

As Amended by House Committee

Session of 2019

HOUSE BILL No. 2048

By Committee on Corrections and Juvenile Justice

1-22

Proposed Amendments to HB 2048 - Rucker  
Senate Judiciary Committee  
Prepared by: Natalie Scott, Assistant Revisor  
March 11, 2019

1 AN ACT concerning crimes, punishment and criminal procedure; relating  
2 to sentencing; determination of offender's criminal history  
3 classification, comparable offense; amending K.S.A. 2018 Supp. 21-  
4 6811 and repealing the existing sections; also repealing K.S.A. 2018  
5 Supp. 21-6811c.

appeal of sentence; correction of sentence;

, 21-6820 and 22-3504

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

8 Section 1. K.S.A. 2018 Supp. 21-6811 is hereby amended to read as  
9 follows: 21-6811. In addition to the provisions of K.S.A. 2018 Supp. 21-  
10 6810, and amendments thereto, the following shall apply in determining an  
11 offender's criminal history classification as contained in the presumptive  
12 sentencing guidelines grids:

13 (a) Every three prior adult convictions or juvenile adjudications of  
14 class A and class B person misdemeanors in the offender's criminal history,  
15 or any combination thereof, shall be rated as one adult conviction or one  
16 juvenile adjudication of a person felony for criminal history purposes.  
17 Every three prior adult convictions or juvenile adjudications of assault as  
18 defined in K.S.A. 21-3408, prior to its repeal, or K.S.A. 2018 Supp. 21-  
19 5412(a), and amendments thereto, occurring within a period commencing  
20 three years prior to the date of conviction for the current crime of  
21 conviction shall be rated as one adult conviction or one juvenile  
22 adjudication of a person felony for criminal history purposes.

23 (b) A conviction of criminal possession of a firearm as defined in  
24 K.S.A. 21-4204(a)(1) or (a)(5), prior to its repeal, criminal use of weapons  
25 as defined in K.S.A. 2018 Supp. 21-6301(a)(10) or (a)(11), and  
26 amendments thereto, or unlawful possession of a firearm as in effect on  
27 June 30, 2005, and as defined in K.S.A. 21-4218, prior to its repeal, will be  
28 scored as a select class B nonperson misdemeanor conviction or  
29 adjudication and shall not be scored as a person misdemeanor for criminal  
30 history purposes.

31 (c) (1) If the current crime of conviction was committed before July  
32 1, 1996, and is for K.S.A. 21-3404(b), as in effect on June 30, 1996,  
33 involuntary manslaughter in the commission of driving under the  
34 influence, then, each prior adult conviction or juvenile adjudication for  
35 K.S.A. 8-1567, and amendments thereto, shall count as one person felony  
36 for criminal history purposes.

1 (2) If the current crime of conviction was committed on or after July  
2 1, 1996, and is for a violation of K.S.A. 2018 Supp. 21-5405(a)(3) *or* (a)  
3 (5), and amendments thereto, each prior adult conviction, diversion in lieu  
4 of criminal prosecution or juvenile adjudication for: (A) Any act described  
5 in K.S.A. 8-2,144 or 8-1567, and amendments thereto; or (B) a violation of  
6 a law of another state or an ordinance of any city, or resolution of any  
7 county, which prohibits any act described in K.S.A. 8-2,144 or 8-1567, and  
8 amendments thereto, shall count as one person felony for criminal history  
9 purposes.

10 (3) If the current crime of conviction is for a violation of K.S.A. 2018  
11 Supp. 21-5413(b)(3) *or* (b)(4), and amendments thereto:

12 (A) The first prior adult conviction, diversion in lieu of criminal  
13 prosecution or juvenile adjudication for the following shall count as one  
14 nonperson felony for criminal history purposes: (i) Any act described in  
15 K.S.A. 8-2,144 or 8-1567, and amendments thereto; or (ii) a violation of a  
16 law of another state or an ordinance of any city, or resolution of any  
17 county, which prohibits any act described in K.S.A. 8-2,144 or 8-1567, and  
18 amendments thereto; and

19 (B) each second or subsequent prior adult conviction, diversion in  
20 lieu of criminal prosecution or juvenile adjudication for the following shall  
21 count as one person felony for criminal history purposes: (i) Any act  
22 described in K.S.A. 8-2,144 or 8-1567, and amendments thereto; or (ii) a  
23 violation of a law of another state or an ordinance of any city, or resolution  
24 of any county, which prohibits any act described in K.S.A. 8-2,144 or 8-  
25 1567, and amendments thereto.

26 (d) Prior burglary adult convictions and juvenile adjudications will be  
27 scored for criminal history purposes as follows:

28 (1) As a prior person felony if the prior conviction or adjudication  
29 was classified as a burglary as defined in K.S.A. 21-3715(a), prior to its  
30 repeal, or K.S.A. 2018 Supp. 21-5807(a)(1), and amendments thereto.

31 (2) As a prior nonperson felony if the prior conviction or adjudication  
32 was classified as a burglary as defined in K.S.A. 21-3715(b) or (c), prior to  
33 its repeal, or K.S.A. 2018 Supp. 21-5807(a)(2) or (a)(3), and amendments  
34 thereto.

35 The facts required to classify prior burglary adult convictions and  
36 juvenile adjudications shall be established by the state by a preponderance  
37 of the evidence.

38 (e) (1) Out-of-state convictions and juvenile adjudications shall be  
39 used in classifying the offender's criminal history.

40 (2) An out-of-state crime will be classified as either a felony or a  
41 misdemeanor according to the convicting jurisdiction.

42 (A) If a crime is a felony in the convicting jurisdiction, it will be  
43 counted as a felony in Kansas.

1 (B) If a crime is a misdemeanor in the convicting jurisdiction, the  
 2 state of Kansas shall refer to the comparable offense under the Kansas  
 3 criminal code in effect on the date the current crime of conviction was  
 4 committed to classify the out-of-state crime as a class A, B or C  
 5 misdemeanor. If the comparable offense in the state of Kansas is a felony,  
 6 the out-of-state crime shall be classified as a class A misdemeanor. If the  
 7 state of Kansas does not have a comparable offense in effect on the date  
 8 the current crime of conviction was committed, the out-of-state crime shall  
 9 not be used in classifying the offender's criminal history.

10 (C) If a crime is not classified as either a felony or a misdemeanor in  
 11 the convicting jurisdiction, the state of Kansas shall refer to the  
 12 comparable offense under the Kansas criminal code in effect on the date  
 13 the current crime of conviction was committed to classify the out-of-state  
 14 crime as either a felony or a misdemeanor. If the state of Kansas does not  
 15 have a comparable offense in effect on the date the current crime of  
 16 conviction was committed, the out-of-state crime shall not be used in  
 17 classifying the offender's criminal history.

18 (3) The state of Kansas shall classify the crime as person or  
 19 nonperson.

20 (A) In designating a ~~crime~~ **misdemeanor** as person or nonperson,  
 21 comparable offenses under the Kansas criminal code in effect on the date  
 22 the current crime of conviction was committed shall be referred to. If the  
 23 state of Kansas does not have a comparable **person** offense in effect on the  
 24 date the current crime of conviction was committed, the out-of-state crime  
 25 shall be classified as a nonperson crime.

26 ~~(B) (i) In designating a felony crime as person or nonperson, an~~  
 27 ~~out-of-state conviction or adjudication for the commission of a felony~~  
 28 ~~offense, or an attempt, conspiracy or criminal solicitation to commit a~~  
 29 ~~felony offense, shall be classified as a person felony if one or more of~~  
 30 ~~the following circumstances is present as defined by the convicting~~  
 31 ~~jurisdiction in the elements of the out-of-state offense:~~

- 32 (a) Death or killing of any human being;
- 33 (b) threatening or causing fear of bodily or physical harm or
- 34 violence, causing terror, physically intimidating or harassing any
- 35 person;
- 36 (c) bodily harm or injury, physical neglect or abuse, restraint,
- 37 confinement or touching of any person, without regard to degree;
- 38 (d) the presence of a person, other than the defendant, a charged
- 39 accomplice or another person with whom the defendant is engaged in
- 40 the sale, distribution or transfer of a controlled substance or non-
- 41 controlled substance;
- 42 (e) possessing, viewing, depicting, distributing, recording or
- 43 transmitting an image of any person;

the felony crime shall be classified as follows:  
(i)

strike

1 (f) lewd fondling or touching, sexual intercourse or sodomy with  
2 or by any person or an unlawful sexual act involving a child under the  
3 age of consent;

4 (g) being armed with, using, displaying or brandishing a firearm  
5 or other weapon, excluding crimes of mere unlawful possession; or

6 (h) entering or remaining within any residence, dwelling or  
7 habitation.

8 (ii) An out-of-state conviction or adjudication for the commission  
9 of a felony offense, or an attempt, conspiracy or criminal solicitation  
10 to commit a felony offense, shall be classified as a person felony if the  
11 elements of the out-of-state felony conviction or adjudication  
12 necessarily prove that a person was present during the commission of  
13 the offense ~~that resulted in the out-of-state conviction~~. For purposes of  
14 this clause, the person present must be someone other than the  
15 defendant, a charged accomplice or another person with whom the  
16 defendant is engaged in the sale, distribution or transfer of a  
17 controlled substance or non-controlled substance. The presence of a  
18 person includes physical presence and presence by electronic or  
19 telephonic communication.

offense that resulted in the

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20 (iii) An out-of-state conviction or adjudication for the commission  
21 of a felony offense, or an attempt, conspiracy or criminal solicitation  
22 to commit a felony offense, shall be classified as nonperson if the  
23 elements of the offense ~~that resulted in the out-of-state conviction or~~  
24 ~~adjudication~~ do not require proof of any of the circumstances in  
25 subparagraph (B)(i) or (ii).

a

felony

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26 (4) Convictions or adjudications occurring within the federal system,  
27 other state systems, the District of Columbia, foreign, tribal or military  
28 courts are considered out-of-state convictions or adjudications.

29 (5) The facts required to classify out-of-state adult convictions and  
30 juvenile adjudications shall be established by the state by a preponderance  
31 of the evidence.

32 (f) Except as provided in K.S.A. 21-4710(d)(4), (d)(5) and (d)(6),  
33 prior to its repeal, or K.S.A. 2018 Supp. 21-6810(d)(3)(B), (d)(3)(C), (d)  
34 (3)(D), (d)(4) and (d)(5), and amendments thereto, juvenile adjudications  
35 will be applied in the same manner as adult convictions. Out-of-state  
36 juvenile adjudications will be treated as juvenile adjudications in Kansas.

37 (g) A prior felony conviction of an attempt, a conspiracy or a  
38 solicitation as provided in K.S.A. 21-3301, 21-3302 or 21-3303, prior to  
39 their repeal, or K.S.A. 2018 Supp. 21-5301, 21-5302 or 21-5303, and  
40 amendments thereto, to commit a crime shall be treated as a person or  
41 nonperson crime in accordance with the designation assigned to the  
42 underlying crime.

43 (h) Drug crimes are designated as nonperson crimes for criminal

1 history scoring.

2 (i) If the current crime of conviction is for a violation of K.S.A. 8-  
3 1602(b)(3) through (b)(5), and amendments thereto, each of the following  
4 prior convictions for offenses committed on or after July 1, 2011, shall  
5 count as a person felony for criminal history purposes: K.S.A. 8-235, 8-  
6 262, 8-287, 8-291, 8-1566, 8-1567, 8-1568, 8-1602, 8-1605 and 40-3104,  
7 and amendments thereto, and K.S.A. 2018 Supp. 21-5405(a)(3) or (a)(5)  
8 and 21-5406, and amendments thereto, or a violation of a city ordinance or  
9 law of another state which would also constitute a violation of such  
10 sections.

11 (j) ~~(1) For the purposes of determining whether an offense is~~  
12 ~~comparable, the following shall be considered:~~

- 13 ~~(A) The name of the out-of-state offense;~~
- 14 ~~(B) the elements of the out-of-state offense; and~~
- 15 ~~(C) whether the out-of-state offense prohibits similar conduct to the~~  
16 ~~conduct prohibited by the closest approximate Kansas offense.~~

17 ~~(2) The legislature intends that this provision related to~~  
18 ~~comparability of an out-of-state offense to a Kansas offense shall be~~  
19 ~~liberally construed to allow comparable offenses, regardless of whether~~  
20 ~~the elements are identical to or narrower than the corresponding Kansas~~  
21 ~~offense, to be used in classifying the offender's criminal history.~~

22 ~~(k)~~ The amendments made to this section by chapter 5 of the 2015  
23 Session Laws of Kansas are procedural in nature and shall be construed  
24 and applied retroactively.

25 ~~(k) The amendments made to this section by this act are~~  
26 ~~procedural in nature and shall be construed and applied retroactively.~~

27 Sec. 2. K.S.A. 2018 Supp. 21-6811 ~~and~~ 21-6811c are hereby  
28 repealed.

29 Sec. 3. This act shall take effect and be in force from and after its  
30 publication in the Kansas register.

strike

See attachment for sections 2-4

, 21-6820 and 22-3504

Renumber sections

Sec. 2. K.S.A. 2018 Supp. 21-6820 is hereby amended to read as follows: 21-6820. (a) A departure sentence is subject to appeal by the defendant or the state. The appeal shall be to the appellate courts in accordance with rules adopted by the supreme court.

(b) Pending review of the sentence, the sentencing court or the appellate court may order the defendant confined or placed on conditional release, including bond.

(c) On appeal from a judgment ~~or~~ of conviction entered for a felony committed on or after July 1, 1993, the appellate court shall not review:

(1) Any sentence that is within the presumptive sentence for the crime; or

(2) any sentence resulting from an agreement between the state and the defendant which the sentencing court approves on the record.

(d) In any appeal from a judgment of conviction imposing a sentence that departs from the presumptive sentence prescribed by the sentencing grid for a crime, sentence review shall be limited to whether the sentencing court's findings of fact and reasons justifying a departure:

(1) Are supported by the evidence in the record; and

(2) constitute substantial and compelling reasons for departure.

(e) In any appeal from a judgment of conviction, the appellate court may review a claim that:

(1) A sentence that departs from the presumptive sentence resulted from partiality, prejudice, oppression or corrupt motive;

(2) the sentencing court erred in either including or excluding recognition of a prior conviction or juvenile adjudication for criminal history scoring purposes; or

(3) the sentencing court erred in ranking the crime severity level of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes.

(f) The appellate court may reverse or affirm the sentence. If the appellate court concludes that the trial court's factual findings are not supported by evidence in the record or do not establish substantial and compelling reasons for a departure, it shall remand the case to the trial court for resentencing.

(g) The appellate court shall issue a written opinion whenever the judgment of the sentencing court is reversed. The court may issue a written opinion in any other case when it is believed that a written opinion will provide guidance to sentencing judges and others in implementing the sentencing guidelines adopted by the Kansas sentencing commission. The appellate courts may provide by rule for summary disposition of cases arising under this section when no substantial question is presented by the appeal.

(h) A review under summary disposition shall be made solely upon the record that was before the sentencing court. Written briefs shall not be required unless ordered by the appellate court and the review and decision shall be made in an expedited manner according to rules adopted by the supreme court.

(i) The sentencing court shall retain authority irrespective of any notice of appeal for 90 days after entry of judgment of conviction to modify its judgment and sentence to correct any arithmetic or clerical errors.

(j) The amendments made to this section by this act are procedural in nature and shall be construed and applied retroactively.

Sec. 3. K.S.A. 2018 Supp. 22-3504 is hereby amended to read as follows: 22-3504. ~~(1)~~(a) The court may correct an illegal sentence at any time while the defendant is serving such sentence. The defendant shall receive full credit for time spent in custody under the sentence prior to correction. Unless the motion and the files and records of the case conclusively show that the defendant is entitled to no relief, the defendant shall have a right to a hearing, after reasonable notice to be fixed by the court, to be personally present and to have the assistance of counsel in any proceeding for the correction of an illegal sentence.

~~(2)~~(b) Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

~~(3)~~ (c) For the purposes of this section:

(1) "Illegal sentence" means a sentence: Imposed by a court without jurisdiction; that does not conform to the applicable statutory provision, either in character or punishment; or that is ambiguous with respect to the time and manner in which it is to be served at the time it is pronounced. A sentence is not an "illegal sentence" because of a change in the law that occurs after the sentence is pronounced.

(2) "Change in the law" means a statutory change or an opinion by an appellate court of the state of Kansas, unless the opinion is issued while the sentence is pending an appeal from the judgment of conviction.

(d) The amendments made to this section by this act are procedural in nature and shall be construed and applied retroactively.

New Sec. 4. If any provision or provisions of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of act which can be given effect without the invalid provision or provisions or application, and to this end the provisions of this act are severable.