

Approved January 29, 1987
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Senator Robert Frey at
Chairperson

10:00 a.m./~~p.m.~~ on January 28, 1987 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~: Senators Frey, Hoferer, Burke, Feleciano, Gaines, Langworthy, Parrish, Steineger, Talkington, and Winter.

Committee staff present:

Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Office of Revisor of Statutes

Conferees appearing before the committee:

Senator Ben Vidricksen
Gene Sims, Shrine
Keith Beach, Shrine
Richard Funk, Kansas Association of School Boards
Ted Ayres, Kansas Board of Regents

Senator Bill Mulich requested the introduction of two bills concerning crimes and punishments relating to alcohol and drugs, and crimes and punishments relating to injury or death of an unborn child. Following his explanation, Senator Gaines moved to introduce the two bills. Senator Burke seconded the motion, and the motion carried.

Senate Bill 49 - An act concerning the crime of hazing.

Senator Ben Vidricksen stated hazing has been a problem in our universities but not in organizations such as the Moose, Elks or Shrine. Their initiations are in good taste; they are not dangerous and they are entertaining. He said he had written for an attorney general's opinion, and the reply was that it did include the fraternal organizations. Senator Vidricksen said he didn't believe it was intended to involve these organizations.

Gene Sims, Shrine, testified his organization has a full staff, and it is a national organization. They have no intention of causing harm to any individual in their initiation, and it is strictly volunteer. If they wish not to participate, they don't have to.

Keith Beach, Shrine, testified he has been involved in the initiation, and he has never heard of anybody being injured or embarrassed. He said it is just part of being a Shriner.

Richard Funk, Kansas Association of School Boards, testified the association supports the provisions in the bill. He stated it was unclear last year whether or not elementary and secondary schools were included in the 1986 bid. We are glad to see this clarifying amendment. A copy of his statement is attached (See Attachment I).

Senator Paul Burke, sponsor of the bill, explained it was never intended to include fraternal organizations such as Shrine and Moose. The passage of the bill last year did create some problems in these organizations. The purpose of the bill is to get to the problem there has been with student organizations.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

room 514-S, Statehouse, at 10:00 a.m./~~xxx~~ on January 28, 1987.

Senate Bill 49 continued

Ted Ayres, Kansas Board of Regents, pointed out in using definition of school the reference Chapt. 72, does it include regents institutions? He suggested making some clear reference to Chapters 74 or 76 or particular language.

Senator Burke moved to amend the bill in Section 2 to conform to include all schools. Senator Hoferer seconded the motion, and the motion carried. Senator Burke moved to report the bill favorably as amended. Senator Langworthy seconded the motion, and the motion carried.

Senate Bill 14 - Diversion of criminal complaints, procedure.

Copies of a court opinion State vs. Priest was passed out to committee members and staff (See Attachment II). The chairman pointed out this decision doesn't say you have to go before a judge in order to comply with what they require to waive the right to assistance of counsel. A committee member said he didn't think it should be mandated who comes before the judge. There should be a record or statement by the defendant that he has read it and been advised. Considerable committee discussion was held concerning waiver of right to counsel. Also committee discussion was held concerning completion of diversion. A committee member pointed out in the post audit report on diversion, people were getting diversion but not actually completing it. A copy of the post audit report will be made available to committee members at the next meeting.

The chairman read the five proposed amendments to the bill (See Attachment III). He said there was also a sixth proposal providing expungement statutes be changed. Following committee discussion Senator Burke moved to amend the bill to provide every individual must be advised their right to take the blood alcohol test. Senator Gaines seconded the motion.

The committee will discuss the pending motion at the committee meeting tomorrow.

The meeting adjourned.

A copy of the guest list is attached (See Attachment IV).

1-28-87
KANSAS
ASSOCIATION



OF
SCHOOL
BOARDS



5401 S. W. 7th Avenue Topeka, Kansas 66606
913-273-3600

TESTIMONY ON S.B. 49

by

Richard Funk, Assistant Executive Director
Kansas Association of School Boards

January 27, 1987

Mr. Chairman and members of the committee, we appreciate the opportunity to testify today on behalf of the 302 members of the Kansas Association of School Boards. KASB supports the provisions in S.B. 49. It was unclear last year whether or not elementary and secondary schools were included in the 1986 bid. We felt that they were and so instructed our members. We are glad to see this clarifying amendment.

Attest, I.
Sen. Judiciary
1-28-87

STATE OF KANSAS, *Appellant*, v. CAROL A. PRIEST, *Appellee*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Habitual Offender—When Prior Conviction Cannot Be Used to Enhance Punishment.* Where the record of a defendant's conviction on its face raises a presumption that the defendant was not represented by counsel, such a conviction cannot be used to enhance punishment under a habitual offender statute until that presumption is overcome.
2. SAME—*Driving under Influence—Diversion—Waiver of Right to Counsel—Effect on Enhancement of Sentence upon Subsequent DUI Conviction.* Prior to entering into a diversion agreement, individuals charged with DUI must be given the opportunity to make a knowing waiver of their constitutional right to assistance of counsel. Where the defendant is without assistance of counsel and has not waived the right to assistance of counsel, the State cannot have the benefit of an uncounseled diversion agreement to enhance the sentence upon a subsequent DUI conviction.

Appeal from Shawnee district court; THOMAS W. REGAN, judge. Opinion filed July 18, 1986. Appeal dismissed.

Arthur R. Weiss, assistant district attorney, argued the cause, and *Gene M. Olander*, district attorney, and *Robert T. Stephan*, attorney general, were with him on the brief for appellant.

Joel W. Meinecke, of Topeka, argued the cause and adopted the brief of appellant.

The opinion of the court was delivered by

LOCKETT, J.: Defendant Carol Priest, who had completed one DUI diversion program and pled nolo contendere to a second DUI charge, was sentenced as a first-time DUI offender because the record of the prior diversion agreement failed to show that she had been advised of her right to legal counsel or that she had given a valid waiver of that right. The State appeals the sentencing pursuant to K.S.A. 22-3602(b)(3).

On October 19, 1983, the defendant, Carol A. Priest, entered a diversion program with the City of Topeka in lieu of further criminal proceedings on a charge of driving under the influence. At that time, Priest did not have an attorney, and there is no indication in the record that she waived her right to an attorney when entering into the diversion agreement.

Priest was arrested on a second DUI charge in September 1985. In November, with the advice and assistance of counsel, Priest pled no contest in Shawnee County District Court to the DUI charge.

Attch. II
Senate Judiciary
1-28-87

Although the presentence evaluation report indicated that Priest had previously entered into a diversion program, that record was silent as to whether she had been represented by counsel or had waived her right to an attorney. In December, the district court sentenced Priest as a first-time DUI offender. The court held Priest could not be sentenced as a second-time DUI offender, absent a showing of either advice of legal counsel or waiver of the right to an attorney prior to entering into the 1983 diversion agreement. The State reserved that question and filed this appeal.

K.S.A. 1985 Supp. 8-1567(e) and (f) provide for an enhanced penalty for second and subsequent convictions for DUI. K.S.A. 1985 Supp. 8-1567(j), which defines convictions, permits only convictions which have occurred within the preceding five years to be used to enhance the penalty. Under the statute, the date at which the conviction accrues is the date on which the defendant enters the diversion agreement. Entering into and successfully completing a diversion agreement in lieu of criminal proceedings for DUI counts as a conviction.

To obtain the benefit of diversion, K.S.A. 1985 Supp. 22-2909 requires the individual charged with DUI to enter into a contract with the prosecutor waiving all rights under the law or the constitution of Kansas or of the United States to a speedy arraignment, preliminary examinations and hearings, a speedy trial, and the right to a jury trial. The defendant and the prosecutor must stipulate to the facts which form the basis of the charge. If criminal proceedings are resumed, the defendant is bound by the contract to be tried on the stipulated facts by a judge.

Chapter 7 (Diversion) in the 1986 revision of the Kansas Municipal Court Manual contains an excellent discussion of the procedure for municipal courts to follow when diversion is appropriate. § 7.06 (Right to Counsel) suggests that in all diversion agreements the defendant be represented by counsel or sign a waiver of the right to counsel. If the individual is indigent and does not waive that right, counsel must then be appointed to represent the defendant prior to entering into a diversion agreement.

The State argues that diversion is a suspension of the prosecution and, therefore, the defendant never enters the critical

stage in the prosecution contends that where a defendant is absent a waiver of counsel, the diversion agreement is not completed and that diversion is not available to enhance the sentencing.

The constitutionality of the diversion program discussed in *State v. Clevenger* was charged. Clevenger was charged with a DUI violation in violation of a diversion agreement, but he argued that his sentencing under the diversion agreement was an individual's right to a fair trial of an individual's guilt or innocence was protected by the diversion agreement. Clevenger argued that he was not to enter the diversion agreement until he had completed the trial phase guarantees of a fair trial. Clevenger voluntarily accepted the diversion agreement, and he was waiving his due process rights. Clevenger argued that the diversion would be completed and sentence imposed. Clevenger argued that the defendant must make a choice when he chooses to go to trial or to accept the diversion agreement. Clevenger argued that he should be allowed to continue with prosecution.

Almost all jurisdictions have held that a defendant's conviction under a diversion agreement cannot be used to enhance the sentence. Clevenger argued that the statute until that presumption is rebutted. Clevenger argued that an individual's Sixth Amendment rights are protected.

In *State v. Oehm*, 9 Kan. 200, 190 P.2d 1000, a defendant was convicted of a DUI violation and sentenced to probation in compliance with a diversion agreement. He appealed his conviction. Oehm had previously been convicted of a DUI violation and sentenced to probation. He was not represented by counsel at the time of his conviction. The Court of Appeals held that the United States Supreme Court's decision in *State v. Oehm* was not applicable to the facts of this case.

II

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stage in the prosecution where he is entitled to legal counsel. It contends that where a defendant, without advice of counsel or absent a waiver of counsel, enters into and successfully completes the diversion agreement, no constitutional rights are violated and that diversion may be counted as a conviction to enhance the sentencing.

The constitutionality of the diversion agreement was discussed in *State v. Clevenger*, 235 Kan. 864, 683 P.2d 1272 (1984). Clevenger was charged with DUI and entered into a diversion agreement which he violated. Tried on the stipulated facts of the diversion agreement, he was found guilty. Clevenger claimed that his sentencing under K.S.A. 1983 Supp. 8-1567 was a violation of an individual's constitutional right to due process since his guilt or innocence was not adjudicated prior to entering into the diversion agreement. We did not agree. A defendant's decision to enter the diversionary program is voluntary. The defendant may choose to go to trial, rather than to accept diversion. The trial phase guarantees all constitutional rights. Therefore, Clevenger voluntarily accepted diversion, with knowledge that he was waiving his due process rights, and with knowledge that the diversion would be considered a conviction if he was ever convicted and sentenced again. *Clevenger* emphasized that a defendant must make a knowing waiver of his due process rights when he chooses to go with a diversion agreement rather than to continue with prosecution.

Almost all jurisdictions have held that where the record of a defendant's conviction on its face raises a presumption that the defendant was not represented by counsel, such a conviction cannot be used to enhance punishment under a habitual offender statute until that presumption is overcome. This insures that an individual's Sixth Amendment right to counsel is protected.

In *State v. Oehm*, 9 Kan. App. 2d 399, 680 P.2d 309 (1984), the defendant was convicted of driving while under the influence of alcohol and sentenced as a second offender to 90 days' imprisonment in compliance with the statutory mandate for second offenders. He appealed the sentence. The record showed that Oehm had previously been convicted of DUI, but at the trial he was not represented by a lawyer and he did not waive any right to counsel. The Court of Appeals discussed the following three United States Supreme Court cases in reaching its decision:

Argersinger v. Hamlin, 407 U.S. 25, 37, 32 L. Ed. 2d 530, 92 S. Ct. 2006 (1972); *Baldasar v. Illinois*, 446 U.S. 222, 225, 64 L. Ed. 2d 169, 100 S. Ct. 1585 (1980); *Scott v. Illinois*, 440 U.S. 367, 369, 59 L. Ed. 2d 383, 99 S. Ct. 1158 (1979). The Court of Appeals concluded that the defendant could not be sentenced as a second offender.

Here, the question is if the prosecution is using a prior diversion agreement that was successfully completed to enhance the penalty of a subsequent DUI conviction, must the record of the diversion agreement indicate that the defendant was represented by counsel or have made a knowing waiver of the right to counsel?

The State argues that since diversion occurs before prosecution, it does not take place at a critical stage and, therefore, counsel is not required; since a diversion agreement is a contract, not a trial, the individual may, without the advice of counsel, contract away certain guaranteed rights. The State implies that it is the form of the proceeding that determines whether an individual is entitled to the assistance of counsel.

K.S.A. 1985 Supp. 8-1567(j)(1) defines "conviction" to include a diversion agreement. The legislature intended that the withholding of adjudication of a DUI charge should be treated as a judgment of conviction for purposes of subsequent punishment.

A successfully completed DUI diversion agreement has the same effect as a conviction for DUI when a sentence is enhanced. Had Priest realized that the successfully completed diversion agreement would result in enhancement of sentence after a subsequent conviction, she might have considered going to trial rather than agreeing to a diversion agreement.

The prosecution's argument that a diversion agreement occurs before prosecution and, therefore, is not a critical stage is incorrect. To adopt such a position is to have an obsessive solicitude for the technical administration of justice and an utter lack of concern for the constitutional rights of the individual. In addition, the State ignores that under Kansas statutes, prosecution commences when a complaint is filed with a magistrate. K.S.A. 22-2301. An individual cannot enter into a DUI diversion agreement until that individual has been charged by the filing of a complaint. After a complaint has been filed and the defendant

has been arrested
reached.

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State v. Priest

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has been arrested, a critical stage of the prosecution has been reached.

It is held that, prior to entering into a diversion agreement, individuals charged with DUI must be given the opportunity to make a knowing waiver of their constitutional right to assistance of counsel. Where the defendant is without assistance of counsel and has not waived the right to assistance of counsel, the State cannot have the benefit of an uncounseled diversion agreement to enhance the sentence for a subsequent DUI conviction. The judge correctly determined that a sentence of imprisonment for DUI conviction may not be enhanced under K.S.A. 1985 Supp. 8-1567 where the record of the prior diversion agreement is silent as to whether the defendant either had or waived the right to assistance of counsel under the Sixth Amendment of the United States Constitution.

The State's appeal is dismissed.

II

MEMORANDUM

January 26, 1987

TO: Senate Judiciary Chairman
FROM: Kansas Legislative Research Department
RE: Suggested Amendments to S.B. 14

S.B. 14 was recommended by the 1986 interim Special Committee on Judiciary. Conferees suggested the following amendments:

1. Prohibit diversion for those persons who refuse to submit to a chemical test to determine the percentage of alcohol in their bloodstream -- Kansas Community Alcohol Safety Action Project Coordinator's Association and others.
2. Prohibit diversion if the chemical test results reveal a blood alcohol content of .15 or more -- Coalition of Drug and Alcohol Programs and others.
3. Make diversion records open to insurers and the public -- Coalition of Drug and Alcohol Programs.
4. Authorize fines for persons on diversion -- Kansas County and District Attorneys Association.*
5. Amend statutes to provide that entering into a diversion agreement by a defendant does not terminate the defendant's obligation under an appearance bond. In other words, revocation of a diversion agreement would trigger an obligation to appear in court under provisions of an appearance bond -- Kansas County and District Attorneys' Association.*

* Both suggestions No. 4 and No. 5 are in reaction to recent Kansas Court decisions, No. 4 being a Kansas district court decision (Gaba) and No. 5 being a Kansas Court of Appeals decision (Chappell).

Judiciary.MH/db

Atch. III
Senate Judiciary
1-28-87