

January 29, 2013

Chairman John Rubin  
House Corrections & Juvenile Justice  
Room 152-S  
Capitol Building  
Topeka KS 66612

Re: HB 2043

Dear Mr. Chairman,

The following represents my written testimony concerning HB 2043, the House Bill which addresses amendment of the aggravated battery statute, K.S.A. 21-5413. The only changes proposed in this statute deal with the felonization of persons charged with DUI to eliminate a requirement of a culpable state of mind that either causes simple bodily harm, great bodily harm or disfigurement.

I am a practicing criminal defense attorney in Kansas. I am also a member and am speaking on behalf of the Kansas Association of Criminal Defense Lawyers. I am speaking in opposition to this Bill.

The opposed amendments to the aggravated battery statute are serious. They would classify new crimes of a Level 5 person felony, punishable by between 136 months presumed prison to a border box of 31 months, and a Level 8 person felony, punishable by 23 months presumed prison to 7 months presumed probation. Neither of these newly created offenses would require intentional, knowing, or reckless acts. The mere fact that a person was DUI would cause a person to be an aggravated batterer if any harm occurred to any person or if great bodily harm or disfigurement occurred to any person while driving under the influence.

I will explain my objections.

Routine accidents would create a person felony

Proposed Section 1(e)(3)(B) would cause a person involved in a routine auto accident to be convicted of a person felony if a pedestrian, any driver, or any passenger was injured in even in a minor manner. For instance, if a driver was in a routine accident in a parking lot going at a slow speed and had an accident, if either driver was driving under the influence of alcohol, regardless of fault, this person would be a felony aggravated batterer if the accident caused a bruise, a minor bump on a body or some other minor injury. If a driver, who had been drinking, ran into a telephone pole, causing minor injury to the only driver in this single car accident, said driver could also be convicted of felony aggravated battery if this driver sustained even a minor injury. If there was a passenger in a car under either of these circumstances, the driver who was DUI could be convicted of felony aggravated battery if the passenger got a broken fingernail.

An automobile can always be operated in a manner which would cause great bodily harm, disfigurement, or death by the very nature of its size and movement on a roadway. Because any automobile can always cause great bodily harm, disfigurement or death, it would be an absolute liability offense if anyone sustained even minor harm even if no disfigurement, disability or impairment was created. Even a 1<sup>st</sup> DUI offender would become a person felon following a minor accident in a motor vehicle because any motor vehicle accident can always cause great bodily harm, disfigurement or death. The proposed crime is too broad and would negatively affect too many good citizens following even a routine accident.

Multiple punishments would arise from the same act.

If a person was guilty of DUI, their punishment would be multiplied to a felony status in addition to being penalized for the DUI and for potentially for a criminal test refusal. One act of driving could thereby be punishable 2 or 3 times regardless of their criminal history, regardless of their DUI history, and regardless of the severity of injury caused to anyone as a result of the accident.

Under existing law, a DUI offense already carries mandatory minimum incarceration and restitution can be ordered. Under existing law, a person can be doubly convicted and punished if they are convicted of DUI and of criminal refusal to take a test. Now the legislature is being asked to potentially triple punishment of a person if they are involved in an accident. There should be limits to how many times a person can be convicted and punished for the same act. The proposed amendment exceeds these limits.

The legislature should not enact  
a double strict liability offense.

DUI is a strict, absolute liability crime. Now the legislature is considering making parts of the aggravated battery statute a strict liability crime if it is based upon a DUI. This means that one strict liability crime is predicated upon another strict liability crime, i.e. the strict liability aggravated battery requires a determination of strict liability DUI. An inference based upon an inference is not acceptable.

Let me put this in perspective. The legislature is being asked to create a person felony which can result in imprisonment, loss of civil rights and monetary punishment without requiring the proof of knowledge, recklessness or intent to injure another person. The establishment of strict or absolute liability is not favored in the law, particularly when one strict liability offense is based upon another prerequisite strict liability offense. It should not be favored by this legislature or supported.

Aggravated battery can still be  
charged in appropriate circumstances.

The existing statute for aggravated battery may be charged when there is knowing conduct or reckless conduct. When a person is recklessly driving their vehicle, that person may still be charged with aggravated battery and DUI simultaneously. The felonization of aggravated battery without recklessness or knowledge should not be approved by the legislature. Aggravated battery should only occur with a culpable state of mind.

The financial cost of this legislation is too great.

As previously stated, this proposed Bill will create new person felony crimes that can result in imprisonment for any level of DUI offense. This prison incarceration would be in addition to the county incarceration for the underlying DUI and/or criminal test refusal. Again, this is double or triple punishment and cost at multiple levels of government.

More felony crimes will be charged if there is any accident resulting in any harm, even minor, when a felony would not otherwise occur for 1<sup>st</sup> and 2<sup>nd</sup> DUI offenders. This will add to the overcrowding in our prisons and increase the litigation costs of prosecution, trial, probation/parole, investigation, and rehabilitation. This is not appropriate when other means exist to address this problem in the most severe circumstances, as indicated in the preceding section.

#### Conclusion

The Bill should not be approved for the reasons recited above.

Sincerely,

Douglas E. Wells

DEW/teb