House Judiciary Committee
February 3, 2022
House Bill 2538

Testimony of the
Kansas Association of Criminal Defense Lawyers
Opponent

Dear Chairman Patton and Members of the Committee:

I appear on behalf of the Kansas Association of Criminal Defense Lawyers. This bill would abolish what has been the policy of this state for over 55 years — a policy where, over the span of decades, the Legislature has carved out exceptions to make the process fair. Making this major change to allow hearsay at preliminary hearings could hurt the prosecution, defendants, victims, witnesses, family members of the accused, and other participants in the criminal justice system. Additionally, HB 2538 would extend the time when the preliminary hearing needs to happen from "14 days" after first appearance to the vague standard of "a reasonable time." Under existing law, preliminary hearings rarely occur within 14 days. This change is unnecessary.

This is not the first time we have testified against this proposed policy change. In 2016 and 2017, proponents argued that allowing hearsay at preliminary hearings would be more efficient for law enforcement and civilian witnesses, and would cut down on the victims and witnesses from being revictimized by repeated testimony.[1] The proponents acknowledged that even though they have grand jury proceedings available now (which are largely hearsay, as far as we can tell—we can't be sure because they are conducted in secret), they also want hearsay at preliminary hearings. As we explain below, dismantling this long-standing public policy will create problems; furthermore, when liberty is at stake, "efficiency" should not be our primary value.

What a preliminary hearing is

The Fourth Amendment "requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975). It is up to individual states "to shape a procedure" for that determination, "with the only requirement being that the State 'must provide a fair and reliable determination of probable cause. . .'" *In re D.E.R.*, 290 Kan. 306, 311 (2010), quoting *Gertstein*, 420 U.S. at 123, 125.

[1] SB 327 was heard in Senate Judiciary on January 21, 2016. On February 3, 2016, without discussion, Senator Haley moved to table the bill, and Senator Smith seconded. The motion passed; the bill died in committee. HB 2259 was heard on February 14, 2017, in House Judiciary, and died in committee.

In Kansas, that "procedure" to comply with the Fourth Amendment is a preliminary hearing. When the state charges someone with a felony, that person and the state have a statutory right to a preliminary hearing. K.S.A. 22-2902(1). The purpose of a preliminary examination is to determine whether a crime has been committed and whether there is probable cause to believe that the defendant committed it. *State v. Boone,* 218 Kan. 482, 484 (1975). A defendant has the right to be present in person at a preliminary hearing, to introduce evidence on his own behalf, and to cross-examine witnesses against him. K.S.A. 22–2902(3). The preliminary hearing is a "critical stage" of the prosecution and thus a defendant has the right to representation. See *Coleman v. Alabama*, 399 U.S. 1 (1970).

Because a preliminary hearing is not a trial, the "full panoply of adversary safeguards" is not required. *State v. Leshay,* 289 Kan. 546, 553 (2009) ("the federal Constitution does not require a state to establish a procedure for the preliminary examination of probable cause that affords the defendant the full panoply of constitutional rights which are applicable at a criminal defendant's trial").

Under K.S.A. 22-2902(2), a preliminary hearing is to take place within 14 days of first appearance, but 1) this timeframe is rarely complied with, and 2) continuances are granted for good cause, which is a low bar in this context. And if the hearing does not happen within 14 days, K.S.A. 22–2902(2) does not require the dismissal of the charge. *State v. Fink,* 217 Kan. 671 (1975). Because the statute "does not provide sanctions for failure to follow the time limits established, [it has] been construed as directory only." *State v. Taylor*, 3 Kan. App. 2d 316, 321 (1979).

"The power to dismiss a criminal complaint with prejudice must be exercised with great caution and only in cases where no other remedy would protect against the State's abuse." *State v. Rivera*, 277 Kan. 109, 119 (2004). A search for cases regarding this 14-day-provision reveals that from 1975 to 2014, only one time—30 years ago—did the prosecution not prevail; there was a 402-day delay that the prosecution failed to present an explanation for, so "[b]ased on the record before us, we cannot say the trial court erred in dismissing the case." *State v. Fitch*, 249 Kan. 562, 564, 568 (1991). Cases involving preliminary hearing delays of 139, 244, 254, and 375 days have been upheld.

While we understand that preliminary hearings where victims and witnesses are called to testify are not pleasant occasions, the reality is 1) many defendants waive their hearings (often because the prosecution agrees to let them out of jail if they waive or says it won't plea bargain unless there's a waiver), and 2) an average of 97-98% of felony cases in Kansas that end in conviction(s) are the result of pleas, which do not require victims and witnesses to testify—only an average of 2-3% of cases are resolved by way of jury or court trials (which would surely appall our Founding Fathers, but that is a conversation for another day).[2]

[2] This data is from Kansas Judicial Branch Annual Reports from FY15-FY19.

Current law on hearsay at preliminary hearings

Over the years, the Legislature has made statutory changes to specifically permit hearsay testimony at preliminary hearings for: 1) victims under 13 years of age, K.S.A. 22-2902(3); 2) reports by forensic examiners, K.S.A. 22-2902a; 3) field tests of alleged controlled substances, K.S.A. 22-2902c; and 4) business records of sales or transactions required to be maintained by scrap metal dealers, K.S.A. 22-2902d.

Furthermore, K.S.A. 60-460 provides that "[e]vidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible" *unless it meets one of 31 exceptions*, which have also been developed over the years. (Some of these come up in criminal cases while many do not.) In other words, there are 31 ways hearsay could come in at a hearing, in addition to the four specifically set out above.

What HB 2538 would do

Adding the phrase "Hearsay evidence shall be admissible at a preliminary examination," would result in hearsay being used to make probable cause findings at preliminary hearings—hearsay would become the rule and not the exception.

After HB 2538, preliminary hearings would look a lot like grand jury proceedings, in that instead of the complaining witness, victim, or witness to a crime or alleged crime being called to the stand to explain what happened, a police officer could just read from his/her report or affidavit, etc.[3] An accused's attorney would not be able to question the complaining witness, victim, or witness about what happened.

As explained earlier, HB 2538 also would extend the time when the preliminary hearing needs to happen from "14 days" after first appearance to the vague standard of "a reasonable time."

Problems presented by SB 2538

Current law functions as a protection against the prosecution having excess power in the criminal justice system. "Although the state may have a legitimate interest in holding a preliminary examination, the provision for the same is primarily for the benefit of the accused. It is a protective procedure whereby a possible abuse of power may be prevented, to the end no person shall be detained for a crime where there is no evidence to support a charge against him." *State v. Bloomer*, 197 Kan. 668, 671 (1966).

[3] Again, I think this is what happens at grand jury proceedings—we cannot know for sure because grand jury proceedings are conducted in secret; the accused is not there, and neither is an attorney for the accused.

This change will disempower some victims. For example, if the prosecution can press on with a case without a victim's testimony, then it can act contrary to the victim's wishes — and that can cause victims harm in any number of ways. As another example, some cases involve mental illness or addiction issues, and the family members who are victims often just want their loved one to get treatment or help. Some cases get resolved after a victim tells the court about that at a preliminary hearing. If a preliminary hearing happens via hearsay (i.e. without their testimony), it can silence the victim's wishes.

Using hearsay at preliminary hearings will clog the system. Allowing hearsay at preliminary hearings will transform them into being more like grand jury cases. Cases where charges result from a grand jury proceeding (as opposed to a complaint being filed, followed by a preliminary hearing) tend to wallow in the pretrial process because the lack of a preliminary hearing means the parties do not as completely address the underlying issues of a case. The defendant requests a jury trial setting because of an issue (exs. witness's credibility, availability, questionable searches, factual issues on values or amounts, etc.) that would have been addressed if there had been a preliminary hearing. When both sides are afforded a preliminary hearing, each evaluates the relative strengths and weaknesses of their own and the opponent's case. This fosters negotiations or other dispositions.

This will not necessarily decrease the number of court hearings. Similar to the above reason, if the state does not put on actual witnesses (ex.: it had a police officer testify from his/her report about what everyone involved said), then the defense may file motions to dismiss, suppress, etc. in order to have witnesses testify in court and be subject to cross-examination.

A defendant could be bound over exclusively on evidence that would be inadmissible at a trial. As a policy matter, does the Legislature want courts to be able to bind a defendant over on a felony charge — that carries all the punishment and consequences that felonies have — based solely on evidence that arguably would be inadmissible if there was a trial? Not only that, but evidence where the court does not even have to make a finding of the reliability of the hearsay testimony in order to bind a defendant over for trial?

In cases with different victims and/or multiple incidents, the state can already use grand jury proceedings in certain situations. See K.S.A. 22-3001.

This policy could backfire on the prosecution in a number of ways. For example, if a victim or witness testifies at a preliminary hearing but is unavailable at trial, the state can seek to admit the unavailable person's testimony at trial. But if the State does not call the victim or a witness at the preliminary hearing, then there was no prior opportunity for a defendant to cross-examine a state's witness; therefore, the state does not get to admit that testimony at trial. See *Crawford v.*

Washington, 541 U.S. 36, 53–54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); Kansas Constitution Bill of Rights, § 10 (criminal defendants have the right "to meet the witness face to face"). In addition, in the absence of preliminary hearing testimony, the state will not know how a victim or witness does on the stand. This is not necessarily important in every case, but it can turn a trial into a fiasco.

Not only would the state be able to admit hearsay at preliminary hearing, but so would the defendant. The defendant could admit hearsay as to what a non-testifying police officer, victim, or witness to the alleged incident said. Defendants may start calling witnesses at preliminary hearing (which typically does not happen) in order to get non-testifying witnesses' statements into evidence.

Additional measures to consider if this change is made

If the Legislature decides to dismantle this long-standing public policy about hearsay, it should consider some safeguards, such as the following:

Require a baseline determination of reliability. In order for law enforcement to obtain a search warrant for a person's home or property, the court must determine whether probable cause exists by making "a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of any persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Hicks,* 282 Kan. 599, Syl. ¶ 1 (2006).

If a court must consider the veracity and basis of knowledge of those providing hearsay in the affidavit for a search warrant before allowing the search of a person's home or property, there should be consideration given to the source of hearsay information before allowing it to be used to make a probable cause finding to bind a defendant over for trial in a felony case.

Require recording of victims' and witnesses' statements. If law enforcement officers are going to be permitted to testify about what victims and witnesses said with no opportunity for cross-examination of the actual speakers of those statements, then arguably those statements should be recorded so the court can observe the makers of the statements.

Making criminal depositions more accessible to defendants. Currently, K.S.A. 22-3211(1) provides that both criminal defendants and prosecutors may request, and a court may order, a deposition be taken "[i]f it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that the witness' testimony is material and that it is necessary to take the witness' deposition in order to prevent a failure of justice." However, there is another process in K.S.A. 22-3211 currently available only to the prosecution:

> If the crime charged is a felony, the prosecuting attorney may apply to the court for an order authorizing the prosecuting attorney to take the deposition of any essential witness [i.e. "an eyewitness to the felony or without whose testimony a conviction could not be obtained because the testimony would establish an element of the felony that cannot be proven in any other manner"]. Upon the filing of such application, the court shall set the matter for hearing and shall order the defendant to be present at such hearing. If, upon hearing, the court determines that the witness is an essential witness, the court shall authorize the prosecuting attorney to take the deposition of the witness in the county where the complaint or indictment has been filed. Upon application, the court may order that a deposition taken pursuant to this subsection be videotaped.

If the state can have victimless and/or eyewitness-less preliminary hearings as a matter of law, then the provisions of K.S.A. 22-3211(4) should be extended to criminal defendants as well.

Conclusion

For all of the reasons explained above, we respectfully request that this Committee reject HB 2538 in its entirety. Alternatively, if the Committee allows hearsay at preliminary hearings, we ask this Committee to create the safeguards and processes set out above.

Respectfully submitted,

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