KANSAS STATE BOARD OF INDIGENTS' DEFENSE SERVICES

Committee on Corrections and Juvenile Justice
March 8, 2023

Senate Bill 174
Testimony of the BIDS Legislative Committee
Prepared by Laura Stratton
Opponent

Dear Chairman Owens and Members of the Committee:

Senate Bill 174, as amended, risks chilling constitutionally protected conduct; criminalizing conduct regardless of an individual's knowledge or intent; and promoting dangerous car pursuits in lieu of foot pursuits.

As written, the proposed statute threatens to make fleeing-on-foot a strict-liability crime.
As a matter of statutory construction, Senate Bill 174, as amended, is vague and uncertain about a critical element of criminal law: the *mens rea* required to commit the crime. At issue is what the adverb "knowingly" modifies. Does it modify "fleeing from a law enforcement officer," or does it modify "fleeing from a law enforcement officer who has reason to stop the person under K.S.A. 22-2402"?

To illustrate the problem, consider two scenarios in which a suspect, Joe, is running away from a law enforcement officer:

	The law enforcement officer…	To violate the proposed statute, Joe must…
Scenario #1	Knows she has a reason under K.S.A. 22-2402 to stop Joe	Know he is running away from a law enforcement officer
Scenario #2	Knows she has a reason under K.S.A. 22-2402 to stop Joe	Know he is running from a law enforcement officer AND know that the law enforcement officer has a reason under K.S.A. 22-2402 to stop him

Absent reasonable suspicion that he has committed a crime, Joe has a constitutional right to run away from law enforcement.[1] Yet under Scenario #1, Joe has no way of knowing whether, when he runs away from law enforcement, he is exercising his constitutional right or committing the crime proposed by SB 174, as amended. That is because under Scenario #1, the illegality of Joe's conduct turns on the law enforcement officer's knowledge, not Joe's. If the law enforcement officer has independent knowledge leading her to reasonably suspect Joe has committed a crime,

[1] *See Fla. v. Bostick*, 501 U.S. 429, 436 (1991).

Joe has violated the proposed statute. If the law enforcement officer does *not* have independent knowledge leading her to reasonably suspect Joe has committed a crime, Joe has *not* violated the proposed statute. In essence, Scenario #1 dispenses with the *mens rea* requirement inherent in nearly all criminal laws.[2] By contrast, had Joe fled by car, it would have been an affirmative defense if he reasonably believed that the car pursuing him was not a police car.[3] SB 174, as amended, contains no such protections. Fleeing from a law enforcement officer on foot is not one of the very few crimes that this Legislature should make a strict-liability crime, and without the protections provided in similar laws.

The bill should be amended to clarify that to violate the proposed statute, an individual must know he is running from a law enforcement officer attempting a stop *and* know that the law enforcement officer has reason under K.S.A. 22-2402 to stop him.

<u>The proposed statute, particularly subsection (b)(6)(C), punishes fleeing-by-foot more harshly than fleeing-by-vehicle, thus promoting dangerous car chases.</u>

Senate Bill 174, as amended, also has a proportionality problem, meaning it is not in proportion to other statutes in the Criminal Code. Under the proposed statute, the penalty for fleeing-by-foot would range from a Class A nonperson misdemeanor to a Severity Level 5 nonperson felony. By contrast, the penalty for fleeing an officer in a vehicle – which is arguably more dangerous – ranges from a Class B nonperson misdemeanor to a Severity Level 7 person felony.[4]

This disparity is most conspicuous in subsection (b)(6)(C) of the proposed statute, which assigns a Severity Level 5 to any fleeing-by-foot in which the person "uses" a firearm. Consider again Joe. Joe has no criminal record, but one day he allegedly commits a misdemeanor. When law enforcement tries to arrest him, he shoots his gun into the air and runs away. Under the proposed statute, Joe can be punished by 31 to 34 months in prison.[5] However, had Joe shot his gun into the air, hopped in his car, and led police on a car chase through downtown Topeka, he could have only been punished by 6 months in the county jail.[6]

The disparity is likewise apparent when considering the enhancement for fleeing a felony. If Joe flees an alleged felony by foot, under SB 174, as amended, he would face a Severity Level 7 felony. Yet if he flees that same alleged felony in a car, he would only face a Severity Level 9 felony.[7]

Finally, SB 174, as amended, does not require the law enforcement officer to give notice of her intent to stop Joe. Had Joe been fleeing in a car, the officer would have been required to give a

[2] *See Staples v. United States*, 511 U.S. 600, 619 (1994).
[3] K.S.A. 8-1568(a)(2).
[4] K.S.A. 8-1568.
[5] *See* subsection (b)(6)(C) of SB 174, as amended.
[6] K.S.A. 8-1568(a)(1)(A) and (c)(1).
[7] K.S.A. 8-1568(b)(2)

"visual or audible signal to bring the vehicle to a stop."[8] SB 174 has arbitrarily deprived flights-by-foot of the protections given to flights-by-car.

The bill's proponent stated in its testimony that the proposed statute is designed to create a sentencing enhancement for those who flee-by-foot, owing to the inherent danger of foot pursuits. However, by enhancing the penalty of fleeing-by-foot far beyond the penalty for fleeing in a vehicle, while this bill may achieve the proponent's goal of fewer foot pursuits, it could do so at the cost of more vehicle pursuits.

Respectfully submitted,

/s/ Laura Stratton /s/

Laura Stratton
BIDS Legislative Committee
lstratton@sbids.org

[8] K.S.A. 8-1568(a)(1)(B).