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June 22, 1984

ATTORNEY GENERAL OPINION NO. 84-57

Charles E. Simmons  
Chief Legal Counsel  
Kansas Department of Corrections  
700 Jackson, 5th Floor  
Topeka, Kansas 66603

Re: Crimes and Punishments -- Kansas Criminal Code --  
Classification of Crimes and Penalties; Effect of  
Legislation Providing for Reduction of Sentences

Synopsis: 1984 Senate Bill No. 858 reduces the sentences which may lawfully be imposed upon persons convicted of Class D or E felonies which are not included in articles 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated. An attempt to commit a felony contained in these three articles is defined as a distinct criminal act by article 33 of the same chapter. Thus, the exclusion of these three articles from the provisions of the bill does not extend to attempts to commit such crimes. Under the terms of this bill, the sentencing court must review the sentence of a person convicted of a non-excluded D or E felony and, at the discretion of the court, reduce the minimum term of imprisonment to the new limits in K.S.A. 1983 Supp. 21-4501, as amended. Such a review and possible reduction is also required for persons who were sentenced for the included felonies within the time frame established by the bill, but who were placed on probation and who remain subject to possible imprisonment should the conditions of their probation be violated. Cited herein: K.S.A. 1983 Supp. 21-3301, 21-4501, 21-4602, 21-4610, K.S.A. 21-4618, 22-3716, 1984 Senate Bill No. 858.

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Dear Mr. Simmons:

As Chief Counsel for the Kansas Department of Corrections, you request our opinion on two related questions concerning 1984 Senate Bill No. 858. That bill, which was passed by the legislature and approved into law by the governor on May 17, 1984, was prompted by overcrowding in the state penal system, which the department administers. Your two questions may be summarized as follows: (1) do the provisions of sections 1 and 10 of the bill include or exclude persons who have been convicted of attempts to commit crimes found in articles 34, 35 and 36 of chapter 21 of the Kansas Statutes Annotated; and (2) does the sentence review provision in section 10(b) include those persons who are now on probation for specified felonies which were committed on or after July 1, 1982?

The relevant portions of the bill state as follows:

"New Section 1. The presumptive sentence for a person who has never before been convicted of a felony, but has now been convicted of a class E felony shall be probation on terms the court determines, unless the conviction is of a crime specified in article 34, 35 or 36 of chapter 21 of Kansas Statutes Annotated. In determining whether to impose the presumptive sentence, the court shall consider any prior record of the person's having been convicted or having been adjudicated to have committed, while a juvenile, an offense which would constitute a felony if committed by an adult.

"Section 9. K.S.A. 1983 Supp. 21-4501 is hereby amended to read as follows: 21-4501. For the purpose of sentencing, the following classes of felonies and terms of imprisonment authorized for each class are established:

.....

"(d) Class D, the sentence for which shall be an indeterminate term of imprisonment by the court as follows:

(1) For a crime specified in article 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated, a minimum of not less than two years nor more than three years and a maximum of not less than five years nor more than 10 years;  
and

(2) For any other crime, a maximum of not less than one year nor more than three years and a

maximum of not less than five years nor more than 10 years.

"(e) Class E, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be fixed by the court at not less than one year and the maximum of which shall be fixed by the court at not less than two years nor more than five years.

"New Section 10.

"(a) . . . .

"(b) If an individual has been sentenced to a minimum term of imprisonment of more than one year for a class D or E felony, other than a felony specified in article 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated, which was committed on or after July 1, 1982, and if the sentence was imposed before the effective date of this act, the sentencing court shall review the individual's sentence within 60 days after the effective date of this act. Upon review, the sentencing court may reduce the individual's minimum term of imprisonment within the limits provided by K.S.A. 21-4501 and amendments thereto."

It is clear from the above that the legislature did not intend the provisions of the quoted sections to apply to felonies contained in articles 34, 35 and 36 of chapter 21 of the statutes. These offenses include crimes against persons, sex offenses and crimes affecting family relationships and children, and were deemed to be too serious for the reduction in sentence/early release provisions contained in the bill. You inquire whether a person convicted of an attempt to commit such an offense is likewise barred from the benefits conferred by the above-quoted sections.

Initially, it is significant that the concept of an attempted crime is contained in article 33 of chapter 21, which deals with anticipatory crimes. K.S.A. 1983 Supp. 21 defines "attempt" and sets forth penalty classifications, i.e. an attempt to commit a Class C felony is a Class D felony. Both the Kansas Supreme Court and Court of Appeals have considered this statute when construing the language of another sentencing statute, K.S.A. 21-4618. Sutton v. State, 6 Kan.App.2d 831 (1982); State v. Smith, 232 Kan. 284 (1982). Both cases involved article 34 crimes, conviction of which under K.S.A. 21-4618 made the defendant ineligible for probation and required him to serve the minimum sentence. In both cases, the court found that, as

the defendant had been convicted only of an attempted crime, he could not be considered as having committed an offense under article 34. Attempts, the courts ruled, come under article 33, and this distinction must be construed strictly against the state.

In our opinion, the same result should be reached here. The legislature was quite specific in excluding certain classes of offenses from the scope of Senate Bill No. 858, and, had it desired to do so, could have excluded article 33 crimes. For whatever reason (the legislative history is silent on this point), the bill does not include article 33 offenses in the list of those excluded from the bill's effect. Accordingly, persons convicted of attempted offenses which are classified as D or E felonies are eligible for consideration under section 10 of the bill.

That section figures in your second inquiry, namely whether the sentences of persons placed on probation should be reviewed in the same manner as those of persons now in the custody of your department. Section 10(b) imposes a duty on trial courts to review the sentences of those persons who have been convicted of a Class D or E felony which was committed on or after July 1, 1982, which does not fall within the excluded group, and in which a minimum sentence of more than one year was imposed. Such review is to be completed within 60 days of the effective date of the bill (e.g. by July 17, 1984), and may, at the court's discretion, result in a reduction of sentence to the new limits in K.S.A. 1983 Supp. 21-4501, as amended by Section 9. As a practical matter, given the language of Section 1 of the bill, the "presumptive" sentence for Class E felonies is now probation. The intended effect of this review is to reduce the number of persons in the prison population convicted of non-violent felonies, thus alleviating in part the over-crowded conditions at state penal institutions.

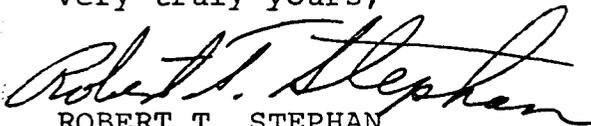
In our opinion, the provisions of Section 10(b) should be applied with equal weight to those persons who have been placed on probation as to those who have actually been imprisoned. Unlike persons whose sentence is suspended, an individual placed on probation is sentenced, but does not actually serve time. K.S.A. 1983 Supp. 21-4602. Rather, he or she is released, subject to conditions imposed by the court, under the continuing supervision of a probation official. K.S.A. 1983 Supp. 21-4610. A violation of the terms of probation subjects the defendant to the procedures of K.S.A. 22-3716, and, if a violation is found, he or she may be ordered to serve the original sentence which was imposed.

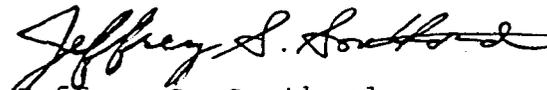
Given this statutory framework, a person sentenced since July 1, 1982, of one of the included offenses who is now on probation

could only benefit by the review provided by Section 10(b) of the bill. While such an individual may never serve any time in the state penal system, upon violation of probation such a possibility exists, and the length of the sentence imposed would then become significant. By the language of Section 10(b), any person who was sentenced during this time period for one of the specified crimes has a right to review of his or her sentence, with actual imprisonment not required. As criminal statutes must be strictly construed against the state and in favor of the defendant [State v. Stuart and Jones, 223 Kan. 600, 607 (1978)], application of this portion of 1984 Senate Bill No. 858 should not be restricted to only those persons now imprisoned, but should be construed to include those persons now on probation for included offenses committed during the time period specified by the legislature.

In conclusion, 1984 Senate Bill No. 858 reduces the sentences which may lawfully be imposed upon persons convicted of Class D or E felonies which are not included in articles 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated. An attempt to commit a felony contained in these three articles is defined as a distinct criminal act by article 33 of the same chapter. Thus, the exclusion of these three articles from the provisions of the bill does not extend to attempts to commit such crimes. Under the terms of this bill, the sentencing court must review the sentence of a person convicted of a non-excluded D or E felony and, at the discretion of the court, reduce the minimum term of imprisonment to the new limits in K.S.A. 1983 Supp. 21-4501, as amended. Such a review and possible reduction is also required for persons who were sentenced for the included felonies within the time frame established by the bill, but who were placed on probation and who remain subject to possible imprisonment should the conditions of their probation be violated.

Very truly yours,

  
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