

As Amended by House Committee

Session of 2008

HOUSE BILL No. 2732

By Representatives Patton, Beamer, Bowers, Carlson, Dahl, Fund, Kelley,
Kelsey, Kinzer, Mast, Judy Morrison, Olson, Rhoades and Watkins

1-31

11 AN ACT concerning crimes, criminal procedure and punishment; relat-
12 ing to sentencing; amending K.S.A. 21-4716 and 21-4719 and K.S.A.
13 2007 Supp. 38-2371 and repealing the existing sections.

14

15 *Be it enacted by the Legislature of the State of Kansas:*

16 Section 1. K.S.A. 21-4716 is hereby amended to read as follows: 21-
17 4716. (a) Except as provided in subsection (b), the sentencing judge shall
18 impose the presumptive sentence provided by the sentencing guidelines
19 for crimes committed on or after July 1, 1993, unless the judge finds
20 substantial and compelling reasons to impose a departure. If the sen-
21 tencing judge departs from the presumptive sentence, the judge shall
22 state on the record at the time of sentencing the substantial and com-
23 pelling reasons for the departure.

24 (b) Subject to the provisions of subsection (b) of K.S.A. 21-4718, and
25 amendments thereto, any fact that would increase the penalty for a crime
26 beyond the statutory maximum, other than a prior conviction, shall be
27 submitted to a jury and proved beyond a reasonable doubt.

28 (c) (1) Subject to the provisions of subsections ~~(c)(3)~~ (c)(2), (c)(4)
29 and (e), the following nonexclusive list of mitigating factors may be con-
30 sidered in determining whether substantial and compelling reasons for a
31 departure exist:

32 (A) The victim was an aggressor or participant in the criminal conduct
33 associated with the crime of conviction.

34 (B) The offender played a minor or passive role in the crime or par-
35 ticipated under circumstances of duress or compulsion. This factor is not
36 sufficient as a complete defense.

37 (C) The offender, because of physical or mental impairment, lacked
38 substantial capacity for judgment when the offense was committed. The
39 voluntary use of intoxicants, drugs or alcohol does not fall within the
40 purview of this factor.

41 (D) The defendant, or the defendant's children, suffered a continuing
42 pattern of physical or sexual abuse by the victim of the offense and the
43 offense is a response to that abuse.

- 1 (E) The degree of harm or loss attributed to the current crime of
2 conviction was significantly less than typical for such an offense.
- 3 (2) *Subject to the provisions of subsections (c)(4) and (e), for any*
4 *person felony ranked in severity levels 1 through 4 of the nondrug grid*
5 *as provided in K.S.A. 21-4704, and amendments thereto, and for any*
6 *offender who has a criminal history score category of A or B, the following*
7 *exclusive list of mitigating factors may be considered in determining*
8 *whether substantial and compelling reasons for a departure exists:*
- 9 (A) *The victim was an aggressor or participant in the criminal con-*
10 *duct associated with the crime of conviction.*
- 11 (B) *The offender played a minor or passive role in the crime or par-*
12 *ticipated under circumstances of duress or compulsion. This factor is not*
13 *sufficient as a complete defense.*
- 14 (C) *The offender, because of physical or mental impairment, lacked*
15 *substantial capacity for judgment when the offense was committed. The*
16 *voluntary use of intoxicants, drugs or alcohol does not fall within the*
17 *purview of this factor.*
- 18 (D) *The defendant, or the defendant's children, suffered a continuing*
19 *pattern of physical or sexual abuse by the victim of the offense and the*
20 *offense is a response to that abuse.*
- 21 (E) *The degree of harm or loss attributed to the current crime of*
22 *conviction was significantly less than typical for such an offense.*
- 23 (3) *Subject to the provisions of subsection ~~(e)(3)~~ (c)(4), the following*
24 *nonexclusive list of aggravating factors may be considered in determining*
25 *whether substantial and compelling reasons for departure exist:*
- 26 (A) *The victim was particularly vulnerable due to age, infirmity, or*
27 *reduced physical or mental capacity which was known or should have*
28 *been known to the offender.*
- 29 (B) *The defendant's conduct during the commission of the current*
30 *offense manifested excessive brutality to the victim in a manner not nor-*
31 *mally present in that offense.*
- 32 (C) *The offense was motivated entirely or in part by the race, color,*
33 *religion, ethnicity, national origin or sexual orientation of the victim or*
34 *the offense was motivated by the defendant's belief or perception, entirely*
35 *or in part, of the race, color, religion, ethnicity, national origin or sexual*
36 *orientation of the victim whether or not the defendant's belief or per-*
37 *ception was correct.*
- 38 (D) *The offense involved a fiduciary relationship which existed be-*
39 *tween the defendant and the victim.*
- 40 (E) *The defendant, 18 or more years of age, employed, hired, used,*
41 *persuaded, induced, enticed or coerced any individual under 16 years of*
42 *age to commit or assist in avoiding detection or apprehension for com-*
43 *mission of any person felony or any attempt, conspiracy or solicitation as*

1 defined in K.S.A. 21-3301, 21-3302 or 21-3303 and amendments thereto
2 to commit any person felony regardless of whether the defendant knew
3 the age of the individual under 16 years of age.

4 (F) The defendant's current crime of conviction is a crime of extreme
5 sexual violence and the defendant is a predatory sex offender. As used in
6 this subsection:

7 (i) "Crime of extreme sexual violence" is a felony limited to the
8 following:

9 (a) A crime involving a nonconsensual act of sexual intercourse or
10 sodomy with any person;

11 (b) a crime involving an act of sexual intercourse, sodomy or lewd
12 fondling and touching with any child who is 14 or more years of age but
13 less than 16 years of age and with whom a relationship has been estab-
14 lished or promoted for the primary purpose of victimization; or

15 (c) a crime involving an act of sexual intercourse, sodomy or lewd
16 fondling and touching with any child who is less than 14 years of age.

17 (ii) "Predatory sex offender" is an offender who has been convicted
18 of a crime of extreme sexual violence as the current crime of conviction
19 and who:

20 (a) Has one or more prior convictions of any crimes of extreme sexual
21 violence. Any prior conviction used to establish the defendant as a pred-
22 atory sex offender pursuant to this subsection shall also be counted in
23 determining the criminal history category; or

24 (b) suffers from a mental condition or personality disorder which
25 makes the offender likely to engage in additional acts constituting crimes
26 of extreme sexual violence.

27 (iii) "Mental condition or personality disorder" means an emotional,
28 mental or physical illness, disease, abnormality, disorder, pathology or
29 condition which motivates the person, affects the predisposition or desires
30 of the person, or interferes with the capacity of the person to control
31 impulses to commit crimes of extreme sexual violence.

32 (G) The defendant was incarcerated during the commission of the
33 offense.

34 (H) The crime involved two or more participants in the criminal con-
35 duct, and the defendant played a major role in the crime as the organizer,
36 leader, recruiter, manager or supervisor.

37 In determining whether aggravating factors exist as provided in this
38 section, the court shall review the victim impact statement.

39 ~~(4)~~ (4) If a factual aspect of a crime is a statutory element of the
40 crime or is used to subclassify the crime on the crime severity scale, that
41 aspect of the current crime of conviction may be used as an aggravating
42 or mitigating factor only if the criminal conduct constituting that aspect
43 of the current crime of conviction is significantly different from the usual

- 1 criminal conduct captured by the aspect of the crime.
- 2 (d) In determining aggravating or mitigating circumstances, the court
3 shall consider:
- 4 (1) Any evidence received during the proceeding;
- 5 (2) the presentence report;
- 6 (3) written briefs and oral arguments of either the state or counsel
7 for the defendant; and
- 8 (4) any other evidence relevant to such aggravating or mitigating cir-
9 cumstances that the court finds trustworthy and reliable.
- 10 (e) Upon motion of the prosecutor stating that the defendant has
11 provided substantial assistance in the investigation or prosecution of an-
12 other person who is alleged to have committed an offense, the court may
13 consider such mitigation in determining whether substantial and com-
14 pelling reasons for a departure exist. In considering this mitigating factor,
15 the court may consider the following:
- 16 (i) The court's evaluation of the significance and usefulness of the
17 defendant's assistance, taking into consideration the prosecutor's evalu-
18 ation of the assistance rendered;
- 19 (ii) the truthfulness, completeness and reliability of any information
20 or testimony provided by the defendant;
- 21 (iii) the nature and extent of the defendant's assistance;
- 22 (iv) any injury suffered, or any danger or risk of injury to the defend-
23 ant or the defendant's family resulting from such assistance; and
- 24 (v) the timeliness of the defendant's assistance.
- 25 Sec. 2. K.S.A. 21-4719 is hereby amended to read as follows: 21-
26 4719. (a) When a departure sentence is appropriate, the sentencing judge
27 may depart from the sentencing guidelines as provided in this section.
28 **The sentencing judge shall not impose a downward dispositional**
29 **departure sentence for any crime of extreme sexual violence, as**
30 **defined in K.S.A. 21-4716, and amendments thereto.** *The sentencing*
31 *judge shall not impose a downward dispositional or durational departure*
32 *sentence without a signed written agreement by the prosecutor for any*
33 *crime of extreme sexual violence, as defined in K.S.A. 21-4716, and*
34 *amendments thereto. Such downward durational departure sentence shall*
35 *be no, to less than 50% of the center of the range of the sentence for such*
36 *crime.*
- 37 (b) When a sentencing judge departs in setting the duration of a pre-
38 sumptive term of imprisonment: (1) The judge shall consider and apply
39 the enacted purposes and principles of sentencing guidelines to impose
40 a sentence which is proportionate to the severity of the crime of convic-
41 tion and the offender's criminal history; and
- 42 (2) the presumptive term of imprisonment set in such departure shall
43 not total more than double the maximum duration of the presumptive

1 imprisonment term.

2 (c) When a sentencing judge imposes a prison term as a dispositional
3 departure: (1) The judge shall consider and apply the enacted purposes
4 and principles of sentencing guidelines to impose a sentence which is
5 proportionate to the severity of the crime of conviction; and

6 (2) the term of imprisonment shall not exceed the maximum duration
7 of the presumptive imprisonment term listed within the sentencing grid.
8 Any sentence inconsistent with the provisions of this section shall consti-
9 tute an additional departure and shall require substantial and compelling
10 reasons independent of the reasons given for the dispositional departure.

11 (d) If the sentencing judge imposes a nonprison sentence as a dis-
12 positional departure from the guidelines, the recommended duration
13 shall be as provided in subsection (c) of K.S.A. 21-4611 and amendments
14 thereto.

15 Sec. 3. K.S.A. 2007 Supp. 38-2371 is hereby amended to read as
16 follows: 38-2371. (a) (1) Whenever a person is adjudicated as a juvenile
17 offender, the court upon motion of the state, shall hold a hearing to
18 consider imposition of a departure sentence. The motion shall state that
19 a departure is sought and the reasons and factors relied upon. The hearing
20 shall be scheduled so that the parties have adequate time to prepare and
21 present arguments regarding the issues of departure sentencing. The vic-
22 tim of a crime or the victim's family shall be notified of the right to be
23 present at the hearing for the convicted person by the county or district
24 attorney. The parties may submit written arguments to the court prior to
25 the date of the hearing and may make oral arguments before the court
26 at the hearing. The court shall review the victim impact statement, if
27 available. Prior to the hearing, the court shall transmit to the juvenile
28 offender or the juvenile offender's attorney and the prosecuting attorney
29 copies of the predispositional investigation report.

30 (2) At the conclusion of the hearing or within 20 days thereafter, the
31 court shall issue findings of fact and conclusions of law regarding the
32 issues submitted by the parties, and shall enter an appropriate order.

33 (3) If a factual aspect of a crime is a statutory element of the crime,
34 or is used to determine crime severity, that aspect of the current crime
35 of conviction may be used as an aggravating factor only if the criminal
36 conduct constituting that aspect of the current crime of conviction is
37 significantly different from the usual criminal conduct captured by the
38 aspect of the crime. Subject to this provision, the nonexclusive lists of
39 aggravating factors provided in subsection ~~(c)(2)~~ (c)(3) of K.S.A. 21-4716,
40 and amendments thereto, and in subsection (a) of K.S.A. 21-4717, and
41 amendments thereto, may be considered in determining whether sub-
42 stantial and compelling reasons exist.

43 (b) If the court decides to depart on its own volition, without a motion

1 from the state, the court must notify all parties of its intent and allow
2 reasonable time for either party to respond if they request. The notice
3 shall state that a departure is intended by the court and the reasons and
4 factors relied upon.

5 (c) In each case in which the court imposes a sentence that deviates
6 from the presumptive sentence, the court shall make findings of fact as
7 to the reasons for departure regardless of whether a hearing is requested.

8 (d) If the sentencing judge departs from the presumptive sentence,
9 the judge shall state on the record at the time of sentencing the substantial
10 and compelling reasons for the departure. When a departure sentence is
11 appropriate, the sentencing judge may depart from the matrix as provided
12 in this section. When a sentencing judge departs in setting the duration
13 of a presumptive term of imprisonment:

14 (1) The presumptive term of imprisonment set in such departure
15 shall not total more than double the maximum duration of the presump-
16 tive imprisonment term;

17 (2) the court shall have no authority to reduce the minimum term of
18 confinement as defined within the placement matrix; and

19 (3) the maximum term for commitment of any juvenile offender to a
20 juvenile correctional facility is age 22 years, 6 months.

21 (e) A departure sentence may be appealed as provided in K.S.A. 2007
22 Supp. 38-2380, and amendments thereto.

23 Sec. 4. K.S.A. 21-4716 and 21-4719 and K.S.A. 2007 Supp. 38-2371
24 are hereby repealed.

25 Sec. 5. This act shall take effect and be in force from and after its
26 publication in the statute book.