



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

A STEP BACK IN TIME

Court Watch

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

EVIDENCE OBTAINED IN VIOLATION OF HIPAA DOES NOT REQUIRE SUPPRESSION

A warrant was issued for Terri Yenzer's arrest. Police were alerted by the legal assistant in her attorney's office that Terri would be at a dental appointment the next day. The next day, police went to the dental office. The officer walked up to where one would check-in and saw Yenzer's name listed on the appointment book, which was visible on the receptionist's desk. He inquired of the receptionist, who advised him that Yenzer had cancelled her appointment for that day. She gave him the date of the rescheduled appointment. The officer returned on that date. He confronted Yenzer and asked for

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Since the dawn of time, young men have felt the need for speed. Today it may mean drag racing your Mustang down an open stretch of highway, but in 1875 it meant drag racing with a different type of mustang.

In February 1875, H.M. Mayberry was driving his horse and buggy in Fort Scott. He was heading home, which was about 4 miles outside of town, when he came across his neighbor, A. Sivey walking home. He invited Sivey to ride home with him. Sivey accepted and jumped in the buggy.

About ½ mile outside of town Mayberry came upon Clark. Clark was driving a span of horses and a wagon. Mayberry challenged Clark to a race and "whipped up his horse to pass Clark." Clark then "whipped up his team to prevent" Mayberry from passing him. The race was on. Sivey "seeing a race imminent, and being in great fear of bodily injury, begged and insisted" that Mayberry stop and let him out. Mayberry refused. Sivey made repeated requests, none of which were honored. He told Sivey, "Never mind, old man, old Bill [meaning his horse] will bring us through all right; if he don't, old Mayberry will pay the damages." While driving his horse at full speed, the buggy struck a stone fence, overturned the buggy, and threw Sivey violently to the ground. He suffered a dislocated shoulder and a bruised arm. This resulted in permanent paralysis of the muscles of the hand.

Sivey sued Mayberry for negligence. The jury found for

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SPOTLIGHT ON: MICHAEL WILSON

Bentley judge Michael Wilson was born and raised in Kansas City, Missouri. His father, a World War II veteran, worked for Southwestern Bell. His mother was a homemaker. He has one younger sister. After graduating from Raytown High School, he went to work at Western Electric in Lee's Summit, Missouri as a junior pipefitter and electrician while he went to school. He received a bachelor's degree from Washburn University in psychology and sociology.

After college, he began a career in law enforcement, working for the Garnett and Lenexa police departments, the University of Kansas Medical Center campus police and the Wyandotte County Sheriff's Department before being named chief of police in Lake Quivira. But the legal profession kept calling him. He attended Washburn University Law School and graduated in 1988.

After a short stint in private practice in Johnson County, Mike joined the public defender's office in Clay County,

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Spotlight on: Michael Wilson

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Missouri. He later ran the office in Platte County, Missouri. His wife, Dr. Camilla M. Wilson, who had been chair of the physical therapy education program at KU Med Center, took a job with Shenandoah University. So the couple moved to Winchester, Virginia. Mike hung out his shingle and was engaged in the private practice of law for their ten years in Virginia.

Mike and his wife returned to Kansas when Dr. Wilson accepted the position of chair of the physical therapy department at Wichita State University in 2001. He has remained in private practice in Wichita ever since. He also serves as city prosecutor for Belle Plain two evenings a month. His position as Municipal Judge keeps him in Bentley one night per month.

“I love the people of Bentley, the court staff, and I appreciate the responsibility that goes with being a municipal judge. Municipal courts are often the first contact people have with the court system and I enjoy the opportunity to help them make some sense out of the process. I try to answer their questions and maintain the “neighborhood” feel of the courtroom. Due to the rising costs of incarceration, I am always trying to find ways to change behavior while using jail as an absolute last resort.”

Mike and Camilla have been married for 38 years. They share their home with a brittney spaniel named Pete. Mike is very involved in young hunter safety training. In addition, he is a certified instructor for the Attorney General’s office in gun safety under the conceal and carry legislation. He is very involved in the Masons, one of the oldest fraternal organizations in the world. In his spare time, he likes to hunt, fish and shoot sporting clays.

He was quick to sing the praises of the KMJA.

“I have had the opportunity to meet the nicest people in the KMJA. The chance to get together one time per year and talk about common issues is great. The nuts and bolts session at the annual conference has always proven to be very valuable. The Verdict newsletter is a tremendous source of information. Every person I’ve met at the conference is the type of person who you would love to have to your home for pie and coffee, that’s how nice they all are.”



Updates from O.J.A.

CONFERENCE REMINDERS

Municipal Court Clerks’ Spring Conference
April 3, 2009
Manhattan, KS

Municipal Judges’ Annual Conference
April 27-28, 2009
Wichita, KS

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

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



Robert Davis Becomes Chief Justice of the Kansas Supreme Court

Kay McFarland ends her term as Chief Justice on January 12, 2009 and Justice Robert Davis then begins his term as Chief Justice.

Robert E. Davis was born August 28, 1939, in Leavenworth. He graduated from Creighton University, Omaha, Neb. with a bachelor's degree in 1961 and received his law degree from Georgetown University Law School, Washington D.C. in 1964. He engaged in private practice in Leavenworth from 1967 to 1984 when he was appointed associate district judge. While in private practice he served as Leavenworth County attorney from 1981 to 1984, and as an attorney for the State Board of Pharmacy from 1972 to 1984. Justice Davis also served as a magis-

trate judge in Leavenworth County from 1969 to 1976. After serving as an associate district judge for two years, Justice Davis was appointed to the Kansas Court of Appeals in 1986. He served in that capacity until his appointment to the Supreme Court.

A member of the U.S. Army Judge Advocate General's Corps, Justice Davis served as trial counsel in the Republic of Korea and as government appellate counsel in Washington D.C. from 1964- 1967. Memberships include the Governor's Advisory Commission on Alcoholism from 1971-76, St. John Hospital, Leavenworth, Board of Trustees (chairman, 1980 to 1984), Leavenworth County Community Corrections Board (director and president, 1980-84), Leavenworth National Bank and Trust Co. (general counsel and board of directors, 1972- 1984), Leavenworth Historical Society (director, 1970-75), and St. Mary College, Leavenworth, (council member 1984). He also has been the Supreme Court's liaison for Alternate Dispute Resolution (1993) and Kansas Lawyer Specialization (1993), a member of the Kansas Department of Corrections Task Force on Female Offenders (1990), and a member and officer of the American Inns of Court since 1992. He presently is a member of the Governor's Adoption Reform Task Force.

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her identification. She lied and then attempted to run from the officer, resulting in obstruction of legal process charges.

Yenzer moved to suppress the statement she made to the officer and the fact that she attempted to run on the basis that her HIPAA rights were violated when both the legal assistant and the dental receptionist gave the officer information about her medical appointment. The district court denied the motion after finding that her HIPAA rights had not been violated. It did not reach the secondary issue, an issue of first impression in Kansas: whether suppression is an appropriate remedy for violation of a defendant’s HIPAA rights.

On appeal, the Court of Appeals decided to address the secondary issue first and assume, for the sake of argument, that Yenzer’s HIPAA rights had been violated. The Court was guided by a decision of the Wisconsin Supreme Court, *State v. Straehler*, 307 Wis.2d 360, 745 N.W.2d 431 (2007). It found that suppression is only warranted when evidence has been obtained in violation of a defendant’s constitutional rights or if a statute specifically provides for suppression as a remedy. In this case, Yenzer had no constitutional claim warranting suppression, nor did she present any statutory authority to support suppression.

“While we do not condone the disclosure of information that occurred here, we must conclude that even if Yenzer could show a HIPAA violation, the district court did not err in denying Yenzer’s motion to suppress.”

State v. Yenzer, ___Kan.App.2d ___ (November 7, 2008).

INEFFECTIVE ASSISTANCE OF COUNSEL = FAILURE TO FULLY ADVISE CLIENT OF STATUTES THAT WOULD PRECLUDE COURT FROM RUNNING SENTENCES CONCURRENTLY EVEN THOUGH THE PLEA AGREEMENT WAS TO RUN SENTENCES CONCURRENTLY

Wilkinson entered a plea of guilty to two counts of possession of cocaine with the understanding that the State was going to recommend that the sentences run concurrently. However, his attorney did not advise him that since he received the second offense while he was on felony bond for the first offense, K.S.A. §21-4608(d) and §21-4720(a) required that the court run the sentences consecutively unless such a sentence would “result in manifest injustice.” A sentence results in manifest injustice when it “is obviously unfair and shocks the conscience of the court.”

After reviewing the case, the district judge found that he could not find “manifest injustice” and therefore the sentences had to run consecutively. This caused Wilkinson to receive a sentence of 56 months, instead of 28 months. He sought to withdraw his plea on the basis of ineffective assistance of counsel.

The district court denied the motion without giving him a hearing. It reasoned that since the consecutive sentence ruling was proper and the court had advised him at the time of the plea that consecutive sentences were possible, counsel could not have been ineffective.

In *Wilkinson v. State*, ___Kan.App.2d ___ (November 7, 2008), the Court of Appeals found that if Wilkinson could show that his attorney had not advised him of the “manifest injustice” standard, he would be entitled to relief (meaning he could withdraw his plea) based on ineffective assistance of counsel. Since no hearing was given on this issue, the Court remanded the case to the district court to conduct such a hearing.

PROPERTY OWNERS ARE PRESUMED TO KNOW THE VALUE OF THEIR PROPERTY

In a juvenile case involving criminal damage to the interior of a church, the pastor of the church testified to the extensive damage done to nine rooms of the church. His duties included being the church administrator. One of the issues in *In the Matter of D.A.*, ___Kan.App.2d___(November 26, 2008) was whether the pastor’s testimony constituted sufficient evidence that the damages exceeded \$1,000.

The Court held that property owners are presumed to know the value of their property and the term “owner” means any person with an interest in the subject property. As pastor and administrator of the church, Rev. Merriman was charged with the care, oversight, and stewardship the church’s property. He had the authority to speak for the church as its agent regarding the value of church property.

The Court went on to reiterate prior caselaw that the damages needed to support a conviction for criminal damage to property are measured by the cost to restore the damaged property, unless the repair costs exceed the fair market value of the property, in which case the fair market value at the time of the loss is the measure. While the factfinder cannot rely on mere speculation, mathematical precision in the calculation of damages is not required.

A BLUFF BY POLICE REGARDING THE AMOUNT OF EVIDENCE THEY HAVE AGAINST A SUSPECT DOES NOT RENDER INVOLUNTARY AN OTHERWISE VOLUNTARY CONSENT TO SEARCH

State v. Tatum, ___Kan.App.2d___ (November 26, 2008) represents an amazingly simplistic approach by the KBI in catching a suspect growing marijuana in his home.

The KBI had suspected Shannon Tatum was growing marijuana in his basement, but they did not have sufficient evidence to arrest him or get a search warrant. So instead, they put on their plain clothes and drove in their unmarked car to Tatum’s house and knocked on the door. Tatum answered the door. They identified themselves as KBI

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agents and showed their badges. Tatum stepped out onto the front porch and shut the door behind himself. The agents told Tatum that they were following up on information that he was growing marijuana inside his house. They clearly gave him the impression that they had significant evidence against him. Tatum initially denied any knowledge.

The agents told Tatum that he was not going to be arrested but that they would like to come into his residence, with his permission, to collect the marijuana and cultivation equipment to turn over to the district attorney. They told him that they did not have a search warrant and he did not have to let them in. Tatum was in his 40's, a college educated man working in the medical field. He could read and write and appeared to understand the agents' questions. He seemed primarily concerned about his neighbors' perceptions if his house was searched by police and he was arrested in front of his neighbors. They assured him that they would not use marked police cars or officers in uniform to assist in the search and collection of evidence. He was never arrested, physically detained or handcuffed. None of his physical property was taken, they never raised their voices, never drew any weapons, never threatened him in anyway. The entire conversation was pleasant.

Tatum consented to the search, let the agents into his house and pointed out the items associated with his marijuana growing operation. The agents said they would like to interview him, but it was completely voluntary. Tatum agreed and gave them a full statement. He signed a written consent to search. The evidence was collected. After the interview was over, the agents thanked him for his cooperation, gave him a business card, and asked if he felt threatened or coerced. He replied in the negative and thanked them for their professionalism.

The Court found that this entire encounter was purely voluntary. Tatum claimed he was "tricked" into giving consent because the agents gave a false impression that they possessed reliable evidence that Tatum was growing marijuana. However, the Court found that a bluff or misrepresentation as to the amount of evidence that law enforcement officers have against an individual will not render involuntary and otherwise voluntary consent.

"TRASH PULLS" OFF REMOTE, RURAL RESIDENTIAL PROPERTY WHEN TRASH IS COLLECTED BY A THIRD PARTY CONTRACTOR ARE UNCONSTITUTIONAL

Lewis Hoffman was suspected of manufacturing methamphetamine at his rural Greeley County home. Greeley County sheriff's deputies decided to conduct a "trash pull." This commonly accepted investigative technique involves officers

picking up someone's trash and looking through it for evidence of criminal activity. The United States Supreme Court has upheld this type of search, finding that there is no expectation of privacy in a person's trash which is left for collection in an area accessible to the public. *California v. Greenwood*, 486 U.S. 35 (1988). *Greenwood* involved garbage bags left at the curbside for city trash collection.

Hoffman's dumpster was not visible from any public road. A visitor had to travel a quarter mile on Hoffman's driveway (a private dirt road running through a fenced pasture) before reaching the dumpster. Seven times over a several month period, a Greeley County sheriff's deputy climbed into the trash truck before it entered Hoffman's rural homestead. The trash was picked up and taken to the county landfill, where two deputies sifted through it for evidence of drug activity. Based upon the evidence they found, they were able to obtain a search warrant for Hoffman's property. Hoffman was charged with attempted manufacture of methamphetamine, among other drug-possession charges.

In *State v. Hoffman*, ___Kan.App.2d___ (November 26, 2008) the question was whether or not the decision in *Greenwood*, and subsequent Kansas cases in agreement with *Greenwood*, would extend to trash that was left within the curtilage of the defendant's home and subsequently collected, not but a governmental unit, but by a third party trash hauler with which the resident had contracted for trash pickup.

In a 2-1 decision, with a written dissent filed, the Court of Appeals held that this "trash pull" was unconstitutional. It found that it was an "unreasonable" search under the Fourth Amendment.

It was clear that this dumpster was not "on the side of the road" but was in fact within the curtilage of Hoffman's residence. This fact was not disputed by the prosecution. The Court found, consistent with *State v. Fisher*, 283 Kan. 272 (2007), that such placement made it clear that the Hoffman's trash was not accessible to the public in any meaningful or intentional way. The fact that it had been placed out for pick-up by a trash hauler is not determinative and did not eliminate Hoffman's reasonable expectation of privacy in that trash, the Court opined, because *Greenwood* did not suggest that this factor alone was determinative.

Therefore, the Court found the illegal trash pull, which was the basis upon which the warrant was issued, required the suppression of all evidenced seized pursuant to the warrant.

The dissent reasoned that society would not find it reasonable for a person to possess a reasonable expectation of privacy in trash that is left for collection when the regularly scheduled time for collection arrives. At that time, it is expected the trash will be removed and the resident relinquishes all interest in it.

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CAN'T CROSS-EXAMINE OFFICER ABOUT THE NHTSA MANUAL UNLESS DEFENSE COUNSEL PRODUCES AND REFERENCES THE MANUAL

In a DUI trial, defense counsel asked the arresting trooper about specific NHTSA requirements regarding the walk-and-turn test. The State objected, arguing that defense counsel should be required to produce and specifically reference the NHTSA manual before questioning the trooper about its asserted contents. The Court sustained the objection and explained “[Y]ou have to make sure that [the prosecutor] can be satisfied that it’s actually in the manual before you ask the question. That’s the whole point of having the manual.” Instead defense counsel was relying on documents he received from CLE training. The Court went on to state, “If you don’t have the manual, I’m not going to accept you as an expert to correct him of anything he doesn’t know the answer.”

The Court of Appeals agreed with the district court in *State v. Garcia*, ___Kan.App.2d___(November 26, 2008) and found that the rules of evidence provide that except under certain circumstances, not applicable to this case, “[a]s tending to prove the content of a writing, no evidence other than the writing itself is admissible.” K.S.A. §60-467(a). Therefore, the “trial court did not err in ruling *Garcia* could not ask the trooper about specific contents of the NHTSA manual without first producing the manual.”

The Court of Appeals further upheld the district court’s ruling that the following questions by defense counsel were irrelevant and therefore not allowed:

“Are there certain instances where somebody cannot complete the test, in your experience?”

“But you wouldn’t normally, in say a speeding case, have somebody get out and take [a filed sobriety test] without other clues present or other indicators present for alcohol?”

WRIT OF MANDAMUS ISSUED AGAINST PHIL KLINE

Planned Parenthood filed a writ of mandamus against Phil Kline regarding the handling of medical records and also seeking a finding of contempt of court.

Before his successor took office Kline and/or his staff boxed up all the records that he had obtained as part of an inquisition he conducted as Attorney General to take with him to Johnson County, even though some involved a clinic in Wichita. He failed to document when and to whom he provided copies, although certainly copies were made. He knowingly attached copies of sealed records to unsealed

briefs he filed in Shawnee County. He held press conferences about the records and appeared on the O’Reilly Factor (where Bill O’Reilly suggested that he had been made privy to the contents of the records). He gave access to the information to several “expert witnesses” who later gave interviews about the contents to the media in his presence and he discussed the records in front of a state legislative committee. All of his actions were in direct conflict with the orders of confidentiality personally relayed to him by the Supreme Court and Shawnee District Judge Richard Anderson. In removing the files from the Attorney General’s office, they took a tortured path to Johnson County including unsecure storage at attorney Steve Maxwell’s private residence, put in the trunk of a state vehicle that sat in a parking lot for several days, and to the dining room of one of his staff investigators, Jared Reed. Some files were left with Shawnee District Attorney Robert Hecht and some were left with Judge Anderson later to be retrieved by Kline’s staff. The Status and Disposition Reports that had been filed with Judge Anderson were clearly erroneous. Kline had been specifically advised that he was not to take any records of the Wichita investigation. He only had a right to the records of the clinic in Johnson County. When Judge Anderson discovered that Kline and his staff had taken the Wichita records he ordered them returned and questioned whether copies had been kept. He was told that no copies had been made, which was patently false.

In *Comprehensive Health of Planned Parenthood v. Kline*, ___Kan. ___(December 5, 2008), the Supreme Court was not able to find that Phil Kline violated any laws in his careless handling of abortion clinic patient files that he took with him from the Attorney General’s Office to the Johnson County District Attorney’s Office. However, the Court did find that his behavior was obstructive and that his actions hampered his successor’s ability to fulfill his duties. He was ordered to return the materials he gathered in relation to the investigation to Attorney General Six. He was given one week from the date of the decision to deliver:

“a full and complete and understandable set of any and all materials gathered or generated by Kline and/or his subordinates in their abortion-related investigation and/or prosecution since Kline was sworn in as Johnson County District Attorney. Neither Kline nor any of his subordinates or lawyers may make any exceptions whatsoever for any reason or on any rationale to the foregoing order. ‘Full, complete and understandable’ means exactly what it says. This set of materials shall be organized and labeled exactly as organized and labeled in the files or repositories maintained by and/or for Kline and his subordinates in the discharge of their duties on behalf of the Johnson County District Attorney’s office. The cost of the production and delivery of the set of materials described in this paragraph shall be borne by the Johnson County District Attorney’s office.

We also hereby order as an additional sanction that Kline, Rucker, Maxwell, Williams, Reed and any other employee of

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the Johnson County District Attorney's office requested by the Attorney General shall meet the with Attorney General and/or his designee(s) on whatever date(s) and at whatever time(s) designated by the Attorney General up to and including noon on January 10, 2009, and at whatever place(s) designated by the Attorney General for the purpose of explaining all of the materials turned over by 5:00 p.m. on December 12, 2008... "

The Court was obviously distressed by the actions of Kline and his staff and the lack of controls he put on the storage and copying of these highly personal medical records which had already been the subject of strict orders regarding confidentiality in *Alpha Medical Clinic v. Anderson*, 280 Kan. 903 (2006). Here are just a few examples from Justice Beier's opinion.

"Kline was demonstrably ignorant, evasive, and incomplete in his sworn written responses to Judge King, this court's appointed agent in the fact-finding process. Kline's responses were far from full and forthright; they showed consistent disregard for Kline's role as a leader in state law enforcement; and they delayed and disrupted this court's inquiry. Among other things, he failed to consult with his subordinates as appropriate to give responses, treating questions posed to him as a public servant whose conduct was under scrutiny in a mandamus action as though they were questions posed to him as an uncooperative and too-clever-by-half private litigant. He was thorough only when digressing from the point..."

"An obvious and sorry pattern emerges from the foregoing examples and from Kline's performance at oral argument before us. Kline exhibits little, if any, respect for the authority of this court or for his responsibility to it and the rule of law it husbands. His attitude and behavior are inexcusable, particularly for someone who purports to be a professional prosecutor. It is plain that he is interested in the pursuit of justice only as he chooses to define it. As already noted in Alpha, he has consistently disregarded the clear import of this court's directions, instead doing what he chose because 'he knew best how he should behave, regardless of what this court had ordered, and [believed] that his priorities should trump whatever priorities this court had set..."

"...Accordingly, we must conclude that this explanation is yet another post hoc rationalization for conduct designed to poison the well of public and judicial opinion about CHPP. Kline's adoption of this tactic is not new but it is transparent. Again, Kline attempts to invoke his (irrelevant) opinion about the strength of his criminal case to defeat any criticisms of his choices in how to pursue it."

"Because Kline's actions also seriously interfered with this

court's efforts to determine the facts and arrive at resolution, we also regard reimbursement of this court for the costs of this action in the amount of \$50,000-i.e., the minimum personal expense associated with filings, hearings, and conferences that could have been avoided if Kline's conduct had been otherwise-to be an appropriate additional sanction. However, were we to impose this sanction, it would be borne by Johnson County rather than Kline personally. We are unwilling to make those taxpayers foot any further bill for the conduct of a district attorney they did not elect in the first place and have now shown the door."

"We also note...that further instances of Kline's improper conduct or the improper conduct of subordinates for whom he bears responsibility may yet come to light. Such actions, standing alone or when considered alongside Kline's or others' conduct in Alpha and/or in this case may merit civil or criminal contempt, discipline up to and including disbarment, or other sanctions. Furthermore, the known pattern of obstructive behavior prompting sanctions, standing alone, may be or become the subject of disciplinary or other actions; a copy of this opinion will be forwarded to the disciplinary administrator."

The opinion was unanimous. However, Justices Davis and McFarland did file concurring opinions. They both objected to the majority's framing of the relief as "sanctions." They stated that that the court simply granted the writ of mandamus and ordered him to perform his duties. Imposition of "sanctions" requires a different and objective standard. Justice Davis opined, *"The facts—without any inferences—speak for themselves concerning the performance of Kline and his employees. I would not attempt to characterize those actions in handling these records and responding to the investigation of this court, as the record speaks loud and clear. I would therefore leave the matter in the hands of the Disciplinary Administrator for an independent judgment as to whether ethical violations have occurred during the course of these proceedings."*

The Chief Justice was a bit more direct. *"I strongly disagree with the last paragraph of the majority opinion. In that paragraph, the majority notes that "further instances of Kline's improper conduct...may yet come to light," and warns that, if it does, such conduct may merit contempt, discipline up to and including disbarment, or other sanctions... This vague statement seems to anticipate and encompass the discovery of additional past or future misconduct. What is the point of this paragraph? Upon compliance with the simple requirements of the "sanction" imposed, the case is over, done, finished. I believe it is inappropriate to set forth, as if to threaten the respondent with, the various penalties that could be imposed if some past or future hypothetical misconduct should "come to light" at a later date."*

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RIGHT TO SPEEDY TRIAL DIFFERENT WHEN DEFENDANT IS CONFINED IN A PENAL INSTITUTION IN ANOTHER STATE

K.S.A. §22-3402 states that when a person is charged with a crime and held in jail solely by reason thereof, he or she must be brought to trial within 90 days of arraignment. Patrick Angelo was in a Missouri prison because of charges in that state when he was transferred to the Wyandotte County jail to face murder charges pursuant to the Uniform Disposition of Detainers Act. This Act, codified at K.S.A. §22-4401 et seq. states that whenever a person is being held in prison in one state and has an untried charge in another state, that state can lodge a detainer for the prisoner. Once the detainer is lodged, the prisoner must be brought to trial within 180 days by the charging state. Angelo was brought to trial within 180 days, but not within 90 days. The question in *State v. Angelo*, ___ Kan. ___ (December 5, 2008) was whether the State is still bound by the 90 days in K.S.A. §22-3402, even though this was a detainer case and that statute allows 180 days. The Supreme Court found that the situation is governed by the Detainers Act and the State has 180 days to get the defendant to trial.

See also, *State v. Harris*, Slip Copy, unpublished, 2008 WL 5135101 (Kan. App. December 5, 2008).

A PERSON SUSPECTED OF DRUNK DRIVING HAS NO FOURTH AMENDMENT RIGHT TO REFUSE TO TAKE A BLOOD-ALCOHOL TEST

Deann Bussart-Savaloja was arrested for suspicion of DUI. After being informed of the implied consent advisories, she agreed to take a breath test. During the 20-minute observation period, she stated that she thought she was going to vomit. The officer decided to change the requested test to a blood test and he again went over the implied consent advisories. She refused the blood test because it was going to have to be taken at the hospital where she worked. She was charged with 3rd offense DUI and given a 12 month jail term.

In *State v. Bussart-Savaloja*, ___ Kan.App.2d ___ (December 5, 2008), the defendant argued that K.S.A. §8-1001(i) was unconstitutional. The statute provides, “The person’s refusal shall be admissible in evidence against the person at any trial on a charge arising out of the alleged operation or attempted operation of a vehicle while under the influence of alcohol or drugs, or both.” The Kansas Supreme Court has already decided that this statute does not violate the Fifth Amendment privilege against self-incrimination. See, *State v. Compton*, 233 Kan. 690 (1983). However, Bussart-Savaloja argued that it violated her Fourth Amendment right to be free from unreasonable searches and seizures. The Court declined to so hold.

It found that there is no constitutional right to avoid a search conducted upon probable cause. Therefore, refusal to consent to such a search has absolutely no constitutional significance regarding the reasonableness of the subsequent search, and is not an invocation of any right whatsoever.

EVIDENCE OF PAST DRUG USE IS NOT ADMISSIBLE WHEN THE DEFENDANT CLAIMS THAT THE DRUGS WERE NOT HIS, ONLY WHEN HE CLAIMS HE DIDN’T KNOW THEY WERE DRUGS

After a traffic stop, a glass pipe with marijuana residue was found under the passenger’s seat, out of reach of the driver. The driver implicated the passenger. The passenger denied any knowledge of the pipe. During questioning, the passenger admitted that he had smoked marijuana about a month earlier. However, at all stages of the proceeding he denied any knowledge of the pipe in the car. He stipulated that pipe was drug paraphernalia and that marijuana was in the pipe. The issue in *State v. Boggs*, ___ Kan. ___ (December 5, 2008) was whether or not the statement Boggs made about prior drug use should have been admitted into evidence.

Pursuant to K.S.A. §60-455 evidence that a person committed a crime on a specified occasion, is inadmissible to prove his or her disposition to commit a crime unless it is relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Boggs argued that his prior marijuana use was not relevant to any material fact because his defense consisted of a denial that he ever possessed the pipe or its residue. The district judge had expressed, in ruling on the motion *in limine*, that prior drug use is uniformly admissible in a nonexclusive possession case as a recognized exception to K.S.A. §60-455. He so instructed the jury.

The Supreme Court agreed with Boggs and disapproved PIK Crim.3d §67.13-D which allows a jury to always consider the defendant’s prior drug use in a nonexclusive possession case. It also overruled any past appellate cases that suggest prior use is always admissible without an analysis of the factors that a court is required to weigh when considering K.S.A. §60-455 evidence. “A review of the records and arguments in this case demonstrates that the only question at issue was the identity of the individual who possessed the pipe. The evidence of Boggs’ prior drug use admitted at trial indicated that he had smoked marijuana about a month before he was arrested for the current offense. This evidence does not raise any inference or provide any details that would lead to a conclusion that Boggs possess the glass pipe in this case. The only conceivable connection between the two events is an assumption that because Boggs used marijuana in the past, it was probable that he would use it again in the future and thus possess the pipe. This is propensity evidence and is precisely what K.S.A. 60-455 was designed to prevent.”

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COURT CLARIFIES WHEN DEFENDANT IS ENTITLED TO AN INSTRUCTION ON HIS DEFENSE THEORY

In *State v. Anderson*, ___ Kan. ___ (December 5, 2008), the Kansas Supreme Court clarified its standard of review when analyzing a trial court’s refusal to instruct on the defendant’s theory of defense. All contrary holdings of the court were disapproved. The new standard is:

“A defendant is entitled to instructions on the law applicable to his or her theory of defense if there is evidence to support the theory. However, there must be evidence which, viewed in the light most favorable to the defendant, is sufficient to justify a rational factfinder finding in accordance with the defendant’s theory.”

DYING DECLARATION EVIDENCE WITHSTANDS CRAWFORD CHALLENGE

Paramedics arrived on the scene of a shooting to find Brannon Wright lying in the street, critically injured. He had a number of gunshot wounds and was paralyzed in all four limbs. He was conscious and able to communicate. In the ambulance on the way to the hospital, Wright asked the paramedics if he was going to die. They did not respond, but instead told him they would do everything they could to keep him alive. The paramedics kept talking to Wright to keep him awake and his airways open. They asked if Wright knew who shot him. He said, “53rd and Brooklyn.” The paramedic inquired if that was Wright’s address and he said, “No.” The paramedic asked if that was the address of the shooter and Wright responded, “Yes.” They again asked Wright tell them who shot him. He responded, “E.” This was subsequently revealed to be the nickname for Eric Jones. Wright died. Eric Jones was charged with murder.

In *State v. Jones*, ___ Kan. ___ (December 12, 2008), Jones argued that based on *Crawford v. Washington*, 541 U.S. 36 (2004) it was a violation of the Sixth Amendment Confrontation Clause to allow Wright’s statements to the paramedic to come into evidence. Wright had not been cross-examined and the “forfeiture by wrongdoing” exception did not apply because there was no evidence that Jones shot Wright to keep him from talking as required by *Giles v. California*, 554 U.S. ___ (2008).

Justice Johnson, writing for the majority, found that Wright’s statement did fit the definition of a “dying declaration” a recognized exception to the hearsay rule under K.S.A. 2007 Supp. §60-460(e). Wright was both on the brink of death and was aware he was dying. He further found that Wright’s state-

ments were testimonial in nature. “*Although Wright was in the midst of a medical emergency, the paramedics’ questions at issue here were not designed to deal with the immediate danger. Rather, the questions about the identity of the shooter related to past events and sought information above and beyond what was necessary to administer medical care. Accordingly, Wright would have reasonably believed that his answers would be passed along to law enforcement officers and would later be available for use in prosecuting the shooter.*” Therefore, based on *Crawford*, their admission would violate the Confrontation Clause unless some other exception applied.

The Court went to find that based on *Giles*, the “forfeiture by wrongdoing” exception did not apply. However, Justice Johnson pointed out that the U.S. Supreme Court also acknowledged in *Crawford* that two forms of testimonial evidence were admitted at common law in the absence of the declarant: “forfeiture by wrongdoing” and “dying declarations.” Therefore, the Court opined that “*we are confident that, when given the opportunity to do so, the Supreme Court would confirm that a dying declaration may be admitted into evidence, even when it is testimonial in nature and is unconfessed.*” Wright’s statements were properly admitted.

JAILER HAS DUTY TO PROTECT A PERSON IN CUSTODY AGAINST THE RISK OF SELF-INFLICTED INJURY

Anthony D. Stapleton committed suicide while in the Shawnee County Adult Detention Center. The issue in *Estate of Stapleton v. County Commissioners of Shawnee County, et al.*, ___ Kan.App.2d ___ (December 12, 2008) was whether or not the governmental entity owed a special duty to Stapleton. The Court found that a custodial relationship is a special relationship which imposes on the custodian a special duty of care. Although a matter of first impression for the Kansas appellate courts, the Court followed the language of the Restatement (Second) of Torts §314A which outlines an exception to the general rule that there is no duty to act for the protection of others. The Court found that a special duty to protect exists when one is required by law to take or voluntarily takes another into custody and thereby deprives the prisoner of his or her normal opportunities for protection.

UNDER ROMEO AND JULIET LAW, OFFENDER MUST BE OLDER THAN VICTIM FOR A CRIME TO HAVE BEEN COMMITTED

In *Matter of E.R.*, ___ Kan.App.2d ___ (December 12, 2008), E.R., a 12-year-old boy fondled a 14-year-old girl. K.S.A. §21-3522(a), also known as the “Romeo and Juliet Law,” states that “*Unlawful voluntary sexual relations is engaging in voluntary... (3) lewd fondling or touching with a child who is [14 or 15] years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender are the only parties in-*

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involved and are members of the opposite sex.” E.R. was adjudged a juvenile offender for violating this law. The State had a unique way of interpreting the statute, regarding which Judge McAnany, writing for the majority, had this to say:

“As we understand it, the State argues that a 12-year-old offender is less than 4 years older than a 14-year-old victim because a person 4 years older than a 14-year-old is age 18, and the age of a 12-year-old is less than the age of an 18-year-old. We suspect that the average reader will have to read the foregoing sentence more than once to figure out the State’s theory. We did. We are confident a mathematician could easily express the State’s theory in a simple equation. But people do not talk that way. And legislators do not write laws that way.”

The Court found that the statute was clear and unambiguous. The offender must be older than the victim by as little as one day and as much as 4 years (exclusive), but older nonetheless. Therefore, the charges against E.R. must be dismissed. He was younger than the victim.

CODE OF JUDICIAL CONDUCT AS IT APPLIES TO ANSWERING QUESTIONNAIRES

In February 2006 Kansas Judicial Review (KJR) mailed a questionnaire and explanatory cover letter to all declared judicial candidates in Sedgwick County, Kansas. Candidates were asked to answer the questionnaire, designed to elicit views on a variety of legal and political issues. The cover letter asked that candidates answer the questionnaire consistent with their ethical obligations. An option of declining to respond if candidates believed the Code prohibited answering was offered. KJR received seven responses, only one of which included substantive answers. All other candidates marked “Decline to Respond.”

Robb Rumsey, a candidate for judicial office, requested an opinion from the Judicial Ethics Advisory Panel regarding whether or not he could respond to the questionnaire. The Advisory Panel advised him that he could not. However, the Commission on Judicial Qualifications added a note to the opinion rejecting the Advisory Panel’s denial, and opining that based on *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), Rumsey could respond to the questionnaire. Butler County District Judge Charles Hart wanted to go door-to-door to solicit signatures for his nomination petition. However the Judicial Ethics Advisory Panel had previously opined that a judicial candidate may not solicit such signatures on his own behalf. In May 2006, KJR, Rumsey, and Hart filed an action in federal district court against the Judicial Qualifications Commission seeking injunctive and declaratory relief from enforcement of the Code against them, arguing that the

provisions of the Code were vague, overbroad and violated the freedom of speech.

In *Kansas Judicial Review v. Stout*, 440 F.Supp.2d 1209 (D. Kan. 2006), federal district judge Julie Robinson found that the Kansas Code of Judicial Conduct, to the extent it prevented judicial candidates from responding to questionnaires, was an unconstitutional infringement on a judge’s First Amendment rights under the U.S. Constitution. She enjoined the Kansas Commission on Judicial Qualifications from enforcing the Code in these circumstances. The Commission appealed to the 10th Circuit Court of Appeals. The 10th Circuit decided not to reach the merits of the case until the Kansas Supreme Court answered five questions it posed concerning the Canons. The Kansas Supreme Court answered those questions in *Kansas Judicial Review v. Stout*, ___ Kan. ___ (December 5, 2008).

Prior to answering the questions, the Court found that it has wide discretion in interpreting its own rules. Although it follows the general rules of statutory construction, when the language of a rule is subject to interpretation, the Court may authoritatively state which among competing interpretations is most consistent with its intent. In addition, the Court acknowledged that the Commission on Judicial Qualifications was in the process of recommending changes to the Code in line with changes adopted in the 2007 Model Code of Judicial Conduct by the ABA. However, the Court specifically states that it has stayed consideration of these changes during the pendency of this case so as not to muddy the water.

Question No. 1. Does a judicial candidate violate Canon 5A(3)(d)(i) and (ii) by answering a questionnaire asking for his or her views on disputed legal and political issues?

Answer: Perhaps, depending on the question asked. The sections in question state that a candidate for judicial office “shall not...make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office” and “shall not...make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” The Court interpreted this to mean that candidates for judicial office cannot make statements that bind them to a particular disposition with regard to a particular issue, a particular case, or a particular controversy bound to come before the candidate as a judge. It does not prohibit candidates from stating a personal view on a disputed issue. The Court went on to give some examples as they relate to questionnaires. “...it would seem that a candidate’s decision to respond to a questionnaire asking, “What is your stance on abortion?” is qualitatively different under the code from a candidate’s decision to respond to a question, “Do you vow to overturn *Roe v. Wade*?” While an answer to the first of these questions would likely be a permissible announcement of a personal view on a disputed legal issue, an affirmative response to the second question would impermissibly bind a candidate to a particular legal action. A second, perhaps less conten-

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tious example—though of equal importance when considering a judge’s duties to decide cases fairly and impartially—might involve a survey that asks whether a judicial candidate would ever grant a downward departure sentence in a criminal conviction for abuse of a child. If a candidate chose to respond to this question substantively—and particularly if the candidate answered in the negative—the candidate’s response would violate even our narrow interpretations of the pledges and commits clauses.” The Court states that a judge is always free to decline to answer such questions and candidates are strongly advised to emphasize in all their answers that the candidate has a duty to uphold the law regardless of his or her personal views and to remain ever mindful of the impartiality that is essential to the judicial office.

Question No. 2. Does a judicial candidate solicit “publicly stated support” in violation of Canon 5C by personally collecting signatures for his or her nomination petition?

Answer: Yes. The Canon in question states that a candidate for judicial office “shall not personally...solicit publicly stated support...A candidate subject to public election may, however, establish committees of responsible persons...to obtain public statements of support for his or her candidacy.” The Court concluded that personally asking someone to sign a nomination petition (the content of which is set by statute) on which the signer declares that he intends to support the candidate therein named is personally soliciting publicly stated support and is in violation of the Canon.

Question No. 3. Does the definition of “the faithful and impartial performance of the duties of the office” in Canon 5A(3)(d)(i) include all conduct relevant to the candidate’s performance in office?

Answer: Yes. The Court opined that this includes everything from “judicial philosophy when deciding cases to work habits to education and ability.”

Question No. 4. Is the definition of “appear to commit” in Canon 5A(3)(d)(ii) limited to an objective appearance of a candidate’s intent to commit himself or herself?

Answer: Yes. In other words, the Court reasoned, would a reasonable person with knowledge of all the circumstances believe that the judge was committing to a particular course of conduct.

Question No. 5. Does the definition of “publicly stated support” in Canon 5C(2) include endorsements of a candidate?

Answer: Yes. The Court found the terms “support” and “endorsement” to be synonymous. Again the Court provided an illustration. “When a judicial candidate engages in con-

duct discussed previously by personally seeking signatures on a nominating petition (rather than having his or her campaign solicit such signatures), such conduct is impermissible in this state, as it amounts to a personal request for the signor’s endorsement of the judicial candidate. But when a newspaper or other media source submits questions to a judicial candidate and the candidate responds, and this exchange results in an endorsement, we conclude that the candidate is not actively seeking support or endorsement in violation of the canons. In the first example, the judicial candidate is actively seeking an endorsement. In the second, the request originated from the media source, not the candidate.”

JUDGE MUST INQUIRE WHETHER THE VERDICT REPRESENTS THE VERDICT OF THE ENTIRE JURY

Randy Johnson was convicted of felony DUI. K.S.A. §22-3421 requires that the trial court ask the jury in open court whether the verdict is the jury’s verdict. The rationale behind this statute is to give the jurors one last chance to express dissent from or disagreement with the verdict. It also states that if no disagreement is forthcoming and if neither party requests that the jury be polled, the verdict is complete.

In *State v. Johnson*, ___ Kan.App.2d ___ (January 2, 2009), the trial court did not ask the jury whether the verdict was their verdict and did not ask the parties if they wanted the jury polled. The defendant offered some evidence on appeal, by way of affidavits from jurors, that this was not in fact the verdict of the jurors. The affidavits suggested that they felt rushed and just wanted to get home. The Court of Appeals found that the facts presented a matter of first impression in Kansas, to wit: *Does K.S.A. §22-3421, which requires that an inquiry be made to the jury whether the verdict represents the jury’s verdict, mandate that a verdict be reversed when the trial court neglects to make such an inquiry and when the appellate record establishes that there is question regarding its unanimity?*

The Court answered in the affirmative and found that it was a fatal error in this case. It remanded the case for a new trial. However, it found that the trial court is not required to ask the parties whether they want the jury polled. The parties are required to affirmatively make such a request and failing to

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MORE FAMOUS KANSANS

Rory Feek, country songwriter, Atchison, Kansas. Part of duet team with wife, Joey Martin, contestants on “Can You Duet?”; Songs: “Cheater, Cheater”; “Some Beach” “You Can Let Go” “How Do You Get That Lonely” “Chain of Love” and many more.

Hon. Judith M. Barzilay, Judge, U.S. Court of International Trade, New York; Russell, Kansas

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do so results in a waiver of individual polling.

EXCLUSIONARY RULE DOES NOT APPLY WHEN UNLAWFUL ARREST BASED ON SIMPLE NEGLIGENCE

Bennie Dean Herring was arrested by police in Alabama based on a mistaken belief that he was the subject of an outstanding warrant. The warrant clerk in the neighboring county had advised police that there was a felony warrant for Herring's arrest. It turned out that the warrant, although still in the computerized database of the county, had been withdrawn five months earlier. By the time the error was discovered, (when the clerk went to the "hard copy" files to actually pull the warrant) officers had already stopped Herring, handcuffed him, searched him and his truck and found methamphetamine. There was no dispute that the arrest violated the Fourth Amendment. The police had neither probable cause nor a warrant. The question was whether the exclusionary rule required that the evidence seized be suppressed.

In *Herring v. United States*, ___U.S.__(January 14, 2009), the U.S Supreme Court held, in a 5-4 decision, that when an arrest is based on careless police record-keeping, as was the case here, rather than intentional police misconduct, the exclusionary rule does not apply. The evidence obtained is admissible. Justice Roberts opined, " *...the exclusionary rules serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.*" The majority did go on to state that if the police have shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would be justified.

OFFICER CANNOT EQUATE PERFORMANCE ON FIELD SOBRIETY TESTS WITH BAC LEVEL

In *State v. Shadden*, ___Kan.App.2d__(January 16, 2009), several issues were raised concerning the field sobriety tests and conclusions that could be drawn therefrom.

First, the Court found that it is not improper to refer to "field sobriety tests" as "tests." The defendant had argued that using terms such as "test," "pass," "fail," or "points" causes prejudice to a defendant because it enhances the significance of the observations as they relate to the ultimate issue of impairment. Judge Standridge, writing for the majority stated:

"...where officer testimony does not link test performance with a specific level of intoxication, the mere use of the term "test" or an indication by the officer that the defendant failed to perform the tests adequately and, therefore, "failed" the

test does not lend scientific credibility to the test results. There is only a semantic difference between "field sobriety test" and "field sobriety exercise" or between "failing a test" and "being unable to perform an exercise adequately." An officer must be permitted to relate the activities a suspected drunk driver was asked to perform and to indicate that certain deficiencies in the performance of these activities indicated the driver was intoxicated...it is appropriate for the officer to testify that field sobriety tests were administered and that, based upon the officer's training and experience, the driver failed those tests."

However, the Court went on to hold that it is impermissible to take the next step of equating the performance on the tests as a whole or individually with a specific BAC level. An officer goes beyond the task of "reporting observations" concerning performance on a test when he or she tries to quantify the level of intoxication from said observations. In *Shadden*, the officer testified that according to NHTSA standards, a driver who exhibits two clues during the walk-and-turn test has a 68% likelihood of having at least a .10 BAC. This improperly implied a level of scientific certainty to the walk-and-turn test results. Since the evidence had not been qualified as "scientifically reliable" under the *Frye* standard for admission of scientific evidence, it was inadmissible. The Court could not find the admission to be harmless, therefore it reversed the conviction and remanded the case for a new trial.

COURT ESTABLISHES NEW STANDARD FOR ADMISSION OF PRIOR BAD ACTS TO SHOW PLAN UNDER K.S.A. §60-455

In *State v. Prine*, ___Kan.__(January 16, 2009), the Court pointed out that prior caselaw in the area of the admission of prior bad acts evidence lacked uniformity and had no "meat on its bones." Therefore, it adopted a new standard. "*Before a district judge admits evidence of prior bad acts to prove plan or modus operandi under K.S.A. §60-455, the evidence must be so strikingly similar in pattern or so distinct in method of operation to the current allegations as to be a signature.*"

This was a child sex abuse case. The Court stated it was "*compelled to make one final set of brief comments on the K.S.A. §60-455 issues raised by this case.*" Justice Beier, writing for the majority, went on to point out that evidence of prior sexual abuse of children in child sex abuse cases is particularly susceptible to characterization as propensity evidence, which is prohibited under K.S.A. §60-455. Therefore, convictions for such crimes are vulnerable to successful attack on appeal.

"This is disturbing because the modern psychology of pedophilia tells us that propensity may actually possess probative value for juries faced with deciding the guilt or innocence of a person accused of sexually abusing a child. In short, sex-

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ual attraction to children and a propensity to act upon it are defining symptoms of this recognized mental illness...And our legislature and our United States Supreme Court have decided that a diagnosis of pedophilia can be among the justifications for indefinite restrictions of an offender's liberty to ensure the provision of treatment to him or her and the protection of others who could become victims...It is at least ironic that propensity evidence can be part of the support for an indefinite civil commitment, but cannot be part of the support for an initial criminal conviction in a child sex crime prosecution. Of course, the legislature, rather than this court, is the body charged with study, consideration, and adoption of any statutory change that might make K.S.A. §60-455 more workable in such cases, without doing unconstitutional violence to the rights of criminal defendants. It may be time for the legislature to examine the advisability of amendment to K.S.A. §60-455 or some appropriate adjustment to the statutory scheme."

Any legislators listening?

PROSECUTOR SUSPENDED FOR SHARING PICTURES OF REPORTED SEXUAL ASSAULT FROM UNDERAGE DRINKING PARTY TO PARENTS OF ALL MINORS IN ATTENDANCE

In May 2007, certain minors attended a party in which beer was consumed. One minor girl, C.H., who had approximately 6 beers, was photographed by other partygoers while she had sexual intercourse with another student. The amateur photographer also recorded minors drinking beer at the party. Within a few days, C.H. reported the incident as a sexual assault to the school counselor. Law enforcement obtained the photographs and forwarded them to the prosecutor. The prosecutor determined that he would not pursue prosecution because he believed the encounter to be consensual.

The prosecutor reported to the local paper that he planned to show the photographs from the party to the parents of the minors who attended. C.H.'s mother contacted the prosecutor to tell him that he did not have her permission to show the photographs of her minor daughter to others. The prosecutor advised her that he did not need permission. The children may be charged with being minors in possession of alcohol and their parents had a right to see the evidence that prosecutor had against them. He also wanted to shock the parents as to what occurs at these teenage parties. He proceeded to show the pictures. When further challenged by C.H.'s mother and the Kansas Coalition Against Sexual and Domestic Violence, the prosecutor wrote them the following letter, in part:

"As the photographs you refer to are evidence of criminal

activity by several minors and as I cannot lawfully withhold evidence, I have allowed and will continue to allow the parents of potential respondents to view altered versions of them, in my office...I further want to thank you for any future litigation that you pursue in this matter as it will inevitably generate a large amount of publicity for the issue of underage drinking, hosting of minors and the harmful effects of minors engaging in public sexual acts. I was beginning to fear that nothing would be done and that this issue would fade from the public eye."

C.H. was subjected to public ridicule as a result of these events and suffers from depression.

In *In re Campbell*, ___Kan.__(January 16, 2009), the Supreme Court suspended the prosecutor from the practice of law for 6 months. K.S.A. 2007 Supp. §38-2310(c) provides that information identifying victims and alleged victims of sex offenses shall not be disclosed or open to public inspection under any circumstances. By violating this statute, the Court found that he engaged in conduct that was prejudicial to the administration of justice. He also prejudiced justice when he failed to recognize that justice required sensitivity to the privacy rights of members of the public in violation of KRPC 8.4(d). The Court seemed particularly upset that when he addressed the Court he stated explicitly that he did not understand why other women and girls who believed themselves to be victims of sex crimes might now be reluctant to report the crimes or assist in their prosecution. The Court was also critical that the prosecutor did not consult with other identified "mentors" in determining whether to pursue the charges for sexual assault



PENNIES FOR FINES

Several stories have appeared lately in the press from around the country regarding defendants attempting to pay their court fines with pennies. The Summer 2002 issue of the *Verdict* has an in-depth article on this topic at page 12. However, as a reminder, pennies are legal tender for fines. Your court may adopt, in writing, reasonable rules with regards to payment of fines. However, absent such rules, you would be hard pressed to deny payment in pennies.

What types of policies might be adopted? In *State v. Carroll*, Slip Copy, 1997 WL 118064 (Court of Appeals of Ohio, Fourth District 1997), the Court supported the requirement that the pennies be wrapped, and not loose. Some courts limit the total amount of money that can be submitted in coin to \$3. In Scott County Iowa this summer a defendant attempted to pay with a bucket of pennies that were covered with an unknown substance. The judge found the defendant in contempt.

It is always a good idea to address this issue by court rule before confronted with the bucket of pennies and a news crew. The rules must be reasonable and adhered to consistently.

A Step Back in Time

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Sivey. However, the verdict was reversed and the case remanded for a new trial. It seems that during the trial, Sivey called the doctor who treated him, William Hayes, to speak about his injuries. Dr. Hayes refused to be sworn or affirm prior to his testimony on the ground he had conscientious scruples against taking an oath or affirmation. He said that he regarded the scriptural injunction to *“let your communications be yea, yea, and nay, nay, and whatsoever is more than this cometh of evil,”* as binding upon his conscience and that to take the oath or affirm, as required by the statute, would be a violation of his conscience and his religious convictions. So the clerk gave the following oath, *“You do solemnly state that the evidence you shall give in the case wherein A. Sivey is plaintiff, and H.M. Mayberry is defendant, shall be the truth, the whole truth, and nothing but the truth?”* Dr. Hayes responded, *“I do.”* The defendant objected on the basis that this did not fit the statutory requirements of being an oath or affirmation. The judge overruled the objection and the doctor testified.

In *Mayberry v. Sivey*, 18 Kan. 291 (1875), the Kansas Supreme Court held that Dr. Hayes should not have been allowed to testify. By statute all oaths had to commence and conclude with *“You do solemnly swear, etc.”* *“so help you God.”* Affirmations must commence and conclude with *“You do solemnly sincerely, and truly declare and affirm,”* etc. *“and this you do under the pains and penalties of perjury.”* (This is still the law today). If a witness has religious concerns about swearing, then he or she must affirm. In this case the Court found that the *“statute was disregarded. The conscience and religious convictions of the party were placed by the court above the law, and superior to the mandatory clauses of our statutes. Such procedure cannot be tolerated.”*

Poor Mr. Sivey had to go through another trial.



JUDGE DISCIPLINED FOR TESTIFYING AS CHARACTER WITNESS

A Shawnee County District Court judge who testified on behalf of a friend convicted of accidentally killing a hunter in Lyon County has been admonished by the Kansas Commission on Judicial Qualifications.

The Lyon County man had been convicted of involuntary manslaughter for shooting a fellow hunter as he waited for geese in a field of decoys. During sentencing the Shawnee County judge testified that he hired the man to build some fences, shared a mutual interest in motorcycles, had known him for about 20 years and considered him a friend. He testified that the defendant was *“forthright, very honest.”* He went on to state that he was *“a man of honesty and character, and I believe given the opportunity of probation, he could do everything in his power to satisfy the conditions of probation.”* The man ended up being sentenced to 32 months in prison.

On November 21, 2008 the Commission issued a cease and desist order to the judge. The judicial canons prohibit a judge from testifying voluntarily as a character witness. *“To do so may lend the prestige of the judicial office in support of the party for whom the judge testifies,”* the Commission wrote. The judge acknowledged his mistake and expressed regret for the impropriety of his actions.



**Kansas City, Kansas
 Municipal Court
 building and courtroom**

COURTS SEE INCREASE IN PRO SE LITIGANTS

By Margery A. Gibbs
Associated Press
November 24, 2008

When Danielle Nitzel found her three-year-old marriage drawing its last breath in 2004, she couldn't afford the minimum of \$1,000 she was told she would need to hire a divorce lawyer.

So she did what more and more Americans are doing: She represented herself in court.

"I looked online and just tried to figure out how to write out the paperwork," said Nitzel, a nursing student who at the time had little money and a pile of education loans. "I think it cost us \$100 to file it ourselves."

The number of people serving as their own lawyers is on the rise across the country, and the cases are no longer limited to uncontested divorces and small claims. Even people embroiled in child custody cases, potentially devastating lawsuits and bankruptcies are representing themselves, legal experts say.

"It's not just that poor people can't afford lawyers. This is really a middle-class phenomenon," said Sue Talia, a judge from Danville, Calif., and author of "Unbundling Your Divorce: How to Find a Lawyer to Help You Help Yourself."

The trend has resulted in court systems clogged with filings from people unfamiliar with legal procedure. Moreover, some of these pro se litigants, as they are known, are making mistakes with expensive and long-lasting consequences — perhaps confirming the old saying that he who represents himself has a fool for a client.

Paul Merritt, a district judge in Lancaster County, Neb., said he knows of cases in which parents lost custody disputes because they were too unfamiliar with such legal standards as

burden of proof.

"There is a lot on the line when you have a custody case," Merritt said. "There are a lot of things that judges take into consideration in determining what's in the best interest of the child, and if you're a pro se litigant, the chances that you will know what those things are, and that you will present evidence of all those issues, are really small."

While the fees lawyers charge vary widely, the average hourly rate ranges from around \$180 to \$285 in the Midwest, and from \$260 to more than \$400 on the West Coast, according to legal consultant Altman Weil Inc.

"Pro se litigants are here to stay. You're either going to give them the tools to get through the system without clogging it up, or you're not going to do it to the detriment of judges, court staff and the lawyers who have the often unenviable task of opposing them."

***Frederic S. Ury
Co-chair of Committee on Pro Se Litigants
Connecticut Bar Association***

Tim Eckley of the American Judicature Society in Des Moines, Iowa, said no national figures are kept on how many people represent themselves, "but I don't think anybody who's involved in the courts would deny that this is a growing trend in the last 10 to 15 years."

In California, about 80 percent represent themselves in civil

family law cases — such as divorce, custody and domestic violence cases — according to the Self-Represented Litigation Network. In San Diego alone, the number of divorce filings involving at least one person not represented by a lawyer rose from 46 percent in 1992 to 77 percent in 2000.

In Nebraska in 2003, 13,295 people represented themselves in civil cases in state district courts. By 2007, the number had risen to 32,016, or 45 percent.

The result?

"Courts are absolutely inundated with people who do not understand the procedures," Talia said. "It is a disaster for high-volume courts, because an inordinate amount of their clerks' time is spent trying to make sure that the procedures are correctly followed."

Pro Se Litigants

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Talia has traveled to nearly every state to speak to lawyers, judges and court workers about measures to handle the growing number of people representing themselves.

Many states offer self-help Web sites or desks at court offices that offer standard legal forms for such things as simple divorces. In some states, volunteer lawyers are made available to give legal advice to those who cannot afford an attorney.

The legal profession may not like the trend but realizes it is here to stay, and has gotten behind the effort. The American Bar Association is encouraging states to set up self-help desks and adopt standard forms.

Also, a majority of states have amended their attorney ethics rules to promote a growing practice known as "unbundling," in which a lawyer handles just part of a contract, lawsuit, divorce or other litigation for a small fee, rather than taking on the entire case.

The ethics rules have been changed to make it clear that lawyers can do this without being held responsible for the entire case. That can ease their fears of being sued for malpractice.

Nitzel, the nursing student, said court staffers helped point her in the right direction, but she also had a friend who happens to be a lawyer help in drafting her divorce papers.

Editor's Note: See also, **The Pro Se Phenomenon**, by Drew A. Swank, 19 *BYU Journal of Public Law* 373 (Winter 2005).

LOW-COST INNOVATIONS

The Self-Represented Litigation Network website, www.selfhelpsupport.org, has created a special library of nominal cost resources at:

http://www.selfhelpsupport.org/library/folder.223114-Low_Cost_Innovations.

This is a free membership site, open to court and other access to justice practitioners. People who access the link will be prompted for a username and password. If they have not previously registered and do not have this login information, they will have the opportunity to fill out a membership application. Membership applications are reviewed for authorization daily. The site is sponsored by the National Center for State Courts.



"Courts are facing perhaps their greatest challenge in a generation or more. As we enter what will be at best a time of great economic uncertainty, we will experience great pressure on budgets at the very time that demand for court services will increase, and in which lack of financial resources will further increase the percentage of those who come to court without lawyers. Unless appropriately addressed, not only will this result in greater backlogs, more crowded calendars, and a potential loss of public trust and confidence, but it will put court staff and judges under great stress, leading to a vicious spiral further reducing the effectiveness and efficiency of the courts.

Faced with these realities, court leaders really have no alternative. Leaders at the state, local and national level have to find zero or very low cost innovations that will break this vicious spiral, and make our courts more efficient, more effective, more accessible, and perhaps most importantly on a day to day basis, more enjoyable and rewarding places to work and judge."

Source: *En\$uring Access to Ju\$stice in Tough Economic Times* by Frank Broccolina and Richard Zorza published in **Judicature**, Vol. 92, No. 3, Nov.-Dec. 2008.

ADDITIONAL WAYS SOME COURTS AND BAR ASSOCIATIONS ARE DEALING WITH PRO SE LITIGANTS

- ◆ Train court clerks or designated staff to work with pro se litigants and assist in form completion.
- ◆ Provide public access to computers/self-help kiosks to complete forms
- ◆ Train law students to assist *pro se* litigants on a clinical basis.
- ◆ Standardize and simplify forms for ease of use
- ◆ Develop informational brochures or handbooks
- ◆ Staff "*pro-se* clinics" with volunteer lawyers

Grandview Woman Sues City for Counsel Denial

By Dan Margolies, Legal Affairs Columnist
Reprinted from Kansas City Star, September 30, 2008

Grandview resident Alice Moore was charged in 2007 with possession of less than an ounce of marijuana in Grandview Municipal Court.

Because she was too poor to afford a lawyer, she asked for the appointment of counsel. The request was denied because Grandview's policy is to appoint counsel only if the prosecutor has recommended jail time.

Moore pled guilty to the charge on March 24, 2008, and Municipal Judge Donald L. Crow imposed a jail sentence but suspended it and ordered her to pay a fine of \$220.

Moore, however, was unable to pay the fine, so Crow converted the sentence to jail time. Moore, a single mother with a young daughter at home, wound up spending five days in the pokey.

Now Moore is suing the city of Grandview and Crow. She said the city's policy of not appointing counsel where jail time was a possibility violated the due process, right-to-counsel and equal rights provisions of the Missouri Constitution.

The suit appears to be the first time the policy has been challenged.

"Lawyers who work in these places tend to work purely for people who can hire them and don't take on the cases of people who can't." said Moore's attorney, Fred Slough of Slough Connealy Irwin & Madden. *"so it's no skin off their noses."*

Moore's lawsuit seeks a court order declaring that the appointment of counsel is required in all situations where jail time is a possibility, including those in which incarceration results from the inability to pay a fine. It also seeks unspecified compensation for the time Moore spent in jail.

Grandview officials referred inquiries to the city's outside counsel, Joseph Gall of Humphrey Farrington & McClain, who said he had glanced at the lawsuit but hadn't had time to formulate a response.

"We'll certainly look at the procedure and see if it's in line with the constitutional rights to counsel and criminal rules," he said.

HARD TIMES AND THE RIGHT TO COUNSEL

Editorial November 21, 2008
Reprinted from The New York Times

Forty-five years after the Supreme Court's landmark ruling established a defendant's constitutional right to counsel in state criminal proceedings, that crucial right is hanging by a tattered thread.

Public defenders' offices always have been underfinanced and overburdened. With state revenues in free fall, the problem is reaching crisis proportions and creating a legal and moral challenge for the criminal justice system, state legislatures and the legal profession. Statewide public defenders in Kentucky and Minnesota and in cities such as Miami and Atlanta have been forced by budget cuts to fire or furlough lawyers. In at least seven states, public defenders' offices are refusing to take on new cases or have sued to limit them. They argue that budget cuts and rising case loads undermine their ability to provide adequate representation.

In a disturbing example of legal triage, a Florida judge ruled in September that the public defenders' office in Miami-Dade County could refuse to represent many poor defendants arrested on lesser felony charges so that its lawyers could provide a better defense for other clients. Behind the ruling were some chastening statistics: Over the past three years, the average number of felony cases handled by each lawyer rose from 367 annually to nearly 500. Misdemeanor case loads rose from 1,380 to 2,225.

Public defenders' offices all over the country are reporting similar problems. The immediate result is that innocent defendants may feel pressure to plead guilty. There also is an increased risk of wrongful conviction, which means that the real offenders would go free.

With states struggling to come up with financing for schools and hospitals, we fear politicians are unlikely to argue for significantly more money for public defenders' offices. To solve the immediate crisis, new sources of support would have to be found—quickly.

One approach would be for states to increase the registration fees charged to lawyers. The private bar also must significantly expand pro bono representation. Such efforts alone cannot fill the gap. Ultimately, government must take responsibility. All defendants, rich or poor, have the right to competent legal counsel.

AND THE GENERAL SAYS.....



The following contains a summary of recent opinions from the office of Kansas Attorney General Six that may be of interest to municipal judges. The full text of all AG opinions can be accessed through www.accesskansas.org.

AG OPINION 08-23 November 3, 2008

A city governing body that rejects a mayoral appointment must simply make a determination that the candidate is either not fit or is unqualified to hold the office or position. The law does not require that a governing body articulate the basis for its determination.

The statute in question, L. 2008, Chapt. 163, §4 provides, in part:

"Any appointment to any board, commission, advisory group or other body made by the mayor of any city which is subject to approval of the governing body of the city must be acted upon by the governing body within 45 days of the appointment by the mayor or the appointment shall be deemed approved. The governing body of the city shall approve such appointment unless the governing body makes a specific finding by the passage of a resolution that the person is either unqualified to hold the office or is not fit to hold the office or position."

The General opined that *"Had the legislature wanted the governing body to elucidate its rationale for rejecting a candidate on grounds of unfitness, appropriate verbiage could have been crafted."*

NUTS AND BOLTS

Question: *Since handicapped parking violations and excessive window tint are misdemeanor violations under state law, do we assess the \$19 state court costs? What about the .50 cent judicial training fee?*

Answer: Neither violation is assessed the \$19 state assessment. Excessive window tint is assessed the .50 judicial assessment, but handicapped parking is not.

You are correct, handicapped parking (K.S.A. §8-1,129) and excessive window tint (K.S.A. §8-1749a) are unclassified misdemeanors under state law. However, that classification doesn't really have anything to do with which fees are assessed.

K.S.A. §12-4116, the statute dealing with the judicial branch education fund, states the .50 fee shall be assessed in

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each case filed in municipal court where there is a finding or a plea of guilty, a plea of no contest, a forfeiture of bond, or a diversion.* The very last sentence of the statute states: *"For the purpose of this section, parking violations shall not be considered cases."* Therefore, it would appear that the .50 judicial training fee would not be applied to handicap parking tickets, but it would be applied to excessive window tint.

But what about the \$19 state assessment? It is governed by K.S.A. §12-4117. It provides that in each case filed in municipal court charging a crime *other than a nonmoving traffic violation*, where there is a finding of guilty or a plea of guilty, a plea of no contest, forfeiture of bond or a diversion the fee shall be assessed. The question is what is a "nonmoving traffic violation?"

There seems to be a series of definitions in the statutes that vary only slightly from each other, each with increasingly broader definitions: traffic infraction, traffic offense, and traffic violation.

A **"traffic infraction"** is any violation contained in the uniform fine schedule at K.S.A. 2007 Supp. §8-2118(c). *See*, K.S.A. §8-2116 and K.S.A. §12-4113(m). Neither handicapped parking nor excessive window tint charges meet the definition of traffic infractions. A **"traffic offense"** is a violation of the uniform act regulating traffic on highways or any similar ordinance as well as any city ordinance violations that are not violations of state laws, but which relate to the regulation of traffic on the roads and any no proof of insurance charge. *See*, K.S.A. 2007 Supp. §8-2117(d) and K.S.A. §19-4708. Excessive window tint does meet the definition of a "traffic offense." In addition, excessive window tint is a non-moving traffic offense. *See*, K.A.R. §92-52-9. Therefore, the \$19 would not apply to a charge of excessive window tint.

Handicapped parking is not a "traffic offense" because it is not in the uniform act regulating traffic on the roads and does not deal with traffic on the roadway. In fact, K.S.A. §19-4708 excludes parking violations from the definition of "traffic offenses." It is, however, a non-moving violation pursuant to K.A.R. §92-52-9. Is it a "traffic violation?" **"Traffic violation"** seems to have even a broader meaning than "traffic infraction" and "traffic offense". K.S.A. §12-4306 seems to indicate that a "traffic violation" is a violation of a "traffic ordinance." "Traffic ordinance" is defined in the same statute as any ordinance relating to the regulation of traffic on streets and highways or the operation of vehicles." Since handicapped parking does deal with the operation of vehicles, it is this author's opinion that it would qualify as a nonmoving "traffic violation" and therefore the \$19 would not be assessed.

*Although the statute actually states that the fee shall not exceed \$1, the Supreme Court has set the fee at 50 cents. *See*, 92 SC 34.

Unpublished Opinions

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

IMPOSITION OF “GANG CONDITIONS” OF PROBATION *Unpublished Decision*

Christian Larios-Alba was convicted by a jury of felony criminal threat. Evidence was admitted that the defendant was part of a gang and, in fact, the charge itself involved flashing gang signs and shouting the name of the gang. As part of his probation, Larios-Alba was prohibited from associating with anyone involved with gangs; from associating with anyone who has been convicted of the sale or possession of drugs; from associating with anyone who is on probation, parole or has an active criminal case; and from going to certain locations known for gang activity. These are commonly referred to as “gang conditions.” In addition he was prohibited from riding in a car with more than one other person, unless the other individuals in the vehicle were his parents, children, or siblings.

In *State v. Larios-Alba*, Slip Copy, unpublished, 2008 WL 4966469 (Kan. App. November 21, 2008), the defendant argued that the last condition had no reasonable relationship to protection of the public or the offense committed. It infringes, he argued, upon his constitutional right to freedom of association found in the First Amendment. He argued it bore no reasonable relationship to its purpose, which was to segregate him from gang members.

The Court of Appeals disagreed and supported the trial court’s imposition of said condition. The trial court had reasoned that such a restriction would eliminate the possibility that the defendant, if caught in a car with other gang members, could claim ignorance of the fact that they were gang members. The goal was to help him sever his ties with the gang. The appellate court found that such a condition was reasonably related to the goals of rehabilitation.

The Verdict

SALE OF DRUGS WITHIN 1,000 FEET OF SCHOOL MUST INCLUDE SPECIFIC EVIDENCE OF THE BUILDING’S USE AS A SCHOOL BY A UNIFIED SCHOOL DISTRICT OR ACCREDITED NONPUBLIC SCHOOL

Unpublished Decision

Broderick West was convicted of selling cocaine within 1,000 feet of a school. The prosecution presented evidence that the sale took place within 1,000 feet of Garfield School. It presented evidence that the school was attended by kindergartners through third graders. However, K.S.A. §65-4161(d) requires that the structure be “used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades one through 12.”

The Court of Appeals found in *State v. West*, Slip Copy, unpublished, 2008 WL 4849472 (Kan.App. November 7, 2008), that the jury cannot be allowed to speculate whether the school was used by a unified school district or an accredited nonpublic school. This is true even if common sense and background can bring them to that conclusion. Therefore, the prosecution failed to present sufficient evidence to support the conviction and the Court overturned the same.

THE CHARGE OF “ATTEMPTED INDECENT SOLICITATION OF A CHILD” INVOLVES AN IMPERMISSIBLE STACKING OF INCHOATE OFFENSES *Unpublished Decision*

Say what? Let’s dissect this issue a little more.

The word “inchoate” means “just begun” or “unfinished.” Common law has given birth to three general offenses that are often referred to as “inchoate” or “anticipatory” crimes: attempt, conspiracy and enticement. The principal feature of these crimes is that they are committed even though the substantive offense is not successfully consummated. Kansas has codified them at K.S.A. §21-3301 (attempt), K.S.A. §21-3302 (conspiracy) and K.S.A. §21-3303 (criminal solicitation or enticement). See also, POC §2.1 (attempt) and §2.2 (conspiracy). In *State v. Sexton*, 232 Kan. 539 (1983) the Kansas Supreme Court held that one anticipatory crime cannot be stacked or added to another anticipatory crime to arrive at a new crime. In *Sexton*, the charge that was struck down was an “attempt to conspire to commit murder.”

Caleb Rexroat exchanged online messages with a detective posing as a 14-year-old girl. The messages were sexually explicit and suggested that she should perform oral sex on him. He sent her a picture of himself. After the exchange, the detective contacted Rexroat, who admitted

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(Continued from page 18)

engaging in the conversations and sending the picture to a person he thought was a 14-year-old girl. He was charged with attempted indecent solicitation of a child in violation of K.S.A. §21-3301 (the attempt statute) and K.S.A. §21-3510 (a)(1) (enticing or soliciting a 14 or 15-year-old child to commit or to submit to an unlawful sexual act). The State had to charge “attempt” because the detective was not in fact a 14-year-old girl.

In *State v. Rexroat*, Slip Copy, unpublished, 2008 WL 4966487 (Kan. App. November 21, 2008), the Kansas Court of Appeals held that since “solicitation” is an anticipatory crime (even though it appears in the substantive statute in this case and not in the separately codified anticipatory crimes listed above), to charge a person with attempted solicitation of a child to commit or submit to a sexual act is the improper stacking of inchoate offenses as prohibited by *Sex-ton*.

It should be noted that after Rexroat was charged, the legislature passed K.S.A. §21-3523 which prohibits “electronic solicitation” which is defined as enticing or soliciting a person whom the offender believes to be a child under the age of 16 to commit or submit to an unlawful sexual act. It includes communication by e-mail, chatroom chats and text messaging. The Court points out that if this law had been in effect when Rexroat made his overtures to the detective, the State would not have had to resort to the “attempt” language it used here. The new offense focuses only on what age the offender believed the child to be, not the actual age of the person with whom he was corresponding.

**WAIVER OF COUNSEL IN MUNICIPAL COURT CASE
CAN BE ESTABLISHED BY ANY COMPETENT EVIDENCE**
Unpublished Decision

Michael Hughes challenged his sentence on an aggravated escape charge. He argued that two misdemeanor convictions that were used to enhance his criminal history, were improperly considered because there was not a valid waiver of counsel on file. The convictions were out of the Dodge City Municipal Court. The Dodge City Municipal Court did have the defendant complete a written waiver of counsel form. The judge signed off on the waiver as having been subscribed and sworn to before her. Hughes argued that the waiver advised him of his right to counsel, but did not advise him further of his right to court-appointed counsel if he was indigent. Since the “suggested” waiver form approved by the Court in *In re Habeas Corpus Application of Gilchrist*, 238 Kan. 202 (1985) informed the defendant of said right, and varied from the Dodge City wavier, the Dodge City waiver was fatally deficient.

In *State v. Hughes*, Slip Copy, unpublished, 2008 WL 4849236 (Kan. App. November 7, 2008) the Court of Appeals compared the waiver used by the Dodge City judge and

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the waiver approved in *Gilchrist*.

DODGE CITY WAIVER	WAIVER APPROVED IN GILCHRIST
<p>I, the undersigned and above name defendant state:</p> <p>(1) That I am appearing upon having been charged with the offense of: battery</p> <p>(2) advised orally of the potential penalties and state that I have been informed of the nature of the charge in open Court and understand the same.</p> <p>(3) After being advised of my rights, I hereby state that I understand my right to counsel and I hereby knowingly and intelligently waive my right to counsel in the above captioned case.</p> <p>Signature of Defendant</p>	<p>The undersigned acknowledges that he or she has been informed by the Municipal Court of the charges against him or her, of the possible penalty, of the nature of the proceedings before the Court, of his or her right to have counsel appointed to represent him or her, if he or she is financially unable to obtain counsel and is determined to be indigent, all of which the undersigned fully understands.</p> <p>The undersigned now states to the Court that he or she does not desire to have counsel, either retained or appointed, to represent him or her before the Court and wishes to proceed without counsel.</p> <p>Signature of Defendant</p>
<p>Acknowledgment and signature by judge that the waiver was subscribed and sworn to in her presence.</p> <p>Signature of Judge</p>	<p>I hereby certify that the above named person has been fully informed of the charges against him or her and the accused’s right to have counsel, either retained or appointed, to represent the accused at the proceedings before this Court and that the accused has executed the above waive in my presence, after its meaning and effect have been fully explained to the accused...</p> <p>Signature of Judge</p>

The Court pointed out that the defendant in *Gilchrist* had not signed anything and there was no record of a conversation with the court, however the Kansas Supreme Court still found that he had knowingly and voluntarily waived his right to counsel based upon his own admissions. *Gilchrist* did not mandate that waivers contain the exact language of the sample. Proof of waiver can be established by any competent evidence. Since the judge signed the waiver form, the record contained sufficient competent evidence to find that the defendant knowingly waived his right to counsel. It states that he was informed by the Court as to the facts and circumstances for appointment of counsel or employment of counsel, which is sufficient. The convictions can be counted in his criminal history score.

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PROBATION CANNOT BE EXTENDED AFTER ITS TERM HAS EXPIRED, EVEN IF DONE SO VOLUNTARILY *Unpublished Decision*

Two days after her probation expired, Carolyn Snapp-Woods executed a “Consent and Order to Extend Probation” for an additional 60 months or until her restitution was paid in full. She made a motion to terminate her probation successfully one month shy of the 60 month term. She argued that the victim had a civil judgment equal to the amount of restitution and she had otherwise complied with all the terms of her probation. The district court denied the request and extended her probation for another 60 months. She appealed the order extending her probation and argued that the court never had jurisdiction to extend her probation in the first place, since the term had expired.

In *State v. Snapp-Woods*, Slip Copy, unpublished, 2008 WL 4966474 (Kan. App. November 21, 2008), the State argued that because she voluntarily extended her probation, the doctrine of “invited error” precludes any claim that the court lacked jurisdiction to extend her probation.

The Kansas Court of Appeals found that “*On its face this argument has some appeal. However, it fails on the merits, as subject matter jurisdiction cannot be conferred by a party’s consent, waiver, estoppels, or failure to object to the court’s lack of jurisdiction.*” Ms. Snapp-Woods was ordered discharged from probation.

The issue was raised again in *State v. Baca*, Slip Copy, unpublished, 2008 WL 5076491 (Kan. App. November 26, 2008). In *Baca*, two weeks after the probation ended, the parties voluntarily agreed to a 12-month extension. The State argued that since K.S.A. §22-3716(d) allows the Court to issue a warrant for violation of probation conditions up to 30 days after the probation has ended, and therefore the same “30 day grace period” applies to voluntary extensions of probation. The Kansas Court of Appeals disagreed. Since the extension was not entered before the end of the probation term, the Court lacked jurisdiction. Mr. Baca was likewise ordered discharged from probation.

THERE MUST BE SOME DEFENSIBLE EVIDENCE TO SUPPORT THE RESTITUTION AMOUNT ORDERED *Unpublished Decision*

Dylan Hornecker and his friend Travis burglarized Lincoln Elementary School in Sumner County. He was ordered to pay restitution, jointly and severally with Travis, in the amount of \$3,450. Most of this, \$2,900, was for the value of 2 saxophones. However, one of the saxophones was recovered and repaired. In *State v. Hornecker*, Slip Copy, unpub-

lished, 2008 WL 4849306 (Kan.App. October 31, 2008) the Court held that there must be some “defensible” evidence to support the amount of restitution ordered. The Court must take into account the reasonable cost of repairs and a reasonable amount to compensate for the loss of use of the item. The restitution amount would be the difference between the reasonable market value for the saxophone before the damage and the reasonable market value after the damage has been repaired. Since there was no evidence that any of this was taken into account in determining the restitution amount, the Court remanded the case for further rulings on restitution.

16-MONTH DELAY BETWEEN CONVICTION AND SENTENCING IS NOT UNREASONABLE *Unpublished Decision*

Constitutional speedy trial rights do not apply to post-conviction proceedings. However, K.S.A. §22-3424 does require that after a defendant has been found guilty sentencing must be “*pronounced without unreasonable delay.*” In November 2005 David Pressley was convicted of aggravated burglary Sedgwick County. Sentencing was set for the following month but Pressley did not appear because he was in the Reno County jail on new drug charges. He was ultimately convicted and sentenced to 98 months in Reno County. He wasn’t sentenced in Sedgwick County until February 2007. In *State v. Pressley*, Slip Copy, unpublished, 2008 WL 4849380 (Kan. App. November 7, 2008) the Kansas Court of Appeals held that the delay was as a result of Pressley’s criminal conduct. He never requested to be returned to Sedgwick County. Therefore, the delay was not unreasonable.

Editor’s note: K.S.A. §12-4507 also requires that “*if the accused person is found guilty, sentence shall be imposed and judgment rendered without unreasonable delay.*”

RESTITUTION MUST BE RELATED TO CRIME OF CONVICTION *Unpublished Decision*

Jeremy Richmond pled guilty to two counts of aggravated battery. He had originally been charged with rape, but the charge was dismissed as part of the plea agreement. In addition to his prison sentence, he was ordered to pay \$200 for a sexual assault examination and \$200 for a sexual assault kit.

In *State v. Richmond*, Slip Copy, unpublished, 2008 WL 4849342 (Kan. App. November 7, 2008), Richmond argued that he should not be required to pay the restitution because it was related to the rape and he was not convicted of rape. The Kansas Court of Appeals agreed. It held that the trial court does not have the discretion to award costs and expenses that are unrelated to the crime of conviction. The facts of the rape charge had nothing to do with his battery convictions. The order to require him to pay \$400 was vacated.

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CAN'T INCREASE RESTITUTION AFTER-THE-FACT *Unpublished Decision*

The Court ordered Jamie Del Swanigan to pay \$2,225 restitution for a car he stole and then wrecked. Several months later, the trial court ordered the restitution increased to \$12,694, based on a claim from the insurance carrier. In *State v. Swanigan*, Slip Copy, unpublished, 2008 WL 4966476 (Kan. App. November 21, 2008) the Court of Appeals found that the court had no jurisdiction to increase the restitution amount. This was not the correction of a clerical or arithmetic error. When a sentence is lawfully entered, the sentence can be modified within 90 days. This was seven months. There was nothing in the record or in the plea agreement to leave the restitution amount "open." The case was remanded with directions to reinstate the original restitution order.

OFFICER MAY SEARCH VEHICLE INCIDENT TO ARREST OF A PASSENGER WHO RECENTLY OCCUPIED THE VEHICLE *Unpublished Decision*

Sheriff's deputies followed a truck to a trailer home park after recognizing the front seat middle passenger as a person for whom there was an outstanding city arrest warrant. The two passengers exited the truck, while the driver remained inside the truck. The police car pulled up beside the truck, not blocking its path in any way. No lights or sirens were employed. The officer asked the driver to yell at the passenger to return to the truck. She had just reached the front door of the trailer. She returned to the truck and was placed under arrest on the outstanding warrant. Shortly thereafter, a city police officer arrived to take the passenger to jail. The deputy advised the driver that he was going to search the truck incident to the passenger's arrest. The driver told the deputy that everything in the truck was his and tried to remove a pack of cigarettes from the hump between the two seats. The deputy told him to put it back and allowed him to exit with only his keys. It turns out that crystal meth was inside the pack of cigarettes. He also found a set of scales in the truck. The driver was charged with possession. He moved to suppress the items seized on the basis that he was unlawfully seized by the deputy when there was no reason to believe he had committed any crime. He argued that since the passenger had already left the truck, there was no legal basis to search it. The district court agreed and suppressed the items. The State appealed.

In *State v. Cannizzo*, Slip Copy, unpublished, 2008 WL 4850003 (Kan. App. November 7, 2008), the Court of Appeals found *Thornton v. United States*, 541 U.S. 615 (2004) to be controlling. *Thornton* held that a search incident to an arrest is proper even though the defendant had recently exited the vehicle. As long as the person arrested was a "recent

occupant" of the vehicle, a search is proper. It made no difference that the person arrested was simply being arrested on a warrant. An officer's authority to search does not depend on the likelihood or probability that evidence of a crime will be found. The Court further found that since the deputy had the right to search the truck, he had the right to order the driver out of the truck for officer safety purposes. Finally, the deputy was justified in not allowing Cannizzo to take the cigarette pack with him because a pack of cigarettes does not carry any expectation of privacy, as would a purse or other highly personal belonging. The search was proper and therefore the items seized are admissible.

POLLMAN, ROUND 3 *Unpublished Decision*

The DUI case of *State v. Pollman* is now on its third round in the Kansas appellate courts. The facts are as follows (*see also, The Verdict*, Fall 2008):

Defendant and his wife were traveling on separate motorcycles. Defendant's wife failed to use her turn signal. The officer stopped her. The defendant also stopped. The officer asked the defendant to move along or go wait in a nearby parking lot, but defendant refused. The officer called for a backup to deal with the defendant. The backup officer smelled alcohol on the defendant's breath and the defendant admitted drinking. The original officer eventually gave the defendant's wife a warning on the traffic infraction and told her she was free to go. He then approached the defendant to talk to him "about obstruction and future charges if he were ever in that situation again."

He asked for the defendant's driver's license, which he kept. The defendant told him he had a few beers. The arresting officer did not smell any odor, did not observe bloodshot eyes, slurred speech, or any unsteady footing. He admitted the only evidence he had was the defendant's admission to drinking. He asked the defendant to submit to a PBT. The results showed .11 alcohol concentration. He then put the defendant through the field sobriety tests and arrested him. The defendant blew .10 at the police station.

In *State v. Pollman*, Slip Copy, unpublished, 2007 WL 1239251 (Kan.App. April 27, 2007), the Court found that the officer had no reasonable suspicion to detain the defendant at the time the officer took his license and prevented him from leaving. The Court found that the district court should have suppressed the breath test results. The Supreme Court disagreed.

In *State v. Pollman*, ___ Kan. ___ (August 8, 2008), the Court found that the officer did have the reasonable suspicion necessary to detain and later test the defendant. However, it remanded the case to the Court of Appeals to determine whether the arrest was supported by probable cause and

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whether K.S.A. §8-1567(a)(2) was unconstitutional or void for vagueness, since the Court of Appeals had not addressed those issues in its prior holding.

In *State v. Pullman*, Slip Copy, unpublished, 2008 WL 4966464 (Kan. App. November 21, 2008), the Court of Appeals had little problem holding that the “per se” law was constitutional and not vague. However, the Court reversed his 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 motorcycle. This evidence was not sufficient to “warrant a reasonable prudent police officer to believe guilt was more than a mere possibility.” Conviction reversed.

CONVICTIONS FOR FELONY FLEEING AND ELUDING AND RECKLESS DRIVING ARE MULTIPLICITOUS IF RECKLESS DRIVING WAS THE BASIS FOR THE FELONY ELUDING CHARGE AND BOTH CHARGES AROSE OUT OF THE SAME CONDUCT

Unpublished Decision

Defendant was convicted of felony fleeing and eluding and reckless driving. He had been involved in a disturbance at Taco Bell. When the police arrived he was running from the area. They yelled at him to stop and he jumped in his car and gave chase. An officer was able to stick his arm in the defendant’s car window in an attempt to remove the keys, but the defendant drug him around the parking lot before colliding with a curb, which dislodged the officer. The defendant proceeded onto the roadway, where he ran a number stop signs and stop lights, kept his headlights off, and swerved as officers chased him, lights and sirens blaring. He was eventually stopped. He was convicted, among numerous other charges, of felony fleeing and eluding and reckless driving. He appealed arguing that that these convictions were multiplicitous. In *State v. Rutledge*, Slip Copy, unpublished, 2008 WL 4849123 (Kan. App. October 31, 2008), the Kansas Court of Appeals agreed. The Court applied the standards for determining multiplicity outlined in *State v. Schoonover*, 281 Kan. 453 (2006). It found that both charges arose out of the same unbroken course of conduct. In addition, the subsection of felony eluding under which the defendant was charged, requires proof that the defendant engaged in reckless driving. K.S.A. §8-1568(b)(1)(C). Therefore,

reckless driving (K.S.A. §8-1566) is a lesser included offense of felony fleeing and eluding while engaged in reckless driving (K.S.A. §8-1568(b)(1)(C)). The charges are multiplicitous, therefore the defendant can only be convicted and sentenced for the more severe offense, in this case the felony. The reckless driving charge was ordered dismissed.

EVIDENCE NECESSARY FOR OBSTRUCTING OFFICIAL DUTY; OVERT ACT NECESSARY AND SILENCE IS NOT AN OVERT ACT

Unpublished Decision

Hector Ochoa was arrested for breaking a car window and trying to steal the car stereo. When the officer asked him his name to fill out the police report, he gave his brother’s name. A different officer transported Ochoa to the jail. Once at the jail, Ochoa told the deputy his correct name. The deputy advised the transporting officer of Ochoa’s correct name. The officer called dispatch and found out Ochoa had outstanding warrants. He changed the police report to reflect Ochoa’s correct name. Ochoa was charged with felony obstruction of legal process or duty, along with the charges related to the car burglary. The complaint alleged that he obstructed the transporting officer. He was convicted by a jury. In *State v. Ochoa*, Slip Copy, unpublished, 2008 WL 5134709 (Kan.App. December 5, 2008), the Court of Appeals reversed the conviction. It found that the State was required to show some overt act on the part of Ochoa to knowingly and willfully obstruct the transporting officer’s duties. The transporting officer never asked Ochoa for any information. “*It is not enough for the State to prove that Officer Bussell was affected by Ochoa’s false statement; the State must show that Ochoa’s false statement hindered Officer Bussell in carrying out some official duty, and there is no evidence to support that assertion.*” The State argued that the use of the transporting officer’s name was an oversight, and it meant to use the arresting officer’s name (the one to whom Ochoa gave the false name) on the complaint. It classified the oversight as a “technical defect.” The Court did not buy it. “*The complaint was not defective, it was factually deficient.*” The State further argued that Ochoa’s failure to advise the transporting officer of his correct name was sufficient to show he knowingly obstructed the officer. The Court found that an overt act of obstruction is necessary to prove the charge. Ochoa’s silence was not an overt act.

HEARSAY STATEMENTS OF TOLLBOOTH OPERATOR SUFFICIENT TO JUSTIFY DUI STOP

Unpublished Decision

Trooper received a dispatch regarding a possible intoxicated driver. The report was based on information from a Kansas Turnpike tollbooth operator, who had observed the driver as he stopped at her tollbooth. The trooper drove to the turnpike tollbooth and spoke to the operator about her observations. She pointed out the pickup truck driven by the allegedly in-

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intoxicated driver. The trooper followed the truck. The trooper eventually stopped the truck and arrested the driver for DUI. After hearing the trooper's testimony and viewing the video of the stop, the district court found that there was no evidence of any traffic violation to justify the stop of the truck. The State appealed.

In *State v. Hankerson*, Slip Copy, unpublished, 2008 WL 5234535 (Kan. App. December 12, 2008), the Court of Appeals held that under these circumstances the statement of the tollbooth operator alone was enough to establish a reasonable suspicion that the truck driver was operating under the influence of alcohol and thereby justify the stop. The Court pointed out that this was a known informant, not an anonymous one. Therefore, the tip had a higher indicia of reliability. In addition, the trooper actually spoke to the tollbooth operator, received details about what she had personally observed. She proceeded to actually point out the truck. Therefore, the district court decision was reversed.

FEIGNED MEDICAL EMERGENCY CAN SUPPORT AN OBSTRUCTION CHARGE *Unpublished Decision*

Claude Smith was arrested for DUI. After Smith refused the breath test at the station, he told the officer that he was a diabetic and needed his medication. He then fell to the floor and began flailing as if he were having a seizure. According to the officer, he appeared to be faking the seizure and later appeared to be faking unconsciousness. He was transported by ambulance to the hospital. For the next three hours at the hospital, Smith was combative. He initially refused a blood draw by hospital staff claiming he had hepatitis. He also refused any treatment. When he was told he would then be transported to the jail, he agreed to the blood draw, but had to be held down to permit the lab technician to accomplish the draw. The doctor on duty concluded that Smith had no problems except intoxication. After this was conveyed to Smith, he became foulmouthed, abusive and threatening to the hospital staff. Among other charges he was charged with and convicted of obstruction of official duty (K.S.A. §21-3808; P.O.C. §7.2)

In *State v. Smith*, Slip Copy, unpublished, 2008 WL 5234531 (Kan. App. December 12, 2008), the Court found that the term "obstruct" has been broadly construed to include imposing obstacles or impediments, hindering, impeding, or in any manner interrupting or preventing and officer from performing his or her duties. The Court concluded that a rational jury could have concluded under these facts that Smith's feigned medical emergency substantially hindered the arresting officer in the performance of his official duty to complete Smith's processing for a DUI arrest. His conviction stands.

EVIDENCE SUFFICIENT TO SUPPORT DUI CONVICTION *Unpublished Decision*

Officer Tatro arrived at the scene of a single-vehicle collision at 3:23 a.m.. The driver was slumped over the driver's seat, wearing a Bud Light wristband and reeking of alcohol. The officer asked the driver, Kevin Brown, about the odor and Brown responded that he probably "drank way too much" that evening. Medical personnel transported Brown to the hospital on a spine board, protecting his neck. At the hospital, Officer Tatro began questioning Brown, *sans Miranda*. He told the officer that he had been to a local bar and was driving home. After Brown became somewhat combative and tried to get up and remove the neck brace, Officer Tatro handcuffed him to the bed. He went through the implied consent advisory and Brown agreed to submit to a blood test. However, he insisted on being allowed to get up and go to the bathroom first. Since the doctor's would not allow him to get up, no blood was taken. About an hour after the lab tech left, Brown was released from the hospital. Officer Tatro immediately arrested him for DUI and transported him to the jail. Brown insisted on the way to the jail that he be allowed to take a breath test. At the jail he was given a breath test and blew .159. He was booked into the jail.

On appeal, Brown argues that he should have been given an opportunity for a blood test after the breath test and his statements to the police at the hospital should be suppressed as obtained while in custody without having first been given his *Miranda* warnings.

The Court found in *State v. Brown*, Slip Copy, unpublished, 2008 WL 5234533 (Kan. App. December 12, 2008), that the statements must be suppressed. Brown was clearly subjected to a custodial interrogation. However, the failure of the district court to suppress the statements was harmless because there was sufficient evidence to convict him of DUI even without the statements being considered. As to his lack of opportunity to obtain a blood test after his breath test, the Court found that Brown never requested a second test. Therefore, the district court was correct in not suppressing the breath test results. Brown's conviction stands.

TIME IN HALFWAY HOUSE COUNTS AS JAIL CREDIT IF IT MEETS DEFINITION OF "RESIDENTIAL FACILITY" *Unpublished Decision*

Randall Fry was required as a part of his probation to live in a halfway house for 90 days. For the first 7 days he could not spend the night anywhere else. After that, he was allowed to ask permission to spend 2 evenings per week elsewhere. He argued in *State v. Fry*, Slip Copy, unpublished, 2008 WL 5234541 (Kan. App. December 12, 2008) that he should be given jail time credit for that time he spent in the halfway house. K.S.A. §21-4614a requires credit for time a defendant

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has spent in a “residential facility” while on probation. The issue becomes the definition of “residential facility.”

The Court pointed out that prior panels had reviewed the issue and reached different conclusions, based on their particular facts. In one case, the defendant was required to live at the house, attend therapy there, follow all house rules and could come and go only with permission. Jail credit was given. In another, the defendant was allowed to sleep at home and could avoid going to the halfway house even during the day when he was working or engaging in some other authorized activity. Jail time credit was denied in that circumstance.

The Court found that in this case there were sufficient restrictions on the defendant to require jail time credit. Although he could spend up to 2 nights per week elsewhere, those had to be weeknights, not weekends and were only granted with permission. Weekends the residents were confined to the house. On weekdays they could leave to go to work, but there was a strict curfew after which no visitors were allowed and all televisions and radios had to be turned off. He was required to participate in treatment at the facility. The Court concluded, *“This was not the proverbial ‘flop-house for the idle’ in which the restrictions on residents are so lax that jail-credit is unwarranted.”*

WATCH WHAT YOU SAY IN THOSE MOTIONS

Unpublished Decision

Five years after he was convicted of murder, Edrick McCarty filed a habeas corpus motion arguing that his attorney should have presented a self-defense claim at trial. There was just one problem, which the Court quickly pointed out in *McCarty v. State*, Slip Copy, unpublished, 2008 WL 5401324 (Kan. App. December 19, 2008):

*“We note that at trial, McCarty testified in his own defense and stated that he was **not** involved in the robbery and did **not** shoot the victim. By alleging in the current motion that he shot the victim but was justified in doing so, he is essentially admitting that he lied on the stand during trial. It appears that McCarty is simply attempting to try out a new defense theory at a second trial.”*

Oops. Never mind.

STATEMENTS UPON WHICH POLICE RELY TO MAKE A PROBABLE CAUSE ARREST MUST BE TRUSTWORTHY OR INDEPENDENTLY CORROBORATED

Unpublished Decision

A few days after a residential burglary of musical instruments, Chad Garman brought a guitar which had been reported stolen in the burglary into a local pawn shop. Police

paid a visit to Mr. Garman. He told them that he had received the guitar from Jose Cibrian. Cibrian had been living with Garman and his girlfriend. Garman allowed police to search his home and more of the stolen property was recovered. Garman told officers another address where Cibrian could be found. The officers found and arrested Cibrian for suspicion of burglary. A search of his wallet found methamphetamine. No additional evidence from the burglary was found. Cibrian was convicted of possession of drugs.

In *State v. Cibrian*, Slip Copy, unpublished, 2008 WL 5401482 (Kan. App. December 19, 2008), the Kansas Court of Appeals found that the methamphetamine should be suppressed. It found that in order to arrest Cibrian, the police needed probable cause. Probable cause exists where the facts and circumstances within the arresting officers’ knowledge and of which they had reasonable trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed. In this case, at the time he was arrested, the only evidence connecting Cibrian to the burglary were the self-serving hearsay statements made by Garman and his girlfriend, both of whom had a strong motivation to lie, as they were discovered with a house full of stolen goods and Garman had pawned stolen items earlier in the day. Other than locating Cibrian at the address given, officers had no corroborating evidence prior to placing him under arrest. The evidence was insufficient to justify probable cause to arrest, therefore all evidence seized must be suppressed.

WHEN EVIDENCE OF PBT REFUSAL IS ADMITTED IN A DUI TRIAL, JURY MUST BE GIVEN LIMITING INSTRUCTION THAT SAYS EVIDENCE IS NOT TO BE CONSIDERED IN DETERMINING

GUILT AS TO THE DUI

Unpublished Decision

Elizabeth Logan-Price was charged with DUI and refusing the PBT. At the conclusion of the trial, she requested an instruction limiting the use of the evidence of her refusal to take the PBT to prove the offense of refusal to take that test and prohibiting the jury from considering it as evidence of DUI. The trial judge denied the request.

In *State v. Logan-Price*, Slip Copy, unpublished, 2008 WL 5401323 (Kan. App. December 19, 2008), the Kansas Court of appeals disagreed. K.S.A. 2005 Supp. §8-1012 specifically prohibits PBT results from being admitted in any DUI except in determining a challenge to the validity of the arrest or the validity of a request to submit to a regular breath test. Therefore, a limiting instruction should have been given. However, the Court found that the error was harmless in the face of overwhelming evidence of her guilt.

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IMPORTANT FOR COURT TO ADVISE DEFENDANT OF RIGHT TO APPEAL AND TIME RESTRAINTS FOR SAME *Unpublished Decision*

In the most recent in a growing number of cases dealing with the right to appeal, the Kansas Court of Appeals has again found that a defendant may be allowed to file an appeal out of time if it is established that the trial court did not advise him or her of the right to appeal, there is no information that the defendant had actual knowledge of the right to appeal and its time restraints, and the defendant presents evidence that he or she would have appealed if he or she had known of said right. *See, State v. Richardson*, Slip Copy, unpublished, 2008 WL 5401481 (Kan. App. December 19, 2008).

Editor's Note: *Municipal judges are encouraged to always advise a defendant of appeal rights at the conclusion of a plea or conviction. Some courts also include this information in written form by way of a handout they provide the defendant following plea or conviction, by posting the information prominently in the courthouse, by including the information on the back of the traffic citation, or by including the information in court brochures and on the court website.*

TURN SIGNAL STATUTE IS CONSTITUTIONAL *Unpublished Decision*

In *State v. Greever*, Slip Copy, unpublished, 2008 WL 5401107 (Kan. App. December 19, 2008), the Kansas Court of Appeals held that K.S.A. §8-1548(a) is constitutional. The defendant had argued that it was void for vagueness because it does not define when a driver is required to use a turn signal. The case was on remand to the Court following the Supreme Court's decision in *State v. Greever*, 286 Kan. 124 (2008). *See, Verdict, Summer 2008, p. 14.* The Court of Appeals found that the Supreme Court had really already decided the issue by its strict reading of the statute. Given the Supreme Court's interpretation that all persons must signal continuously for at least 100 feet before a turn, regardless of their intent, the statute conveys a sufficient and definite warning and fair notice to drivers of the prohibited conduct.

Editor's note: *K.S.A. §8-1548(a) is identical to STO §54.*

CRIMINAL DAMAGE TO PROPERTY IN WHICH THE DEFENDANT HAS AN INTEREST *Unpublished Decision*

Tracey and Willie Wilson were in the midst of a divorce. During the marriage, Willie purchased a Kia Sorento for Tracey and a Dodge Ram truck for himself. The Dodge was titled in both their names, but the Kia was only in Willie's name. During the divorce proceedings, the judge ordered that Willie use the Kia and Tracey the Dodge, primarily due to the titling discrepancy.

The two were arguing one night at the home of a mutual friend and Tracey became angry. Tracey intentionally drove the Dodge into the Kia several times, causing significant damage. There was some evidence that she was also trying to run over Willie. She was charged with criminal damage to property and aggravated assault with a deadly weapon. The trial court dismissed the criminal damage to property charge at the conclusion of the preliminary hearing on the basis that the property was marital property and Tracey had just as much interest in it as Willie. She could consent to the damage of her own property, therefore the State would not be able to establish that the property was damaged without the consent of the owner. The State appealed.

In *State v. Wilson*, Slip Copy, unpublished, 2008 WL 5401335 (Kan.App. December 19, 2008), the Court of Appeals agreed with the State and remanded the case for trial. It found that the clear language of K.S.A. §21-3720(a)(1) covered intentional damage to **any** property in which **another has an interest** without **that** person's consent. The statute applies to marital property as it does to any property. The prosecution need only show that a person other than the defendant also had a legal interest in the property and did not consent to the damage.

Editor's note: *K.S.A. §21-3720(a)(1) is identical to POC §6.6.*

SPEEDY TRIAL: DELAY DUE TO JUDGE'S ILLNESS *Unpublished Decision*

Matthew Hoffman was found guilty of DUI in front of a magistrate. He appealed to the district court on December 12, 2005. He advised the court at pretrial conference on January 9, 2006 that he would be filing a motion to suppress. The motion was filed on January 12, 2006 and heard on February 3, 2006. After the hearing, Hoffman requested until February 14 to file additional authority. The record showed no additional findings. The judge left on medical leave and did not rule on the motion until June 9, 2006. He denied the motion to suppress. The journal entry for the finding was filed on July 10, 2006. The judge retired and all further proceedings were heard by another judge. Trial was set for September 20, 2006. On September 12, the defendant filed a motion to dismiss based on the denial of his right to a speedy trial. The motion was denied and the parties agreed that the case could be decided on stipulated facts rather than a trial. On November 7, 2006 the decision was filed finding Hoffman guilty. He appealed.

In *State v. Hoffman*, Slip Copy, unpublished, 2008 WL 5401319 (Kan. App. December 19, 2008), the Court of Appeals found the defendant's statutory right to a speedy trial was denied. It calculated the time as follows:

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December 12 – January 9	28 days	Charged to State	(Filing of appeal to pretrial conference)
January 9 – January 12	3 days	Charged to Defendant	(Delay related to Motion to Suppress)
January 12 – March 16	63 days	Charged to Defendant	(Delay related to Motion to Suppress)
March 16 – June 8	85 days	Charged to State	(Judge's illness)
June 9 – September 20	101 days	Charged to State	(Trial setting)

Since more than 180 days were attributed to the State, the charges were ordered dismissed.

SPEEDY TRIAL: DELAY DUE TO COURT'S CONTINUANCE *Unpublished Decision*

Michael Marcotte was convicted of DUI in Clay Center Municipal Court. He appealed to the district court and demanded a jury trial. He was arraigned in district court on February 6, 2007 and a jury trial was set for May 25, 2007. However, the district court cancelled the trial after its court reporter contacted Marcotte's counsel and was informed counsel was considering withdrawing due to Marcotte's lack of communication. However, Marcotte appeared on May 25, only to be told by the district court that it was resetting the trial to August 30, 2007, more than 6 months after arraignment. In denying the defendant's motion to dismiss, the district court found that the time between May 25 and August 30 should be charged to the defendant due to his failure to communicate with his attorney.

The Kansas Court of Appeals disagreed. In *City of Clay Center v. Marcotte*, Slip Copy, unpublished, 2008 WL 5401460 (Kan. App. December 19, 2008), the Court found that Marcotte did not seek a continuance and appeared on his scheduled trial date. The delay must be attributed to the State. Since the delay was 204 days after his arraignment, the Court found that his statutory right to a speed trial under K.S.A. §22-3402(2) was violated.

Editor's note: This case is noted because the Court assumed that K.S.A. §22-3402 was the applicable speedy trial statute in the case of this city appeal. The Court did not address, nor did the parties apparently argue, the applicability of K.S.A. §12-4501, which is the municipal court speedy trial provision. Application of said statute would not have changed the result, since said provision is stricter than the district court provision. See, *City of Overland Park v. Fricke*, 226 Kan. 496, 499 (1979) and *City of Shawnee v. Patch*, 33 Kan.App.2d 560, 563 (2005). In addition, in this case the Court started the speedy trial clock ticking when the defendant was arraigned in district court. In another case decided the same day, *State v. Hoffman*, Slip Copy, unpublished, 2008 WL 5401319 (Kan. App. December 19, 2008), summarized herein, the Court started the speedy trial clock ticking when the appeal was filed or docketed with the Court. This would be consistent with the finding in *Fricke*, supra at

The Verdict

502. Again, either way the result would have been the same in this case.

FREEDOM OF SPEECH V. TELEPHONE HARASSMENT *Unpublished Decision*

Rodney Farmer was charged with telephone harassment for a call he made to his son's mother. The message he left on her answering machine was long and angry. He was ranting about her alleged violation of the visitation agreement and his payment of child support. He did not make any threats and the words he used were not "fighting words." Farmer filed a motion to dismiss on the basis that his message was protected speech under the First Amendment. The district judge agreed and dismissed the charges. The State appealed.

In *State v. Farmer*, Slip Copy, unpublished, 2008 WL 5401338 (Kan. App. December 19, 2008), the Court of Appeals found the dismissal to be in error. It found that the telephone harassment statute does not criminalize his words, but his conduct. It was the use of the telephone to harass which was the violation, not the actual words. In fact the statute makes the telephone call a violation "regardless of whether or not conversation ensues." Therefore, even if the content represents protected speech, that fact does not bar prosecution under the statute. The charge was reinstated and the case remanded for further proceedings.

Editor's note: The applicable language in the statute at issue in this case, K.S.A. §21-4113(a)(2) is identical to POC § 9.10(b).

COMMON LAW MARRIAGE WITH PARENTAL CONSENT IS NOT A DEFENSE TO AGGRAVATED INDECENT LIBERTIES WITH A CHILD *Unpublished Decision*

Thomas Flora, 36, impregnated a 14-year-old girl. He was charged with aggravated indecent liberties with a child, to wit: having sexual intercourse with a 14-year-old. Flora argued that he and the girl engaged in a Wiccan religious handfasting ceremony eight months earlier. He argued that they held themselves out to the public and family as husband and wife, and that they jointly created bills in their names. The district judge refused to allow the evidence on the basis that state law no longer recognizes common law marriage for anyone under the age of 18. The defendant appealed, arguing that this was a violation of equal protection. Since persons under the age of 18 can get a marriage license as long as they have parental consent, those under 18 should be recognized as common law married as long as they have parental consent. He proffered evidence that the girl's parents would have consented. It is an affirmative defense to aggravated indecent liberties if the child was married to the accused at the time of the offense. See, K.S.A. §21-3504(b).

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The Court of Appeals agreed with the trial court in *State v. Flora*, Slip Copy, unpublished, 2008 WL 5401320 (Kan. App. December 19, 2008). Although Kansas law does recognize common law marriage, and the age of consent used to be 14 years old for males and 12 years old for females, with no requirement of parental consent or knowledge, the law was changed in 2002 to deny recognition to any common law marriage in which either party is under the age of 18, parental consent or not. See, K.S. A. §23-101(b). Said statute does not deny the defendant equal protection under the of the Fourteenth Amendment, because it applies equally to all persons who seek to be common law married. The State has a compelling interest in restricting the fundamental right to marry when it comes to children. Likewise, it does not violate the Fourteenth Amendment Due Process Clause.

PROSECUTION'S DENIAL OF DIVERSION CAN BE CHALLENGED ON EQUAL PROTECTION GROUNDS

Unpublished Decision

Clinkenbeard filed a motion to compel diversion in his DUI case. The court denied the motion on the basis that it had no pretrial authority to compel diversion. A huge discovery dispute ensued. The defendant wanted lists of all persons that were denied diversion because of their criminal history, a list of all persons granted diversion during the district attorney's tenure, etc. The court found that the defendant was not entitled to most of the information, however, based upon the information he obtained, the defendant again moved the court to compel diversion. It refused. The defendant was found guilty on stipulated facts. At sentencing he renewed his motion to compel discovery, but the court refused to reconsider it. He appealed to the Court of Appeals.

In *State v. Clinkenbeard*, Slip Copy, unpublished, 2008 WL 5401333 (Kan.App, December 19, 2008) the Court of Appeals held that a defendant does not have a right to diversion and the prosecutor's discretion is broad. However it is subject to review for equal protection violations based on a particular classification of defendants. A decision not to divert is analogous to a decision not to prosecute. The decision will be upheld as long as it was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification. The Court chose to examine the facts under an "abuse of discretion" standard. It found that the prosecutor's decision was not unreasonable. Although the original reason may have been wrong, the State was able to articulate specific factors for its decision. "The fact that others with similar histories may have been permitted diversion does not change that." There was no evidence that the defendant was part of a protected class or was denied diversion based on an arbitrary or invidious criterion. Mere prosecution or failure to prosecute is no basis for finding a denial of equal protection. The defense must show that the decision was based on intentional or purposeful discrimination.

The Court pointed out that New Jersey has a law that requires a written statement of the reasons for granting or denying diversion in order to allow a defendant to respond, dispel suspicions of arbitrariness and allow appellate review. "While it might be a better practice, this is not explicitly the law in Kansas."

The Court went on to examine the denial of discovery. To successfully allege discriminatory prosecution the defendant must show (1) others who are similarly situated are not generally prosecuted for conduct similar to that for which the defendant is being prosecuted, and (2) the defendant has been intentionally and purposefully singled out for prosecution on the basis of an arbitrary or invidious criteria. A defendant must show a "colorable entitlement" to the defense of discriminatory prosecution before discovery is allowed. This is to avoid the use of the defense as a means to obtain information to which a defendant is not otherwise entitled. The Court found that under an abuse of discretion standard, the trial court's decision that the defendant had not made a sufficient claim of "colorable entitlement" would not be disturbed.

PRE-TRIAL HOUSE ARREST IN DUI CASE DOES NOT VIOLATE DOUBLE JEOPARDY CLAUSE

Unpublished Decision

Joshua Long was charged with, among other traffic offenses, DUI. He was arrested and had a \$5,000 appearance bond. As a condition of bond, he was placed on house arrest. He later pled guilty to DUI and was sentenced to a period of time in jail. He was a 5th time offender. In *Long v. State*, Slip Copy, unpublished, 2008 WL 5428291 (Kan. App. December 24, 2008) the Court of Appeals followed U.S. Supreme Court precedent and held that pretrial detention that is regulatory or remedial in nature, rather than punitive, does not constitute punishment before trial, and therefore does not trigger the attachment of "jeopardy" so as to invoke the protection of the Double Jeopardy Clause. A sanction is remedial if it seeks to protect the public from harm or revokes a privilege that is being abused. Even if the sanction has some punitive effects, if it can be construed as also being remedial, it is not subject to challenge.

In this case, Long's pretrial house arrest was clearly remedial. It was imposed as a component of his appearance bond and was meant to protect the public from another potential DUI while Long was free on bond. Therefore, even if Long did suffer inconvenience or restrictions because of the house arrest, the detention was at least partly remedial.

20 MINUTE OBSERVATION PERIOD NOT EVIDENT ON INTOXILYZER PRINT OUT

Unpublished Decision

Defendant was arrested for DUI and taken to station for breath test. The officer looked at his watch at 2:54 a.m. and

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started the 20-minute observation period prior to conducting the test. He manually entered into the intoxilyzer that the observation started at 2:54 a.m. The breath test was registered at 3:13 a.m., seemingly 19 minutes later. He explained this discrepancy during his testimony by saying that his watch was not synchronized with the intoxilyzer clock. However, he testified under oath that he observed the defendant for the full 20 minutes prior to the intoxilyzer result being obtained. The defendant moved to suppress the results. The motion was denied and he appealed.

In *State v. Betschart*, Slip Copy, unpublished, 2008 WL 5428289 (Kan. App., December 24, 2008) the issue before the Court was whether there was sufficient evidence that the KDHE testing protocol had been followed. It found that there was. The officer was the only person to present testimony on the observation period. He stated that he always used the time on his watch, his watch did not read the same time as was on the intoxilyzer, and he wrote the start time down on his hand before entering it into the instrument. A reasonable factfinder could conclude that this evidence was truthful and therefore the conviction stands.

**IN ORDER TO SET ASIDE AN ADMINISTRATIVE
DRIVER'S LICENSE SUSPENSION DUE TO THE LACK OF
A REASONABLE SUSPICION TO STOP THE VEHICLE,
THE OFFICER'S CONDUCT MUST BE EGREGIOUS**

Unpublished Decision

Deputy Rogers received an anonymous tip that a person was following a woman home and had driven by her house in a large dark vehicle. Deputy Rogers went to the location, where he observed Tyson Koenig, the only person in the area. Koenig had out-of-county tags on his vehicle, but had not committed any traffic offense. (The opinion doesn't state if the vehicle he was driving was "large and dark.") After stopping the vehicle, Deputy Rogers smelled alcohol and noticed an alcohol container in the car. Koenig's eyes were bloodshot, he had poor balance, he admitted he consumed alcohol and he failed the preliminary breath test. He was apparently arrested for DUI and his driving privileges were suspended. Koenig's appealed the suspension of his driving privileges to the district court. The district court reinstated his privileges, holding that Deputy Rogers lacked reasonable suspicion to stop Koenig. The Department of Revenue appealed.

In *Koenig v. Kansas Department of Revenue*, Slip Copy, unpublished, 2008 WL 5455289 (Kan. App. December 31, 2008), the Court had no problem finding that the deputy had reasonable grounds to believe that Koenig was operating his vehicle under the influence of alcohol. However, the decision to stop is a separate matter. The Court went on to point out that the Supreme Court had recently ruled that an administrative hearing officer is barred from deciding whether the

officer lacked reasonable suspicion to effectuate a stop. *See, Martin v. Kansas Dept. of Revenue*, 285 Kan. 625 (2008). Even though a driver can raise the issue at the district court level, even if the court finds that there was no basis for the stop, the exclusionary rule does not apply to administrative driver's license sanctions unless the court can find under a totality of the circumstances that the officer's actions were egregious. Koenig argued that the officer's actions were egregious. He argued the deputy stopped him without corroborating the anonymous tip and profiled him based on the fact that he had an out-of-county tag on his car. The Court disagreed. It found that to be egregious the conduct must be "extremely or remarkably bad; flagrant." Although the Court seems to suggest that it agrees that the stop was not based on a reasonable suspicion of criminal activity, Deputy Rogers did not act

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Law-Related Blogs: A Sampling

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***Editor's Note: Judges are advised to carefully read the judicial ethics code before starting their own blog**

Unpublished Opinions

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egregiously.

MANDAMUS CANNOT BE USED TO COMPEL JUDGE TO REMOVE ONE COURT-APPOINTED LAWYER AND REPLACE HIM WITH ANOTHER *Unpublished Decision*

William Holt asked Judge Jack Lively to remove his court-appointed attorney because he was not effectively assisting him. When he refused, Holt filed a writ of mandamus against the judge in an effort to get a court order requiring Judge Lively to appoint a different attorney for him.

In *Holt v. Lively*, Slip Copy, unpublished, 2009 WL 77903 (Kan.App. January 9, 2009), the Court of Appeals held that the remedy of mandamus is available only for the purpose of compelling the performance of a clearly defined duty. It may not be invoked to control discretion or to enforce a right which is in substantial dispute. It may only be granted when the party invoking it is clearly entitled to the order which he or she seeks. Whether or not to remove counsel from a case is entirely discretionary with the judge. An indigent defendant may not compel the court to appoint such counsel as the defendant chooses. This lies within the sound discretion of the court. While an indigent accused has the right to be represented by counsel, he does not have the right to be represented by a particular lawyer. In addition, mandamus cannot be used as a substitute for an appeal. If Judge Lively's conduct violated Holt's rights (by not conducting a hearing regarding whether his right to counsel had been violated), his remedy is by a direct appeal of his criminal case.

MOTHER CAN CONSENT TO SEARCH OF SON'S ROOM IF SHE ROUTINELY EXERCISES CONTROL OVER IT *Unpublished Decision*

John Cantu was living with his mother after his release on parole from the Department of Corrections. One day he left to spend time with his children. His mother entered his room to clean, which she did routinely. She looked in the bedroom closet and noticed some duffle bags. Both bags were open, but covered with black plastic trash bags. She removed the trash bags and observed bags of marijuana inside. She called the police. Cantu was eventually charged and convicted of possession with intent to sell and several other drug related charges. He was sentenced to just over 4 years in prison. The issue in *State v. Cantu*, Slip Copy, unpublished, 2009 WL 77885 (Kan. App. January 9, 2009) was whether the mother could consent to the search of the duffle bags.

The Court of Appeals found that a third party has authority to consent to a search of the property if that third party has either (1) mutual use of the property by virtue of access, or (2) control for most purposes over it. In this case, Cantu's

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mother was in the room regularly to clean, pick up, help with his laundry, including putting his clothes away. They told Cantu that they were to have unfettered access to his room when he moved back home. The door to his room was

RESULTS OF ALCOHOL-IMPAIRED DRIVING

◆According to the National Highway Traffic Safety Administration (NHTSA), about three in every ten Americans will be involved in an alcohol-related crash at some point in their lives.

◆In 2006, 13,470 people died in alcohol-impaired driving crashes, accounting for nearly one-third (32%) of all traffic-related deaths in the United States.

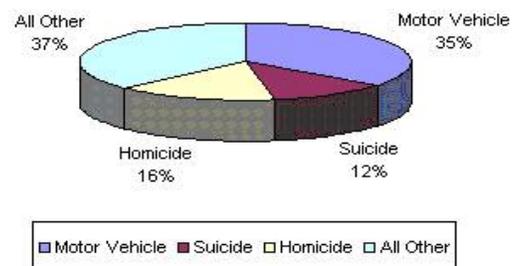
◆In one year, over 1.4 million drivers were arrested for driving under the influence of alcohol or narcotics. This accounts for less than 1% of the 159 million self-reported episodes of alcohol-impaired driving among U.S. adults each year.

◆Alcohol-related crashes in the United States cost about \$51 billion a year.

◆Every day, 36 people in the United States die and another 700 are injured in motor vehicle crashes that involve an alcohol-impaired driver.

Source (above and below): Center for Disease Control and Prevention

Leading Causes of Death for Teens



ABA Traffic Court Seminar

By Patrick Caffey, Manhattan

Thanks to funding from the State through KDOT, I was privileged to be able to attend the 2008 Traffic Court Seminar in New Orleans sponsored by the ABA. The seminar included sessions on various topics in a somewhat similar format as our annual Municipal Judges Conferences. Sessions included subjects such as dealing with immigrants, the media, older drivers, use of electronic monitoring for supervised offenders, use of alcohol and drug courts, sobriety testing (including demonstrations using participants who volunteered to get intoxicated), judicial outreach, and search and seizure law. All of those might be appropriate subjects for future articles in the *Verdict*, but the one I would like to feature in this article is the session which dealt with making the courts more user friendly by creating a more approachable bench.

This article is inspired by that session and by the white paper on Procedural Fairness written by Judge Kevin Burke and Kansas Court of Appeals Judge Steve Leben for the American Judges Association.

A few days ago a young man came before me who was applying for a diversion for a minor offense. Diversion is, of course, the province of the prosecutor, but this young man insisted on talking to me about his case. I told him it wouldn't do any good for him to talk to me about the case, which, of course is true, but that did not deter him. I then undertook to explain to him that the decision about whether he would be granted diversion and the terms of the diversion were entirely up to the prosecutor and that whatever he wanted to tell me about the case was more properly a matter to discuss with the prosecutor.

The perception of unfair or unequal treatment is the single greatest source of dissatisfaction with the American legal system expressed by the public. In looking back on my encounter with the young man about diversion, clearly he just wanted somebody to listen to him and he did not understand why it did no good to talk to me. At least until I explained the process to him, he probably thought he was being treated unfairly.

The aforementioned Burke and Leben article concludes that procedural fairness is the critical element in public perception and satisfaction with the court system.

Psychology Professor Tom Tyler, a leading researcher on the subject, suggests that there are four basic expectations that encompass procedural fairness:

“Voice: The ability to participate in the case by expressing their viewpoint;

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Neutrality: Consistently applied legal principles, unbiased decision makers, and a “transparency” about how decisions are made;

Respectful treatment: Individuals are treated with dignity and their rights are obviously protected;

Trustworthy Authorities: Authorities are benevolent, caring and sincerely trying to help the litigants – this trust is garnered by listening to individuals and by explaining or justifying decisions that address the litigants needs.”

Those are not my words, but like much of this article, are taken from the article by Burke and Leben on “Procedural Fairness” published in *Court Review* – Volume 44 at page 6.

The authors conclude that procedural fairness increases compliance with court orders, because procedures perceived as fair cultivate the impression that legal authorities are both legitimate and moral.

The inescapable conclusion is that it is not enough for court procedure to be fair and unbiased, it is also important for litigants to see that fact. In that respect the outcome of a trial may be less important than the perception that the procedure was fair in the eyes of the litigant.

What my encounter with the young man about diversion displayed was that litigants have a need to express themselves vocally during the court’s proceedings.

The Burke and Leben article suggests nine things an individual judge can do to improve the perception of fairness in his or her courtroom:

1. As a matter of practice, explain in understandable language what is about to go on to litigants and witnesses.
2. Learn how to listen better.
3. Because not everyone in court has a lawyer to explain judicial orders, you have a responsibility to explain orders in understandable terms.
4. Put something on the bench as a mental reminder that patience is a virtue not always easily practiced.
5. At the start of a docket, explain the ground rules for what will happen.
6. Share and discuss this matter with courtroom staff. They can give feedback and support.
7. Arrange to have yourself videotaped and review the tape – maybe with a professional or a colleague.
8. Enlist the local academic community. Professors who specialize in communication and non-verbal behavior can offer great insight.
9. Thank people for their patience.

I hope this article will help you to improve the way you run your court.

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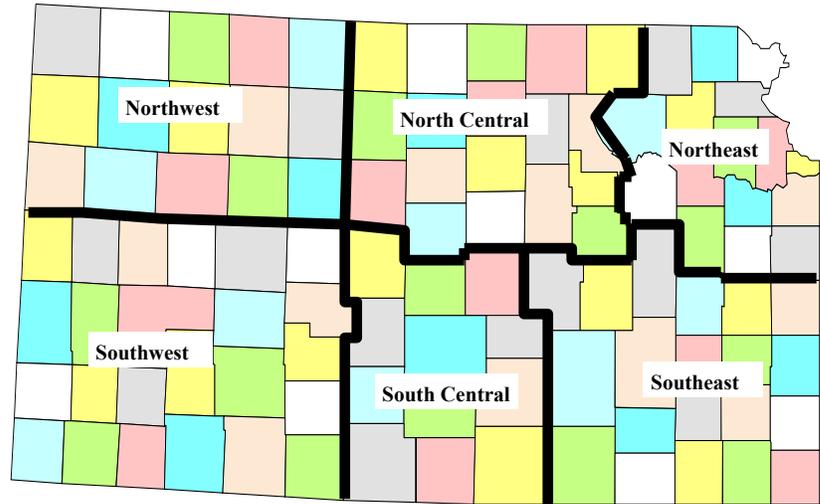
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- President-Elect
- Secretary
- Treasurer
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See map above to determine your region. Anyone interested should contact

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