

# The Verdict

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If you would like to submit an article or would like to see a topic addressed, please send it to Judge Arnold-Burger.

## A STEP BACK IN TIME

### Court Watch

*The following are cases that have been decided since our last issue that may be of interest to municipal judges. Only the portion of the case that may relate to issues that arise in municipal court are discussed. Members are encouraged to read the whole opinion.*

#### HOUSE ARREST IS LAWFUL CUSTODY FOR PURPOSES OF THE ESCAPE FROM CUSTODY STATUTE

Bobby Kraft resided at the Johnson County Community Corrections facility as a condition of his probation on an attempted robbery conviction. As part of his conditional release from the Community Corrections facility, Kraft was placed on house arrest. He signed out of the facility on January 4, 2005 and failed to return. He picked up his house arrest equipment, but never made it home with the equipment to set up. He was charged with aggravated escape under K.S.A. 2004 Supp. §21-3810(a)(1). Aggravated escape from custody is defined

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#### FIRST, LET'S KILL ALL THE ... DOGS

Dog fighting and killing of helpless dogs has been in the news lately with the prosecution of football star Michael Vick. But in the early days of Kansas, sometimes it was necessary to kill all the dogs.



In June, 1883 a mad dog (otherwise known as rabid) was loose in Wabaunsee county. He had bitten one person and several other dogs, as well as cattle and other animals. All the dogs he had bitten had also become mad. Mr. Henderson gathered the citizens of Wabaunsee County together. On June 25, 1883, an otherwise normal summer evening, a group of neighbors met in the school-house and agreed that for the purpose of protection they needed to kill all the dogs in the neighborhood. They set out on their task. Mr. Henderson went to John Lawder's house with his band of 20-30 neighbors. They knocked on his door and asked for permission to kill his two shepherd dogs. Mr. Lawder testified that he did not give permission. Mr. Henderson and the gang argued that he did give permission, because they promptly killed Lawder's dogs.

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### SPOTLIGHT ON: JAMES CAMPBELL

James Campbell was born and raised in Yates Center. His father was a funeral director and owned and operated the Campbell Funeral Home as well as a furniture store. His mother was a homemaker. He has two older sisters. After graduating from Yates Center High School he went on to Emporia State University to earn a business degree. He was a member of Kappa Sigma fraternity and remains involved with the national fraternity to this day.

He went on to KU law school, from which he graduated in

1990. He returned to Emporia to practice law with a small firm, which also served as city attorney for Emporia. He then went on to be Coffey County Attorney for four years before opening his own firm in Burlington. He currently also serves as Anderson County counselor. He handles primarily oil and gas and criminal cases. Although he was able to stop handling domestic cases a couple years ago, he certainly went out with a bang.

James represented the husband of Lisa Montgomery, the

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## Spotlight on: James Campbell

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woman from Melvern who cut open a pregnant woman's womb and cut out her baby. He had filed an action for change of child custody on behalf of Carl Bowman, her ex-husband, just 10 days before the murder. He had also represented other members of Lisa's family. After the murder, he and his client were barraged by phone calls, and television and newspaper interviews. He was interviewed by Anderson Cooper, Greta Van Susteren and Larry King. He and his client were flown to New York to appear on the Montel Williams show. He did interviews for Fox, ABC, the New York Times, the London Times, People Magazine and the National Enquirer to name a few.

James's wife Tracy owns her own communications business. She edits and designs publications for the Kansas Historical Society and the Brown v. Board of Education Foundation. They have two children, Joel, 17, an accomplished guitarist and musician and Alex, 15 an all-sport athlete.

James is active in his church, Burlington Christian, and has traveled with his church group for the last 8 summers building churches in Mexico. He is chairman of the Hidden Haven Church Camp and is also active in the Masonic Lodge. He enjoys woodworking, baseball (yes, the Royals) and is an avid reader. He also spends "too much" time fixing up his 110 year old house in Burlington.

James was appointed judge in Ottawa in 1997. Court meets for 2 half days each week. *"I like the fact that at least once a week I get to make the decisions instead of have some one make them for me."*

James is one of the newest members of the KMJA Board of Directors, representing the Northeast District.

*"I have always enjoyed the KMJA conferences. I like the relaxed atmosphere and the camaraderie. I also have no doubt that I learn as much from talking to other municipal judges and learning what others do as I do from the formal presentations. They are really a great group of people and we are all similarly situated."*



## Updates from O.J.A.

### ANNOUNCING NEW JUDGES!!

Since our Summer 2007 issue, the following new municipal judges have been appointed or elected:

- Don Kelly Mound City
- Robert Van Allen St. Francis
- Nina Miley Alta Vista

### ▲▲▲▲ 2007-2008 CONFERENCE REMINDERS

**Municipal Court Clerks'  
Spring Conference**  
April 4, 2008  
Hutchinson, KS

**Municipal Judges'  
Annual Conference**  
April 28-29, 2008  
Topeka, KS

**District Judges'  
Spring Conference**  
June 8-10, 2008  
Topeka, KS

### ▲▲▲▲ 2007 STATEWIDE ANNUAL REPORT

The FY 2007 Annual Report will be distributed to all municipal courts in mid November. This report contains statewide statistical data regarding the numbers and types of cases filed in municipal courts.

### ▲▲▲▲ 2008 MUNICIPAL COURT CLERKS CONFERENCE

This conference will be held on Friday, April 4 at the Grand Prairie Hotel in Hutchinson. You will receive the conference agenda and registration materials in January. Topics included on the program include Understanding Human Behavior, Appeals, Customer Service, and a DMV Update.

### ▲▲▲▲ 2008 MUNICIPAL COURT JUDGES CONFERENCE

The conference will be held April 28-29 at the Capitol Plaza Hotel in Topeka. The program will include a Mock Trial, with Judge Robert Pirraglia (Rhode Island) and Judge Karl Grube (Florida) leading the trial. A steak fry at the Kansas Museum of History is planned for the Monday night-out activity. President Ken Lamoreaux has arranged for some great blue grass music. Come join the fun!

You will receive the conference registration materials in late January.

Life is not measured by the number of breaths we take, but by the moments that take our breath away.

George Carlin

# Judicial Ethics Opinions

**JE 155**  
*August 17, 2007*

A judge inquires as to whether the judge and spouse may accept an invitation from a former law partner and spouse to stay at their Colorado condo for about a week. The former law partner and spouse would not be present and have refused to accept compensation for the stay unless required to do so under judicial canons.

The two couples continue their friendship and visit in each others homes. The disqualification of the judge would be required under Section 3E in any case involving the former law partner.

Canon 4 provides in pertinent part that a judge shall conduct all the judge's extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge. (2006 Kan. Ct. R. Annot. 579). Since the use of the condo is gratuitous, the financial aspect of the invitation becomes the real concern. Section D of Canon 4 concerns financial activities and provides in pertinent part in subsection (5) that a judge shall not accept a favor, however, there are exceptions. One of those exceptions is found Canon 4D(5)(e) which permits a judge to accept a favor from a close personal friend whose appearance or interest in a case would in any event require disqualification.

We conclude that since disqualification is required, the judge may accept the invitation, which falls under the specific provisions of Canon 4D(5)(e) and results in the value of the favor not being required to be reported.

**JE 156**  
*September 5, 2007*

The judge is a retired district judge who accepts occasional judicial assignments when called upon by the chief judge. The judge's daughter and son-in-law are both lawyers, and the son-in-law has requested the judge to assist him in a criminal case that will soon be tried to a jury.

The judge correctly recognizes that the judge is not prohibited from the practice of law by virtue of paragraph B of the Application of the Code of Judicial Conduct (2006 Kan. Ct. R. Annot. 593) and Canon 4G (2006 Kan. R. Annot. 585). The judge may, therefore, assist in the criminal trial.

In addition the judge asks whether there are other ethical impediments to the judge's assistance in the criminal jury trial.

Rule 650(c) requires that requests for judicial ethics advisory opinions shall contain a complete statement of all facts pertaining to the intended conduct together with a clear, concise question of judicial ethics. (2006 Kan. Ct. R. Annot. 613). Without a complete factual statement, we are unable to respond to the question of whether there are other ethical impediments to the judge's assistance in the criminal case.

## TICKET-FIXING CHARGES

A former court clerk in Hennepin County, Minnesota was charged with fixing 73 of her own parking tickets to avoid paying \$5,112 in fines and late fees.

Dawn Nyberg, 32, of Blaine, Minnesota was charged with theft by swindle of public funds, forgery and misconduct by a public officer.

Traffic citations were entered electronically at the end of each day into a computer system which then tracked what happened to them. By overriding the entry of the citation it was possible for Nyberg to delete or expunge an entry. By entering incorrect vehicle information, she could avoid responsibility entirely. The County has since had an auditor review their procedures and change them to prevent future occurrences.

## MORE FAMOUS KANSANS

*Earl Cole*, Winner 2007 SURVIVOR FIJI,  
Kansas City, KS

*Carol Journey*, Big Brother, Season 8,  
Haysville, KS

*Jessica Hughbanks*, Big Brother, Season 8,  
Haysville, KS

*Sarah Lancaster*, Actress, "Chuck" and  
"Everwood" and "Dr. Vegas", Overland  
Park, KS

*Kristen Richardson*, Actress, and Dancer,  
married to Back Street Boy, Kevin  
Richardson, Shawnee, KS

# CHICAGO SUBURB USES HUMOR FOR NEW STOP SIGNS

Saturday, September 29, 2007

Associated Press

OAK LAWN, Ill — A big red sign that says "Stop" sometimes isn't enough to get everyone to stop. Maybe a laugh will get their attention.

This Chicago suburb has installed second stop signs beneath the regular ones at 50 intersections with messages, including "WHOOAAA" or "Stop ... and smell the roses."

"I thought it might make people smile and take notice," Mayor Dave Heilmann said as he launched the campaign Friday. "You've got people on their cell phones, their BlackBerries and iPods while driving. Those are all distractions. Hopefully, when they see a sign they're not expecting it might make them stop."

The new signs are red octagons, just like the real stop signs, but instead of just "Stop" they say "Stop ... right there pilgrim" and "Stop ... in the naame of love." Naame? Think of the drawn-out pronunciation in the hit by the Supremes.

It might be too soon to know whether the alternative signs will work. But while the mayor was posing for a photo with one of the new signs, a driver sped by without stopping.



# KASPER IS MORE THAN JUST A FRIENDLY GHOST

The Kansas Adult Supervised Population Electronic Repository (KASPER) allows you to search the Department of Corrections (DOC) data base to determine whether or not a person has a record with the Department, the details of that record, often including a photograph, and whether the person has been released and when, whether the person is still in custody and where, or whether the person has absconded from custody.

What might municipal courts want with this information? A court can compare its list of outstanding warrants with KASPER to determine if the person is in State custody and, if so, where. The Kansas Department of Corrections Risk Reduction and Reentry Project is hoping that it will be able to assist municipal courts in resolving their cases involving persons in DOC custody. By resolving the case, the inmate may become eligible for valuable programming that he or she would not be able to take advantage of if there was an outstanding warrant, even a municipal one. In addition, if it is a traffic offense that will result in driver's license suspension, the suspension time can be running while the offender is in custody, so that when he or she gets out, driving privileges will be restored and the inmate can seek and obtain employment. DOC has even indicated its willingness to include compliance with municipal court orders as part of the inmate's post-release supervision. It really is a win-win for everyone.

To access KASPER, go to <http://www.dc.state.ks.us/kasper> and follow the directions on screen. It is that simple. If you have any questions regarding how DOC can help your court resolve cases with inmates, please contact Colleen Fischli, Risk Reduction and Reentry Specialist with DOC, at (785) 296-4118.



## Court Watch

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as “escaping while held in lawful custody upon a charge or conviction of a felony.” “Custody” is defined in K.S.A. 2004 Supp. §21-3809(b) as “*arrest, detention in a facility for holding persons charged with or convicted of crimes...;detention in a...facility pursuant to a court order, imposed as a specific condition of assignment to a community correctional services program;...or any other detention for law enforcement purposes.*” “Escape” is defined in the same statute as “*departure from custody without lawful authority or failure to return to custody following temporary leave lawfully granted pursuant to express authorization of law or order of the court.*”

In a case of first impression, the Kansas Court of Appeals held in *State v. Kraft*, \_\_\_ Kan.App.2d \_\_\_ (July 27, 2007), that absconding from house arrest in this case appropriately resulted in the defendant’s conviction for aggravated escape from custody. It found that Kraft was ordered to complete the community corrections program as a condition of his probation. Therefore, even though he was no longer residing at the community corrections facility, he was in the custody of the Center until he was released from the program. The Court cited with approval *State v. Pritchett*, 222 Kan. 719, 720 (1977) which held that custody contemplates an intent on the part of prison officials to exercise action or construction control of the prisoner and that in some manner the prisoner’s liberty is restrained. There is no requirement that the prisoner be constantly supervised or watched over by prison officials. The key factor is that prison officials have not evidenced an intent to abandon or give up their prisoner, leaving him free to go on his way. Kraft was not free to go on his way, he was subject to the rules of the community corrections facility and house arrest.

**Editor’s note:** POC §7.3 mirrors K.S.A. §21-3809.

### **VIOLATION OF A TRAFFIC INFRACTION CANNOT BE THE BASIS FOR OBSTRUCTING OFFICIAL DUTY**

Deputies had signs posted on the highway “Drug Dog Working Ahead” and “Narcotics Officers Working Ahead.” A deputy sat in a lawn chair on the side of the road watching motorists as they approached the signs. Two other deputies were positioned ½ mile up the road. The deputy in the lawn chair saw a car driving toward the sign. He saw the driver lean over toward the passenger side of the vehicle and begin moving around frantically. In doing so, he drifted left of the center line of the highway. The deputy radioed the two deputies up the road of the traffic infraction. The car was stopped. While the stopping officer obtained a driver’s license and checked it through dispatch, the other deputy walked around the car with the narcotics sniffing dog. The dog alerted to the front passenger side of the car. The deputy directed the driver to step from the car. He shouted “No” and drove away. He was eventually stopped, charged with possession of methamphetamine, possession of marijuana, possession of

drug paraphernalia, felony obstruction of official duty and fleeing or eluding a police officer.

K.S.A. §21-3808 defines obstruction of official duty as knowingly and intentionally obstructing, resisting or opposing any person authorized by law to serve process in the service or execution or in the attempt to serve or execute any writ, warrant, process or order of the court, or in the discharge of any official duty. Obstructing official duty in the case of a felony is a felony. Obstructing official duty in the case of misdemeanor is a misdemeanor

In *State v. Kelly*, \_\_\_ Kan. App. 2d (July 27, 2007), the Court held that since the reason for the stop, driving left of center, was a traffic infraction, not a felony nor a misdemeanor, the felony obstruction charge could not stand. The Court also found that a traffic violation, even if pretextual as it appeared to be in this case, provides an objectively valid reason to effect a traffic stop.

**Editor’s Note:** POC §7.2 mirrors K.S.A. §21-3808, however it states that “*Obstructing legal process or official duty in a case of a violation, or resulting from any authorized disposition of a violation or a civil case is a Class A violation.*” It would appear that “*violation*” refers to any violation in the Public Offense Code, but the term is not defined in the ordinance.

### **DEFENDANT MAY EXERCISE RIGHT TO SELF-REPRESENTATION AS LONG AS HE IS COMPETENT TO STAND TRIAL**

Gregory McCall was charged with identity theft. He waived his right to jury trial. Two different privately hired attorneys entered their appearances but later withdrew from McCall’s case. McCall indicated he wanted to exercise his right to self-representation. He was informed of the serious nature of the charges and the difficulty he would have presenting his case, not being law-trained. The Court found McCall’s decision was knowing and voluntary, but because he admitted taking psychotropic medication due to a brain injury, he was provided standby counsel. Due to some strange motions filed and his brain injury, the State requested a competency hearing. McCall opposed the hearing. The Court held the hearing and McCall was allowed to represent himself at the hearing. The evaluator found that McCall was competent to stand trial. He was allowed to represent himself at trial. He was convicted and sentenced to 44 months in prison. On appeal he claims that he should have been provided an attorney at the competency hearing and failure to do so violated his Sixth Amendment right to counsel.

In *State v. McCall*, \_\_\_ Kan.App.2d \_\_\_ (August 3, 2007), the Court cited cases from the 8<sup>th</sup> Circuit and the 2<sup>nd</sup> Circuit which came to different conclusions regarding a defendant’s right to counsel at the competency hearing. It stated that it

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## Court Watch

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was not prepared to enter a bright-line rule regarding pro se representation at a competency proceeding. It sided with the Utah Court of Appeals which stated that there was no need for separate a mental health evaluation to determine if a person was competent to represent himself at trial. A competency to stand trial evaluation is all that is necessary. In this case, based on the fact that McCall was deemed competent to stand trial and he knowingly and voluntarily waived his right to counsel, McCall's Sixth Amendment right to counsel was adequately protected.

### **IDENTITY THEFT IS A CONTINUOUS COURSE OF CONDUCT CRIME, THEREFORE 2 YEAR STATUTE OF LIMITATIONS COMMENCES TO RUN WHEN THE CONDUCT ENDS**

Maria Meza took on the identity and social security number of Nayssa Davila when she arrived in the United States from Mexico. In 1998, she used it to get a job at Peerless Products in Ft. Scott. In *State v. Meza*, \_\_\_Kan.App.2d \_\_\_(August 3, 2007), the Court had no problem finding that Meza's conduct met the definition of identity theft. See, K.S.A. 2004 Supp. §21-4018. The bigger issue was whether or not the statute of limitations had run.

At the time of the defendant's arrest, identity theft had a two year statute of limitations. See, K.S.A. 2004 Supp. §21-3106 (8) This time limit has since been increased to five years, K.S.A. 2006 Supp. §21-3106 (4). In any event, Meza was not arrested until 2004, when the real Nayssa Davila tracked her down through the IRS. If Meza's crime was a single offense, it would have occurred in 1998 when she first used the name and social security card to obtain employment. The statute of limitations would have long passed. However, if it was intended by the legislature to be a continuing offense, the statute of limitations would not even start to run until the conduct ceased, in this case at the time she was arrested and required to stop using Davila's identity. The Court found that the legislature intended identity theft to be a continuous course of criminal conduct crime. *"The very nature of identity theft involves more than the surreptitious acquisition of a victim's personal information. It includes the multitude of injurious acts which flow from the acquisition of that information...Meza's misrepresentation of her identity was repeated every payday when she accepted, endorsed, and cashed a paycheck made out to Nyssa Davila, for whom Peelress reported these earned wages to the IRS."*

### **DEFENDANT MAY PLEAD TO A "HYPOTHETICAL" CRIME**

Under Kansas law, there is no such crime as attempted sec-

ond degree unintentional murder. In *State v. Shannon*, 258 Kan. 425, 229 (1995) the Kansas Supreme Court found that it is logically impossible for a person to have the specific intent to commit an unintentional murder.

This little detail did not stop Ronnie McPherson from entering a plea bargain with the State wherein he pled no contest to one count of attempted second-degree unintentional murder. He had originally been charged with attempted first degree murder. McPherson was sentenced and did not appeal. He subsequently filed a K.S.A. §60-1507 motion (habeas corpus). In *McPherson v. State*, \_\_\_Kan.App.2d \_\_\_(August 13, 2007), the Court was asked to rule on the effect of entering a plea agreement and making a plea to a "hypothetical" crime.

It held that a defendant is permitted to plead to a nonexistent or hypothetical crime as part of a plea agreement so long as the defendant (1) was initially brought into court on a valid pleading; (2) received a beneficial plea agreement; and (3) voluntarily and knowingly entered into the plea agreement. In this case, McPherson was charged with a valid crime initially, attempted first degree murder. He cut his sentence by nearly 2/3's by entering the plea agreement (8 years v. 25 years). And finally, the record disclosed a lengthy colloquy between the court and McPherson, complying with all due process requirements. He understood what he was doing and knowingly and voluntarily waived his rights.

*"Although the practice of permitting plea agreements such as this one to stand may seem illogical at first glance, such agreements serve a legitimate purpose. Compromises have long been permitted by our courts. Criminal cases are resolved by plea bargains virtually every day. As long as due process requirements are met and the bargain is beneficial to the defendant, the defendant cannot later validly collaterally attack either the plea or the bargained-for sentence. To paraphrase the Spencer court, if a defendant enters into a beneficial plea agreement voluntarily and intelligently, he or she forfeits the right to attach the underlying infirmity in the charge to which he or she pled."*

### **"IMMEDIATE PRESENCE" REQUIREMENT OF BREATH TEST**

Anthony Martin was arrested for DUI. At the station he agreed to take the intoxilyzer test. KDHE testing procedure states: "Keep the subject in your immediate presence and deprive the subject of alcohol for 20 minutes immediately preceding the breath test." The videotape of the booking room activity clearly showed that the deputy that arrested Martin stepped out of the testing room several times for a few seconds at a time. The videotape also indicated that Martin coughed and cleared his throat several times during the testing period. There is no indication that he belched, burped, vomited, regurgitated, or otherwise introduced substance into his mouth from his stomach during the testing

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## Court Watch

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period. In fact, he testified he did not. He also testified that he did not drink any alcohol during the 20 minutes leading up to the test.

In *Martin v. Kansas Dept. of Revenue*, \_\_\_Kan.App.2d \_\_\_ (August 11, 2006), published July 18, 2007, the Court of Appeals found that it had never required strict adherence to the KDHE testing procedures where there is no evidence indicating the intoxilyzer malfunctioned or the breath test was contaminated. It further found that Martin had the burden to prove the testing procedures did not substantially comply with the testing procedures promulgated by the KDHE. "Substantial compliance" has been defined as "compliance in respect to the essential matters necessary to assure every reasonable objective." The Court found that in this case the testing procedures substantially complied with the "immediate presence" requirement.

**FACT THAT A PERSON IS AN ILLEGAL ALIEN MAY JUSTIFY DENIAL OF PROBATION, IF THE PERSON IS IN VIOLATION OF FEDERAL LAW BY HAVING RE-ENTERED THE COUNTRY ILLEGALLY AFTER HAVING BEEN PREVIOUSLY DEPORTED**

Pursuant to a plea agreement, Nicholas Martinez pled guilty to possession of cocaine and endangering a child. In return, the State dismissed several charges and recommended the court impose the presumptive sentence of probation. There was no dispute that Martinez was in the country illegally. The district judge found that she could not grant probation because the defendant couldn't comply with the terms. Since he was already in violation of federal law by being in the country unlawfully, he could not comply with the requirement that he not violate state or federal laws.

Martinez appealed, arguing that the court's reliance on his status as an illegal alien resulted in him being sentenced for immigration violations, an unintended use of the sentencing guidelines as well as a violation of his due process and equal protection rights.

In *State v. Martinez*, \_\_\_Kan.App.2d \_\_\_ (August 17, 2007), the Court framed the issue as follows: "Does the fact that a defendant is an illegal alien automatically render that defendant unamenable to probation?"

The Court dove into the federal immigration statutes and found that if one enters the country illegally, he or she is subject to deportation, but the alien's mere presence in the country is not a crime. Only if an alien illegally re-enters the United States after being deported has a federal crime been committed. Therefore, the Court found that if a person has illegally re-entered the country after having been previously deported, he

or she is, as a matter of law, not amenable to probation. To place such a person on probation would require the probation officer to "look the other way" with regards to the federal law violation. However, if the defendant has entered the country illegally and remained, but has not been previously deported, he or she has committed no crime and will not be committing a crime during the term of probation, although he or she may be deported at any time. Therefore, denial of probation under those circumstances would not be warranted. The Court remanded the case to the district court for the judge to determine the defendant's immigration status.

**CONSENT BY PARENT TO SEARCH RESIDENCE SHARED WITH ADULT CHILD**

Twenty-two year old Jared Chilson lived at home with his father. He had his own bedroom, with shared access to a bathroom, with his father. Police were called to the residence on a "domestic disturbance." Upon arrival, pursuant to their procedure they immediately separated father and son so they were out of sight and out of hearing of each other.

The father told the police that he had found a baggie of marijuana in his son's room. A confrontation ensued and his son flushed the marijuana down the toilet in their shared bathroom. The father gave the officers permission to look throughout the house, specifically in the bathroom, where officer discovered fragments of marijuana in the toilet. Officers did not ask Chilson if they could search the house or the bathroom.

Based on the recent decision by the U.S. Supreme Court in *Georgia v. Randolph*, 547 U.S. 103 (2006) (*see also*, *The Verdict*, Spring 2006, page 20), the district court found that the officers should have sought out Chilson's consent or used the father's information to get a search warrant.

In *State v. Chilson*, \_\_\_Kan.App.2d (August 24, 2007), the Kansas Court of Appeals disagreed. It found that *Randolph* was specifically limited to those situations where the co-occupant was physically present and objecting to a search. The police were under no obligation to seek out the son and ask him. There was no evidence to suggest that the police purposefully removed Chilson for the purpose of avoiding a possible objection. They separated Chilson and his father as part of normal departmental protocol. Despite the officers' failure to inquire, Chilson did not voice an objection. Therefore, in order for the ruling in *Randolph* to apply (that a co-tenant can override his fellow tenant's consent to search), the objecting tenant must be physically present and expressly object. And, the police have no duty to inquire of the co-tenant unless it can be found that the police purposefully separated the co-tenants in an effort to avoid an objection to the search.

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## Court Watch

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### DECISION TO ARREST SOMEONE ON AN OUTSTANDING WARRANT IS A DISCRETIONARY FUNCTION, THEREBY CLOAKING POLICE IN IMMUNITY FROM LIABILITY



Jose M. Soto was stopped by Bonner Springs police for an improper license tag. He provided officers with a driver's license and a date of birth. When the police called the information into dispatch, dispatch responded that Johnson County had a warrant for

Soto's arrest. Date of birth, name and driver's license number all corresponded. Johnson County confirmed the warrant. Soto protested that this must be an error to no avail. He was in the Wyandotte County jail for 2 1/2 days before he was transported to Johnson County. Once in Johnson County it was determined that he did not match the picture of the person for whom the warrant was issued and he was released. He sued Bonner Springs and Wyandotte County for false arrest.

In *Soto v. City of Bonner Springs*, \_\_\_ Kan.App.2d \_\_\_ (August 31,2007), the Court found that the decision to arrest someone on an outstanding warrant is a discretionary function. Government employees are exempt from liability under the Kansas Tort Claims Act for performing or failing to perform a discretionary act, regardless of whether that discretion is abused and regardless of the level of discretion involved. See, K.S.A. 2006 Supp. §75-6104(e).

Once the facial validity of the warrant was confirmed by Johnson County, any further investigation to determine whether Soto was the person named in the warrant was discretionary. Neither the City, the County, nor the police officers are civilly liable for damages to Mr. Soto.

### EITHER THE OFFICER WHO INVESTIGATED THE CASE OR THE OFFICER WHO OPERATED THE INTOXILYZER MAY SERVE THE DEFENDANT WITH THE NOTICE OF SUSPENSION

Russell Ashby was taken to the Overland Park police station after having been arrested for DUI. He blew over .08. The officer who investigated the case served Ashby with his notice of license suspension. Ashley argued that he was not properly served with the notice. He argued that the officer who conducted the test must be the one to serve the DC-27 according to K.S.A. §8-1002(c) (which states that "*When the officer directing administration of the testing determines that a person has failed a test...the officer shall serve upon the person notice of suspension*").

The Kansas Supreme Court disagreed. In *Ashley v. Kansas Dept. of Revenue*, \_\_\_ Kan.App.2d \_\_\_ (September 7, 2007) the Court found that both officers were involved in the testing procedure and "[t]o adopt Ashley's argument would require a highly technical interpretation of the statute which is inconsistent with the remedial nature of the legislation."

### APPLICATION OF APPRENDI TO THIRTY DAY DUI SENTENCE ENHANCEMENT WHEN CHILD UNDER 14 IN CAR

Mearl Whillock was arrested for DUI. He blew .368. He had a 6-year-old child in the vehicle with him. At sentencing he pled no contest to a third time DUI. The judge announced that he was giving him one year for the DUI plus 30 days for the fact that a child under the age of 14 was in the car pursuant to K.S.A. §8-1567(h). Whillock appealed on the basis that the additional 30 day enhancement imposed violated his constitutional rights under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (which requires that any fact used to enhance a sentence beyond the statutory maximum must be proven to a jury beyond a reasonable doubt).

In *State v Whillock*, \_\_\_ Kan.App.2d \_\_\_ (September 7, 2007), the Court agreed.



However, it expressly stopped short of finding that the statute was facially unconstitutional in light of *Apprendi*. It found only that it was unconstitutional as applied to the facts of this particular case because Whillock had pled no contest. He did not stipulate to the fact that a child under the age of 14 was in the vehicle. He did not consent to the court finding said fact. The Court indicated that the result would be different if the defendant had pled guilty or made such a stipulation, because a defendant can clearly waive his *Apprendi* rights. The case was remanded for resentencing.

### SUPREME COURT OVERRULES COURT OF APPEALS IN ANALYZING THE VOLUNTARINESS OF A CONSENT SEARCH

Dennis Thompson was stopped by police in McPherson for a faulty headlight. The officer asked Thompson for his license and insurance documentation. He determined there were no wants or warrants for Thompson. The officer called for a back-up and told the back-up that he intended to ask Thompson for consent to search his vehicle. The back-up arrived. The officer gave Thompson back the identification documentation, issued a verbal warning, and told Thompson to have a good day. The defendant said "thank you." The officer started to walk away, but then returned and asked Thompson if he could ask him such additional questions which ultimately resulted in Thompson's consent to search the vehicle and his later written permission to search his garage. Thompson was charged with several drug

(Continued on page 10)

## A Step Back in Time

(Continued from page 1)

Lawder sued Henderson for \$300, the value of the dogs (about \$7,000 in today's dollars). He presented the testimony of Mr. Taylor. Taylor indicated that the mob had also come to his house, led by Henderson. He testified that Henderson read a list of owners of dogs that had been killed. Henderson allegedly told Taylor that all the owners except Lawder and one other had consented to the killings.

Henderson took the stand and testified solely to the fact that he read no such list, nor made any such statement at Taylor's house. Lawder's attorney tried to cross-examine Henderson regarding whether or not he was ever at Lawder's house that evening, whether he killed Lawder's dogs and whether or not Lawder had given permission. However, the cross-examination was not allowed, because the court ruled it was outside the scope of direct examination. A Wabaunsee County jury found for the defendant, Henderson. Lawder appealed on the issue of the Court refusing to allow Henderson to be cross-examined on whether or not he killed Lawder's dogs without permission.

In *Lawder v. Henderson*, 36 Kan. 754 (1887), the Kansas Supreme Court found that a witness cannot be questioned upon a matter in cross-examination about which he had not testified on direct examination. Lawder's attorney could have called Henderson as his own witness, but he did not. The verdict in favor of Mr. Henderson was affirmed.

### COURT-ORDERED INTERLOCK

**According to Marcy Ralston, courts should not report interlock orders that are made pursuant to K.S.A. §8-1567 (STO §30) to the DMV. Those interlock orders run with the defendant and the cars, not with the driver's license. It is the Court's responsibility to monitor compliance with court-ordered interlock devices.**

## Illegal Immigrants and the Offender Registry

By Kelly McPherron, Assistant Attorney General, KBI  
Reprinted from the KCJIS Newsletter, August 2007



The Kansas Offender Registration Act (ORA) requires sex offenders, violent offenders, and some drug offenders to comply with certain obligations. One such obligation is the annual renewal of a driver's license or identification card. *K.S.A. 22-4904(a)(5)(J)*. A driver's license issued to a registered offender is assigned a distinguishing number by the division of vehicles which indicates to law enforcement officers that the individual is a registered offender. *K.S.A. 2006 Supp. 8-243(d)*. Likewise, identification cards are "readily distinguishable" to show an individual is a registered offender. *K.S.A. 8-1325a(b)*.

An offender holding a valid driver's license may continue to operate motor vehicles until the offender's next birthday, at which point, the driver's license will expire. *K.S.A. 2006 Supp. 8-247(h)*. Likewise, a registered offender who possesses an identification card must renew the card "on the first birthday of the applicant following the date of original issue." *K.S.A. 8-1325(a)(a)*.

However, the division of vehicles will not issue a driver's license to anyone whose presence in the U.S. violates federal immigration laws. *K.S.A. 2006 Supp. 8-237(i)*. In addition, individuals must submit "proof of lawful presence" to obtain an identification card. *K.S.A. 2006 Supp. 8-1324(b)*.

As a result, it appears that an offender who is illegally in the U.S. will be in violation of the Kansas ORA because the offender cannot renew a valid driver's license or identification card. However, although the Kansas ORA requires offenders to annually renew a driver's license or identification card, the act itself does not require offenders to possess either of these items. Thus, an offender will not be considered in violation of the Kansas ORA for having neither a driver's license nor an identification card. However, if an offender obtains either form of identification, the offender is subject to the Kansas ORA, and must renew the driver's license or identification annually, as set out in *K.S.A. 22-4904(a)(5)(J)*. Although not required by Kansas law currently, a sex offender will be required to possess a valid driver's license or identification card upon implementation of the federal Sex Offender Registration and Notification Act.

If you have questions or concerns regarding this issue, or any other matters related to the Kansas Offender Registration Act, please contact Kelly McPherron at (785) 296-3150.

## Court Watch

(Continued from page 8)

charges as well as manufacture of methamphetamine.

Thompson challenged the search as exceeding the scope and duration of the stop.

The State conceded that the officer had no reasonable and articulable suspicion that Thompson was engaged in illegal activity prior to the search. Therefore, the sole issue is whether or not the search was consensual. In *State v. Thompson*, 36 Kan.App.2d 252 (2006), the Kansas Court of Appeals found that the encounter was not consensual. See also, *The Verdict*, Fall 2006, page 10. The Court of Appeals chastised the use by law enforcement of the “Columbo” approach.

In *State v. Thompson*, \_\_\_ Kan. \_\_\_ (September 7, 2007, modified opinion filed October 17, 2007), after a lengthy analysis of the case law and various legal treatises and law review articles, the Kansas Supreme Court overruled the Court of Appeals. It highlighted the fact that these types of cases are highly case specific based on a totality of all the circumstances and it simply reached a different conclusion based on the facts in this case. The case is a wonderful compilation of the law regarding consent searches in the case of traffic stops.

Justice Beier was joined by Justice Rosen in a dissent, in which she wrote, “*I do not share the majority’s confidence that the phoenix of a voluntary police-citizen encounter arose out of the ashes of the traffic stop of defendant Thompson...I think the majority expects far too much chutzpah from a person in defendant’s position. I certainly would not rule that a traffic stop can never be converted into a voluntary encounter, but I would require more than the totality of the circumstances demonstrates here.*”

### CONSENT OF THE VICTIM IS NOT A DEFENSE TO VIOLATION OF A PROTECTION ORDER

In June 2005, Pamela Hird obtained a protection from abuse (PFA) order against Darrell Branson under the provisions of K.S.A. §60-3101. Branson was served with the order shortly after it was issued. The PFA prohibited Branson from having any contact with Hird “except as authorized by the Court in this Order.” He was not to “enter or come on or around” her residence or workplace.” By its terms, the order expired at midnight on June 27, 2006.

On October 18, 2005 Hird was advised that Branson had appeared at her business. He was denied entry. He left in Hird’s vehicle. The police were notified and stopped Branson in Hird’s vehicle. He denied being at her business, but admitted to taking her car from her residence. It turns out he had been living in her basement, with her consent, for a couple

days. He also did some repairs within her residence during this time. Nonetheless, he was charged under K.S.A. §21-3843(a)(1), violating a protection from abuse order.

Defense counsel moved to dismiss on the basis that Hird had allowed Branson to stay at her residence and had not contacted police. The Court denied the motion and held that Hird’s acquiescence was not a defense to a charge of violating the court order.

In *State v. Branson*, \_\_\_ Kan.App.2d \_\_\_ (September 21, 2007), the Kansas Court of Appeals agreed. It cited the philosophy of criminal law that criminal prosecution is a State affair and that a criminal act specified and defined in the criminal code occurs against the peace and dignity of the State, not any particularized victim.

**Editor’s Note:** *The statute under which Branson was charged is identical to P.O.C. §3.8.1, for those municipal courts that have adopted the LKM Public Offense Code.*

### DELAY IN SERVING WARRANT WHILE DEFENDANT IN CUSTODY IN ANOTHER JURISDICTION

A bench warrant was issued in McPherson County for the defendant’s arrest on a probation violation. Unfortunately, the defendant had been incarcerated in Saline County a few weeks earlier. Over the next six years while the defendant was in DOC custody on the Saline County matter, he attempted to get McPherson County to transport him on the warrant to no avail. He wrote several letters both to the McPherson County district attorney and to the district judge expressing his frustration because the outstanding warrant was causing him to be ineligible for several programs in prison that he was required to complete before he could be released. The district judge did order transport at one point, but the order was never effectuated for some unknown reason. After he completed his prison term, he was arrested on the McPherson warrant and transported to McPherson County.

At the hearing to revoke his probation, the defendant moved for dismissal due to the delay in prosecution of the motion. The district court denied the motion on the basis that the State was not obligated to bring the defendant back from prison on a probation revocation. The judge stated, “*I’ve always proceeded under the assumption the State does not have that duty that they can simply wait until they’re discharged, although I think the better practice is to bring them back, but that’s not my call. Until the Supreme Court tells me they have to bring them back when they’re in prison I don’t feel it has application.*”

In *State v. Hall*, \_\_\_ Kan.App.2d \_\_\_ (September 21, 2007), the Kansas Court of Appeals took the judge up on his challenge. It found:

*Considering the facts before us and specifically due to: (i) the State’s inability to explain the delay; (ii) the fact that Hall could have been transported to McPher-*

(Continued on page 12)

# The U.S. Supreme Court Talks Fines

What follows are a few excerpts from U.S. Supreme Court decisions regarding payment of fines and the difficulty the Court recognizes judges face in collecting said fines. These are the **concurring** opinions that Judge Fred Rodgers, during his presentation in Hutchinson, suggested judges read to get a feel for the fact that the U.S. Supreme Court, at least some justices, does feel our pain. Note, the selected quotes are not binding statements of law. These arguments have no precedential value. They are merely dicta.

The U.S. Supreme Court held in *Tate v. Short*, 401 U.S. 395 (1971) that a defendant defaulting on payment of traffic fines for offenses not carrying a jail penalty may be remanded to jail but only after a hearing is conducted on the defendant's ability to pay. A statute that purports to convert unpaid fines automatically to jail sentence without a hearing denies equal protection of the law. Here Justice Blackmun seems to suggest, in a concurring opinion, that if you want to get serious, forget assessing fines and send everyone to jail. This is also one of many times that Justice Blackmun refers to the "carnage on the highways." in his opinions.

*The Court's opinion is couched in terms of being constitutionally protective of the indigent defendant. I merely add the observation that the reversal of this Texas judgment may well encourage state and municipal legislatures to do away with the fine and to have the jail term as the only punishment for a broad range of traffic offenses. Eliminating the fine whenever it is prescribed as alternative punishment avoids the equal protection issue that indigency occasions and leaves only possible Eighth Amendment considerations. If, as a nation, we ever reach that happy point where we are willing to set our personal convenience to one side and we are really serious about resolving the problems of traffic irresponsibility and the frightful carnage it spews upon our highways, a development of that kind may not be at all undesirable.*

In *Bearden v. Georgia*, 461 U.S. 660 (1983), the Court held that before revoking probation or a deferred sentence on the basis of unpaid fines or restitution, the court must inquire into both the defendant's financial resources and his good faith efforts to seek employment or borrow funds to meet the obligation. Before remanding him to jail, the court must find that alternate forms of punishment such as community service were inadequate to meet the state's interest in punishment and deterrence.

However, Justice White wrote a concurring opinion joined by Powell and Rehnquist, pointing out that he would find that as long as the jail term given is reasonably related to the crime,

he would see no problem with requiring that the jail term be served if the fine is not paid without going through a "superstructure of procedural steps." Since, in this case the state court found that the length of the sentence imposed (2 years for burglary and theft) was not a rational and necessary trade off, he concurred in the opinion. But he certainly suggests, that had the jail term imposed been more appropriate for the crime and the violation, he would have no problem imposing the alternate jail term if the fine is not paid.

*Poverty does not insulate those who break the law from punishment. When probation is revoked for failure to pay a fine, I find nothing in the Constitution to prevent the trial court from revoking probation and imposing a term of imprisonment if revocation does not automatically result in the imposition of a long jail term and if the sentencing court makes a good-faith effort to impose a jail sentence that in terms of the state's sentencing objectives will be roughly equivalent to the fine and restitution that the defendant failed to pay. The Court holds, however, that if a probationer cannot pay the fine for reasons not of his own fault, the sentencing court must at least consider alternative measures of punishment other than imprisonment, and may imprison the probationer only if the alternative measures are deemed inadequate to meet the State's interests in punishment and deterrence. There is no support in our cases or, in my view, the Constitution, for this novel requirement.*

*The Court suggests, that if the sentencing court rejects non-prison alternatives as "inadequate", it is "impractical" to impose a prison term roughly equivalent to the fine in terms of achieving punishment goals. Hence, I take it, that had the trial court in this case rejected non-prison alternatives, the sentence it imposed would be constitutionally impregnable. Indeed, there would be no bounds on the length of the imprisonment that could be imposed, other than those imposed by the Eighth Amendment. But *Williams v. Illinois*, 399 U.S. 235 (1970) and *Tate v. Short*, 401 U.S. 395 (1971) stand for the proposition that such "automatic" conversion of a fine into a jail term is forbidden by the Equal Protection Clause, and by so holding, the Court in those cases was surely of the view that there is a way of converting a fine into a jail term that is not "automatic". In building a superstructure of procedural steps that sentencing courts must follow, the Court seems to forget its own concern about imprisoning an indigent person for failure to pay a fine.*

## Court Watch

(Continued from page 10)

son County for revocation proceedings during his incarceration on the Saline County conviction; (iii) Hall's unanswered correspondence requesting timely resolution of the revocation motion; (iv) the failure of the State to comply with the district court's order to transport Hall back to McPherson County to resolve this matter; (v) the potential prejudice to Hall of the unresolved detainer and its impact on program eligibility during his incarceration; and (vi) the emotional anxiety of waiting 6 years to learn of the outcome of a revocation motion, we hold that Hall's due process rights were violated by the 6-year delay and the State must be barred from its belated efforts to prosecute the revocation motion.

The district court order revoking Hall's probation was reversed and the defendant was discharged from all further liability for his probation violation.

**Editor's Note:** Although this case has little application to municipal cases since the Uniform Disposition of Detainer Act has no application to municipal warrants and the State will not transport a state prisoner to a municipal court to satisfy a warrant, it simply illustrates the issues we discussed in Hutchinson about the difficulty preparing prisoners for re-entry into society after their prison term when they are unable to resolve outstanding warrants while in prison. See also, pages 4 and 13 of this publication for additional discussion of this issue..

### DIFFERENT APPELLATE PANEL COMES TO DIFFERENT CONCLUSION REGARDING CROSSING FOG LINE AS BASIS FOR STOP

Desiree Marx was proceeding down the Kansas Turnpike with her husband, Peter, in their motor home. A Kansas Trooper saw the vehicle cross the fog line, overcorrect, and cross the centerline. After stopping the vehicle, drugs were found and both husband and wife were charged with possession. One of the issues on appeal was whether or not this driving behavior was sufficient for the officer to stop the motor home, especially in light of *State v. Ross*, 37 Kan.App.2d 126 (2007), *rev. denied*, 284 Kan. \_\_\_(2007).

In *Ross*, the defendant's vehicle was stopped after the officer observed the defendant cross the fog line only once. A different panel of the Court of Appeals held that K.S.A. §8-1522 (failure to maintain a single lane) requires a showing that the vehicle movement was not done safely. Absent such a showing, there was insufficient reasonable suspicion of a traffic violation to stop the vehicle.

The *Ross* decision was later criticized in *United States v. Jones*, 501 F.Supp. 2d 1284 (D.Kan. 2007). In *Jones*, the officer observed the defendant weave out of his lane, crossing the fog line by a tire width. Also believing that K.S.A. §8-1522 (fail to maintain a single lane) had been violated, the officer

stopped the car, and ultimately found drugs. According to *Jones*, the *Ross* opinion was "ambiguous on whether an officer has reasonable suspicion of a violation only if the lane movement was actually unsafe or whether or not it is enough that the officer reasonably suspects the driver failed to determine first the safety of the lane movement." According to *Jones*, the *Ross* decision was in "conflict with well-reasoned precedent of other jurisdictions" especially that of the Tenth Circuit. The Tenth Circuit has consistently held that a vehicle driving out of a lane, even one time, can provide reasonable suspicion of a violation of K.S.A. §8-1522 when, under the circumstances, the driver should reasonably be expected to maintain a straight course.

According to *Jones*, the court's role is not to decide whether the facts are sufficient to sustain a conviction under K.S.A. §8-1522, but whether they are adequate to form an objectively reasonable suspicion that the defendant's vehicle was being operated in violation of the statute. If an officer reasonably believes in good faith that a traffic violation has occurred, the stop is valid even if it ultimately turns out that the driver is not guilty of the traffic violation. *Jones*, 501 F. Supp.2d at 1298 n. 15.

Therefore, in *State v. Marx*, \_\_\_ Kan.App.2d \_\_\_(October 26, 2007), a different panel of the Court of Appeals sided with the *Jones* court and specifically declined to follow the *Ross* panel. It found that Marx's maneuver was inherently unsafe. There were no obstructions in the roadway that would have caused the driver to leave her lane of traffic. The officer stopped Desiree and informed her of the reason for the stop. The Court held:

*"We interpret K.S.A. §8-1522 to mean that a vehicle shall be driven as nearly as practicable entirely within a single lane of traffic. The "nearly as practicable" language allows a driver to momentarily move outside a lane of traffic due to special circumstances such as weather conditions or an obstacle on the road. Otherwise, the driver must stay in one lane. The statute further provides that if a driver intentionally decides to move his or her vehicle from its lane of traffic, the driver must first ascertain that such movement can be made with safety."*

The defendant argued that the State failed to produce evidence to establish whether there were special circumstances which may have caused Desiree to leave her lane of traffic, such as weather conditions or an obstacle on the road. Although the Court recognized that the State bears the overall burden of proving the lawfulness of a search and seizure by a preponderance of the evidence, "...if there was a special circumstance such as an obstacle in the road which caused Desiree to swerve the motor home, it would seem that this is evidence only she could provide. The State is not required to prove a negative. Although the prosecutor could have asked the [the Trooper] if he observed anything that might have caused the motor vehicle to swerve, the prosecutor's failure to ask this question was not fatal." It distinguished this as a suppression issue where the state must only prove reasonable suspicion, not a trial for a violation of K.S.A. §8-1522.

## Second Chance Act of 2007

*“Tonight I ask you to consider another group of Americans in need of help. This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit crime and return to prison. So tonight, I propose a four-year, \$300 million prisoner re-entry initiative to expand job training and placement services, to provide transitional housing, and to help newly released prisoners get mentoring, including from faith-based groups. America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life.”*

George W. Bush, State of the Union Address 2004

This year bi-partisan legislation has been introduced in Congress (Rep. Dennis Moore and Sen. Sam Brownback of Kansas were among the sponsors) to help prepare inmates and other ex-offenders to successfully return to their communities. The Second Chance Act of 2007 authorizes assistance to states and localities to develop and implement strategic plans for providing and coordinating efforts to enable ex-offenders to successfully reenter their communities.

According to Department of Justice statistics, 52% of state prisoners report being under the influence of drugs and/or alcohol at the time they committed the offense. DOJ estimates that about 80% of both the state and federal prison populations have a problem with illegal drugs or alcohol. Therefore, alcohol and drug treatment programs are a big part of this initiative. It also encourages collaborations between state and local units of government and technical schools, community colleges, and workforce development employment services. It will fund temporary post-release housing, including group homes for substance abusers. Mental health services and mentoring programs are also key components to the legislation. It also establishes a federal expungement provision. Currently there are no expungements for federal crimes. A presidential pardon is the only option.

To participate offenders would have to meet certain criteria. They cannot have any convictions for crimes of violence, remain alcohol and drug free, fulfill all the requirements of their sentences, get a GED or high school diploma and complete at least one year of community service.

More than \$350 million will be made available in the form of grants to state and local governments. It looks like the legislation stands a good chance of passing. Stay tuned.

# Treasurer's Report

Prepared by Kay Ross, K.M.J.A. Treasurer

### INCOME:

Balance as of 04/20/07.....	\$20,064.58
Income from dues.....	\$ 375.00
Bank interest.....	\$ 39.51
K.M.J.A. Outing Fees.....	\$ 1,390.00
Total Income 04/20/7 to 07/27/07.....	\$ 1,804.51

**TOTAL INCOME TO DATE** **\$21,869.09**

### EXPENSES:

Bus Expense.....	\$ 380.00
Kansas Cosmosphere.....	\$1,284.60
Dues Report Printing Expenses.....	\$ 18.31
CNA Surety Bond, Treasurer.....	\$ 100.00
Hospitality Room expense.....	\$ 730.36
Verdict Printing.....	\$ 485.90
Trivia Prizes.....	\$ 120.84
Lee Reed, 30 year pins.....	\$ 349.80

**TOTAL EXPENSES TO DATE.....** **\$ 4,056.59**

**BALANCE ON HAND 07/27/07.....** **\$17,812.50**



***When enlisted in a good cause, never surrender, for you can never tell what morning reinforcements will come marching over the hilltop.***

*General Jan Christian Smuts  
South Africa*

## The Verdict

### THOSE RHYMING FEDERAL JUDGES!

Yet another federal judge has decided to issue an opinion in rhyme. This time, it was U.S. Magistrate James Muirhead of Concord, New Hampshire. Judge Muirhead made headlines several months ago when he ruled that the state prison could not take away religious diets from sincerely religious inmates. The case involved an Orthodox Jew who sued to obtain kosher meals. Magistrate Muirhead granted the requested relief.

So, next in line came inmate Charles Jay Wolff, who also claimed to be entitled to a kosher diet. Although the state gave him a kosher diet (in response to Judge Muirhead's ruling), the hard boiled eggs they served him caused him heart and digestive problems. He argued that he should be served eggs any other way, but not boiled. He complained to the judge and sent a hard boiled egg to accompany his complaint, which prompted this response from Judge Muirhead:

**UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEW HAMPSHIRE**

Charles Jay Wolff

v. Civil No. 04-cv-321-FD

New Hampshire Department  
of Corrections, et al.

**ORDER**

Plaintiff has filed a hard-boiled egg as part of his preliminary injunction request.

**Discussion**

No fan I am  
Of the egg at hand.  
Just like no ham  
On the kosher plan.

This egg will rot  
I kid you not.  
And stink it can  
This egg at hand.

There will be no eggs at court  
To prove a clog in your aort.  
There will be no eggs accepted.  
Objections all will be rejected.

From this day forth  
This court will ban

Hard-boiled eggs of any brand.  
And if you should not understand  
The meaning of the ban at hand  
Then you should contact either Dan,  
the deputy clerk, or my clerk Jan.

I do not like eggs in the file.  
I do not like them in any style.  
I will not take them fried or boiled.  
I will not take them poached or broiled.  
I will not take them soft or scrambled  
Despite an argument well rambled.

No fan I am  
Of the egg at hand  
Destroy that egg!  
Today! Today!  
Today I say! Without delay!

**SO ORDERED** (with apologies to Dr. Seuss)

Signed James R. Muirhead, U.S. Magistrate Judge

Date: September 19, 2007.



**KMJA Board  
discusses  
2008  
Conference Agenda**





The following contains a summary of recent opinions from the office of Kansas Attorney General Paul Morrison that may be of interest to municipal judges. The full text of all AG opinions can be accessed through [www.accesskansas.org](http://www.accesskansas.org).

**AG OPINION NO. 2007-26**  
**August 30, 2007**

**MUNICIPAL COURT JURISDICTION POST-SB 31**

Municipal courts have subject matter jurisdiction to hear certain ordinance violations that could be prosecuted as felony crimes in district court. Convictions under such ordinances will be misdemeanor convictions—not felony convictions. Moreover, a municipal court has jurisdiction in third and subsequent driving under the influence (DUI) violations where (1) the ordinance violation occurred after July 1, 2006; and (2) the city has enacted an ordinance subsequent to July 1, 2007 giving its municipal court jurisdiction over third and subsequent DUI violations.

**AG OPINION NO. 2007-27**  
**September 4, 2007**

**CONFIDENTIALITY OF JUDICIAL PERFORMANCE**  
**EVALUATIONS**

The statutory provisions prohibiting the Commission on Judicial Performance and elected judges from disclosing data from surveys evaluating elected judges’ judicial performance violates the First Amendment of the United States Constitution because the purported justifications of: (1) promoting fairness in the use of public funds to evaluate judicial candidates in partisan elections; (2) preventing a violation of K.S.A. 25-4169a; and (3) preventing judicial candidates from using the evaluations in a misleading manner, do not serve a compelling state interest or are not narrowly tailored to serve those interests.

**KMJA DIRECTORY**

If you want a copy of the  
2007 KMJA Directory  
please call or email  
Judge Karen Arnold-Burger at:

[karen.arnold-burger@opkansas.org](mailto:karen.arnold-burger@opkansas.org)  
(913) 327-6852

**The Verdict**

**ATTENTION  
JUDGES !!!!**

Every year, rain or shine, **every** municipal court in the state must submit a Caseload Report to the Office of Judicial Administration. Every year, no exceptions, it is due by July 15.

K.S.A. §12-4106(d) states:

*The municipal judge shall promptly make such reports and furnish the information requested by any departmental justice or the judicial administrator, in the manner and form prescribed by the supreme court.*

This means, submission of this report is not optional, and it is not subject to “whenever you get around to it.”

In addition, Supreme Court Rule 601A, the Kansas Code of Judicial Conduct, which applies to municipal judges states, in pertinent part:

**CANON 3**

**A Judge Shall Perform the Duties of Judicial Office  
Impartially and Diligently**

- A. **Judicial Duties in General.** The judicial duties of a judge take precedence over all the judge’s other activities. The judge’s judicial duties include all the duties of the judge’s office prescribed by law. ...
- C. **Administrative Responsibilities.**
  - (1) A judge shall diligently discharge the judge’s administrative responsibilities...and should cooperate with other judges and court officials in the administration of court business.

In 1989 the Supreme Court publicly censured a judge for not performing her duties diligently, including not submitted required reports. See, *In re Long*, 244 Kan. 719 (1989).

The Municipal Judges Education and Testing Committee would like to reiterate the importance of timely submission of caseload reports and remind judges that failure to comply may result in disciplinary action up to and including removal from office.

**IT IS THE JUDGE’S RESPONSIBILITY TO  
SUBMIT THE CASELOAD REPORT TO OJA.  
FAILURE TO DO SO IS AT YOUR OWN  
PERIL !!!!!**

## THE CARDBOARD BOAT RACE

*“The Cardboard Boat Race” by Hon. William J. Boklund, published in Judges’ Journal, Volume 45, No. 4, Fall 2006. Copyright © 2006 by the American Bar Association. Reprinted with permission.*

I joined a health club called the Powerhouse Gym in the winter before I became a judge. I was a regular at that gym for several years. I made friends with many of the other regulars, especially those who, like me, focused some of their energy on jaw exercise.

We have a summer festival in our town, and one of the events is a cardboard boat race. On a whim, a group of us from the Powerhouse decided to build a boat and enter the race. The rules were simple. All boats had to be made entirely of cardboard. The boats that finished in the top two in each of three heats made the finals. Then, whichever boat made it across the finish line first before it sank was the winner. We had an engineer, an architect, and a designer on our team. We were confident our boat could hold six rowers for four voyages and not fall apart when we carried it. We knew we would win.

The boat looked like a pirate ship. It had the figure of a woman on the bow and a tall main mast that only made it through the first heat. We even had T-shirts that read “Powerhouse Pirates” and wore pirate handkerchiefs on our heads. We won the prize for best looking entry. Our designer was proud.

As the race approached, I began to worry that perhaps being a Powerhouse Pirate was not consistent with the dignity of my new office. In a moment of weakness I had promised to be a rower, but I was having second thoughts. I tried to beg off, but my friends needed me. I kept my promise. Besides, I thought, who would notice me in that crowd?

As we carried our boat toward the pier for the first heat, a photographer shouted, “Hey, judge.” I looked up and he snapped my picture. My heart sank. I knew that picture of me dressed like a pirate was going to be on the front page the next day.

While I worried about the picture, we positioned our boat at the starting line. People laughed at us, but some slapped me on the back and wished us luck. With each heat, the number of our supporters grew. I saw a lot of familiar faces along the route from start to finish line. Most were encouraging. Some even chanted, “Pirates, Pirates.”



After our third heat, we took a break under a canopy next to the grandstand out of sight. I was hot, and one of the guys had a case of beer and a few soft drinks. He offered me a beer. I hesitated. Someone else grabbed it before he could offer it to me again.

When my friend offered me another beer, I shook my head and despite his taunting grabbed a Pepsi. As I drank that Pepsi, all I could think of was how good that beer would have tasted right then.



Our boat sank in the final just as it crossed the finish line—in second place. We put the trophy in the front window of the Powerhouse Gym. For a while people teased me about being in the race and my “pirate” picture on the front page. Some just said, “Arrrr,” and chuckled. But a surprising number of people told me how neat it was that a judge would “do something like that.”

Summer turned to fall, and I was busy droning dialogue to one of the countless faces I see in criminal court. This one was entering a guilty plea to yet another operating-while-intoxicated charge. He was a regular, and I had already exhausted all of my resources on him. I asked if he wanted to say anything before I sentenced him, expecting him to say no.

Without looking up he said, “I saw you at that boat race. Your friends all drank beer.” Then he whispered, “You didn’t.”

I would be years before I saw that man again. I was in the part to perform a wedding on a beautiful day in June. The park was crowded, and I had the strange feeling that someone was watching me. I casually looked around to see if I was right.

There he was, leaning against an oak tree. He grinned and waved to me with a can of Coke. He looked sober. I smiled, nodded, and continued toward the beach. He was not there when I returned.

The Powerhouse Gym closed the following spring. My friends went their separate ways. Some of us joined another gym, but it was never the same. We never built another boat.

I never saw that man again, either. I heard that he had resolved to quit drinking. Maybe he did. Maybe he found a way to beat his addiction, at least for a while. Given what he said at sentencing, maybe seeing what I drank that day at the boat race was part of what turned things around for him. I hope it was any-

*(Continued on page 17)*

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## The Cardboard Boat Race

(Continued from page 16)

way, but I will never know. Notwithstanding, I am haunted by the mere possibility that such a small choice on my part might have made such a tremendous impression on another human being.

People tell mean-spirited jokes about lawyers. When those lawyers become judges, the same people ask them to marry their children or say the blessing at a meal. Deserved or not, we become living symbols of the law when we put on the robe. It is a sacred trust and a ponderous burden that we carry at all times. What we do in court affects lives. Sometimes what we do at a cardboard boat race does, too.



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**Two other interesting cases this quarter (unrelated to municipal court law):**

*In the Interest of KMH*, \_\_\_ Kan. \_\_\_ (October 26, 2007) involving issues of paternity rights for a known sperm donor; and  
*Williams v. Lawton*, \_\_\_ Kan.App.2d \_\_\_ (October 26, 2007) regarding impeaching a jury verdict by subsequent affidavits following telephone polling by counsel.

## Unpublished Opinions

*Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion. However, whenever cited, a copy of the opinion must be attached to the document, pleading or brief that cites them. Westlaw has now started indexing Kansas unpublished opinions. Therefore, in conducting legal research you may be routed to an unpublished decision. With that in mind, The Verdict, will start summarizing unpublished opinions that deal specifically with cases out of municipal courts or directly related to issues that arise in municipal courts.*

### BEING “SHAKEN UP” FOLLOWING A COLLISION IS NOT GROUNDS TO REFUSE A BREATH TEST

#### *Unpublished Decision*

Nathan Fleming was involved in a rollover collision. When officer's arrived they detected the odor of alcohol and blood-shot eyes. Fleming admitted to drinking one beer. He refused to perform the field dexterity tests, the preliminary breath test, and the intoxilyzer test. He claimed he was too “shaken up” following the collision to take the test. The district court found that this was a valid excuse and overruled the administrative suspension of Fleming's driver's license for a test refusal.

In *Fleming v. Kansas Dept. of Revenue*, unpublished, Slip Opinion, 2007 WL 2178261 (Kan. App. July 27, 2007), the Court of Appeals reversed the district court and reinstated the defendant's driver's license suspension.

*“The district court seems to have been impressed that Fleming told the officer that he would **not** be able to pass any tests because “he was shaken and upset” as a result of a severe rollover automobile accident. We are **not** similarly impressed with this excuse. In fact, we note that involvement in an accident or collision is one of the express criteria for testing under K.S.A. 2006 Supp. 8-1001(b). Under the district court's reasoning, any person involved in an accident or collision could avoid testing upon a claim of being “shaken up,” thus eviscerating the legislative contemplation that testing should be required where there is reasonable grounds and the person has been involved “in a vehicle accident or collision resulting in property damage, personal injury or death.”*”

### ELLIOTT REARS ITS UGLY HEAD AGAIN

#### *Unpublished Decision*

Eric Salsberry was sentenced as a fourth or subsequent DUI offender in district court. He had district court DUI convictions

in 1990 and 1994, and two municipal court DUI convictions in 2002. He did not object to his criminal history in the PSI, nor did he voice any concerns about priors at sentencing. However, for the first time on appeal he argues that the Court could not sentence him as a fourth or subsequent offender because convictions number three and four were in municipal court and based on *State v. Elliott*, 281 Kan. 583, 588 (2006) the municipal court lacked subject matter jurisdiction over said offenses. Since subject matter jurisdiction can be raised at any time, he was allowed to present this argument for the first time on appeal. In *State v. Salsberry*, unpublished, 162 P.3d 845 (Kan. App. July 27, 2007), the Court found that *Elliott* required that the two municipal court convictions be voided for lack of subject matter jurisdiction. Defendant could only be sentenced as a third-time offender, not a fifth.

*Editor's Note: Again, it should be noted that based on the complete and total removal in 2001 of all DUI convictions that occurred prior to 1996 from all Kansas driving records, there is a very good chance that the municipal courts had no knowledge of the district court convictions from 1990 and 1994 when they sentenced the defendant in 2002. Since he did not challenge the two district court convictions, we also don't know if they were examined by the municipal courts and not counted because the defendant was not represented by counsel and had not validly waived counsel. Elliott does not allow for any analysis of the municipal court charging and sentencing decision. It is merely a simple count of DUI convictions. It should also be noted that this decision would not prevent the district court from sentencing the defendant on remand to greater than the mandatory minimums for a third time offender. DUIs are not sentencing guidelines cases and the maximum sentence is the same (1 year and \$2,500), regardless of whether it is a third or a fifth or a twentieth. So on remand, Salsberry could receive the exact same sentence.*

### SPEEDY TRIAL CLOCK WHEN PROSECUTION MOVES TO DISQUALIFY DEFENSE COUNSEL

#### *Unpublished Decision*

Defendant pled not guilty on October 10, 2005. Jury trial was set to start on December 28, 2005. On the day of trial, the State filed a motion to disqualify defense counsel due to what it deemed to be a conflict with her representation of the defendant and the co-defendant in the case (who was being offered immunity if he testified against the defendant). On January 5, 2006 a hearing was held and defense counsel was disqualified from representing the defendant. New counsel came on board and trial was set for April 6, 2006 to give new counsel an adequate opportunity to prepare. It was again continued to April 11. On April 7, the defendant filed a motion to dismiss on the basis of violation of his right to a speedy trial. It appears the defense had not requested any continuances in the case and the day

*(Continued on page 19)*

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of hearing, April 10, was day 182. The defendant argued that all of this time should be charged to the prosecution because it was the prosecution that caused the delay by waiting so long to file a motion to disqualify (which was contested by the defendant).

In *State v. Lara*, unpublished, 162 P.3d 845 (Kan. App. July 27, 2007) the Court of Appeals held that according to well-established case law, reasonable delay caused by change in defense counsel—even if not initiated by the defendant—is properly chargeable to the defendant. The disqualification of counsel and the time for new counsel to prepare is all accomplished for the benefit of the defendant. The time from January 6, 2006 (following the disqualification) to the April 6 trial date were ordered charged to the defendant. In addition, the Court charged the time from December 28 (filing of motion to disqualify) to January 5, 2006 (date of hearing on motion) to the defendant. Finally, the period from April 6 to April 11 was also to be charged to the defendant, for a total of 87 days to the State and 99 days to the defendant.

**FIELD DEXTERITY TESTS MUST BE PERFORMED IN THE FIELD, TAKING DUI SUSPECT TO POLICE STATION FOR “FURTHER INVESTIGATION” CONSTITUTES AN ARREST WITHOUT PROBABLE CAUSE**

*Unpublished Decision*

Officers stopped defendant for speeding. When they approached his car, they smelled the odor of consumed alcohol coming from the vehicle and later from the defendant. They saw the defendant place something behind the passenger seat. One officer shined his flashlight into the car and observed two open containers and some open six-packs of beer. The defendant admitted drinking 30 minutes earlier. The officers asked the defendant for a driver’s license and proof of insurance. He was not able to provide proof of insurance.



*“While it may not be advisable to injure the attorney-client relationship by insulting the intelligence of one’s client or the client’s mother, the conduct alleged by the defendant in this case does not rise to the level of a conflict of interest, an irreconcilable conflict in representation, or a complete breakdown in communication.”*

*State v. Saunstaire*, Slip Copy, unpublished opinion, 2007 WL 2301910 (Kan.App. August 10, 2007)

Due to the unsafe location of the stop (on a very muddy shoulder) and the precarious position the cars were in as related to the highway, the officers asked the defendant to go to the police station for some field dexterity tests. He was placed in the patrol car and taken to the station. At the station the defendant failed the dexterity tests and was placed under arrest for DUI, transporting an open container, speeding in a construction zone, and no proof of insurance. He tested .177 on the Intoxilyzer. The defendant was convicted in municipal court and appealed to the district court for a trial to the court. He was convicted in district court.

The defendant appealed to the Court of Appeals on the grounds that the officers had no probable cause to place him under arrest and transport him to the station for “further investigation,” therefore all evidence obtained should be suppressed.

In *City of Norton v. Schoenthaler*, Slip Copy, unpublished, 2007 WL 2410122 (Kan. App. August 31, 2007) the Court of Appeals agreed with the defendant. The Court stated that the evidence presented was not sufficient to establish probable cause to arrest the defendant and take him to the station. Even though they asked the defendant if he wanted to go, it was not a voluntary transport. The defendant was not free to go, therefore he was under arrest. Since the stated purpose of the transport to the station was to conduct “further investigation” no probable cause existed to arrest.

In an interesting interpretation of field dexterity tests, the Court stated

*“This reasonable suspicion supported Schoenthaler’s further reasonable detention for field sobriety tests. Field sobriety tests are conducted in the **field**, not at a police station...no reason was provided why the field sobriety testing was required to be physical...the officers could have requested Schoenthaler to perform nonphysical sobriety tests, such as reciting the alphabet or counting aloud...because the officers failed to diligently pursue an otherwise permissible DUI investigatory stop, the transportation of Schoenthaler to the sheriff’s department became an arrest...since the purpose behind the officers’ transport was to conduct additional investigation in the form of field sobriety tests to confirm their suspicions that Schoenthaler had committed a DUI, the officers lacked probable cause to arrest Schoenthaler. Consequently, the evidence subsequent to Schoenthaler’s transportation must be suppressed.”*

**LABEL ON BOTTLE OF ALCOHOLIC LIQUOR IS INADMISSIBLE HEARSAY TO PROVE THE CONTENTS OF THE BOTTLE**

*Unpublished Decision*

In *State v. Gubbels*, Slip Copy, unpublished, 2007 WL 2580501 (Kan. App. August 31, 2007), the Kansas Court of

(Continued on page 20)

## Unpublished Opinions

(Continued from page 19)

Appeals held that in a transporting an open container case, the prosecution cannot rely on the label on a bottle of intoxicating liquor to prove its contents, because the labels are inadmissible hearsay. However, the Court stopped short of requiring a chemical analysis of the contents. In this case, the wine bottle was introduced into evidence. The officer testified that it was found open with some liquid still in it. He smelled inside and it smelled like wine. The defendant admitted that the bottles had been in his car for a week because he and some friends had a party. This evidence was sufficient to establish that the bottle was an alcoholic beverage container.

### DUI CONVICTIONS FOR OFFENSES PRIOR TO 1993, NOT SUBJECT TO *ELLIOTT* PROBLEM *Unpublished Decision*

Defendant was convicted in January 2006 of DUI. He had prior convictions in 1965, 1974, 1989 and two in 1992. The 1965 and the 1989 convictions were counted as convictions number 1 and 2. For some unknown reason, the 1974 conviction was not considered for enhancement purposes. This would make his 1992 convictions number 3 and 4, and the 2006 conviction his fifth. However, the 1992 convictions were in municipal courts and the defendant argued that based on *State v. Elliott*, 281 Kan. 583 (2006) they should not count as 3 and 4 because municipal courts do not have felony jurisdiction.

The Kansas Court of Appeals disagreed. In *State v. Freeman*, Slip Copy, unpublished, 2007 WL 2767980 (Kan.App. September 27, 2007), the Court held that since the DUI law did not change to make third and subsequent offenses felonies until July 1, 1993 the municipal courts did have jurisdiction over offenses occurring before that date, regardless of the number of conviction. Therefore, Freeman is a 5th offender.

### LOCKED TANNING BOOTH IS A “STRUCTURE” FOR PURPOSES OF BURLARY STATUTE *Unpublished Decision*

Defendant went to a tanning salon and inquired about a membership for his girlfriend. When the conversation was completed, he asked to use the restroom. The receptionist pointed him down the hall to the bathroom. Instead of going to the bathroom, he entered the locked tanning booth of a female client. When the client turned in response to a noise she heard, she saw the defendant standing in the booth with one hand on her pile of clothes (under which was her wallet). Since the defendant had entered the tanning **salon** lawfully, the issue in *State v. Hauser*, Slip Copy, unpublished, 2007 WL 2819883 (Kan.App. September 28, 2007), was whether or not the tanning booth was a separate “structure” for purposes of the burglary statute (“knowingly and without au-

## The Verdict

thority entering into or remaining within any building, manufactured home, or other structure...”)

The Court held that it was. It analogized the case to *State v. Vinyard*, 32 Kan.App.2d 39 (2004), wherein the defendant entered a mall with permission, but did not have permission to enter a particular store within the mall based on his prior shoplifting convictions. In *Vinyard* the court held that each store in the mall was leased by a separate vendor, with separate entrances and secured accordingly, therefore a burglary could be charged. Likewise, the Court in *Hauser* found that the booths in a tanning salon are “leased” by its occupant, albeit for a short amount of time.

### ASSESSMENT OF KBI LAB FEES *Unpublished Decision*

Defendant was arrested for DUI and multiple traffic offenses. He refused all breath, blood or urine test requests. After his ar-

(Continued on page 21)



*“It is most unfortunate that some in this country have chosen to use dangerous and irresponsible rhetoric when talking about judges. We have seen federal judges compared to the Ku Klux Klan, called “the focus of evil,” and in one unbelievable instance referred to as a “more serious than a few bearded terrorists who fly into buildings.” A prominent television evangelist even proclaimed the federal judiciary “the worst threat America has faced in 400 years – worse than Nazi Germany, Japan and the Civil War.” Perhaps most regrettably, we have seen some in Congress threaten the mass impeachments of judges with whom they disagree and even suggest that violence against judges has been brought on by their own rulings.*

*This high-pitched rhetoric should stop, for the sake of our judges and the independence of the Judiciary. Judicial fairness and independence are essential if we are to maintain our freedoms. Our independent Judiciary is a model for the rest of the world and a great source of our national strength and resilience. During the last few years it has been the courts that have acted to protect our liberties and our Constitution. We ought to be protecting them, physically and institutionally.”*

Sen. Patrick Leahy, (D-Vt), Senate Judiciary Committee Hearing, February 14, 2007

(Continued from page 20)

rest, and while in DOC custody, the officers found a white powdery substance in his pocket and sent it off to the KBI lab for testing. Although it did test positive for cocaine, he was never charged with possession of cocaine. The defendant pled guilty to DUI and at sentencing, the State asked and the Court allowed, the assessment of the \$400 KBI lab fee for testing of the cocaine. He objected to the Kansas Court of Appeals. The State argued that testing the substance was necessary for its DUI prosecution, and “but for” his DUI arrest the cocaine would have never been found and tested, therefore the fee should be assessed.

In *State v. Ortiz*, Slip Copy, unpublished, 2007 WL 2819991 (Kan. App. September 28, 2007) the Court held that Ortiz was not charged with possession of cocaine or any crime involving cocaine. He pled to felony DUI, with no indication that drugs were involved. He wasn’t charged with “operating under the influence of drugs.” He admitted to having a few drinks, and he failed the standardized field sobriety tests. Therefore, imposition of the \$400 lab fee on his DUI case was improper.

### CITY CAN ADOPT ORDINANCE PROHIBITING CERTAIN ANIMALS AND APPLY IT TO EXISTING OWNERS OF SAID ANIMALS PURSUANT TO POLICE POWER

*Unpublished Decision*



Rexford, Kansas, population 157, enacted a city ordinance prohibiting farm animals (livestock, including horses) in the city beginning April 1, 2005. Tony and Lisa Bice ran a business in Rexford, selling horses. When the city notified the Bices they had to remove their horses from the city, they filed an action to enjoin enforcement of the ordinance.

The Bices argued that two statutes protected their right to continue raising horses in the city.

First, they claimed that K.S.A. §2-3202, known as the Kansas right to farm law, protected their continued use of the property for agricultural uses (raising horses for sale is an agricultural use). The statute states that “[a]gricultural activities conducted on farmland, if...established prior to surrounding nonagricultural activities, are presumed to be reasonable and do not constitute a nuisance, public or private.” In other words, one who comes to a nuisance, cannot sue to abate it. A similar example is found at K.S.A. §47-1505, which codifies the “coming-to-the-nuisance” rule for feedlots operated according to applicable regulations.

In *Bice v. City of Rexford*, Slip Copy, unpublished, 200 WL 2915611 (Kan. App. October 5, 2007), the Court found that

the right to farm law had no application because neither the city nor any of its residents had sued the Bices to abate a nuisance.

The Bices next argued that the ordinance banning livestock from the city constitutes a zoning ordinance and pursuant to K.S.A. §12-758, zoning regulations generally “shall not apply to the existing use of any building or land.” Non-conforming uses may generally continue, though any expansion or enlargement of the pre-existing use is subject to the new zoning regulation.

The Court of Appeals also rejected this argument. It found that zoning ordinances are not the only mechanism available to a city to promote the health, safety and welfare of the community. The existence of zoning authority does not negate a city’s police power to enact other citywide ordinances promoting the public health, safety, and welfare. The Court cites prohibition of fireworks and dynamite as ordinances that are based solely on the police power. The Court determined that the ordinance in question was allowed under the City’s police power. Just as other animal-related bans have been upheld (pit-bulls in Overland Park, horseback riding in Johnson County, and tuberculosis testing of cows within the city in Atchison), so too this one is justified under the City’s police power.

The Court, interestingly, lead off its opinion with the following:

*“Times change. The issue in this case is whether all residents of a small rural community must change with them.”*

The answer was an unequivocal, “YES.”

### IMPLIED CONSENT WARNINGS FOR THOSE UNDER THE AGE OF 21

*Unpublished Decision*

In *Hoover v. Kansas Dept. of Revenue*, Slip Copy, unpublished, 2007 WL 2992427 (Kan.App. October 12, 2007), the Court found that an implied consent notice that advised a driver under the age of 21 that if she blew over .08 her license would be suspended for one year and if she blew over .02 her license would be suspended for 30 days upon a first occurrence and for one year upon on a second occurrence, substantially complied with K.S.A. §8-1567a(b)(2) and K.S.A. §8-1001(f)(F). Technically, under the strict language of §8-1567a(b)(2), she should have been advised that if she blew over .02 **but less than .08**, her license would be suspended for days upon a first occurrence and for one year upon on a second occurrence. In addition, under the strict language of K.S.A. §8-1001(f)(F) she should have been advised that if she blew over her privileges would be suspended for **up to** one year. The Court found, however, that the warnings she was given were in substantial compliance and therefore, sufficient.

# The Verdict

Fall 2007

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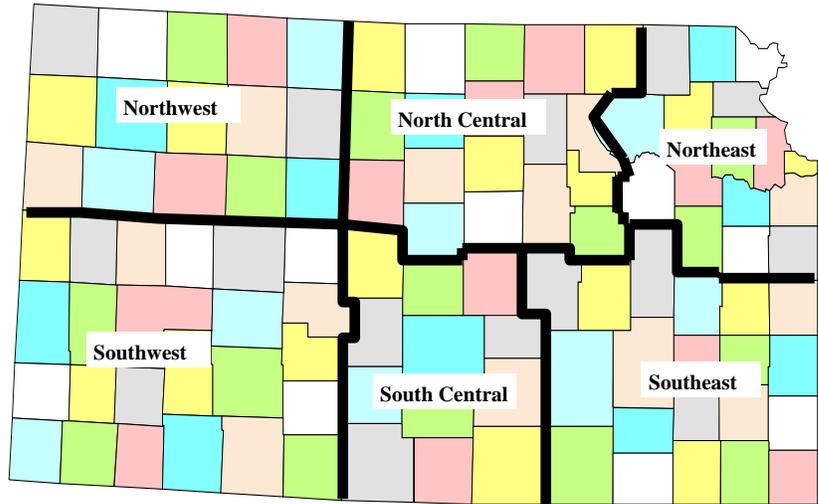
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