BACK-UP & MATERIAL-PRE-INSANITY ISSUE

3-26-82

'Dog' bill may hurt police legislation

by Bill White
Times Juneau Bureau

Juneau — It's being labeled a dog bill.

The measure would make it a crime carrying a jail term of up to a year for kicking or otherwise striking a police dog that is acting in the line of duty.

That short provision in the seven-page bill that makes dozens of major changes in the state's criminal code dominated conversations about the measure before the House Judiciary Committee took it up Thursday afternoon.

One wag asked, "Who would strike a police dog? That would be suicide."

Committee Chairwoman Ramona Barnes, R-Anchorage, said the dog provision was inserted at the urging of Anchorage police officers. They apparently say their dogs are often victims of unprovoked attacks.

The rest of the bill has become part of a law-and-order package going through the Legislature. At the Law Depatment's request, it would toughen dozens of areas of the criminal code, written in 1978, and it makes other changes suggested by the committee staff. The measure carries the resounding endorsement of the state Department of Law — except for the police dog section — and is backed by the governor.

But Rep. Chuck Anderson, former chief of the Anchorage police department, has reservations about the proposal. The Anchorage Republican questioned if the bill is too sweeping in scope. Some lawmakers will object to some provisions of the bill, and that could be enough to kill it, good provisions and all, he said.

A former police chief in Anchorage and one of the strongest tough-on-crime lawmakers, Anderson called the proposal a "Christmas tree" bill that has a lot of unrelated changes hung on it.

Barry Stern, an assistant attorney general, said the Senate had before it a similar bill. But that measure was stripped to half its original size in part to make it more appealing to the full Senate. The senior chamber should take up its bill today.

Stern said the measure stems from the Law Department's biannual review of the code.

Besides the dog section, the department considers as unneeded a provision that makes it a special crime carrying a jail term of up to 10 years to injure a police officer, Stern said. Peace officers already are covered under assault laws, he said.

But Anderson expressed dismay at this position.

"I'm really kind of surprised the Department of Law, the highest law enforcement agency in the state, would oppose this provision," he said.

Stern answered that the section would be acceptable if it stated the officer was seriously injured.

He also noted that at least one provision of the bill carries with it a multimillion dollar cost to the state. That section would raise the standard sentence for class A felonies — attempted kidnapping or murder, manslaughter and some sexual assaults — to eight years from six years.

Other sections of the proposal include:

— Making sentences consecutive if the defendant is convicted on separate offenses or if he commits different crimes in the same criminal episode.

— Letting a judge lower a sentence only within 60 days the first sentencing. The present law lets a judge reduce a sentence any time.

— Letting judges consider before sentencing past crimes by a defendant if those cases were closed in the previous 10 years. Present law says seven years.

— Letting judges consider juvenile records when passing sentences.

— Making a defendant who pleads insanity prove his case, not the prosecutor disprove it.

MOTH

Melting snow appears as minat
iers hanging from an ice-coveri
bell Creek near Stuckagain Heigh
sure sign that spring is on its w

Session limit ballot plan stalled again

Associated Press

Juneau — A resolution calling for a statewide ballot on whether the length of legislative sessions should be constitutionally limited was back in the Senate Transporation Committee Thursday and apparently with the House on other legislation.

Transportation Committee Chairman Bill Ray, D-Juneau, asked that the bill be returned to his committee to revise a substitute to a House-passed resolution approved the day before much to the House's senate

Boat fisher

IN

News Saturday, March 20, 1982

Rapist slapped with long sentence

By SHEILA TOOMEY
Daily News reporter

An Anchorage Superior Court judge Friday sentenced rapist Joseph Contreras to three consecutive jail terms that will keep the 33-year-old escape artist behind bars until he is well past 50 years of age.

In a courtroom bristling with extra security, Judge Douglas Serdahely sentenced Contreras to 15 years for robbing, assaulting and terrorizing an Anchorage couple in August, 1980. Contreras also drew terms of six years each for two short-lived escape attempts. The convict also is known as David Ziegler.

In a court appearance last year, Contreras leaped over the defense table and dashed through the judge's exit door, leading troopers on a two-block chase until he was recaptured.

Ketchikan District Attorney Mary Ann Henry, who handled the prosecution, appeared for the state and asked for a 48-year sentence. "He taunted the victims and he put them through an extended period of terror," Henry said as both victims listened from the rear of the courtroom.

According to testimony at his July trial, Contreras broke into the couple's apartment and waited until they returned from a night of dancing. He met them at the door, his face hidden behind a ski mask and a pistol in his hands. Contreras sexually assaulted the woman and threatened to kill the man, holding the gun to his head and telling him, "You're about three-eighths inches from death. You have two seconds to live."

The man eventually wrested the gun from Contreras, sustaining a minor gunshot wound in the process.

Contreras lived to be tried only because the gun he used that night failed to fire when his victim tried to shoot him in the head with it.

Contreras was convicted on nine different counts connected with the incident. Henry said that a parade jail terms be imposed on most of the counts, to be served one after the other.

But Public Defender Grant McGee argued successfully that all the counts were part of a single criminal transaction. Although Serdahely imposed a total of 63 years, he ruled that all the lesser terms could be served concurrently with the longest single sentence given, which was 15 years.

Serdahely then took advantage of the two

See Page C-3, Column 1

Anchorage Daily News Paul Brown

An Alaska state trooper escorts convicted rapist Joseph Contreras from court Friday.

Rapist gets 33-year term

Continued from Page C-1

escape convictions to almost double Contreras' jail time by imposing the maximum six-year sentence for each of the two counts.

Under the state's presumptive sentencing for felons with prior convictions, Contreras will have to serve three-quarters of his sentence, or nearly 21 years, behind bars before becoming eligible for parole. "It is clear that Mr. Contreras is going to be a middle aged man before he sees daylight again," McGee said.

Everyone who entered the fourth-floor courtroom for Friday's sentence hearing was met at the door by two security guards who ran metal detectors over each person's body and searched pocketbooks and briefcases.

Inside the courtroom, one uniformed and three plainclothes Alaska State Troopers watched the slight, shackled defendant throughout the proceeding.

Contreras, who has three felony convictions in other states, still faces trial for kidnapping, rape and assault of another Anchorage couple. That trial has been held up pending the outcome of a legal dispute over the admissibility of evidence from previously hypnotized witnesses.

* Sec. 2. AS 12.30.022 is amended by adding

ANALYSIS OF THE DECISION IN
JUNEBY V. STATE, Opinion No. 72
(Alaska Court of Appeals, March 11, 1982)

In this sentence appeal case, Juneby had plead no contest to burglary in the First Degree, a class B felony and Sexual Assault in the First Degree [HEREAFTER REFERRED TO AS RAPE], a class A felony. The maximum penalties provided by statutes were 10 years for Burglary and 20 years for Rape. However, the presumptive sentence for the Rape was 10 years, since this was considered a "second felony conviction" on Juneby. He had been convicted earlier of Grand Larceny.

The Superior Court Judge sentenced Juneby to 8 years for the Burglary and 20 years for Rape. The two sentences were made concurrent, leaving Juneby with one 20 year sentence, which would interpret to 15 year under the "good time" statutes.

The pertinent factors for the actual sentencing were:

1. Even though Juneby was convicted of both burglary and rape, the two crimes were considered to have arisen "out of a single continuous criminal episode during which there was no substantial change in the nature of the criminal objective..." AS 12.55.145(a)(3). Accordingly, the conviction for the burglary could not be considered as a second felony, subjecting Juneby to treatment as a third felony for the rape. The Court of Appeals at footnote 3, page 3 indicates that the judge could have sentenced consecutively for the burglary and rape, under provisions of AS 12.55.025(a). However, this is subject to question, upon a careful reading of both 025 and 125. In any event, the trial judge having already made those sentences concurrent, can not go back and change that upon the reman from the Court of Appeals.

2. The Superior Court Judge increased the rape sentence from the 10 year presumptive to the 20 year maximum on the basis of "aggravating factors" presented by the District Attorney. These were under attack in the sentence appeal by the defense, and ultimately the Court of Appeals reversed on the basis of the findings as to some of the aggravating factors.

Page 21 of the Opinion give the statement of the victim as to the details of the rape:

> V.W. [THE VICTIM]'s statements indicated that Juneby had knocked at her door and asked about a former girlfriend of his who lived next door. When V.W. told him that she had seen a moving van there recently, Juneby asked to use V.W.'s phone; V.W. allowed him to enter. After an unsuccessful attempt to call a moving company, Juneby abruptly attacked V.W. He beat her repeatedly about the fact and ribs with his fist, then he twisted her arm and dragged he down a corridor into a bathroom. There, Juneby forced V.W. into submission by choking her. He forcibly pressed her throat against a clothes dryer, causing V.W. to loose her breath for a short time. At this point, V.W. did not know why Juneby was attacking her. She thought that he was trying to kill her. Suddenly, Juneby ceased choking his victim; he commanded her to undress and then proceeded to rape her. The photographs of V.W. show that her face was bruised and swollen following this incident. In addition, V.W. stated that her ribs were badly bruised. These injuries were treated by a physician after the incident, but V.W. was not hospitalized. Although V.W. experience considerable pain and discomfort for several weeks, she suffered no permanent disfigurement of physical impairment.
>
> Juneby does not contest the fact that V.W. sustained physical injury within the definition of AS 12.55.155(c)(1); he does, however, question the amount of weight that should properly be assigned to this aggravating factor in adjusting the presumptive sentence of 10 years called for by AS 12.55.125(c)(2).

Following that summary of the facts of the rape, the Court of Appeals stated that increases of presumptive terms should not be an "automatic consequence" when the aggravating factor is proved. The court points out, at page 22, that subsections (c)(d) of 125 state that the aggravating mitigating

factors "shall be considered by the sentencing court and may aggravate [or mitigate] the presumptive terms" established by law. [Emphasis added in the opinion].

On the next several pages the court discusses the fact that injury is a common element of rape, and that less weight should be given to relatively minor injuries. Specifically, the court stated at page 24 that

> We would be blinding ourselves to reality if we did not recognize that, in most cases involving rape, or sexual assault in the First Degree under AS 11.41.410(a)(1) actual or threatend and violence will be involved and the victim will suffer at least some level of physical injury or discomfort. The use of force in the affliction of at least some physical injury to the victim are, realistically, characteristic of the crime of rape. Indeed, it is the prevailing view that rape is primarily a crime of violence, as distinguished from a sexual offense...as with all other presumptive sentences, the 10-year presumptive term for first degree sexual assault was meant by the legislature to be appropriate in the majority of cases -- those cases involving conduct that is characteristic of the offense of rape and it falls into the middle-ground between the most serious and least serious extremes for the offense. It must therefore be recognized that this presumptive term takes into account the high potential for the use of violence and the likelihood of some physical injury and first degree sexual assaults falling within the definition of AS 11.41.410(a)(1).
>
> Where, as here, violence and injury are characteristic of the defense defined by statute, the mere fact that of some physical injury to the victim as a result of defendant's conduct, though technically an aggravating factor under AS 12.55.155(c)(1), will not justify a significant increase in the presumptive term. Thus, when a charge of sexual assault in the first degree is based upon

> the theory of rape under sub-section (a)(1) of AS 11.41.410, in order to justify a substantial increase to presumptive terms, the prosecution must bear the burden making it clear convincing showing the injuries where unusual and uncharacteristically severe.

On page 25, the Court of Appeals notes that it does not believe that the physical injuries inflicted by Juneby could approach the definition of "serious physical injury at AS 11.81.900(49)." Also they state that "Nor do we think that these injuries -- though perhaps more severe than those in many cases -- are highly uncharacteristic of injuries all too frequently suffered by rape victims. Accordingly, we do not believe that these injuries, standing alone, would justify a substantial increase in Juneby's presumptive term."

On page 27 the Court of Appeals considers the aggravating factor of "manifested deliberate cruelty" that was considered by the Superior Court Judge. Specifically, the court stated that "deliberate cruelty," as used in AS 12.55.155(c)(2) "...must be restricted to instances in which pain -- whether physical, psychological or emotional -- is inflicted gratuitously or as an end in itself." ...When this definition is applied to the present case, we believe that it is questionable whether the evidence considered by the sentencing judge would properly lead to the conclusion that the injuries suffered by V.W. resulted from deliberate cruelty on Juneby's part." On that matter, they remanded the case to the sentencing judge for a decision as to whether deliberate cruelty had been shown, although he had apparently found it was there in the original sentencing.

At page 28, the court considers the question as to whether this particular rape was "among the most serious conduct involved in the definition of rape." If this were the case, this would fall in aggravating factor (10) under 12.55.155(c). The court concluded that the evidence showed that this rape was not among the most serious for rape. The Superior Court Judge had concluded that, since this was rape under (a)(1) of AS 11.41.410, that this was the most serious of the four types listed under 410. The others are basically (1) attempted sexual penetration with serious resulting injury, (2) statutory rape, and (3) a form of incest. The Court of Appeals found that

> ...the grouping of these four separate acts of conduct together under the same criminal heading [Sexual Assault in the First Degree], with identical classifications as class A felonies is a forceful indication of the legislature's conclusion that all four sub-paragraphs were meant to be viewed as involving equally serious conduct." [emphasis added].

The Court of Appeals noted that the Superior Court Judge said that he would still find this rape to be within the most serious if his interpretation of the statute was incorrect. He had emphasized that there was no prior contact with the victim, the rape was committee in V.W.'s own home; that he found deliberate cruelty in the injuries inflicted upon V.W.; Juneby did not terminate his rape of V.W. voluntarily, but fled when he heard another person knock on the door. In response to this, the Court of Appeals said that

> We believe that the various factors articulated by Judge Van Hoomissen are not sufficient to support a finding, by clear and convincing evidence, that Juneby's conduct was among the most serious included in the definition of the offense with which he was charged." [Emphasis added].

On pages 31 and 33 the Court of Appeals whisks away the Superior Court's emphasis on the fact that the rape was committed in V.W.'s own home by noting that Juneby was separately charged with and convicted of burglary, and that the court imposed a separate sentence for the burglary. Oddly enough, the Court of Appeals ignored the fact that that sentence was made concurrent by the Superior Court Judge, (possibly because of his concern over the "single, continuous criminal episode" factor). In fact, the Court of Appeals even went so far as to state:

> Juneby had thus been separately punished for his act of violating V.W.'s privacy by entering her home. [Emphasis added]. Page 32.

Thus, the Court of Appeals considers that this rapist was "punished" by being separately convicted for burglary, although even a sixth grader could tell by the words concurrent sentencing' that there was no additional punishment for the burglary.

On page 35, he court stated:

> On balance, consideration of the totality of the circumstances of this offense leaves us with the a firm impression that, but for the injuries inflicted upon

> Juneby's victim, this crime may reasonably be considered to fall far closer to the middle ground, or norm, of conduct for the offense charged than to either the most serious or least serious extreme [setting the stage for the 10 year presumptive sentence].

Considering the factors briefly summarized here, and others stated more specifically in the opinion, the sentence was vacated and the case remanded to the Superior Court for resentencing. In addition to the factors noted above, The Court of Appeals on page 39 comments on the "mitigating factor" in the sentencing that Juneby's prior felony conviction was for "an offense [grand larceny] of a less serious class than his present offense," per AS 12.55.155(d)(8). In reference to that factor, as well as others covered, the Court made it clear that upon the remand, Judge Van Hoomission should make findings on the factors and aggravation in mitigation "with specificity." This may mean that, indeed, it would be a factor to mitigate, or reduce the presumptive term for Juneby that his prior felony was for a less serious crime. Some persons have referred to this factor of mitigation as a "reward for moving up from one level of felony to another."

PRE-INSANITY ISSUE W/ SECTION ANALYSIS & ISSUES

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

4/14/82

Representative Ramona L. Barnes
Chairman, House Judiciary Committee

This note is to reaffirm my opinion as conveyed previously to Bill Cook that House CS For CS SB 535 (Jud) violates the single subject requirement of Art. II, Sec. 13, Constitution of Alaska.

I would be available to elaborate for the benefit of the committee if you so desired.

Sincerely,

James M. Lear

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