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TESTIMONY IN OPPOSITION TO SENATE BILL 40

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My name is Shane Rolf, I have been a bail bondsman in Olathe, Kansas, for the past 30 years. I am the Executive Vice President of the Kansas Bail Agents Association. I am providing this testimony on behalf of the KBAA in Opposition to Senate Bill 40 in its current form.

About KBAA

The KBAA is dedicated to supporting and enhancing the entire bail bond industry, through five key objectives:

1. Promoting legislation and rules which will advance the profession.
2. Combating legislation and rules which may harm the profession.
3. Promoting and maintaining professional and ethical standards for the profession.
4. Improving relations between the industry and the legal community - attorneys, judges, clerks and sheriffs - and the general public, both locally and nationally.
5. To educate and train both the Professional Bail Agent as well as the Professional Recovery Agent.

As bail agents we are intimately familiar with the pre-trial release process and are always attentive to changes in the statutes contained in Chapter 22, Article 28 and they deal primarily with our profession and our clientele.

To that end, the KBAA offers its testimony in opposition to Senate Bill 40 in its current form. While we certainly agree that the Legislature should establish some protocol for addressing the necessary procedures for revocation of a pre-trial bond, we feel that this bill, absent changes, is not the appropriate answer.

The Proposed Language is Unconstitutional

We believe that the scenario envisioned by this new language is unconstitutional. It is a usurpation of judicial authority at worst, or an unlawful delegation of judicial authority at best. The current language of the statute indicates that the bond is considered "revoked" by the execution of a warrant for a defendant's arrest for a violation of a bond condition. This presupposes that there has been judicial review of the alleged violation by virtue of the issued warrant. This provides at least a modicum of due process, in that there is judicial review and at least a minimal level of probable cause to issue the warrant in the first place. The additional proposed language would allow a revocation by "an arrest ***without*** **a warrant** for a violation of a bond condition as provided in this subsection. Any pretrial services supervision officer may arrest the defendant without a warrant or may deputize any other officer with power of arrest to do so by giving the officer a written or verbal statement setting forth that the defendant has, **in the judgment of the pretrial services supervision officer**, violated the conditions

of the defendant's bond." This language completely removes the Court from any decision making regarding this bond revocation, save for setting a new bond.

The Kansas Attorney General issued an opinion on this very topic in 1993: Opinion 93-11: "*In our opinion a statute which granted unilateral authority to a court services officer … to restrict the liberty of an individual in derogation of a court order would run afoul of basic due process considerations."* This proposed language does exactly that. It provides absolutely no due process to the unconvicted pretrial defendant. It doesn't even contemplate involvement of the Court, not even retroactively. The Pretrial Services Supervision Officer (whatever that is) simply substitutes his judgment for that of the Court and the bond is revoked.

The Federal courts in *US v Delker,* 757 F.2d 1390 (1985), found that:

> "Pretrial detention implicates a liberty interest and thus may not be imposed contrary to the mandates of procedural due process." While due process might be a fickle thing, dependent upon its circumstances, the standard is certainly not met by excising the Court from the process entirely.

Two other states, Georgia and Tennessee, addressed challenges to the constitutionality of revocation of pretrial bail.

In *Hood v. Carsten*, 481 S.E.2d 525 (1997), the Georgia Supreme Court held:

> "We are unaware of and the parties have not presented any specific guidelines under Georgia law pertaining to a trial court's power to revoke a bond. It is clear that **trial courts** have such power and the **decision to revoke the appearance bond of a person charged with stalking lies within the discretion of the trial judge**. … Because a bond revocation involves the deprivation of one's liberty, however, the trial court's decision to revoke bond must comport with at least minimal state and federal due process requirements.
>
> Our decision in this case turns on the trial court's complete failure to provide a meaningful opportunity to be heard. We do not hold or intimate in this opinion that a court is precluded from ordering the arrest of a defendant believed to have violated a condition of bond where the arrest order is supported by the personal knowledge of the judge or by affidavit or testimony establishing a reasonable belief that a violation of a condition of bond has occurred."
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> In short, the ***Court*** clearly has the inherent authority to issue a warrant for a violation of bond conditions. This is consistent with the current language found in K.S.A. 22-2807, which presumes judicial involvement in the issuance of a warrant. {Emphasis added}

In *State v. Burgins*, 464 S.W.3d 298 (2015), the Tennessee Supreme Court addressed a challenge to its statute that permitted a Court to revoke a pretrial bond. This was a matter of first impression for them and the Court in its ruling essentially fashioned a minimum procedure for the revocation of a pretrial bond. The Court held:

> [P]retrial bail revocation implicates liberty interests within the purview of the Fourteenth Amendment. Accordingly, the procedure to revoke pretrial bail must meet the requirements of due process embodied within the Fourteenth Amendment and article I, section 8 of the Tennessee Constitution.
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> After a thorough review of applicable law, we hold that a pretrial bail revocation proceeding under Tennessee Code Annotated section 40-11-141(b) can be **initiated by the trial judge**, *sua sponte*, or **by the State filing a written motion setting forth at least one statutory ground for revocation**. The defendant is entitled to 1) written notice of the alleged grounds for revocation and the date, place, and time of the hearing, 2) disclosure of the evidence against him or her, 3) the meaningful opportunity to be heard and to present evidence, 4) the right to confront and cross-examine witnesses, and 5) the right to make arguments in his or her defense. The trial court must conduct an evidentiary hearing at which the State is required to prove, by a preponderance of the evidence, sufficient ground(s) under Tennessee Code Annotated section 40-11-141(b) to support a revocation.

None of these factors are present in the current language proposed in Senate Bill 40 and as such the bill would most certainly fail in any Constitutional challenge.

The position of Pretrial Services Supervision Officer is meaningless.

Not only does this bill propose to usurp judicial authority, it proposes to invest that authority in some unknown, heretofore unheard of position: a Pretrial Services Supervision Officer. What exactly is a "*pretrial services supervision officer?"* Who does a PSSO work for? What are the restrictions on who can be a PSSO? Is this position an arm of the Court, or an arm of the Executive Branch? There are no statutory definitions for this position. There appear to be no statutory restrictions upon who can claim to be a PSSO.

On the other hand, a "Court Services Officer" is defined in various places throughout the Kansas Statutes, including K.S.A. 21-5413 which defines a CSO as: "court services officer" means an employee of the Kansas judicial branch or local judicial district responsible for supervising, monitoring or writing reports relating to adults or juveniles as assigned by the court, or performing related duties as assigned by the court.

As there is a statutory definition for a Court Services Officer, CSO's are protected (and constrained) by statute. For instance, a battery against a CSO carries the same penalty as a battery against a law enforcement officer. Conversely, there are statutory protections afforded to the public *from* CSO's. For instance, CSO's, like bail bondsmen, are specifically prohibited from engaging in consensual sexual relations with those under their charge [K.S.A. 21-5512(10)].

None of these protections are in place for this statutorily undefined position of "*pretrial services supervision officer,"* Keep in mind that this bill proposes to invest this murky position with **arrest power** and grant it the authority to **command law enforcement** to arrest and incarcerate certain individuals.

Additionally, K.S.A. 22-2802(1)(e) states that the Court may "place the person under the supervision of a **court services officer** responsible for monitoring the person's compliance with any conditions of release ordered by the magistrate. The magistrate may order the person to pay for any costs associated with the supervision provided by the court services department in an amount not to exceed $15 per week of such supervision. The magistrate may also order the person to pay for all other costs associated with the supervision and conditions for compliance in addition to the $15 per week."

So, whatever a Pretrial Services Supervision Officer is, it lacks the authority to supervise defendants who have been released pursuant to K.S.A. 22-2802, because that authority is assigned by statute to a Court Services Officer.

Obviously, very little thought went into crafting the language in this legislation.

These changes are unnecessary, or can be solved in other ways.

The Courts currently have the inherent authority to issue warrants for those individuals who appear to have violated conditions of pretrial release. The Courts do this on a regular basis now. Warrants can be obtained electronically, as many search warrants are, presumably in rapid fashion. CSO's are typically available only during regular business hours, much the same as the courts. Almost all districts have a duty judge that could order a warrant at any time.

A violation of a "no contact" order would constitute new criminal act [see K.S.A. 21-5924(4)] and can be addressed by law enforcement immediately. Therefore, there is no need to vest authority with a CSO to counter this concern.

Seemingly, the only reason to attempt to expedite this process (by trampling all over the due process rights of the accused) is some concern that the defendant would slip away after – for instance – failing a drug test and the Court would be unable to locate the defendant to ensure his future appearance.

This concern can be easily remedied by altering K.S.A. 22-2802 to clarify that if the defendant is risky enough to require "Bond Supervision" as set out in section (1)(e), then that individual should not be eligible for release on bond without sureties. That way, if the defendant were to fail to appear, someone with a vested financial interest would be involved to make sure the defendant was returned.

Alternative Language (attached)

If this committee is interested in going forward with this bill, the KBAA has proposed language that it believes will correct the Constitutional concerns, while still providing a court services officer with a limited ability to arrest and detain the defendant for purposes of having a hearing on the validity of the bond violation claims.

This language change does not "revoke" the bail upon arrest by a CSO, but allows the CSO to detain in anticipation of a hearing by the court. This authority is limited as follows:

1. The violation must be a material violation. Not simply that the defendant was 5 minutes late to his meeting or some other minor annoyance, but the defendant has actually violated a condition placed upon him by the Court.
2. The violation must be non-financial in nature. A defendant who is behind in his supervision payment cannot be summarily arrested. This fact can, of course, be submitted to the court for proper determination as to whether the non-payment was willful. This is a real concern as many defendants are currently unable to post bond due to outstanding fees they owe to Court Services programs.
3. The violation has to take place in the presence of the Court Services Officer. This will ensure that failed drug tests or other immediate violations can be addressed, but angry ex-girlfriend claims over the phone can be addressed by the Court.
4. Arrest authority would be limited to situations where a warrant cannot be promptly obtained. A court ordered warrant should be the default for any detention related to bond revocation and, as such, arrest by the CSO must be limited to more urgent situations. A defendant who stops meeting the CSO should have a warrant issued, not receive a visit from a Court Services "flying squad." It there is time to leave the office to arrest the defendant, then there is time to secure a warrant.

This language also specifies that in the event a bond is revoked, or the defendant is placed into custody by a CSO, any future bonds would be limited to cash or surety bonds, as the defendant has demonstrated his unreliability for less stringent release.

CONCLUSION

Clearly, the current language will not stand up to constitutional muster and as the language stands, KBAA cannot support it and urges this committee not to move the bill forward.

If the Committee feels that granting CSO's arrest authority over defendants under supervision pursuant to K.S.A. 22-2802(1)(e), is needed, then we respectfully request that you consider the alternative language we have proposed herein.

ATTACHMENT

AN ACT concerning criminal procedure; relating to appearance bonds; revocation; amending K.S.A. 2015 Supp. 22-2807 and repealing the existing section.
Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 2015 Supp. 22-2807 is hereby amended to read as follows: 22-2807.

~~(1)~~ *(a)* If a defendant fails to appear as directed by the court and guaranteed by an appearance bond, the court in which the bond is deposited shall declare a forfeiture of the bail.

~~(2)~~ *(b)* An appearance bond may only be forfeited by the court upon a failure to appear.

If a defendant violates any other condition of bond, the bond may be revoked and the defendant remanded to custody. An appearance bond is revoked by the execution of a warrant for a defendant's arrest for a violation of a bond condition. If an appearance bond is revoked, the magistrate shall ~~forthwith~~ *promptly* set a new bond pursuant to requirements of K.S.A. 22-2802, and amendments thereto.

(c) If a material, non-financial, violation of a bond condition occurs in the presence of a court services officer who is supervising the defendant pursuant to K.S.A. 22-2802(1)(e), and a warrant cannot be promptly obtained, the court services officer may arrest the defendant without a warrant or may deputize any other officer with power of arrest to do so by giving the officer a written or verbal statement setting forth that the defendant has, in the judgment of the court services officer, violated the conditions of the defendant's bond. A written statement delivered to the official in charge of a county jail or other place of detention shall be sufficient warrant for the detention of the defendant. After making an arrest, the court services officer shall present to the detaining authorities a similar statement of the circumstances of the violation. Upon arrest and detention pursuant to this subsection, the court services officer shall immediately notify the court and shall submit in writing a report showing in what manner the defendant has violated the conditions of release. The Court shall promptly set a new bond pursuant to requirements of K.S.A. 22-2802, and amendments thereto and set the case for a hearing on the violation. A defendant whose prior bond has been revoked or who has been arrested by a court services officer as set out herein shall not be eligible for release pursuant to his own recognizance as set out on K.S.A. 22-2802(6).

~~(3)~~ *(d)* The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture. If the surety can prove that the defendant is incarcerated somewhere within the United States prior to judgment of default by providing to the court a written statement, signed by the surety under penalty of perjury, setting forth details of such incarceration, then the court shall set aside the forfeiture. Upon the defendant's return, the surety may be ordered to pay the costs of that return.

~~(4)~~ *(e)* When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. If the forfeiture has been decreed by a district magistrate judge and the amount of the bond exceeds the limits of the civil jurisdiction prescribed by law for a district magistrate judge, the judge shall notify the chief judge in writing of the forfeiture and the matter shall be assigned to a district judge who, on motion, shall enter a judgment of default. By entering into a bond the obligors submit to the jurisdiction of any court having power to enter judgment upon default and irrevocably appoint the clerk of that court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and notice thereof may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses. No judgment may be entered against the obligor in an appearance bond until more than 60 days after notice is served as provided herein. No judgment may be entered against the obligor in an appearance bond more than two years after a defendant's failure to appear.

~~(5)~~ *(f)* After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in subsection ~~(3)~~ *(d)*.

Sec. 2. K.S.A. 2015 Supp. 22-2807 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.