

Criminal Code and Drug Crimes; Senate Sub. for Sub. for HB 2318

Senate Sub. for Sub. for HB 2318 amends several statutes concerning the criminal code and drug crimes.

Criminal Code Amendments

The bill amends various sections of the Kansas Criminal Code to:

- Create the crime of "endangerment," defined as recklessly exposing another person to a danger of great bodily harm or death. Endangerment is a class A person misdemeanor;
- Amend the statute governing multiple prosecutions for the same act and lesser-included crimes to add language establishing that a defendant may not be convicted of identical offenses based upon the same conduct, the prosecution may choose which such offense to charge, and, upon conviction, the defendant shall be sentenced according to the charged offense;
- Amend the conspiracy statute to allow the unilateral theory of conspiracy, which does not require the other person(s) with whom the defendant conspired to have the actual intent to commit the underlying crime, provided the defendant believed the other person(s) to have such intent;
- Add abandonment of a child and aggravated abandonment of a child to the list of inherently dangerous felonies in the statute governing first degree murder;
- Amend the statute governing human trafficking, so subsection (b)(2) is no longer a stand-alone means of committing aggravated human trafficking. Instead, the act will have to first meet the definition of human trafficking;
- Increase the severity level for the crime of incest from a severity level 5, person felony to a severity level 3, person felony if the victim is the offender's biological, step, or adoptive child;
- Expand the crime of unlawful use of recordings to include possession of recordings by a person knowing or having reasonable grounds to know the article was produced in violation of law, which becomes a class B nonperson misdemeanor;
- Replace "sexual battery" with "sexually motivated crime" in the burglary statute;
- Expand the crime of interference with law enforcement to include falsely reporting to a law enforcement officer or state investigative agency any known false information with intent to influence, impede, or obstruct an officer or agency's duty, or concealing, destroying, or materially altering evidence with intent to prevent or hinder the apprehension or prosecution of any person;

- Clarify the culpability standard for the crime of simulating legal process;
- Amend the crime of escape from custody to include escaping while held under arrest without a written charge;
- Amend the bribery statute to add a *quid pro quo* requirement, include the omission of performance of a public duty, and clarify that a public official may accept some gifts consistent with state ethics laws;
- Amend the statute prohibiting smoking in enclosed areas or at public meetings to make it a "strict liability" infraction rather than applying the general recodification culpability standard of recklessness ;
- Amend other smoking provisions to clarify the culpability requirements for smoking where prohibited (strict liability), allowing smoking where prohibited (recklessness), and taking adverse action for reporting or attempting to prosecute a violation of the smoking prohibition (intent to retaliate);
- Amend the criminal disposal of explosives statute to clarify that the action must be taken without lawful authority and that ignorance of the age of the recipient is irrelevant. The severity level of carrying concealed explosives is increased from a class C to a class A person misdemeanor;
- Amend the cruelty to animals statute to eliminate a requirement that a county or district attorney file charges when a valid complaint is filed;
- Remove the use of living rabbits or chickens, ducklings, or goslings as an advertising device or promotion display from the definition of unlawful disposition of animals; and
- Amend the statute governing sentencing in multiple conviction cases to allow a judge to consider the need to impose an overall sentence that is proportionate to the harm and culpability in determining whether sentences should be served concurrently or consecutively. It also would give a judge discretion to impose an entire consecutive sentence or a part of such sentence.

Drug Crimes

The bill also adopts a new drug sentencing grid with five levels, adding a new level 2 with penalties falling between the current first and second levels of the drug grid. The grid also expands the presumptive imprisonment boxes to include levels 4-C and 4-D (formerly levels 3-C and 3-D), making the presumed sentence for certain offenders convicted of level 4 crimes imprisonment, and expands the border boxes to include levels 5-C and 5-D (formerly levels 4-C and 4-D), allowing courts to impose an optional non-prison sentence for certain offenders convicted of level 5 offenses.

The bill specifies that offenders assigned a high-risk status, as determined by a drug abuse assessment, and a moderate or high-risk status, as determined by the criminal risk-need assessment, will be committed to a drug-abuse treatment program. Offenders so committed will be supervised by community correctional services. Otherwise, based on the result of the

criminal risk assessment, they would be supervised either by community correctional services or court services.

Further, it allows the court to order an offender who does not meet the drug risk assessment level requirements to undergo an additional drug risk assessment while the offender is on probation and to undergo drug abuse treatment if the offender is determined to meet the risk assessment level requirement. The offender will pay the costs of that assessment.

The bill also makes several changes to the statutes governing drug crimes. Specifically, the bill deletes the packaging or repackaging of a substance or labeling or relabeling its container from the definition of "manufacture," and clarifies that it does not include the addition of dilutants or adulterants. It also amends the definition of "drug paraphernalia" to clarify that it does not include certain drug precursors.

Next, it amends as follows the severity levels for a violation of KSA 21-5703, manufacture or attempted manufacture of a controlled substance or controlled substance analog:

- Change a violation from a drug severity level 1 felony to a drug severity level 2 felony for a first conviction; a second or subsequent conviction for manufacture will be a drug severity level 1 felony; and
- Specify that manufacture of methamphetamine will remain a drug severity level 1 felony.

In KSA 21-5705, the bill imposes new felony classifications on the drug grid, based on quantity, for the crimes of distribution or possession with the intent to distribute the drugs listed in subsection (a), including lisdexamphetamine, a schedule II substance, as follows:

- Less than 3.5 grams, severity level 4;
- At least 3.5 grams, but less than 100 grams, severity level 3;
- At least 100 grams, but less than 1 kilogram, severity level 2; and
- One kilogram or more, severity level 1.

The bill creates exceptions to these penalties, as follows:

- Violations involving marijuana have the following felony classifications on the drug grid based on quantity:
 - Less than 25 grams, severity level 4;
 - At least 25 grams, but less than 450 grams, severity level 3;
 - At least 450 grams, but less than 30 kilograms, severity level 2; and
 - 30 kilograms or more, severity level 1 felony.
- Violations involving heroin or methamphetamine have the following felony classifications on the drug grid based on quantity:

- Less than one gram, severity level 4;
- At least one gram, but less than 3.5 grams, severity level 3;
- At least 3.5 grams, but less than 100 grams, severity level 2; or
- 100 grams or more, severity level 1.
- Violations involving substances outlined in KSA 65-4105, 65-4107, 65-4109, or 65-4111 (schedules I–IV) have the following felony classifications on the drug grid based on quantity:
 - Fewer than ten dosage units, severity level 4;
 - At least ten dosage units, but less than 100 dosage units, severity level 3;
 - At least 100 dosage units, but less than 1,000 dosage units, severity level 2; and
 - 1,000 dosage units or more, severity level 1.
- Violations occurring within 1,000 feet of any school property increase the severity level by 1 level.

The crime of distribution or possession with the intent to distribute a controlled substance listed in schedule V becomes a class A person misdemeanor, except that if distributed to or possessed with the intent to distribute to a minor, it is a nondrug severity level 7, person felony.

Cultivation of a controlled substance listed in subsection (a) has the following felony classifications on the drug grid based on the number of plants cultivated:

- More than four, but fewer than 50, severity level 3;
- At least 50, but fewer than 100, severity level 2; or
- 100 or more, severity level 1.

A rebuttable presumption of intent to distribute is created for possession of the following amounts of controlled substances:

- 450 grams or more of marijuana;
- 3.5 grams or more of heroin or methamphetamine;
- 100 dosage units or more containing a controlled substance listed by statute in the Uniform Controlled Substances Act (Act); or
- 100 grams or more of any other controlled substance listed under the Act.

The bill also amends KSA 21-5705 to bar the use of certain defenses and define some key terms.

The bill criminalizes sale of lisdexamfetamine, a schedule II substance (KSA 21-5706).

In KSA 21-5710, the subsections with enhanced penalties for distribution or causing paraphernalia to be distributed to a minor on or within 1,000 feet of any school property are amended to strike the requirement that the offender be 18 or older.

The bill clarifies that a person prosecuted for the distribution or possession with the intent to distribute a noncontrolled substance as a controlled substance also could be prosecuted for, convicted of, and punished for theft (KSA 21-5714).

In KSA 21-5716, concerning crimes involving proceeds derived from the commission of any drug crime, the severity level of crimes involving proceeds of \$100,000–\$500,000 is lowered for proceeds of \$100,000–\$250,000, from a level 2 to a level 3, due to the adoption of the five-level grid. For proceeds of \$250,000–\$500,000, the severity level remains a level 2.