



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



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.

A STEP BACK IN TIME

Last year, when Tricia Walsh-Smith took to You-Tube to post intimate details of her divorce from her millionaire husband, millions of people watched a woman scorned on the internet, spewing allegations for which listeners had no basis for determining the truth or veracity. The tabloids are full of politicians whose careers end due to the details of indiscretions being plastered on the front page. Over one hundred years ago, Kansas had a case of a woman, married to a politician, who took to the media of her day, the newspaper, to embarrass and humiliate her husband, and she succeeded in ending his political career.



John Carpenter was born in Pennsylvania. His father was an attorney. He was interrupted in his "reading of the law" by a stint in the Union Army during the Civil War. He was a prisoner of war for a period of time at the hands of the Confederacy. After the war, he returned to Pennsylvania. He was admitted to the bar on April 6, 1866 and the next day left Penn-

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AND YOU THOUGHT YOU WOULD NEVER HAVE TO DIAGRAM A SENTENCE AGAIN

In *State v. Casey*, ___Kan.App.2d___ (July 17, 2009), Judge Green wrote for the majority in a case involving statutory construction. Relying on rules set forth in *A Writer's Reference* (5th ed. 2003), by Diana Hacker, here is just a sample of the Court's opinion:

"The structure of the first sentence...and the placement of the various commas within the sentence make it difficult to ascertain the legislature's intent. Notice that the two phrases, '[e]xcept as provided by subsection (f)...and amendments thereto' and 'in addition to any of the above,' are separate adverbial prepositional phrases that modify the verb 'shall require' in the sentence. For example, because each one of the two previously mentioned prepositional phrases answers either when or under what conditions the trial court shall require a defendant to participate in a certified drug abuse treat-

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SPOTLIGHT ON: FRED A. JOHNSON

The last issue of the *Verdict* featured Fred W. Johnson, judge in *Oswego* and *Altamont*. This issue focuses on Fred A. Johnson, judge in *Rosehill*. As you can imagine, having two Fred Johnson's as members of the KMJA has caused great confusion at our annual conferences. Hotels have been known to cancel reservations, thinking they have a duplicate, and leaving the slowest Fred out of a room. So in this issue we will clear the confusion and tell you a little about the "other" Fred Johnson.

Fred A. Johnson was born in Quinter, Kansas. His family, including his brother Casey, farmed land two miles north of Grainfield. They primarily raised wheat, milo and alfalfa. He graduated from Hoxie High School and went on to Fort Hays State College to major in political science.

From college he headed to Wichita where he read for a blind attorney for a year before entering Washburn Law School. Following law school, and ever since, he has practiced law in

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Spotlight on: Fred A. Johnson

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Wichita. He has a general practice, with some emphasis in collection work and probate. He is married to Mary, who assists in his practice. He has two daughters, Nicole and Bridget and one grandchild.

Fred has been judge in Rosehill (Butler County) since 1995. Court meets the first and third Thursdays of the month. He was quick to point out that "we feed the attorneys." To be more specific, on court days he and his staff provide a food for those road-weary attorneys who appear in his courtroom, whether it be pot luck, pizza, sloppy joes or just chips and dip he aims to keep them happy. He enjoys his judicial career tremendously.

"I really view it as a way to give back to the profession. It also gives me an opportunity to see a case from a different perspective. It makes me a better lawyer. I also have the opportunity to meet members of the bar that I may not otherwise meet."

Although Judge Johnson belongs to the Wichita Bar Association and the Wichita Collection Attorney's Association, and is an amateur pilot, his real passion is pool. He plays in the Air Capital Pool League two times per week and serves on its Board of Directors. He also referees pool. He referees the Kansas state tournament, the national team tournament in Colorado and the international tournament in Las Vegas. In 2009 he was named "Referee of the Year" for the Valley National Eight Ball Association (VNEA) in Las Vegas. All of this talent makes him the natural person to organize the Judges Pool Tournament each year as part of Wichita's Judges Day.

Fred also appreciates his membership in the Kansas Municipal Judges Association.

"I love the annual conferences, especially the updates from Marcy Ralston with the Department of Revenue. I usually always pick up something new and enjoy seeing the other judges. It is good to kick things around with them."



Updates from O.J.A.

ANNOUNCING NEW JUDGES!!

Since our Summer 2009 issue, the following new municipal judges have been appointed or elected:

- Montie Deer McLouth
- Trey Pettlon Edgerton



FUTURE CONFERENCES

Municipal Court Clerks' Orientation
March 25, 2010
Holidome
Salina, KS

Municipal Court Clerks' Conference
March 26, 2010
Holidome
Salina, KS

Municipal Judges Annual
April 26-27, 2010
Wichita Marriott
Wichita, KS

District Judges Spring Conference
June 10-11, 2010
Wichita Marriott
Wichita, KS

District Judges Annual Judicial Conference
October 18-19, 2010
Marriott
Overland Park, KS



CJE REPORTS

The CJE Compliance forms for nonlawyer judges will be mailed in November. The deadline for filing your report with the Office of Judicial Administration is February 1, 2010. If you have any questions regarding the report, please contact Denise Kilwein at (785) 296-2256.

MORE FAMOUS KANSANS

Kavya Shivashankar
2009 National Spelling Bee Champion
Olathe, Kansas

Dr. Robert Gates
U.S. Secretary of Defense
Wichita, KS

Nancy Opel
Broadway Actress, Tony Nominee
Prairie Village, KS

Step Back in Time

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sylvania for Kansas.



He settled in Chanute, Kansas and is considered one of its founders, as well as Erie. He owned the first store to be built in Erie, at the corner of 4th and Main, which still stands today. He was an “up and comer” of his day and had aspirations for higher political office. He was a delegate to the Republican Convention of 1872 (in Philadelphia) which nominated Ulysses S. Grant for a second term as president. He served in the Kansas

Senate and his name was often bantered about in connection with a future gubernatorial nomination. He practiced law in Chanute until 1878, when was appointed, at the age of 40, IRS Collector for the U.S. District of Kansas and was required to set up office in Leavenworth. For the first four years he lived in Leavenworth. He was a single man and boarded with a family (the Mitchells). Then he married Eliza Armstrong, who was from Pittsburg, Pennsylvania. Eliza had never lived in Kansas before. They boarded with the Mitchell family for a few months and then rented a furnished house in Leavenworth.

Nine months after the wedding (three months which Eliza had spent back in Pennsylvania visiting her family), Eliza sent several anonymous letters accusing her husband of adultery “and other wrongs” with Mrs. Mitchell (the family they had boarded with). She sent the letters to the Leavenworth *Daily Standard*, the Leavenworth *Daily Times*, Mr. Mitchell, and to herself in care of her husband’s office, which he intercepted. The addresses on the outside of the envelope and the letters were made up of cut of letters from other printed material. When Eliza finally confessed to John that she wrote the letters, they agreed to separate. On December 29, 1882, Eliza left Kansas and returned to Pennsylvania.

John sued Eliza for divorce on the basis of extreme cruelty. At trial, Eliza denied she wrote the letters and testified under oath that she did not have any evidence to suggest that her husband was having an affair with Mrs. Mitchell. In fact, she did not believe he had any sexual relations with “that woman.”

Carpenter v. Carpenter, 30 Kan. 712 (1883) lays out the sordid details of the letters that were sent, of Eliza’s growing hatred of the Mitchells, and her diary entries during her brief marriage. The Kansas Supreme Court found there was sufficient evidence to support a finding that Eliza sent the letters. Her intention was to humiliate John and squelch his future political aspirations. The Court found that there was absolutely no evidence to support her allegations. As a result of her unfounded accusations, John became “broken, severely

injured in health, depressed in spirits, and sorely troubled, and injured in mind and body.” This constituted extreme cruelty, and the Court upheld the granting of the divorce.

John Campbell never became governor. He was offered several other political appointments over the years, but turned them down. He served on the Board for the World’s Fair in St. Louis at the turn of the century, but that is about the only office he held. He returned to Chanute and practiced law until he died in 1921 at the age of 83. His obituaries do not list any children or any survivors, and his marriage to Eliza is never mentioned.



JUDGE LETS AIR OUT OF TIRE OVER PARKING SPOT

Jean Washington, a part-time cleaning worker at the courthouse in La Plata, Maryland had just arrived to start her shift Monday afternoon when a sheriff’s deputy warned her that Circuit Judge Robert C. Nalley was going to let the air out of her tire if she didn’t move her car out of the restricted area and, more specifically, his parking spot. She went to move her 2004 Toyota Corolla but she was too late. The right rear tire was flat.

Two jail officers said they saw Nalley do it because Washington was parked in his space on a side street, and one of the officers used a cell phone camera to capture the incident.

“When I actually saw that my tire was flat, I was almost in tears, and not because of the fact that the air was out of my tire,” Washington told a local news station. “It was because of who did it.” She stated she did not know the area was restricted and she had not received any warnings.



Judge Nalley has acknowledged he deflated the tire, but he isn’t apologizing. He told a local television station that he let out the air because leaving notes for those parked illegally isn’t effective. The area was posted “Restricted Parking

Only.” The spot was not marked as his.

He faces disciplinary action. In the meantime, he has resigned as chief judge in his district and has been limited to hearing only civil cases.



Judicial Ethics Opinions

JE-168
August 5, 2009

The judge informs us that the DUI Victims Center of Kansas, a non-profit organization which appears to be an advocacy group, has requested the opportunity to make a presentation to a group that would include judges.

The judge asks whether it would be appropriate for judges to attend this presentation.

We are told that the purpose of the DUI Victim Center of Kansas is to offer services to DUI victims such as victim impact panels, court advocacy, counseling referrals and court monitoring. We are also told that the mission of this organization is to reduce the traumatic effects DUI incidents have on victims and their families and to increase the awareness of the danger and the human consequences of DUI.

Rule 2.4(C) of the Kansas Code of Judicial Conduct (Rule 601B) provides that "A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge."

The judge states that the DUI Victims Center of Kansas appears to be an advocacy group, and we agree with that assessment. The attendance of the judge at a presentation by this organization would therefore convey the impression that the organization is in a position to influence the judge.

The appearance of the judge at presentation of the DUI Victims Center of Kansas would violate Rule 2.4(C) of the Kansas Code of Judicial Conduct.

Our conclusion is consistent with our earlier opinions, JE 121 and JE 126.

Editor's Note: *DUI Victim Center of Kansas website:*
<http://www.duivictimcenter.com>



CONVICTION INTEGRITY UNIT

Investigation Discovery is launching a new reality TV show this fall based on Dallas District Attorney Craig Watkins' Conviction Integrity Unit, the first of its kind in the country. When he ran for District Attorney of Dallas County in 2007, he promised voters he would start such a unit. The CIU's work re-examining hundreds of petitions by inmates seeking post-conviction DNA testing and other investigations has resulted in the disclosure of at least 19 wrongful convictions.



"A lot of folks look at me as a hug-a-thug DA. That's not being hug-a-thug," said Mr. Watkins. "We've been taught that the district attorney is supposed to convict. But the district attorney is supposed to be seeking justice."

Dallas County has already had more exonerations than any other county in the U.S., and more are likely.

"What's happening right now in Dallas County is a true revolution in criminal justice," said Jeff Blackburn of the Innocence Project of Texas. "It may be the only DA's office that is practically committed to real justice. They're not playing games. It matters to them whether a conviction has integrity."

Top Ten Frustrations of Kansas Municipal Judges

Results of April 2009 survey of municipal judges:

1. Collecting fines (overwhelming #1)
2. Interference by elected officials
3. Interference by police chief
4. Dog cases
5. Lack of job security
6. Domestic violence victims requesting charges be dismissed
7. Repeated requests for continuances by "agreement"
8. Lack of respect shown by lawyers to non-lawyer judges
9. Poor relationship with sheriff, interfering with handling of city prisoners
10. Inability to stop the flow of people who continue to drive on a suspended license

RapID and DigiScan Web Produce Results

By Ely Meza, KBI_Data Processing
Reprinted from KCJIS News, Vol. II, Issue 2
May 2009

A new function of the Kansas Automated Fingerprint Identification System (AFIS) is the ability to capture a subject's two index fingerprints, transmit them to the KBI, and (if the subject has an existing record in the state AFIS database) receive an immediate response of positive identification. This new technology supports two types of capture devices; one is a hand-held, wireless capture device with a display screen much like a personal data assistant (PDA), and the other is a wired capture device attached to a PC or laptop connected to the Internet.

RapID. The KBI has purchased sixty of the wireless units, known as RapID devices, from MorphoTrak, Inc., the vendor that installed the host AFIS at the KBI. The KBI has already issued five units to the Johnson County Sheriff, two to the Shawnee County Sheriff and two to the Topeka Police Department. The remaining devices have not yet been received from MorphoTrak. RapID devices support spot ID checks and suspect identification in the field.

DigiScan Web. In addition to the RapID units, the KBI also purchased ten of the capture devices that attach to a PC and connect to the KBI through the Internet. These are DigiScan Web units, and are also manufactured by MorphoTrak. To date, one has been assigned to the El Dorado Correctional Facility, two to the Johnson County Sheriff's Office and one to the Wichita Parole Services. DigiScan Web applications include courtroom identification, jail intake/release and movement control, pre-booking identification, probation reporting, and offender registration.

The KBI is considering future features for these devices, to include:

Checking for local and federal warrants.
Return of mug shot and rap sheet information with the identification message.
Access to III, NLETS and NCIC.

The following are some reported RapID and DigiScan Web experiences:

"Well we have had our first (as far as I know) success with the DigiScan. Olathe brought in a subject using the name "X"

who had a warrant out of their city. Upon checking his fingerprints with the DigiScan, they came back to a name "Y". He maintained who he was and was sitting in the vestibule while we tried to figure it out.

"Their mug shots were different and the suspect had several tattoos that name "Y" did not have. After a short period he finally owed up to who he was. Subject with name "Y" had several warrants out of District Court, Overland Park and KCK.

"This whole thing started with Leawood who had contacted him for parking in a handicap space and wrote him a ticket. He gave them the subject name "X" (who is his brother). Subject name "Y" knew he had our warrants and was probably unaware his brother had warrants out of Olathe. Olathe confirmed the warrants and responded to Leawood and picked him up and then brought him to us.

"Olathe is going to charge him with Obstruction, I have not heard if Leawood will charge him or not." –

-Deputy Mills, Johnson County Sheriff's Office, February 6, 2009.

"We have been very happy with the DigiScan Web here at EDCF. We feel confident that this is a step in the right direction of new technology. We have used the DigiScan Web for new intakes as well as for the Inmates that we are releasing and transferring out to other facilities. I can definitely see how the DigiScan Web can help out everyone in the long run."

-Sgt. Agnes Linaweaver, El Dorado Correctional Facility, February 16, 2009

"I assisted Deputy Gaulter with a traffic stop on 03/07/2009. During the course of an investigation, a passenger verbally identified himself as subject "A", B/M, 12/01/81. He also stated he had a KS DL, but no record could be found under that name. He submitted his fingerprints on RapID. We received a positive hit on those prints for subject "B", B/M, 01/02/80. This identity was later confirmed along with a KDOC parole violation for kidnapping and agg robbery."

-Deputy Mills, Johnson County Sheriff's Office, March 7, 2009.

"Tonight I was dispatched to assist OLPD with identifying a subject who claimed to be subject name "A". RapID confirmed this subject's identity was actually subject name "B", W/M, 04/10/1985. It was then confirmed that subject name "B" had active warrants through Johnson County, Westwood, and his DL was also suspended"

.- Deputy Mills, Johnson County Sheriff's Office, March 24, 2009.

I was contacted by Olathe ADC in reference to assisting in identifying a Hispanic individual. The subject was brought in
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RapID and DigiScan

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by Overland Park PD and was booked in under "John Doe". The subject was being charged with Identity Theft (using someone's SSN). Originally I was contacted to attempt to translate, however it was determined he did not speak Spanish but a Nautahl language. Upon arriving I determined he spoke enough broken Spanish to get his first name - "X". "RapID confirmed this subject's identity as "A" H/M 01/01/1970. Subject was ultimately booked in and deported by ICE".

-Master Deputy Edgar Castillo, Johnson County Sheriff's Office, March 26, 2009

"I was assigned to assist Olathe PD at location "X" this evening. During the course of the assignment, OLPD had an intoxicated subject who was unable to spell his name. The officer had just arrested the subject last month. They were unable to properly ID him to arrest him on various charges. I utilized the RapID and was able to successfully identify the subject based on a print hit".

-Deputy Chris Farkes, Johnson County Sheriff's Office, April 20, 2009



RapID Unit

DigiScan Unit



2009 Kansas DUI Commission Appointed

Legislative Members

- Sen. Tim Owens, Chairperson
- Rep. Janice Pauls, Vice-Chairperson
- Sen. David Haley
- Rep. Lance Kinzer

Non-Legislative Members

- | | |
|------------------------|--------------------------|
| Gregory Benefiel | Robert Blecha |
| Pete Bodyk | Maj. Mark Bruce |
| Hon. Ernest J. Johnson | Hon. Jennifer Jones |
| Secretary Don Jordan | Mary Ann Khoury |
| Sheriff Ken McGovern | Chris Mechler |
| Marcy Ralston | Hon. Peter Ruddick |
| Dalyn Schmitt | Les Sperling |
| Police Chief Bob Story | Jeremy Thomas |
| Douglas Wells | Secretary Roger Werholtz |
| Karen Whitman | |

Kansas Legislative Research

Department Revisor of Statutes Office

Athena Andaya, Jerry Donaldson, Karen Clowers, Committee Assistant, Jason Thompson, Doug Taylor, Sean Ostrow

TOPICS

- ◆Review past and current driving under the influence statutes in Kansas;
- ◆Review driving under the influence statutes in other states;
- ◆ Review proposals related to driving under the influence introduced in the 2009 legislative session;
- ◆ Review other subjects related to driving under the influence referred to the commission by the chairperson of the standing senate committee on judiciary, house committee on judiciary or house committee on corrections and juvenile justice;
- ◆ Review what is effective in changing the behavior of driving under the influence offenders by examining evaluation, treatment and supervision practices, enforcement strategies and penalty structure;
- ◆Develop a balanced and comprehensive legislative proposal that centralizes recordkeeping so that offenders are held accountable, assures highway safety by changing the behavior of driving under the influence offenders at the earliest possible time and provides for significant restriction on personal liberty at some level of frequency and quantity of offenses; and
- ◆Assess and gather information on all groups and committees working on issues related to driving under the influence and determine if any results or conclusions have been found to address the issues.

MEETING DATES

- August 6 and 7, 2009
- September 14 and 15, 2009
- October 1 and 2, 2009
- November 5 and 6, 2009
- December 7 and 8, 2009

Court Watch

(Continued from page 1)

ment program, each phrase acts as an adverbial prepositional phrase...Moreover, the job of an adverbial prepositional phrase is to modify the verb in the sentence...

Although the legislature did not specifically clarify what "above" means in the second adverbial prepositional phrase, the noun "above" is modified by the adjective prepositional phrase "for felony violations of..."...This adjective prepositional phrase is used to describe and limit the noun "above."

A second construction of the first sentence of [the statute] could be that the three phrases...are all separate adverbial prepositional phrases, especially when the latter prepositional phrase is not used as an adjective prepositional phrase to describe or limit the noun "above."



POSSESSION OF LORTAB IS A FELONY

In *State v. Surowski*, ___ Kan.App.2d ___ (July 17, 2009), the Court of Appeals held that under the plain language of K.S.A. 2008 Supp. §65-4160(a), possession of any narcotic is a felony. Because Lortab contains hydrocodone, which is a narcotic, the unlawful possession of Lortab is a proscribed felony under the statute. In an interesting twist, the Court also alerts the prosecution that on remand the "State must amend the complaint to charge the appropriate crime." Apparently, the complaint charged the defendant with possession of "hydrocodone, a schedule II substance identified at K.S.A. 65-4107(b)(1)(N)." The Court notes that the complaint must be amended to read "possession of the narcotic drug Lortab, a schedule III substance identified at K.S.A. 65-4109(d)(4)."

COURT ALLUDES TO RACIAL PROFILING

In *State v. Diaz-Ruiz*, ___ Kan.App.2d ___ (July 17, 2009), KHP Trooper Nicholas was parked in the median observing traffic on I-70 in Geary County. He saw a pickup truck traveling eastbound with a ladder strapped in the bed of the truck. Although the ladder did not move, Nicholas followed the truck because the ladder was strapped at an angle and "it just didn't look right." As he followed the truck, he saw the ladder move from "side to side." He pulled it over on the sole basis that the ladder was loose and could pose a road hazard.

A videotape of the stop, which began as soon as the truck pulled to the side of the road, reveals that the ladder did not move as the driver pulled over. As he approached the truck, Trooper Nicholas gave the ladder a firm tug and determined it wasn't going to fall off. At this point, the caselaw would require him to turn around and get in his car and leave (after briefly explaining the reason for the stop and the fact that his

suspicions were dispelled). Of course, it did not end there.

Nicholas asked the driver and passenger (two Hispanic males) where they had come from and where they were going. The driver said they were on their way to Kansas City. The driver produced a New Mexico ID instead of a driver's license. Nicholas told the driver he was not going to give him a ticket. He returned to his car and discovered that the driver's license was suspended. Nicholas testified that he wrote the driver a warning for failing to secure the load, but didn't give it to him and only gave him a "verbal" warning. The videotape of the stop revealed no written or verbal warning about the load. He also did not give any ticket to the driver for driving on a suspended license. Instead, he told the passenger (the driver's father) that he was going to have to drive. He never checked the passenger's driver's license. He then did a very quick "Columbo pivot" and asked the men if he could ask them a few more questions. He was given consent to "search their load." He found 300 pounds of marijuana beneath the truck bed.

The Court of Appeals found that the scope of the stop was unlawfully extended. Trooper Nicholas had dispelled any suspicions regarding the ladder before approaching the driver. He unlawfully extended the scope by questioning the occupants regarding their travel plans and requesting identification. The subsequent consent did not purge the taint of the illegal stop. There was not sufficient time between the illegal stop and the request to search to purge the taint, but more interestingly in this case is the Court's discussion of the flagrancy of the official misconduct.

The Court pointed out that the trooper's testimony at the suppression hearing was inconsistent with the videotape. He claimed he prepared a written warning and then gave a verbal warning. He even produced the "written warning" that he decided not to give. But the videotape was devoid of any reference to either. Although he said he had a high level of concern about the ladder, it appeared by his actions to be a minor concern since he immediately started peppering the driver with questions about his travel plans, never mentioning the ladder except at the very beginning and then only briefly. He took no action on the driving while suspended issue and never even asked the passenger if he was licensed to drive.

The Court saw through this ruse, "...the facts demonstrate that the trooper was instead motivated by a desire to search the vehicle of these two Hispanic men." The Court found the trooper's actions to be flagrant misconduct. The marijuana was properly suppressed by the district court.



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Court Watch

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THE FALLACY OF HASTY GENERALIZATION

Charles Smith was charged with robbery primarily based on a surveillance camera video of a person that looked like him robbing a convenience store. Smith and his attorney (Rumsey) had a disagreement. His court-appointed attorney sought to withdraw because he had viewed the video and believed the person thereon to be the defendant. The defendant denied that it was him and wanted the attorney to put on evidence regarding an infirmity that would have made it impossible for him to have committed the robbery. The attorney felt this evidence would be fraudulent and therefore, was seeking to withdraw.

The district judge would not allow the withdrawal, finding that no attorney appointed would be allowed to put on fraudulent evidence. Any attorney who viewed the video would see it was the defendant in the video and likewise would not be able to put on the requested “exonerating” evidence, according to the district court.

Not so fast, opined Judge Green in *State v. Smith*, ___ Kan.App.2d ___ (July 24, 2009).

“Based on the assertion of only Rumsey who refused to present potentially relevant defense evidence because he believed that the suspect shown in the surveillance video was Smith, the trial court formulated a general rule covering all attorneys who could have represented Smith. The fallacy in this form of nondeductive reasoning is called a hasty generalization. It is drawing a conclusion from too few examples or unrepresentative instances. See generally Copi and Cohen, Introduction to Logic, pp. 146-47 (12th ed. 2005).

A hasty generalization occurs when a person creates a general rule from observing only one (or only a very few) of the members of that class. For example, it does not logically follow that because one attorney may believe that a suspect shown in a surveillance video is the defendant that all attorneys will view the video in the same way. This is especially so when we recognize the possibility that one person's sense of sight and identification may not be as accurate as those of another, particularly a specially trained person. To argue that all attorneys would view the video in the same way is to generalize hastily. As a result, the trial court has developed a binding general rule based on too few instances...

On the other hand, when the dissent argues that there was no evidence to support Smith's contentions, the dissent's reasoning is unacceptable because of the difficulty in sustaining a factual proposition merely by negative evidence. When an advocate determines that “there is no evidence that B is the case”; he or she is attempting to affirm or assume that non-B

is the case. But all that is affirmed is that the advocate has found no evidence of non-B.” Aldisert, Logic for Lawyers, p. 156 (3d ed. 1997).”

The Court concluded that although Rumsey had a duty to zealously defend the defendant, his belief that the suspect on the video was the defendant placed him in a “no-win” situation. He believed Smith was being dishonest; he and Smith could not agree on how the case should be defended; and his belief that Smith was guilty prevented him from utilizing potentially relevant defense evidence. He should have been allowed to withdraw. The case was reversed and remanded for a new trial.

Judge Pierron filed a dissent pointing to the overwhelming evidence against Smith and the fact that Rumsey presented every piece of evidence possible on Smith’s behalf in the trial.

THE FUGITIVE DISENTITLEMENT DOCTRINE

The fugitive disentitlement doctrine generally holds that the appeal of a criminal defendant who has absconded from the jurisdiction of the courts should be dismissed. In *State v. Raiburn*, ___ Kan. ___ (July 24, 2009) the Kansas Supreme Court provides an in-depth and fascinating history of this doctrine in Kansas and throughout the country.

In *Raiburn*, the more specific issue was whether a defendant’s failure to report to his or her probation officer could result in a finding of fugitive disentitlement and thus dismissal of his or her appeal. The Court found that it could. However, the State had the burden to raise the issue by filing a motion to dismiss. The appellate court must then remand the case to the district court for an evidentiary hearing on fugitive status. The State must show by a preponderance of the evidence that the defendant has absconded. If the district court finds that the defendant has not absconded, the appeal will proceed. If the district court finds that the defendant has absconded then the appellate court will review said decision to determine whether or not it is supported by substantial competent evidence. Once it has been determined by such evidence that the defendant is a fugitive, the doctrine applies and the appeal may then be dismissed by the appellate court.

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“We see a significant difference between the state of being a fugitive and that of being dead. Presumably, the former is significantly more often a matter of choice than the latter.”

Justice Rosen writing the unanimous opinion in *State v. Raiburn*, ___ Kan. ___ (July 24, 2009)

Court Watch

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SPECIFIC INTENT NOT NECESSARY FOR CRIME OF “FAILURE TO REGISTER”

K.S.A. §22-4903, makes it a felony for any person who is required to register under the Kansas offender registration act to fail to comply with any provision of the act. In *Matter of C.P.W.*, ___ Kan. ___ (July 24, 2009) the Kansas Supreme Court held that a violation of the reporting requirements of the act is not a specific intent crime. Kansas appellate courts have consistently interpreted statutes that define a crime by using the phrase “with intent to” as requiring a specific intent element. The Kansas offender registration act contains no such language. However, it is not a strict liability crime either (meaning no criminal intent required). It is a general intent crime.

VALID CONSENT TO SEARCH DOES NOT REQUIRE MIRANDA AND FAILURE TO GIVE SAME DOES NOT REQUIRE SUPPRESSION OF PHYSICAL EVIDENCE THAT COMES TO LIGHT AS RESULT OF SEARCH

Pest control worker advises landlord that there is marijuana in plain view in Schultz’s apartment. Landlord, who always thought Schultz acted weird, contacted the police. Police arrive in full uniform and talk to Schultz at the door. They asked if they could come inside. He permitted them to step just inside the door. When they walked in, the officers smelled the strong odor of marijuana and observed marijuana on a coffee table. The officers explained why they were there. They told Schultz that they could either get his consent to search or they could get a search warrant. They told him that he could walk around with them. Schultz consented and even signed a consent to search form that also advised he had the right to refuse. He made several incriminating statements to them. They found guns and marijuana in one room of the house. In *State v. Schultz*, ___ Kan. ___ (July 24, 2009), the Kansas Supreme Court held that the officers were required to give Schultz *Miranda* warnings. Any incriminating statements he made to the officers must be suppressed. However, the discussion does not end there.

A valid consent to search does not require *Miranda* warnings. Officers are not required to give *Miranda* warnings prior to requesting consent to search. The Court adopted the Supreme Court decision *U.S. v. Patane*, 542 Kan. 630 (2004), (although the case was not argued by the parties) and found that the mere lack of *Miranda* warnings does not, under the fruit of the poisonous tree doctrine, require suppression of the physical evidence that comes to light because of an unwarned custodial interrogation. The exclusionary rule does not apply to violations of the right against self-incrimination. The exclusion of unwarned statements is a

complete and sufficient remedy for any perceived *Miranda* violation. The exclusion does not extend to physical evidence found. The physical evidence found as a result of a valid consent search is admissible. Only Schultz’s incriminating statements are excluded.

OFFICERS ARE NOT REQUIRED TO SEEK OUT CONSENT TO SEARCH FROM ANOTHER RESIDENT OF DWELLING ONCE ONE RESIDENT HAS GIVEN A VALID CONSENT

Officers obtained consent to search defendant’s girlfriend’s house. He stayed at the house several days a week and was in the house when officers entered to begin their search. He helped pay her rent and utilities and bought food for her. His clothes and hygiene products were kept at the house. He argued in *State v. Ransom*, ___ Kan. ___ (July 24, 2009) that he should have been provided an opportunity to refuse the consent to search the house. The Supreme Court disagreed.

Law enforcement officers are not free to ignore a resident’s refusal of consent to search a dwelling and then seek a more welcoming response elsewhere, and they are not free to manipulate an uncooperative or potentially uncooperative resident’s presence or absence to silence him or her. But officers are not required to seek out consent or refusal of another resident once one resident’s voluntary consent has been obtained. In this case there was no evidence that Ransom ever expressly objected to the search or that officers removed him from the house for the sake of avoiding a possible objection. He was seated initially in the house and was free to speak up about his occupancy and to prevent or stop the search.

JUVENILE ADJUDICATION DOES NOT COUNT IN DETERMINING LENGTH OF OFFENDER REGISTRATION

The Kansas Offender Registration Act, K.S.A. §22-4901 et seq., requires that sex offenders register for 10 years on a first conviction and for life on a second or subsequent conviction. In *State v. Reese*, ___ Kan.App.2d ___ (July 31, 2009) the Court of Appeals held that a juvenile adjudication does not qualify as a conviction for purposes of determining whether the offender must register for 10 years or life.

ALFORD PLEA, NO CONTEST PLEA AND STIPULATION OF FACTS EXAMINED

Christopher Case entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970) to an amended charge of aggravated child endangerment. The statute to which he pled, a level 9 person felony, called for a 17 month sentence and postrelease supervision for 12 months. The plea agreement included a recommended 10 month upward departure, for a total of 27 months. For purposes of the plea, Case stipulated to the factual basis provided by the State. Part of those facts included a statement that the defendant fondled a person

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under the age of 14 with the intent to satisfy his own sexual desires. These are not elements necessary to establish a child endangerment charge. At sentencing, the district judge imposed the 27 month sentence but required 60 months of postrelease supervision due to the fact that the crime was “sexually motivated.” Case appealed, arguing that pursuant to his *Alford* plea, he was not admitting the truth of the State’s allegations, only that there was sufficient evidence for a jury to find him guilty of the charge of aggravated child endangerment (which does not require any sexual gratification evidence). Therefore, the Court could not enhance his sentence based on something he did not stipulate to or agree with.

In *State v. Case*, ___ Kan. ___ (August 7, 2009) the Kansas Supreme Court agreed with Case. The decision includes a discussion of an *Alford* plea, a no contest plea, and stipulations of a factual basis. An *Alford* plea is a “plea of guilty to the charge without admitting to the commission of the offense.” This is done when a defendant finds that his or her interests require that such a plea be entered, even though the defendant either purports to be innocent or refuses to admit to any facts constituting a crime. A plea of no contest is a plea in which the defendant does not expressly admit guilt, but nonetheless waives the right to a trial and authorizes the court to treat him as if he were guilty. The defendant is not contesting the charge. The basic premise of both pleas is that the defendant does not admit the facts upon which his or her guilty for the crime would be based. However, the defendant does consent to a guilty finding being entered and a sentence imposed.

The Court reversed the Court of Appeal’s unpublished opinion in the case which found that the defendant had stipulated (or agreed) that his actions were an attempt to satisfy his own sexual desires. The Supreme Court pointed out that Case never stipulated (or agreed) to the truth of anything. In an *Alford* plea situation, failure or even refusal to object to the presented facts or put on evidence does not equate to an admission of facts and does not empower the trial court to make findings based upon those purported admissions to increase a sentence beyond the prescribed statutory maximum. The defendant has no obligation to object to the State’s “factual basis”, nor does a defendant have any obligation to accept a Court’s invitation to put on evidence. Instead, a defendant is fully justified in simply refusing to admit to committing the offense. A stipulation to the factual basis for the plea is not an admission of the truth of those facts. Therefore, the district court improperly enhanced Case’s sentence based on additional facts not admitted to in the plea in violation of *Apprendi*. The case was ordered remanded for sentencing.

The Court suggested a way to avoid this problem:

“Potential confusion can be considerably lessened, if not eliminated, by language in the pleas documents that the defendant merely stipulates that the facts presented by the State are sufficient to prove guilty beyond a reasonable doubt to a jury and therefore provide a sufficient factual basis for the *Alford* plea. The language would also state, however, that the defendant does not stipulate or agree that those presented facts are true.”

PUBLIC SAFETY STOP

Troy Ragnoni called his ex-wife and asked her to tell the kids goodbye for him. She called the police. They went to his home and nobody was home. An “attempt to locate” dispatch was put out to area law enforcement describing his car and asking law enforcement to stop the individual. Based on department policy, when there is a report that someone may be suicidal, this information continues to be disseminated through dispatch until the person is located.

Three days later, Salina Police Officer McCary came on duty and received the information about Ragnoni. Ragnoni drove past the officer and Officer McCary stopped him in a private residence driveway. His three kids were in the car with him. Ragnoni advised the officer that he was not suicidal. However, in talking to Ragnoni the officer developed probable cause for a DUI arrest. Ragnoni was convicted in municipal court of DUI and refusing the PBT. He appealed. Pursuant to a motion to suppress on appeal, the district judge suppressed all evidence subsequent to the stop on the basis that a public safety stop was not justified. The City filed and interlocutory appeal to the Court of Appeals.

In *City of Salina v. Ragnoni*, ___ Kan.App.2d ___ (August 7, 2009), the Court of Appeals found that Officer McCary was allowed to conduct a public safety stop of Ragnoni if it was based upon specific and articulable facts that indicated a concern for public safety, regardless of whether or not there was a reasonable suspicion of criminal activity. It rejected the defendant’s argument that the articulable facts necessary to justify a public safety stop must indicate some *immediate* danger to the public or individual if the stop is not made. The defendant had argued that if the City believed there was an immediate danger it should have done more follow-up to find him on the day he made the statement. Instead, they simply noted he wasn’t home and put the word out to dispatch. The Court held that whether the peril might have been addressed more promptly by authorities is irrelevant. And finally, the Court stated that it was unable and unwilling to fault the officer’s conduct. The officer stopped Ragnoni based on the dispatch alert, contacted him long enough to confirm his identity, and gave Ragnoni an opportunity to address the suicidal allegation. This was a minimal intrusion, according to the Court.

The case was remanded to the district court with instructions to deny the defendant’s motion to suppress.

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USING FALSE IDENTIFICATION ON TRAFFIC STOP = IDENTITY THEFT

Bradley Hardesty was stopped for DUI. He gave the officer his deceased brother's driver's license and presented it as his own. Among other things, he was charged with identity theft. K.S.A. §21-4018 makes it a felony to knowingly and with intent to defraud for any benefit, possess or use one or more identification documents or personal identification number of another person. Identity fraud is knowingly possessing, using or furnishing to another any identification document for the purpose of deception.

Hardesty did not argue that the identity theft/fraud statute did not apply. He argued that it did not apply to identification documents of a deceased person. He argued that when the statute uses the term "another person" it means "another living person." The Kansas Court of Appeals didn't buy it.

In *State v. Hardesty*, ___ Kan.App. 2d ___ (August 14, 2009) the Court held that it does apply to persons, alive or dead. It was undisputed that Hardesty used his deceased brother's identity to avoid officers knowing his real identity when he was stopped for DUI. He intended to fraudulently procure a benefit from the use of said identification. Therefore, it upheld his conviction for identity theft.

DOMESTIC VIOLENCE STATUTE IS NOT UNCONSTITUTIONAL AS APPLIED TO UNMARRIED COHABITATING COUPLES

The Kansas domestic battery statute, K.S.A. §21-3412a (UPOC §3.1.1), when applied to unmarried cohabitating couples, is not unconstitutional due to a conflict with the Kansas' Defense of Marriage Amendment (KDOMA) to the Kansas Constitution. Anthony Curreri had argued that the KDOMA states that "no relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage." By lumping persons that are cohabitating with "spouses" in the domestic violence statute, he argued, the statute is attempting to impose rights on cohabitating couples that are reserved for married couples. Apparently, this same argument was made in an Ohio case, with the same result.

In *State v. Curreri*, ___ Kan.App.2d ___ (August 21, 2009), the Court of Appeals held that the domestic battery statute is not predicated upon the State's recognition of a relationship, other than the marriage relationship between one man and one woman in violation of KDOMA. The statute simply extends to Curreri's partner the right to be protected from battery: a right that is extended to persons, married or not, who may be particularly vulnerable to violence due to their close proximity to or relationship with another.

10 DAYS TO APPEAL ANY KDOR DL SUSPENSION ORDER RELATED TO THE IMPLIED CONSENT LAW

A driver has 10 calendar days from the effective date of the Kansas Department of Revenue's suspension order involving an implied consent suspension to appeal the suspension of his or her driver's license. Any delay beyond that statutory time limit is fatal. *Moser v. Dept. of Revenue*, ___ Kan. ___ (August 28, 2009).

NO RIGHT TO CONFRONTATION AT PRELIMINARY HEARING, THEREFORE LAB REPORTS CAN COME IN WITHOUT LIVE WITNESS FOR DEFENSE TO CROSS-EXAMINE

The Kansas Supreme Court has held that since the right to confrontation is a **trial** right and does not extend to a preliminary hearing, the defendant does not have the right to confront the person that prepared the KBI laboratory report under a *Crawford v. Washington* analysis. See, *State v. Leshay*, ___ Kan. ___ (August 28, 2009). The U.S. Constitution does not require that a state establish a procedure for the preliminary hearing that affords the full panoply of constitutional rights to which a criminal defendant is entitled at trial. K.S.A. §22-2902a which allows the introduction of forensic laboratory reports in lieu of live testimony is not unconstitutional.

EVIDENCE INSUFFICIENT TO JUSTIFY SEARCH OF OCCUPANT OF HOME THAT WAS SUBJECT TO A CONSENSUAL SEARCH

Officers have report of someone selling crack cocaine out of a car in front of a house. Officers were familiar with the residents of house. When officers arrived, no vehicles were in front of the house. They decided to conduct a "knock and talk." Resident allowed officers inside. She consented to the search of the home for drugs or contraband.

Two men were standing in kitchen. There was no evidence that they were involved in any illegal activity, although one of the men, Willie Dean, appeared nervous. Officers asked Dean if he had any weapons on him. He responded negatively. One of the officers informed Dean that he was going to pat him down. During the pat down he felt what he thought might be a crack pipe. He asked Dean to remove it. It was a crack pipe. He arrested Dean for possession of drug paraphernalia and continued to search him, apparently incident to the arrest. He found another pipe and eight rocks of crack cocaine. He moves to suppress on the basis that the officer had no basis to pat him down.

In *State v. Dean*, ___ Kan.App.2d ___ (August 28, 2009), the Court of Appeals found that the evidence should have been suppressed. The officer lacked reasonable suspicion to search Dean. There was no evidence presented regarding the basis for any prior knowledge the officer may have had about

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Legal Standoff Over Intoxilyzer in Minnesota

By Matt Ehling | Tuesday, June 2, 2009
Reprinted from the Minnesota Post

Attorneys for the Minnesota Department of Public Safety and CMI, Inc. announced a tentative settlement Monday in the department's long-running lawsuit over access to the computer source code for the Intoxilyzer 5000EN, a breath-alcohol testing device.

The settlement, if given final approval, would give defendants in criminal DWI cases and petitioners in civil implied-consent cases complete access to the computer code, or programming language, for the Intoxilyzer. It represents the next chapter in a novel legal standoff between the State of Minnesota, members of the defense bar, and CMI, Inc., which manufactures the principal testing device used by police agencies in the enforcement of Minnesota's DWI laws.

A changing landscape

Legal wrangling over access to the source code for CMI's Intoxilyzer machine has gone on since 2006, and the matter has reached the Minnesota Supreme Court on two separate occasions. As Minnesota's high courts have grappled with source-code issues, district courts across the state have had to adapt to rapidly changing rulings that have challenged long-held assumptions about the way DWI prosecutions are handled.

One can look to an ongoing DWI case in Hennepin County District Court for an example of how the source-code matter has played out at the trial-court level. A handful of years ago, a case such as *State of Minnesota vs. Aaron Michael Sommers* would have been just another routine DWI prosecution. Since the advent of the source-code controversy, however, cases like *Sommers* have become forums for claims and counterclaims about the propriety and validity of the source-code issue.

On May 26, Hennepin County District Judge Thor Anderson issued an order in the *Sommers* case in response to a discovery motion made by Aaron Sommers' attorney. At first glance, his order is unremarkable. Like many orders granting discovery motions, it requires the prosecution to turn over specific materials to the defense — in this case, the complete computer source code for the Intoxilyzer 5000EN machine. Anderson's four-sentence order, however, is qualified by a five-page memorandum that chastises the Minnesota Supreme Court for compelling prosecutors to produce the code in the first place. Why? Because, said Anderson, they simply don't have it.

"Our Supreme Court has in effect held that the source code is in

the possession, custody, or control of the State," Anderson wrote. He noted that the Supreme Court has held that the State is essentially entitled to the source code through a contractual arrangement with the CMI, Inc. "But," Anderson continued, "a freshman logic course would teach us that being entitled to something is different than having it. Just ask Hillary Clinton."

Seeking the source code

The Intoxilyzer 5000EN is a microprocessor-driven breath alcohol analyzer manufactured by CMI, Inc. of Owensboro, Kentucky. CMI manufactures several types of breath-alcohol devices that are currently in use across the country. Since 1983, Minnesota law-enforcement agencies have used various models of CMI's Intoxilyzer to test the blood-alcohol levels of individuals suspected of drunken driving.

The Intoxilyzer analyzes physical data from breath samples, and the machine's computer source code determines how to interpret the data the device receives. Intoxilyzer test results have been used in scores of criminal and civil cases over the past three decades, and they have become a cornerstone of Minnesota DWI prosecutions.

In past years, defense challenges to Intoxilyzer tests were specific to the results produced by a particular machine, in a particular instance. That changed in 2006, when Eagan-based defense attorney Jeff Sheridan moved to obtain the machine's entire computer source code on behalf of this client, Dale Lee Underdahl. In doing so, Sheridan sought to examine — and to call into question — the overall reliability of the machine.

The Underdahl case begins

Dale Underdahl was arrested on suspicion of driving while intoxicated, and submitted to a breath test in which the Intoxilyzer was used. At Underdahl's license-revocation hearing, Sheridan sought access to the Intoxilyzer's computer source code as part of the discovery process in his case. He maintained that Underdahl needed to have access to the instrument and its source code in order to ensure its accuracy and reliability. "The instrument," Sheridan later stated, "is (Underdahl's) accuser."

In responding to Sheridan's motion, the State maintained that defense counsel had failed to adequately show that obtaining the source code would provide facts relevant to Underdahl's defense. It also claimed that the district court lacked jurisdiction to hear a generic challenge to the Intoxilyzer's reliability.

The State noted that, as a procedural matter, such challenges would have to be brought in the Court of Appeals, since the Intoxilyzer had already been approved for use in Minnesota through an administrative rule-making process, and had been presumed to be reliable. Finally, the State claimed that the source code was not in its possession — it was held by the manufacturer instead.

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Source Code Dispute

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On May 2, 2006, Judge Richard Spicer granted Underdahl's discovery request, and ordered the State to produce the complete Intoxilyzer source code, as well as a fully functional Intoxilyzer 5000EN machine. The Minnesota Department of Public Safety, which held a contract with CMI to use the Intoxilyzer, appealed.

As in the lower court, much of the argumentation turned on the question of who actually possessed the Intoxilyzer source code. During the appeals process, the commissioner of public safety sought to prohibit the district court from enforcing its order to produce the source code. The State, the commissioner claimed, simply did not possess or control the code.

Supreme Court weighs in

In 2007, the Supreme Court examined the source code issue for the first time. It ultimately ruled against the State, and noted that the commissioner of public safety had not met the threshold necessary to prohibit the district court from ordering production of the Intoxilyzer code.

In its opinion, the court agreed with Underdahl that the code was in the possession of the state, based on language found in a request for proposal (RFP) that CMI submitted in its bid to obtain the Intoxilyzer contract. The language of the RFP stated that any copyrightable materials created by the contractor would be "the property of the State" and that the contractor would also provide information to "attorneys representing individuals charged with crimes in which a test with the proposed instrument is part of the evidence." The Court held that because of this arrangement, the State could compel CMI to honor its contract, and thereby make the source code available for discovery.

While the State acknowledged that it owned a portion of the source code, it expressed skepticism that CMI would turn over the entire source code, because the company considered the full code to be proprietary information that it wished to conceal from its competitors. As it turns out, this is precisely what happened.

The source code show-down

As source-code litigation proceeded through the Minnesota Court system, the commissioner of public safety attempted to obtain the complete Intoxilyzer code from CMI. CMI refused, and the State then filed suit in federal court, alleging breach of contract.

CMI's initial reply was blunt. Responding to the State's complaint, CMI's brief stated that the company essentially denied "each and every allegation, matter, and thing" alleged by the State. For its part, the company maintained that the state of

Minnesota lacked the authority to order it to produce the source code. Furthermore, CMI's attorneys noted that courts had only ordered the State of Minnesota — and not CMI itself — to turn over the code.

After much wrangling, a tentative deal was struck between the two parties in early 2009. This deal was subsequently rejected by Judge Donovan Frank, on the grounds that litigants seeking source code information would have to travel to Kentucky to get it.

At issue

For the parties involved, the battle over the source code is not an academic matter. In its complaint against CMI, the State noted that the company's refusal to produce the source code had "placed the outcome of numerous impaired driving-related cases in jeopardy" since Intoxilyzer results would be thrown out of court if defendants did not have an opportunity to examine the code. Similarly, the Bureau of Criminal Apprehension later noted that if Minnesota police were effectively prohibited from using Intoxilyzer tests, they would have to move toward using blood and urine tests — the volume of which would quickly overwhelm the bureau's crime lab.

For their part, defense attorneys close to the source code issue have pointed to other states — such as New Jersey — where they claim that the methodology behind CMI's Intoxilyzer has been called into question. Disclosure of the source code, they maintain, would allow them to verify the Intoxilyzer's ultimate reliability.

'A speeding bullet'

After a rocky trip back through Minnesota's lower court system, the source-code issue ended up before the Supreme Court for a second time. In a 2009 opinion, the Supreme Court expanded on its decision in the original *Underdahl* case, and ordered the production of source code information to a DWI defendant, Timothy Arlen Brunner.

After the court's ruling, district courts began issuing discovery orders for the Intoxilyzer code, even though the State's lawsuit against CMI was still ongoing. While many defense attorneys viewed this outcome as a net positive, the court's decision caused consternation among some trial-court judges.

For instance, in Thor Anderson's memo in the *Sommers* case, the judge decried what he saw as the untenable situation that district court judges had been placed in, due to the Supreme Court's rulings on source code matters.

"The State's position is that if it had the source code, it would disclose it faster than a speeding bullet," Anderson wrote. "The trial court now must sacrifice truth as a burnt offering on the altar of *stare decisis* and go down the rabbit hole with Alice and from the precincts of Wonderland tell the world that the State has the source code when it really doesn't."

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Source Code Dispute

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Toward resolution?

Yesterday's settlement agreement may finally resolve the question of who actually has access to the Intoxilyzer source code. The tentative agreement struck between CMI and the State allows defendants in criminal cases and petitioners in civil implied-consent cases full access to the computer code, and also makes \$50,000 in fees available for experts to defend the source code in Minnesota legal proceedings. The agreement is not final, however, and its validity is already being called into question by some local attorneys. Defense lawyer Chuck Ramsay wrote on his blog yesterday that "This agreement is not yet settled."

A hearing on the proposed settlement between the State and CMI, Inc. will be held in federal court on June 11 before Judge Donovan Frank.

The *Sommers* Opinion

What follows is the memorandum decision of Judge Thor Anderson in *State v. Aaron Michael Sommers*, Fourth Judicial District, Division II, Brookdale, MN, File No. 27CR09-14456. This is in response to a defense attorney's motion to compel release of the intoxilyzer source code. By granting the motion, the Court would be placed in the frustrating position of having to dismiss the charge or suppress the test result if the State fails to comply.

This memorandum relates to the attached pretrial order which decides a defense motion which is part of the lava flow from a recent volcanic eruption by our Supreme Court. *State v. Underdahl and Brunner* (A09-2293, A09-2428, April 30, 2009).

For the reader fortunate enough to be unfamiliar with the issue, a Reader's Digest summary of the underlying situation is in order.

In Minnesota it is illegal to drive a motor vehicle with a blood alcohol concentration (BAC) of over .08. A violation has both civil and criminal consequences.

With the appropriate legal predicates (which are not an issue here) the police can test the BAC by blood, urine or the driver's breath. In the overwhelming percentage of cases the breath test is used (including the case at bar). This is accomplished by taking the driver to a local police station and having the driver give a breath sample in a machine known as an Intoxilyzer. This machine is operated by a computer program known as a "source code." The machine's accuracy can be authoritatively tested by use of a known alcohol sample. The use of

the machine is authorized by state law and the State designates the model to be used and contracts for or otherwise specifies the machine's operating characteristics.

In recent months and years, in both implied consent and criminal matters, drivers have moved pretrial for disclosure by the State of the above-mentioned source code.

The State has responded in two ways. Firstly, that the source code is irrelevant because the accuracy of the machine can be proven (or disproven if in fact the source code is out of kilter) by a test of the machine by a known alcohol sample.

Secondly, that the State does not possess the source code and cannot obtain it. The manufacturer claims it is proprietary information and will not disclose it to the State (or anyone else).

These issues by fits and starts lurched their way to our Supreme Court and this motion comes about as the result of that Court's most recent pronouncement cited above.

Firstly, the Court decided that if a party files an elaborate and expensive enough supporting affidavit (which all litigants now have submitted), need for the source code has been shown. One supposes this will be quibbled with in some law review articles but as a matter of fact, it doesn't matter. This is because the State's position is that if had the source code it would disclose it faster than a speeding bullet. The State does not care if the drivers have the source code. In fact, it is the State and, of course, those people killed by drunk drivers that are the victims in this judicial squeeze play.

In fact, the State has claimed it is entitled to the source code under its agreements with the manufacturer in a case commenced in the U.S. District Court. That leisurely proceeding has become more exciting by the embellishment of a judicially permitted intervenor who is not a party to the contract or agreement between the State and the manufacturer. There could of course be a surprise settlement (rumor has it that the intervenor torpedoed a recent attempt at one), but absent that we can be assured that with appeals, remands, new trials, and further appeals the case will be completed within lives in being plus twenty-one years.

Our Supreme Court has in effect held that the source code is in the possession, custody or control of the State. This author realizes that sounds odd, but the reader should keep in mind that when our Supreme Court speaks *ex cathedra* on matters of law from its courtroom in St. Paul it is, as far as the lower courts are concerned, miraculously preserved from error. It is a

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Source Code Dispute

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good thing, too, because the miracle of finding that the State has control of the source code makes accepting any miracle in the Bible a slam dunk.

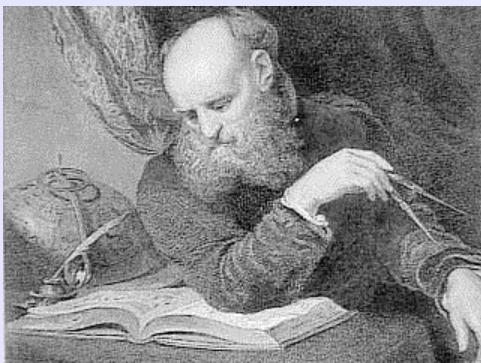
It appears the Supreme Court reached its conclusion because the paperwork seemed to the Court (without input from the manufacturer who claims otherwise) that the State is entitled to the source code. Well, the State must think so, too, or it would not sue for the source code in Federal Court. But a freshman logic course would teach us that being entitled to something is different than having it. Just ask Hillary Clinton.

The Court's decision puts the trial court in the position of Galileo, who in the 1600s was deemed by the Holy Inquisition a heretic because he argued the Earth goes around the Sun, when every God-fearing person could look up in the sky and watch the Sun go around the Earth once a day.

The trial court now must sacrifice truth as a burnt offering on the altar of *stare decisis* and go down the rabbit hole with Alice and from the Precincts of Wonderland tell the world that the State has the source code when it really doesn't. It of course may in the future, but it doesn't now, and it is now that drunk drivers will keep their licenses and kill people. These decedents are unable to intervene here or in Federal Court.

Galileo was sentenced to house arrest for life (this author could see that coming) but to prevent the unpleasantness of the medieval equivalent of waterboarding, Galileo publicly renounced his heresy and stated that the Sun revolved around the Earth. But as he left the room he whispered to his guard, "The Earth still revolves around the Sun."

In the accompanying order, this author renounces his heresy and follows the Supreme Court's findings to the letter. But to the people of Minnesota and every family that has had a loved one killed by a drunk driver, he whispers, "The State does not now have possession, custody or control of the source code."



Supreme Court Issues Bench Warrant

In an extremely rare move, the Kansas Supreme Court issued a bench warrant for the arrest of David Martin Price. The warrant was posted on the Court's website.

Price had been ordered to appear pursuant to a Show Cause Order to determine whether or not he should be found in indirect contempt of court for practicing law without a license in violation of a permanent injunction issued by Justice Beier on December 7, 2007.

In the case of *Kansas ex rel Morrison v. David Martin Price*, 285 Kan. 389 (2007), Price was for "now and ever after" prohibited from appearing in any Kansas legal proceeding in a representative capacity for another; from taking any action intended to assist nonmembers of the state bar of Kansas in the presentation of any legal matter; from preparing or aiding in the filing of any pleading or legal document in a Kansas controversy or legal proceeding, except when doing so solely on his own behalf; and/or from counseling or advising any nonmember of the state bar on any legal matter whatsoever unless he becomes duly licensed as a member of the state bar. Justice Beier also directed the Clerk of the Appellate Courts and the clerks of our state district courts to refuse to file any pleading or document signed or prepared by Respondent David Martin Price, except when he is a named party to the action in which the pleading or document is to be filed and the pleading or document is being filed solely on his own behalf.

Attorney General Steven Six filed a motion with the Court alleging that Martin violated the injunction by filing papers and appearing for Eldon Ray, in Mayetta, Kansas who was assisting in the construction of the Mayetta Christian Church. Ray had been fined for acting in the capacity of a licensed architect. The matter was set for hearing on July 20, 2009.

Price announced to the press that he had no intention of attending the hearing. He made good on the threat and the Court responded. The warrant was issued on July 21 and he was arrested within a few hours of its issuance. The Court added a count of direct contempt for not showing up on July 20, 2009. His bond was set at \$5,000. His hearing was set for August 4, 2009.

At the hearing on August 4, Price appeared pro se. After hearing the positions of Price and the Attorney General, the Court found Price in direct contempt of court for failure to appear on July 20, and in indirect contempt of court for violating the permanent injunction. He was ordered to surrender to the Shawnee County jail for 5 days for direct contempt. After serving that term, he was ordered to remain in jail for

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Supreme Court Issues Warrant

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the indirect contempt until he purged himself of the contempt by demonstrating that he had discontinued the unauthorized practice of law and signed a consent order agreeing to refrain from future unauthorized practice of law in Kansas. He has steadfastly refused to sign such a document and remains in jail as of this writing.

Several justices had recused themselves from the case presumably because Price had filed an action against them in federal court several years ago, which was dismissed. (See, *Price v. McFarland, et al.*, 133 Fed. Appx. 485 (10th Cir. 2005). Judges McAnany, Buser and Hill sat in the place of Justices Nuss, Luckert and Davis.

Price is the founder of several organizations that believe that the legal profession needs competition from non-lawyers such as, Pro Se Advocates and Kansas Citizens for Equal Access to Justice. A check of Westlaw reveals at least 22 cases just in Kansas state and federal courts in which Mr. Price is involved either directly or indirectly often naming judges, lawyers and other government officials as defendants. He has also filed cases in other states.

Court Watch

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Dean and the fact that he was acting nervously, by itself does not justify the pat down. There was no evidence that Dean was armed, so the officer safety argument also fails. The officer did testify he patted down everyone in the house for officer safety purposes, but since there was no individualized suspicion regarding Dean, the safety argument fails, according to the Court. Dean's conviction was reversed.

FAIL TO MAINTAIN A SINGLE LANE: KANSAS SUPREME COURT WEIGHS IN

So maybe being a "traffic" judge isn't quite as easy as it looks. The Kansas Supreme Court must have entertained such thoughts as it wrote a lengthy opinion in *State v. Marx*, ___ Kan. ___ (September 18, 2009) centering on what conduct by a driver is prohibited by the "fail to maintain a single lane" statute. See, K.S.A. §8-1522 and STO §46. Justice Davis even saw fit to file a concurring opinion regarding his interpretation of the statute.

Marx was driving northbound on I-35 in his motor home, when he lost a hubcap as he passed an officer who happened to have another driver stopped on the side of the road. The officer retrieved the hubcap and headed after the motor home. After he caught up, he continued to follow the motor home for about a mile, until he noticed that the motor home crossed the fog line (the solid white line separating the lanes from the shoulder). Marx overcorrected and crossed the dotted white line separating the two northbound lanes of I-35. The officer activated his

emergency lights and stopped the motor home. He approached the vehicle, handed the hubcap to the driver and smelled marijuana. And well, as you can imagine it went downhill for Mr. Marx from there.

In response to a motion to suppress, the district court found the stop to be unlawful. The Court of Appeals found that the stop was lawful based on a violation of K.S.A. §8-1522. (See, Verdict, Fall 2007, p. 12). The Kansas Supreme Court accepted the case. All three courts rejected the State's argument that this was a public safety/community caretaking stop on the basis that the loss of a hubcap presented no danger to anyone and the fact that the officer continued to follow Marx for a mile after he caught up with him, belied that argument. So the opinion focuses simply on the interpretation of K.S.A. §8-1522 and whether Marx violated the statute.

The statute states:

(a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

(Emphasis added)

The Kansas Supreme Court conducted a lengthy analysis of the statute, including its interpretations by other states and the federal courts.

The Court finally concluded that there are two separate rules of the road in the statute: first, keep entirely within a single lane. However, second, when it is impractical to do so (due to weather or other conditions of the road), the driver may change lanes if he or she can do so safely. A traffic infraction occurs when either rule is violated. Because of the "as nearly as practicable" language, the statute is not a strict liability crime, as are most traffic infractions. The officer is required to present evidence that there were no conditions that made it impractical to stay in a single lane, necessitating the driver's change of lanes. In this case, because no such evidence was presented by the officer, the State failed to maintain its burden of proof and the evidence was properly suppressed.

Justice Davis, in a concurring opinion, agreed that the officer's evidence was insufficient to prove a violation of the statute. However, the decision in the case was not whether a traffic violation actually occurred, but whether or not the officer had a reasonable and articulable suspicion that one had occurred to justify a stop.

"Yet the majority's statements regarding the statute's flexibility—that the statute requires 'compliance that is close to that which is feasible'—coupled with its requirement that the State prove a violation of the statute in order to establish reasonable suspicion creates a standard that will be difficult if not impossible for officers to enforce...the effect of this decision will be hesitancy in, if not an all-out end to, the enforcement of the single-lane requirement."

WHY WE MUST FIX OUR PRISONS

By Sen. Jim Webb (D. Virginia)
Reprinted from Parade Magazine
March 29, 2009

America's criminal justice system has deteriorated to the point that it is a national disgrace. Its irregularities and inequities cut against the notion that we are a society founded on fundamental fairness. Our failure to address this problem has caused the nation's prisons to burst their seams with massive overcrowding, even as our neighborhoods have become more dangerous. We are wasting billions of dollars and diminishing millions of lives.



We need to fix the system. Doing so will require a major nationwide recalculation of who goes to prison and for how long and of how we address the long-term consequences of incarceration. Twenty-five years ago, I went to Japan

on assignment for PARADE to write a story on that country's prison system. In 1984, Japan had a population half the size of ours and was incarcerating 40,000 sentenced offenders, compared with 580,000 in the United States. As shocking as that disparity was, the difference between the countries now is even more astounding--and profoundly disturbing. Since then, Japan's prison population has not quite doubled to 71,000, while ours has quadrupled to 2.3 million.

The United States has by far the world's highest incarceration rate. With 5% of the world's population, our country now houses nearly 25% of the world's reported prisoners. We currently incarcerate 756 inmates per 100,000 residents, a rate nearly five times the average worldwide of 158 for every 100,000. In addition, more than 5 million people who recently left jail remain under "correctional supervision," which includes parole, probation, and other community sanctions. All told, about one in every 31 adults in the United States is in prison, in jail, or on supervised release. This all comes at a very high price to taxpayers: Local, state, and federal spending on corrections adds up to about \$68 billion a year.

Our overcrowded, ill-managed prison systems are places of violence, physical abuse, and hate, making them breeding

grounds that perpetuate and magnify the same types of behavior we purport to fear. Post-incarceration re-entry programs are haphazard or, in some places, nonexistent, making it more difficult for former offenders who wish to overcome the stigma of having done prison time and become full, contributing members of society. And, in the face of the movement toward mass incarceration, law-enforcement officials in many parts of the U.S. have been overwhelmed and unable to address a dangerous wave of organized, frequently violent gang activity, much of it run by leaders who are based in other countries.

With so many of our citizens in prison compared with the rest of the world, there are only two possibilities: Either we are home to the most evil people on earth or we are doing something different--and vastly counterproductive. Obviously, the answer is the latter.

Over the past two decades, we have been incarcerating more and more people for nonviolent crimes and for acts that are driven by mental illness or drug dependence. The U.S. Department of Justice estimates that 16% of the adult inmates in American prisons and jails--which means more than 350,000 of those locked up--suffer from mental illness, and the percentage in juvenile custody is even higher. Our correctional institutions are also heavily populated by the "criminally ill," including inmates who suffer from HIV/AIDS, tuberculosis, and hepatitis.

Drug offenders, most of them passive users or minor dealers, are swamping our prisons. According to data supplied to Congress' Joint Economic Committee, those imprisoned for drug offenses rose from 10% of the inmate population to approximately 33% between 1984 and 2002. Experts estimate that this increase accounts for about half of the dramatic escalation in the total number imprisoned over that period. Yet locking up more of these offenders has done nothing to break up the power of the multibillion-dollar illegal drug trade. Nor has it brought about

a reduction in the amounts of the more dangerous drugs--such as cocaine, heroin, and methamphetamines--that are reaching our citizens.

Justice statistics also show that 47.5% of all the drug arrests in our country in 2007 were for marijuana offenses. Additionally, nearly 60% of the people in state prisons serving time for a drug offense had no history of violence or of any significant selling activity. Indeed, four out of five drug arrests were for possession of illegal substances, while only one out of five was for sales. Three-quarters of the drug offenders in our state prisons were there for nonviolent or purely drug offenses. And although experts have found little statistical difference among racial groups regarding ac-

With so many of our citizens in prison compared with the rest of the world, there are only two possibilities: Either we are home to the most evil people on earth or we are doing something different--and vastly counterproductive. Obviously, the answer is the latter.

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Fix Our Prison System

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tual drug use, African-Americans--who make up about 12% of the total U.S. population--accounted for 37% of those arrested on drug charges, 59% of those convicted, and 74% of all drug offenders sentenced to prison.

Against this backdrop of chaos and mismanagement, a dangerous form of organized and sometimes deadly gang activity has infiltrated America's towns and cities. It comes largely from our country's southern border, and much of the criminal activity centers around the movement of illegal drugs. The weapons and tactics involved are of the highest order.

The Mexican drug cartels, whose combined profits are estimated at \$25 billion a year, are known to employ many elite former soldiers who were trained in some of America's most sophisticated military programs. Their brutal tactics took the lives of more than 6000 Mexicans last year alone, and the bloodshed has been spilling over the border into our own neighborhoods at a rapid pace. One terrible result is that Phoenix, Ariz., has become the kidnapping capital of the United States, with more than 370 cases in 2008. That is more incidents than in any other city in the world outside of Mexico City.



The challenge to our communities is not limited to the states that border Mexico. Mexican cartels are now reported to be running operations in some 230 American cities. Other gang activity--much of it directed from Latin America, Asia, and Europe--has permeated our country to the point that no area is immune. As one example, several thousand members of the Central American gang MS-13 now operate in northern Virginia, only a stone's throw from our nation's capital.

In short, we are not protecting our citizens from the increasing danger of criminals who perpetrate violence and intimidation as a way of life, and we are locking up too many people who do not belong in jail. It is incumbent on our national leadership to find a way to fix our prison system. I believe that American ingenuity can discover better ways to deal with the problems of drugs and nonviolent criminal behavior while still minimizing violent crime and large-scale gang activity. And we all deserve to live in a country made better by such changes.

“Until the lion has his or her own storyteller, the hunter will always have the best part of the story.”

African Proverb

An Ill Wind Blowing

By Neal C. Lemery Justice of the Peace,
Tillamook County, Oregon *The following is reprinted
with permission from Judge Lemery.*



There is an ill wind blowing through our town. It steals our hope, and the childhood and energy of our kids, and it steals our strength to build our families and our future. It takes our jobs and it takes food from the mouths of our children, and it leaves us sick and frail, too weak to care for ourselves and the people we love.

We don't talk about the elephant in the living room, and we quickly sidestep the difficult questions it raises as we go about our lives, and step around the corpses of its victims.

If this ill wind was the Black Death, or an oil spill on our beaches, or another Tillamook Burn, we would rise up in the streets, and fight this disaster head on, with all of our collective energies and resources.

But we don't. Once in a while, after one of our youth is killed in an alcohol-soaked crash, or there is a serious assault or homicide caused by booze, we wring our hands and bemoan the prevalence and power of alcohol abuse in our town. But, a few weeks later, the topic of conversation changes, and we go on.

Over 300 people are arrested in our county each year for DUI, and yet people still refer to this crime as “getting a ticket”, and say “well, it's just a DUI.”

Yet, this wind blows deeper and deadlier into the heart of our community. Our grade school kids tell us that 12% of them have been drunk at a party, 37% started drinking when they were nine or ten years old, and half have ridden in a car driven by a drunk. And, 4% of these kids report they've been too hung over to make it to school.

The numbers get worse in junior high: 14% drink on a weekly basis; 23% binge drink (more than five drinks) and 8% binge drink monthly. 85% think drinking and driving is a serious community problem.

And, high school kids: By age 14, 44% have used alcohol; 12% have driven drunk themselves; and 19% of our kids have been injured when they are drinking.

The numbers go on and on, and we could all point fingers or wring our hands at these tragic numbers. Or, we could applaud and cheer, as so many of us did at this year's Tillamook High School graduation, where the student speaker was bragging about her “graduation MIP” as a rite of passage, and a large part

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Underage Drinking

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of the audience responded with applause and cheers. I was there, and I wept for my town.

Every day, I see the faces and the wreckage of under aged drinking, and the personal costs of our society's acceptance of alcohol abuse. I see kids dropping out of school, not applying themselves to build healthy families and find productive work, and to raise their own kids. I see their bruises, and their already long driving and criminal records. And with some, I see their meth sores and heroin needle marks, but all of those kids tell me it started with booze.

I see their young faces as they walk the chain gang through the courthouse on the way to criminal court, and more jail time. I read their names on the jail roster every morning.

Kids tell me all time of their loss of hope, the emptiness of their family life, their yearning to find a safe place to be with their friends, and their hunger for a meaningful, productive life. Our kids in trouble have good values, and they want to succeed. They need our help in beating this ill wind, and to put this storm to rest.

Many of us are working to beat this crisis, and stop this ill wind from blowing through our town, and we try to stop the stealing of lives, and the slaying of hope and the young dreams of our youth. There are many who feel this storm for what it is. I see you in the courthouse hallways, and I see you in our churches and our streets and in our schools. I see you in the back of the courtroom weeping as your man-child deals with his charges. I see you placing yet another cross by the side of the road. And, I know there are many conversations around the dinner table.

Our community is rich in resources. We have great health care providers, counselors, and self help groups, and there are nightly meetings of people in recovery. Yes, we've come a long way since I was a kid myself in this town. I've seen some good changes.

And, I wear the scars of this storm in my own heart. The statistics are more than numbers for me; they are counted in my friends, neighbors, family, and people who have been in my court who have fallen from this storm. Like you, I know the names on the roadside crosses. We all have these scars and we are all in pain.

And, yet, there is a great silence. After last June's flurry of articles and discussion on that graduation speech, the public clamor died down. And, since then, more people have died, more people have been assaulted, more people have driven drunk, more people have gone to jail, and more kids have started drinking. There is a Trail of Tears running through our town, and we need to bind our wounds, and set a new course for how we live, and how our children are raised.

I'm a believer in the rule of law, and the law as a statement of our community values and dreams. And, I'd better believe that. You have entrusted me to be a judge, and to be fair and apply justice. Yet, as I go about my work to enforce the law and to change behavior, I am often left at the end of a day on the bench feeling like the Dutch boy holding his finger in the dike.

It is time, my neighbors, for all of us to rise up, and to be angry about this ill wind, and to find horror in the message we are getting from our young people. Our kids see alcohol abuse as a very serious problem. It is time that we listen to what our kids are saying.

It is time to be outraged. It is time to talk about the elephant in our town's living room.



For those thinking of throwing a party in Lawrence and inviting underage drinkers to it — you might want to reconsider. Lawrence just became the city with the strongest social hosting ordinance in the state.

Concerned that laws against those serving alcohol to minors at parties weren't being fully enforced, a local alcohol prevention group lobbied the Lawrence City Commission to strengthen its social hosting law. Earlier this year, the Legislature changed the wording so hosts would be responsible even if they didn't intentionally supply alcohol to underage drinkers, but acted recklessly. The city's law goes a step further, more specifically defining what that reckless behavior would entail, including not taking steps to keep alcohol out of the hands of minors.

Under the new ordinance individuals who are hosting parties need to control the access of alcohol by minors and verify suspected minor's ages with photo IDs. The law also establishes a presumption that everyone attending the party is invited. So, it would be up to the host to prove that minors were trespassing. While the state's social hosting law is geared toward parents, the majority of cases in Lawrence center around college-age parties in the Oread neighborhood just off the Kansas University campus.



Just as with the state law, violators face a mandatory minimum fine of \$1,000 and the possibility of up to one year in jail.

THE GERMAN AUTOBAHN

Reprinted from NTSI (National Training Center Institute Interchange) Newsletter
February 2009 - Santa Ana, California

Autobahns are equivalent to freeways or motorways elsewhere on this planet. They feature at least two lanes per direction, sometimes three, and very rarely four. The German autobahn is thought by some to be the ideal place to drive, with no speed limits and wide open roads. However, the autobahn can be intimidating for those who have not driven it before.

The autobahn is considered the world's second largest super-highway system behind the United States. As previously stated, there is no set speed limit for the autobahn, so drivers can go at whatever set speed they choose. However, this doesn't mean that you can drive however you please on the autobahn. The trick is to drive in the right ("slow") lane whenever you are driving the autobahn at a "slower" speed, such as 80 mph.

Only use the left ("passing") lane of the autobahn when actually passing a car and make sure to pass as quickly as possible. Failure to pass quickly or not maintain a speed of 100 mph or higher while in the left lane of the autobahn will give the cars behind you an excuse to ride your bumper until you move into the right lane. If you don't move quickly enough to the right lane when passing, the cars behind you will get so close to your bumper that you will be sure that they will hit you!



Autobahn tunnel (left) and valley bridge (right)

Structure

The autobahn's structure was designed to allow an unimpeded, high-speed traffic flow. In order for this vision to become a reality, certain design features were implemented. For example, the number of lanes per direction on any stretch of the autobahn is two, three, or even four lanes separated by a median with double-sided guardrails. Since cars travel at such great speeds, long acceleration and deceleration lanes were added to the on- and off-ramps. The curved areas are purposely gentle and well banked, with blinders

added for safety so drivers do not get distracted. These blinders, which are installed on top of the median, prevent drivers from looking at oncoming traffic or scenery on the side of the road. Most hilly sections have been considerably leveled to only small grades. To prevent the road from freezing at anytime, the concrete is freeze-resistant and the surface is bituminous (a kind of coal).

Emergencies

In the event of an accident, breakdown, or other emergency along the autobahn, you are never more than a 0.50 mile away from help. Emergency telephones are located at 1.25 mile intervals along the sides of the road. The direction to the nearest phone is indicated by small arrows atop the roadside reflector posts. In long tunnels, emergency phones are located in safe rooms every 62-124 mile.

The emergency phone system was privatized several years ago. All calls go to a central call center in Hamburg. In the event of an accident, dispatchers there will immediately connect the caller to the nearest police or emergency services office. For breakdowns, the dispatcher will obtain the information necessary to send the appropriate service. Roadside assistance is free, but you'll likely have to pay for parts. If you need to be towed, there is no charge to remove the vehicle from the Autobahn, but you will have to pay for towing beyond that. Depending on the time of day, volume of calls, and traffic conditions, response time for a breakdown may vary from a few minutes to possibly over an hour.



There are now two varieties of emergency phones in use. On the older phones, you will find a cover with a handle. Lift the cover all the way and wait for a dispatcher to answer. The newer phones don't have a cover; instead, they have an external speaker/microphone area with two buttons that you can press to connect you to the appropriate dispatcher. There is a yellow button with a wrench symbol for reporting a breakdown and a red button with a red cross to report an accident. Press the appropriate button and wait for a reply. In most cases, the location of the phone is transmitted automatically when your call is connected. If not, you will need to give the dispatcher the kilometer location of the phone as indicated on a label on the inside of the cover or near the speaker and your direction of travel. An English-speaking dispatcher is usually available.

Accident Rates

Despite the prevailing high speeds, the accident, injury and death rates on the autobahn are remarkably low. The autobahn carries about a third of all Germany's traffic, but injury accidents on the autobahn account for only 6% of such accidents nationwide and less than 12% of all traffic fatali-

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Autobahn

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ties were the result of autobahn crashes. In fact, the annual fatality rate (3.2 per billion k/min 2004) is consistently lower than that of most other superhighway systems, including the US interstates (5.0 in 2005). How can that be possible?? Germany has stricter requirements than the United States for licenses. The Germans' written test is tougher than Americans', the minimum driving age is 18, and German drivers have to take classes in city traffic, on country roads, on autobahns and at night before being let loose on the roads. The biggest difference is driving habits, according to Alex Landsdorff, press attaché at the German Embassy in Washington . German drivers actually obey the rules. They don't cruise in the left lane; they keep both hands on the wheel and act predictably. You know what the guy behind you is up to and you know what the guy ahead of you is up to. That is never the case in the U.S. At German speeds, drivers are less likely to become distracted — they don't shave, put on makeup, play with the CD changer or do the various things that lead to American drivers taking their eyes off the road, says David Champion, head of Consumer Union's auto testing center in East Haddam, Conn. "It's very difficult to find cup holders and the like" in European cars, he said. But American drivers, accustomed to doing other things while driving, continue their dangerous habits even at high speeds, he says.

Below are 3 links where you are able to see glimpses of the German autobahn:

<http://www.youtube.com/watch?v=sE0Knlx1CzM>
210 km/h (130 mph) on the Autobahn surpassing 4 Police cars

<http://www.youtube.com/watch?v=sYPCLtA-ETk&feature=related>
Driving Lamborghini on Autobahn at 305km/h=189mph

<http://www.youtube.com/watch?v=FO3OO8H2CUM&feature=related>
Ferrari Accident (360 Spider)

“The State’s argument on this issue is a classic resort to purposive statutory interpretation: the statute is designed to protect the public and keep a close eye on sex offenders, so let’s broadly interpret “conviction” to include juvenile adjudications. But statutory interpretation focuses first on the words actually used by the legislature.”

Judge Leben writing for the majority in *State v. Reese*,
___ Kan.App.2d ___ (July 31, 2009)

**KANSAS JUDGES
MAKE A DIFFERENCE
NATIONALLY**

The Kansas Municipal Judges Association is a great organization, but Kansas judges at all levels have had a strong history of becoming involved and making a difference in professional organizations at a national level. Here are a few you might want to consider joining. Involvement in these organizations will not only expand your horizons beyond Kansas and make you a better judge, it will re-energize you and provide both personal and professional enrichment opportunities.

● **The National Association of Women Judges (NAWJ)** is the nation’s leading voice for women jurists dedicated to: preserving judicial independence; ensuring equal justice and access to the courts for women, minorities and other historically disfavored groups; providing judicial education on cutting-edge issues; and increasing the numbers and advancement of women judges at all levels to more accurately reflect their full participation in a democratic society. NAWJ welcomes both men and women, as well as judicial clerks, attorneys and law students. Members include federal, state, tribal, military and administrative law judges at both the appellate and trial levels from every state in the nation. Non-lawyer judges can join under the associate category. Associate membership is \$175 per year, judicial membership is \$200. Our own Kansas Supreme Court Justice Carol Beier chairs our District (District 10: Kansas, Nebraska, Minnesota, South Dakota and North Dakota) and is responsible for greatly increasing the membership from Kansas. She has met with the Kansas membership and some great programs are in the works.

The National Association of Women Judges
<http://www.nawj.org>

● **The American Judges Association (AJA)** was originally founded as the National Association of Municipal Judges (NAMJ) in 1959 at Colorado Springs, Colorado, by 30 municipal court judges (former Chief Justice of the Kansas Supreme Court Richard Holmes being one of the 30). As the association's membership grew to include judges from other types of courts and from a wider geographical area, its name was changed to the American Judges Association in 1973. Currently, AJA has a membership exceeding 3,000 members, which includes both present and former judges of courts of all jurisdictions in the United States, Canada, Mexico, Puerto Rico, Guam, American Samoa and The Virgin Islands. Its Board of Governors is composed of representatives from fourteen districts.

The objective and purpose of the Association is: to promote and improve the effective administration of justice; to maintain the status and independence of the judiciary; to provide a forum for the continuing education of its members and the

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Expand Your Judicial Horizons

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general public; and for the exchange of new ideas among all judges. Kansas Court of Appeals Judge Steve Leben is a former president of the AJA, as was 10th Judicial District Court Judge Gerald Elliott. Dues are \$150 per year.

The American Judges Association:
<http://www.aja.ncsc.dni.us>

●**The American Bar Association: Judicial Division: National Conference of Specialized Court Judges (NCSCJ)** is comprised of judges who preside over matters dealing with tax, probate, traffic, juvenile, domestic relations, environmental, small claims, landlord-tenant, tribal, immigration, municipal, county, district and international criminal courts. Its goal is to instill public trust and confidence in the judicial system. It is committed to judicial outreach in the communities served and the public at large. The Conference actively presents programs around the country on the topics of traffic safety, domestic violence, military justice, juvenile delinquency, child abuse and many other areas in which its judges have served as judicial officers and faculty.

Membership is limited to attorneys and is based on the years since you were admitted to the bar, with the maximum of \$399 per year if you have been out over 10 years. The Judicial Division is \$35 in addition to ABA membership dues. Non-judge lawyers may also join. Within the Judicial Division are several "conferences." There is an Appellate Judges Conference, a State Trial Judges Conference, a Federal Judges Conference and a Conference of Specialized Court Judges (to which Kansas municipal judges who are lawyers would qualify for membership). Overland Park Municipal Judge Karen Arnold-Burger has held several leadership positions in the Judicial Division and in the NCSCJ. As Kansas ABA Membership Co-Chair, she can also arrange for you to obtain half-price membership for your first year if you want to try it out. Kansas Court of Appeals Judge Christel Marquardt has been active in the ABA throughout her legal career. Kansas Federal District Magistrate Judge David Waxse currently serves as Chair of the Judicial Division Conference of Federal Judges. The ABA awarded the John Marshall Award to Judge Deanell Tacha in 2008.

**The American Bar Association; Judicial Division;
National Conference of Specialized Court Judges:**
<http://www.abanet.org/jd/ncscj/home.html>

●**The National Judges Association (NJA)** was founded in 1979 by judges dedicated to the promotion of the interests of all non-attorney judges. The mission of the organization is to preserve the existence of the non-attorney judge and to foster improved performance of traditional duties of the non-attorney judges. The NJA has been instrumental in fighting legislation in several states directed toward the elimination of

the non-attorney judge. The Annual Education Conference is held in the spring of each year. The focus of this four-day conference is the continuing education of the limited jurisdiction judge and features excellent and challenging classes. Dues are based on income, with a minimum rate of \$30 per year and a maximum rate of \$120 per year for salaries over \$30,000. Currently 40 Kansas non-lawyer judges belong to the NJA. Kansas District Magistrate Judge Tom Webb has chaired this organization in the past.

The National Judges Association:
<http://www.nationaljudgesassociation.org>

●**The American Judicature Society (AJS)** works to maintain the independence and integrity of the courts and increase public understanding of the justice system. It is a nonpartisan organization with a national membership of judges, lawyers and other citizens interested in the administration of justice. Cynthia Gray, who has spoken at our annual conference in the past, directs its center on judicial ethics and is a nationally recognized expert on judicial ethics. A one year membership for judges is \$75. Kansas Federal Magistrate Judge David Waxse, and Tenth Circuit Court of Appeals Judge Deanell Tacha have been very active in the AJS.

The American Judicature Society
<http://www.ajs.org>

●**American Inns of Court (AIC)** are designed to improve the skills, professionalism and ethics of the bench and bar. An American Inn of Court is an amalgam of judges, lawyers, and in some cases, law professors and law students. Each Inn meets approximately once a month both to "break bread" and to hold programs and discussions on matters of ethics, skills and professionalism. Dues are established locally based on national dues and the cost of monthly dinner meetings. There are four "Inns" in Kansas: the Earl E. O'Connor Inn which meets in Prairie Village; the Honorable Wesley E. Brown Inn which meets in Wichita; the Judge Hugh Means Inn of Court which meets in Lawrence and the Sam A. Crow Inn of Court which meets in Topeka. The Honorable Deanell Tacha is past-president of the American Inns of Court nationally. Many Kansas lawyer judges belong to their local Inn of Court.

The American Inns of Court
<http://innsofcourt.org>



JUDGE HENRY W. GREEN, JR., LOGICIAN?

All appellate judges have read Logic for Lawyers
Judge Henry W. Green, Jr. is an appellate judge.
Therefore, Judge Green has read Logic for Lawyers.

Although the major premise of this categorical syllogism may be an overstatement, the conclusion is absolutely true. How do we know this?



In 2009 alone, Judge Henry W. Green, Jr. of the Kansas Court of Appeals has authored five opinions wherein he directly cites Logic for Lawyers (LFL) by retired Chief Judge of the U.S. Court of Appeals, 3rd Circuit Ruggero J. Aldisert. In addition he was on the panel of at least one other case where a per curiam decision was entered and LFL was cited. And what other logical conclusion can be drawn? Attorneys arguing in front of

Judge Green should brush up on their legal logic skills, because he certainly has.

Although other judges have been on panels with Judge Green, no other appellate judge in Kansas has directly cited this book in an opinion in which he or she appears as the author. A Westlaw search reveals 53 times various appellate courts around the country have quoted from LFL since 1989. However, only Aldisert's own 3rd Circuit quotes him more than the Kansas court and they have not quoted him since 2006. In fact, most of the 3rd Circuit cases in which LFL is quoted were authored by Aldisert himself. Even decisions from the 9th, 10th and 11th Circuits wherein LFL was quoted were opinions authored by Judge Aldisert while he was sitting by designation as a visiting Senior Judge. No single appellate judge other than Aldisert himself quotes him as often as Judge Green and no appellate court other than the Kansas Court of Appeals quotes him as often. In addition, Judges Buser and Elliott have been on the panels with Judge Green in three of the four cases in which he wrote the opinion citing LFL and in one per curiam case where LFL was cited. Therefore, it seems to be an important treatise to them as well. Interestingly, five of the six cases are unpublished opinions.

There are several other cases in which Judge Green has either written the opinion or been on the panel when a per curiam was issued in which various logic theories have been applied with no specific cite. In fact, this author is unable to find any cases in the last 10 years involving a discussion of some theory of logic that does not involve Judge Green. So, appellate lawyers take note. If your reasoning is flawed as examined through the trained eye of a logician, you will not get far.

Although Aristotle may be the father of logic in history, Judge Green appears to be the father of logic on the Kansas appellate courts.

See: Cunningham v. Riverside Health System, 33 Kan.App.2d 1 (2004); Bryant v. Kansas Dept. of Revenue, 198 P.3d 784, 2009 WL 112821 (January 16, 2009); Jones v. State, 203 P.3d 739, 2009 WL 793133 (Kan. App. , March 20, 2009)(LFL cited); State v. Hunter, 203 P.3d 23, 2009 WL 723030 (Kan. App. March 20, 2009)(LFL cited); State v. Scott, 203 P.3d 1281, 2009 WL 929102 (Kan. App. April 3, 2009)(LFL cited); State v. Ellis, 205 P.3d 791, 2009 WL 1036110 (Kan.App. April 17, 2009); State v. Deal, 206 P.3d 529, 2009 WL 1160373 (Kan. App. May 1, 2009)(LFL cited); State v. Lackey, Slip Copy, 2009 WL 1634873 (Kan. App. June 12, 2009)(LFL cited); and Grabner v. Kansas Dept. of Revenue, Slip Copy, 2009 WL 2030383 (Kan. App. July 10, 2009); State v. Smith, ___ Kan.App.2d ___ (July 24, 2009) (LFL cited and citing for the first time Copi and Cohen, Introduction to Logic, 12th ed. 2005).

Logic for Lawyers (LFL) is not recommended night time reading, unless you are an insomniac, but it is interesting reading when you are alert and engaged. It requires a lot of "deep" reflection. The book was first published in 1988 and is now in its Third Edition. It is published by the National Institute for Trial Advocacy (NITA). It serves as a textbook for many law schools and for judicial courses offered by various judicial organizations including the National Judicial College. Judge Aldisert himself traveled the world teaching the topic for many years. Others have now taken his place in a field that he really pioneered for judges. He ends the book with the following:

"A final word. Logical reasoning and avoidance of fallacies does not always guarantee a solution. There is still the dilemma and counter-dilemma, one of which, "Litigiousus," kept ancient Greek logicians busy for many years:

Protagoras, the Sophist, is said to have agreed to train Euathlus in the art of pleading. Half of the fee was to be paid when the course was completed; the remaining half when Euathlus should win his first case in court. Euathlus delayed undertaking any suit, and Protagoras eventually sued his pupil for the other half of the agreed fee, urging the following dilemma:

If this case is decided in my favor, Euathlus must pay me by judgment of the court;
And if it is decided in his favor, he must pay me by the terms of our contract.
But it must be decided either in my favor or in his.
Therefore, he is in any case obligated to pay.

Euathlus urged the following rebuttal:

If this case is decided in his favor, I am free by the terms of our contract;
And if it is decided in my favor, I am free by the judgment of the court.
But it must be decided in his favor or in mine.
Therefore, I am in any case freed of the obligation.

Take your time to work this out. (A couple of years will do). Happy thinking!"

AND THE GENERAL SAYS.....

What follows are opinions from the office of Kansas Attorney General Stephen Six that may be of interest to municipal judges. The full text of all AG opinions can be found at: www.accesskansas.org.

KANSAS ATTORNEY GENERAL ESTABLISHES SILVER ALERT PROTOCOL

Attorney General Steven Six, along with members of the Silver Alert Committee, have released the state protocol for the new Kansas Silver Alert, adopted by the legislature this session. The Kansas Silver Alert Protocol creates a voluntary process for coordinating efforts between law enforcement agencies, media outlets and other entities when a person 65 years of age or older, or a person suffering from dementia is reported missing by family members or caregivers.

The Protocol was designed to respect the dignity and independence of Kansas seniors and their right to make choices in their everyday lives. Although there is little data to document how many seniors go missing each year, it does happen-sometimes with tragic results. It is a particular concern for seniors with cognitive impairment.

It requires that law enforcement have reason to believe that the person might be a risk to harm himself and the person must be missing under circumstances that are not part of a normal routine.

AG Opinion 2009-18 August 17, 2009

OPEN RECORDS REQUESTS WHEN NO LISTS OF NAMES OR ADDRESSES REQUESTED

K.S.A. 2008 Supp. §45-220(c) states that under certain circumstances a person can be required to sign, as part of his or her open records request, a statement that the person will not use any lists of names or addresses for purposes of selling or offering for sale to the listed persons any property or service. Many agencies have this as standard “boiler-plate” language on their records requests form.

The Attorney General was asked about a situation in Butler County where a person requested that the county appraiser provide information regarding assessed valuations of real property by parcel number. The requester refused to sign the certification outlined in K.S.A. 2008 Supp. §45-220(c) on the basis that the records he was requesting did not contain individual names and addresses.

The Attorney General opined that if a requested record does not contain a list of names and addresses or such a list cannot be derived from the records, the requester cannot be required to complete the “boiler-plate” certification as a prerequisite to obtaining the records.

AG Opinion 2009-20 September 16, 2009

AUTHORITY OF PROSECUTORS TO CARRY WEAPONS



Prosecutors are exempt from the prohibitions against criminal use of a weapon and criminal discharge of a firearm if a prosecutor has secured appropriate authorization, obtained a concealed carry license and completed a specific firearms training course. Additionally, the exemption for criminal discharge of a firearm applies only while the prosecutor is actually engaged in the duties of employment or any activities incidental to such duties.

Prosecutors are exempt from the prohibition against unauthorized possession of a firearm in county courthouses and court-related facilities. However, this exemption is contingent upon a prosecutor meeting the requirement of appropriate authorization, obtaining a concealed carry license, and completing a specific firearms training course, subject to any restrictions or prohibitions imposed by the chief judge of the judicial district. Finally, this last exemption is not applicable if a county resolution opts out of the exemption.



The victim of Schwartz' crime was his own daughter. ... it takes little thought to realize that admitting that you've committed two serious felony offenses against one of your own children might impact your parental rights.

Judge Leben writing for the majority in *State v. Schwartz*, Slip Copy, 2009 WL 2506285, (Kan.App.) (August 14, 2009)

Turner argues, based on her education, limited experience with police officers, and the television show “Cops,” that she did not understand her right to refuse consent.

State v. Turner, Slip Copy, 2009 WL 2499289, (Kan.App.) (August 14, 2009), Per Curiam



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 of particular applicability to cases heard in municipal courts.

BEWARE OF NEGATIVE PROOF IN DUI CONTEXT

Unpublished Decision

In the per curium opinion, *Grabner v. Kansas Dept. of Revenue*, Slip Copy, 2009 WL 2030383 (Kan. App. July 10, 2009), filed in an appeal of an administrative license suspension the Court wrote:

“Probable cause is a fact-intensive determination made on a case-by-case basis. Grabner wants this court to focus on the signs of impairment he did not exhibit while glossing over or trying to discount those signs of impairment he did exhibit. He would have this court rely on the concept of “negative proof.” This is the attempt to sustain a factual proposition merely by negative evidence. The fact that Grabner did not exhibit some signs of impairment of his physical and mental faculties does not imply that he did not exhibit other known psychomotor signs of impairment.”

MUNICIPAL COURT HAS NO JURISDICTION OVER

FELONIES REGARDLESS OF LANGUAGE OF

K.S.A. §22-2601 AND K.S.A. §12-4104

Unpublished Decision

Defendant pled guilty to misdemeanor theft in Wichita Municipal Court. He was ordered to pay a fine and serve a jail term, which he did. One month later, the State charged the defendant with the same theft, but as a felony in the district court (felony due to two or more prior convictions). The city prosecutor moved to vacate the municipal court conviction on the basis that the court lacked jurisdiction over a felony theft. The municipal court granted the motion to vacate. The defendant then moved to dismiss the felony charge on the basis of double jeopardy.

In *State v. Jenkins*, Slip Copy, 2009 WL 2144059 (Kan.App. July 17, 2009) the Court of Appeals held that the municipal

court did not have jurisdiction over the theft charge because municipal courts do not have jurisdiction over felonies. Since the court had no jurisdiction, jeopardy did not attach and the defendant could be tried in district court on the felony theft. The Court found that K.S.A. §12-4104 “does not impact the present case.” It relies on *State v. Elliott*, 281 Kan. 583 (2006) for the proposition that municipal courts do not have jurisdiction over felonies.

Editor’s Note: The Court does not explain why the exceptions to exclusive felony jurisdiction in the district court under K.S.A. §22-2601 do not apply. The amendments to K.S.A. §22-2601 and K.S.A. §12-4104 were made subsequent to State v. Elliott, 281 Kan. 583 (2006) and in response thereto. Instead, the Court bases its decision on Elliott.

STOPPING VEHICLE TO INVESTIGATE WHEREABOUTS OF SOMEONE ASSOCIATED WITH DRIVER

Unpublished Decision

Officers had a warrant for the arrest of Alex Aguirre. They went to his apartment, where they met his sisters. The sisters said he had gone back to Mexico the previous week. The officers left and talked to a maintenance worker who said he had seen Aguirre around in the last few days. As they drove around to the back of the apartment they saw Hernandez Martinez backing out of a stall next to Aguirre’s apartment. They knew Martinez was Aguirre’s cousin. One of the officers had seen Aguirre in this same car with Martinez on previous occasions. The officers forcibly stopped Martinez. He got out and started walking toward the officers. They told him to return to his car. When the officers approached the car they found Aguirre lying down, hiding in the back seat. Martinez was charged with aiding and abetting a felon and obstruction of justice.

In *State v. Martinez*, Slip Copy, 2009 WL 2143991 (Kan. App. July 17, 2009), the issue was whether or not the officers had a reasonable and articulable suspicion to stop Martinez. A majority found that they did. They found that given Aguirre’s prior association with Hernandez and the lies told by the sisters, officers had a reasonable suspicion that Aguirre was in the car and that Martinez was committing a crime by concealing him.

Judge Buser dissented. He pointed to facts and testimony that the officers were stopping the car to see if Martinez knew anything about Aguirre’s whereabouts. They did not have any reason to believe Aguirre, a juvenile, was actually hiding in the car. Because that was the only reason they stopped the car, they lacked sufficient basis for the stop, opined Judge Buser. Officers cannot stop a car merely because someone associated with the car has a warrant. An individual’s association with the car must be more particularized. The information about Aguirre being in the car with Martinez on prior occasions was stale and insignificant, he argued.

(Continued on page 26)

Unpublished Decisions

(Continued from page 25)

**SUFFICIENCY OF EVIDENCE FOR
TRANSPORTING AN OPEN CONTAINER CHARGE;
VOLUNTARY INTOXICATION NOT
A DEFENSE TO DISORDERLY CONDUCT**
Unpublished Decision

Eugene Fuller was so intoxicated that when the gas pump showed he put in 10 gallons, he thought it meant he only owed \$10 and he became belligerent with the attendant when she tried to explain his error. After he stumbled out the door, she called the police, who eventually stopped him for suspicion of DUI based on the attendant's report. Fuller admitted drinking and failed all the field sobriety tests. He was arrested for DUI and taken to the station. A search of his car revealed a bottle labeled "Barton Vodka." The officer photographed it, opened it, and smelled its contents which he believed to be vodka. The bottle was approximately 1/4 full and not sealed. The officer placed his PBT in the bottle and it registered for alcohol.

Fuller first argued that the evidence of the PBT results on the bottle were inadmissible. Since the PBT is a scientific test, he argued, a proper foundation must be laid for its admission. In *State v. Fuller*, Slip Copy, 2009 WL 2242442 (Kan. App. July 24, 2009), the Court of Appeals opined that "*While the admissibility of [the officer's] statements regarding his use of the PBT to test the contents of the vodka bottle may be problematic under Frye's foundational requirements,*" Fuller failed to object at trial, therefore the issue was not preserved for appeal.

Fuller then argued that the prosecution failed to establish that the bottle labeled Barton Vodka that was found in the vehicle actually contained vodka. The Court of Appeals disagreed.

"In addition to the label itself, the photo of the bottle showed that the seal to the bottle had been broken and that the bottle was approximately 1/4 full of liquid. Further Sheriff Rine testified the bottle smelled of vodka. Viewing the evidence in the light most favorable to the State, we conclude ample circumstantial evidence supported Fuller's conviction for transporting an alcoholic beverage in an open container."

Fuller also became belligerent at the station was charged with disorderly conduct. He asserted that he should have been allowed to have the jury consider a voluntary intoxication instruction. The Court found that since disorderly conduct is not a specific intent crime, voluntary intoxication is not a defense, therefore no such instruction can be given.

**OFFICER SAFETY PATDOWN CAN'T EXTEND TO DRUGS
IN POCKET THAT DON'T FEEL
LIKE WEAPONS**
Unpublished Decision

Deputies James Blake Winter and Kevin Hughes were dispatched to investigate a disabled vehicle on Highway 56 in Douglas County. When they arrived, they discovered Hoadley standing next to his car, which had run out of gas.

There was an extended discussion between the three individuals in which Hoadley admitted to some alcohol consumption but passed a preliminary breath test (PBT). Eventually, lost and with no money and a dead cell phone, Hoadley agreed to let the deputies take him home.

At this point the deputies informed Hoadley that he could not ride in the patrol car unless he was patted down. Hoadley agreed. There is no dispute that everything up to this point was lawful. The patdown did not result in any weapons being found. However, officers did see a plastic baggy in one of his pockets. They reached in and pulled it out. It contained marijuana. They asked for consent to search his car. He gave it. They found paraphernalia.

In *State v. Hoadley*, Slip Copy, 2009 WL 2371029 (July 31, 2009) the Court of Appeals held that the district court properly suppressed all evidence recovered after the officer reached in Hoadley's pocket to recover the baggie of marijuana. Although he had the right to conduct a pat down, reaching in the pocket to recover a baggie that he believed contained drugs (not a weapon) impermissibly extended the scope of the officer safety search for weapons. There was no evidence that drugs were in plain view, nor was their any reliance on the "plain feel" doctrine. Hoadley's consent to the patdown search was not a general consent which would require the emptying of his pockets. Hoadley walks on all counts.

**CHARGING "OPERATION" AND "ATTEMPTED
OPERATION" IN THE ALTERNATIVE DOES NOT
REQUIRE THAT BOTH BE PROVED**
Unpublished Decision

In *City of Pittsburg v. Witty*, Slip Copy, 2009 WL 2436695 (Kan. App. August 7, 2009), the Court held that if the city charges the defendant in the alternative of "operating or attempting to operate" a vehicle while under the influence of alcohol, it is not required to prove both alternatives to obtain a conviction.

The City only presented evidence that Witty attempted to operate the vehicle. It presented no evidence that he actually drove the vehicle. The judge found him guilty of attempting to operate a vehicle under the influence of alcohol following a bench trial. There was substantial evidence to support his finding.

(Continued on page 27)

Unpublished Decisions

(Continued from page 26)

MUNICIPAL COURT CONVICTIONS WITH VALID WAIVER OF COUNSEL ORDERS ON FILE CAN BE USED FOR ENHANCEMENT PURPOSES

Unpublished Decision

Edgar Flores-Picasso was convicted of felony DUI. He challenged his two prior DUI convictions in Salina Municipal Court on the basis that the Spanish Waiver of Counsel forms that were completed were insufficient.

The Court found that although the translation was somewhat strained, the waiver of counsel forms were in substantially the same form as those suggested in *In Re Habeas Corpus Application of Gilchrist*, 238 Kan. 202 (1985), therefore the convictions could be used for enhancement purposes.

See, *State v. Flores-Picasso*, Slip Copy, 2009 WL 2436686 (Kan. App. August 7, 2009).

PROBATION REVOCATION STANDARD IS PREPONDERANCE OF THE EVIDENCE, NOT PROBABLE CAUSE

Unpublished Decision

Rolla Bailey was on probation for aggravated sexual battery. A motion to revoke his probation was filed alleging that he failed to refrain from violating the law, specifically he had been arrested and charged with aggravated indecent liberties and aggravated criminal sodomy involving his minor step-daughter in Wyandotte County. It was also alleged that he failed to complete sex offender treatment. While the revocation was pending he received additional charges in Missouri of child molestation.

Bailey testified at the revocation hearing that he was pleading not guilty to each of the pending cases. He stated he would be requesting a jury trial on all cases. The State presented no witnesses at the hearing. The trial court revoked Bailey's probation on the basis that there had been "probable cause" findings in the pending cases (as evidence by the fact, apparently, that Bailey had been bound over on the charges, although no evidence of said preliminary hearings was presented). Bailey appealed on the basis that the district court used the wrong standard by which to review the evidence and revoke his probation.

The Court of Appeals agreed. In *State v. Bailey*, Slip Copy, 2009 WL 2506265 (Kan. App. August 14, 2009), the Court held that the proper standard is a "preponderance of the evidence" in a probation revocation proceeding, not probable cause. Although the State is not required to wait for a conviction to file a revocation or for a court to revoke a proba-

tion based on crimes committed while on probation, in fact, the defendant may actually be acquitted of said crimes and still have his probation revoked. However, the State must present evidence of the crime.

The Court suggested that even presentation of the transcript of the preliminary hearing may have been sufficient. But, evidence to establish by a preponderance of the evidence that a crime was committed is necessary. The evidence necessary to bind a defendant over for trial is that evidence, viewed in the light most favorable to the State, that tends to disclose that the offense charged was committed and the defendant committed it. This is not a "preponderance of the evidence" standard.

Because the trial judge did not preside over the preliminary hearing on the new charges and because the State presented no evidence other than the probable cause findings, and the Court applied the wrong standard, the Court of Appeals remanded the case to the trial court for a new hearing.

DOUBLE JEOPARDY MAY LIE WHEN FACTS OF OFFENSE CHARGED WERE USED FOR SENTENCE ENHANCEMENT IN ANOTHER CASE

Unpublished Decision

Charles Green was driving under the influence of drugs when he hit another car and severely injured the driver. He was convicted of aggravated battery. During sentencing, the State moved for an upward durational departure. In support of an enhanced sentence, it presented evidence before the same jury of four other instances when Green had driven recklessly while under the influence of alcohol or drugs.

One of those instances was October 29, 2004, when he fled the scene of an accident after he hit another car. When he was subsequently apprehended he admitted to drinking, failed the field sobriety tests and refused the breath test.

The jury found substantial and compelling evidence that Green posed a risk of future danger to the public's safety and the judge proceeded to sentence him to an upward departure sentence (2 years more than he would have otherwise gotten).

Meanwhile, the State filed DUI charges out of the October 29, 2004 incident. Green moved to dismiss on the basis of double jeopardy. The request was denied and he was subsequently convicted of felony DUI and sentenced to 90 days in jail.

In *State v. Green*, Slip Copy, 2009 WL 2499288 (Kan. App. August 14, 2009), the Court agreed with Green and reversed his DUI conviction. It found he was subjected to double punishment for the same criminal offense.

The Court wrote:

(Continued on page 28)

Unpublished Decisions

(Continued from page 27)

“If the state had wanted to convict Green of the October 29, 2004 DUI and subject him to further criminal proceedings and punishment for that offense, then the State should have withheld the evidence of the DUI from the sentencing enhancement proceedings for the aggravated battery. . . . Because the State failed to do so, Green has been subjected to double punishment for the DUI offense.”

DEFENDANT DOES NOT PLACE HIS CREDIBILITY IN ISSUE BY MERELY TAKING THE WITNESS STAND

Unpublished Opinion

Delano Hoskins took the stand in his own defense in a criminal case. The prosecutor questioned him about a prior forgery conviction over his attorney’s objection. The prosecutor argued Hoskins’ credibility was in issue because this was a “he said/she said” case. The district judge allowed the prosecutor to inquire about his forgery conviction.

In *State v. Hoskins*, Slip Copy, 2009 WL 2499247 (Kan. App. August 14, 2009), the Kansas Court of Appeals reiterated long standing case law that the mere fact that a defendant takes the stand and describes events differently than the prosecution, does not mean that he has opened the door to credibility evidence. In fact, because the case rested entirely on whom the jury believed (the defendant or the victim), introduction of the forgery conviction was not harmless and required reversal.

INSUFFICIENT BASIS FOR TRAFFIC STOP

Unpublished Opinion

Officer in Marysville sees a truck stopped with its headlights on along the chain fence line of Orschlen’s Farm and Home Supply at 2:15 a.m.. A burglary had occurred at this same location several months earlier. Because nothing was open at this time, the officer thought the truck’s presence was unusual. He thought the occupants might be about to commit a burglary. When the truck’s driver started driving away, the officer pursued it. When he activated his emergency equipment, the truck strayed across the unmarked center line of the road. The driver did not pull over immediately. The officer could not see the driver’s license plate because the tailgate was down. The officer walked up to the truck and quickly developed probable cause for a DUI arrest.

In *City of Marysville v. Lake*, Slip Copy, 2009 WL 2595948 (Kan. App. August 21, 2009), the Court of Appeals found that the officer did not have sufficient reasonable suspicion of criminal activity to stop the truck. Although the officer clearly had a “hunch”, nothing he observed rose to the level of reasonable suspicion.

ADMISSION AT DE NOVO TRIAL OF TRANSCRIPT OF MAGISTRATE PROCEEDING

Unpublished Opinion

Following a DUI arrest, Craig Hillman took the intoxilyzer test and scored .147. A bench trial was held in front of the magistrate judge. Both the arresting officer (who read the implied consent and conducted the breath test) and his back-up testified. Hillman was found guilty. He appealed to a trial *de novo* in front of the district court.

He filed a motion to suppress arguing a lack of reasonable suspicion for the stop and failure to comply with the KDHE protocol before conducting the breath test. The arresting officer testified at the suppression hearing, but the back-up officer did not, although he was available. The State was allowed to submit a transcript of the entire proceeding before the magistrate. Hillman was convicted and appealed to the Kansas Court of Appeals arguing that admission of the transcript of the magistrate proceeding was error, because the witnesses were available.

In *State v. Hillman*, Slip Copy, 2009 WL 2762499 (Kan. App. August 28, 2009), the Court found that the district court abused its discretion in allowing a transcript of the back-up officer’s testimony to be reviewed (although the transcript of the arresting officer’s testimony was not error, because he testified before the district judge as well). However, it was harmless given his live testimony would not have changed the result.

FAILURE OF ATTORNEY TO ADVISE OF COLLATERAL CONSEQUENCE OF PAROLE REVOCATION

Unpublished Opinion

Defendant was charged in Ellis County with aggravated battery and as part of a plea agreement plead no contest to a reduced charge. Later his parole was revoked in Sedgwick County due to the Ellis County conviction. He moved to withdraw his plea in Ellis County on the basis that his attorney was ineffective for failing to notify him of the likelihood that his Sedgwick County parole would be revoked as a result of his plea in Ellis County. He also argued that the Ellis County judge should have also advised him of the collateral consequence of parole revocation.

In *Hagen v. State*, Slip Copy, 2009 WL 2762495 (Kan. App. August 28, 2009), the Kansas Court of Appeals rejected both arguments. Hagen testified that he knew he was on parole and he knew a revocation might happen, but he had hoped it would not. Thus, Hagen could not show that he would not have entered the plea if his counsel had told him about a consequence he already was aware of. Likewise, the district judge was not required to advise the defendant of collateral consequences of his plea. A judge is only required to advise a defendant of those consequences which are immediate and largely an automatic result of the guilty plea. A parole revocation is not immediate and automatic.

UNIQUE PUNISHMENT FOR NOISE OFFENDERS

Barry Manilow's "I Write the Songs" begins with the line, "I've been alive forever." For noise ordinance violators, listening to Manilow may feel like forever.

Fort Lupton, Colorado Municipal Judge Paul Sacco says his novel punishment of forcing noise violators to listen to music they don't like for one hour has cut down on the number of repeat offenders in his northwestern Colorado prairie town.

About four times a year, those who plead guilty to noise ordinance violations are required to sit in a room and listen to music from the likes of Manilow, Barney the Dinosaur, Dolly Parton, Karen Carpenter, the theme song from "All in the Family, Joni Mitchell, and The Platters' crooning "Only You"

"These people should have to listen to music they don't like," said Judge Paul Sacco.

Sacco, a part-time judge and lawyer, began the program years ago when he noticed that many of the repeat offenders simply showed up at his courtroom to pay their fine (\$95) with cash. Their parents, flanking them, actually ended up paying it most of the time.

"I just felt like a rubber-stamper," Sacco explained.



He wanted to give the offenders a dose of their own medicine - the "music immersion" sentence was born. Even if offenders want to pay a fine, he declines and sends them to his unique class.

"Most kids don't want to hear somebody like Glen Close trying to sing opera," he said.

Video of a recent class showed teenagers with long faces shifting in their seats or looking up at the ceiling.

"You can't fall asleep," said teenager Rueben Fuentes right before letting out a bit of a sigh.

Members of a garage band were at the class after playing music late at night in their backyard.

"The cop station was two blocks away," said band member Robert Mort. "People who were at the party loved it. I'm not sure the cops did."

"Too much music, too loud, too late," added band member Harrison DeRuiter.

So what does Sacco think of Barry Manilow?

"I actually don't think Manilow's too bad," he said.

Class is one hour long and offenders are not allowed to talk, eat, drink, chew gum, read or sleep.

The judge also said there have been only a few repeat offenders of the noise ordinance law since his program was instituted.

He has been issuing this type of punishment since the 1990s. Sacco said many other judges across the country have borrowed his idea in their jurisdictions.

LOST IN TRANSLATION

Is counsel just shaking his head in disbelief or sending a client secret signals? The issue arose last fall during former Alaska Sen. Ted Stevens' corruption trial. The trial judge accused a lawyer for a government witness of sending secret signals to his client while he testified. Other lawyers say this behavior, if not commonplace, is not unusual. Here's what they've seen:



THE BOB

A lawyer who doesn't want her witness to answer a question—or wants him to answer in the negative—simply shakes her head while looking down at a legal pad. The key is to avoid eye contact. Likewise unimaginatively, the Nod is used to urge an affirmative answer.



THE BLUR

A lawyer removes his glasses to get his witness to stop talking. But there's a risk when the client is not paying attention: It's a difficult move to repeat without looking ridiculous.



THE BOOT

Sometimes nothing is more effective than a good, swift kick. But this can backfire. One lawyer says his client, after a swift pop to the ankle, turned to him and said, "Stop kicking me, please."

—Stephanie Francis Ward

Reprinted from ABA Journal, February 2009

The Verdict

Fall 2009

Issue 49

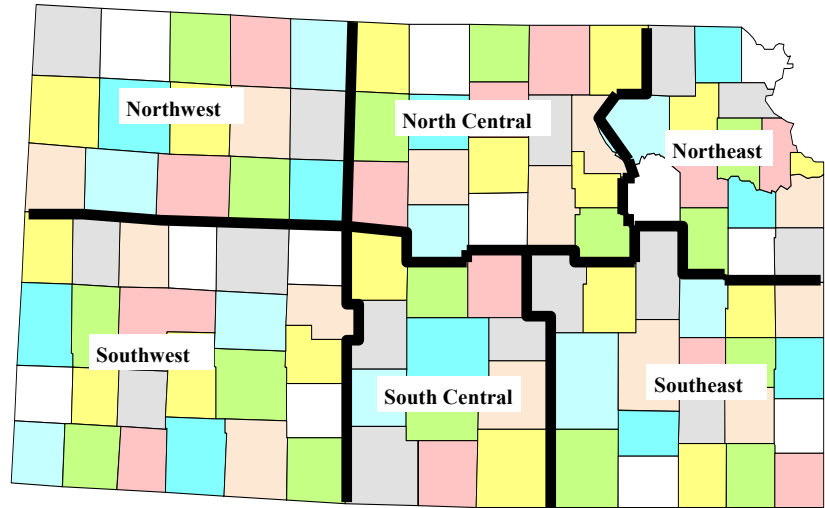
**C/O Overland Park Municipal Court
12400 Foster
Overland Park, KS 66213
(913) 327-6852 ▶ Fax-(913) 327-5701
karen.arnold-burger@opkansas.org**

All KMJA dues should be sent to:

Kay Ross
610 S.W. 9th
Plainville, KS 67663

If you have any questions, you can reach her at (785) 434-2018.

KMJA MEMBERSHIP REGIONS



Interested in serving on the KMJA Board of Directors? At the April 2010 meeting the following positions will be up for election:

- President-Elect
- Secretary
- Treasurer
- Northeast Director
- South Central Director

See map above to determine your region. Anyone interested should contact

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brenda.stoss@salina.org**

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There's room for lots of correspondents!! Please volunteer by sending in an article or idea.

The Verdict

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