

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 A.M. on March 9, 2005, in Room 123-S of the Capitol.

All members were present except:

Barbara Allen- excused

David Haley- excused

Committee staff present:

Mike Heim, Kansas Legislative Research Department

Jill Wolters, Office of Revisor of Statutes

Helen Pedigo, Office of Revisor of Statutes

Nancy Lister, Committee Secretary

Conferees appearing before the committee:

Randall Hodgkinson, Attorney

Representative Kathe Decker

Kyle Smith, Special Agent, Kansas Bureau of Investigation

John Wheeler, Finney County Attorney

Mark Gleeson, Office of Judicial Administration

Tim Madden, Kansas Department of Corrections

Others attending:

See attached list.

Chairman Vratil opened the hearing on **HB 2304**.

HB 2304 Criminal act to ingest or inject certain controlled substances

Proponents:

Representative Kathe Decker stated that last year the House passed a bill dealing with internal possession of drugs. The bill went to an interim Judiciary committee hearing during the summer. It was suggested that the bill be simplified to add the words “ingest or inject” into law to define internal possession of a controlled substances. Representative Decker felt this would be another tool for law enforcement to have available. (Attachment 1)

Kyle Smith, Special Agent for the Kansas Bureau of Investigation, testified in support the bill. Mr. Smith stated that in the Kansas Supreme Court decision, *State v. Flinchpaugh*, the court held that if a person ingested controlled substances, then the person no longer possessed them. Since then, the presence of controlled substances in a person’s system could not be the basis for the charge of possession. This bill would reverse the *Flinchpaugh* decision by adding “ingestion” to the existing crimes involving ‘possession’. (Attachment 2)

Chairman Vratil questioned whether Mr. Smith had seen the bed space impact on the bill. Ms. Patricia Biggs, Executive Director of the Kansas Sentencing Commission, stated the impact was difficult to accurately assess. Chairman Vratil stated that since these are non-violent drug offenses, they would be subject to the provisions of **SB 123**, which might blunt any significant bed space impact.

Senator Bruce questioned whether there would be situations where there may be drugs found in a person’s system that are not of a significant level to prosecute. Senator Betts requested an explanation of page 2, line 13. Mr. Smith stated that if one looks first at line 6, that it states it is a Class A misdemeanor for first offense; then for a second offense, such as for marijuana, it is a severity level 4; the same sentencing structure applies to drugs as marijuana. Senator Journey questioned what minimum levels or false positives would mean in prosecuting. Mr. Smith stated that there would have to be some practical considerations in determining whether to prosecute. For example, the state has to prove beyond a reasonable doubt, so a few nanograms of a controlled substance in the blood or urine may not be pursued. Mr. Smith stated that he could see where there might be a problem with marijuana, since it lingers in the system for more than 30 days. Senator Journey stated that people could be claim a defense of “second hand smoke” in their system . Mr. Smith

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stated that normally there would be other signs, such as a DUI, a wreck, drug paraphernalia, that would substantiate a case.

Chairman Vratil closed the hearing on **HB 2304** and opened the hearing on **HB 2262**.

HB 2262 Legal holidays include holidays observed by the supreme court by order

Proponent:

Mr. Randall Hodgkinson, Deputy Appellate Defender, stated that he was testifying not in his capacity as a public defender, but just as an attorney. Mr. Hodgkinson described an experience he had in regards to filing a legal appeal. On Thursday, December 23, 2004, he received an unfavorable decision from the Court of Appeals. According to the Appellate rules, Mr. Hodgkinson had ten days to file a motion for rehearing to ask the Court of Appeals to reconsider that decision. Christmas fell on Saturday, and as a state employee, December 24, 2004, was a day off. Similarly, December 31, 2004, was a day off. The court was closed also on these days. New Year's Day was on Saturday. The time period for appeal is 10 days or less, excluding weekends and holidays. When Mr. Hodgkinson counted the days to the deadline, he included both December 24 and December 31 because he thought they were holidays. It turned out these days were not holidays, under the interpretation of legal holidays, as given by the case in his written testimony, *City of Lawrence v. McCormick*. (Attachment 3) The Supreme Court said that the legislature has defined what the holidays are, and the legal holiday for Christmas, for example, is the date of December 25th, and it does not matter that it falls on a Saturday. If the legislature wants to have "observed" holidays be legal holidays, it is up to them to do that.

Mr. Hodgkinson stated that the bill says whenever the courthouse is closed, it should be a legal holiday. This would eliminate confusion and help clarify the days not to count when appropriately assessing statutory deadlines. Chairman Vratil questioned whether the bill should state language "or observed as a holiday by order of the Supreme Court or by the Governor". Mr. Hodgkinson concurred but noted that the bill isn't perfect, and that even the legislature may set its own holidays.

Chairman Vratil closed the hearing on **HB 2262** and opened the hearing on **HB 2386**.

HB 2386 Unlawful sexual relations includes court services officers and community correctional officers

Proponents:

John Wheeler, Finney County Attorney, testified in support of the bill. When K.S.A. 21-3520 was passed in 1993, it prohibited consensual sexual relations between department of corrections employees with inmates and between state parole officers and persons under their supervision. Over a period of years, it was amended to include jailers, juvenile justice officials, law enforcement officers and even teachers. Mr. Wheeler stated that the bill adds two groups that he believes are conspicuously absent from the prohibitions, and these are court service officers and community corrections officers in new Section 1 (9) and (10). (Attachment 4)

Chairman Vratil requested that Ms. Wolters provide a balloon amendment defining a law enforcement officer, a court services officer and community corrections services officer, along with a reference to a statute or a narrative definition.

Mark Gleeson, Family and Children Program Coordinator in the Office of Judicial Administration (OJA), stated that the OJA supports the bill and the message it conveys for creating and maintaining a high degree of integrity and confidence among those who supervise offenders. (Attachment 5) He questioned whether the language "under supervision of the agency," stating there are times where not all court service officers would know who is under supervision. He would like to see that tightened and the issue addressed of when a court service officer unknowingly has a relationship with someone under supervision.

Senator Journey stated that Mr. Gleeson brought up a valid point. In small communities, everyone knows everyone; however, in larger cities, it is possible that a court service officer could meet someone, such as in a bar, and the offender doesn't volunteer that they are being supervised. Chairman Vratil requested that Ms. Wolters prepare an amendment to add that it is a violation to "knowingly" have relations with a supervised offender.

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Tim Madden, Kansas Department of Corrections, stated he had provided to the Committee testimony from Secretary Roger Werholtz in support of the bill. Due to the use of contract services by court services and community corrections agencies for surveillance, home and employment visits, and other supervision services, the Department believes the employees of contractors who provide "direct supervision and control" over an offender should likewise be prohibited from engaging in consensual sexual relations with that offender. Inclusion of those contract employees, as provided by the House amendment, is consistent with the provisions of K.S.A. 21-3520 currently applicable to the employees of contractors providing services on behalf of jails, the department, SRS and the Juvenile Justice Authority.

(Attachment 6)

Chairman Vratil closed the hearing on **HB 2386**.

Final Action:

SB 179 Enhancing penalties for offenses against children

Chairman Vratil called to the Committee's attention the bed space impact prepared by the Kansas Sentencing Commission. The Chairman stated that the bill, among other things, increased the severity level for aggravated indecent solicitation of a child from a severity level six to a severity level five. The bill also takes indecent solicitation of a child from a severity level seven to a severity level six. The new bed space report was premised on the assumption that the Committee would amend indecent solicitation of a child to take the severity level back to a level seven. The bed space report indicated a significant bed space impact, with 18 prison additions in 2006, and 20 additions in 2015; bed space would be 20 additions in 2006 and 113 additional prison beds by 2015. Chairman Vratil reminded the Committee of the previously made amendments dealing with other areas of the bill.

Senator Goodwin stated that in the past two or three years she has heard that prison bed space should not be considered when trying to make laws to protect the public; however, the reality was if bills were passed that create significant bed space impact, then the Committee should also be amenable to raising taxes and to raising new revenues for prisons. She stated that the bill is two-pronged- passing a law to increase the severity levels and funding new prisons. Senator Goodwin stated that she has not seen evidence that this year's legislature was receptive to adding any more money into the budget. Because of the prison bed impact, Senator Goodwin stated she would not be able to support the bill.

Senator Betts stated that he was concerned that if appropriations were found to build new prisons that there should be funding to help provide some development and education for offenders, to help them in the transition back to living outside prison.

Senator Schmidt stated that he shares Senator Goodwin's view, that the legislature has to carry the responsibility to provide space with the responsibility to provide public safety. There are additional options to providing space, private prisons, an option that is being actively considered in Ways and Means Committee, so he is in favor of the bill, and it is good public safety policy. He believes that we will be able to step up this session and provide the other half of the balance in terms of space for offenders, and he will support the bill.

Senator Donovan asked if the severity level was dropped, why there was not more of a reduction in prison bed space. Patricia Biggs, Executive Director of the Kansas Sentencing Commission and guest in the meeting, stated that because the severity level drops, there is presumptive probation, so not many of those individuals are going to prison. Senator Donovan stated that with the recently passed Methamphetamine bill, he hoped that there might be fewer people involved in the drug business, and there would not be as many going to jail. He stated that the Sub-Committee and he feel that this issue is too important to not take action on it now. Senator Donovan stated he would prefer to pass the bill with all the severity levels kept where they were originally in the bill and strongly urged the Committee to take favorable action.

Chairman Vratil stated that the question before the Committee was should they reduce the severity level for indecent solicitation of a child, page 1, line 22, where the numeral 7 has been stricken and the numeral 6 is inserted. A motion was made to take indecent solicitation of a child from a level six to a level seven, in order to reduce bed space impact. Senator Journey moved, seconded by Senator Betts, but the motion failed.

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There was a motion to recommend the bill favorably as amended out of Committee. Senator Donovan moved, seconded by Senator O'Connor, and the motion passed. Senator Goodwin requested that her vote of "no" on the motion be recorded.

Chairman Vratil adjourned the meeting at 10:30 A.M. The next meeting is scheduled for March 10, 2005.