

House Corrections and Juvenile Justice Committee
February 5, 2019
House Bill 2073

Testimony of Jennifer Roth
Opponent

Dear Chairman Jennings and Members of the Committee:

Thank you for the opportunity to discuss two parts of HB 2073 that concern me: 1) changing the process for determining an indigent defendant's payment of BIDS reimbursement fees and 2) changing what sentencing issues can be raised for the first time on appeal. I appear today in my individual capacity. My knowledge and experience come from over 20 years of defending clients who are indigent and charged with (and/or convicted of) felonies in Kansas.

2019 HB 2073 would undo statutory language that has existed for 38 years¹

K.S.A. 22-4513(b) gives district court judges considerable discretion to determine the amount of BIDS fees, including the ability to waive part or all of the fees. HB 2073 strikes subsection (b) [(a) is included for context]:

(a) If the defendant is convicted, all expenditures made by the state board of indigents' defense services to provide counsel and other defense services to such defendant or the amount allowed by the board of indigents' defense reimbursement tables as provided in K.S.A. 22-4522, and amendments thereto, whichever is less, shall be taxed against the defendant and shall be enforced as judgments for payment of money in civil cases.

(b) In determining the amount and method of payment of such sum, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose. A defendant who has been required to pay such sum and who is not willfully in default in the payment thereof may at any time petition the court which sentenced the defendant to waive payment of such sum or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may waive payment of all or part of the amount due or modify the method of payment.

¹ After the Tenth Circuit ruled K.S.A. 22-4513 unconstitutional in *Olson v. James*, 603 F.2d 150 (10th Cir. 1979), the Legislature amended K.S.A. 21-4513(b) to its current form. See L. 1981, ch. 157, sec. 2.

State v. Robinson: the Legislature means what it said

Almost thirteen years ago, in *State v. Robinson*, 281 Kan. 538 (2006), our Kansas Supreme Court concluded this about K.S.A. 22-4513(b):

The language [in K.S.A. 2005 Supp. 22-4513(b)] is mandatory; the legislature stated unequivocally that this “shall” occur, in the same way that it stated unequivocally that the BIDS fees “shall” be taxed against the defendant. *Compare* K.S.A. 2005 Supp. 22-4513(a), (b). The language is in no way conditional. There is no indication that the defendant must first request that the sentencing court consider his or her financial circumstances or that the defendant must first object to the proposed BIDS fees to draw the sentencing court’s attention to those circumstances.

Robinson, 281 Kan. at 544-45. The district court must explicitly consider the factors in K.S.A. 22-4513(b) and state on the record how those factors have been weighed in the court’s decision. *Robinson*, 281 Kan. at 546.

K.S.A. 22-4513/*Robinson* does not impose an unreasonable burden on district court judges

When the proponent(s) or others say “*Robinson* remands,” this refers to times when a district court failed to make explicit findings about a defendant’s financial resources and the burden, if any, that payment would impose (in other words, does not follow the statute), and the appellate courts reverse the order for BIDS fees and send the case back to the district court for proper consideration. It is my understanding that the proponent(s) brought HB 2073 in order to curb *Robinson* remands.

But K.S.A. 22-4513(b)/*Robinson* does not impose an undue burden on district courts.² Thousands and thousands of times every year, district court judges order BIDS fees and there is no issue with the rulings. However, there are times when judges do not follow K.S.A. 22-4513(b) – a few examples of inquiries (or lack thereof) that would not comply include 1) not asking a defendant who is going to prison for life with no parole about his ability to pay attorney’s fees; 2) ordering a defendant to pay a percentage of an unknown amount of attorney’s fees; and 3) not asking a defendant if the information in his financial affidavit (i.e. what the court used to appoint counsel) is still current.

² From *State v. Farrington*, No. 107,781 (Kan. Ct. App. 2013) (unpublished): “We pause here to note that *Robinson* does not impose an undue burdensome standard on the district court. Farrington completed a financial affidavit in order to obtain court-appointed counsel. It set forth considerable information regarding his financial status. If the district court had simply asked Farrington whether the information in the affidavit was still current and accurate and then briefly stated on the record how the court weighed those factors in arriving at its ruling regarding reimbursement, the requirements of K.S.A. 22-4513 and *Robinson* would have been met.”

HB 2073 will impose a burden on the Prisoner Review Board and result in the same outcome that the proponents claim to solve

Although not apparent on the face of the bill, the proponent(s) relies on two other statutory provisions relating to BIDS attorney's fees [in place of K.S.A. 22-4513(b)]: K.S.A. 21-6607(c)(4) and K.S.A. 22-3717(m)(5). The idea is that district courts would continue inquiring about and ordering BIDS fees if the court places the defendant on probation. K.S.A. 21-6607(c)(4) provides that the court shall order the defendant to "reimburse the state general fund for all or a part of the expenditures by the state board of indigents' defense services to provide counsel and other defense services to the defendant." *The rest of subsection (c)(4) reads exactly like K.S.A. 22-4513(b), word for word.* That means that although HB 2073 would eliminate K.S.A. 22-4513(b) – which is the statutory basis for the Court's decision in *Robinson* – I (and others like me) would start arguing the very next day that *Robinson's* rationale applies to K.S.A. 21-6607(c)(4) as well, given that they are identical. In other words, the Legislature means what it says.

As for defendants being sentenced directly to prison, the proponent(s) relies on K.S.A. 22-3717(m)(5) – the plan would be to have the Prisoner Review Board order a defendant to pay BIDS fees once he/she is released from prison, rather than having fees considered by the court at the time of the defendant's sentencing (when said defendant is standing next to their BIDS attorney). Again, *subsection (m)(5) reads exactly like K.S.A. 22-4513(b),* except that it has no provision for a defendant to petition a court (or the Board) to request waiver of payment. This presents two problems: 1) again, people like me will argue that *Robinson's* rationale applies and 2) without a way to petition later for waiver of payment, (m)(5) looks like the version of K.S.A. 22-4513 that was found unconstitutional in 1979. See *Robinson*, 281 Kan. at 544-45.

Consider the numbers

Searches using different terms yield anywhere from 126 to 552 cases since 2006 that mention *State v. Robinson* (i.e. an average of 10-40 cases per year). Only some of those resulted in remands. It is my understanding that in FY 2017, public defenders and appointed counsel handled 28,802 felony cases (15,200 PDs; 13,602 assigned counsel). For the sake of argument, even if there were 40 remands in FY 2017, that means 0.14% of the cases handled by BIDS-related attorneys that year resulted in a *Robinson* remand.

The Kansas Sentencing Commission's FY 2017 Annual Report shows 15,045 felony sentences imposed that year: 6,497 were to prison and 7,934 were for probation (and the other 614 were DUIs). Under the proponent(s)'s plan, the Prisoner Review Board would

be responsible for making the necessary inquiries into BIDS fees – months or years after the fact – for those almost 6,500 defendants (and that’s just one year’s worth).³

I have other concerns with HB 2073 and the proponent(s)’s plan to replace K.S.A. 22-4513, but I will leave it at this for now. While I understand that remands can be a pain, that is the consequence when courts do not follow the Legislature’s directives. There is no need to blow up the current system of how BIDS fees are determined.

HB 2073 limits the ability to correct illegal sentences

By adding one word to K.S.A. 21-6820(e), HB 2073 would prevent defendants from challenging their illegal sentences for the first time on appeal unless it was a **direct** appeal:

(e) In any **direct** appeal, the appellate court may review a claim that . . . (2) the sentencing court erred in either including or excluding recognition of a prior conviction or juvenile adjudication for criminal history scoring purposes; or (3) the sentencing court erred in ranking the crime severity level of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes.

During my in-person testimony, I will address how 1) it is not good policy to have people serving sentences longer than they should be; 2) plea agreements work, who is bound by them and who is not, and what happens when they are not followed; 3) this will result in defendants’ appeals being treated differently depending on timing and their attorney’s information; 4) the fiscal note does not address the cost of defendants spending more time than they should in custody; and 5) this does not promote judicial economy. (I am sorry I do not elaborate here; I spent all of my time addressing the other part of HB 2073!)

Thank you again for the opportunity to raise these concerns. I urge this Committee to remove these provisions from HB 2073.

Respectfully,

Jennifer Roth
jrothlegislative@gmail.com
785.550.5365

³ Incidentally, this is not reflected in the fiscal note because there is no mention of the Prisoner Review Board. Additionally, the fiscal note writer misstates how BIDS reimbursements work. BIDS reimbursements go to the state general fund and not back to BIDS directly. See, e.g., K.S.A. 21-6607(c)(4).