



2023 Legislative Changes & Case Law Update CLE

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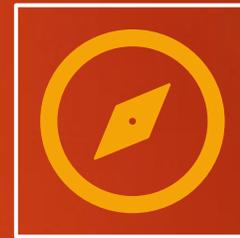
Webinar Rules



Poll



Chat/Q&A



Survey

Overview

Changes from
the 2023 Kansas
Legislative
Session

Recent Kansas
appellate cases

Updated 2023
JE/PVJE

2023 Legislative Changes

Punishment/Deterrence	SB 123 Expands
Increase in criminal penalties and new special sentencing rules	Nondrug, nonperson felonies now included

SB 174 – Increases in Criminal Penalties

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- ▶ Definition of Drug Manufacture Amended & Increased Penalties for Unlawful Manufacture of Fentanyl
 - ▶ Adding the placing of controlled substances into pills or capsule form into the definition of “manufacture”.
 - ▶ Fentanyl test strips are exempted from drug paraphernalia
 - ▶ Increasing the criminal penalties from drug SL2 to drug SL1 for manufacturing “fentanyl related controlled substances.”
- ▶ Burglary Elements Expanded
 - ▶ Domestic Battery and Violation of a Protective Order added to the elements of burglary as the intent an offender may have when committing the crime.
- ▶ Battery of Healthcare Worker
 - ▶ Battery of healthcare worker is created as a class A, person misdemeanor

SB 174 – Increases in Criminal Penalties

Cont'd

- ▶ Special Sentencing Rules
 - ▶ Sentence for distribution of fentanyl is now presumptive prison and shall be two times the maximum duration of the presumptive term. Not considered a departure and not subject to appeal.
 - ▶ Sentence for distribution or manufacture of controlled substances is now presumptive prison and shall be two times the maximum duration of the presumptive term if packaging is found likely to be attractive to minors. Not considered a departure and not subject to appeal.
- ▶ Fleeing from a LEO
 - ▶ Penalties for Interference with LEO increased when the violation is fleeing from LEO
 - ▶ For misdemeanor or civil case, class A, nonperson misdemeanor
 - ▶ For felony or parole from a felony, SL7NPF
 - ▶ For felony and offender discharged or used firearm while fleeing, SL5NPF
- ▶ Attorney General Jurisdiction Expanded
 - ▶ AG is authorized to prosecute theft or RICO violations that are part of a course of criminal conduct occurring in 2 or more counties.

SB 217 – Prohibition on Electronic Tracking Systems

- ▶ Stalking “course of conduct” definition amended by including utilizing any electronic tracking system or acquiring tracking information to determine the target person’s location, movement or travel patterns in the crime of stalking when done as part of an unlawful course of conduct and authorizing orders to prohibit such conduct under the Kansas family code, the revised Kansas code for care of children, the protection from abuse act and the protecting from stalking, sexual assault or human trafficking act and increasing the time of an initial restraining order and possible extensions issued in a protection from abuse order or a protection from stalking, sexual assault or human trafficking order.

S Sub for HB 2010

- ▶ Technical amendment updating a statutory cross reference to provide proper jury instruction in cases when a defendant lacks the required mental state to commit a crime;
- ▶ Allowing certain nondrug offenders to participate in a certified drug abuse treatment program (SB 123);
- ▶ Providing that the service of the postrelease supervision period shall not toll except as otherwise provided by law; and
- ▶ Amend the definition of criminal discharge of a firearm to include the reckless and unauthorized discharge of any firearm at a motor vehicle in which there is a human being, regardless of whether the defendant knows or has reason to know a human being is present.

S Sub for HB 2010 – Special Sentencing Rules

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- ▶ Enacting the reduced armed violence act to increase the criminal penalties for certain violations of criminal possession of a weapon by a convicted felon that involves firearms. The sentence is presumptive imprisonment and shall be consecutive to any other terms of imprisonment. No other sentence shall be permitted;
- ▶ A violation of a criminal discharge of a firearm involving the reckless and unauthorized discharge of a firearm at a dwelling, building, structure, or motor vehicle. Special rule is triggered if trier of fact makes a finding beyond a reasonable doubt that the offender discharged a firearm and that the offender knew or reasonably should have known a person was present at the above-mentioned locations.
 - ▶ When the person present is 14 years of age or older, sentence would be presumptive imprisonment per the KSGA, plus 60 months of additional imprisonment to be served consecutively to any other term(s) of imprisonment.
 - ▶ When the person present is less than 14 years of age, the sentence would be a presumptive term of imprisonment per the KSGA plus 120 months of additional imprisonment, to be served consecutively to any other term(s) of imprisonment.

Sub for HB 2121- Statutory Speedy Trial Rights Suspension Extended to March 1, 2024.

- ▶ Extends the suspension of statutory speedy trial rights for defendants in all criminal cases until March 1, 2024. Current law suspension to expire March 1, 2023.
- ▶ Time between March 19, 2020, and March 1, 2024, may not be assessed against the State for any reason.
- ▶ Any person arraigned before March 1, 2024, is deemed to have been arraigned on that date for the application of speedy trial.
- ▶ The bill takes effect upon publication in the *Kansas Register*.

Sub for HB 2127 – Statute of Limitations

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Adds the crime of childhood sexual abuse, as defined by the bill, to the list of crimes, such as rape, agg. criminal sodomy, and murder, in which a criminal prosecution may be commenced at any time; and

Extends the time to file a civil action to recover damages resulting from childhood sexual abuse.

HB 2216 - Driving While Suspended, Cancelled or Revoked

- ▶ Removes, for the first-time offender, the mandatory term of imprisonment for driving with a driver's license that was canceled, suspended, or revoke for failure to appear in response to a traffic citation or failure to pay fines or otherwise comply with a traffic citation.
- ▶ Convictions for the offense will be subject to a mandatory fine of at least \$100.
- ▶ The bill also replaces all references to "imprisonment" with "confinement."
- ▶ The bill takes effect upon publication in the *Kansas Register*.

HB 2269 – Kansas Cigarette and Tobacco Products Act

- ▶ Raises the minimum age to 21 to sell, purchase, or possess cigarettes, electronic cigarettes, or tobacco products.

HB 2350 – Human Smuggling

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- ▶ Creates crime of intentionally transporting, harboring, or concealing an individual into or within Kansas when the person:
 - ▶ Knows, or should have known, that the individual is entering into or remaining in the US illegally;
 - ▶ Benefits financially or receives anything of value; and
 - ▶ Knows, or should have known, that the individual being smuggled is likely to be exploited for the financial gain of another.
- ▶ Human smuggling is a SL5PF
- ▶ Aggravated human smuggling is human smuggling
 - ▶ With a deadly weapon or by threat of use of a deadly weapon;
 - ▶ Causes bodily harm, great bodily harm, or disfigurement to the individual being smuggled; or
 - ▶ Causes the individual being smuggled to become a victim of a sex offense, or human trafficking, or causes the person to commit selling sexual relations, all as defined in the statute.
 - ▶ SL3PF

UPDATED JE/PVJE/PSI AND LAMINATES!

JE with
highlighted
changes

PVJE with
highlighted
changes

PSI with
highlighted
changes

Recent Case Law Affecting Criminal Sentencing in Kansas

KANSAS OPINIONS

UNPUBLISHED OPINIONS

Consolidation

- ▶ Anderson was charged with 3 separate cases
- ▶ District Court consolidated cases before plea hearing
- ▶ At sentencing, defendant argued criminal history score of “C” should only be applied to one primary count
- ▶ Anderson was sentenced as if he had 3 separate cases
- ▶ *State v. Anderson*, No. 124,727, 2023 WL 176658 (Kan. App. January 13th, 2023) (unpublished opinion).

Consolidation

Where the district court consolidated a defendant's 3 cases and sentenced the defendant using a separate primary crime for each, the Kansas Court of Appeals remanded the case for the district court to designate a base sentence for the most severe crime among the three cases to serve as the base sentence for all. See *State v. Anderson*, No. 124,727, 2023 WL 176658 at *6, (Kan. App. January 13th, 2023) (unpublished opinion). The Court of Appeals found the differential treatment violated his constitutional right to equal protection because Anderson's controlling prison sentence was several months longer than it would have been if the State had filed only one charging document. *Id.* at *1.

Upward Departures

Upward Departure

- ▶ Defendant pled guilty to one count of aggravated kidnapping, two counts of rape, and one count of aggravated sodomy.
- ▶ The district court judge doubled the presumptive sentence after finding two aggravating factors: (1) Newman-Caddell committed a crime of extreme sexual violence and was a sexual predator and (2) he posed a risk of future dangerousness to society.
- ▶ Defendant appealed the aggravated kidnapping departure
- ▶ Argued that aggravated kidnapping is not a crime of extreme sexual violence as defined by the departure sentence statute
- ▶ See *State v. Newman-Caddell*, 527 P.3d 911, (Kan. April 21, 2023).

“We reject Newman-Caddell's contention that the elements of aggravated kidnapping must include an act of extreme sexual violence for K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i) to apply. Nothing in K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i) explicitly imposes that requirement; instead, it extends the aggravating factor to any crime involving a nonconsensual act of sexual intercourse or sodomy. The kidnapping statute contemplates that a kidnapping will involve other crimes. The Legislature has defined kidnapping to include “the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person: ... (2) to facilitate flight or the commission of any crime.” (Emphasis added.) K.S.A. 2022 Supp. 21-5408(a). Any crime may include a crime of extreme sexual violence.” *State v. Newman-Caddell*, 527 P.3d 911, 913 (Kan. April 21, 2023).

Upward Departure

Where a defendant argued that his upward departure sentence was illegal because aggravated kidnapping is not a crime of extreme sexual violence, the Kansas Supreme Court held the defendant's aggravated kidnapping committed to facilitate rape and aggravated sodomy constituted a crime of extreme sexual violence under K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i) and thus, affirmed the district court's upward durational departure sentence. See *State v. Newman-Caddell*, 527 P.3d 911, 921 (Kan. April 21, 2023).

Upward Departure

- ▶ Defendant pled to sex offenses
- ▶ As part of the plea, he agreed to an upward departure stipulating to 2 aggravating factors
- ▶ This allowed him to get grid sentences
- ▶ Defendant admitted to aggravated factors, but then argued his sentence was illegal because he wasn't advised of & did not knowingly & voluntarily waive his right to jury trial on the upward aggravating factors.
- ▶ See *State v. Johnson*, No. 124,064, 2023 WL 4277856 at *6 (Kan. June 30th, 2023).

“We hold a claim challenging the constitutional validity of a waiver relinquishing the statutory right under K.S.A. 2022 Supp. 21-6817(b) to have a jury determine the existence of upward departure aggravating factors falls outside the definition of an illegal sentence. Absent a valid illegal sentence claim under K.S.A. 2022 Supp. 22-3504, an appellate court has no jurisdiction to review a sentence resulting from an agreement between the State and the defendant that the court approves on the record. Based on these holdings, we expressly overrule our prior opinion in *Duncan*, 291 Kan. 467, 243 P.3d 338. Because the panel relied on *Duncan* to reach the merits of the appeal, we reverse the Court of Appeals' decision and dismiss the appeal for lack of jurisdiction. We deny as moot the State's motion for supplemental briefing on the issue of harmless error and note Johnson's response to the State's motion.” *State v. Johnson*, No. 124,064, 2023 WL 4277856 at *6 (Kan. June 30th, 2023).

Restitution

- ▶ Defendant sentenced to 100 months in prison
- ▶ The court ordered \$1,954.36 in restitution
- ▶ Defense counsel asked court to delay payments until defendant released from prison stating that payments from prison were “totally unworkable”
- ▶ In response to questions from court, Taylor said he had children to support, but he did not have cash, a home, a car, or any bank accounts. [unsworn testimony]
- ▶ Ordered to pay \$15 a month while in prison
- ▶ See *State v. Taylor*, 530 P.3d 431, 434 (Kan. June 9, 2023).

“The plain language reflects that “[r]estitution is the rule and a finding that restitution is unworkable is the exception.” *Holt*, 305 Kan. at 842, 390 P.3d 1. Thus, the burden is on the defendant to show compelling circumstances that would render restitution unworkable, in whole or part. *State v. Meeks*, 307 Kan. 813, 816-17, 415 P.3d 400 (2018). To meet that burden, defendants must generally present evidence of their inability to pay at the time the financial obligation is due. 307 Kan. 813, Syl. ¶ 2, 415 P.3d 400; *Holt*, 305 Kan. at 842, 390 P.3d 1; *State v. Alcalá*, 301 Kan. 832, 840, 348 P.3d 570 (2015). Absent that evidence, the restitution order is presumed to be workable.” *State v. Taylor*, 530 P.3d 431, 434 (Kan. June 9, 2023).

Restitution Cont'd.

The Kansas Supreme Court recently held a defendant had not met his burden to show that his restitution plan was unworkable because, aside from his responses to the district court's questions, he presented no evidence about his ability to make the monthly restitution payments that were ordered while he was incarcerated. See *State v. Taylor*, 530 P.3d 431, 435 (Kan. June 9, 2023). The Court went on to say that the defendant did not introduce evidence about the likelihood of securing employment while incarcerated, the daily wages he might expect from such employment, or other expenses he expected to incur while incarcerated. See *id.*

Restitution

- ▶ Defendant ordered to pay \$3,567.95 in restitution for damages caused by 2 burglaries
- ▶ Defendant had rented out a storage unit and then used that access to burglarize 2 others (removed walls, caused electrical damage, etc)
- ▶ Repair estimate from the company who originally built the units
- ▶ Defendant argued that the state was required to introduce evidence of the market value of the damaged property before restitution could be ordered
- ▶ “Like its predecessor statute, K.S.A. 2021 Supp. 21-6604(b)(1) does not require the judge to consider the fair market value of the damaged property before determining restitution. Ingall's testimony establishing the cost to repair the storage units provides reliable evidence and yields a defensible restitution figure. We find no error by the district court in basing the restitution amount on the cost to repair the storage units and uphold its restitution order.” See *State v. Goertzen*, No. 124,561, 2023 WL 334677 at *3 (Kan. App. January 20, 2023) (unpublished opinion).

State v. Goertzen cont'd.

In a burglary case, the Kansas Court of Appeals recently rejected the notion that the district court was required to consider the fair market value of property before determining restitution for the repair of the damaged property. See *State v. Goertzen*, No. 124,561, 2023 WL 334677 at *3 (Kan. App. January 20, 2023) (unpublished opinion).

Criminal Threat

The Kansas Court of Appeals recently held that a defendant's prior criminal history conviction could not be scored for criminal history purposes because the plea did not establish which version of criminal threat he pled to. See *State v. Degand*, No. 125,120, 2023 WL 3261802 at *6 (Kan. App. May 5, 2023). The COA went on to say that the language of the amended indictment, the factual basis given by the State during the plea hearing, and the journal entry of judgment all reinforce this conclusion. See *id.*

Counterman v. Colorado

DOES THIS DECISION
AFFECT HOW PRIOR
CRIMINAL THREAT
CONVICTIONS WILL
BE SCORED IN
KANSAS?

KORA

- ▶ Defendant convicted of Involuntary Manslaughter while DUI
- ▶ Ordered to register as violent offender
- ▶ Crime not listed as offense that would trigger automatic registration as violent offender
- ▶ State argued that court's finding that defendant used deadly weapon enough to support violent offender registration
- ▶ Defendant was not notified of his duty to register at sentencing
- ▶ the court checked the box labeled "Yes" in answer to the question: "Did offender, as determined by the Court, commit the current crime with a deadly weapon?"
- ▶ The offender registration supplement that the court was required to attach reflected only that Buzzini had to register for 15 years because of the involuntary manslaughter conviction.
- ▶ The judge did not check the box on the supplemental form signifying that Buzzini committed the offense with a deadly weapon.
- ▶ See *State v. Buzzini*, 63 Kan.App.2d 335, 528 P.3d 1024 (Kan. App. 2023).

Offender Registration

Where a defendant was ordered to register under KORA for a crime that did not automatically require registration, the Court of Appeals found that the district court did not make sufficient findings on the record that a deadly weapon was used because registration was not discussed at sentencing, the court did not check the box signifying the defendant was informed of his duty to register, and the judge did not check the box on the offender registration supplement signifying that a deadly weapon was used. See *State v. Buzzini*, 63 Kan.App.2d 335, 343, 528 P.3d 1024 (Kan. App. 2023).

Juvenile Sentence

The Kansas Court of Appeals recently found that a defendant's 615-month sentence for crimes involving sexual violence committed as a juvenile was not the functional equivalent of life in prison without the possibility of parole. See *Steele v. State*, No. 125,240, 2023 WL 2344619 at *4 (Kan. App. March 3, 2023) (unpublished opinion).

Presumptions in Drug Distribution Cases

K.S.A. 2023
Supp. 21-
5705(e)(2)

In any prosecution under this section, there shall be a rebuttable presumption of an intent to distribute if any person possesses the following quantities of controlled substances or analogs thereof:

(2) 3.5 grams or more of heroin or methamphetamine;

State v. Strong

- ▶ Search warrant on home where Strong lived
- ▶ 10.24 grams of meth in plastic baggie, another plastic baggie of 1.4 grams of meth and other indicia of distribution (empty plastic baggies, digital scale)
- ▶ Defendant convicted of possession of meth with intent within 1000 ft of school
- ▶ Defendant claimed there was an instructional error because jury instruction stated that the jury could, but did not have to, presume Strong intended to distribute methamphetamine, if he possessed at least 3.5 grams.
- ▶ Defendant argued this instruction conflicts with the mandatory presumption in the statute
- ▶ KS Supreme Court agrees that the instruction is not legally appropriate; however, no clear error shown (Court is not firmly convinced that the jury would have reached a different verdict if the instructional error had not occurred).
- ▶ See *State v. Strong*, 317 Kan. 197, 527 P.3d 548 (2023).

State v. Slusser, 317 Kan. 174, 527 P.3d 565 (2023).

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- ▶ 11.2 grams of meth found in defendant's pocket during traffic stop
- ▶ No other indications of distribution; defendant told officers he was working with a DEA agent but that wasn't true
- ▶ Indicted on one count of possession of meth with intent to distribute among other charges
- ▶ Defendant argued jury instruction was erroneous
- ▶ Jury instruction said the jury could, but was not required to, infer the defendant intended to distribute methamphetamine if the evidence showed he possessed 3.5 or more grams of the drug
- ▶ Slusser argues the plain language of the statute imposes a mandatory presumption of an intent to distribute when the evidence shows defendant possessed 3.5 grams or more of methamphetamine. But the instruction to the jury described a permissive inference under the same set of circumstances
- ▶ Supreme Court declined to reach merits on first issue – the instructional challenge – because of the invited-error doctrine

State v. Slusser Cont'd.

- ▶ Second, the defendant argued the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e)(2) was unconstitutional. KS Supreme Court declined to reach the merits of this argument because the defendant failed to preserve the constitutional challenge
- ▶ Finally, the defendant argued the prosecutor erred in closing argument by characterizing the permissive inference instruction as a mandatory presumption. The KS Supreme Court agreed.
 - ▶ Prosecutor mischaracterized the jury instruction
 - ▶ KS Supreme Court held that prosecutor erred
 - ▶ Prosecutor erred by using the term “presumption” instead of inference
 - ▶ Prosecutor used the terms “presume” and “assume” interchangeably
 - ▶ Prosecutor mentioned that the legislature had found that possessing 3.5 grams or more.... Goes along way with the intent to distribute
 - ▶ **Prosecutorial error not harmless**

State v. Slusser Cont'd.

- ▶ “Now, I want to talk to you guys about something called the rebuttable presumption. This is listed in Instruction No. 9 at the very last paragraph and you'll have a copy of this, but I want to read it again briefly.
- ▶ “If you find the defendant possessed 3.5 grams or more of methamphetamine, you may infer that he possessed it with the intent to distribute. You may consider the inference along with all other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the intent of the defendant and this burden never shifts to the defendant.
- ▶ “Why is this important? Why am I reading this to you again? You've heard it once already. The point is, this is a rebuttable presumption. What that means is, you can presume it. The law and the legislature tells you, you can presume it, but you don't have to assume. This is not a 100 percent, you must do this. But it's important. Why? During jury selection when we were doing our voir dices nobody *186 that's seated indicated that they have personal experience with methamphetamine. Therefore, I think it's safe to assume that me and Mr. Luttrell, can assume that you all may not know the differences between a dealer weight, a distributor weight, or a simple user weight. So we have this rebuttable presumption in there for that reason.
- ▶ “Again, if someone is possessing methamphetamine over 3.5 grams, which is what we have here, remember we have 11.2, you can assume that they are possessing that with the intent to distribute, merely on the weight alone. Again, like I said, you don't have to follow that presumption. And you should consider that with all the other evidence that has been presented in front of you. But you don't have to automatically throw that out. The legislature is trying to give you, and the **575 PIK instruction is trying to give you instruction or guidance on that topic. They have found that typically 3.5 grams or more is—goes along with the intent to distribute. And I would argue that that's what we have here, the intent to distribute.”
- ▶ *State v. Slusser*, 317 Kan. 174, 185, 527 P.3d 565 (2023).

State v. Martinez

- ▶ Martinez had 111 grams of meth in jacket he was wearing
- ▶ Defendant convicted of possession of meth with intent to distribute among other charges
- ▶ Argued jury instruction was not legally appropriate
- ▶ “While K.S.A. 2022 Supp. 21-5705(e)(2)'s mandatory presumption requires the jury to find the presumed fact (the intent to distribute) based on evidence supporting the predicate fact (possession of at least 3.5 grams of methamphetamine), the instruction's permissive inference informs the jury that it “may accept or reject” the presumed fact. See *Holder*, 314 Kan. at 804-05, 502 P.3d 1039; *Valdez*, 316 Kan. at 8-9, 512 P.3d 1125. And because the permissive-inference instruction deviates from the mandatory presumption in the statute, it is not legally appropriate.” *State v. Martinez*, 317 Kan. 151, 163, 527 P.3d 531 (2023).
- ▶ KS Supreme Court agreed with defendant that jury instruction was not legally appropriate. However, no clear error found.



QUESTIONS?

KSSC RESOURCES

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Training

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