

MINUTES

KANSAS DUI COMMISSION

November 5-6, 2009
Room 143-N—Statehouse

Members Present

Senator Thomas C. (Tim) Owens, Chairperson
Representative Janice Pauls, Vice-chairperson
Senator David Haley
Representative Lance Kinzer
Greg Benefiel, Assistant District Attorney, Douglas County
Pete Bodyk, Kansas Department of Transportation
Major Mark Bruce, Kansas Highway Patrol
Honorable Judge Jennifer Jones
Wiley Kerr, Kansas Bureau of Investigation
Mary Ann Khoury, Victim advocate
Deb Stithem substituted for Don Jordan, Secretary, Kansas Department of SRS
Retired Police Chief Ed Klumpp
Sheriff Ken McGovern, Douglas County
Chris Mechler, Court Services Officer Specialist, OJA
Helen Pedigo, Executive Director, Kansas Sentencing Commission
Ted Smith substituted for Marcy Ralston, Kansas Department of Revenue
Honorable Peter V. Ruddick, 10th Judicial District
Dalyn Schmitt, Substance Abuse Professional
Les Sperling, President, KAAP
Jeremy Thomas, Parole Officer
Doug Wells, Attorney, Kansas Bar Association
Roger Werholtz, Secretary, Kansas Department of Corrections
Karen Wittman, Traffic Safety Resource Prosecutor, Attorney General's Office

Staff Present

Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Jason Thompson, Office of the Revisor of Statutes
Doug Taylor, Office of the Revisor of Statutes
Sean Ostrow, Office of the Revisor of Statutes
Karen Clowers, Committee Assistant

Others Attending

See attached list.

**Thursday, November 5
Morning Session**

The meeting was called to order by Chairperson Owens at 10:04 a.m.

The Commission reviewed the minutes of October 1 and 2, 2009. Corrections were made regarding attendance of members and spelling.

Ed Klumpp moved, Dalyn Schmitt seconded, to approve the minutes of October 1 and 2, 2009 as corrected. Motion carried.

Jeff Collier, State Coordinator, Kansas Drug and Classification/Standardize Field Sobriety Testing Program, Kansas Highway Patrol, addressed the Commission regarding Drug Recognition Experts (DREs) (Attachment 1). Mr. Collier provided an overview of the program in Kansas, indicating that officers are trained to detect DUIs caused by substances other than alcohol. This training is not part of basic police training. Evaluations are based on a standardized 12-step process, which was described in detail. DREs are recognized as technical experts and may testify as such in court.

Kevin Barone, Vanguard Offender Management, spoke on continuous alcohol monitoring devices (Attachment 2). Mr. Barone indicated there are no solid rules on house arrest across the State and there is much inconsistency between monitoring. He recommended the Commission set the criteria.

The Commission recessed for lunch.

Afternoon Session

The meeting reconvened at 12:50 p.m. The Commission heard reports of the subcommittees.

Law Enforcement/Record Keeping Subcommittee

Karen Wittman, Chairperson of the Subcommittee on Law Enforcement and Record Keeping, reviewed recommendations to date from that Subcommittee. The tentative recommendations are as follows:

Records

The Kansas Criminal Justice Information System (KCJIS) is the appropriate entity to collect and furnish data to agencies in need of information concerning DUI criminal history. This information would allow one inquiry that would check all records on an individual, such as: Department of Motor Vehicle (DMV) records, arrest history, and conviction data.

The Subcommittee envisioned an inquiry to KCJIS would produce a "certified" record of information held by the State of Kansas concerning an individual identified. A report could be

generated that would provide an “evidentiary” report which would be offered in court as the “official record.” This might require a legislative change in KSA 60-465 (Authentication of Copies of Records).

Finally, the Subcommittee would like a “subscription and notify” program to be created to generate information to alert prosecutors, court officials, and probation officers of any activity of an individual pertaining to any current law enforcement contact on a daily basis.

Administrative Driver’s License Hearings (DL Hearings)

The Subcommittee tentatively decided to recommend that administrative DL hearings should remain with the Kansas Department of Motor Vehicles. A fee, similar to a docket fee, should be assessed for a request for hearing. The fee assessed would be different depending on whether a “face to face” hearing or a “phone” hearing is requested.

The Subcommittee would like to establish a protocol for the hearing and require hearing officers to receive special training. Finally, there might need to be a statutory change to identify specifically the scope of the hearing.

Ignition Interlock

The Subcommittee would like to require ignition interlock devices to use photo technology to insure the person producing the sample is the person required to produce the sample.

Additionally, the Subcommittee would like to have a report generated of the persons required by the Division of Motor Vehicles (DMV) to have interlock in their vehicle and compare that to the reports generated and submitted to DMV from interlock providers. A notification to those individuals required to have interlock that do not have the device that further sanctions may be imposed. That would require some type of sanction for those individuals not having interlock in their vehicle when required. The possible sanctions included impoundment of vehicle or extension of requirement of interlock, or both. The Subcommittee would like a graduated sanction for those individuals who have had a prior violation for failure to have an ignition interlock device in their vehicle.

The Commission as a whole discussed these recommendations but did not decide upon a final recommendation for the interim report.

Criminal Justice Subcommittee

Representative Janice Pauls reviewed the recommendations of the Criminal Justice Subcommittee because the Chairperson of the Subcommittee, Roger Werholtz, was unable to attend the portion of the Subcommittee meeting when recommendations were voted on by the Subcommittee. Subcommittee recommendations included:

- The current penalty for a first conviction of DUI is adequate;
- The current penalty for a second conviction of DUI is adequate with the note that the five days in jail should be a firm five days in jail, rather than 48 hours in jail with the option of serving remainder of the mandatory minimum sentence on work release or house arrest, as authorized by the current statute;

- The penalty for a third conviction of DUI should be a misdemeanor, rather than a felony, as it is in current law, and it should be solely under the jurisdiction of the district court. The Subcommittee recommends the mandatory minimum sentence be ten days in jail with no house arrest or work release, 90 days person alcohol monitoring by technological means, parole of up to 18 months through community corrections, and treatment as ordered by the court based on a standardized substance abuse evaluation;
- The penalty for a fourth conviction of DUI should be a felony with a sentence of prison and treatment;
- Instead of an Alcohol and Drug Safety Action Programs (ADSAP) evaluation, do a full-blown clinical evaluation and follow the recommendations of the assessment;
- Criminalize refusal to take a breath alcohol test (but the Subcommittee reserves the option to make additional clarifications of this position); and
- Delay for an additional year the effective date of the provision in 2009 HB 2096 which would amend the law regarding penalties for third convictions of DUI to make the penalty the same as a fourth or subsequent conviction of DUI under current law. The penalty for a fourth and subsequent conviction of DUI would be a new penalty. The provisions of this section would be in effect on July 1, 2010.

The Commission as a whole discussed the recommendations. Based on Commission discussions, further discussions will include several items, including: criminalization of breath test refusals; expungement or decay of records, or both; standards for counting prior convictions; DUI courts; and determination of where the fourth DUI will be on the sentencing grid, and penalties.

Substance Abuse Evaluation and Treatment Subcommittee

Les Sperling, Chairperson of the Substance Abuse Evaluation and Treatment Subcommittee, reviewed the recommendations of the Subcommittee. He stated the effective evaluation, education, and treatment of substance use plays a vital role in the continuum of interventions targeted to reduce the incidence of DUI in the State of Kansas. The following recommendations are respectfully submitted in an effort to enhance the quality and scope of treatment services in Kansas and to reduce the impact that DUI has on the citizens of the State of Kansas.

Require All Alcohol and Drug Safety Action Programs to Be Licensed by Social and Rehabilitation Services-Addiction and Prevention Services

The Kansas Department of Social and Rehabilitation Services (SRS) currently has licensing standards for Alcohol and Drug Safety Action Programs (ADSAP) that include standards for both evaluation and Alcohol and Drug Information School curriculum. However, under current legislation, ADSAP providers are not required to obtain this important license and are not subject to annual licensing visits that ensure compliance with the minimum standards of competency, as defined in the state standards. This has resulted in a disparity of the quality and consistency of ADSAP evaluations across the State of Kansas.

*Licensed ADSAP Providers Comprise the ADSAP Network
Available to All Judicial Districts and Municipal Courts*

Each judicial district currently selects ADSAP providers. While judicial districts strive to select providers in a manner consistent with current statutes, testimony provided to the Kansas Substance Abuse Policy Board and Kansas DUI Commission reveals that selection criteria currently utilized are not consistent. Municipal courts also may select ADSAP providers. While most municipal courts utilize the provider list generated by their district court, they are not required to do so and there are instances where district and municipal court provider lists differ. This can be confusing to all stakeholders and in some cases, limit access to services. If ADSAP providers were licensed by SRS, SRS could provide all stakeholders with a complete listing of eligible providers.

It is anticipated that the number of providers available to complete ADSAP work will increase if licensing is required.

*Require All DUI Substance Use Evaluations Be Completed
in a Standardized Electronic Format*

Testimony submitted to the Kansas Substance Abuse Policy Board indicates that DUI substance use evaluations prepared for the court for pre-sentencing purposes vary widely in quality and scope. It is recommended that the American Society of Addiction Medicine Patient Placement Criteria 2 (ASAMPPC2) be utilized as the foundation of the standardized evaluation. The ASAMPPC2 has been widely accepted as the most comprehensive information and decision-making tool used to assess the severity of alcohol/drug problems and recommend the appropriate intensity and level of treatment intervention. Collecting this information in an electronic format is crucial because it will provide an efficient method for treatment histories and outcome measures, to be included in the larger DUI data system. Adequate resources for the implementation of the standardized evaluation should be made available to SRS.

The Commission as a whole discussed the recommendations. The Subcommittee will continue to work on a standardized ADSAP evaluation.

Dalyn Schmitt stated that diagnosis of substance abuse and dependency is a recognized chronic illness. She stressed the importance of a correct diagnosis on the first offense.

The Commission broke into subcommittees for further discussion on their assigned topics.

The Commission reconvened at 3:40 p.m.

Chairman Owens indicated the Commission will continue with subcommittee meetings in the morning and then work from noon until approximately 2:00 p.m. on the interim report to the Legislature.

The meeting adjourned at 4:00 p.m.

**Friday, November 6
Morning Session**

The meeting was called to order by Chairperson Owens at 9:10 a.m.

The Commission broke into Subcommittees for discussion on their assigned topics.

Afternoon Session

The Commission reconvened at 12:40 p.m.

Law Enforcement/Record Keeping Subcommittee

Karen Wittman reported the Law Enforcement Subcommittee met jointly with the Criminal Justice Subcommittee to discuss the "look back" issue regarding previous convictions. Following a lengthy discussion, the Subcommittees recommend using the specific date of July 1, 1996 for charging offenses. This is due to the lack of complete driving records available before that date. This does not preclude the use of older records for judges to use in sentencing. The subcommittees then broke into their individual groups.

The Law Enforcement Subcommittee then discussed the issue of criminalizing test refusals, the purpose being to stop individuals from avoiding charges of a DUI. Three options were discussed:

- Whether to make it a second criminal offense;
- Make it a per se violation; or
- Make it a rebuttal presumption.

The pros and cons of each were covered and the Subcommittee will continue to work on this issue.

Substance Abuse Evaluation and Treatment Subcommittee

Les Sperling reported the Substance Abuse Subcommittee has not reached any specific recommendations but continues to discuss the issues presented yesterday. These include:

- Standardized electronic assessment;
- Direct payment of fees to treatment providers; and
- A system to provide oversight of the program providing assessment of supervision and monitoring.

Criminal Justice Subcommittee

Roger Werholtz indicated the Criminal Justice Subcommittee has nine issues to address and recommendations are based on the basic principles of:

- Supervision should be based on risk;
- Treatment should be based on meaningful evaluations; and
- The number of courts hearing DUI cases should be reduced.

The Subcommittee has made some previous recommendations, one of which is that third DUI convictions are treated as a misdemeanor but that those cases are heard in a district court. The Subcommittee further recommends the third DUI be sent to community corrections for evaluation and assessment and then assigned based on the results of that assessment, being either continued supervision under community corrections or supervision under court services.

The second recommendation is any municipal court wanting jurisdiction over DUI cases must be approved by the Supreme Court. Rules should include standardized risk assessments, standardized substance abuse evaluations, and the capacity to supervise according to that assessment and evaluation.

The third recommendation is in regard to second DUI offenses. In court hearings following a second DUI conviction, the court would be required to order a standardized evaluation and a standardized assessment.

Ed Klumpp recommended adding to the recommendation regarding approval of municipal courts. His suggestion was to add to list of criteria the ability to comply with electronic recording of the arrest and disposition.

The Chairman reviewed Subcommittee report parameters for the interim report to be reviewed in December meeting.

The meeting adjourned at 1:40 p.m.

The next scheduled meeting is December 7, 2009.

Submitted by Karen Clowers
Edited by Athena Andaya

Approved by Committee on:

December 7, 2009
(Date)