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February 9, 2018

Senate Judiciary Committee
Attn: Senator Richard E. Wilborn
State Capitol, Ste. 541-E
Topeka, KS 66612

RE: Testimony in Opposition to SB 374

Introduction

My name is Patrick Dunn. I have been an attorney in Kansas practicing in the field of criminal defense appeals for over 20 years. I was the defense attorney in *State v. Ryce*, 303 Kan. 899, 368 P.3d 342 (2016), adhered to on reh'g, 306 Kan. 682, 396 P.3d 711 (2017). I am submitting this testimony against S.B. 374 as an attorney, lifelong Kansas citizen, and father of two young children.

Section 12, and any references to K.S.A. 8-1025, should be removed from the bill

The prior version of K.S.A. 8-1025 was held unconstitutional under both the United States and Kansas Constitutions in *Ryce* as a due process violation based upon its forced one to give up Fourth Amendment rights. Although the *Ryce* Court ultimately recognized the United States Supreme Court's holding in *Birchfield v. North Dakota*, -- U.S. --, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), that warrantless breath testing was permissible as a search incident to arrest, it did not address the propriety thereof under § 15 of the Bill of Rights to the Kansas Constitution. Because the holding in *Birchfield* was flawed, it is likely it would not stand up to scrutiny under the Kansas Constitution.

Nor did *Ryce* address how criminalizing test refusals would violate the Fifth Amendment to the United States Constitution or it corresponding provision in § 10 of the Bill of Rights to the Kansas Constitution. Specifically, one must give a statement when asked to submit to chemical testing. That person's answer forms the basis of the charge under K.S.A. 8-1025, so it constitutes self-incrimination. As such, it likely cannot stand up to constitutional scrutiny either.

Many people were charged under K.S.A. 8-1025 that could simply have been charged under K.S.A. 8-1567. By not doing so, people were left in limbo for nearly five years, and many were not even prosecuted who could have been. Enacting another version will open this up to another round of litigation, and again allowing some not to ultimately be prosecuted who should have been. And the reality is that the current DUI statute is more than adequate:

- If an individual does not submit to testing, the State may proceed with a DUI prosecution without requiring chemical. See, K.S.A. 8-1567(a)(3) (Driving under the influence is operating a vehicle while under the influence to a degree that renders the person incapable of safely driving a vehicle). Indeed, most of these encounters are on video, and if one is truly impaired, then it is readily apparent, and would be easy to prove at trial.
- The State may obtain a warrant, requiring the suspect to submit to testing. And, the suspect may be forcibly restrained using "acceptable law enforcement restraint practices" if he further refuses. See, K.S.A. 8-1001(g).
- If obtaining a warrant is not possible, no warrant is necessary under the exigent circumstances exception, and chemical testing can be obtained. See, Missouri v. McNeely, -- U.S. --, 185 L.Ed.2d 696, 133 S.Ct. 1552 (2013). Thus, the State is in no way hindered by existing constitutional procedures in obtaining the evidence sought to be coerced from an individual under K.S.A. 2014 Supp. 8-1025.
- If the suspected drunk driver attempts to refuse to comply with the warrant, he may be additionally convicted under K.S.A. 21-5904(a)(3) for knowingly obstructing, resisting or opposing a law enforcement officer in the service of a warrant.
- This does not even considering the relevant administrative driver's license sanctions that promote the exact same interest.

Other unintended consequences of K.S.A. 8-1025

By making a refusal a crime, it likely ends the constitutional ability of the State to use one's refusal as evidence of guilt in a prosecution for DUI under K.S.A. 8-1567, as the ability to do so was premised upon one having an actual choice to (1) take a chemical test or (2) suffer administrative consequences (ie. license suspension, etc.). But if the test was refused, no warrant could be obtained. See, South Dakota v. Neville, 459 U.S. 553, 559-560, 74 L.Ed.2d 748, 103 S.Ct. 916 (1983). This problem is compounded by the proposed changes to K.S.A. 8-1001 allowing warrants regardless of test refusal.

Because there is no choice, the privilege against self-incrimination becomes implicated. Furthermore, because one's self-incrimination rights were not implicated, one did not have the right to an attorney. It is likely that this too changes with the criminalization of test refusal.

K.S.A. 8-1025 likely has more negative implications for DUI prosecutions in Kansas than positive. In short, there is no real need to enact K.S.A. 8-1025. It creates more problems that it could possibly solve.

New Section 1 should be eliminated or modified because it punishes prior offenses not punished under Kansas law

New Section 1 enumerates statutes in various jurisdictions to be counted as prior offenses for sentencing purposes under our DUI statutes. The problem is that the broad lumping of these statutes results in punishment for prior offenses based upon conduct dissimilar to the prior offenses for which Kansas enhances punishment in subsequent DUIs.

Many states criminalize simply being in control of a vehicle, not operating or attempting to operate that vehicle

Under the Alabama statute, Ala. Code § 32-5A-191(a), criminalizes, *inter alia*, DUI for simply being in "***actual physical control*** of any vehicle" while under the influence. Kansas, on the other hand, requires operating or attempting to operate a vehicle, not mere control. See, K.S.A. 8-1567.

Several other statutes mirror this Alabama provision. See F.S.A. § 316.193(1)(a); OGCA § 40-6-391(a); HRS § 291E-61(a); I.C. § 18-8004(1)(a); 625 ILCS 5/11-501(a); KRS § 189A.010(1); MCA § 61-8-401(1); N.R.S. § 60-6,196(1); NDCC § 39-08-01(1); 47 Okla. St. Ann. § 11-902(A); 75 Pa.C.S.A. § 3802(a)(1); T.C.A. § 55-10-401; U.C.A. § 41-6a-502(1); 23 VSA. § 1201(a); W.S. § 31-5-233(b).

Many states criminalize operation of machinery not used for enhancement in Kansas

In Alaska, AS § 28.35.030(a) criminalizes DUI of aircraft or watercraft. Neither are punished under K.S.A. 8-1025 or K.S.A. 8-1567. Watercraft DUI is actually criminalized under K.S.A. 32-1131.

Many other states do likewise: See, A.C.A. § 5-65-103(a) ("motorboat" DUI); La. R.S. § 14:98A(1) ("aircraft, watercraft, vessel, or other means of conveyance"); N.H. Rev. Stat. § 265-A:2(II) (boat DUI); M.S.A. § 169A.20 (motorboat, snowmobile, all-terrain vehicle, off-highway motorcycle, off-road vehicle); Ohio – R.C. § 4511.19(A)(1) (streetcar, or trackless trolley); V.T.C.A., Penal Code §§ 49.05(a) (aircraft), 49.06(a) (watercraft); Va. Code Ann. § 18.2-266 (trains).

Some states criminalize acts not involving illegal substances

The Alabama statute also criminalizes DUI for being "Under the influence of any substance which impairs the mental or physical faculties of such person to a degree which renders him or her incapable of safely driving." Ala. Code § 32-5A-191(a)(5) (Emphasis added). Thus, if one has a tea that makes one sleepy, that would qualify.

Some states criminalize simply owning, rather than being the operator of, a vehicle driven DUI

In Michigan, M.C.L.A. § 257.625(2) criminalizes the owner or person in charge of a vehicle allows that vehicle to be driven DUI. New Jersey has a similar provision. See, N.J.S.A. § 39:4-50(a) ("permits another person who is under the influence . . . to operate a motor vehicle owned by him or in his custody or control").

Some states prohibit habitual substance users from driving, impaired on not, even when that substance is lawfully prescribed

In California, Cal. Veh. Code § 23152(c) makes it "unlawful for a person who is addicted to the use of any drug to drive a vehicle." It is irrelevant if this addiction is to a lawfully prescribed medication, and it is irrelevant if one is not actually impaired. That is not a crime in Kansas. West Virginia has a similar provision. See, W. Va. Code § 17C-5-2(g).

Some states criminalize all test refusals

Even the proposed Kansas statute does not use convictions for test refusals unless they occurred after July 1, 2018. Minnesota's statute, M.S.A. § 169A.20 Subd. 2, criminalizes all test refusals, not just those after July 1, 2018. So does North Dakota. See, NDCC § 39-08-01(1)(e).

Conclusion

The provisions of New Section 1 have been hastily written and would use acts from other jurisdictions to enhance DUI sentences which would not otherwise be used had those acts occurred in Kansas. It should not be enacted.

The provisions of SB 374 criminalizing driving with any amount of controlled substances listed in K.S.A. 65-4105 or 65-4107, any pharmacologically active metabolites, should be removed

In Sections 5, 7, 9, 10, and 13 all references to this language should be removed, as it is bad policy for Kansas. In Section 13, for example, it amends K.S.A. 8-1567(a) adding that DUI is:

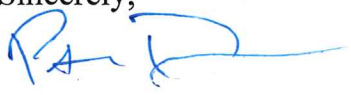
> (6) having present in the person's blood any amount, as measured within three hours of the time of operating or attempting to operate a vehicle, of a controlled substance listed in K.S.A. 65-4105 or 65-4107, and amendments thereto, or its pharmacologically active metabolite, as defined in K.S.A. 8-1013, and amendments thereto. It shall be an affirmative defense to a violation of this paragraph that the person lawfully ingested the controlled substance by order of a practitioner or mid-level practitioner, as defined in K.S.A. 65-4101, and amendments thereto, or otherwise ingested the controlled substance in accordance with the laws of the United States or the state of Kansas.

The problem with this is that it criminalizes substances that remain in one's system long after they could possibly impair one's ability to safely operate a vehicle. Furthermore, the listed substances, while they may be illegal to possess or use in Kansas, are not necessarily illegal to possess or use in other states. This becomes a serious issue when people from those states come to Kansas.

By criminalizing *any amount* of these substances, it deters people from those other states from coming to and spending money in Kansas. In this day and age of tight budgets, Kansas can ill afford to be deterring law abiding citizens from coming to Kansas. Quite simply, these people are no danger to the citizenry of Kansas. We should discourage them from coming here and spending money.

I appreciate the committee's time, and am more than willing to answer any questions.

Sincerely,



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