The Verdict

The Official Publication of the Kansas Municipal Judges Association

Issue 47 Spring 2009

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

LEGISLATIVE UPDATES

Following is a **summary** of bills which have been signed by the Governor this legislative session that you may find interesting. This is not an exhaustive list. If there are any more with implications to municipal courts, they will be summarized in the Summer edition of *The Verdict*.

RESTRICTED DL'S FOR THOSE WHO DON'T COMPLY WITH TICKET

SB 158 authorizes the Department of Revenue to issue, in lieu of suspension, a driver's license restriction for up to one year or until there is compliance with the terms of the traffic citation. The person will make application directly to the DMV and pay a $25 fee to the DMV. If the driver fails to comply within the one year time frame, the license will be suspended by the DMV. This will not change how municipal courts handle fail to comply notices.

DUI AMENDMENTS

Senate Sub. For HB 2096 creates a DUI Commission to review Kansas DUI statues and enforcement practices and make recommendations to the legislature. It also requires the prosecutor to request and receive the DUI offender's driving record from the DMV and criminal history from the

(Continued on page 5)

A STEP BACK IN TIME

"[T]he graveman of the complaint is that, being an empiric without moral sense, and having acted according to the ethical standards of an imposter, the licensee has perfected and organized charlatanism until it is capable of preying on human weakness, ignorance, and credulity to an extent quite beyond the invention of the humble mountebank who has heretofore practiced his pretentions under the guise of practicing medicine and surgery."
Brinkley v. Hassig, 130 Kan. 874 (1930)

Dr. John R. Brinkley sued J.F. Hassig and other members of the Kansas State Board of Medical Registration and Examination for revoking his medical license under what he claimed was an unconstitutional statute. He argued his license was a property right that could not be denied without due process of law. He argued that he should have been allowed to subpoena witnesses and documents, take prehearing depositions and cross-examine witnesses. The Court found that the Board was an administrative entity and while he was entitled to a hearing before his license was revoked,

(Continued on page 22)

SPOTLIGHT ON: SHELLEY SELFRIDGE

Shelley Selfridge was raised in Dighton, Kansas. Her father was a farmer and her mother still lives on the family farm. She is the second of 6 children.

After graduating from high school in Dighton, Shelley went on to Kansas State University where she received both a bachelors and a masters degree in Home Economics and Fashion Design. Following college, she worked for Salt City Business College and worked in retail before she married and moved to Kingman, Kansas. She worked in the medical center in Kingman where she gave birth to a son. She and her husband briefly owned and operated a maternity wear manufacturing company in Kingman before Shelley and her son returned to Kingman.

Shelley got the judicial bug when she worked for the Lane County Attorney for twelve years. She was elected District Magistrate Judge for Lane County in 1997. Since Dighton and Lane County have a consolidated government, she was

(Continued on page 2)

Spotlight On: Shelley Selfridge

also appointed Dighton Municipal Judge at the same time.

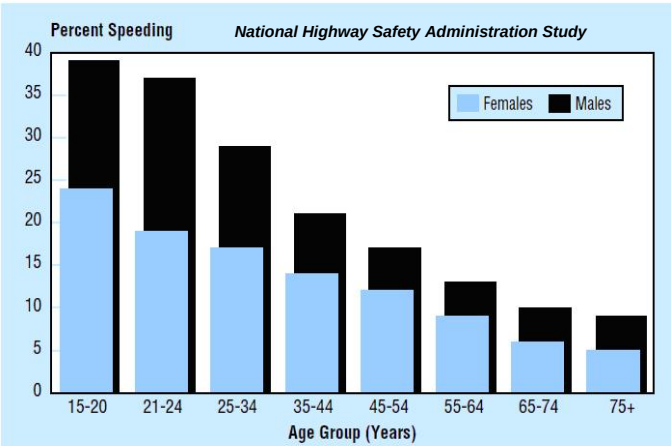
She is the caregiver for her aging mother and enjoys drawing (colored pencil art), sewing, knitting and scrap booking in her spare time. She serves on the Lane County Museum Board and the Lane County Arts Council. Her son, a welder, has inherited his mother's artistic side. He obtained a degree from the Kansas City Art Institute in metal sculpture and puts his welding skills to work in his spare time practicing his craft. He resides in New Orleans.

Dighton Municipal Court meets a minimum of two times per month. She also serves as the court clerk. She enjoys the educational component of her job as a judge. People often, in fact *usually*, don't understand the legal process and they are scared. She states that she gets the most satisfaction out of educating people about the process.

Judge Selfridge had great things to say about the KMJA:

"Oh my goodness, the KMJA Conferences are the best ones I attend! I get more education from them than any other conferences ***anywhere****, by far. The way the material is presented is always entertaining and insightful. I have noticed that the judges in attendance at the municipal judges' conference never dwindle at the end of the day or at the end of a session, like they do at the state judicial conferences. I think it is because the conference works hard at keeping the attendees attention at each and every session. They are GREAT."*

Speeding Drivers in Fatal Crashes by Age and Sex, 2007



Updates from O.J.A.

ANNOUNCING NEW JUDGES

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

-Colton Eikenberry	Scott City
-Becky Hurtig	Clearwater
-William Muret	Douglass
-Charles Pike	Great Bend
-Michael McKone	Junction City
-Peggy Alford	Ulyssess
-John Mazurek	Pittsburg
-Dale Snyder	Otis
-Duane Brown	Mulvane
-David Hensley	Baxter Springs
-Don Pruitt	Victoria
-Carissa McKenzie	Alta Vista

CONFERENCE REMINDERS

District Judges' Spring Conference
June 18-19 , 2009
Overland Park, KS

Annual Judicial Conference
October 19-20, 2009
Wichita, KS

ANNUAL CASELOAD REPORTS

Your FY 2009 Annual Caseload Report form is due in the Office of Judicial Administration by July 15, 2009. The statistics will cover the time periods of July 1, 2008 through June 30, 2009. If you have any questions regarding the report, please contact Denise Kilwein at (785) 296-2256.

JUSTICE IN KANSAS VIDEO

Published by the Kansas Supreme Court in January 2009 and hosted by chief Justice Robert E. Davis, the new "Justice in Kansas" video provides information regarding the structure and function of the Kansas Judicial Branch. Copies of the video are available upon request to teachers or anyone interested in law-related education. Contact Ron Keefover, Education and Information Officer of the Office of Judicial Administration, Topeka, (785) 296-4872 to order. The video is approximately seven (7) minutes in length. Window Media Player 9.0 or above is required. You can find it on the Kansas Courts website at http://www.kscourts.org

Our sympathy goes out to the family of Cliff "Teno" Ratner who passed away April 19, 2009. He had been battling lung cancer. Teno was the pro tem judge in Wichita since 1995, hearing the Environmental Code Docket. He served as Police Court Judge from 1973-1979.

Judicial Ethics Opinions

JE-167
March 9, 2009

A judge's spouse is a lawyer practicing in partnership with one other lawyer. The judge asks whether the lawyer who is in partnership with the judge's spouse may practice before the judge.

Canon 2, Rule 2.11(A) provides that "A judge shall disqualify himself or herself in any proceeding in which the judge's *impartiality* might reasonably be questioned…"

We are of the opinion that the judge's impartiality might reasonably be questioned in a proceeding before the judge in which a party is represented by the partner of the judge's spouse.

Canon 1, Rule 1.2 provides "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

We are also of the opinion that appearance before the judge of the judge's spouse's law partner would not promote public confidence in the *independence, integrity*, and *impartiality* of the judiciary and would result in the appearance of impropriety.

The judge is, therefore, required to disqualify in any proceeding in which the partner of the judge's spouse represents a party.

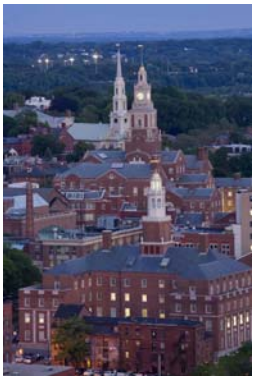
The Canons and Rules quoted above are in accordance with the Kansas Code of Judicial Conduct, Rule 601B as adopted by the Kansas Supreme Court effective March 1, 2009.

ALERT ALERT ALERT

The Kansas Supreme Court has adopted new judicial ethics rules, effective March 1, 2009. Each Kansas judge should have received a copy of the new rules.

MAKE PLANS NOW TO ATTEND THE 2009 ABA TRAFFIC COURT PROGRAM IN RHODE ISLAND OCTOBER 14-16

Traffic courts affect more citizens than any other court. That's why every year, the ABA Judicial Division Committee on Traffic Court provides traffic court judges with first-rate educational programs and resources to help improve their court operations. We are continuing that tradition this year with our 2009 Traffic Court Seminar featuring several new and exciting presentations including dealing with pro se litigants, how speed detection devices work, photo traffic enforcement, judicial ethics, racial profiling, addiction and sentencing, case flow management, dealing with teen drivers and a mock DUI trial.



The Seminar will be held in Providence, Rhode Island during the pinnacle of brilliance of the New England fall foliage. While the main reason for coming is the quality of the presentations, this year's seminar will offer opportunities to learn more about the area. An optional walking tour of historic Providence will be offered, as well as an optional tour to neighboring Newport, location of the "cottages" of the Vanderbilt and Belmont families of America's Gilded Age, the Tennis Hall of Fame, the Newport Yachting Center, and the Eisenhower House in Fort Adams.

We hope you will join judges and traffic court personnel from across the country to discuss the latest improvements in scientific evidence, technology and traffic court law.

For more information, contact ABA Judicial Division, Committee on Traffic Court, 321 N. Clark Street, 19th Floor, Chicago, IL 60610-4714 Phone: 312-988-6716; or email Gena Taylor at:

taylore@staff.abanet.org

Court Watch

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

INVENTORY SEARCH MUST BE BASED ON REASONABLE GROUNDS AND CANNOT BE A RUSE TO RUMMAGE FOR INCRIMINATING EVIDENCE

Police spotted Jason Branstetter walking out of a convenience store to his car. The officer recognized Branstetter from multiple prior contacts and knew he had warrants out for his arrest. The officer drove his patrol car to a nearby intersection and waited for Branstetter to drive out of the parking lot. There was a passenger in the car with Branstetter. Once he exited the lot, the officer stopped Branstetter solely for the outstanding warrants. It turns out the car was not registered to Branstetter. Brantstetter was placed under arrest on the warrants. Pursuant to department policy, since Branstetter was not the owner of the car, the vehicle was impounded. There were no outstanding warrants for the passenger and Branstetter was never consulted about what he wanted done with the car. The officers did not conduct a search of the vehicle incident to the arrest. Instead they conducted an inventory search later with a K-9 based on the officer's belief that "there was a good possibility that narcotics were in the vehicle." They discovered methamphetamine in the center console cupholder and behind the driver's seat. At the station, Branstetter made incriminating statements.

The issue in *State v. Branstetter*, ___Kan.App.2d___ (January 23, 2009) was whether the evidence and statements should be suppressed based on an illegal search. The Court reiterated that inventory searches of lawfully impounded vehicles, conducted pursuant to standardized policy procedures, have long been recognized as an exception to the warrant requirement. An inventory search serves three purposes: (1) the protection of the owner's property while it remains in police custody; (2) the protection of the police against claims or disputes over lost or stolen property, and (3) the protection of the police from potential danger. In order to impound a vehicle, the police must have authority by statute or ordinance, and if no such authority exists, impoundment is appropriate only if there are "reasonable grounds" for the same. In this case, there was no statute or ordinance. Instead, the police relied on an internal policy (which was never submitted for review) and "reasonable grounds.'

The Kansas Supreme Court has identified six situations giving rise to "reasonable grounds" for an inventory search.

The necessity for removing:

1. An unattended car illegally parked or otherwise illegally obstructing traffic;
2. An unattended car from the scene of an accident when the driver is physically or mentally incapable of deciding upon steps to be taken to deal with his property (to wit: intoxicated, mentally incapacitated or seriously injured);
3. A car that has been stolen or used in the commission of a crime when its retention as evidence is necessary;
4. An abandoned car;
5. A car so mechanically defective as to be a menace to others using the public highway;
6. A car impoundable pursuant to ordinance or statute which provides therefore, as in the case of forfeiture.

None of these situations applied in this case. In addition, the Supreme Court has previously held that if the owner, operator, **or person in charge** of a vehicle is readily available to make a determination as to the disposition of the vehicle, then he may do so. If the **person responsible for the vehicle** desires that the vehicle be left lawfully parked upon the streets or that it be turned over to some other person's custody, then, absent some other lawful reason for impounding the vehicle, his or her wishes must be followed. Although consultation with the driver is not the only factor to be considered in the reasonableness of an impoundment, it is an important consideration.

The police cannot rely on their unwritten policy to impound all cars when the registered owner is not present and the operator is arrested. To do so would eviscerate the "reasonable grounds" test set out in the caselaw. Therefore, the Court found the inventory search to be unreasonable and suppressed all evidence obtained and statements made. In addition, although not considered in the decision to suppress the search, the Court states that its position is further buttressed by the fact that the search was obviously a ruse for a general rummaging in order to discover incriminating evidence. The officer's stated purpose was to discover incriminating evidence and he called in the K-9 unit to help in that endeavor.

It is interesting to note that the State did not argue that this was a search incident to an arrest or was admissible based on inevitable discovery, because the officer could have searched the vehicle at the scene incident to an arrest and if he had, would have inevitably discovered the contraband in the console and behind the driver's seat. The Court noted that this was not argued.

(Continued on page 10)

Legislative Updates

(Continued from page 1)

KBI upon the filing of the complaint and notice to appear. It requires city prosecutors to forward felony DUIs to the county or district attorney for prosecution. It also toughens the penalties for third and fourth time offenders. Third time offenders would have to serve 90 days, 87 of which could be in a jail work release program where the offender returns to jail after work. Fourth time offenders must serve at least 180 days, 174 days may be on a jail work release program where the offender returns to jail after work. In addition, the district judge will be authorized to revoke the offender's license plate on a third offense (currently fourth).

MUNICIPAL JUDGE RESPONSIBILITIES UNDER THE DUI AMENDMENTS

Sen. Sub. for HB 2096 contains two requirements for municipal court judges. First, it requires the municipal judge to forward the arrest and charging information on a DUI to the KBI. The municipal judge is also required to ensure that the person arrested or charged with DUI is fingerprinted at the time of booking.

DRIVER IMPROVEMENT CLINICS

Sen. Sub. for HB 2096 also establishes driver improvement clinics throughout the state, which may be privately operated. The DMV can allow someone to keep driving privileges if they attend such a clinic. This would be entirely at the discretion of the DMV.

GRADUATED DRIVER'S LICENSES PUT IN PLACE

Sub. for HB 2143 modifies the requirements for driving permits and driver's licenses for drivers younger than 17 years old and increases the age to get a full license from 16 to 17.

Instruction Permit. The bill requires that the adult who is accompanying the holder of an instruction permit be at least 21 years old, have a valid driver's license and have one year of driving experience. (Current law does not list a specific age for the adult). The bill adds that an instruction permit can be suspended or revoked like any other driver's license. The minimum age for application for an instruction permit remains 14.

Farm Permit. A farm permit will be available from age 14 until age 17 (changed from age 16). The bill continues to allow farm permit holders to drive in connection with any farm work and to drive to and from school. The bill would allow permit holders who are 16 or older also to drive at any time from 5 a.m. to 9 p.m. and while going to or from authorized school activities.

Restricted License. An applicant for a restricted license must have held an instruction permit for at least one year, instead of the current 6 months. If the applicant is younger than 16, the applicant must have completed driver's education and show proof of 25 hours of adult supervised driving. During the succeeding year, the restricted driver must show an additional 25 hours of supervised driving. A 16-year old applicant must have completed at least 50 hours of adult-supervised driving, with 10 of those hours at night. A 15-year-old applicant would continue to be subject to a requirement for 25 hours of adult-supervised driving. The bill would allow licensees who are 16 or older also to drive at any time from 5a.m. to 9 p.m. and while going to or from authorized school activities.

Restrictions on nonsibling passengers. The bill continues to ban nonsibling minor passengers if the holder of the restricted license or farm permit is younger than 16. It would allow the holder of a farm permit or a restricted license who is at least 16 years old to have one passenger younger than 18 who is not a member of the permit holder's or licensee's immediate family.

Restrictions on use of wireless devices. Those with instruction permits, farm permits, or restricted licenses are prohibited from operating wireless communication devices while driving except to report illegal activity or to summon emergency help. "Wireless communication device" is defined as "any wireless electronic communication device that provides for voice or data communication between two or more parties."

Lifting of restrictions. The bill would lift restrictions such as limits on nonsibling passengers and time of day when driving would be allowed on holders of farm permits and restricted licenses who are at least 16 years old and who have not violated any of the restrictions for at least six months. The permit or restricted license would continue to be considered a permit or restricted license for purposes of imposing penalties.

Full licensure. Under the law, a first-time applicant would have to be at least 17 years old; current law allows full licensure at 16. The applicant for a full license who is younger than 18 must have completed at least 50 hours of supervised driving, with 10 of those hours at night, as in current law.

Penalties. The bill makes several changes to penalties for violations of driving restrictions:

- The bill requires – rather than "allows" as in current law – suspension of a farm permit or restricted license for any violation of restrictions or if the holder has two or more accidents chargeable to the holder.

- A suspended restricted license or farm permit could not be reinstated for one year if two or more accidents are charged

(Continued on page 6)

Legislative Updates

(Continued from page 5)

to the holder. Current law stipulates that it cannot be reinstated for one year or until the license holder reaches 16, whichever is longer.

●Under current law, the holder who is younger than 16 and convicted of two moving violations committed on separate occasions is not eligible to receive an unrestricted license until age 17. The new law provides that if the holder of a farm permit or restricted license is 16 and convicted of two or more moving violations committed on separate occasions, the holder may not receive a driver's license that is not restricted until age 18.

●The new law requires suspensions of driving privileges for those guilty of violating permit or license restrictions: 30 days for a first conviction, 90 days for a second conviction, and one year for a third or subsequent conviction.

Effective date. The law becomes effective January 1, 2010.

Continuation of current requirements. The law applies the conditions, limitations, and restrictions in place as of December 31, 2009, to those who hold any valid driver's license or permit as of January 1, 2010.

AMENDING AND REORGANIZING DRUG CRIMES UNDER THE CRIMINAL CODE

HB 2236 moves the drug crimes from the Public Health Chapter (65) to the Crimes and Punishments chapter (21)of the Kansas Statutes Annotated. This bill is the product of the Kansas Criminal Code Recodification Commission, which was created by the 2007 Legislature.

It also contains some new provisions:

●A list of definitions that pulls definitions from various sections of Chapter 65 and puts them all in one place.

●All costs and expenses resulting from the seizure, disposition and decontamination of an unlawful drug manufacturing site shall be assessed against the defendant.

●A separate crime has been established for using any communication facility (defined as including cell phones, beepers, pagers, and computers) to commit, cause or facilitate a drug crime.

●The prosecuting attorney is required to notify the Board of Pharmacy of the initiation of a drug prosecution for a controlled substance analog so that the Board may collect the data to recommend to the Legislature whether the controlled substance analog should or should not be scheduled;

●New Section 17 of the bill is a "uniformity" provision, that prohibits any city from enacting or enforcing any ordinance in conflict with, in addition to, or supplemental to the listed provisions. The provisions listed are K.S.A. §21-2501a(c) *(reporting requirements regarding drug labs);* K.S.A. §65-1643(k) and (l) *(regarding sales in pharmacies)*; K.S.A. §65-4113(e),(f) and (g) (*regarding compounds generally used to make meth*); and the provisions in the newly adopted laws dealing with the requirement that bail for listed drug violations must be at least $50,000 cash or surety unless the court determines on the record that the defendant is not likely to reoffend, or the court imposes pretrial supervision, or the defendant enters into a treatment program.

PAY CHILD SUPPORT OR LOSE YOUR PROFESSIONAL LICENSE, INCLUDING YOUR LAW LICENSE

When a person who holds **any kind of professional license or certification** in this state owes past due child support equal to or greater than three months of child support and has failed, after reasonable opportunity, to comply with any payment plan, HB 2201 mandates that **the court** order notice

(Continued on page 7)

"Self-represented litigants generally pose more questions and make more procedural errors than litigants represented by an attorney. Judges of the district courts, as well as our court clerks, spend additional time assisting these individuals in filing, processing, and understanding their cases. The issue becomes more complex when one considers the fact that clerks of the district court are not attorneys. They are prohibited from providing legal advice to self-represented litigants. Judges, who are neutral fact-finders, also are limited in the advice and guidance they can provide.

These and other issues led the Kansas Supreme Court to create the Self-Represented Study Committee in 2007. With a membership that includes judges, attorneys, court administrators, and clerks of the district court, this committee has been working hard to provide insight and to seek improvements that will benefit self-represented litigants. The intent of this committee's work is not to marginalize or do away with the need for attorneys, but to make better use of limited resources for everyone involved in the system. We are committed to providing self-represented litigants more and easier access to our trial courts."

Chief Justice Robert Davis, Kansas Supreme Court; State of the Judiciary Speech to the Legislature, February, 2009

Legislative Updates

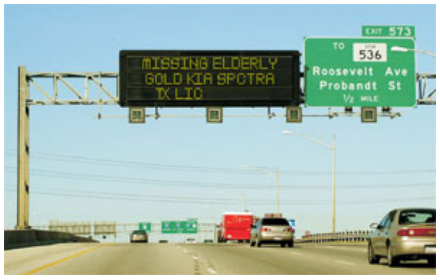
(Continued from page 6)

sent to the support debtor's licensing body. In the case of an attorney, **the court** is required to file a complaint with the disciplinary administrator in this state and/or any other state in which the attorney is licensed.

Once the licensing body gets notice, it must notify the support debtor within 30 days that it will suspend or withhold issuance or renewal of debtor's license. It can then issue a temporary license that is good for up to 6 months to give the debtor a chance to comply. The sixth months can be extended an additional 30 days upon a showing of extreme hardship. The licensing body has no jurisdiction over anything related to the debt. Upon compliance, the license would be reinstated or renewed.

SILVER ALERT PLAN ADOPTED

SB 148 established a Silver Alert Plan which is basically an Amber Alert for the elderly. Under the plan, public notice of a missing elderly person may be promptly broadcast and a search may be timely undertaken with the cooperation of local law enforcement, news media and the general public in order to locate such person to time to avoid serious harm or death.



UNLAWFUL HOSTING MINORS EXPANDED TO INCLUDE "RECKLESSLY" PERMITING UNDERAGE CONSUMPTION OR POSSESSION

HB 2165 expands the social hosting law (K.S.A. §21-3610c) to define unlawful hosting as intentionally or ***recklessly*** permitting a person's residence or any property owned by them to be used by an invitee of the person or the person's child in a manner that results in the possession or consumption therein of alcohol by a minor.

It also contains an exemption from civil liability for any lodging establishment (hotel).

EXPANSION OF SCRAP METAL REGULATIONS

SB 237 makes numerous changes to the regulations regarding scrap metal. It includes junked vehicles and vehicle parts in the definition of scrap metal. It makes it unlawful to sell regulated scrap metal unless the seller provides to the dealer (or agent) the seller's sex, date of birth, an identifying number from an official U.S. government document, and a legible fingerprint. This bill makes extensive changes and imposes numerous regulations on the sale and purchase of scrap metal. Those interested are encouraged to read the entire bill.

Editor's Note: *This will require comparable amendments be made to POC §6.24 and §6.25 or similar city ordinances.*

CODE TRAINING FOR PLUMBERS, HEATING AND AIR CONDITIONING MECHANICS AND ELECTRICIANS

HB 2142 requires that plumbers, heating and air conditioning mechanics and electricians receive at least 6 hours of training every two years relative to construction, maintenance and code update training.

FIRE FIGHTER POWERS EXPANDED

SB 115 amends K.S.A. §31-145 to allow fire fighters to take necessary action to prohibit people from interfering with them in the performance of their duties and allows them to temporarily blockade any highway while discharging their duties. The prior law had only allowed them to block a highway when actually fighting a fire.

COMMUNITY CORRECTION ADVISORY BOARDS MAY HAVE UP TO 15 MEMBERS

HB 2232 amends current law to increase the maximum number of members on the corrections advisory board to 15 people (and increase of 3 members). Additionally, the board of county commissioners will now be authorized to appoint up to six members to the board. Currently, they are able to appoint a maximum of three members.

DISTRICT COURT PRE-TRIAL CONDITIONAL RELEASE SUPERVISION FEES INCREASED TO $15 PER WEEK

HB 2207 amends K.S.A. 22-2802(15) to increase the fees for pre-trial supervised release under the conditions of an appearance bond from $10 to $15 per week.

DEALER-HAULER FULL-PRIVILEGE TRAILER LICENSE PLATE ESTABLISHED

HB 2188 establishes a dealer-hauler full-privilege trailer license plate for trailer dealers and manufacturers This basically mirrors the requirements for a regular full-privilege dealer plate.

ANTIQUE CARS CAN DISPLAY REPLICA CITY-ISSUED PLATES

SB 123 amends K.S.A. §8-172 to allow antique cars to display a reproduction of a license plate originally issued by a

(Continued on page 8)

Legislative Updates

(Continued from page 7)

Kansas city The state will issue the number to be assigned to the plate.

LICENSED PRIVATE DETECTIVES AUTHORIZED TO SERVE PROCESS

K.S.A. §60-303 and K.S.A. §61-3003 were amended by HB 2311 to allow licensed private detectives to serve process anywhere in or out of state (along with process servers and attorneys).

EDUCATIONAL INSTITUTIONS CAN INSPECT THEIR OWN BUILDINGS FOR COMPLIANCE WITH STATE FIRE REGULATIONS

SB 187 allows the state fire marshal and any state educational institution to enter into agreement under which employees of the state educational institution are commissioned by the state fire marshal to inspect buildings.

DIRECTOR OF VEHICLES AUTHORIZED TO CANCEL REGISTRATION WHEN NOTIFIED BY KCC THAT MOTOR CARRIER'S ABILITY TO OPERATE IN THE STATE IS CANCELLED

HB 2023 allows the director of vehicles to revoke, suspend, cancel, retrieve license plate or refuse to issue or renew a registration certificate upon receipt of notice from the Kansas Corporation Commission that an intrastate carrier's ability to operate has been terminated or denied. The director can request assistance from law enforcement to carry out this duty and officers are required to assist when requested.

DRIVERS REQUIRED TO REMOVE DISABLED VEHICLES FROM THE ROADWAY

A new statute was adopted by HB 2147 requiring the driver of a vehicle which obstructs the flow of traffic on any multilane or divided road or any highway to move the vehicle from the roadway if it can be done safely and without further damage to the vehicle or without endangering other vehicles or persons. It also allows law enforcement or KDOT employees to do the same. It exempts accidents involving death or injury from this requirement, as well as accidents involving hazardous materials. State, county and municipal agencies and their employees and agents are exempted from liability for said removal.

Editor's note: *This will in all likelihood be added to the STO as well as minor related amendments to STO §§24 and 26.*

MODIFYING THE WOMAN'S RIGHT-TO-KNOW ACT

SB 238 modifies the Woman's Right-to-Know Act by requiring physicians who utilize sonogram equipment in connection with an abortion procedure to inform the woman that she has the right to view the ultrasound image. It also requires physicians who utilize heart monitor equipment in connection with an abortion procedure to inform the woman she has the right to hear the fetal heartbeat. Finally, SB 238 requires facilities in which abortions are performed to post certain notices, and requires KDHE to make information regarding fetal development available in printed, electronic and video format.

"INTERACTIVE COMMUNICATIONS" IN A SERIES REQUIRED TO BE OPEN

SB 135 amends the open records act to state that *"interactive communications in a series"* are open pursuant to the open meetings act if they collectively involve a majority of the membership of the body or agency, share a common topic of discussion concerning business or affairs of the body or agency, and are intended by any or all of the participants to reach agreement on a matter that would require binding action to be taken by the body or agency. The prior language used the term *"meetings in a series."* This would seem to make telephone calls, emails, and texts all subject to the open meetings act if the stated conditions are met.

The statute (K.S.A. 2008 Supp. §75-4318(f)) continues to contain an exception "as provided in section 22 of Article 2" of the Kansas constitution. It is unclear what this exception means. Article II, Section 22 of the Kansas Constitution simply says "*For any speech, written document, or debate in either house, the members shall not be questioned elsewhere."*

PROCEEDS DERIVED FROM DRUG CRIMES IN OTHER STATES

HB 2059 amends the crime of receiving or acquiring proceeds derived from a violation of the Uniform Controlled Substance Act (UCSA) (K.S.A. §65-4142) to include proceeds derived from violations of similar offenses from another jurisdiction. Current law only makes it illegal to receive or acquire proceeds derived from violations of the Kansas UCSA rather than from any jurisdiction.

EXPANSION OF RAPE SHIELD LAW AND CLARIFICATION OF ELECTRONIC SOLICITATION

HB 2098 amends what is commonly referred to as the "Rape Shield" law. The bill adds aggravated trafficking and electronic solicitation to the list of crimes in which evidence of the complaining witness' previous sexual conduct with any person, including the defendant, would not be admissible or referenced during the trial unless the defendant files a written motion to the court to admit the evidence and the

(Continued on page 9)

Legislative Updates

(Continued from page 8)

court rules the evidence is relevant. The bill also amends current law concerning electronic solicitation. It clarifies that enticing a person whom the offender believes to be a child 14 or more years of age but less than 16 years of age for an unlawful sexual act would be a severity level 3 person felony.

APPEAL BY THE PROSECUTION

A criminal defendant is discharged from further liability if not promptly brought to trial. (KSA §22-3402) The law provides for certain circumstances to toll, or stop, the time counted for speedy trial purposes. KSA §22-3604 tolls the time during the pendency of an appeal by the prosecution for speedy trial purposes.

HB 2233 amends current law regarding appeals by the prosecution to clarify the term "an appeal by the prosecution." The term would include appeals, interlocutory appeals, and appeals that seek discretionary review in the Kansas Supreme Court or the United States Supreme Court.

WITHDRAWAL OF A GUILTY OR NO CONTEST PLEA

HB 2233 also amends the statute on withdrawal of a guilty or no contest plea after a sentence has been imposed (K.S.A. §22-3210). The amendment places a limitation of one year from the final order of the last appellate court in order to make such a motion. The time can be extended by the court upon an additional, affirmative showing of excusable neglect by the defendant.

SELECTION OF ALTERNATE JURORS

Finally, HB 2233 amends current law (K.S.A. §22-3412) to authorize selection of one or more alternate jurors in a criminal case to be selected at the same time as the regular jury is being selected. Under current law, the alternate juror or jurors are selected after the regular jury has been empaneled and sworn. The bill would leave it to the discretion of the judge to decide whether the alternate juror or jurors are selected at the same time as the regular jury or after the regular jury has been empanelled and sworn.

STATE MINIMUM WAGE

SB 160 increases the state's minimum wage for $2.65 an hour to $7.25 per hour. The wage increase takes effect January 1, 2010. The bill exempts employees and employers covered under the federal Fair Labor Standards Act.

KELSEY SMITH ACT

Senate Sub. For HB 2126 enacts the Kelsey Smith Act which requires wireless telecommunications carriers to provided information about the location of the telecommunications device of a user of the carriers' services, if requested by a law enforcement agency in order to respond to a call for emergency services or to respond to an emergency situation that involves risk of death or serious physical harm. The KBI is to maintain a list of all the contact information for wireless carriers doing business in Kansas.

PLACEMENT OF SEXUALLY VIOLENT PREDATORS

SB 237 contains a provision whereby no more than eight sexually violent predators may be placed in any one county on transitional release or conditional release. The Secretary of SRS is required to issue an annual report to the Governor and Legislature detailing activities regarding these placements including the total number of such predators and the location of placement.

CEREAL MALT BEVERAGE ACT

SB 53 makes changes in the CMB Act by allowing a county or city certain discretion on whether to issue, revoke, or suspend a retail CMB license to any person, partnership or corporation if any member or stockholder of such entity owns or has owned a 25% aggregate of stock in such corporation and has had a prior retailer's license revoked or has been convicted of a violation of the club and drinking establishment act or the CMB laws of Kansas.

TRAFFIC IN CONTRABAND

SB 237 adds "care and treatment facility" to the facilities (generally correctional institutions) where contraband is illegal. It defines "care and treatment facility" to mean a facility operated by SRS for the purpose of care and treatment of involuntarily committed sexually violent predators. It provides an exception for those authorized to carry firearms to allow same in the parking lot.

KANSAS POWER OF ATTORNEY ACT

SB 45 amends the Kansas Power of Attorney act (K.S.A. §58-652) to authorize the a principal, who is physically unable to sign the power of attorney document but is otherwise competent and conscious, to appoint a designated adult to sign. This signing must be done in front of a notary and the principal must express the desire to have the person sign in front of the notary. It further requires an attorney in fact, acting under a power of attorney, to keep records of all receipts, disbursements and transactions made on behalf of the principal and not comingle funds. Finally, it authorizes a procedure for the voluntary resignation of the attorney in fact.

ALL-TERRAIN VEHICLE AND IMPLEMENTS OF HUSBANDRY—DEFINITONS

SB 275 amends the definition of "nonhighway vehicle" to

(Continued on page 41)

Court Watch

(Continued from page 4)

NO LONGER MATTERS WHAT ORDER JUDGE TAKES UP ANALYSIS OF QUALIFIED IMMUNITY FOR POLICE; DOCTRINE OF "CONSENT-ONCE-REMOVED" DOES NOT APPLY TO INFORMANTS IN KANSAS

Brian Bartholomew was an informant for the Utah Narcotics Task Force. He told officers that he had arranged to buy methamphetamine from Afton Callahan later that day. The officers wired Bartholomew, gave him marked money and stood by as he went to Callahan's residence to complete the purchase. Callahan's daughter opened the door and let Bartholomew inside. Callahan got the meth from his freezer and sold Bartholomew a gram for $100. Bartholomew gave the arrest signal to the officers who were monitoring the conversation and they converged on the house and entered through a porch door. As a result, Callahan was charged with possession and distribution of methamphetamine.

Officers can only enter a home without a warrant based on consent or exigent circumstances. The Utah Supreme Court eventually found that the police had neither in this case and vacated Callahan's conviction. Callahan then sued the police under 42 U.S.C. §1983 for violation of his constitutional rights. In *Saucier v. Katz*, 533 U.S. 194 (2001) the U.S. Supreme Court found that courts must go through a two step analysis in determining whether police officers are immune from civil liability in these situations. First, a court must decide whether the facts that the plaintiff alleges establishes a violation of a constitutional right. Second, it the plaintiff has satisfied the first step, the court must decide whether the right at issue was "clearly established" at the time of the officer's alleged misconduct. The court must conduct each step sequentially.

The Tenth Circuit found that the officers were not entitled to immunity. The police had relied on the doctrine of "consent-once-removed." This doctrine, which many district and appellate courts have adopted, permits a warrantless entry by police officers into a home when consent to enter has already been granted to an undercover officer who has observed contraband in plain view. The Tenth Circuit, which had not been confronted with this issue before, found that this doctrine applied only to undercover officers, not informants and that cases from other jurisdictions that had held otherwise had improperly expanded the doctrine. It found the officers could not have reasonably relied on the fact that consent extended to informants. Therefore, they were not entitled to qualified immunity and the suit would be allowed to proceed.

In *Pearson v. Callahan*, ___U.S.____(January 21, 2009) the U.S. Supreme Court found that requiring courts to analyze these cases based on the order set out in *Saucier* was not necessary and overruled *Saucier* to the extent that it so required. To require that a court first decide if there was a constitutional violation requires courts to engage in an activity that may turn out to be purely academic at great cost to the efficient use of judicial resources. There are far more cases where it is plain that a constitutional right is not clearly established, negating the need to go through an in depth constitutional analysis. The whole idea of immunity is to avoid unnecessary time and resources in defending litigation. The *Saucier* steps should still be examined, but the courts are allowed to confront them in whatever order it wants. If it is found that the issue of constitutionality was not clearly established at the time, the court does not have to delve into the right "constitutional" answer.

The Supreme Court went on to reverse the Tenth Circuit in this case and found that at the time of this seizure, the "consent-once-removed" doctrine had gained general acceptance in lower courts. Several cases had extended its application to informants as well as undercover police officers. In fact, up until the Tenth Circuit decided this case, no court had held that it did not apply to informants. The officers were entitled to rely on those cases without facing personal liability for their actions. The Court didn't have to address the issue of whether or not the rule applied to informants. The fact that the police were reasonable in relying on the existing caselaw (or lack thereof) on the topic was sufficient.

As a final note, although the Supreme Court did not answer the undercover officer v. informant issue, it is **now** clear that the Tenth Circuit does not expand "consent-once-removed" to informants. Therefore, until the U.S. Supreme Court says otherwise, that is the federal rule of law in the 10th Circuit.

THE RIGHT TO SELF-REPRESENTATION AT PRELIMINARY HEARING IS SUBJECT TO A HARMLESS ERROR ANALYSIS

Prior to preliminary hearing, Alfonzal Jones advised the court that he wanted to represent himself. The district judge denied the motion and appointed an attorney to represent him. The Court did not conduct an extensive hearing to make this determination, but based it primarily on its observations of the defendant. By the time the case came for pre-trial motions another judge conducted an extensive discussion with Jones about self-representation at trial and after initially insisting on representing himself, Jones ultimately agreed that he wanted the court-appointed attorney to represent him at trial. He was convicted. On appeal he argued that the court violated his rights under the Sixth and Fourteenth Amendments by summarily denying his motion to represent himself at the preliminary hearing.

In *State v. Jones*, ___Kan.App.2d___(January 23, 2009), the Court held that although the district court did not conduct a sufficient inquiry before denying his right to repre-

(Continued on page 11)

Court Watch

(Continued from page 10)

sent himself (in that it did not inform him on the record of the dangers and disadvantages of self-representation), the denial of the right to self-representation at a preliminary hearing that does not affect the criminal defendant's trial, conviction, or structural integrity of the criminal proceedings is subject to a harmless error analysis. In this case, the denial was harmless. It found that Jones had clearly expressed his desire to waive his right to counsel at preliminary hearing and the district court had violated his right to self-representation by requiring him to be represented by counsel. However, this had no effect on the outcome of his trial, nor did he argue that it did.

The Court pointed out that the U.S. Supreme Court has made it clear that the right to self-representation **at trial** is either respected or denied. And the denial, cannot be found to be harmless. Recognizing that a conviction is more likely where the right to self-representation is respected, the question of whether the defendant suffered prejudice where the right was violated is irrelevant. The defendant has the right to represent himself at trial, regardless of the consequences of that choice. However, preliminary hearings are a different animal. The general rule has always been that any error at the preliminary hearing stage is harmless unless it appears that the error caused prejudice at trial.

OFFICER MAY FRISK PASSENGERS ON TRAFFIC STOP AS LONG AS IT DOES NOT MEASURABLY EXTEND THE DURATION OF THE STOP AND OFFICER HAS REASON TO BELIEVE PASSENGER MAY BE ARMED AND DANGEROUS

Officers were on patrol in Tucson, Arizona in an area associated with the Crips gang. They pulled over a vehicle for a tag violation. The vehicle had three occupants. The officers had no reason to suspect anyone in the car of criminal activity. Three officers approached the vehicle and ordered everyone to keep their hands visible. The occupants indicated that there were no guns in the car. The driver was asked to exit the vehicle. The officers noticed that the back seat passenger, Johnson, who was still seated in the vehicle, kept looking back at the officers. He was dressed in traditional "Crips" clothing. He had a police scanner clearly visible in his jacket pocket. In response to questioning from one of the officers he identified himself but said he had no identification on him. The area he said he was from was known as being the home to a Crips gang. He advised the officers that he had served time in prison and had been out for about a year.

One officer decided she wanted to question Johnson further away from the others in order to *"gain intelligence about the gang he might be in."* While the stopping officer was questioning the driver and dealing with the traffic citation, she asked Johnson to get out of the car. *"Based on her observations and his answers to questions she suspected he might have a weapon on him"* so she patted him down for officer safety. Turns out he had a gun. He was charged with being a felon in possession of a weapon. He moved to suppress on the basis of an illegal search.

In a unanimous decision, authored by Justice Ginsburg, the United States Supreme Court opined in *Arizona v. Johnson*, ___U.S. ___ (January 26, 2009), that traffic stops are especially fraught with danger to police officers. The risk of harm to both police and vehicle occupants is minimized if the officers routinely exercise unquestioned command of the situation. Officers may order the driver to get out of the car, as well as the passengers pending the completion of the stop. A passenger is seized, just as the driver is, from the moment the car is stopped. The temporary seizure of the driver and passengers continues, and remains reasonable, for the duration of a stop. Normally the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. **The officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as the inquiries do not measurably extend the duration of the stop.**

"Nothing occurred in this case that would have conveyed to Johnson that, prior to the frisk, the traffic stop had ended or that he was otherwise free to depart without police permission." The officer was *"surely not constitutionally required to give Johnson an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her."*

It is important to note that the Supreme Court accepted the lower court's assumption that the officer had reasonable suspicion that Johnson was armed and dangerous. However it did *"not foreclose the appeals court's consideration of that issue on remand."*

Editor's Note: *This does seem to be in conflict with current Kansas case law. See, for example,* State v. Smith, *286 Kan. 402 (2008). The Court can always find that the Kansas constitution provides more protection than the federal one. So, stay tuned. See, page 19, supra.*

REMOVAL OF THEFT DETECTION DEVICE REQUIRES KNOWLEDGE THAT THE DEVICE IS ON THE MERCHANDISE; DEATH OF DEFENDANT AFTER FILING NOTICE OF APPEAL DOES NOT ABATE THE APPEAL

Paul Davison placed a large quantity of DVDs in his cart at Wal-Mart. He then took the DVD discs from the packages and put them in his pocket. The packages contained theft detection devices. He left the empty DVD packages with the detection devices still in them on a shelf in a different part of the store. Davison was charged with one count of theft and one count of removal of a theft detection device. At trial,

(Continued on page 12)

Court Watch

(Continued from page 11)

Davison admitted stealing the DVDs and removing the discs from their cases in order to facilitate an easier theft from the store. However, he denied any knowledge that the DVD cases contained theft detection devices or that he intentionally removed the theft detection devices.

In *Davison v. State*, ___Kan.App.2d ___(January 30, 2009), the Kansas Court of Appeals found that that the PIK instruction used, PIK Crim. 3d 59.67-B, was clearly erroneous because it did not require that the State prove that the defendant knowingly removed the device. The instruction has now been changed. Davison's conviction was reversed.

Interestingly, Davison died while his appeal was pending. The Court found that the defendant's death did not deprive the court of jurisdiction to hear his appeal. Even if the defendant's death moots the sentence and renders a new trial impossible, it is in the interest of the public that issues raised on appeal be adjudicated on the merits.

SPEEDY TRIAL CAN BE TOLLED IF DEFENSE COUNSEL "ACQUIESCES IN" THE GRANT OF A CONTINUANCE; ACQUIESCENCE FURTHER DEFINED; JUDICIAL PROCRASTINATION IS NOT TO BE CHARGED TO THE DEFENDANT

During an official misconduct case in Wyandotte County, the case was repeatedly continued due to the recusal of numerous Wyandotte County judges and the illness of the senior judge who was ultimately assigned to the case. A total of 269 days passed between the date of arraignment and the scheduled trial date. K.S.A. 22-3402(2) provides:

"If any person charged with a crime and held to answer on an appearance bond shall not be brought to trail within 180 days after arraignment on the charge, such person shall be entitled to discharged from further liability to be tried for the crime charged, unless the delay shall happen as a result of application or fault of the defendant."

In *State v. Vaughn*, ___Kan. ___(January 30, 2009), the Supreme Court reiterated prior caselaw which held that a defendant's waiver of the right to a speedy trail extends not only to a defendant's request for a continuance but also is effected by a defendant's *"acquiescing in the grant of a continuance."* It went on to state (citations omitted):

"While the term 'acquiescence' does not appear in Kansas' speedy trial statute, our previous decisions have indicated that when a defendant acquiesces to a continuance, that defendant wais his or her [statutory speedy trial rights]… Black's Law Dictionary…defines 'acquiescence' as '[a] person's tacit or passive acceptance; implied consent to an act.' In Kansas, however, we have never held that passive acceptance of a continuance waives a defendant's speedy trial rights…Such a notion is inconsistent with our decisions hold that a defendant is not required to take any affirmative action to see that his or her right to a speedy trial is observed."

It made clear that "silence" is not acquiescence. The record must support a conclusion that the defendant expressly or impliedly agreed to the delay.

In addition, although generally time necessary for the court to rule on motions filed by a defendant toward the end of the statutory speedy trial periods are charged to the defendant, procrastination by the judge will not be charged to the defendant. Although judges are allowed a "reasonable" time to rule on motions, in this case the Court found the 207 days (7 months) the judge took to rule in this case to be presumptively unreasonable. *"Judicial procrastination is not the defendant's fault and should not be charged to him."* Likewise, judicial illness does not toll the running of the speedy trial clock, unless defense counsel "acquiesces" in the continuances due to illness.

The Court ended up sending the case back to the trial court to determine if the pivotal delay in the case, which was due to the judge's illness, was "acquiesced to" by defense counsel.

The Court was faced with a similar issue a few weeks later in *State v. Miller*, Slip Copy, *unpublished*, 2009 WL 400998 (Kan. App. February 13, 2009) where the delay was caused due to the judge's maternity leave. The Court held that the delay counted against the State, not the defendant and dismissed the charges based on a denial of the right to a speedy trial. The issue of acquiescence was not discussed in *Miller*.

Editor's Note: *Query if defense counsel would feel comfortable objecting on the record to such a continuance, particularly if the "ill" judge would remain the judge on the case. Wouldn't this be "coerced acquiescence?" It would seem wise for judges in this situation to provide the parties with an alternative to the continuance, for example calling in a pro tem judge to handle the case and thereby sticking to the appropriate time table. Given alternatives, the parties may then knowingly and intelligently elect to "acquiesce" in the continuance.*

SEQUESTRATION OF WITNESSES

Earl Brinklow was charged in 2005 with allegedly sexually abusing his step-daughter in 2001. The step-daughter had made the allegations in 2001 but she claimed she had been told by her mother to recant them to avoid embarrassment. Prior to the commencement of trial, Brinklow moved to sequester the witnesses. He did not want the step-daughter and ex-wife to be able to tailor their testimony to fit each other, the sole problem that sequestration is meant to address. During a pretrial conference, defense counsel had advised the

(Continued on page 13)

Court Watch

(Continued from page 12)

court that part of the defense strategy was to establish that the mother had a great deal of influence over the daughter and that they were acting together to make false accusations. In addition, another witness that the prosecutor was going to call was claiming to be present during the initial reporting in 2001, although the police report did not indicate she was present. Brinklow wanted her sequestered so he could test her knowledge of what transpired that night in an effort to challenge the fact that she was even present. The prosecutor objected to sequestration and the district judge erroneously opined that in the absence of the agreement of both parties to the sequestration, he could not grant the motion. Therefore, the witnesses were not sequestered.

The mother was present during her daughter's testimony. When the mother took the stand, the prosecutor simply asked, "Did she tell you, or describe for you the same thing she testified to earlier today?" The mother responded, "Yes." Therefore, as Justice Johnson pointed out in his opinion in *State v. Brinklow*, ___Kan. ___(January 30, 2009):

"The mother did not merely tailor her testimony to match that of A.C.; the mother adopted A.C's testimony by reference…One would be hard-pressed to conceive of a more direct example of one witness tailoring her testimony to that of another witness."

In addition, the defendant was prevented from effectively challenging the presence of the other witness because she had been allowed to sit through the trial and hear the testimony of the step-daughter and ex-wife prior to testifying.

The refusal of the district judge to sequester witnesses was clearly erroneous. The Court could not find that this did not effect the outcome of the trial, so it reversed and remanded for a new trial. (There were also several other errors committed by the prosecutor in closing statements, so the Court also cites a 'cumulative effect").

CONDITION OF PROBATION ALLOWING OFFICERS TO CONDUCT RANDOM SUSPICIONLESS SEARCHES OF PROBATIONERS VIOLATES THE FOURTH AMENDMENT

Nicholas Bennett was granted probation on a possession of drugs case. As a condition of his probation, Bennett was required to submit to random searches without probable cause or further court order. He filed an objection to this condition, arguing that it violated his Fourth Amendment right to be free from unreasonable searches. He argued that at a minimum any search would have to be supported by reasonable suspicion.

In *State v. Bennett*, ___Kan. ___ (January 30, 2009) the Kansas Supreme Court agreed with Bennett and the prior decision of the Court of Appeals at 39 Kan.App.2d 890 (2008) (*The Verdict*, Summer 2008, p. 17). The Court reviewed the reasoning of the U.S. Supreme Court in *Samson v. California*, 547 U.S. 843 (2006) which **upheld** a California law allowing suspicionless searches of parolees. However, the Court was persuaded by *U.S. v. Freeman*, 479 F.3d 743 (10th Circuit 2007) where the 10th Circuit held that contrary to *Samson*, in Kansas parolees are not statutorily required to submit to warrantless suspicionless searches, as parolees were in California. In fact, under the KDOC Internal Management and Policies and Procedures (IMPP) parolees agree that their *"parole officer…may conduct a search if suspicion exists that I have violated the conditions of my release…"* Therefore, the 10th Circuit found, *"parolees in Kansas have an expectation that they will* ***not*** *be subjected to suspicionless searches."*

The Kansas Supreme Court pointed out that a person's reasonable expectation of privacy depends on the level of freedom the person enjoys in society. Parolees have some expectation of privacy, although that expectation is greatly diminished. Probationers have a greater expectation of privacy than parolees, but less than free citizens. It then follows, the Court opined, that if probationers generally are considered to have greater expectations of privacy than parolees, searches of probationers must also be based on a reasonable suspicion.

Editor's Note: *This case stands to have more impact on the criminal justice system in Kansas than any in the last several years. Why?*

Tests of blood, breath and urine constitute a search in the context of the Fourth Amendment. State v. Martinez*, 276 Kan. 527 (2003). Preliminary breath tests are searches subject to the Fourth Amendment.* State v. Jones*, 279 Kan. 71 (2005).*

If the Court does not carve out any exceptions to this rule (as courts have in other states) it will be the death knell for random drug and alcohol screens for probationers. It would prevent judges from placing probationers on color-code, an essential tool in reducing recidivism by keeping offenders clean and sober during their probations, particularly drug offenders and DUI offenders. It will impact the way some courts monitor defendants as a part of pre-trial bond supervision.

Many questions remain. Must there be an individualized suspicion for each requested test, or could a probation officer develop a general suspicion of use and them place a probationer on color-code and randomly check? Is the standard the same for a diversion, which the Supreme Court has generally reviewed in terms of contract law. In other words, is a defendant free to "contract away" his or her fourth amendment rights and consent to random searches as part of a diversion agreement?

(Continued on page 14)

Court Watch

(Continued from page 13)

The Bennett *Court put a lot of emphasis on the reasoning in* U.S. v. Freeman*, supra, which was in turn interpreting* Samson v. California*, supra. However, in* Samson *the U.S. Supreme Court* ***upheld*** *the warrantless search of a parolee even in the absence of reasonable suspicion, where the parolee had signed a parole agreement that allowed parole officers or other peace officers to search the parolee with or without a search warrant or without or without cause. The Court went on to point out that some states require a level of individualized suspicion and that is a matter of state law. In* Samson*, California law specifically required all parolees to agree to be subjected to search or seizure at any time for any reason or no reason and the U.S. Supreme Court held that the Fourth Amendment did not prohibit such a search of parolees. As the 10th Circuit pointed out in Freeman, "*Parolee searches are therefore an example of the rare instance in which the contours of a federal constitutional right are determined, in part, by the content of state law." Freeman *at 747.*

In Freeman*, the 10th Circuit deemed it significant that the search of Freeman was done by regular Wichita law enforcement officers and not his probation officer as required by both the KDOC regulations and the parole agreement he signed. Both the KDOC regulations and the agreement also required reasonable suspicion to exist prior to a search of the parolee. In* Bennett*, the Kansas Supreme Court found that since parolees in Kansas have less rights than probationers, and parolees cannot be subjected to suspicionless searches, then probationers can't either. This is based solely on a KDOC regulation and the language in a particular KDOC drafted parole agreement. No state law was involved at all. In addition, the probation agreement in* Bennett *did not contain the limiting language of the KDOC agreement in* Freeman *and it is not clear that the probationer was even governed by KDOC regulations or that the KDOC regulations are even the same as they were when* Freeman *was decided. . Therefore, paraphrasing* Freeman*, does this mean that the "contours of a federal constitutional right" in Kansas are actually determined by an executive branch agency regulation?*

So query, if the legislature adopted a law requiring probationers and parolees to agree to be subjected to random suspicionless, searches by their probation officer, as was the case in California when Samson *was decided, would the Kansas Supreme Court find such searches to be constitutional? Or, if KDOC changed its regulation and the language of its parole order, would the* Bennett *decision be different? What if a city adopted an ordinance allowing suspicionless searches of its probationers? Since cities have home rule powers and can govern their own affairs, would it put the city in the same position as the state of California in* Samson*?*

Be prepared for these issues to come up in your courts.

PRESENCE OF DRUGS AND PROXIMITY TO DRUGS OF A MERE SOCIAL GUEST TO A HOME IS INSUFFICIENT TO SHOW CONSTRUCTIVE POSSESSION

A search warrant was executed at a residence in Clay Center, Kansas. Cody Beaver was present at the home, although he did not reside there. He was detained at the back door of the residence, 4 feet from the kitchen table on which there was a digital scale, money and a bag of crystal substance. A field test showed the presence of methamphetamine. Although the residence was generally cluttered and disorganized, all of the seized items were in plain view from the back door, where he was detained. However, the table did have numerous other items on it besides the illegal items. Although Beaver was a frequent visitor to the house, there was no evidence regarding how long he had been there on the day in question and no mail or other documents at the residence in Beaver's name.

Nothing was found on Beaver's person. He did not engage in any incriminating or suspicious behavior. There was no evidence that he had previously participated in the sale of drugs.

In *State v. Beaver*, ___Kan.App.2d ___(February 13, 2009), the Court of Appeals affirmed the district court's dismissal of the charges. It found that the only evidence of Beaver's constructive possession was his relative proximity to the items and the fact that they were in plain view. The State failed to show that he was anything other than a social guest. Without more, there was no probable cause to believe the he was in constructive possession of illegal drugs and drug paraphernalia found on the kitchen table.

STANDARD TO USE IN DETERMINING IF AN OFFICER HAS "SUBSTANTIALLY COMPLIED" WITH KDHE PROTOCOL IN CONDUCTING BREATH TEST

Billy Mitchell's driver's license was suspended for failing a breath test following a DUI arrest. During the 20-minute observation period he was out of the officer's view and alone in the bathroom for several minutes. During that time, he drank a cup of water. The question in *Mitchell v. Kansas Dept. of Revenue*, ___Kan.App.2d ___ (February 13,2009) was whether this constituted "substantial compliance" with the KDHE breath testing protocol.

The Court found that while strict compliance with the KDHE standards is not required in an administrative driver's license action, the testing procedures must be in substantial compliance with the protocol. In this case, the district judge found that had Mitchell testified that he belched or burped while he was alone in the bathroom, the testing may have been compromised. In the absence of such evidence, he failed to meet his burden of proof. The Court of Appeals disagreed and found that the driver is not required to present affirmative evidence that the Intoxilyzer malfunctioned or the breath sample was contaminated in order to establish that the testing

(Continued on page 15)

Court Watch

(Continued from page 14)

procedures did not substantially comply with the KDHE protocol.

The substantial compliance standard requires the petitioner in a driver's license case to demonstrate a violation of the KDHE testing procedures that "strikes at the purpose for the protocol and casts doubt upon the reliability of the subsequent test results." This is determined on a case-by-case basis. If affirmative evidence that a breath test was **not** contaminated is presented, this is a factor for the court to consider in determining substantial compliance. For example, in *Martin v. Kansas Dept. of Revenue*, 38 Kan.App.2d (2006), the officer stepped out of the room for a brief period of time, the defendant was on video the whole time and there was no evidence that he belched or vomited or ingested anything or regurgitated any stomach contents. In fact, he testified he had not, so it was appropriate to find "substantial compliance." Likewise, in *State v. Anderson*, No. 94,364, unpublished opinion filed April 7, 2006, the driver went to the bathroom, but told the officer that he had not belched, vomited or consumed anything while he was gone. In this case, there was no evidence that Mitchell did not burp or vomit. In fact, he testified that he **may** have done so. The breach of the protocol casted doubt on the reliability of the results. The suspension was set aside.

THE COMPULSION DEFENSE

K.S.A. §21-3209 outlines the "compulsion defense." Except in cases of murder or voluntary manslaughter, a person is not guilty of a crime if he commits the crime while under the reasonable belief that death or great bodily harm will be inflicted upon him or upon his spouse, parent, child, or sibling if he does not commit the crime. The statute does go on to state that the defense is not available if a person willfully or wantonly places himself in a situation in which it is probable that he will be subjected to compulsion or threat.

In *State v. Harvey*, ___Kan.App.2d ___(February 13, 2009) the Court of Appeals discussed the compulsion defense as it related to an escape from custody. William Harvey was an inmate at the Wichita Work Release Facility. He was given a thirty minute pass to go for a walk. He did not return for 2 days, at which time he turned himself in to the jail. He was charged with aggravated escape from custody. At trial, Harvey testified that he left the facility because he believed he was going to be killed that day He did not trust anyone at the facility and he wanted to talk to the only person he felt he could trust, his ex-wife. He believed he was going to be harmed by the members of a skinhead gang. . He had been running from this gang and they had a vendetta out for him. On the day of his escape two gang members approached him, but backed off when prison guards appeared. Forty minutes later he got his pass and left the facility. His ex-wife convinced him to turn himself back over to authorities. She verified his statements to her regarding his fear. He asked for an instruction regarding the compulsion defense.

The Court found that based on prior caselaw, the compulsion defense is not available in an escape from custody case unless (1) the inmate faced a specific threat of imminent infliction of death or great bodily harm; (2) there was no time for a complaint to the authorities or there was a history of futile complaints making any result from such complaints illusory; (3) there was no time or opportunity to resort to the courts; (4) there is no evidence of force or violence used toward prison personnel or other "innocent" persons in the escape; and (5) the inmate immediately reported to the proper authorities once he or she attained a position of safety from the imminent threat. All five conditions must be met.

The Court found that conditions one, three and four had been met. However, the defendant had conceded that he was in a position of safety as soon as he left the facility and none of the persons who threatened him followed him out of the facility. Since the defendant made no attempt to contact authorities for two days, the Court found that he had not been able to meet condition five. In addition, there was no evidence that he had reported his fears to the authorities or that there had been a history of futile complaints. So, likewise he was not able to meet the second condition. Since he had not met the threshold requirements, the compulsion defense was not available to him. The district court was correct in not allowing him to present testimony regarding compulsion and not allowing a compulsion instruction to the jury.

SCOPE OF SEARCH INCIDENT TO ARREST

Shelia Davison was arrested for driving on a suspended license. She was asked to step out of her car. The officer searched her and handcuffed her before putting her in the back of his patrol car. Another officer arrived at the scene, who began searching Davison's car incident to the arrest. The arresting officer assisted when he finished with Davison. On the driver's seat was a purse which contained a marijuana cigarette, a "snort" tube with methamphetamine and a notebook with names, dollar amounts and weight measurements. More drugs, money and scales were found on the passenger's seat. Davison was charged with numerous crimes related to the items found.

She argued on appeal that the items found in the car should be suppressed because the officers had no basis to search her car when she had already been arrested and placed in a patrol car, many feet away from the vehicle. K.S.A. 22-2501 states that after a lawful arrest, an officer may *"reasonably search the person arrested and the area within such person's immediate presence"* for the purpose of (1) protecting the officer from attack; (2) preventing the person from escaping; or (3) discovering fruits, instrumentalities or evidence of a crime. The officer testified that he did not find any weapons or contraband on Davison. He was not in fear of his safety

(Continued on page 16)

Court Watch

(Continued from page 15)

and he was not concerned she would escape. Kansas case-law has identified the acceptable "scope" of the search to be the person arrested and/or the area within the person's immediate presence. This has also been described as areas within the arrestee's "immediate control." Davison argued that the car was not in her immediate presence. It was impossible for her to make contact with anything in the vehicle from her handcuffed position in the backseat of a police car. She had arranged for someone to pick up the car and the police did eventually release the vehicle to her friend to take home.

In *State v. Davison*, ___Kan.App.2d ___(February 13, 2009), the Court of Appeals held that as long as the arrestee has been a "recent occupant" of a vehicle, such vehicle may be considered to be within the person's "immediate presence" and therefore within the proper scope of a search incident to an arrest under K.S.A. §22-2501. The Court relied on *New York v. Belton*, 453 U.S 454 (1981) and *State v. Tygart*, 215 Kan. 409 (1974).

In *Belton*, the U.S. Supreme Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile. Although *Tygart* was decided before *Belton*, *Tygart* is still followed in Kansas and sets out six factors to consider in determining whether a vehicle is within an arrestee's immediate control for purposes of a search incident to an arrest: 1) proximity of the vehicle to the place of the arrest; 2) probability that the vehicle contains seizable items related to the crime; 3) the amount of time which has elapsed between the arrest and the search; 4) the recent departure of the arrestee from the vehicle; 5) the fact that the vehicle had been employed in some way in connection with the crime; and 6) the character of the place of arrest, i.e., public street, business premises or private home. No factor standing alone is decisive. In this case, the defendant was arrested in her vehicle. The search began shortly after the arrest was made and shortly after the defendant departed the vehicle. The arrest was made at a traffic stop on a public street. These factors support the validity of the search.

Editor's Note: *See, page 41, supra, for a discussion of possible changes on the horizon in the area of automobile searches incident to the arrest of the driver.*

SUPREME COURT ALLOWS CITY TO MAINTAIN TEN COMMANDMENTS MONUMENT IN CITY PARK

In a unanimous decision, the United States Supreme Court has held that Pleasant Grove City, Utah does not have to allow a religious sect to place its monument in the City park, even though the City has a monument honoring the Ten Commandments. It held that permanent monuments displayed on public property typically represent government speech, and the government has freedom of speech. A government entity has the right to speak for itself and to select the views it wants to express. The public park is a public forum and the government cannot restrict private speech in such a public forum, but it can restrict its own government speech. Government decision makers for hundreds of years have selected the monuments that appear in public places. They decide the appropriate placement and content taking into account esthetics, history and local culture. They control the message by having final approval authority. They select monuments to present the image of the City that they want to project. A park can only accommodate a limited number of monuments. Justice Alito wrote:

"Every jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought. New York City, having accepted a donated statue of one heroic dog (Balto, the sled do who brought medicine to Nome, Alaska, during a diphtheria epidemic) may be pressed to accept monuments of other dogs who are claimed to be equally worthy of commemoration."

He goes on to compare the various meanings over time of the Statute of Liberty and the Imagine tribute to John Lennon in Central Park, complete with the entire lyrics of the song contained in a footnote. A public forum analysis simply does not apply to government speech. The monument does not violate any part of the First Amendment, including the Establishment Clause. *See*, *Pleasant Grove City, Utah v. Summum*, ___U.S.___(February 24, 2009)

DOMESTIC VIOLENCE CONVICTION PROHIBITING OFFENDER FROM POSSESSING A GUN CAN BE A SIMPLE MISDEMEANOR BATTERY OR ASSAULT IF THE VICTIM AND OFFENDER HAD A DOMESTIC RELATIONSHIP

The federal Gun Control Act of 1968 has long prohibited the possession of a firearm by any person convicted of a felony. In 1996, the Act was expanded to include persons convicted of a "misdemeanor crime of domestic violence." Randy Hayes was convicted in 1994 of simple battery. The victim was his then-wife with whom he had a child in common. Fast forward to 2004. Police were called to his house on a domestic violence call. They find guns in his house. A federal grand jury indicted him for violation of the Gun Control Act. He moved to dismiss on the basis that the predicate offense did not have as an element of the offense a domestic relationship between the victim and the offender. The case made it all the way to the Supreme Court in *U.S. v. Hayes*, ___U.S. ___(February 24, 2009).

(Continued on page 17)

Court Watch

(Continued from page 16)

In a case of thorough statutory analysis and construction, the Court held that the predicate offense does not have to have a domestic relationship as one of its elements. All the Government has to prove it that it was a battery or assault conviction and the victim was a spouse or domestic victim.

IF PBT DEVISE NOT ON LIST OF APPROVED DEVICES, RESULTS MUST BE SUPPRESSED

The Court ordered a former unpublished opinion published in *State v. Pullman*, ___Kan.App.2d ___(November 21, 2008). *See*, *The Verdict*, Winter 2009, p. 21. The Court reversed Mr. Pullman's conviction on the basis that his arrest was not supported by probable cause. It found that the district court should have suppressed the PBT results because, at the time of the stop, the PBT device used was not on the approved list of devices published by the KDHE, a prerequisite to admissibility. Absent the PBT results, there was not probable cause to arrest the defendant. Although he allegedly failed one out of four FST's, the State did not present any evidence on the results of the FSTs. The only evidence to consider was 1) Pollman's refusal to follow lawful requests to leave the area; 2) Pollman's admission to consuming a few beers; and 3) Pollman had the odor of alcohol on his breath (according to the backup officer, not the arresting officer) after operating a motorcyle. This evidence was not sufficient to *"warrant a reasonable prudent police officer to believe guilt was more than a mere possibility."* Conviction reversed.

COURT DISCUSSES BREACH OF PLEA AGREEMENT

In *State v. Woodward*, ___Kan. ___(March 6, 2009), the defendant argued that the prosecutor breached the plea agreement by arguing the heinous nature of the offenses and the losses suffered by the victims. The Kansas Supreme Court reiterated that a plea agreement is a promise that must be fulfilled by both parties. It is possible for a prosecutor to breach a plea agreement by effectively arguing against the negotiated sentencing recommendation. However, if the prosecutor makes the sentencing recommendation it promised and speaks in support of the recommendation without effectively undermining it there is no breach. The prosecutor doesn't have to be enthusiastic.

In this case, the Court found the prosecutor was just responding to statements made by the defendant's wife. The judge could have imposed a sentence less than that recommended if it adopted the wife's argument that the crime was accidental. The prosecutor was just arguing why the recommended sentence was the most appropriate.

THIRD-PARTY EVIDENCE RULE

Judith Shrum was found dead in Chetopa, Kansas. The defendant's vehicle was seen in the area around the time of Ms. Shrum's disappearance. The defendant admitted knowing the victim. The defendant's facial hair was found on a towel in the victim's bathroom and his pubic hair was found in her shower drain. Stains found on her robe, the towel from the bathroom and the bathroom vanity contained a mixture of DNA that could not exclude either the victim or the defendant. Defendant was charged with one count of first degree murder.

The State filed a motion *in limine* to exclude the defendant's proffered evidence of a third party's culpability. The prosecution argued that the defendant was offering nothing more than conjecture, conspiracy and speculation in accusing the victim's son-in-law, James Cook. The defendant had proffered evidence that Cook had a possible motive to commit the crime because his wife would benefit from the inheritance, and that as a first-aid officer at the defendant's place of work, Cook could have had the opportunity to collect the defendant's hair from headgear and blood from used bandages to later plant at the crime scene while staying overnight. The district court judge granted the motion and excluded the proffered evidence. The defendant appealed his subsequent conviction.

A defendant is entitled to present his theory of defense. The exclusion of evidence that is an integral part of that theory is error. In addition, all relevant evidence is admissible. Relevant evidence is evidence having any tendency in reason to prove any material fact. To establish relevance there must be some material or logical connection between the asserted facts and the inference or result they were designed to establish.

In *State v. Krider*, ___Kan.App.2d ___(March 6, 2009), the Kansas Court of Appeals followed existing case law and opined that where the prosecution relies on direct rather than circumstantial evidence for conviction, evidence offered by the defendant to indicate a possible motive of someone other than the defendant to commit the crime is incompetent absent some other evidence to connect the third party with the crime. Evidence of a third person's motive *alone* would not have a tendency to prove a material fact, but would instead confuse the jury or permit them to indulge in speculations on collateral matters wholly devoid of probative value. This is also known as the third-party evidence rule. However, motive may be relevant if there is other evidence to connect the third party to the crime. Circumstantial evidence linking a third party to a crime will not be excluded merely because the prosecution relies on direct evidence of the defendant's guilt. The judge must weight all the facts and circumstances in the case in making a decision. In this case, the Court of Appeals found that the district court judge was correct to exclude the evidence. The evidence was nothing more than mere speculation and conjecture and did not connect Cook to the crime.

(Continued on page 18)

Court Watch

(Continued from page 17)

FAILING TO REPORT OR TO STOP A CRIME ≠ ACCOMPLICE TO THE CRIME

In *State v. Decker*, ___Kan. ___ (March 13, 2009) the Kansas Supreme Court reiterated prior case law holding that a person who merely fails to stop a crime or fails to report a crime is not an accomplice.

JUDGE SHOULD NOT COMMENT ON WITNESSES CREDIBILITY IN PAST CASES

A question was raised in a criminal case regarding whether or not the defendant was intoxicated or impaired at the time he confessed. As part of a motion *in limine*, to determine whether the confession and the tape thereof should be admitted, the detective who took the confession testified that it was freely and voluntarily given and that the defendant showed no signs of intoxication or drug impairment. In ruling on the motion, the district judge made the following comment:

"Detective Lawson has testified in this court a number of times on these issues and the Court has found Detective Lawson in the past to be a very credible witness, that Detective Lawson will freely say things that may not necessarily be in the State's best interest, but that he has always been an exceptionally honest witness in this Court's view and there's nothing that's occurred here today that would cause my mind to be changed."

In *State v. McReynolds*, ___Kan. ___ (March 13, 2009), the Supreme Court held that *"this is perhaps the most serious assertion of fault raised by the appellant."* Justice Johnson, writing for the majority, pointed out that it is incumbent on the court to rely on the evidence presented in the case before it and not on its impression of a witness' credibility based on testimony presented in previous cases. In this case, *"the trial court's reference to Detective Lawson's credibility in other cases was not merely passing; it was mad at some length and in some detail."* However, the Court found that there was ample evidence in the record to support the trial court's finding that the statements were made freely and voluntarily. *"It therefore appears that the trial court's comment on Lawson's credibility was more in the nature of surplus verbiage and less in the nature of an independent, compelling reason for admitting the statements. While the trial court's comment was unnecessary, it did not amount to reversible error."*

DELAY CAUSED BY MULTIPLE COURT-APPOINTED ATTORNEYS AND THE DEFENDANT'S OWN DISRUPTIVE BEHAVIOR IS CHARGED AGAINST THE DEFENDANT FOR SPEEDY TRIAL PURPOSES

In *Vermont v. Brillon*, ___U.S. ___(March 9, 2009), the U.S. Supreme Court, in a rare case, accepted an appeal by the prosecution from an order by the Vermont Supreme Court dismissing charges of felony domestic assault and habitual violator against Michael Brillon for violation of his Sixth Amendment right to a speedy trial. Three years had elapsed from the time of his arrest to the time of his jury trial. He remained in jail the entire time. During that time at least 6 different attorneys were appointed to represent him. Brillon "fired" the first one. The second one immediately withdrew based on a conflict. The third one was allowed to withdraw when Brillon threatened his life. The fourth one was allowed to withdraw because his contract with the public defender's office was about to expire and Brillon had filed a letter with the court complaining of #4's unresponsiveness. The fifth one withdrew due to "modifications to his firm's contract with the public defender's office." The sixth, and final, court-appointed attorney moved to dismiss on the basis of lack of a speedy trial. The trial court denied the motion, but the Vermont Supreme Court vacated his conviction and sentence on the basis that the delays in the last two years that revolved around actions in the public defender's office should be charged against the State. The U.S. Supreme Court reversed the Vermont Supreme Court.

In determining whether or not a defendant's right to a speedy trial has been denied, appointed counsel, just like retained counsel, act on behalf of their clients, and delays sought by counsel are ordinarily attributable to the defendants they represent. Delays caused by the failure of several court-appointed attorneys to move the defendant's case forward and delays caused by the defendant's disruptive behavior should not be charged to the State. There is no justification for treating defendants' speedy trial claims differently based on whether their counsel is privately retained or publicly assigned. "*A contrary conclusion could encourage appointed counsel to delay proceedings by seeking unreasonable continuances, hoping thereby to obtain a dismissal…on speedy-trial grounds."* However, the State can be charged with delay that is the result of failure of the trial judge to appoint replacement counsel "with dispatch" and the State can bear

(Continued on page 19)

"We know that the law changes over time through statutory amendment, court interpretation of statutory ambiguity, and court interpretation of constitutional requirements. Yet we must ask trial judges and trial lawyers to accurately assess the changing landscape. Because these shifts are not fully anticipated, sometimes the law is not correctly applied at trial. And sometimes we can all agree on that. This is one of those cases.

The State has conceded two points that the defendant raised on appeal. Prosecutors in criminal cases have a special role in our system: they must seek justice, not mere victories. Thus, the prosecutors here have done their job conceding errors when appropriate."

Judge Steve Leben, writing for the majority in *State v. Beal*, Slip Copy, 2009 WL 743156 (Kan. App. March 13, 2009).

Court Watch

(Continued from page 18)

the responsibility if there is a "breakdown in the public defender system." There was no evidence of that in this case.

COURT OF APPEALS GETS OPPORTUNITY TO ADDRESS *ARIZONA V. JOHNSON*

Just a few weeks after the Supreme Court ruled on questioning and frisking passengers in traffic stops, the Kansas *Johnson*, __U.S. ___ (January 26, 2009). *See, page 11, supra.* In *State v. Golston*, ___Kan.App.2d ___(March 13, 2009), the Court was faced with a lawful traffic stop. Due to some suspicions regarding the involvement of the occupants in drug activity, the officer called in the drug dog. While waiting for the dog to arrive, and after the traffic ticket had been issued and the driver had refused consent to search, the officer asked the driver and passenger to step from the vehicle. In patting the passenger down for weapons, the officer found drugs and the passenger was charged. Citing *Arizona v. Johnson*, the Court of Appeals recognized that the Supreme Court had made clear that as long as the inquiries to the passenger do not measurably extend the duration of the stop such questioning is lawful. However, Golston, it opined, was undisputedly detained beyond the conclusion of the traffic stop. Therefore, the officers needed reasonable suspicion of criminal activity to justify the length of the stop. He had already been stopped for 20 to 30 minutes before he was asked to step from the vehicle. The Court found the officers did have reasonable suspicion of drug activity, justifying the detention.

"As the court stated in Anderson, *an officer "does not have to know that the defendant committed a crime. Merely pointing to some facts that would cause a reasonable person to be suspicious is enough to conduct a* Terry *stop."* The officer and the Court were able to point to sufficient facts to suggest involvement in drug activity.

VALID PUBLIC SAFETY STOP

Salina police received an anonymous call from a young woman who expressed concern about seeing a car drive off the road near her neighborhood. The car had driven through a dead end and not returned. She was afraid the people might be stuck or injured. Police sent officers to check it out. They found the car in a remote area, off the paved road next to a field near the dead-end that the caller identified. The engine was not running and the lights were off. The officer parked his car so as not to block the suspect car's movement. He did turn on his patrol car's emergency lights so they would see him and stay put. He did not observe anything that would lead him to believe that the car was in any type of distress. When he reached the driver's door, the window was down and he observed 4 people inside. He identified himself as a police officer and "asked them what they were doing there."

The driver responded that they were "just sitting there." The officer smelled the odor of marijuana and observed marijuana on the window frame of the car door. He called for a canine unit. More marijuana was found in the car. The defendant filed a motion to suppress arguing that there was no lawful justification to stop and approach the car. The State argued that it was justified under either the community caretaking exception or it was a voluntary encounter.

In *State v. Schuff*, ___Kan.App.2d ___ (March 13, 2009) the Court of Appeals found that the stop was justified as a public safety stop. Such a stop is to be evaluated in three steps. First, there must be objective, specific and articulable facts from which a law enforcement officer would suspect that a citizen is in need of help or is in peril. Second, if the citizen is in need of aid, the officer may take appropriate action to render assistance. Third, once the officer is assured that the person is not in peril or is no longer in need of assistance, any actions beyond that constitute a seizure if not based on probable cause. These types of stops must be totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute. The Court found that this was a valid public safety or community caretaking stop. It incorporated the district court judge's finding that one could not imagine what any reasonable officer would have done other than what this officer did.

MEDICAL ASSISTANT ≠ MEDICAL TECH, EMT OR PHLEBOTOMIST FOR PURPOSES OF DUI BLOOD DRAW…OR IS SHE?; PARTIES BOUND BY STIPULATIONS

K.S.A. §8-1001(c) states that a DUI blood draw can only be done by a doctor, a nurse, or a qualified medical technician (which includes, "but is not limited to" an EMT or a phlebotomist). Merilynn McBride withdrew blood from Jeremiah Stegman in conjunction with his DUI arrest. She was a medical assistant and experienced at and an expert in drawing blood. The issue in *State v. Stegman*, ___Kan.App.2d ___ (March 20, 2009) was whether her experience and training qualified her as a medical technician. Stegman was, of course, arguing that the blood test results should be suppressed.

The prosecution argued that since the State has no certification process for phlebotomists the general definition should be used, to wit: a phlebotomist is someone who is "trained to draw blood." It shouldn't make any difference that her job title is not "phlebotomist." If her training, it argued, is comparable to that of a "phlebotomist" she should qualify under K.S.A. §8-1001(c). The Court agreed.

However, the prosecution and defense had filed written stipulations wherein the prosecution stipulated that Ms.

(Continued on page 20)

Court Watch

(Continued from page 19)

McBride was not a phlebotomist. There was no evidence presented concerning her training, only that she graduated from Brown Mackie College with a "medical assistant" degree and certificate. The Court held that it was bound to review the case based on the filed stipulations and the evidence was simply not sufficient to show that she was trained as a phlebotomist. The Court noted that the trial court had made factual findings not included in the stipulations that McBride was an experienced expert in drawing blood. However, it appears that the trial court simply took judicial notice of these facts because they were not included in the filed stipulations. The Court opined *that "[i]f these facts would have been stipulated to by the parties, our determination may have been different."* But without this, the State failed to carry its burden to show that McBride was qualified to withdraw blood under K.S.A. §8-1001. The test results must be suppressed.

GUILT MAY NEVER BE BASED ON INFERENCE ALONE

Domestic battery is defined as intentionally or recklessly causing bodily harm by a family member or household member against another family member or household member. *See*, K.S.A. §21-3412a(a)(1). "Family or household member" is defined in the statute to only include persons who are 18 years or older.

Emiliano Perez-Rivera was convicted of domestic battery against his wife, Wendy. However, there was no evidence presented at trial regarding Wendy's age. The State argued that it presented circumstantial evidence as to her age, to wit: she had been married to Emiliano for 2½ years; the marriage ceremony took place in Las Vegas; Nevada requires a person to be at least 16 prior to marriage (even though there was no evidence at trial presented about Nevada laws); and Wendy looked and acted at least 18 and the jurors could have concluded she was at least 18 at the time of the battery.

In *State v. Perez-Rivera*, ___Kan.App.2d ___ (March 27, 2009) the Kansas Court of Appeals held that although a conviction may be sustained by circumstantial evidence, guilt may never be based on inference alone. *"Reasonable presumptions and inferences may be drawn from facts established by direct or circumstantial evidence, but a presumption may not be based upon a presumption or an inference upon an inference."*

The jurors were being asked to infer Wendy's age from her appearance, demeanor and Nevada marriage laws which were not introduced at trial. They were being asked to make an inference concerning her age based on their personal knowledge or observations, not evidence presented at trial. Since the State failed to put on any evidence of Wendy's age, the conviction was reversed.

Editor's Note: *See also, POC §3.1.1*

"PROSECUTORIAL MISCONDUCT" DURING CROSS-EXAMINATION OF THE DEFENDANT NO LONGER GETS A PASS WHEN IT COMES TO CONTEMPORANEOUS-OBJECTION RULE

The contemporaneous-objection rule, codified at K.S.A. §60-404, provides that a timely and specific objection to evidence at trial is required to preserve issues arising from the admission on appeal. The purpose of the rule is to give the trial court the opportunity to conduct the trial without using tainted evidence and thus avoid possible reversal and a new trial. In other words, one should not be allowed to claim that the trial court erred in its rulings when the party challenging the court's actions did not give the trial court a chance to review the party's objections. However, under current case law beginning in 1999, the Kansas Supreme Court has not required a contemporaneous objection to preserve issues of prosecutorial misconduct. The Court adopted a "plain error" rule, holding that where the prosecutor's conduct is so prejudicial or constitutes a constitutional violation which if not corrected will result in injustice or a miscarriage of justice, a contemporaneous objection will not be required to preserve appellate review.

Although at first the Court only applied this "exception" to closing statements, it soon expanded the analysis to prosecutorial cross-examination of the defendant when the prosecutor is trying to convey certain information to the jury through his or her questioning. Since a prosecutor is allowed to ask leading questions during cross-examination of the defendant, he or she may attempt to put words in the witness's mouth so that the testimony is really that of the prosecutor, not the defendant. Attorneys were allowed to couch such questioning as "prosecutorial misconduct" and thus avoid the contemporaneous-objection rule. The Court was forced to examine whether the questions and answers were an attempt to introduce objectionable evidence or were simply "argument," because the contemporaneous-objection rule only applies to the admission of evidence.

In *State v. King*, ___Kan. ___ (March 27, 2009) Chief Justice Davis, writing for a unanimous court, stated that determining which questions and answers were subject to the contemporaneous-objection rule had proven to be "vexing."

The Court held that by judicially creating this exception in the case of prosecutorial cross-examination it was not giving full force and effect to the legislative mandate of K.S.A. §60-404 and had rendered the contemporaneous-objection rule meaningless in at least one evidentiary context. Justice Davis wrote, "

From today forward, in accordance with the plain language

(Continued on page 21)

Court Watch

(Continued from page 20)

of K.S.A. §60-404, evidentiary claims—including questions posed by a prosecutor and responses to those questions during trial—must be preserved by way of a contemporaneous objection for those claims to be reviewed on appeal. "

However, the Court is still not going to require a contemporaneous objection for alleged prosecutorial misconduct during voir dire, opening statement or closing argument.

DEFENDANT HAS BURDEN TO PRESENT EVIDENCE OF INABILITY TO PAY RESTITUTION

State v. King, ___Kan. ___ (March 27, 2009) also clarified that K.S.A. §21-4603(b)(1) requires that a court order the defendant to pay restitution for his or her crime. The court is not required to examine the defendant's financial ability to pay before entering the order of restitution. The burden is on the defendant to present evidence to the court of his or her inability to pay.

UNCOUNSELED MISDEMEANOR CONVICTIONS IN WHICH JAIL IS ASSESSED BUT NOT SERVED V. INDIRECT CONTEMPT FOR FAILURE TO PAY FINES ON SAME

Travis Long was convicted of battery in Garden City Municipal Court. He was not represented by an attorney and there was no indication that he waived his right to same. He was given one year probation and fines. A year later he was convicted in the same municipal court of two counts of battery. He again got one year probation and fines. Again, there was no indication that he had an attorney at his sentencing and there was no waiver indicated in the file. He did not serve any jail time on either case. (It is unclear what he was placed on "probation" for if there was no underlying jail term, so the court deemed this a one year "suspended sentence"). Subsequently, Long was found guilty of indirect contempt for failure to pay his fines and fees in all three cases. He had an attorney at the hearing. The judge sentenced him to 6 months in jail, but suspended the jail on the condition that Long pay the fines and fees at the rate of $100 per month to purge himself of the contempt. It is unknown whether or not he actually ended up serving any of the contempt sentence.

Long then went before the district court on a felony drug charge and the issue arose as to how to count the Garden City convictions in determining his criminal history score. He argued that since the battery convictions resulted in a jail term being assessed for his failure to pay and since he didn't have an attorney for those convictions, they should not be counted in his criminal history score. He argued that his constitutional right to counsel had been denied. He did not address his statutory right to counsel under K.S.A. §12-4405, so that argument was deemed waived by the Court of Appeals in *State v. Long*, ___Kan.App.2d ___(March 20, 2009).

The Kansas Court of Appeals held, consistent with prior Kansas appellate court decisions, that in the case of prior uncounseled misdemeanor convictions for which the defendant received a suspended sentence or probation that does not actually result in incarceration, the conviction remains valid and may be included in the defendant's criminal history. The Court followed the "actual imprisonment" rule for the necessity of appointed counsel in misdemeanor matters. The fact that Long was given a jail term for indirect contempt does not impact the validity of his convictions. K.S.A. §12-4510 and §12-4106 allow a municipal judge to find a defendant in contempt for not paying fines and to incarcerate the defendant for same. Long's probation wasn't revoked. His "suspended sentence" wasn't imposed. The indirect contempt is a separate and distinct proceeding and he was represented by a lawyer at that hearing.

"It is true that Long would have never faced a contempt charge had he not been initially convicted of battery. But this does not mean that Long's battery convictions caused him to serve time in jail. If Long served time in jail in either of his municipal court cases, the jail time was for being in contempt of court and not for the battery convictions."

All three convictions, the Court held, can be used in calculating Long's criminal history score.

TRAFFIC STOP FOR PARTIAL OBSTRUCTION OF LICENSE PLATE

Kansas Highway Patrol Trooper noticed a Ford Explorer with an Ohio license plate traveling eastbound on I-70. An "Ohio State Buckeyes" metal tag bracket surrounded the license plate. It partially obscured the license plate's registration decal. The decal was applied to the lower right-hand corner of the tag and stated the tag expiration date. The metal tag bracket, which otherwise would have entirely obscured the expiration date, had been cut so that part of the expiration date was showing. The trooper pulled over the driver. Even after stopping the vehicle he could read the month, but only one digit of the year. Since he was unfamiliar with Ohio plates, he was not familiar with their color coding for expiration years. In addition, the state name was obscured, although the trooper testified that he could have figured out pretty easily it was Ohio. Upon further approach, and by looking behind the metal tag, the trooper was finally able to see the expiration year. The tag was not expired.

Eventually, the stop led to the discovery of 25 kilograms of cocaine. The driver moved to suppress the evidence recovered on the basis that there was no probable cause or reasonable suspicion to stop his car. He argued that obstruction of the registration decal is not a crime in Kansas.

(Continued on page 27)

Step Back in Time

(Continued from page 1)

he was not entitled to a full blown "trial." He was given reasonable notice of the action and an opportunity to be heard and present his defense. That is all that is required and, therefore, the statute so providing was not unconstitutional. After the opinion was announced, the Kansas City Star declared that the *"superquack of Milford is finished."*

Dr. Brinkley was not a stranger to the Kansas Supreme Court and the *Hassig* opinion did not "finish" him. Two years later, the Court filed its decision in *Brinkley v. Fishbein et al.,* 134 Kan. 833 (1932). Brinkley sued Morris Fishbein, editor of the Journal of the American Medical Association, for libel after he published an article stating that Brinkley was a "quack" doctor of "unsavory professional antecedents." The district court denied Fishbein's motion for summary judgment. He had argued the statements were the truth and that their truth was evident by reading the entire article. He appealed to the Kansas Supreme Court. The Court found that the plaintiff was challenging the truth of the items in the article, and therefore the case should be allowed to go to a jury. It affirmed the denial of the defendant's motion for summary judgment.

Although we don't know the results of the Kansas trial, in a similar trial in Arkansas, Fishbein was able to establish the truth of the allegations and thus received a defendant's verdict. *See, Brinkley v. Fishbein*, 110 F.2d 62 (C.A. 5, 1940). It was a case that finally put an end to Dr. Brinkley's career. So who was Dr. John R. Brinkley? And was he a "quack?"

Dr. John R. Brinkley was also known as the "Milford Messiah" and the "Goat Doctor." He was a run-of-the mill flim-flam man and "tonic" salesman until 1917 when he settled in to Milford, Kansas, after the town placed an ad for a doctor. It didn't seem to matter that he had never graduated from any medical school. He set up shop.

One day a 46 year-old farmer by the name of Bill Stittsworth appeared at his door complaining of impotence. Goats have long been known by farmers to be particularly frisky animals. When Dr. Brinkley advised Stittsworth that he did not know of any cure for such a problem, Stittsworth allegedly said, "*Too bad I don't have billy-goat nuts."* An idea was born. Dr. Brinkley started implanting (or more aptly inserting) goat testicles into men to increase their virility. It turned out to be the Viagra of the 1920's, although the entire success was as a result of the placebo effect. Word spread like wild fire and soon people from all over the world were descending on Milford for the surgery.

This idea had not been concocted entirely in a vacuum. In France, Dr. Serge Voronoff had reported similar results by transplanting chimpanzee testicles into men. In fact, he had captured so many chimpanzees to keep his clinic stocked, he nearly drove the species to extinction.

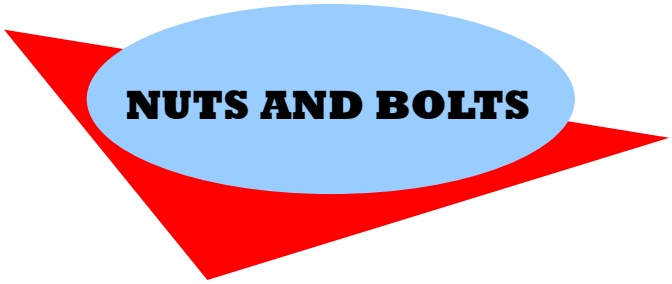
Brinkley got bolder. He started implanting goat ovaries in women to increase their fertility. He had an "executive" package he offered for considerably more money where he implanted human testicles in his wealthier patients that were obtained from executed inmates at prisons in Kansas and Oklahoma. He was making almost $50,000 per week. He had a 16 bed hospital in Milford. He traveled the world performing the surgery. By 1924 he had built a radio station in Milford, one of the few in the country. KFKB ("Kansas First, Kansas Best) was the first time a radio program operated with "advertisements" and "sponsors." He hosted a show called "The Medical Question Box." People would call in their ailments and he would prescribe the various tonics he produced as a cure. Not only did the caller go to pharmacy to buy the tonics, but thousands of listeners with similar complaints did too (all part of the Brinkley Pharmaceutical Association which provided kickbacks to the pharmacies that sold Brinkley's tonics). He kept raking in the money, now in the millions. When California tried to extradite him for fraud committed in that state, the Governor of Kansas, Jonathan M. Davis, refused to comply and replied, *"We people in Kansas get fat on his medicine. We are going to keep him here so long as he lives."*

Simultaneously with the *Hassig* case, the Federal Radio Commission refused to renew Brinkley's radio license on the basis that his broadcasts were entirely for his own private interests, not the "public interest" as required by the law. It found his "Medical Question Box" program was inimical to the public health and safety. The decision was supported by the Court of Appeals of the District of Columbia in *KFKB v. FRC*, 47 F.2d 670 (1931).

Three days after losing his medical license, Brinkley announced he would run for Governor. His plan was to replace the medical review board with his appointees and get his license back. He was too late to get on the ballot, the election being only a few weeks away, so he used his radio program to mount a write-in campaign. Just a few days before the election, when it was clear Brinkley would win in a landslide, the Kansas Attorney General announced that the only way a write-in ballot would be counted would be if the voter wrote "J.R. Brinkley." If the periods were missing or there was anything other than "J.R. Brinkley" on the ballot it would not count. He narrowly lost the election. All agree that if the "intent of the voter" had been considered the standard for judging the ballots, as had been decreed by the Kansas Supreme Court in the past, Brinkley would have won. There were more than sufficient ballots thrown out to have given Brinkley the governor's mansion.

No longer feeling the love in Kansas, Brinkley sold the radio

(Continued on page 26)



Question: What is the issue I keep hearing about regarding the KDHE intoxilyzer certifications? Are they valid?

Answer: It revolves around whether or not departments were required to get their intoxilyzers recertified when new KDHE regulations took effect mid-year. Some courts have held they were and failure to do so requires suppression of the breath test results. Some courts have held that the certifications that were granted for one year, remain valid for one year as stated on their face, regardless of a mid-year change in regulations. An appellate court will surely get to decide this issue.

The KDHE revoked its regulations regarding certification of breath testing machines and adopted new substitute provisions. The new regulations are contained at K.A.R. 28-32-8 through K.A.R. 28-32-14 and became effective March 14, 2008. From January 1, 2008 to March 14, 2008 the old regulations applied and there are no questions regarding the appropriateness of certification for tests obtained up to March 14, 2008.

Prior to the new regulations, police departments were provided certifications for their breath test machines that ran from January 1, 2008 to December 31, 2008. The new regulations require that the agency head, generally the Chief of Police, submit an application for "agency certification" on forms provided by the KDHE. There is no provision to allow the Chief of Police to delegate this responsibility. Prior regulations required that the "agency" submit the application and this generally was someone designated by the Chief of Police. No application forms were ever sent out by KDHE under the new regulations. Nor were any new applications made by "heads of agencies."

The new regulations also require a separate application for certification of the testing device. This is to be submitted by the agency custodian, which may or may not be the Chief of Police. The application must be submitted on forms provided by KDHE. No forms were provided by KDHE and none were submitted by agency custodians.

In September 2008, when it became apparent that this was going to become an issue in admitting breath tests, KDHE sent all the police departments certifications back-dated to March 14, 2008. KDHE's Breath Alcohol Supervisor testified in at least one case that the new regulations do not provide for or require reapplication for certification after the effective date of the new regulations. In other words, once the certifications were issued January 1, 2008 for the whole year, that certification remained valid. The agency would only have to comply with the new regulations when they renewed in 2009. Of course, the distribution of new certifications in September, backdated to March, complicate that argument.

So the issue in these cases is the admissibility of tests performed after March 14, 2008, on machines and for agencies which were arguably required to be, but were not, certified under the new regulations.

On November 7, 2008, in *State v. Melissa Hood*, Case No. 08CR1013, in Johnson County District Court, Judge John Anderson, III issued a written opinion and found that the KDHE regulations were not intended to invalidate the existing certifications. He held that the issuance of the second certificate was merely an administrative action intended to clarify any confusion caused by the new regulations. He found that the April 29, 2008 breath test was admissible.

On February 3, 2009, in *State v. Sean Ernesti*, Case No. 08CR1153, in Douglas County District Court, Judge Paula Martin issued a written opinion and found that the regulations had not been complied with regarding a test that was taken on July 26, 2008. She found strict compliance with the new regulations was required. She suppressed the breath test result.

On April 2, 2009, in *State v. Menke*, Case No. 08CR1389, in Johnson County District Court, Judge Stephen Tatum issued a written opinion and found that the KDHE regulations were not intended to invalidate pre-existing certifications. He denied the motion to suppress.

There are undoubtedly other district court opinions that have also been issued of which this author is unaware. It is unknown at this time whether any of these cases have been appealed. Given the fact that thousands of breath tests stand to be invalidated, it will certainly reach an appellate court eventually.

Question: Defendant is convicted of one charge in municipal court and acquitted of the other. He appeals. In district court, does he have to face the charge for which he was acquitted in municipal court?

Answer: No.

In *State v. Derusseau*, 25 Kan.App.2d 544 (1998), the defendant was convicted of DUI and acquitted of eluding before a magistrate judge. He appealed. The district judge found that Derusseau must stand trial on the "original complaint" which would include the charges for which he was acquitted. The jury found him guilty of eluding but hung up on the DUI. Later at a retrial he was found guilty of the DUI. He appealed to the Kansas Court of Appeals arguing that jeopardy

(Continued on page 24)

Nuts and Bolts

(Continued from page 23)

attached in magistrate court on the eluding and to make him stand trial for a charge for which he was acquitted violated the prohibition against double jeopardy. The Court of Appeals agreed with Derusseau. It reversed his eluding conviction.

The Kansas Supreme Court has not been faced with this exact fact pattern. However, in *City of Salina v. Amador*, 279 Kan. 266 (2005), it cited *Deruseau* with approval :

"Although Derusseau *demonstrated that jeopardy can attach in municipal court, the distinguishing factor is that the defendant in* Derusseau *was acquitted of the charge in municipal court, while the defendant in this case was convicted of the charges in municipal court."*

This ruling is consistent with others around the country. *See*, *Peak v. Com*. , 199 S.E. 473, 473 (Va.1938); *Taylorsville City v. Adkins,* 145 P.3d 1161, 1165 (Utah App.,2006). In fact, this author could not find any that allowed retrial on acquitted charges following a *de novo* appeal by the defendant.

Therefore, if a defendant appeals, he only faces those charges for which he was convicted in municipal court or were dismissed by the court without prejudice. He cannot be retried on the charges for which he was acquitted. If a defendant appeals, and the **charges** are dismissed in district court before jeopardy has attached, the City can refile the charges in municipal court. *See*, *Amador*, *supra,* and *State v. Hanson*, 280 Kan. 709 (2005). Although not addressed in any cases, the third scenario which happens frequently in our courts is that the defendant fails to follow through with the appeal (usually by not showing up) and the **appeal** is dismissed. Although there have been no cases addressing the proper procedure in such a situation, traditionally, the district court then remands the case back to the municipal court for execution on the previously imposed sentence. In effect, reinstating the original proceeding. See also, Kansas Municipal Court Judge Manual, p. 11-4.

Question: I get very frustrated with defendants who drag their feet regarding an attorney. They come to court and say they don't want a court-appointed attorney or they don't qualify for a court-appointed attorney, but they continue to show up without one and ask for a continuance to get one. (1) Can I "deem" that they have waived counsel and require them to proceed to trial pro se? Or, (2) am I required to appoint them an attorney at City expense even though they have stated they don't want one or they don't qualify?

Answer: (1) Yes, if the totality of facts support such a finding. (2) Probably, if they qualify for court-appointed counsel, probably not if they don't qualify.

The most recent case to deal with this issue is *State v. Young*, 35 Kan.App.2d 107 (2006).

Vincent Young was facing a motion to revoke his probation. Young appeared multiple times and kept telling the judge that he was hiring Tom Bath to represent him and was gathering funds to do so. He continued to insist that he could get his own attorney, but he kept showing up without one. The record also showed that **the defendant qualified for court-appointed counsel**, although again, he said he preferred to get his own.

Finally the judge had enough, a situation we can all relate to. Witnesses had appeared numerous times on the motion and were sitting in the courtroom, again ready to proceed. The Court told the defendant it was going to proceed with the motion. During the hearing, Young did not present any witnesses or cross-examine any of the State's witnesses. His probation was revoked. He appealed claiming that the judge had abused his discretion in denying him a request for a continuance and forcing him to proceed pro se.

The Court of Appeals agreed and held

"...when Young failed to appear with retained counsel on the morning of the probation hearing, the trial court was required to appoint counsel to represent Young and to set the hearing date with adequate time for counsel to confer with Young, to prepare a defense, to subpoena witnesses, and to become acquainted with the facts and law."

The Court based this holding on the Supreme Court decision in *State v. Weigand*, 204 Kan. 666 (1970). In *Weigand*, the case had already been continued several times when on the day of trial the defendant's attorney asked to withdraw due to poor health. The judge asked the defendant if he had another lawyer. He said he did not, but he assured the court that he could and would hire counsel. It was continued two weeks. On the day of trial, with a jury present ready for voir dire, the defendant arrived without an attorney. He told the judge he was going to Olathe that day to look for one. The trial court judge appointed an attorney on the spot, apparently someone who just happened to be sitting in the courtroom that morning. He ordered jury selection to begin at 1:00 p.m and trial to start the next day. Defense counsel objected and requested a continuance to prepare. The request was denied.

The Kansas Supreme Court reversed the defendant's conviction, ordered a new trial and held

"The trial court should be aware of the propensities of the accused to procrastinate in the hiring of counsel. The court can and should protect itself against the irresponsibility of the defendant. After a reasonable time has been granted to the accused to procure counsel of his own choosing, as was done in this case, the accused should be ordered to appear on a day certain with counsel. If the accused has not obtained counsel on that day counsel should then be appointed to represent him and the trial date should be set with suffi-

(Continued on page 25)

Nuts and Bolts

(Continued from page 24)

cient time to permit counsel to advise with the accused, prepare a defense, subpoena witnesses and acquaint himself with the facts and the law. What time is reasonable will depend upon the circumstances of each case and should be determined by the trial court in its discretion…A prompt and vigorous administration of the criminal law is commendable and we have no desire to clog the wheels of justice. What we here decide is that to force a defendant to trial ten or fifteen minutes after appointed counsel is precipitated into a serious felony case denies the accused effective assistance of counsel and violates fundamental principles of due process of law. "

Nine years after *Weigand*, the Kansas Court of Appeals was faced with a case in which the defendant was forced to go to trial *pro se* on DUI and driving on a suspended license charges. The defendant was not represented at arraignment. The court informed the defendant that if he qualified, counsel would be appointed for him. The defendant at first stated that he did not want an attorney appointed for him. However, he did request that the court appoint a Mr. White to represent him. The court declined to honor this request but asked the defendant to complete the necessary indigency papers, which he did. The Court refused to appoint an attorney, because the defendant did not qualify. The defendant continued the case several times and stated that John White was his attorney. John White eventually notified the court that he was representing the defendant and asked for yet another continuance. He was involved in taking a pre-trial deposition because of the planned excused absence of a witness at trial. On the trial date, the defendant and his attorney appeared for trial and requested another continuance due to the defendant's medical problems and a disagreement between the two of them, prompting John White to ask to withdraw. The defendant had fired Mr. White and represented that he was attempting to hire another attorney, but the new attorney was not ready to proceed. The court had advised the defendant in the case in the past that if he didn't have an attorney, he would be forced to proceed without one. The Court ordered the trial to proceed with the defendant unrepresented. The trial proceeded. The defendant cross-examined witnesses and presented two witnesses of his own. The court found the defendant guilty and he appealed arguing that his Sixth Amendment right to counsel had been denied by the refusal of the judge to grant the continuance request.

In *State v. Miller*, 4 Kan. App.2d 68 (1979), the Court upheld the judge's action requiring the defendant to proceed pro se.

"Here, of course, defendant found not to be financially unable to employ counsel and so the court could not follow the directive of Weigand*…Without question, however, the trial court viewed the defendant's conduct as dilatory. The court was also aware that both prosecution and defense witnesses were present, as they had been on the previously scheduled trial date. Further, the sole testimony of one of the key prosecution witnesses to be introduced as evidence at trial had been secured and preserved by deposition [which his retained counsel had taken part in]. Finally, defendant himself discharged his retained counsel…All authorities reviewed…stress the need to view each case according to the totality of circumstances and refuse to recognized one strict, simple rule when continuances are requested to retain new counsel. Consequently, it cannot be said that the trial court in this case abused its discretion by denying the defendant's request for a continuance."*

The U.S. Supreme Court had a chance to first review the issue in *Ungar v. Sarafite*, 376 U.S. 575 (1964). In *Ungar*, a lawyer cited for contempt was denied a continuance when his request was made on the date of the contempt hearing. He had argued that his counsel was unfamiliar with the case as he had been trying another case. The Supreme Court affirmed the denial of a continuance in light of all the circumstances, noting that Ungar had been given sufficient notice to hire counsel, the evidence was fresh, the issues were limited, the motion for continuance was not made until the day of the hearing, and that Ungar, as a lawyer himself, was a familiar with the court's practice of denying continuances. It found that

"*There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."*

Ungar was cited with approval by the Kansas Supreme Court in *Weigand*.

The reporter system is chock full of cases involving dilatory actions on the part of defendants which resulted in the judge requiring them to proceed *pro se*. *See, for example*, *Smith v. State*, 392 S.E.2d (Ga.App. 1990); *State v. Batiste*, 687 So.2d 499 (La. App. 3 Cir. 1996); *Commonwealth v. Wentz*, 421 A.2d 796 (Pa. Super. 1981); *State v. Jacobs*, 245 S.E.2d 606 (South Carolina 1978); *State v. Hook*, 514 N.E.2d 721 (Ohio App. 2d 1986); Some courts have held that if a court is going to find that the defendant has waived counsel by his conduct, the defendant must have been warned in advance that his dilatory conduct may be deemed as waiver of counsel and must be advised of the dangers of self-representation. *See*, *City of Tacoma v. Bishop*, 920 P.2d 214 (Wash. App. 1996); *U.S. v. Allen*, 895 F.2d 1577 (10th Cir. 1990) (which also held that the denial of the right to counsel is not subject to a harmless error analysis: if it is denied reversal is required. The same is true for the right to self-representation. *See*, *State v. Jones*, ___Kan.App.2d___(January 23, 2009*), supra, page 10.)*

Barbara, Kansas Criminal Law Handbook, pp. 11-10, 11-11 (1992), lists the following dangers of self-representation of which judges should advise defendants: (a) The law provides

(Continued on page 26)

Nuts and Bolts

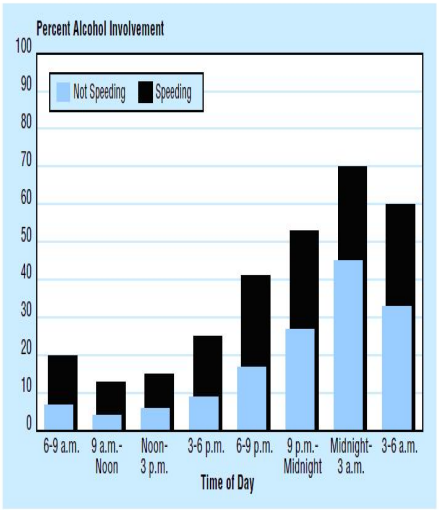
(Continued from page 25)

for numerous pretrial motions available to the defendant, which are of a technical nature, the advantage of which the defendant would lose if allowed to represent himself or herself; (b) The defendant's vocabulary may impede clear communication with the court and opposing counsel; (c) Judges will not act on behalf of a defendant in asserting objections or making appropriate motions where ordinarily it is the duty of counsel to call such matters to the court's attention; (d) The prosecutor will not assist in the defense of the case; (e) The rules of law are highly technical and will not be set aside in view of his or her status; (f) A defendant may waive constitutional, statutory, and common law rights unknowingly; (g) If the defendant is in custody, it is difficult for a defendant to locate witnesses, interview them, prepare subpoenas, and have them served;

In conclusion, it appears that judges can deem defendants have waived counsel based on their dilatory tactics. Although all of the cases involving "forfeiture" or "waiver" of right to counsel are fact specific and based on a weighing of all factors, factors to consider seem to be 1) the number of continuance requested to get counsel; 2) when the continuance was requested; 3) the reasons for the continuance requests; 4) whether the defendant qualifies for court-appointed counsel; 5) whether the defendant was warned of his impending waiver; 6) whether the defendant was advised of the consequences and challenges of self-representation; and 7) severity of charges defendant faces. If the defendant qualifies for court-appointed counsel, the best policy would be to go ahead and appoint counsel to represent him, regardless of his continual assurances to get his own attorney. Such an action will move the case, while at the same time protecting the defendant's rights.

Alcohol-Impaired Drivers (BAC=.08+) in Fatal Crashes by Speeding Status and Time of Day, 2007

National Highway Safety Administration Study



"Between midnight and 3 a.m., 70 percent of speeding drivers involved in fatal crashes are alcohol-impaired (BAC = .08+).

Step Back in Time

(Continued from page 22)

station and moved to Del Rio, Texas. He built a station on the other side of the border in Mexico, away from the reach of the Federal Radio Commission. He obtained permission from the Mexican government to broadcast in a higher frequency than any station had ever been allowed to broadcast in the world. Station XERA, also known as the "border blaster," was born. His programming could be heard all the way in Toronto, Canada. Many country and western stars got their start on XERA in Del Rio. Brinkley was the first to record broadcasts to be played later. He continued to make millions of dollars and perform his goat gland surgeries at will. Some say that Huey Long had been scheduled for the surgery, but he was assassinated before it could be performed.

Throughout his career, Brinkley was "chased" by Morris Fishbein, editor of the Journal of the American Medical Association and well-known "quack-buster" of his time. He finally succeeded in destroying Brinkley, but it took him over 20 years to do so. At his Kansas Medical Board hearing in 1930, midway through his career, prosecutors proved that Brinkley had killed at least 42 patients at the Milford Hospital itself, and many others staggered away from the clinic to die elsewhere from complications and infection. In addition, he had 10 years worth of patients on the Medical Question Box program that followed his "tonic" advice and did not seek further medical treatment for their ailments, undoubtedly resulting in their untimely deaths as well.

So yes, Dr. John Brinkley was a quack and a charlatan. Many believe he was the most dangerous quack (or mountebank) to ever live. If you want to read more about him, much of the information from this article was obtained from a New York Times Bestseller, *"Charlatan: America's Most Dangerous Huckster, The Many Who Pursued Him, and the Age of FlimFlam"* by Pope Brock. It is a fascinating look at Kansas history that many of us were never exposed to in our Kansas schooling.

San Diego Tests Solar-Powered Parking Meters

Reprinted from NTSI Interchange, March 2009

Around 50 solar-powered parking meters from IPS Group are being installed in central San Diego in a four-month pilot project that could lead to their use throughout the city.

Mayor Jerry Sanders says the meters will accept credit cards, pre-paid parking "value" cards or coins, and can be installed on existing poles. The new meters also provide improved parking management statistics, greater control over parking rates and are easier to use with better display and clearer instructions.

They are also claimed to be more environmentally friendly than conventional meters, because they do not use disposable batteries.

They will be tested alongside parking sensors that will track parking activity at individual spaces.

TEEN DRINKING BY THE NUMBERS

74 percent of high school students nationwide have had one or more drinks of alcohol in their lifetime.

28 percent of 12- to 20-year-olds report drinking in the past month. 19 percent were binge drinkers and 6 percent were heavy drinkers.

10 percent of 12- to 17-year-olds have had five or more drinks on the same occasion at least once in the past 30 days. (Binge drinking.)

2 percent of 12- to 17-year-olds have had five or more drinks on the same occasion on five or more days in the past 30 days. (Heavy drinking.)

Almost half of those who begin drinking before age 14 later become alcohol dependent.

Source: U.S. Substance Abuse and Mental Health Services Administration

Court Watch

The Tenth Circuit Court of Appeals held in *U.S. v. Orduna-Martinez*, ___F.3d ___ (C.A. 10 April 3, 2009), that Kansas law does prohibit obstruction of registration decals. K.S.A. §8-133 requires that plates be clearly visible and legible. (*See also*, STO §198). This provision applies equally to plates and decals. It also applies to out-of-state vehicles. The Court conducted an extensive review of the Kansas laws regarding vehicle registration and display. The defendant had argued that the statute must not apply to decals because these are so small that they are never legible from a moving vehicle traveling at a safe distance. The Circuit Court disagreed and found that where a metal bracket obstructs a decal so that it can only be read by looking behind the frame, it is not "clearly legible." Therefore, the trooper had a reasonable suspicion to stop the defendant. As the court stated:

"This case presents an unforeseen cost of perhaps vicarious alma mater loyalty."

EVIDENTIARY HEARING BY TELEPHONE

Craig Fischer, a convicted murderer, filed a habeas corpus motion under K.S.A. §60-1507 alleging ineffective assistance of trial counsel. The district court determined that an evidentiary hearing was in order, but denied his request to be present. Instead, he was allowed to participate by telephone.

In *Fischer v. State*, ___Kan.App.2d ___ (April 17, 2009) the Court of Appeals found that the Court was required to allow the petitioner to be present in person. Mere telephonic participation in an evidentiary hearing does not enable the movant to hear and observe witnesses, attorneys, or the judge and does not enable the manner of assistance of counsel that is critical in such a hearing. The majority cited Supreme Court Rule 145, which states that the court may use a telephone or other electronic conference to conduct any hearing or conference, **other than** a trial on the merits. The §60-1507 hearing was a hearing on the merits, the Court opined.

Judge Leben wrote a very pointed dissent that is well worth reading for those so inclined. He pointed out the cost and security issues involved in transporting a three-time convicted murderer, sentenced to 70 years in prison, 287 miles to a small rural community for a hearing. He also points out the tendency of prisoners to file these motions in the sole hope of getting a "vacation" from prison. He emphasizes that this is a civil case, not a criminal case, and the defendant was not prejudiced by the telephonic conference. He also questioned the application of Supreme Court Rule 145 to such a proceeding.

Crime-Fighting Cameras Give Officers an Edge

By Joe Lambe
Reprinted from Kansas City Star, March 23, 2009

Are you driving with a suspended license? Wanted for unpaid tickets?

Be warned: Even if you're driving too smoothly to draw attention, the police cruiser in the next lane can find you out. All it takes are cameras and a computer to speed up the old police tactic of matching bad guys with their license plates.

Lenexa is testing a car-mounted, weatherproof camera system — the first to reach the area — that scans thousands of license plates an hour as officers drive on patrol or cruise parking lots. Within seconds, a computer's beep will alert the officer if that shiny convertible he just passed is stolen. Or if the rust bucket parked by the curb belongs to a wanted man. Even critics say it's an effective tool, but one that can be taken too far if money becomes the motive for using it.

The company that makes the system being tried here, ELSAG North America Law Enforcement Systems, says its product has been on the market for five years in the United States and is now used in approximately 515 police agencies in 33 states. Such technology is spreading rapidly, said Frank Scafidi, a spokesman for the National Insurance Crime Bureau, which has given it to the California Highway Patrol and others to help recover stolen cars.

It is great for that, Scafidi said, but he has concerns that some cities use it to squeeze money from minor offenders like parking violators. It all depends on what kind of database is linked to it.

"When that ka-ching factor gets going," Scafidi said, *"there's no getting that horse back in the barn."*

Kansas City Police Sgt. Grant Ruark of traffic enforcement said he sees the system as more useful for tactical units than for traffic officers. For instance, he said, the system could be useful for units that check plates at apartment complexes while looking for wanted criminals.

Police do that time-consuming chore periodically "so good people have a good place to live," he said.

New York City Detective Wayne Scibelli said that city has the cameras on about 200 of 2,200 squad cars and uses them mainly to find stolen cars. A counterterrorism unit also uses them, he said.

Civil liberties are a concern with all such technology, Scibelli said, but "you have to remember these are license plates on cars on the street. It's not something that is your private information." Last year, the governor of Arizona called for the technology's use to be expanded from targeting stolen cars used by human smugglers to fighting crime statewide.

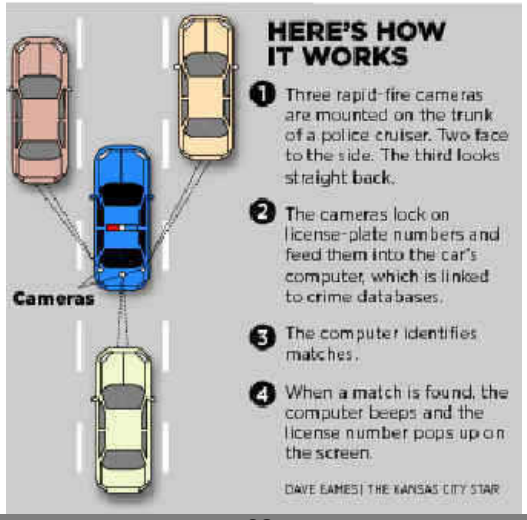
New Haven, Conn., last year used it to go after tax delinquents. It is also is effective nationwide in connection with Amber Alerts and high-profile crimes, supporters say.

On March 31, Lenexa will demonstrate how the system works to about 45 area police agencies, Lenexa Police Lt. Dawn Layman said. One big selling point, she said, is that the system can use data from the Coplink intelligence program being put in place by 13 area police agencies to better share information. But such crime-fighting is not cheap. The system being tried in Lenexa costs $20,000 per car. The manufacturer lent it to police for 60 days, until the demonstration next week.

"I don't think anybody will be able to equip all their cars with these," Layman said.

But even one car with one camera gives police thousands of new eyes.

The system is limited only by how many databases are linked to an in-car computer. Layman said Lenexa has data from the FBI, Kansas driver's license authorities and some area police agencies. Adding the Coplink data, she said, would allow quick information-sharing. And get it to a cop car that sees all.



AS JURORS TURN TO WEB, MISTRIALS ARE POPPING UP

By John Schwartz
Reprinted from New York Times

Last week, a juror in a big federal drug trial in Florida admitted to the judge that he had been doing research on the case on the Internet, directly violating the judge's instructions and centuries of legal rules. But when the judge questioned the rest of the jury, he got an even bigger shock.

Eight other jurors had been doing the same thing. The federal judge, William J. Zloch, had no choice but to declare a mistrial, a waste of eight weeks of work by federal prosecutors and defense lawyers.

"We were stunned," said a defense lawyer, Peter Raben, who was told by the jury that he had been on the verge of winning the case. "It's the first time modern technology struck us in that fashion, and it hit us right over the head."

It might be called a Google mistrial. The use of BlackBerrys and iPhones by jurors gathering and sending out information about cases is wreaking havoc on trials around the country, upending deliberations and infuriating judges.

Last week, a building products company asked an Arkansas court to overturn a $12.6 million judgment, claiming that a juror used Twitter to send updates during the civil trial.

And on Monday, defense lawyers in the federal corruption trial of a former Pennsylvania state senator, Vincent J. Fumo, demanded before the verdict that the judge declare a mistrial because a juror posted updates on the case on Twitter and Facebook. The juror had even told his readers that a "big announcement" was coming on Monday. But the judge decided to let the deliberations continue, and the jury found Mr. Fumo guilty. His lawyers plan to use the Internet postings as grounds for appeal.

Jurors are not supposed to seek information outside of the courtroom. They are required to reach a verdict based on only the facts the judge has decided are admissible, and they are not supposed to see evidence that has been excluded as prejudicial. But now, using their cellphones, they can look up the name of a defendant on the Web or examine an intersection using Google Maps, violating the legal system's complex rules of evidence. They can also tell their friends what is happening in the jury room, though they are supposed to keep their opinions and deliberations secret.

A juror on a lunch or bathroom break can find out many details about a case. Wikipedia can help explain the technology underlying a patent claim or medical condition, Google Maps can show how long it might take to drive from Point A to Point B, and news sites can write about a criminal defendant, his lawyers or expert witnesses.

"It's really impossible to control it," said Douglas L. Keene, president of the American Society of Trial Consultants.

Judges have long amended their habitual warning about seeking outside information during trials to include Internet searches. But with the Internet now as close as a juror's pocket, the risk has grown more immediate — and instinctual. Attorneys have begun to check the blogs and Web sites of prospective jurors.

Mr. Keene said jurors might think they were helping, not hurting, by digging deeper. "There are people who feel they can't serve justice if they don't find the answers to certain questions," he said.

But the rules of evidence, developed over hundreds of years of jurisprudence, are there to ensure that the facts that go before a jury have been subjected to scrutiny and challenge from both sides, said Olin Guy Wellborn III, a law professor at the University of Texas.

"That's the beauty of the adversary system," said Professor Wellborn, co-author of a handbook on evidence law. "You lose all that when the jurors go out on their own."

There appears to be no official tally of cases disrupted by Internet research, but with the increasing adoption of Web technology in cellphones, the numbers are sure to grow. Some courts are beginning to restrict the use of cellphones by jurors within the courthouse, even confiscating them during the day, but a majority do not, Mr. Keene said. And computer use at home, of course, is not restricted unless a jury is sequestered.

In the Florida case that resulted in a mistrial, Mr. Raben spent nearly eight weeks fighting charges that his client had illegally sold prescription drugs through Internet pharmacies. The arguments were completed and the jury was deliberating when one juror contacted the judge to say another had admitted to her that he had done outside research on the case over the Internet.

The judge questioned the juror about his research, which included evidence that the judge had specifically excluded. Mr. Raben recalls thinking that if the juror had not broadly communicated his information with the rest of the jury, the trial could continue and the eight weeks would not be wasted. "We can just kick this juror off and go," he said.

But then the judge found that eight other jurors had done the same thing — conducting Google searches on the lawyers and the defendant, looking up news articles about the case, checking definitions on Wikipedia and searching for evi-

(Continued on page 30)

Jurors Surfing Web

(Continued from page 29)

dence that had been specifically excluded by the judge. One juror, asked by the judge about the research, said, "Well, I was curious," according to Mr. Raben.

"It was a heartbreak," Mr. Raben added.

Information flowing out of the jury box can be nearly as much trouble as the information flowing in; jurors accustomed to posting regular updates on their day-to-day experiences and thoughts can find themselves on a collision course with the law.

In the Arkansas case, Stoam Holdings, the company trying to overturn the $12.6 million judgment, said a juror, Johnathan Powell, had sent Twitter messages during the trial. Mr. Powell's messages included "oh and nobody buy Stoam. Its bad mojo and they'll probably cease to Exist, now that their wallet is 12m lighter" and "So Johnathan, what did you do today? Oh nothing really, I just gave away TWELVE MILLION DOLLARS of somebody else's money."

Mr. Powell, 29, the manager of a one-hour photo booth at a Wal-Mart in Fayetteville, Ark., insisted in an interview that he had not sent any substantive messages about the case until the verdict had been delivered and he was released from his obligation not to discuss the case. "I was done when I mentioned the trial at all," he said. "They're welcome to pull my phone records."

But juror research is a more troublesome issue than sending Twitter messages or blogging, Mr. Keene said, and it raises new issues for judges in giving instructions.

"It's important that they don't know what's excluded, and it's important that they don't know why it's excluded," Mr. Keene said. The court cannot even give a full explanation to jurors about research — say, to tell them what not to look for — so instructions are usually delivered as blanket admonitions, he said.

The technological landscape has changed so much that today's judge, Mr. Keene said, "has to explain why this is crucial, and not just go through boilerplate instructions." And, he said, enforcement goes beyond what the judge can do, pointing out that "it's up to Juror 11 to make sure Juror 12 stays in line."

It does not always work out that way. Seth A. McDowell, a data support specialist who lives in Albuquerque and works for a financial advising firm, said he was serving on a jury last year when another juror admitted running a Google search on the defendant, even though she acknowledged that she was not supposed to do so. She said she did not find anything, Mr. McDowell said.

Mr. McDowell, 35, said he thought about telling the judge, but decided against it. None of the other jurors did, either. Now, he said, after a bit of soul-searching, he feels he may have made the wrong choice. But he remains somewhat torn. "I don't know," he said. "If everybody did the right thing, the trial, which took two days, would have gone on for another bazillion years."

Mr. McDowell said he planned to attend law school in the fall.

PARENTS AT PARTIES

99 percent of parents say they would not be willing to serve alcohol at their teen's party.

but... **28 percent** of teen partygoers have been at parties at a home where parents were present and teens were drinking alcohol.

Source: National Center on Addiction and Substance Abuse at Columbia University

UNDER THE INFLUENCE

Among six things that might affect their decisions about drinking, 71 percent of U.S. teens ages 13 to 17 identified their parents as the leading factor.

Parents:	71%
Don't know:	12%
Best friends:	9%
Media:	3%
Teachers:	2%
Siblings:	2%
Ads:	1%

Source: GfK Roper Youth Report, 2008

Unpublished Opinions

Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precidential 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 of interest to municipal courts.

ARGUMENTUM AD IGNORANTIAM
Unpublished Decision

Gary Bryant flunked the breath test following a DUI arrest and lost his driver's license. He challenged the suspension on the basis that the officer failed to follow the KDHE protocol for breath testing. The protocol requires that the officer keep the subject in his immediate presence and deprive the subject of alcohol for 20 minutes immediately preceding the breath test. The officer testified that he complied with the 20-minute deprivation period. According to his report, he started the deprivation period at 12:40 a.m. and administered the test at 1:00 a.m. However, the printout from the Intoxilyzer 5000 showed that the testing sequence started at 1:07 a.m and the actual test was at 1:09 a.m. The officer could not explain the discrepancy. However, in response to questioning from the State the officer said that he observed the defendant the whole time and that Bryant did not consume anything.

The district court, in an appeal from the administrative order suspending his driver's license, found that Bryant failed to show that the officer had not substantially complied with the KDHE testing protocol. This is a negative factual finding. To disprove the trial court's finding, Bryant needed to offer positive proof in the form of undisputed evidence that the officer had not conducted the 20-minute deprivation period. Instead, he argued that the officer either complied or he didn't. Since he was unsure why his report and the intoxilyzer report were in conflict, he was therefore unsure of whether he actually conducted the observation period. Therefore, the officer failed to establish that he complied. In *Bryant v. Kansas Department of Revenue*, Slip Copy, 2009 WL 112821 (Kan. App. January 16, 2009), Judge Standridge wrote:

"The problem with this logic is that it relies on an absence of evidence as support for the proposition that one of two possibilities exists. To argue in such a way is to commit the fallacy of argumentum ad ignorantiam, *that is, an argument from ignorance. In committing this fallacy, one argues that the absence of evidence in support of a proposition establishes that the proposition is false or, conversely, that the absence of evidence in opposition to the proposition establishes that the proposition is true."*

There was no evidence that the officer conducted an observation period less than 20 minutes. Worst case, he conducted a 29 minute observation period. The suspension stands.

AMENDMENT OF COMPLAINT TO ADD CHARGES THE DAY BEFORE TRIAL
Unpublished Decision

Kenneth Gehmlich was charged with aggravated sexual battery. The day before trial the State moved to amend the complaint to add an alternative count of aggravated battery and a separate charge of criminal restraint. Gemlich argues that he suffered prejudice by the court allowing new charges to be added and not giving him sufficient notice to properly defend himself. K.S.A. §22-3201(e) allows the court to permit amendment of a complaint at any time prior to a verdict if no additional crime is charged and if substantial rights of the defendant are not prejudiced.

In *State v. Gehmlich*, Slip Copy, 2009 WL 112785 (Kan. App. January 16, 2009), the Court found that the offenses added were distinctly different, *"however, [that fact] does not end our inquiry."* It found that the Kansas Supreme Court has loosened the standard and has routinely held that different crimes may be added by amendment as long as the substantial rights of the defendant are not prejudiced. The Court found that Gehmlich could not meet the prejudice prong of the test. The amended charges were based on the same conduct as the aggravated sexual battery. Gehmlich argued that the new charges "may" have had an impact on his defense strategy, but failed to specify in what that impact might be. His claim of prejudice was entirely speculative. It therefore, fails. The decision by the trial court to allow the amendment did not constitute an abuse of discretion.

EVIDENCE OF PRIOR DUI CONVICTIONS: JOURNAL ENTRY NOT REQUIRED
Unpublished Decision

Alvino Torrez was convicted of DUI, as a fourth-time offender. He appealed the Court's admission into evidence of a prior conviction from Wyoming.

Any documents admitted for the purpose of proving a defendant's criminal history must satisfy the authentication requirements of K.S.A §60-465. Torrez argued that when out-of-state documents are introduced, they must be certi-

(Continued on page 32)

Unpublished Opinions

(Continued from page 31)

fied or attested to and accompanied by a certificate in order to properly authenticate them. The Wyoming DUI was in the form of a traffic ticket. The copy submitted contained a raised seal which bore a notation indicating that the copy was certified to by *"a full true and correct copy of the original in my custody."* There was an original signature from a person designated as the clerk of the circuit court. There was also a three page summary docket attached, reflecting that the charge was DUI, his plea of guilty to the charge, his conviction, and his sentence. The final page of this document also contained a raised seal and handwritten signature from someone purporting to be the clerk of the court.

In *State v. Torrez*, Slip Copy, 2009 WL 112826 (Kan. App. January 16, 2009), the Court found that these documents were sufficient to meet the requirements of K.S.A. §60-465.

"The fact these Wyoming documents do not contain a journal entry is not significant. …while a certified copy of a journal entry is the best evidence of a prior conviction, it is not the only permissible form of evidence to prove a defendant's criminal history…"

The Court pointed out that in the past it had even accepted authenticated printouts of computer screens from another state as sufficient. Torrez did not submit any evidence that the Wyoming DUI was different than a Kansas DUI. Therefore, the Court found that he abandoned the argument. The documents established that the offenses were "sufficiently similar." Therefore, his conviction as a fourth-time offender stands.

AN OVERT ACT CAN BE ESTABLISHED WHEN THE DEFENDANT MERELY ARRIVES AT THE SCENE WHERE THE CRIME IS TO OCCUR

Unpublished Decision

Here we have another "To Catch A Predator"-type sting. Robert Hill began corresponding on line with a Johnson County Sheriff's Office detective posing as a 14 year-old girl. He made lots of nasty comments and suggestions, making it crystal clear that he wanted to have sex with her, and arranged to meet her at her apartment. "Brandy" gave Hill her cell phone number and address and he was to call her when he got to the apartment. He said he was going to bring condoms and would be driving a black car. He was to walk to the trash dumpster where Brandy could see him and then he would walk up to her apartment.

Hill drove to the apartment complex in a silver car. He pulled in and out of a couple of parking spaces. He called "Brandy's" number several times, while blocking his own number. He did not exit his car. After a while, he left the complex and deleted the record of his phone calls to Brandy from his phone. When he was eventually stopped, he did not have condoms in his possession and he stated that he had no intention of actually meeting Brandy.

The question in *State v. Hill*, Slip Copy, 2009 WL 196152 (Kan. App. January 23, 2009) was whether Hill had completed enough of an overt act to be convicted of attempted aggravated indecent liberties with a child. The Court of Appeals found that it was. It cited *State v. Peterman*, 280 Kan. 56 (2005) for the proposition that an attempt may be established when the defendant merely arrives at the scene where the crime is to occur.

Hill next argued that if this was an overt act, he withdrew from the attempt and abandonment should be a complete defense to an attempt. The Court pointed out that Kansas has expressly rejected a defense of voluntary abandonment where there is an overt act by the defendant followed by a failure to complete the crime.

STOP BASED ON MISTAKEN IDENTITY

Unpublished Decision

Police were executing a search warrant at the residence of Dontae Patterson. Officers were assigned to monitor the area around Patterson's residence and presumably stop him before he reached the house. (The case is unclear as to the basis for stopping Patterson). They were given mug shots of Patterson so that they would recognize him if they saw him. Officers observed a driver they thought was Patterson. They followed and the driver pulled into a driveway about 3 blocks away from Patterson's home. The driver exited the car, threw down a cigarette-like object and looked toward the officers. The officers turned on their emergency lights, directed their spotlight on the driver and ordered him to stop. Turns out the cigarette was a marijuana cigarette. The driver identified himself as Williams Henderson, but because Patterson used numerous aliases, the officers still thought they had Patterson. During a patdown of Henderson, the officers found more marijuana. Henderson moved to suppress the evidence on the basis that police had no basis to stop him.

In *State v. Henderson*, Slip Copy, 2009 WL 248102 (Kan.App. January 30, 2009), the Court held that the law on arrests based on mistaken identity is well established. When police officers have probable cause to arrest one person and they reasonably mistake a second person for the first, the arrest of the second person is a valid arrest. In this case, the district judge reviewed the photographs and found that there was a reasonable resemblance between Patterson and Henderson. *"The totality of the circumstances shows that, under these facts, the officers had a minimal level of objective justification,"* therefore the trial court's order denying the motion to suppress was affirmed.

(Continued on page 33)

Unpublished Opinions

(Continued from page 32)

EXPUNGEMENT DENIED BECAUSE DEFENDANT STILL OWED ON THE CIVIL JUDGMENT THAT RESULTED FROM THEFTS

Unpublished Decision

Carol Dyer filed a petition to expunge her theft convictions. As part of her conviction she was required to pay $65,000 in restitution. She did so and was successfully released from probation. Dyer's thefts had occurred over a 10-year period in her capacity as a bookkeeper for M & M Motors and totaled over $276,000. The restitution was less than the total stolen because some of the thefts occurred outside of the criminal statute of limitations. M&M obtained a civil judgment against Dyer in excess of $200,000. At the time of the filing of her expungement petition she still owed on the civil judgment. The district judge denied her petition on the basis that it was not consistent with the public welfare to expunge the conviction when she still owed money for her crimes. A full hearing was held and witnesses testified in favor and in opposition to her petition. In *State v. Dyer*, Slip Copy, 2009 WL 248237 (Kan. App. January 30, 2009) the Court found that the judge did not abuse his discretion in denying the petition.

NO ERROR FOUND WHEN COURT EXCLUDED DEFENSE'S EXPERT WITNESS ON THE NHTSA FIELD SOBRIETY TEST STANDARDS AND THEIR LACK OF RELIABILITY WHEN DEVIATED FROM

Unpublished Decision

During his administrative driver's license hearing (challenging his suspension) Douglas Hower argued that the officer did not conduct the field sobriety tests in accordance with NHTSA standards. Hower had advised the officer that he had a knee problem and the walk-and-turn test was not conducted with an actual line on the pavement. In addition both the one-leg stand and the walk-and-turn were not conducted on a dry, level surface. Hower wanted to call an expert witness to testify on the deviations the officer had made from the NHTSA standards. The judge first denied the request, then granted it, heard the testimony and then struck the testimony because it was not helpful.

In *Hower v. Kansas Department of Revenue*, Slip Copy, 2009 WL 28231 (Kan. App. January 30, 2009), the Court pointed out that expert testimony is admissible if it aids the trier of fact in understanding unfamiliar subjects, in interpreting technical facts, or in arriving at a reasonable factual conclusion based on the evidence. Expert testimony is inadmissible if the normal experience and qualifications of the trier of fact permits him or her to draw proper conclusions from the given facts and circumstances. An expert may pass on the weight or credibility of evidence. In this case, the expert's testimony about the physical condition of the street and the NHTSA standards was neither helpful nor necessary to aid the court in understanding the facts. In addition, the expert testified concerning the reliability of the field sobriety tests in light of the deviation from NHTSA standards. This was clearly improper because it concerned the weight to be given to the test results, a matter solely within the province of the trier of fact (in this case, the judge). The judge did not abuse his discretion in excluding the expert's testimony.

JUSTIFICATION FOR ARREST V. REASONABLE SUSPICION TO STOP A VEHICLE

Unpublished Decision

Jason Buster got a little testy with his employer after being fired. He refused to leave and became unruly (to wit: trespassing and disorderly conduct). After he finally left, the employer called the police. The officers passed Buster as they went into the employer's offices to find out what was going on. He told them he was just there to retrieve some tools. When the officers entered the office, Buster drove away. After talking to the employer, they went after Buster and stopped him two blocks away. He committed no traffic infractions. The officers indicated they saw signs that Buster was under the influence of alcohol and they arrested him for DUI, disorderly conduct and trespassing. However, neither officer had any discussion of the DUI in their arrest reports and they never charged Buster with DUI. They never mentioned to Buster that they thought he was impaired and they never told him they were arresting him for DUI. When they searched his car incident to the arrest they found marijuana and drug paraphernalia, so those charges were added. Buster moved to suppress the evidence seized on the basis that there was no basis to stop him.

The district judge analyzed these facts as an arrest. In other words, the officers left the business, without an arrest warrant, to arrest Buster for the trespass and disorderly conduct. She examined the statute regarding when an officer can arrest someone without a warrant, K.S.A. §22-2401(c) and (d), and found that none of the criteria for an arrest applied. He was alleged to have committed two minor misdemeanors; the evidence would not have been irretrievably lost if he were not detained; his address was easily obtainable; he was no threat to public safety; and no crimes were committed by him in the officer's presence. Therefore, she opined, there was no basis for the warrantless arrest and the evidence they obtained subsequent thereto must be suppressed

The Court of Appeals disagreed with this approach in *State v. Buster*, Slip Copy, 2009 WL 196203 (Kan. App. January 23, 2009). The issue, the panel said, was not whether there was a statutory basis for a warrantless arrest, but whether there was reasonable suspicion to conduct a traffic stop. It found that an officer has reasonable suspicion to conduct a traffic stop when the officer receives information from an

(Continued on page 34)

Unpublished Opinions

(Continued from page 33)
identified informant (in this case the employer) that the suspect has engaged in criminal activity. The officers had reasonable suspicion to believe that Buster had committed disorderly conduct and trespassing. Therefore, the traffic stop was proper.

The next question is whether the officers had a basis to arrest Buster. The Court remanded the case for the district court to determine if the officers had probable cause to arrest Buster for DUI (even though they never charged him with it). If they did not, the inquiry ends there and for all the reasons the judge used in determining that the stop was unlawful, suppression would be required. However, if she finds that the officers did have sufficient evidence to arrest for DUI (an on-view offense), then the evidence will probably come in unless the search exceeded its lawful scope.

EMERGENCY-AID EXCEPTION REQUIRES AN OBJECTIVE NECESSITY TO ACT IMMEDIATELY

Unpublished Decision

Police received an anonymous tip concerning drug activity in a Wichita motel room. After arresting one of the occupants of the room on a parking warrant when she came outside, they discovered there were children in the room. The oldest was purportedly only 5 years-old and she was unclear as to whether there was an adult in the room with them. Officers took the room key from her pocket and told her they were going to go up to the room with the key to check the welfare of the children. She protested and stated that her sister could go in and take custody of the children. The officer knocked on the door and when no one answered, he opened the door with the key. Dexter Baker was inside with three small children. One of them was his. The officer saw drugs in the room. The issue in *State v. Dexter*, Slip Copy, 2009 WL 311813 (Kan. App. February 6, 2009) was whether the officer's warrantless entry into the room with a key was lawful.

The Court found it was not. It rejected the State's "emergency-aid" argument. It found that the touchstone for the emergency-aid exception to the warrant requirement is necessity: given the circumstances and the significance of the threat to life or property, officers must act immediately. Although the officers in this case had sufficient reason to be concerned, the arrestee's sister, an adult relative of the children, was present and could have checked on the children as requested by the arrestee. There was no evidence that she was unable to check the welfare of the children. It was not objectively necessary for police to take on that role and use the emergency-aid doctrine to justify a warrantless entry. The evidence found in the room is not admissible against Dexter.

JUDGE LEBEN MAKES CASE TO REMOVE "WITNESS CERTAINTY" AS FACTOR FOR JURORS TO CONSIDER IN CASE OF EYEWITNESS IDENTIFICATION

Unpublished Decision

Michael Mitchell was charged with aggravated robbery. Mark Trevino identified him as the person who kicked in his door, hit him and demanded money. He described his attacker to the police and said he knew him, although not his name. Trevino had met Mitchell at a bar and allowed him to stay in his apartment in the past. Trevino was shown a line-up. He quickly identified Mitchell as the robber. He wrote on the form that he was 100% certain that Mitchell was the person who robbed him. On appeal, Mitchell argued that the jury was improperly instructed on how to evaluate eyewitness-identification testimony. The district court instructed the jury regarding eyewitness testimony consistent with the "Biggers" factors (as in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)) and subsequent Kansas Supreme Court decisions.

The issue at the heart of *State v. Mitchell*, Slip Copy, 2009 WL 311814 (Kan.App. February 6, 2009) was what place a witness's stated certainty in the identification has in jury instructions regarding eyewitness identification testimony. In writing for the majority, Judge Leben took great pains to point out that the Court was bound by the precedents of the Kansas Supreme Court which had approved consideration of witness certainty as a factor to consider when determining whether the testimony should be admitted at all. It has also tacitly approved witness certainty as a factor for the jury to consider absent a finding that such consideration impacted the case. However, he made no secret of the fact that he does not believe it should be a factor.

"While Mitchell's jury was told to consider the extent to which the witness was certain of the identification, social-science research suggests that factor may not be a good indicator of accuracy…We realize that serious questions remain about whether a jury should be instructed to give special consideration to witness certainty in determining whether an eyewitness' testimony is accurate, and psychologists have studied the question quite diligently. Researchers have found only a weak relationship between witness certainty and identification accuracy, and mistaken eyewitness testimony has been the single biggest factor leading to wrongful convictions for cases in which DNA evidence has demonstrated the innocence of convicted defendants."

Judge Buser filed a short concurring statement indicating that he was not expressing an opinion with regard to the scientific literature on eyewitness identification.

A few months later a different panel of the Court again had a chance to review the "degree-of-certainty" factor in an eyewitness identification instruction and again found it to

(Continued on page 35)

Unpublished Opinions

(Continued from page 34)
be a viable factor under existing Kansas law. *See, State v. Anderson*, Slip Copy, 2009 WL 793019 (Kan. App. March 20, 2009).

JUDGE CAN'T RESUME TRIAL AND CALL WITNESSES AFTER DEFENDANT STEPS OUT OF ROOM TO GO TO BATHROOM

Unpublished Decision

During Perry Hilson's criminal trial, he made an "urgent" request to use the restroom. The Court allowed him to do so. He left the room. The judge then told the prosecutor to call the next witness. The defense attorney stood up and advised the court that his client would like to be present for the testimony. But the trial court denied the request and the trial continued. The trial judge opined that the defendant had voluntarily absented himself from the trial.

In *Hilson v. State*, Slip Copy, 2009 WL 311819 (Kan. App. February 6, 2009), the Court found that the error was structural in nature and deprived the defendant of a fair trial. It deprived him of his Sixth Amendment right to confront the witnesses. Since it was a structural error, whether or not the error was harmless is irrelevant. Hilson gets a new trial.

OFFICER MAY TESTIFY AS LAY WITNESS OR EXPERT ON OBSERVED INTOXICATION

Unpublished Decision

Allowing an officer to testify to the defendant's sobriety level **and ability to safely operate a motor vehicle** is based on the officer's personal observations and expertise as an officer and there is no abuse of discretion in allowing the testimony. Moreover, lay witnesses are permitted to testify on the issues of intoxication. Finally, it does not matter if the officer's opinion that the defendant was intoxicated is given as an expert or lay witness, since either type of testimony is permitted even though it embraces the ultimate issue. *See*, *State v. Duncan*, Slip Copy, 2009 WL 398995 (Kan. App. February 13, 2009).

DRUG RESIDUE—STILL MUST HAVE SOME EVIDENCE OF KNOWING POSSESSION

Unpublished Decision

A small plastic bag containing cocaine residue was found in Donald Gray's wallet when he was booked into jail on an unrelated matter. He told the officer he kept his pills in the bag and at trial he said he kept his prescription medications in the bag. The jury found him guilty of possession of cocaine.

In *State v. Gray*, Slip Copy, 2009 WL 398837 (Kan. App. February 13, 2009), Gray objected to the following instruction:

"Proof of the possession of any amount of a controlled substance is sufficient to sustain a conviction even though such amount may not be measurable or useable."

He argued that this instruction basically forced the jury to find him guilty. The Court of Appeals disagreed. The jury had also been instructed that the State was required to prove that the defendant possessed cocaine or had it under his control and that he did so intentionally. The instructions went on to state *"[p]ossession of a controlled substance requires that the defendant have control over the substance with knowledge of and the intent to have such control. To possess a controlled substance, the defendant must have knowledge of the presence of the controlled substance with the intent to exercise control over it. Control means to exercise a restraining or directing influence over the controlled substance."*

These instructions, read together, further clarified the State's burden and would not have reasonably misled the jury into thinking that as long as the substance was present, they must convict.

WARRANTLESS SEARCH OF BACK PORCH AFTER SMELLING ANHYDROUS AMMONIA COMING FROM IT WAS UNLAWFUL SEARCH EVEN THOUGH OFFICERS RETURNED WITH A WARRANT

Unpublished Decision

Two Hutchinson police officers smelled a strong odor of anhydrous ammonia coming from the backyard of Timothy Swansen's residence. They entered the backyard and approached an enclosed back porch attached to the residence. They shined a flashlight inside and observed several items associated with the production of methamphetamine. None of the items could have been seen from the street.

The officers then went to the front door of the residence to conduct a "knock and talk." Swansen opened the door. One of the officers asked for Swansen to consent to him looking in the back porch for a meth lab. Swansen consented and walked back to the porch with the officers. They all observed the same items the officers had seen moments earlier. The officer asked for permission to look inside the residence. Swansen refused. The officers left and got a search warrant.

Three hours later, the original two officers and several others held a briefing about one block from the house in anticipation of serving the warrant. A truck pulled up to the residence. Crystal McFadden exited the truck and approached the driver's side door of a Saturn that was parked on the street next to Swansen's house. At about the same time, Bryan Frischenmeyer ran from the rear of the resi-

(Continued on page 36)

Unpublished Opinions

(Continued from page 35)

dence to the passenger side of the Saturn. He did not appear to be carrying anything. An officer pulled up behind the Saturn and detained McFadden and Frishchenmeyer.

McFadden told the officers that the Saturn belonged to her mother and that she had loaned it out to someone who had failed to return it at the arranged time. She was out looking for the car when she saw it parked at the residence.

The officers asked to search the car. McFadden refused, saying the car was her mother's and they would have to ask her mother. Meanwhile, the other officers executed the search warrant and found a meth lab inside the house. Frischenmeyer and Swansen were arrested. McFadden was detained. She was told she would be released the search of the house was complete. However, she could not leave in the Saturn. When the officers advised her she was free to go, she elected to remain because she wanted to make sure the officers did not search the car. She was free to move about as she wanted, but was not allowed in or around the Saturn.

The officers eventually applied for and obtained a search warrant for the car based on the items found in the residence and the fact that Frischenmeyer ran from the residence to the car. Three hours after being detained, McFadden's Saturn was searched. They found a grinder and pill bottles with white powder. One of the officers approached McFadden on the sidewalk and asked to speak with her. She agreed. He told her what he had found and McFadden admitted the items belonged to her. She was arrested and charged with manufacturing meth and five other related charges.

All three individuals challenged the search. *See*, *State v. McFadden*, Slip Copy, 2009 WL 400994 (Kan. .App. February 13, 2009) ; *See*, *State v. Frischenmeyer*, Slip Copy, 2009 WL 400997 (Kan. .App. February 13, 2009): *See*, *State v. Swansen*, Slip Copy, 2009 WL 401007 (Kan. .App. February 13, 2009). The prosecution argued that there was no expectation of privacy on the back porch. In addition, the odor of anhydrous ammonia created a health hazard, eliminating any expectation of privacy they may have had. Since there was no fence, the officers were concerned about the strong odor and were simply tracking the source of this highly toxic substance. However, the Court of Appeals noted that the officers never called in a hazmat unit or evacuated the area, so it must not have been that great of a threat. They never even asked Swansen if there were other people in the house who may have been sickened by the fumes. Instead, they left and took three hours to get a warrant. The Court found that the State could not establish that this was an emergency and thus an exception to the warrant requirement. The district judge was correct to suppress all evidence obtained from the illegal entry into the curtilage of Swansen and Friscenmeyer's home.

Further, the officers had no probable cause to search McFadden's car irrespective of the warrant they obtained. The search of her car was unlawful because there was no probable cause to believe it had been used in the furtherance of any crime. Finally, since the search was illegal, the statements McFadden made to the police are suppressed. Likewise, the district judge was correct to grant McFadden's motion to suppress. All three defendants walk.

TRANSITORY ANGER NOT PUNISHABLE AS TERRORISTIC THREAT

Unpublished Decision

K.S.A. §21-3419(a)(1) states:

"A person is guilty of a felony of the third degree if he threatens to commit any crime of violence with purpose to terrorize another …or in reckless disregard of the risk of causing such terror…"

In the commentary to the draft of this section, the drafters indicated their intent to draw a line between serious and trivial threats.

"In drafting legislation penalizing threats, we would not wish to authorize grave sanctions against the kind of verbal threat which expresses transitory anger rather than settled purpose to carry out the threat or to terrorize the other person." A.L.I., Model Penal code 211.3 (Tentative Draft No. 11 1960).

In *State v. Singleton*, Slip Copy, 2009 WL 454735 (Kan. App. February 20, 2009) the Kansas Court of Appeals supported the interpretation suggested in the Model Code as well as other jurisdictions with similar statutes in holding that threats which only express transitory anger are not punishable as terroristic threats. It cited a case from Pennsylvania wherein the defendant was drunk and angry and shouted at police officers that he was going to kill them. The Court found that there was insufficient evidence of actual intent to cause terror or reckless disregard of the risk of causing terror in the drunken defendant's conduct. The threat was merely unpunishable "transitory anger." Regardless of whether the threat is real or even capable of being carried out, it is the reaction desired by the communicator, or the communicator's reckless disregard of the possibility of creating that reaction which constitutes the offense. "Transitory anger" is relevant in determining the communicator's intent or his realization the subject of his communication would be in fear of imminent danger.

.

DO NOT NEED TO PROVE THE EXACT DATE OF OFFENSE, "ON OR ABOUT" IS SUFFICIENT, HOWEVER A TWO WEEK SWING IS NOT "ON OR ABOUT"

Unpublished Decision

William Murr was charged with manufacturing methamphetamine on or about January 12, 2005. However, the State failed to present any evidence at trial that he manufactured methamphetamine on that date. After the testimony of a few witnesses, the State moved to amend the complaint to change the

(Continued on page 37)

Unpublished Opinions

(Continued from page 36)

dates on the charge to a time period from June 2004 to January 12, 2005. The court denied the request primarily due to the fact that the State knew about the earlier involvement well before trial and a change at such a late date would prejudice the defendant. It was clear from cross-examination that the defense was based on the fact that no activity took place on January 12, 2005. In closing, the prosecutor argued that they did not have to prove that the crime took place on January 12, 2005 due to use of the words "on or about" in the charging document. He argued that as long as the crime occurred within the statute of limitations, the jury could convict. They did and Murr appealed.

In *State v. Murr*, Slip Copy, 2009 WL 596514 (Kan.App. March 6, 2009), the Court of Appeals acknowledged that it is not necessary for the prosecution to prove the exact date upon which an offense was committed. It is sufficient to prove that the offense charged was committed on or about the date alleged in the information, and within the statutory period of limitations. However, cases that so hold usually only involve a "swing" of a few days. Two weeks, which was the shortest the "swing" could be if the evidence was considered in the light most favorable to the prosecution, the court found, is too long to be considered "on or about." In addition, the prosecutor's closing was improper in that it suggested that the jury could take into account criminal activity that was not included in the charging document, to wit: manufacturing as early as November 2004. The defendant's conviction was reversed and the case remanded for a new trial.

TRAFFIC STOP BASED ON MISTAKE OF LAW IS INVALID AND ALL EVIDENCE OBTAINED MUST BE SUPPRESSED

Unpublished Decision

Manhattan police officer saw a van with a piece of paper taped to the back window that did not appear to be either a 30-day tag or a license plate. There was no license plate on the van. He stopped the van. The officer looked at the paper, which was a valid auctioneer's transport permit. The officer, however, had never seen such a thing before and didn't know that it was a valid document allowing the operator to drive the vehicle without a license tag. After questioning the driver and obtaining his identifying information, he determined the driver's license was suspended. The defendant was charged with driving on a suspended license and ultimately convicted.

In *City of Manhattan v. Enlow*, Slip Copy, 2009 WL 596555 (Kan. App. March 6, 2009), the Kansas Court of Appeals found that the police officer had a sufficient basis to stop Enlow. He saw a van with no license plate and unreadable paper in the window. He had the right to stop the vehicle to investigate a possible violation of the law. However, the stop then developed into a mistake of law, because the officer was unfamiliar with auctioneer transport permits. Even though the stop may be valid, when a stop is based on mistake of law, the stop is invalid and all evidence obtained as a result must be suppressed. An officer is charged with knowledge of the law. The Manhattan officer should have known the permit was valid. Once he read the permit, he unlawfully extended the stop by asking the driver for his identifying information and driver's license. Therefore, all evidence obtained during the stop must be suppressed.

The district court had suppressed the evidence obtained after the stop, however it allowed the case to proceed to trial with the in-car video of the defendant driving the car and a certified copy of the defendant's driving record showing it to be suspended. The Court of Appeals found that the officer would not have known the defendant's identity absent the illegal detention, therefore all evidence that was presented at trial was fruit of the poisonous tree and must be excluded. The defendant's conviction was reversed and he was discharged from any further liability for the matter.

UNREASONABLE DELAYS DUE TO JUDICIAL REASSIGNMENT ARE CHARGED AGAINST THE STATE IN SPEEDY TRIAL ANALYSIS

Unpublished Decision

Immediately after taking a plea to two counts of aggravated assault, judge #1 realizes he knows the victims. He discloses this and allows the defendant to withdraw the pleas. He then recuses himself and the case is sent to the Chief Judge of the district for reassignment. A month later defendant appears for plea in front of judge #2. Before entering the plea, judge #2 announced that he too knows the victims. Judge #2 recuses himself and forwards the case to the Chief Judge for reassignment. Another appearance was never scheduled and the case fell into a black hole for 10 months, when it was only brought to light because the defendant filed a motion to dismiss on the basis of denial of a speedy trial.

In *State v. Douglas*, Slip Copy, 2009 WL 596548 (Kan.App. March 6, 2009), the Court of Appeals found that the "reasonable" time necessary for reassignment of judge is charged to the defendant. Therefore, the delay between judge #1 and judge #2 is attributable to the defense. Assuming a "reasonable" time between judge #2 and judge #3, which courts have generally found to be 30 days, still leaves 9 months to be charged against the State. It is the State's obligation to ensure the accused is provided with a speedy trial and the defendant is not required to take any affirmative action to see this right is observed. Judge #3's decision to dismiss the charges was correct.

(Continued on page 38)

Unpublished Opinions

(Continued from page 37)

INTERPRETER STATUTE IS NOT A RULE OF EVIDENCE
Unpublished Decision

K.S.A. §75-4351(e) states that a qualified interpreter shall be appointed for persons whose primary language is one other than English *"prior to any attempt to interrogate or take a statement from a person who is arrested for an alleged violation of a criminal law or the state or any city ordinance."*

Gerard Lopez-Brito was arrested for aggravated robbery. His primary language was not English. He was not provided an interpreter prior to questioning by police. He moved to suppress his statements on the basis that he did not understand English well enough to knowingly waive his *Miranda* rights. The district court found that there was overwhelming evidence the defendant could both understand and speak English. An interpreter was provided at the hearing on the motion to suppress.

In *State v. Lopez-Brito*, Slip Copy, 2009 WL 596543 (Kan. App. March 6, 2009), the Court of Appeals found that K.S.A. §75-4351does not state a rule of evidence. Whether or not an interpreter is appointed and is present at the taking of the statement, the district court must still determine whether an in-custody statement was freely, voluntarily, and knowingly given, with knowledge of the *Miranda* rights. The determination must be based upon the totality of the circumstances. The fact that he did not have an interpreter during his interview with detectives is just one factor for the court to consider. The Court of Appeals found there was sufficient evidence to support the trial court's finding that Lopez-Brito could speak and understand English.

Editor's Note: *This decision appears to follow other Kansas appellate decisions which render K.S.A. §75-4351(e) virtually meaningless in the context of the criminal rules of evidence. Evidence obtained in violation of its mandate will not be excluded solely on that basis. K.S.A. §75-4355d does allow a person aggrieved by failure to provide an interpreter for the deaf or speech impaired under K.S.A. §75-4355a-K.S.A. §75-4355d to enforce the provisions in district court. No similar provision appears for those whose primary language is other than English.*

JOURNAL ENTRIES USED TO PROVE PRIORS MUST BE PROPERLY AUTHENTICATED
Unpublished Decision

The prosecution has the burden of proving prior convictions for sentencing purposes. In *State v. Everett*, Slip Copy, 2009 WL 596526 (Kan.App. March 6, 2009), Everett challenged a New York possession of cocaine conviction. The State presented evidence of the challenged conviction by way of a Geary County pre-sentence investigation which listed the conviction and a sentencing journal entry from Geary County which indicated that there had been no objection lodged to the criminal history in that case. The Kansas appellate courts have opined before that the fact that another court has counted a conviction can be used as evidence of that conviction. The Geary County documents bore a certification by the district court clerk on one of the pages of the journal entry. However, the certification was not "freshly made" on the copy presented, but was part of the copy. In other words, it was a copy of a certified copy. Since the document was not properly authenticated under K.S.A. §60-465, it could not be considered by the court. The prior was not properly established and therefore could not be used to increase Everett's criminal history score.

ORAL AGREEMENTS BETWEEN LAW ENFORCEMENT AGENCIES REGARDING REQUESTS FOR ASSISTANCE ARE ACCEPTABLE, EVEN WHEN THE DECISION IS LEFT TO DISPATCH AS TO WHEN TO REQUEST SUCH ASSISTANCE
Unpublished Decision

McPherson County has a verbal agreement with municipalities within the county which allows municipal police officers to operate outside of their jurisdiction in emergency situations. The Sheriff testified that dispatch, a separate entity from the Sheriff's department, will routinely ask a city officer to investigate incidents outside their own city limits so that the county does not have to send officers a long distance to investigate minor matters.

In *State v. Atkins*, Slip Copy, 2009 WL 793109 (Kan. App. March 20, 2009), the Court of Appeals held that in order to comply with K.S.A. §22-2401a regarding jurisdiction of city law enforcement officers, there is no requirement that a request for assistance be made on a case-by-case basis, or that the actual need for assistance be established, just that a request for assistance was made. In this case, the burden of requesting such assistance rested with the dispatcher, who was aware that the McPherson County sheriff wanted assistance from city law enforcement in circumstances like the one presented in the case. This was sufficient to meet the requirement of a "request for assistance" under K.S.A. §22-2401a, conferring extra-territorial jurisdiction to the city police.

MURDERER CAN BE REQUIRED TO PAY RESTITUTION FOR THE COST OF A CASKET, EVEN THOUGH THE VICTIM WAS CREMATED
Unpublished Decision

David Knapp was convicted of involuntary manslaughter. He was ordered to pay $5,234 in restitution to the victim's family for funeral expenses. Roughly half of this ($2,290) was for a casket. The defendant objected because the victim was cremated and a cremation urn was already included in the restitution amount. The casket, he argued,

(Continued on page 39)

Unpublished Opinions

(Continued from page 38)
was an unnecessary and therefore, indirect expense.

In *State v. Knapp*, Slip Copy, 2009 WL 793124 (Kan. App. March 20, 2009), the Court held that the victim's family are entitled to restitution for all of their expenses. A cremation urn does not serve a casket's function of transportation or display of the body for the sake of funeral services. The cremation urn merely takes the place of a burial plot and headstone. The casket expense was a direct result of the defendant's crime, therefore its cost is subject to a restitution order.

THE FALLACY OF NEGATIVE PROOF
Unpublished Decision

In presiding over DUI trials, it is very common to witness defense counsel cross-examining the officer regarding all the "clues" the officer **did not** see when conducting the field sobriety tests. The point the attorney is trying to make is even though the defendant may have exhibited some clues of alcohol impairment, there are many more clues the defendant did not exhibit. Therefore, the defendant must not be impaired.

This approach was discussed in two recent cases: *City of Great Bend v. Rowlands*, Slip Copy, 2009 WL 929131 (Kan. App. April 3, 2009) and *State v. Scott*, Slip Copy, 2009 WL 929102 (Kan. App. April 3, 2009).

In *Rowlands*, the panel stated:

"Rowlands wants this court to focus on other known signs of legal impairment he did not exhibit while glossing over or trying to discount those signs of impairment he did exhibit. To do so ignores this court's standard of review in determining probable cause. The facts and circumstances observed by Brough prior to his arrest of Rowlands-taken in their totality and viewed from the perspective of a reasonably prudent police officer-are supported by substantial competent evidence and demonstrate more than a mere possibility that Rowlands was DUI."

In *Scott*, a completely different panel referred to this type of reasoning as the "fallacy of negative proof."

Scott 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. Scott's argument is an example of what logicians call the fallacy of negative proof. This occurs when someone attempts to sustain a factual proposition merely by negative evidence.

> *'This type of 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 or assumed is that the advocate has found no evidence of non-B. The correct method of proceeding is to find affirmative evidence of non-B.' Aldisert, Logic for Lawyers, p. 156 (3d ed.1997).*

Similarly, Scott not exhibiting some signs of impairment of his physical and mental faculties does not imply that he did not exhibit other known psychomotor signs of impairment. ... Accordingly, we conclude that the facts-taken in their totality and viewed from the perspective of a reasonably prudent police officer-showed more than a mere possibility that Scott was DUI."

REGULATORY SEARCH OF COMMERCIAL VEHICLE
Unpublished Decision

KHP approached the driver of a semi-truck that was stopped at the Emporia turnpike interchange. It was stopped 6 feet into the driving lane. The driver told the trooper that he was tired and had pulled over. The trooper became suspicious because there was a truck stop within view. The trooper asked the driver to pull the truck into the parking lot. He then asked to see the driver's log book. He discovered it did not have entries for the preceding 20 hours, in violation of Commercial Vehicle Safety Alliance (CVSA) regulations. He decided he needed to search the truck for receipts and other documentation as to the driver's whereabouts for the last 20 hours. He had the driver and his passenger, Susan Stevenson, step from the truck and he began his search.

In the sleeper area he found an eyeglass case that rattled when he picked it up. It was not locked, so the trooper opened the case. He found two glass pipes and burnt residue. The driver denied they belonged to him, but Stevenson volunteered that they were hers (she had already been given her *Miranda* rights by the trooper). Further search located more smoking devices and methamphetamine. Stevenson was charged with one count of possession of drug paraphernalia and one count of possession of methamphetamine.

Stevenson challenged the search as not based on probable cause and outside the scope of a regulatory search.

K.S.A. §74-2108(b) grants authority to the highway patrol to stop and examine commercial motor carriers to ensure compliance with state laws regulating commercial motor carriers. It requires that the driver have various documents available upon request including registration receipts, authority cards, driver logs, bills of lading, way bills fright bills, run tickets, etc. In *State v. Crumm*, 270 Kan. 870 (2001), the Kansas Supreme Court held that the driver of a motor carrier is on notice by statute that an officer may stop him or her for an inspection at any time, any place,

(Continued on page 40)

Unpublished Opinions

(Continued from page 39)
and under any circumstances, but that inspection is limited to determining whether the driver and vehicle are in compliance with applicable motor carrier laws, rules and regulations.

Although Stevenson conceded that the trooper had the right to approach the truck and to search the truck for receipts, she argued that once the trooper heard rattling inside the eyeglass case, he knew it did not contain receipts and he exceeded the permissible scope of the regulatory search by opening it. The trooper testified at the suppression hearing that he didn't know what was in it until he opened it. It could have easily held receipts as well as whatever was rattling inside.

In *State v. Stevenson*, Slip Copy, 2009 WL 929320 (Kan. App. April 3, 2009), the Kansas Court of Appeals found that the search did not exceed the scope of a valid regulatory search. People place receipts in all sorts of places. The fact that the case rattled did not dispel the possibility it could have contained a receipt. The motion to suppress was properly denied by the district court.

DIRECT CONTEMPT FINDING UPHELD
Unpublished Decision

Attorney's client was charged with aggravated robbery. His co-defendants pled guilty and agreed to testify against him. During opening statements his attorney referred to one of the co-defendant's "problems with the law." The prosecutor objected and the Court ordered counsel not to refer to the witness's criminal drug record. The State subsequently filed a motion *in limine* to prohibit any reference to prior convictions for either of the co-defendants other than crimes involving dishonesty or false statement. The Court sustained the motion.

As the trial continued, the attorney started cross-examining the co-defendant. She asked him about a marijuana dependency "according to a report I have." The prosecution objected and the trial judge admonished the attorney not to inquire about prior drug use, but did allow counsel to ask whether the witness used drugs on the day of the robbery.

The next day, the other co-defendant took the stand. On cross-examination the defendant's attorney inquired about the fact that he had never had a job in his life. She then asked whether his criminal record had anything to do with his not being able to get a job. As you can imagine, it hit the fan at that point. The trial judge demanded, out of the presence of the jury, an explanation for counsel's conduct. The Court found her explanation disingenuous and declared a mistrial. He found the defendant's attorney in contempt and continued sentencing for a month.

At the sentencing hearing, the trial judge again found counsel's explanation disingenuous. He found that her questioning was *"calculated...I believe it was done for the purpose of getting into evidence information that I had indicated could not go in and it was done with the assumption that the state after three and a half days of trail would not want a mistrial and that the Court after three and a half days of trial would not grant a mistrial."*

The judge assessed a fine and costs and memorialized its order in compliance with K.S.A. §20-1203. She was required to reimburse the State the cost of preparing for trial, jury expenses and a $500 fine. The attorney appealed.

In *State v. Townsend*, Slip Copy, 2009 WL 929233 (Kan. App. April 3, 2009), the Court found that based upon *State v. Jenkins*, 263 Kan. 351 (1997) it was required to review counsel's conduct *de novo* with an "abuse of discretion" standard only used to review the sanctions imposed. It found that counsel's actions were not "inadvertent misstatements that frequently occur in the heat of battle," nor were they the product of her being overly tired, as she claimed. Instead she reviewed her prewritten questions after the Court's ruling and purposefully left them in. This was in direct contempt of the court's order and directly resulted in the mistrial. The trial judge's actions were proper.

SEARCH OF CAR INCIDENT TO ARREST OF DRIVER
Unpublished Decision

In an eight page unpublished opinion, Judge Leben, writing for the Kansas Court of Appeals, presented a superb analysis of the state of the law regarding the search of a car incident to the arrest of the driver. *See*, *State v. Craig*, Slip Copy, 2009 WL 929094 (Kan. App. April 3, 2009).

The leading case in this area is *New York v. Belton*, 453 U.S. 454, *reh. denied*,453 U.S. 950 (1981). In *Belton*, the U.S. Supreme Court held that when a police officer has made a lawful custodial arrest of the occupant of an automobile, he or she may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile. The officer can also search any containers found within the passenger compartment. Kansas has followed this rule.

In a few recent U.S. Supreme Court cases, justices have hinted at some reservations about this "bright-line" rule when there is neither a demonstrated need to search for officer safety nor is there a need to search for evidence of the crime for which the defendant was arrested. The Court is currently sitting on *Arizona v. Gant*, which some believe may result in the U.S. Supreme Court modifying the *Belton* rule.

In *Craig, supra*, the defendant asked the Kansas Court of Appeals to skip to the chase and find that the search of his vehicle incident to a misdemeanor warrant arrest was not

(Continued on page 41)

Unpublished Opinions

(Continued from page 40)
justified. The Court declined the offer, indicating that it was bound by the current state of the law. Judge Leben did, however, acknowledge that a change may be on the horizon.

"Craig's argument here has been made elsewhere by other defendants. Indeed, good defense lawyers should make this argument, if only to preserve it should the United States Supreme Court move in the directions sought by Justices Scalia and Ginsburg...In addition, there are valid concerns about allowing car searches-for any reason or virtually no reason at all-whenever an occupant is arrested. We believe, however, that faithful adherence to the Supreme Court's existing decisions does not allow us to accept Craig's argument."

Judge Greene wrote a concurring opinion in which he made his position clear as to how he would like to see the caselaw evolve. He concluded:

"I regret our inability to suppress the evidence from the fishing expedition into Craig's vehicle, but we are obligated to follow controlling precedent.

***EDITOR'S ALERT: Arizona v. Gant* was decided by the U.S. Supreme Court on April 21, 2009. The Court held, as expected, that police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest. It was a 5-4 decision, with Justice Stevens writing the majority opinion. Justices Breyer, Alito, Roberts and Kennedy dissented.**

A more detailed description of the case will appear in the Summer Edition of the *Verdict.*

Legislative Updates

(Continued from page 9)
exclude implements of husbandry from the definition. Farm tractors are included in the definition of implements of husbandry.

The bill also increases the size requirements for a motor vehicle to be classified as an "all-terrain vehicle." It increases the width from 48" to 50" inches and the weight from 1,000 to 1,500 pounds.

Finally, the bill changes "low-pressure tire" in the definition of all-terrain vehicles to "nonhighway tire."

Editor's Note: *This will require amendments to STO §1, Definitions, or similar city ordinances.*

DISTINCTIVE LICENSE PLACES

HB 2134 makes several changes to the law regarding license places, particularly distinctive personalized plates. As of January 1, 2010 a "Support Kansas Arts" plate will be available. It allows personalized plates to have a specific combination of letters/numbers to be assigned to just one vehicle. It amends the definition of "disabled veteran" for eligibility for receiving a distinctive license plate, from one who is being compensated for a 100% service-connected disability to one who has a 50% service-connected disability as determined by the U.S. Department of Veterans Affairs. Some special exemptions were put in place for the "In God We Trust" plates authorized last year.

CONCEAL AND CARRY LICENSES: MILITARY

HB 2308 allows a member of the active duty military to obtain a concealed carry license number if he or she does not have a Kansas driver's license or a Kansas nondriver's license identification card. In addition the bill adds two circumstances in which the AG is not required to issue a concealed carry license: If the applicant has (1) attempt to commit suicide in the five years immediately preceding the application; or (2) has been adjudicated as a "mental defective" or committed to a mental institution. It does not include voluntary admissions to a mental institution or admission solely for observation.

CONCEAL AND CARRY LICENSES: PROSECUTORS

SB 19 authorizes prosecutors, under certain circumstances, to carry concealed firearms while engaged in the duties of their employment or any activities incidental thereto. The prosecutors so authorized under this legislation are U.S. Attorneys and Assistant U.S. Attorneys, the Attorney General and Assistant Attorney Generals, any district or county attorney and their assistant attorneys. The Chief Judge in the district can restrict or prohibit firearms in the courthouse or court-related facility.

CIVIL FORFEITURES

House Sub. For SB 28 adds the following crimes to the list of criminal offenses that could lead to civil forfeiture of assets: dog fighting, possession of dog fighting paraphernalia, cockfighting, possession of cockfighting paraphernalia, prostitution, promoting prostitution and patronizing a prostitute.

DRIVING IN THE RIGHT LANE OUTSIDE CITIES

House Sub. For SB 145 requires vehicles to be driven in the right lane on a multi-lane road when driven outside of a city.

Editor's Note: *This may result in similar changes to the STO.*

RETIREMENT AGE FOR JUDGES

SB 87 increases the retirement age for state judges from 70 to 75. This includes the appellate bench. The judge may finish serving any term during which the age of 75 was attained.

The Verdict

Spring 2009 Issue 47

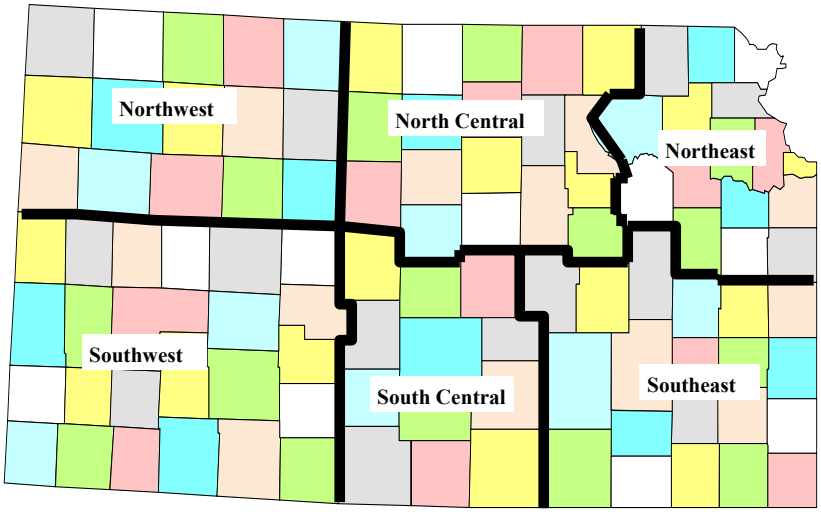
C/O Overland Park Municipal Court
12400 Foster
Overland Park, KS 66213
(913) 327-6852 ► Fax-(913) 327-5701
karen.arnold-burger@opkansas.org

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 2009 meeting the following positions will be up for election:

President-Elect
Secretary
Treasurer
Northwest Director
Southeast Director

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

President
John McLoughlin
(620) 855-2215

BOARD OF EDITORS

THE VERDICT

Editor.....Karen Arnold-Burger (OP)
Correspondents...
.....John McLoughlin (Cimarron)
.....Bryce Abbott (Wichita)
.....Pat Caffey (Manhattan)
....William Thompson (Belleville)
.....Bob Nicholson (Paola)
.....Cathy Lucas (Sublette)

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

KMJA BOARD OF DIRECTORS

President.....John McLoughlin (Cimarron)
President-Elect.....Brenda Stoss (Salina)
Secretary.....Steve Ebberts (Topeka)
Treasurer.....Kay Ross (Plainville)
Past-President.....Ken Lamoreaux (Waterville)

Directors:

Northwest District.....Dorothy Reinert(Atwood).....2009
Southeast District.....Timothy Fielder (Gerard).....2009
North Central District.....Scott Condray (Concordia).....2011
Southwest District.....Charles Hull (Rolla).....2011
South Central District.....Greg Keith (Haysville).....2010
Northeast District.....James Campbell (Ottawa).....2010

MUNICIPAL JUDGES' TESTING AND EDUCATION COMMITTEE

Tom Buffington.....Marquette
Jay Emler.....Lindsborg
Karen Arnold-Burger.....Overland Park
James Wells.....Topeka
Lee Parker.....Andale

MUNICIPAL COURT MANUAL ADVISORY COMMITTEE

Jay Emler.....Lindsborg
Dorothy Reinert.....Atwood
Patrick Caffey.....Manhattan
Karen Arnold-Burger.....Overland Park
Bette Lammerding...Marysville
Connie Sams.....Ottawa
Tom Buffington.....Marquette
James Wilson.....Mulvane