

2011 LEGISLATIVE CHANGES IN KANSAS DOMESTIC VIOLENCE LAW: A PRIMER

Overview of Changes:

1. *Mens rea* requirement has been re-phrased;
2. No more than 2 diversions in any 5 year period;
3. New domestic violence offense “tagging” provision;
 - A. Trier of fact determines if any offense is a domestic violence offense;
 - B. If offense is “domestic violence offense” it is designated as such and special sentencing provisions apply.
4. New domestic violence sentencing consequences.
 - A. The Court must order domestic violence evaluation;
 - B. The Court may impose a special domestic violence program fee.

The new domestic battery “offense” provision

Excerpt from K.S.A. 21-5414:

“(a) Domestic battery is:

(1) Knowingly or recklessly causing bodily harm by a family or household member against a family or household member; or

(2) knowingly causing physical contact with a family or household member by a family or household member when done in a rude, insulting or angry manner.

....

(c) As used in this section:

(1) “Family or household member” means persons 18 years of age or older who are spouses, former spouses, parents or stepparents and children or stepchildren, and persons who are presently residing together or who have resided together in the past, and persons who have a child in common regardless of whether they have been married or who have lived together at any time. “Family or household member” also includes a man and woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time; and

....”. (emphasis added).

The change: Model Penal Code *mens rea* language

Excerpt from K.S.A. 21-5202:

“....

(b) Culpable mental states are classified according to relative degrees, from highest to lowest, as follows:

(1) Intentionally;

(2) knowingly;

(3) recklessly.

(c) Proof of a higher degree of culpability than that charged constitutes proof of the culpability charged. If recklessness suffices to establish an element, that element also is established if a person acts knowingly or intentionally. If acting knowingly suffices to establish an element, that element also is established if a person acts intentionally.

....

(h) A person acts "intentionally", or "with intent," with respect to the nature of such person's conduct or to a result of such person's conduct when it is such person's conscious objective or desire to engage in the conduct or cause the result. All crimes defined in this code in which the mental culpability requirement is expressed as "intentionally" or "with intent" are specific intent crimes. A crime may provide that any other culpability requirement is a specific intent.

(i) A person acts "knowingly", or "with knowledge," with respect to the nature of such person's conduct or to circumstances surrounding such person's conduct when such person is aware of the nature of such person's conduct or that the circumstances exist. A person acts "knowingly," or "with knowledge," with respect to a result of such person's conduct when such person is aware that such person's conduct is reasonably certain to cause the result. All crimes defined in this code in which the mental culpability requirement is expressed as "knowingly," "known," or "with knowledge" are general intent crimes.

(j) A person acts "recklessly" or is "reckless", when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." (emphasis added).

Issue: Is bodily harm "conduct" or a "result" under K.S.A. 21-5202(i)? If it is a result, isn't the actor required to know that his conduct is reasonably certain to cause bodily harm?

The new domestic battery “penalty” provision

Excerpt from K.S.A. 21-5414.

“

(b) Domestic battery is a:

(1) Class B person misdemeanor and the offender shall be sentenced to not less than 48 consecutive hours nor more than six months' imprisonment and fined not less than \$200, nor more than \$500 or in the court's discretion the court may enter an order which requires the offender enroll in and successfully complete a domestic violence prevention program, except as provided in subsection (b)(2) or (b)(3);

(2) class A person misdemeanor, if, within five years immediately preceding commission of the crime, an offender is convicted of domestic battery a second time and the offender shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than \$500 nor more than \$1,000, except as provided in subsection (b)(3). The five days imprisonment mandated by this paragraph may be served in a work release program only after such offender has served 48 consecutive hours imprisonment, provided such work release program requires such offender to return to confinement at the end of each day in the work release program. The offender shall serve at least five consecutive days imprisonment before the offender is granted probation, suspension or reduction of sentence or parole or is otherwise released. As a condition of any grant of probation, suspension of sentence or parole or of any other release, the offender shall be required to enter into and complete a treatment program for domestic violence prevention; and

(3) person felony, if, within five years immediately preceding commission of the crime, an offender is convicted of domestic battery a third or subsequent time, and the offender shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than \$1,000 nor more than \$7,500. The offender convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the offender has served at least 90 days imprisonment. The court shall require as a condition of parole that such offender enter into and complete a treatment program for domestic violence. If the offender does not enter into and complete a treatment program for domestic violence, the offender shall serve not less than 180 days nor more than one year's imprisonment. The 90 days imprisonment mandated by this paragraph may be served in a work release program only after such offender has served 48 consecutive hours imprisonment, provided such work release program requires such offender to return to confinement at the end of each day in the work release program.

(c) As used in this section:

(1) “Family or household member” means persons 18 years of age or older who are spouses, former spouses, parents or stepparents and children or stepchildren, and persons who are presently residing together or who have resided together in the past, and persons who have a child in common regardless of whether they have been married or who have lived together at any time. “Family or household member” also includes a man and woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time; and

(2) for the purpose of determining whether a conviction is a first, second, third or subsequent conviction in sentencing under this section:

(A) "Conviction" includes being convicted of a violation of K.S.A. 21-3412a, prior to its repeal, this section or entering into a diversion or deferred judgment agreement in lieu of further criminal proceedings on a complaint alleging a violation of this section;

(B) "conviction" includes being convicted of a violation of a law of another state, or an ordinance of any city, or resolution of any county, which prohibits the acts that this section prohibits or entering into a diversion or deferred judgment agreement in lieu of further criminal proceedings in a case alleging a violation of such law, ordinance or resolution;

(C) only convictions occurring in the immediately preceding five years including prior to July 1, 2001 shall be taken into account, but the court may consider other prior convictions in determining the sentence to be imposed within the limits provided for a first, second, third or subsequent offender, whichever is applicable; and

(D) it is irrelevant whether an offense occurred before or after conviction for a previous offense.

(d) A person may enter into a diversion agreement in lieu of further criminal proceedings for a violation of this section or an ordinance of any city or resolution of any county which prohibits the acts that this section prohibits only twice during any five-year period."

(emphasis added).

The change: a longer look-back period for diversion eligibility

The legislature changed the penalty provision to restrict the availability of diversion for repeat offenders. Previously, a person could have no more than two diversions for this offense in any three year period. Now, a person can have no more than two diversions for this offense in any five year period.

Issue: Did the legislature create a prior "conviction" loophole?

Under new K.S.A. 21-5414(c)(2)(A), a "conviction" includes: (1) "being convicted of a violation of K.S.A. 21-3412a, prior to its repeal;" (2) being convicted of "this section;" or (3) "entering into a diversion or deferred judgment agreement in lieu of further criminal proceedings on a complaint alleging a violation of this section."

What about "entering into a diversion or deferred judgment agreement in lieu of further criminal proceedings on a complaint alleging a violation of K.S.A. 21-3412a, prior to its repeal"? This language is conspicuously absent from current law.

The new domestic violence offense “tagging” provisions and sentencing consequences

Excerpt from K.S.A. 22-4616

“(a) On and after July 1, 2011, in all criminal cases, if there is evidence that the defendant committed a domestic violence offense, the trier of fact shall determine whether the defendant committed a domestic violence offense.

(1) Except as provided further, if the trier of fact determines that the defendant committed a domestic violence offense, the court shall place a domestic violence designation on the criminal case and the defendant shall be subject to the provisions of subsection (p) of K.S.A. 21-6604, and amendments thereto.

(2) The court shall not place a domestic violence designation on the criminal case and the defendant shall not be subject to the provisions of subsection (p) of K.S.A. 21-6604, and amendments thereto, only if the court finds on the record that:

(A) The defendant has not previously committed a domestic violence offense or participated in a diversion upon a complaint alleging a domestic violence offense; and

(B) the domestic violence offense was not used to coerce, control, punish, intimidate or take revenge against a person with whom the offender is involved or has been involved in a dating relationship or against a family or household member.

(b) The term “domestic violence offense” shall have the meaning provided in K.S.A. 21-5111, and amendments thereto.

(c) This section shall be a part of and supplemental to the Kansas code for criminal procedure.” (emphasis added).

Excerpt from K.S.A. 21-5111

“(i) “Domestic violence” means an act or threatened act of violence against a person with whom the offender is involved or has been involved in a dating relationship, or an act or threatened act of violence against a family or household member by a family or household member. Domestic violence also includes any other crime committed against a person or against property, or any municipal ordinance violation against a person or against property, when directed against a person with whom the offender is involved or has been involved in a dating relationship or when directed against a family or household member by a family or household member. For the purposes of this definition:

(1) “Dating relationship” means a social relationship of a romantic nature. In addition to any other factors the court deems relevant, the trier of fact may consider the following when making a determination of whether a relationship exists or existed: Nature of the relationship, length of time the relationship existed, frequency of interaction between the parties and time since termination of the relationship, if applicable.

(2) “Family or household member” means persons 18 years of age or older who are spouses, former spouses, parents or stepparents and children or stepchildren, and persons who are presently residing together or have resided together in the past, and persons who have a child in common regardless of whether they have been married or have lived together at any time. Family or household member also includes a man and woman if the woman is

pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time.

(j) "Domestic violence offense" means any crime committed whereby the underlying factual basis includes an act of domestic violence." (emphasis added).

Issue: Federal firearms law provides that it is unlawful for any person who has been convicted in any court of a "misdemeanor crime of domestic violence" to possess a firearm. 18 U.S.C. 922(g)(9). Federal law looks at the underlying factual basis, not the elements, of the crime of conviction when determining if it is a "domestic" crime. See 18 U.S.C. 921(a)(33)(A)(ii); and *e.g. White v. Dept. of Justice*, 328 F.3d 1361, 1364-67 (Fed. Cir. 2003). As a result, the Kansas state domestic violence designation makes it easier for the feds to identify appropriate factual bases for firearms violation prosecutions.

Excerpt from K.S.A. 21-6604

"(a) Whenever any person has been found guilty of a crime, the court may adjudge any of the following:

....

(10) order the defendant to pay a domestic violence special program fee authorized by K.S.A. 20-369, and amendments thereto;

....

(p) In addition to any of the above, for any criminal offense that includes the domestic violence designation pursuant to K.S.A. 22-4616, and amendments thereto, the court shall require the defendant to undergo a domestic violence offender assessment and follow all recommendations unless otherwise ordered by the court or the department of corrections. The court may order a domestic violence offender assessment and any other evaluation prior to sentencing if the assessment or evaluation would assist the court in determining an appropriate sentence. The entity completing the assessment or evaluation shall provide the assessment or evaluation and recommendations to the court and the court shall provide the domestic violence assessment and any other evaluation to any entity responsible for supervising such defendant. A defendant ordered to undergo a domestic violence offender assessment shall be required to pay for the assessment and, unless otherwise ordered by the court or the department of corrections, for completion of all recommendations." (emphasis added).

K.S.A. 20-369

"(a) If a judicial district creates a local fund, the court may impose a fee as provided in this section against any defendant for crimes involving a family or household member as provided in K.S.A. 21-5414, and amendments thereto, and against any defendant found to have committed a domestic violence offense pursuant to K.S.A. 21-4616, and amendments thereto. The chief judge of each judicial district where such fee is imposed shall set the amount of such fee by rules adopted in such judicial district in an amount not to exceed \$100 per case.

(b) Such fees shall be deposited into the local fund and disbursed pursuant to recommendations of the chief judge under this act. All moneys collected by this section shall

be paid into the domestic violence special programs fund in the county where the fee is collected, as established by the judicial district.

(c) Expenditures made in each judicial district shall be determined by the chief judge and shall be paid to domestic violence programs administered by the court and to local programs within the judicial district that enhance a coordinated community justice response to the issue of domestic violence.” (emphasis added).

Issue: As of November 14, 2011, no Douglas County, Kansas local rule proscribes a fee as authorized in this section.