

**REPORT OF THE JUDICIAL COUNCIL
CRIMINAL LAW ADVISORY COMMITTEE
ON 2014 HB 2712**

2014 HB 2712 was introduced by Representative Annie Kuether in the House Judiciary Committee, which held a hearing on the bill on March 5, 2014. HB 2712 would amend K.S.A. 21-5414, the domestic battery statute, to require that first-time offenders undergo domestic violence offender assessments as a condition of probation, suspension of sentence, or parole. The bill also creates a new subsection (c) that would require the court to consider current or prior protective orders issued against the offender when sentencing and adds “protective order” to the definitions section of the statute. The bill was not worked in House Judiciary, but the Committee Chair, Representative Lance Kinzer, requested in May 2014 that the Judicial Council study the bill and make recommendations. Representative Kinzer requested that the Judicial Council obtain input from prosecutors, defense counsel, and judges regarding the effectiveness of domestic violence offender assessments.

At its June 6, 2014 meeting, the Judicial Council assigned the study to the Criminal Law Advisory Committee, directing that additional members specializing in batterer intervention programs, domestic violence, and court services be added temporarily to the Committee for this study.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Criminal Law Advisory Committee are:

Stephen E. Robison, Chair, Member of Fleeson, Gooing, Coulson & Kitch, LLC and Member of the Kansas Judicial Council; Wichita

Sen. Terry Bruce, Kansas State Senator and Practicing Attorney; Hutchinson

James W. Clark, Practicing Attorney; Lawrence

Sal Intagliata, Criminal Defense Attorney, Wichita

Patrick M. Lewis, Criminal Defense Attorney; Olathe

Prof. Joel Meinecke, Retired Attorney; Topeka

Steven L. Opat, Geary County Attorney; Junction City

Rep. John Rubin, Kansas State Representative, Attorney, and Retired Federal Administrative Law Judge; Shawnee

John Settle, Pawnee County Attorney; Larned

Ann Swegle, Sedgwick County Deputy District Attorney; Wichita

Loren L. Taylor, Attorney and Police Trainer; Kansas City

Ron Wurtz, Retired Public Defender (Federal and Kansas); Topeka

The ad hoc members participating in this study were:

Annie Grevas, Director of Community Corrections for Saline County; Salina

Rep. Annie Kuether, Kansas State Representative; Topeka

Michelle McCormick, Batterer Intervention Program Coordinator, Office of the Attorney General; Topeka

Chris Mechler, Court Services Specialist for the Office of Judicial Administration; Topeka

Kathy Ray, Director of Advocacy, Education and Rural Programs for the Kansas Coalition Against Sexual and Domestic Violence; Topeka

COMMITTEE STUDY

The Committee met on September 5, 2014 in person and on November 18 and November 25, 2014 via telephone conference to consider the issues presented. In preparation for the discussion on HB 2712, the Committee reviewed the bill and the following materials:

- Minutes and testimony from the House Judiciary Committee hearing on HB 2712.
- The following articles:

Aldarondo, E. (2009, November). "Assessing the Efficacy of Batterer Intervention Programs in Context." Discussion paper presented at the policy symposium *Batterer Intervention: Doing the Work and Measuring the Progress*, sponsored by the National Institute of Justice and Family Violence Prevention Fund, Bethesda, MD, December 3-4, 2009.

Edleson, J. (2012, February). "Groupwork with Men Who Batter: What the Research Literature Indicates." Harrisburg, PA: VAWnet, a project of the National Resource Center on Domestic Violence. Available at: <http://www.vawnet.org>

George, T. (2012). "Domestic Violence Sentencing Conditions and Recidivism." Olympia: Washington Center for Court Research, Administrative Office of the Courts.

Gondolf, E. (2004). "Evaluating batterer counseling programs: A difficult task showing some effects." *9 Aggression and Violent Behavior*, 605.

Gondolf, E. (2009, November). "Responding to 'Evidence-Based Practice' and Improving Program Operation." Position paper presented at the policy symposium *Batterer Intervention: Doing the Work and Measuring the Progress*, sponsored by the National Institute of Justice and Family Violence Prevention Fund, Bethesda, MD, December 3-4, 2009.

Gondolf, E. “The Evidence-Based Practice Movement: Contributions, Controversies, and Recommendations.” In R. Scott, S. Kosslyn and N. Pinkerton, eds., *Emerging Trends in the Social and Behavioral Sciences*, Hoboken, NJ: John Wiley & Sons (2014).

Klein, A. (2009, June). “Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges.” National Institute of Justice, U.S. Department of Justice.

Miller, M., Drake, E., & Nafziger, M. (2013). “What Works to Reduce Recidivism by Domestic Violence Offenders?” (Document NO. 13-01-1201). Olympia: Washington State Institute for Public Policy.

- Summary of current research, prepared by Dorthy Stucky Halley.
- Feedback from district judges, magistrate judges, prosecutors, and defense attorneys.
- Information and map regarding Kansas BIPs by Judicial Districts.
- Inter-Rater Reliability Survey Report prepared by the Victims’ Services Division of the Kansas Attorney General’s Office.
- The Kansas Domestic Violence Offender Assessment Form.

DISCUSSION

HB 2712 would amend K.S.A. 21-5414, the domestic battery statute, in two separate ways. First, the bill would change the sentencing provisions for a first offense in subsection (b)(1) by mandating a domestic violence offender assessment, which is currently up to the sentencing judge. Second, the bill would create a new subsection (c) which provides that in determining the sentence for a conviction of domestic battery, the court shall consider any current or prior protective orders issued against the offender. The bill also adds a detailed definition of “protective order” to the definitions subsection.

Amendment to Subsection (b)(1) Regarding Mandatory Assessments on a First Offense

Currently, K.S.A. 21-5414(b)(1) provides that when a court sentences an offender convicted of domestic battery, and it is a first offense, “in the court’s discretion the court may enter an order which requires the offender to undergo a domestic violence offender assessment conducted by a certified batterer intervention program and follow all recommendations made by such program.” HB 2712 would change that by deleting the clause about the court’s discretion and inserting new language as follows:

“As a condition of any grant of probation, suspension of sentence or parole or an any other release, the offender shall be required to undergo a domestic violence offender assessment conducted by a certified batterer intervention program and follow all recommendations made by such program, unless otherwise ordered by the court or the department of corrections;

With this change to K.S.A. 21-5414(b)(1), the sentencing language for a conviction of a first offense of domestic battery mirrors language found in subsections (b)(2) and (b)(3), which deal with subsequent convictions of the same crime.

The Committee first discussed a minor technical issue. When the hearing on HB 2712 was held in the House Judiciary Committee, the Department of Corrections testified that “or the department of corrections” should be stricken. Because the maximum penalty for domestic battery is one year in jail, no offender would ever be remanded to the custody of the Department of Corrections. The Committee agrees, and recommends that the phrase be stricken from subsections (b)(1), (b)(2), and (b)(3).

The Committee went on to discuss the meaning of the remaining words in the clause and found the meaning to be ambiguous. There was a split among the Committee members as to whether the phrase “unless ordered by the court” is meant to refer only to the requirement of following the recommendations of the batterer intervention program (“BIP”) or whether the phrase also modifies the requirement of undergoing an assessment. It was unnecessary for the Committee to resolve the conflict in order to reach its conclusion regarding this change to the statute, but because the language also appears in subsections (b)(2) and (b)(3), the Committee recommends that the Legislature clarify the language to ensure the Legislature’s intent is clearly expressed.

The Committee next discussed the issue of “effectiveness,” which Representative Kinzer specifically requested be addressed in the study. The Committee reviewed a number of research articles on the topic and was unable to draw firm conclusions on the overall effectiveness of BIPs, because the researchers’ opinions vary considerably. It does appear to be a fairly consistent finding that, when looking only at offenders who complete BIP treatment, those persons are less likely to reoffend. A study done by Court Services in Shawnee County found that completion of BIP treatment cut the rate of recidivism in half. A more troubling statistic from that study was the rate of completion – 50% of those ordered to BIP treatment finished the program.

As requested by Representative Kinzer, the Committee also sought input on the question of effectiveness from district court judges, magistrate judges, prosecutors, and defense counsel. Although the number of responses received was disappointing, the responses were thoughtful and quite helpful to the discussion. More judges were of the opinion that BIPs are effective than not,

and several noted that the assessments are a valid predictor of future abuse. However, a number of the judges responding positively still do not think assessments should be made mandatory for first offenses. Prosecutors generally favor BIPs and think they are effective, while defense counsel do not. Judges and defense counsel raised a number of issues that they think weigh against mandatory assessments for first-time offenders, and those issues generally relate to funding.

Offenders are required to pay for an assessment and, if recommended as a result of the assessment, the 26-week treatment program. Although most BIP providers offer discounts or a sliding scale based on income, the cost can be a significant obstacle to program completion for indigent offenders, and a majority of defendants in the criminal justice system are indigent. It was noted that the charges of even a low-cost BIP provider can be too high to fit into the budgets of no and low-income offenders.

Funding is an issue for providers as well. BIP services are not self-sustaining, especially in more rural areas in which the number of referrals is lower. Most BIP providers rely on other services that they provide to support their BIP services. Some providers who were offering only BIP services have been unable to sustain enough income to stay in business, and a few judicial districts are currently left with no BIP provider at all.

After an extensive discussion and taking all of the foregoing into consideration, the Committee concluded that it does not have sufficient information about effectiveness to recommend making such a significant change to the statute. The Committee commends the hard work that has been done in Kansas to develop an accurate, evidence-based assessment tool and to create a statewide network of certified BIP providers. However, at a time when assessments and BIP treatment remain such a significant financial hurdle for many offenders and are not easily accessible in all judicial districts, the Committee is opposed to taking away the court's discretion on first offenses to determine, based on the facts of the case, whether an assessment is appropriate. The Committee recommends that the Legislature retain the current sentencing language for first offenders and that it not enact HB 2712's proposed changes to K.S.A. 21-5414(b)(1).

Amending K.S.A. 21-5414 to Require Consideration of Protective Orders at Sentencing

HB 2712 would add a new subsection (c) to the domestic battery statute that would require a court, when determining the sentence to be imposed for a conviction of the offense, to "consider any current or prior protective order" issued against the offender. The bill also adds a detailed definition of "protective order" to the definition section of the statute, now labeled as subsection (d). Protective orders are civil, and information on such orders is not normally available to a court when imposing sentence for a conviction of the crime of domestic battery. The Committee unanimously agreed that providing the sentencing judge with this additional information at the time of sentencing would be beneficial to the process and would be a positive amendment to the statute.

When HB 2712 was heard in the House Judiciary Committee, the Office of Judicial Administration (“OJA”) expressed concerns about the breadth of the definition of “protection order,” which includes descriptions of the different types of orders that are to be considered. Specifically, OJA was concerned because some of the types of orders included are not found in any existing database and it would thus be difficult, if not impossible, for court services officers to locate all of the information required. OJA’s suggested solution to this issue was to completely strike entire subsections describing the types of orders not easily accessible to court services officers.

After discussion, the Committee agreed that striking entire categories of protective orders is not the best solution because it unnecessarily limits the information that might be provided to the court. The Committee believes it would be preferable to amend the language in new subsection (c) as follows:

“In determining the sentence to be imposed within the limits provided for a first, second, third or subsequent offense under this section, a court shall consider available information relating to any current or prior protective order issued against such person.”

According to the hearing testimony, OJA would have some concern with the Committee’s proposed language because of the possibility of nonuniformity in sentencing. In other words, a person with prior protection orders that can be identified, verified, and brought before the court may be sentenced differently than a person with similar orders that were not identified, verified, and brought before the court because the information about those orders was not found in a database, not timely provided by another state, or was not available for some other reason. The Committee acknowledges this concern, but believes that the risk is very low. Between the research done by the prosecutor and the victim’s knowledge of the offender’s history, the court will be apprised of the relevant information relating to current and prior protection orders in the vast majority of cases.

The Committee recommends two amendments to K.S.A. 21-5414(d)(2)(D), a part of the new definition of “protective order” proposed in HB2712, as follows:

(D) an order issued in this or any other state as a condition of pretrial release, diversion, probation, suspended sentence, postrelease supervision or at any other time during the criminal case or upon appeal that orders the person to refrain from having any direct or indirect contact with ~~another person~~ a family or household member;

The Committee recommends adding the words “or upon appeal,” an amendment suggested by OJA, to expand the time period during which orders issued could be considered by the court.

Finally, the Committee recommends changing the last words in the section from “another person” to “a family or household member,” which was also suggested by OJA, to mirror language in subsection (a) of the statute.

CONCLUSION AND RECOMMENDATIONS

HB 2712 would amend K.S.A. 21-5414 in two ways. First, the bill would change the sentencing provisions for a first offense in subsection (b)(1) by mandating a domestic violence offender assessment, which is currently up to the sentencing judge. The Committee recommends against this amendment. Second, the bill would create a new subsection (c) which would require the court to consider current and prior protection orders issued against the offender when imposing sentence for a domestic battery conviction and would add a definition of “protection order” to subsection (d). The Committee recommends these changes, as further amended by the Committee, to the domestic battery statute.

The Committee’s recommended amendments to the current K.S.A. 21-5414 are attached.

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.

(b) Domestic battery is:

(1) Except as provided in subsection (b)(2) or (b)(3), a 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 to undergo a domestic violence offender assessment conducted by a certified batterer intervention program and follow all recommendations made by such program;

(2) except as provided in subsection (b)(3), a 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. 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 undergo a domestic violence offender assessment conducted by a certified batterer intervention program and follow all recommendations made by such program, unless otherwise ordered by the court ~~or department of corrections~~; and

(3) a 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. As a condition of any grant of probation, suspension of sentence or parole or of any other release, the offender shall be required to undergo a domestic violence offender assessment conducted by a certified batterer intervention program and follow all recommendations made by such program, unless otherwise ordered by the court ~~or department of corrections~~. If the offender does not undergo a domestic violence offender assessment conducted by a certified batterer intervention program and follow all recommendations made by such program, 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) In determining the sentence to be imposed within the limits provided for a first, second, third or subsequent offense under this section, a court shall consider available information relating to any current or prior protective order issued against such person.

(d) 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) "protective order" means:

(A) A protection from abuse order issued pursuant to K.S.A. 60-3105, 60-3106 or 60-3107, and amendments thereto;

(B) a protective order issued by a court or tribunal of any state or Indian tribe that is consistent with the provisions of 18 U.S.C. § 2265, and amendments thereto;

(C) a restraining order issued pursuant to K.S.A. 23-2707, 38-2243, 38-2244 or 38-2255, and amendments thereto, or K.S.A. 60-1607, prior to its transfer;

(D) an order issued in this or any other state as a condition of pretrial release, diversion, probation, suspended sentence, postrelease supervision or at any other time during the criminal case or upon appeal that orders the person to refrain from having any direct or indirect contact with a family or household member;

(E) an order issued in this or any other state as a condition of release after conviction or as a condition of a supersedeas bond pending disposition of an appeal, that orders the person to refrain from having any direct or indirect contact with another person; or

(F) a protection from stalking order issued pursuant to K.S.A. 60-31a05 or 60-31a06, and amendments thereto.

~~(2)~~ (3) 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)~~ (e) 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.