

House Substitute for SENATE BILL No. 12

By Committee on Veterans, Military and Homeland Security

3-23

1 AN ACT concerning crimes, punishment and criminal procedure; relating
2 to service members of the United States armed forces; diversion;
3 sentencing; amending K.S.A. 2014 Supp. 12-4415, 21-6630, 21-6815
4 and 22-2908 and repealing the existing sections.

5
6 *Be it enacted by the Legislature of the State of Kansas:*

7 Section 1. K.S.A. 2014 Supp. 12-4415 is hereby amended to read as
8 follows: 12-4415. (a) In determining whether diversion of a defendant is in
9 the interests of justice and of benefit to the defendant and the community,
10 the city attorney shall consider at least the following factors among all
11 factors considered:

12 (1) The nature of the crime charged and the circumstances
13 surrounding it;

14 (2) any special characteristics or circumstances of the defendant;

15 (3) whether the defendant is a first-time offender of an alcohol related
16 offense and if the defendant has previously participated in diversion,
17 according to the certification of the division of vehicles of the state
18 department of revenue;

19 (4) whether there is a probability that the defendant will cooperate
20 with and benefit from diversion;

21 (5) *whether there is a probability that the defendant committed such*
22 *crime as a result of an injury, including major depressive disorder,*
23 *polytrauma, post-traumatic stress disorder or traumatic brain injury,*
24 *connected to service in a combat zone, as defined in section 112 of the*
25 *federal internal revenue code of 1986, in the armed forces of the United*
26 *States of America;*

27 (6) *if subsection (a)(5) applies to the defendant, whether there is a*
28 *probability that the defendant will cooperate with and benefit from*
29 *inpatient or outpatient treatment from any treatment facility or program*
30 *operated by the United States department of defense, the United States*
31 *department of veterans affairs or the Kansas national guard with the*
32 *consent of the defendant, as a condition of diversion;*

33 ~~(5)~~ (7) whether the available diversion program is appropriate to the
34 needs of the defendant;

35 ~~(6)~~ (8) the impact of the diversion of the defendant upon the
36 community;

1 (7) (9) recommendations, if any, of the involved law enforcement
2 agency;

3 (8) (10) recommendations, if any, of the victim;

4 (9) (11) provisions for restitution; and

5 (10) (12) any mitigating circumstances.

6 (b) A city attorney shall not enter into a diversion agreement in lieu of
7 further criminal proceedings on a complaint alleging an alcohol related
8 offense if the defendant:

9 (1) Has previously participated in diversion of an alcohol related
10 offense;

11 (2) has previously been convicted of or pleaded nolo contendere to an
12 alcohol related offense in this state or has previously been convicted of or
13 pleaded nolo contendere to a violation of K.S.A. 8-2,144 or 8-1567 or
14 K.S.A. 2014 Supp. 8-1025, and amendments thereto, or of a law of another
15 state, or of a political subdivision thereof, which prohibits the acts
16 prohibited by those statutes; or

17 (3) during the time of the alleged alcohol related offense was
18 involved in a motor vehicle accident or collision resulting in personal
19 injury or death.

20 (c) *"Major depressive disorder," "polytrauma," "post-traumatic stress
21 disorder" and "traumatic brain injury" shall mean the same as such terms
22 are defined in K.S.A. 2014 Supp. 21-6630, and amendments thereto.*

23 Sec. 2. K.S.A. 2014 Supp. 21-6630 is hereby amended to read as
24 follows: 21-6630. (a) Upon motion of the defendant at the time of
25 conviction or prior to sentencing, a defendant convicted of a criminal
26 offense may assert that such defendant committed such offense as a result
27 of ~~mental illness~~ *an injury*, including *major depressive disorder,*
28 *polytrauma,* *post-traumatic stress disorder,* ~~stemming from or traumatic~~
29 *brain injury, connected to service in a combat zone in the United States*
30 *armed forces of the United States of America.* The court shall hold a
31 hearing to determine whether the defendant:

32 (1) Has served in the armed forces of the United States of America in
33 a combat zone, as defined in section 112 of the federal internal revenue
34 code of 1986. Proof of such service shall consist of a certification by the
35 executive director of the Kansas commission on veterans affairs in
36 accordance with K.S.A. 73-1209, and amendments thereto;

37 (2) ~~has separated from such armed forces with an honorable discharge~~
38 ~~or general discharge under honorable conditions;~~

39 (3) suffers from ~~mental illness~~ *injury*; and

40 (4) (3) ~~such mental illness was caused or exacerbated by events~~
41 ~~occurring during such defendant's service in a combat zone~~ *injury was*
42 *connected to service in a combat zone in the armed forces of the United*
43 *States of America.*

1 (b) (1) Except as provided in subsection (b)(2), if the court
2 determines that such defendant meets the criteria provided in subsection
3 (a) and such defendant's current crime of conviction and criminal history
4 fall within a presumptive nonprison category under the sentencing
5 guidelines, the court may order such defendant to undergo inpatient or
6 outpatient treatment from any treatment facility or program operated by
7 the United States department of defense, the ~~federal veterans'~~
8 ~~administration~~ *United States department of veterans affairs* or the Kansas
9 national guard ~~with the consent of the defendant~~, *if the defendant is*
10 *eligible for and consents to such treatment.*

11 (2) If the court determines that such defendant meets the criteria
12 provided in subsection (a), *such defendant is ineligible for treatment*
13 *pursuant to subsection (b)(1)* and such defendant meets the requirements
14 established in K.S.A. 2014 Supp. 21-6824, and amendments thereto, the
15 provisions of K.S.A. 2014 Supp. 21-6824, and amendments thereto, shall
16 apply, ~~except that in lieu of requiring such defendant to participate in a~~
17 ~~certified drug abuse treatment program as provided in K.S.A. 2014 Supp.~~
18 ~~75-52,144, and amendments thereto, the court may order such defendant to~~
19 ~~undergo drug abuse treatment from any treatment facility or program~~
20 ~~operated by the United States department of defense, the federal veterans'~~
21 ~~administration or the Kansas national guard with the consent of the~~
22 ~~defendant.~~

23 (c) Nothing in this section shall be construed to limit the court's
24 authority to:

25 (1) Order any other sanction pursuant to K.S.A. 2014 Supp. 21-6602
26 or 21-6604, and amendments thereto;

27 (2) order a mental examination pursuant to K.S.A. 22-3429, and
28 amendments thereto;

29 (3) order commitment pursuant to K.S.A. 22-3430 et seq., and
30 amendments thereto; or

31 (4) determine that a person is a mentally ill person subject to
32 involuntary commitment for care and treatment as defined in K.S.A. 59-
33 2946, and amendments thereto.

34 (d) As used in this section:

35 (1) ~~"Mental illness" means a mental disorder manifested by a~~
36 ~~clinically significant behavioral or psychological syndrome or pattern and~~
37 ~~associated with either a painful symptom or an impairment in one or more~~
38 ~~important areas of functioning, and involving substantial behavioral,~~
39 ~~psychological or biological dysfunction, to the extent that the person is in~~
40 ~~need of treatment; and~~

41 ~~(2) "Major depressive disorder" and "post-traumatic stress disorder"~~
42 ~~means posttraumatic stress disorder as mean the same as such terms are~~
43 defined in the diagnostic and statistical manual of mental disorders, fifth

1 edition (DSM-5, 2013), of the American psychiatric association and that
2 occurred as a result of events during the ~~person's~~ *defendant's* service in one
3 or more combat zones.

4 (2) *"Polytrauma" means injury to multiple body parts and organ*
5 *systems that occurred as a result of events during the defendant's service*
6 *in one or more combat zones.*

7 (3) *"Traumatic brain injury" means injury to the brain caused by*
8 *physical trauma that occurred as a result of events during the defendant's*
9 *service in one or more combat zones.*

10 (e) This section shall be a part of and supplemental to the Kansas
11 criminal code.

12 Sec. 3. K.S.A. 2014 Supp. 21-6815 is hereby amended to read as
13 follows: 21-6815. (a) Except as provided in subsection (b), the sentencing
14 judge shall impose the presumptive sentence provided by the sentencing
15 guidelines unless the judge finds substantial and compelling reasons to
16 impose a departure sentence. If the sentencing judge departs from the
17 presumptive sentence, the judge shall state on the record at the time of
18 sentencing the substantial and compelling reasons for the departure.

19 (b) Subject to the provisions of ~~subsection (b)~~ of K.S.A. 2014 Supp.
20 21-6817(b), and amendments thereto, any fact that would increase the
21 penalty for a crime beyond the statutory maximum, other than a prior
22 conviction, shall be submitted to a jury and proved beyond a reasonable
23 doubt.

24 (c) (1) Subject to the provisions of subsections (c)(3) and (e), the
25 following nonexclusive list of mitigating factors may be considered in
26 determining whether substantial and compelling reasons for a departure
27 exist:

28 (A) The victim was an aggressor or participant in the criminal
29 conduct associated with the crime of conviction.

30 (B) The offender played a minor or passive role in the crime or
31 participated under circumstances of duress or compulsion. This factor may
32 be considered when it is not sufficient as a complete defense.

33 (C) The offender, because of physical or mental impairment, lacked
34 substantial capacity for judgment when the offense was committed. The
35 voluntary use of intoxicants, drugs or alcohol does not fall within the
36 purview of this factor.

37 (D) The defendant, or the defendant's children, suffered a continuing
38 pattern of physical or sexual abuse by the victim of the offense and the
39 offense is a response to that abuse.

40 (E) The degree of harm or loss attributed to the current crime of
41 conviction was significantly less than typical for such an offense.

42 (F) *The offender committed such crime as a result of an injury,*
43 *including major depressive disorder, polytrauma, post-traumatic stress*

1 *disorder or traumatic brain injury, connected to service in a combat zone,*
2 *as defined in section 112 of the federal internal revenue code of 1986, in*
3 *the armed forces of the United States of America. As used in this*
4 *subsection, "major depressive disorder," "polytrauma," "post-traumatic*
5 *stress disorder" and "traumatic brain injury" shall mean the same as such*
6 *terms are defined in K.S.A. 2014 Supp. 21-6630, and amendments thereto.*

7 (2) Subject to the provisions of subsection (c)(3), the following
8 nonexclusive list of aggravating factors may be considered in determining
9 whether substantial and compelling reasons for departure exist:

10 (A) The victim was particularly vulnerable due to age, infirmity, or
11 reduced physical or mental capacity which was known or should have
12 been known to the offender.

13 (B) The defendant's conduct during the commission of the current
14 offense manifested excessive brutality to the victim in a manner not
15 normally present in that offense.

16 (C) The offense was motivated entirely or in part by the race, color,
17 religion, ethnicity, national origin or sexual orientation of the victim or the
18 offense was motivated by the defendant's belief or perception, entirely or
19 in part, of the race, color, religion, ethnicity, national origin or sexual
20 orientation of the victim whether or not the defendant's belief or perception
21 was correct.

22 (D) The offense involved a fiduciary relationship which existed
23 between the defendant and the victim.

24 (E) The defendant, 18 or more years of age, employed, hired, used,
25 persuaded, induced, enticed or coerced any individual under 16 years of
26 age to:

27 (i) Commit any person felony;

28 (ii) assist in avoiding detection or apprehension for commission of
29 any person felony; or

30 (iii) attempt, conspire or solicit, as defined in K.S.A. 2014 Supp. 21-
31 5301, 21-5302 and 21-5303, and amendments thereto, to commit any
32 person felony.

33 That the defendant did not know the age of the individual under 16
34 years of age shall not be a consideration.

35 (F) The defendant's current crime of conviction is a crime of extreme
36 sexual violence and the defendant is a predatory sex offender. As used in
37 this subsection:

38 (i) "Crime of extreme sexual violence" is a felony limited to the
39 following:

40 (a) A crime involving a nonconsensual act of sexual intercourse or
41 sodomy with any person;

42 (b) a crime involving an act of sexual intercourse, sodomy or lewd
43 fondling and touching with any child who is 14 or more years of age but

1 less than 16 years of age and with whom a relationship has been
2 established or promoted for the primary purpose of victimization;

3 (c) a crime involving an act of sexual intercourse, sodomy or lewd
4 fondling and touching with any child who is less than 14 years of age;

5 (d) aggravated human trafficking, as defined in ~~subsection (b) of~~
6 K.S.A. 2014 Supp. 21-5426(b), and amendments thereto, if the victim is
7 less than 14 years of age; or

8 (e) commercial sexual exploitation of a child, as defined in K.S.A.
9 2014 Supp. 21-6422, and amendments thereto, if the victim is less than 14
10 years of age.

11 (ii) "Predatory sex offender" is an offender who has been convicted of
12 a crime of extreme sexual violence as the current crime of conviction and
13 who:

14 (a) Has one or more prior convictions of any crimes of extreme
15 sexual violence. Any prior conviction used to establish the defendant as a
16 predatory sex offender pursuant to this subsection shall also be counted in
17 determining the criminal history category; or

18 (b) suffers from a mental condition or personality disorder which
19 makes the offender likely to engage in additional acts constituting crimes
20 of extreme sexual violence.

21 (iii) "Mental condition or personality disorder" means an emotional,
22 mental or physical illness, disease, abnormality, disorder, pathology or
23 condition which motivates the person, affects the predisposition or desires
24 of the person, or interferes with the capacity of the person to control
25 impulses to commit crimes of extreme sexual violence.

26 (G) The defendant was incarcerated during the commission of the
27 offense.

28 (H) The crime involved two or more participants in the criminal
29 conduct, and the defendant played a major role in the crime as the
30 organizer, leader, recruiter, manager or supervisor.

31 In determining whether aggravating factors exist as provided in this
32 section, the court shall review the victim impact statement.

33 (3) If a factual aspect of a crime is a statutory element of the crime or
34 is used to subclassify the crime on the crime severity scale, that aspect of
35 the current crime of conviction may be used as an aggravating or
36 mitigating factor only if the criminal conduct constituting that aspect of the
37 current crime of conviction is significantly different from the usual
38 criminal conduct captured by the aspect of the crime.

39 (d) In determining aggravating or mitigating circumstances, the court
40 shall consider:

41 (1) Any evidence received during the proceeding;

42 (2) the presentence report;

43 (3) written briefs and oral arguments of either the state or counsel for

1 the defendant; and

2 (4) any other evidence relevant to such aggravating or mitigating
3 circumstances that the court finds trustworthy and reliable.

4 (e) Upon motion of the prosecutor stating that the defendant has
5 provided substantial assistance in the investigation or prosecution of
6 another person who is alleged to have committed an offense, the court may
7 consider such mitigation in determining whether substantial and
8 compelling reasons for a departure exist. In considering this mitigating
9 factor, the court may consider the following:

10 (1) The court's evaluation of the significance and usefulness of the
11 defendant's assistance, taking into consideration the prosecutor's
12 evaluation of the assistance rendered;

13 (2) the truthfulness, completeness and reliability of any information
14 or testimony provided by the defendant;

15 (3) the nature and extent of the defendant's assistance;

16 (4) any injury suffered, or any danger or risk of injury to the
17 defendant or the defendant's family resulting from such assistance; and

18 (5) the timeliness of the defendant's assistance.

19 Sec. 4. K.S.A. 2014 Supp. 22-2908 is hereby amended to read as
20 follows: 22-2908. (a) In determining whether diversion of a defendant is in
21 the interests of justice and of benefit to the defendant and the community,
22 the county or district attorney shall consider at least the following factors
23 among all factors considered:

24 (1) The nature of the crime charged and the circumstances
25 surrounding it;

26 (2) any special characteristics or circumstances of the defendant;

27 (3) whether the defendant is a first-time offender and if the defendant
28 has previously participated in diversion, according to the certification of
29 the Kansas bureau of investigation or the division of vehicles of the
30 department of revenue;

31 (4) whether there is a probability that the defendant will cooperate
32 with and benefit from diversion;

33 (5) whether the available diversion program is appropriate to the
34 needs of the defendant;

35 (6) *whether there is a probability that the defendant committed such*
36 *crime as a result of an injury, including major depressive disorder,*
37 *polytrauma, post-traumatic stress disorder or traumatic brain injury,*
38 *connected to service in a combat zone, as defined in section 112 of the*
39 *federal internal revenue code of 1986, in the armed forces of the United*
40 *States of America;*

41 (7) *if subsection (a)(6) applies to the defendant, whether there is a*
42 *probability that the defendant will cooperate with and benefit from*
43 *inpatient or outpatient treatment from any treatment facility or program*

1 *operated by the United States department of defense, the United States*
2 *department of veterans affairs or the Kansas national guard with the*
3 *consent of the defendant, as a condition of diversion;*

4 ~~(6)~~ (8) the impact of the diversion of the defendant upon the
5 community;

6 ~~(7)~~ (9) recommendations, if any, of the involved law enforcement
7 agency;

8 ~~(8)~~ (10) recommendations, if any, of the victim;

9 ~~(9)~~ (11) provisions for restitution; and

10 ~~(10)~~ (12) any mitigating circumstances.

11 (b) A county or district attorney shall not enter into a diversion
12 agreement in lieu of further criminal proceedings on a complaint if:

13 (1) The complaint alleges a violation of K.S.A. 8-1567 or K.S.A.
14 2014 Supp. 8-1025, and amendments thereto, and the defendant: (A) Has
15 previously participated in diversion upon a complaint alleging a violation
16 of that statute or an ordinance of a city in this state which prohibits the acts
17 prohibited by that statute; (B) has previously been convicted of or pleaded
18 nolo contendere to a violation of that statute or a violation of a law of
19 another state or of a political subdivision of this or any other state, which
20 law prohibits the acts prohibited by that statute; or (C) during the time of
21 the alleged violation was involved in a motor vehicle accident or collision
22 resulting in personal injury or death;

23 (2) the complaint alleges that the defendant committed a class A or B
24 felony or for crimes committed on or after July 1, 1993, an off-grid crime,
25 a severity level 1, 2 or 3 felony for nondrug crimes, a drug severity level 1
26 or 2 felony for drug crimes committed on or after July 1, 1993, but prior to
27 July 1, 2012, or a drug severity level 1, 2 or 3 felony committed on or after
28 July 1, 2012; or

29 (3) the complaint alleges a domestic violence offense, as defined in
30 K.S.A. 2014 Supp. 21-5111, and amendments thereto, and the defendant
31 has participated in two or more diversions in the previous five year period
32 upon complaints alleging a domestic violence offense.

33 (c) A county or district attorney may enter into a diversion agreement
34 in lieu of further criminal proceedings on a complaint for violations of
35 article 10 of chapter 32 of the Kansas Statutes Annotated, and amendments
36 thereto, if such diversion carries the same penalties as the conviction for
37 the corresponding violations. If the defendant has previously participated
38 in one or more diversions for violations of article 10 of chapter 32 of the
39 Kansas Statutes Annotated, and amendments thereto, then each subsequent
40 diversion shall carry the same penalties as the conviction for the
41 corresponding violations.

42 (d) *As used in this section, "major depressive disorder,"*
43 *"polytrauma," "post-traumatic stress disorder" and "traumatic brain*

1 *injury" shall mean the same as such terms are defined in K.S.A. 2014*
2 *Supp. 21-6630, and amendments thereto.*

3 Sec. 5. K.S.A. 2014 Supp. 12-4415, 21-6630, 21-6815 and 22-2908
4 are hereby repealed.

5 Sec. 6. This act shall take effect and be in force from and after its
6 publication in the statute book.