concern that judges may not have, or may not choose to exercise such discretion. She said that in her experience judges have only allowed the prosecution to make a motion to revoke the prior sentence. Mr. Opat strongly disagreed, and said that he had never encountered such a viewpoint among judges, and Judge White agreed that the sentencing judge would continue to have jurisdiction in such instances.

Senator Vratil reemphasized his point that writing instructional statutes to judges to clear up an issue that perhaps didn't present an actual problem was not productive and would further complicate matters. He said the statute would inevitably omit overlooked details that would become fodder for additional litigation. *Mr. Klumpp moved to table this discussion indefinitely, Senator Vratil seconded, and the motion carried unanimously.* Professor Stacy noted that further discussion could arise if the Commission encountered evidence and testimony that such a statute would be useful.

Burglary Statute Revision

Professor Stacy turned the discussion towards the revised burglary statute. The Commission had previously considered making a recommendation to the legislature to change the intent requirement for burglary and aggravated burglary from the intent to commit "a felony, theft or sexual battery" to "any crime therein."

At the last meeting the proposed recommendation received a divided vote. *Mr. Opat moved*

to adopt the recommendation, and Senator Vratil seconded. Mr. Madden voiced his concern that the Kansas statute included the terms “entering into or remaining” while the Model Penal Code recognized only “entering.” He said that the Kansas statute would create situations where somebody who is told to leave and commits a minor crime before exiting would be charged with burglary. He mentioned that Colorado state law had recently been amended to address that issue. Mr. Madden did not want to change the statute as it currently stands in part because he believed that the “remaining” element of the crime was sufficiently broad in itself, and that adding the “any crime” language would make it overbroad. Ms. Wilson agreed, saying she thought that “any crime” encompassed too broad of a spectrum.

Ms. Parker said that she thought that the issue was with the violation of the sanctity of one’s personal space, particularly the home. She said this sanctity deserved adequate protection, which would be achieved by broadening the scope of the requisite intent. Mr. Klumpp said he thought that some expansion of the language was appropriate, but would not agree to go as far as including *all* crimes.

Professor Stacy said he thought it was important to ensure that all domestic violence cases were covered by the statute. He suggested the compromise that “all person crimes” and “all felonies” would replace the term “all crimes.” Mr. Opat asked about vandalism, which would not be considered a felony for a low dollar-amount of damage, and would not be a person crime.

A vote was then taken on Mr. Opat’s original motion. *The motion failed, with Mr. Madden, Ms. Wilson, Mr. Klumpp, Professor Stacy, and Senator Haley dissenting.* Mr. Drees then suggested that the statute include the language “intent to commit any felony, person misdemeanor, theft, or property crime.” He said this would cover any intimidation attempts, domestic violence, and vandalism. *Ms. Wilson moved to adopt Mr. Drees’ suggestion, Mr. Klumpp seconded, and the motion carried with Mr. Madden dissenting.*

Aggravated Endangering a Child

Professor Stacy said that the Commission had discussed altering this statute, which in some cases has led to sentencing indiscrepancies which under-penalize battery when the victim is a child. He suggested leaving the statute as it currently existed and using the fact that the victim was a minor as an aggravating circumstance.

Ms. Parker noted that actually battering a child and placing a child in a position where harm could befall them are two very different crimes, and that as such there is nothing stopping a prosecutor from charging a party under both statutes where the behavior satisfies the requirements of both statutes. Mr. Drees said that in his experience some judges had considered the aggravated endangerment statute a more specific form of aggravated battery, or they just consider abuse of a child as simple battery with an enhancement. Mr. Opat agreed with Mr. Drees that most judges don’t view these as separate offenses.

Ms. Parker said that she thought there was a great difference between this statute which included situations where a child *could* be injured as opposed to aggravated battery, which required *actual* injury. *Professor Stacy moved to change the phrase “is injured” in parts (a)(1) and (a)(2) of the statute to “may be injured.” He also moved to adopt severity level sections 2 and 4 on page 8 and disregard sections 1 and 3.* He said that the harm listed in these sections was already covered in the aggravated battery statute. *After discussion on the organization of these statutes, Professor Stacy amended his motion to eliminate section (a)(1) as unnecessary, add the phrase “may be injured or endangered to the statute, and change the severity level to a 7.*

Mr. Opat suggested changing the phrase “may injure or endanger” in sections (a)(1) and (a)(2), and using the uniform severity level 7 for the entire statute. He said this will simplify this statute by having only 1 threshold to meet. *Professor Stacy accepted Mr. Opat’s suggestion as a friendly amendment. Ms. Parker seconded the motion, which passed unanimously. Professor Stacy also noted that this motion had the effect of approving this statute in its entirety.*

Sex Offense Severity Levels

Mr. Drees said one of the most important recommendations the proportionality subcommittee had proposed was the re-inclusion of the sex offenses on the sentencing grid. He said that this would improve the predictability of sentencing and allow for improved proportionality by providing a uniform benchmark by which to measure sentencing. One major concern was that homicide, which was widely considered among the worst crimes one could commit, was included on the grid, while these six sexual offenses were categorically off-grid offenses with higher penalties. He asked whether these crimes were really that much worse than homicide, and whether they should remain off the grid.

He also cited concerns with bed-space impact for off-grid crimes. He said that at that time there were approximately 728 inmates imprisoned for off-grid crimes, and that in the future this number was expected to double to 1500 inmates. This was a staggering number, he said, in light of the fact that the state prison system’s capacity was limited to 9000 total beds. He also noted that many off-grid offenders are given durational departures during sentencing, and to place them on the grid would bring the punishment more into proportion with actual sentencing practice.

Rape

Professor Stacy said he would like to view each of the six off-grid sex offenses separately and tailor an appropriate sentencing level for each crime individually. The first crime to be examined was rape. Ms. Spradling said that she thought rape of children under 14 should still be considered an off-grid felony because of the likelihood that the victims will perpetuate sexually aggressive conduct and perhaps become perpetrators themselves. She said this happens more frequently with younger victims than adult victims. Ms. Parker agreed, saying the Commission should recognize the devastating nature of this crime in determining the appropriate sentence. Mr. Drees added that rape often goes unreported, and is generally among the most underreported serious crimes. Mr. Opat said that he had seen evidence that many rapists had wished that they had killed their victims. Ms. Parker agreed, saying that the current sentencing grid actually made it somewhat appealing for a rapist to kill a victim, because murder generally carries a lesser penalty than rape.

Mr. Drees reiterated his concern with the bed-space impact, and cautioned that any downward change that the Commission might recommend would be unpopular within the legislature. He said he thought the rationale for the change was well-established and practical, especially in light of the sentence for murder. He also gave his opinion that this would be an ideal time to propose the change, because it was a non-election year and the legislature would not have re-election concerns at the forefront. Senator Vratil said it would be tough to predict the makeup of the legislature in the coming session, but nonetheless thought that the Commission’s charge was to make well-intentioned and practical recommendations, regardless of their perceived popularity. He noted that one of the reasons the criminal code needed recodification was the buildup of discrepancies caused by the legislative habit of over-scrutinizing the “crime of the year” and imposing disproportionate sentences. Senator Vratil urged the Commission to stick to their principles and focus on their task, not the political ramifications.

Professor Stacy moved to adopt the proportionality subcommittee's recommendations for placing rape on the sentencing grid, Mr. Klumpp seconded, and the motion carried with Ms. Spradling dissenting.

Aggravated Indecent Liberties

Mr. Drees discussed the proposal for this statute. Ms. Spradling asked if the changes would go into effect retroactively. Mr. Drees said that he was not in favor of making the changes apply 7 retroactively, as this presented a myriad of problems. Ms. Spradling said that she considered this to be an off-grid crime because of the likelihood that the offender will continue to perform the crime on a victim over a number of years. *Mr. Madden moved to adopt the proportionality subcommittee's recommendations, Ms. Wilson seconded, and the motion carried over Ms. Spradling's dissent.*

Aggravated Criminal Sodomy

Ms. Parker said that she thought this should be penalized equal to rape, as the only difference between the conduct was essentially the orifice being penetrated. Professor Stacy and Ms. Spradling concurred. *Mr. Opat moved to change the severity level for aggravated criminal sodomy from a 2 to a 1, Ms. Spradling seconded, and the motion carried unanimously.* After consideration and acquiescence by the Commission, this motion was construed to mean that the sodomy of an under 14 year old by an offender under 18 would be a level 3, equal to the corresponding penalty for rape.

Promoting Prostitution

Ms. Wilson moved to adopt the recommendation, Ms. Parker seconded, and the motion carried unanimously.

Sexual Exploitation of a Child

Mr. Drees said that this was historically a federal crime, but that he has seen increasing state prosecutions utilizing this statute. While the proportionality subcommittee noted that this statute does not necessarily require sexual contact, if sexual contact did occur there were a number of available statutes that could be used concurrently. However, they considered that violating this statute unequivocally supports the child sex industry, which warrants the provision of a higher penalty. Professor Stacy noted that anyone who encourages or supports this activity could be charged as an accomplice.

The proposed change would put sections (a)(5) and (a)(6) on the grid as a severity level 3. *Ms. Wilson moved to adopt the recommendation as provided, Mr. Klumpp seconded, and the motion carried with Ms. Parker dissenting.*

Aggravated Trafficking

Mr. Drees said that this statute was rather complicated, but it shared elements of sexual exploitation and promoting prostitution. Professor Stacy said he thought this statute had numerous problems and needed recodification and clarification before it was ready for a vote. Mr. Klumpp agreed, but suggested the preliminary change to bring section (b) into congruity with the previous

suggested changes. *Mr. Klumpp moved to make aggravated trafficking a level 2 if the victim was over 18, and a level 1 if the victim was under 14. Professor Stacy seconded, and the motion passed with Ms. Spradling dissenting.* Professor Stacy noted that some provision was needed to cover trafficking where the victim was between 14 and 18 years old.

Final Remarks

Professor Stacy thanked Mr. Drees for coming to the meetings and for all his hard work with the Proportionality Subcommittee. Mr. Drees asked the Commission to consider a proposal that he found to be very important; raising all homicide offenses by 1 level. He said that he was unable to persuade the proportionality subcommittee to adopt this recommendation, but he personally felt it would improve the proportionality of the entire grid tremendously. He asked the Commission to consider making this part of their proposal to the legislature.

Judge White mentioned that the recodification subcommittee would be meeting twice in October to make up for the missed meeting this month. The tentative dates for these meetings would be October 16 and 21. The Commission at large would meet as regularly scheduled on Wednesday, October 22nd.

The meeting adjourned at 3:00 p.m.

Prepared by Brett Watson

Approved by Commission on:

October 22, 2008

