

MINUTES

KANSAS CRIMINAL CODE RECODIFICATION COMMISSION

January 30, 2008

Kansas Judicial Center, Court of Appeals Courtroom

Members Present

Professor Tom Stacy
Ed Klumpp
Honorable Richard Smith
Honorable Crystal Marquardt
Professor Michael Kaye
Senator John Vratil
Representative Lance Kinzer
Representative Jan Pauls
Tim Madden
Debra Wilson
Steve Opat

Staff Present

Judge John W. White, Reporter
Brett Watson, staff attorney

Others Present

Katie Firebaugh, Kearney & Associates
Edward F. Britton, Kansas Sentencing Commission

Judge White called the meeting to order at 9:30 a.m. Judge White explained that Mr. Watson would be making changes to the report and executive summary as the meeting progressed. A projector was attached to his laptop. Judge White explained the changes that had been made to the drug code and the report. First, he explained that an executive summary had been added to satisfy the concerns about brevity that had been raised at the last meeting. He also noted the addition of boxes in the full report with summaries, conclusions, and recommendations as are found in most reports the legislature receives. He explained that the drug departure sentencing material had been removed from the drug code. It was part of the general sentencing statutes and removing would make the code less cohesive. He also explained that the previous revised statute regarding anhydrous ammonia had been removed as it was duplicative of a provision in the drug paraphernalia statute.

Prof. Kaye stated that the fundraising subcommittee was close to having a grant proposal letter drafted and ready for the Pew Trust. A proposal was expected within the next two weeks. He consulted with people associated with the trust who gave him helpful advice regarding what would comprise a successful proposal. He also stated that other organizations such as the JEHT Foundation were being considered as sources of additional funding. Mr. Madden asked whether reference to additional sources of funding should be included in the report or not. He wanted to emphasize the fact that current levels of funding were necessary and was concerned that mentioning these other organizations might suggest that the current funding level was unnecessary. Prof. Stacy disagreed, stating that it would be better to tell the legislature that the Commission is making efforts to locate other sources of revenue.

Judge Smith took issue with a statement in the report that said *State v. Fisher* and *State v. Stevens* were inconsistent opinions. He claimed that both opinions could be read together, narrowly. Prof. Stacy disagreed, claiming that they were inconsistent. Judge White suggested that the paragraph could be revised to remove reference to inconsistency but the analysis could highlight the tension between the two opinions. That change was made.

Judge Marquardt spoke on the section regarding the reduction of the guideline sentences for manufacture of controlled substance. She noted that the report stated that Representative Kinzer and Mr. Opat objected to that policy. She stated that she would like to reflect that she abstained from the vote on that matter as she did not feel it was appropriate for a sitting judge to comment on what the sentence range should be. Judge Smith agreed with Judge Marquardt and stated that he would like the report to reflect that he was not present when the policy recommendation was adopted or that he also abstained from that vote. That change was made.

Prof. Stacy suggested that the report should contain a stronger statement explaining why the drug crimes should be moved to Chapter 21. He noted three points: first, relocation would bring the main drug offenses together into one place in the code. As it stands now the main criminal drug provisions are scattered throughout Chapter 65 and there is a substantial amount of civil material in Article 41 that is irrelevant to criminal prosecutors. Second, the recodification clearing defines the main criminal offense as manufacture, distribution, and possession of controlled substances. In the current code this definition is obscured by several additional terms that are necessary for civil regulation but not criminal prosecution. Third, by recodifying and relocating the drug offenses the entire drug code will be more coherent. A statement to this effect was drafted and included in the final report.

Judge Marquardt suggested that Appendix C could be eliminated as it was unnecessary to repeat information on the membership of the 3Rs committee. Senator Vratil moved to strike Appendix C. His motion was seconded and passed unanimously.

The Commission discussed several grammatical and format changes that had no bearing on the substance of the report.

Judge White noted that in the policy section of the report there was a reference to the 2006 downward departure rate of 85.9 percent for D1 offenses. He noted that this was an issue of concern to the legislature, but 2007 statistics showed a departure rate of about 30 percent for D1 offenses. He asked whether the 85.9 percent figure should remain in the report. Mr. Madden asked if the 2006 numbers were a reflection of the *McAdam* decision. Prof. Stacy said that he spoke with Helen Pedigo at the KSC and she told him that the departure rate was not a reflection of *McAdam* cases. Mr. Klumpp said that he had investigated the matter and was confident that the 2006 statistic was not misleading. He explained that there was some discrepancy in methodology that accounted for the different numbers. Mr. Klumpp stated the departure statistics are collected in two ways:

convictions that reach the Kansas Department of Corrections, and sentencing journal entries. He stated that he would provide a more thorough explanation at a future meeting.

Mr. Klumpp stated that he spoke with Jerry Donaldson at the Legislative Research Department, and the internet links at the end of the report that referred to the Commission's minutes would be operational when the report was published.

Prof. Stacy moved to adopt the report and executive summary, excluding the appendices, with the stated revisions. His motion was seconded and passed unanimously.

Senator Vratil moved to adopt the minutes of the last meeting. His motion was seconded and passed unanimously.

Judge White began discussing Appendix A which contained the drug code revisions. He reminded the Commission that two sections had been removed, the drug sentencing section and the anhydrous ammonia section. He also emphasized that great care had been used to ensure that the code contained no substantive law changes. Judge White began to review the revisions that had been made since the last meeting.

On 21-501, Judge White noted that the term "harvesting" had been removed from the definition of "cultivate." He also noted that the definition of "school property" had been revised to bring it into conformity with current law. At a previous meeting the Commission voted to remove reference to grade levels in order to expand the definition. That language was returned as well as the phrase, "If the structure or property meets the above definition, the actual use of that structure or property at the time alleged shall not be a defense to the crime charged or the sentence imposed."

On 21-502, Judge White noted subsection (b) which states that conduct is prohibited unless it is authorized by the Pharmacy Act, the Uniform Controlled Substances Act, or otherwise authorized by law. The subsection was added to avoid unnecessary repetition of the phrase "unless otherwise authorized by law."

On 21-503, Judge White noted that the provisions in the current statute relating to the attempt statute had been restored. At a previous meeting the Commission voted to subject attempted manufacture to the drug attempt provision in K.S.A. 21-3301. As that was a substantive change, the code was revised to conform to existing law.

On 21-504, Judge White noted that there was no change.

On 21-505, Judge White noted that no significant change was made. The terms "except that" and "and" had been added to the penalty subsection.

On 21-506, Judge White noted that in subsection (c)(3) the language was revised to conform to current law. In the previous version, the language suggested that any violation of a county resolution could trigger the recidivism provision. In the revised version, the code reflects that the county resolution must involve marijuana or THC.

On 21-507, Judge White noted that the term "knowingly or intentionally" had been previously omitted accidentally. Those terms were restored in the current version.

On 21-508, Judge White noted that no significant change was made. The terms "except that" and "and" had been added to the penalty subsection.

On 21-509, Judge White noted that subsection (a) had been added verbatim from current law. He noted that the act requirement in subsection (b), “use or possess with intent to use,” had been incorporated from current law. He noted that subsection © incorporated the anhydrous ammonia provision in current law. He also noted that subsection (d) was a provision contained in current law, regarding possession of pseudoephedrine, but it was omitted from the previous version of the statute.

On 21-510, Judge White noted that no significant change was made. The terms “except that” and “and” had been added to the penalty subsection.

On 21-511, Judge White noted that no change had been made.

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On 21-514, Judge White noted that no significant change was made. The terms “except that” and “and” had been added to the penalty subsection.

On 21-515, Judge White noted that the term “knowingly or intentionally” had been previous omitted accidentally. Those terms were restored in the current version.

On 21-516, Judge White noted that no change had been made.

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On 21-518, Judge White noted that several subsections had been added that referred to the provisions effected by the 2005 act.

Senator Vratil moved to adopt Appendix A. His motion was seconded and passed unanimously.

Judge White began discussing Appendix B. He noted that it contained the three policy recommendations that the Commission adopted at the previous meeting: First, to amend the definition of manufacture to exclude cutting and packaging; second, to amend the non-controlled substance statute to allow prosecutions for theft by deception; and third, to integrate paraphernalia offenses into the law of attempts. *Mr. Klumpp moved to adopt Appendix B. His motion was seconded and passed unanimously.*

Judge White began a discussion of Mr. Watson’s memo on simulated controlled substances (SCS). He stated that the definition of simulated controlled substance statute only applies to substances that are labeled or accompanied by advertising material. He also noted that the Kansas Court of Appeals has strictly applied this definition. He stated that the memo recommended either striking out the label and advertising language from the definition or combining the SCS statute with the non-controlled substance statute and, at a later point, revising the severity levels.

Mr. Watson stated that the legislative history did not indicate why SCSs were so regulated. He noted that there was not any discussion of the SCS provision except for one passing reference to it by Attorney General Stephen.

Judge White said that his research uncovered a SCS in Iowa that set the severity level at the same level the substance was represented to be or simulated. He also noted that Iowa assessed a tax against SCSs similar to other controlled substances.

Prof. Stacy stated that he would be in favor of eliminating the statute and allow prosecutions of defendants who sell fake drugs to fall under the theft by deception statute or the non-controlled substance statute. He recognized that the punishment for possession of a controlled substance is more severe than distribution of a non-controlled substance, but that was rationally based on the harm the statutes sought to prohibit. Distributors create societal harm, he claimed, because they actually distribute drugs and possessors cause societal harm by actually possessing drugs.

Prof. Kaye suggested amending the definition of SCS. Prof. Stacy said that option would be less preferable because it could create an offense that would duplicate the non-controlled substance statute.

Judge Smith suggested that the law was fine as it was written because it target certain products that were associated with illegal drugs. He cited a canned beverage called "Cocaine" as an example. He stated that purpose of the law was to prohibit the sale of these products which glorify drug use.

Senator Vratil suggested that any action on SCSs should be delayed for further consideration. Judge White agreed.

Senator Vratil recommended that the final version of the report should be prepared quickly and delivered to the President of the Senate, the Speaker of the House, the clerks of both the House and the Senate, the Senate and House Majority and Minority Leaders, and the House and Senate Judiciary Committee chairs and ranking members.

Mr. Klumpp stated that he had already contacted Bruce Kinzie in the Revisor's Office about preparing a bill draft. Senator Vratil suggested that the bill should be introduced in the Senate since he was familiar with the Commission's work.

Prof. Stacy asked if there would be hearings on the bill. Senator Vratil said that the chairs of the Commission and the reporter would be notified in the event of legislative hearings.

Senator Vratil noted that Senate Bill 409 provides mandatory prison time for certain DUI and property offenders. He asked if that would be contrary to any of the work of the Commission. Judge White said that he had not yet considered that issue. Prof. Stacy asked if it would be helpful to consider that at the next meeting. Senator Vratil said that it would be helpful.

The Commission agreed to meet next on February 22, 2008.

The meeting was adjourned at 3:45 p.m.

Submitted by Brett Watson, Staff Attorney

Approved by Commission on:

April 16, 2008

(date)