

The Verdict

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A STEP BACK IN TIME

By Judge Patrick Caffey

When I volunteered to write a story about Kansas history for The Verdict, I didn't have in mind doing a biography, but earlier this year we celebrated the 70th anniversary of the D-day Normandy



Invasion. The commander in charge of Operation Overlord, the code name for the invasion, was General Dwight D. Eisenhower. I decided that a brief biography of the general and 34th President would be in order.

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COURT WATCH

FEB. 2014 – OCT. 2014

State v. Hall, Kansas Supreme Court, Decided February 28, 2014



The sentence in a criminal case is effective when it is pronounced by the judge, and the sentence cannot be modified once it is pronounced. Restitution is part of a defendant's sentence, and in a case where restitution is an issue, the sentence is not complete until a restitution amount is decided. A defendant's right to appeal does not

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SPOTLIGHT ON: Justice Carol A Beier

In the spotlight this issue is Carol A Beier, Supreme Court Justice for the State of F Kansas. The article could, if needed, cover several pages, a multitude of topics or address several of the over 600 opinions authored by Judge

Carol A Beier. Due to space constraints and a burning desire not to read all of her published opinions, legal publications or other articles this spotlight will not address political thoughts or profound legal analysis. Therefore, the content

is left with what every Judge should know about Justice Carol A Beier.

It all began in a normal sequence with the birth of Judge Beier in Kansas City Kansas on September 27th, 1958. History is silent on her grade school years, but it was recorded she attended Bishop Ward High School in Kansas City Kansas. From that base she attended nearby Benedictine College in Atchison Kansas followed by the University of Kansas where she obtained a B.S. in Journalism. After receiving her degree she began work at the Kansas City Star. A year or so later Justice Beier continued her education at the University of Kansas where she obtained her JD in 1985.

During her law school years she was a Rice Scholar, Articles Editor of the Kansas Law Review and Student Director of the Defender Project. Upon graduation, she was named to the Order of the Coif law honorary and selected by the law faculty to receive the Samuel Mellinger Award of Scholarship, Leadership and Service.

Justice Beier despite her hectic schedule had and has a personal life outside the law. She has



always enjoyed reading and at one point was running long distance. She is married to Richard W. Green and has three children. Justice Beier is especially proud of her family and

the role she had shaping the individuals they've become.

Following Law School Justice Beier commenced her legal career by becoming the law clerk to Judge James K Logan U. S. Court of Appeals for the Tenth Circuit. At the conclusion of her clerkship she was awarded a Revson fellowship at the Georgetown Law Center Women's Rights and Public Policy Program. This program allowed her to work on family income security, education and employment issues at the National Women's Law Center. Upon completing the fellowship she entered into private practice with the Washington DC firm of Arent, Fox, Kintner, Plotkin and Kahn.

Justice Beier elected to return to Kansas where she became a partner at Foulston Siefkin L.L.P. in Wichita Kansas. Her time at Foulston Siefkin allowed Judge Beier to experience a wide and varied practice, encompassing trial and appellate practices. The cases handled included family law, personal injury. Commercial litigation, plaintiff employment claims, government investigations of health care clients and multiple topics too numerous to categorize. During this period Justice Beier spent one year as a vesting professor at the University of Kansas, where she designed and taught a course on women and the law, taught advanced torts and directed two student clinical programs.

The progression of Justice Beyer's legal career led to the Kansas Court of Appeals a seat she was appointed to in 2000 by then Governor Bill Graves. In September 2003 she was elevated from the Kansas Court of Appeals to the Kansas Supreme Court by then governor Kathleen Sebelius. The position filled had belonged to retired Justice Bob Abbott and was at a time when there were a number of appointments to the higher benches. The position on the Supreme Court is the bench where Justice Beier

still presides. 2004 Justice Beier received an L.L.M. from the University Of Virginia School Of Law.

The career of Justice Bier is broad and impressive and does not fit neatly into a small article. Suffice to say that she has maintained a high standard and strives to continue in advancing and educating the legal community and Kansas Citizens. Her involvement in a multitude of associations and organizations is well documented and not surprisingly is diverse. A list of organizations, activities and awards can

be found at the Kansas Judicial Branch website regarding Justice Beier. Certainly the most important may be the guidance and supervision of Kansas Municipal Judges.

One Quote that Justice Beier has referenced should have broad appeal to most Judges,

“It is never too late to give up your prejudices.” -Thoreau

Step Back In Time, continued from page 1

I was an elementary school student in Oklahoma when Eisenhower was elected President, and I paid little attention to his Kansas roots, but I remember the “I Like Ike” campaign slogan. My democratic father supported Eisenhower’s opponent Adlai Stevenson, but I liked Ike.



President Eisenhower’s father, David Jacob Eisenhower, was an engineer who married Ida Elizabeth Stover in Lecompton, Kansas in 1885. They were wed on the campus of Lane University (I confess, I’ve never heard of Lane University).

Ike’s parents lived in Hope, Kansas where his father ran a general store. When his father’s business failed due to economic conditions, the Eisenhower family moved to Texas. David Dwight Eisenhower was born on October 14, 1890 in Dennison, Texas. That is not a misprint, his names were later reversed, reportedly to avoid confusion about the two Davids in the family. Dwight was the third of seven boys.

When the Eisenhowers returned to Kansas in 1892 it is reported they had \$24 to their name.

From about age 1½ years Dwight lived in Abilene, where his father worked in his brother-in-law’s creamery. When Dwight was just four years old, his ten-month old brother died of diphtheria.

Despite tragedy and poverty in his early years, Dwight would later remember his childhood as happy. He was active in high school athletics, playing baseball and football at Abilene High School.

Eisenhower graduated from high school in 1909 and entered the United States Military Academy in 1911. Graduating in the middle of his class in 1915, Dwight David Eisenhower began his distinguished military career as a second lieutenant.



During WWI Eisenhower rose through the ranks, but his assignments were stateside. His career seemed somewhat stalled, as he held the rank of Major for 16 years. One

early assignment involved a transcontinental convoy from Washington D.C. to San Francisco. The trip which averaged about 5 mph would later be a major factor in President Eisenhower's push for improvement of the nation's highway system and give birth to the Interstate Highway system.

Eisenhower was promoted to Brigadier General in October 1941. During his early career he had been an administrator, but did not have much command experience. WWII brought a series of leadership experiences and a rapid advance in rank. In December 1943 President Roosevelt chose Eisenhower to be Supreme Allied



Commander in Europe. A month later he also became Supreme Allied Commander of the Allied Expeditionary Force. In these dual roles he was in charge

of planning and carrying out the allied assault on the coast of Normandy, the liberation of Western Europe, and the invasion of Germany.

Following the war General Eisenhower served as Military Governor of the United States Occupation Zone in Germany. He had camera crews document the evidence of atrocities in the Nazi concentration camps for use in the Nuremberg Trials. While aggressively purging ex-Nazis, he chose to treat the German people as Nazi victims rather than as villains.

President Truman attempted to convince Eisenhower to run for office as a Democrat. He declined. However, the Republican Party's "Draft Eisenhower" movement convinced him to declare his candidacy in the 1952 presidential election. Defeating Robert Taft for the Republican nomination, and also defeating the Democratic Party's candidate, Adlai Stevenson in November; Ike took office in January 1953



and served two terms as president turning the White House over to John F. Kennedy in 1961. During his presidency Eisenhower orchestrated an armistice in the Korean War; Alaska and

Hawaii became states; the Interstate Highway System was created; the 1957 Civil Rights Act took effect; the Civil Rights Commission was established and the National Aeronautics and Space Administration was created.

On March 28, 1969, Eisenhower died in Washington, D.C. His body was buried in a small chapel on the grounds of the Eisenhower Presidential Library in Abilene.

Written by Judge Patrick Caffey (Manhattan)
Note: In addition to Wikipedia, much of the information for this article came from www.biography.com.

COURT WATCH

(Continued from page 1)

commence until the sentence is complete. A court may pronounce all parts of a sentence except restitution and may defer a decision on a restitution amount until a later date. The Court instructed as follows: "the expected practice for a sentencing judge will be an explicit and specific order of continuance for the purpose of determining the amount of restitution or whatever other aspect of sentencing remains incomplete." If the court does that, the completion of the defendant's sentence by ordering an amount of restitution must take place in the defendant's presence. Once the sentence has been completed, the defendant's right to appeal matures. If a defendant has filed a notice of appeal prior to the hearing ordering restitution, that notice of appeal "lies dormant" until the sentence is

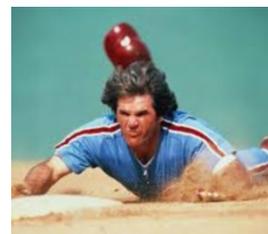
completed, and then becomes effective. In this case, Hall was a maintenance worker at the apartment complex where the victim lived. Hall argued that the portion of restitution requested for relocation expenses did not fit under the requirement of K.S.A. 21-4603d(b)(1) because it was not “damages that are caused directly by the criminal conduct of the defendant”. The Court held that substantial competent evidence supported the district court’s finding of a causal link between the defendant’s crime and the victim’s relocation.

State v. Charles, Kansas Supreme Court, Decided February 28, 2014

This case involved a charge that included the alternative means of “. . . knowingly and without authority enter into or remain within any building. . .” Citing *State v. Gutierrez*, 285 Kan. 332 (2007), the Court held that those alternative means of committing the offense are not mutually exclusive. The defendant can “remain within” a building either after making an initial authorized entrance, or if the initial entering of the building was unauthorized. The presentence report stated a specific restitution amount for one victim, and for a second victim the report stated the restitution amount was “to be determined.” At the time of sentencing, the district court judge stated that restitution “as contained within the presentence report will be ordered.” When the restitution order was filed, it stated a specific dollar amount for restitution to the second victim, even though the judge did nothing to preserve jurisdiction over restitution or continue the matter, and there had been no further hearing for restitution. As set out in *State v. Hall* (also decided February 28, 2014), if a judge is not prepared to finalize a restitution order at the time of sentencing, the judge must preserve jurisdiction over restitution by scheduling a hearing and the defendant must be present for the hearing that determines the amount of restitution ordered, unless the defendant makes a valid waiver of his right to be present for the restitution hearing. The Court vacated the restitution order for the second victim.

State v. Frierson, Kansas Supreme Court, Decided February 28, 2014

The defendant objected to the admission of a baseball cap that the victim knocked off the head of his attacker. The officer who collected the cap at the scene at the time of the response to the incident and placed the cap into evidence with the police department was not available to testify at the preliminary hearing or trial. The victim testified and identified the cap as the one he knocked off his attacker, and the person who retrieved the cap from where it was deposited into evidence also testified. The gap in the chain of custody goes to the weight to be given to the evidence, but does not make the evidence inadmissible.



Decorum??

It is our responsibility as Judges to maintain proper decorum and ensure every person who appears before us receives a fair hearing. Sometimes maintaining proper decorum can be difficult since not only do some people believe Municipal Court is not as important as District Court but also because of some of the things people say.

The following are real things said in Court:

Q: How old is your son-the one living with you?

A: Thirty-eight or thirty-five, I can't remember which.

Q: How long has he lived with you?

A: Forty-five years.

The defendant also challenged the restitution order, which was entered by a written order approved by Frierson's attorney and the prosecutor and then presented to the judge, who approved the order without a hearing. At the time of sentencing, the parties identified a specific issue for restitution that was yet to be determined, and the judge specifically ordered that the issue of restitution be "left open" for 30 days. Since the parties did not have the benefit of the Court's rulings in the *Hall* and *Charles* cases, and since the defendant's attorney approved the restitution order and Frierson was not claiming a violation of his right to be present when restitution was determined, the Court upheld the restitution order. The Court again emphasized that courts should now follow the procedure set out in *Hall*, *Charles* and *Frierson* for ordering restitution.

State v. Mosher, Kansas Supreme Court, Decided March 14, 2014

The Court is not bound to follow the recommendations of a plea agreement reached between the government and the defendant. The parties can include recommendations for a sentence to be imposed as part of the plea agreement, but the Court can choose to disregard the recommendations.

State v. Santos-Vega, Kansas Supreme Court, Decided March 21, 2014

The use of a defendant's post-arrest, post-*Miranda* silence for impeachment purposes violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). In this case, the court had entered an order in limine that prohibited the State from presenting any evidence or inference that the defendant did not cooperate with law enforcement's investigation of the allegations against him because he chose to exercise his constitutional right to remain silent and seek the assistance of an attorney. In response to a question about what information he had when he prepared a probable cause affidavit, the police detective responded that the defendant "refused to give me a statement . . . asked for an attorney and invoked his rights . . ." A court issues an order in limine if the mere offer of or reference to some evidence would be prejudicial. Even without the order in limine, the comment on the defendant's refusal to answer questions violated his constitutional rights and provided the grounds for a new trial.

State v. Stephenson, Kansas Supreme Court, Decided March 28, 2014

Police officers were staking out a suspected drug house. They followed a vehicle that left the house until they observed the traffic infraction of not properly signaling a turn. The driver didn't activate the turn signal until 15-30 feet before the turn, while the statute requires signaling for 100 feet before a turn. The traffic infraction was acknowledged to be a pretext to stop the vehicle that the officers suspected was occupied by someone involved in drug activity. The driver was alone in the vehicle, and the two officers noted a "very strong" odor of alcohol coming from the vehicle, which they believed was probably the result of alcohol being spilled in the vehicle. A DUI investigation was conducted, but the officers concluded that the driver was not impaired. The driver had a valid license and had no active warrants for his arrest. One of the officers had stuck his head in the open window of the vehicle and



noted the odor of alcohol but did not observe any open containers. However, the officers believed, based on the strong odor, that they had probable cause to search the vehicle for evidence that the defendant was transporting an open container of alcohol. The Court discusses in detail the inferences that could be drawn from the odor of alcohol, comparing it to the odor of marijuana, an illegal substance. Ultimately, the Court holds that under these circumstances, the strong odor of alcohol alone does not provide probable cause to search a vehicle for evidence of the offense of transporting an open container of alcohol.

State v. Sharkey, Kansas Supreme Court, decided April 11, 2014

Sharkey filed pro se motions with the court requesting a new trial and requesting “re-appointment of counsel”, alleging that his attorney was ineffective during his trial, that his attorney failed to properly prepare him for trial, and that the attorney “hoodwinked” Sharkey into not taking the stand during the trial. The judge at the sentencing hearing asked Sharkey if he wanted to make statements, and Sharkey declined. However, the Court held that the judge erred by not affirmatively inquiring to determine whether there was a conflict of interest between Sharkey and his attorney. The court has the duty to protect the defendant’s constitutional right to counsel.

State v. Fritz, Kansas Supreme Court, decided April 11, 2014

When considering a motion to withdraw a plea that a defendant files prior to sentencing, the court considers the factors set out in *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 (2006): “(1) whether the defendant was represented by competent counsel; (2) whether the defendant was misled, coerced, mistreated, or unfairly taken advantage of; and (3) whether the plea was fairly and understandingly made.” The court can also consider other factors when considering the request. The defendant’s motion must raise “substantial issues of fact or law.” When a review of the file and proceedings make it clear that the defendant is not entitled to relief, the court is not required to conduct an evidentiary hearing, and the court can summarily deny the motion.

State v. Gibson, Kansas Supreme Court, decided April 18, 2014

If a defendant challenges the admissibility of incriminating statements made during an investigation, the government has the burden to prove by a preponderance of the evidence that the statements were voluntary. The court weighs the evidence considering the totality of the circumstances. Factors to consider are “(1) the accused’s mental condition; (2) the manner and duration of the interview; (3) the accused’s ability to communicate on request with the outside world; (4) the accused’s age, intellect, and background; (5) the officer’s fairness in conducting the interview; and (6) the accused’s fluency with the English language.” *State v. Randolph*, 297 Kan. 320 (2013). Other factors can be taken into consideration, but all circumstances are to be considered together. The Court held that the government met the burden of proving that Gibson’s statements were voluntary, even though he was 17 at the time the statements were made.



State v. Neighbors, Kansas Supreme Court, decided April 18, 2014

One exception to the requirement that officers have a warrant before conducting a search is the emergency aid exception. In this case the Court refined and clarified the exception, which allows a warrantless search “when: (1) law enforcement officers enter the premises with an objectively reasonable basis to believe someone inside is seriously injured or imminently threatened with serious injury; and (2) the manner and scope of any ensuing search once inside the premises is reasonable.” The Court specified that the emergency aid exception does not extend to actions of an officer to protect property; it must be an emergency to aid a person. In addition, once the emergency is addressed, the officers must end their investigation. In the *Neighbors* case, officers initially responded when a landlord reported an unresponsive person located in an apartment. The officers entered without a warrant, were able to wake Neighbors and determine that Neighbors was in no physical distress. Another officer, who had collateral information that Neighbors was involved in drug activity, arrived later and conducted a search. The evidence discovered in that search was suppressed as it did not fall under the emergency aid exception and the officer did not have a search warrant.



State v. Reiss, Kansas Supreme Court, decided May 2, 2014

Reiss was driving the middle vehicle in a group of three vehicles. The lead vehicle was being operated at night without headlights on. An officer intended to stop the lead vehicle. Upon activating emergency equipment, all three vehicles pulled over, but the officer pulled in behind Reiss’s vehicle. Reiss got out of his vehicle and walked toward the officer’s vehicle, asking why the officer stopped him. The officer ordered Reiss to get back in his vehicle. After repeating that instruction several times, Reiss got back in his vehicle. The officer then went to Reiss’s vehicle, and asked Reiss why he got out and approached the officer’s vehicle. Reiss said he didn’t really know why he did it. The officer was satisfied with that response. The officer then asked for Reiss’s driver’s license and insurance information. At this point, the officer observed indicators that Reiss was an impaired driver, and conducted a DUI investigation. Reiss was arrested for DUI. The Court held that the officer’s action in ordering Reiss back to his vehicle constitutes a seizure, but that seizure was reasonable under the circumstances due to officer safety concerns. That action did not violate Reiss’s Fourth Amendment rights. However, once the officer had asked Reiss the reasons for his actions and was satisfied with his response, there was no longer an officer safety concern. There was no reasonable suspicion to justify any further detention of Reiss, so the evidence from the DUI investigation should have been suppressed.



State v. Sievers, Kansas Supreme Court, decided May 2, 2014

Sievers was arraigned on felony charges and a date was set for a pretrial hearing and trial. Sievers did not appear for the pretrial hearing, and his attorney requested a continuance of the trial because Sievers had not cooperated in meeting with his attorney to prepare for trial. Sievers surrendered himself five days before the trial date, but his attorney requested postponement of the trial to allow time to prepare. After some further delays, Sievers was convicted at a trial in January. Sievers claimed his speedy trial rights were violated, arguing that the delay from the pretrial hearing date to the original trial date should not be attributable to him. However, the Court disagreed and said that the delay from

the pretrial hearing date until the continuance was granted was a result of the fault of the defendant. Sievers' speedy trial rights were not violated. NOTE: The Municipal Court code does not provide a specific number of days in which the government is required to bring the case to trial. However, in reviewing a claim of a violation of a municipal court defendant's speedy trial rights, the same assessment of whether delay was caused by the fault of the defendant would be appropriate.

State v. Williams, Kansas Supreme Court, decided May 23, 2014

Williams raised several issues on appeal, including an objection to a photograph admitted by the State. The investigation indicated that a gun had been placed in the dashboard of a car, and that the gun was used in committing the offenses that Williams faced. Once Williams was arrested, the car was impounded. While the car was in the impound lot, an officer took his own gun and placed it in an opening in the dashboard and photographed it. When evidence showed that in fact there had been a stereo in the opening of the dashboard but the stereo had been stolen while the car was impounded, the officer got a car stereo, put the gun in the opening and then put the stereo in front of it and photographed it. The defendant objected to the admission of both sets of photographs. The Court held that such demonstrative photographs are admissible if they are relevant, and if the witness lays the proper foundation to show that he or she has the skill to conduct the demonstration and to also show that the photographs are reliable and accurate. If the party offering the photograph shows that the conditions are the same or similar to the actual event, then the photograph should be admitted and any minor differences go to the weight to be given the evidence.



State v. Dominguez, Kansas Supreme Court, decided May 23, 2014

Dominguez claimed the trial court erred by not giving a jury instruction on the defense of voluntary intoxication, along with claiming other errors in his trial. Voluntary intoxication can be a defense to a crime that is a specific intent crime. In addition to the legal basis for the defense of facing a charge that requires proof of a specific intent, there must be a factual basis for the instruction. The evidence must show that the defendant was impaired to the extent that he or she could not form the required intent to commit the offense. While there was evidence that Dominguez consumed alcohol, there was no evidence that established how much he drank and no evidence that he was so impaired he could not form the specific intent to commit the offense. Failure to give the voluntary intoxication instruction was not error.

Decorum??

More things said in court...

Q: Now doctor, isn't it true that when a person dies in his sleep, he doesn't know about it until the next morning?

Q: The youngest son, the twenty-year old, how old is he?

Q: How far apart were the vehicles at the time of the collision?

evidence that established how much he drank and no evidence that he was so impaired he could not form the specific intent to commit the offense. Failure to give the voluntary intoxication instruction was not error.

State v. McBroom, Kansas Supreme Court, decided June 6, 2014

Most of this decision discusses issues of change of venue that do not apply to municipal courts. However, in reviewing the defendant's challenge to whether there was sufficient

evidence to convict him of first degree murder and other charges, the Court points out that “there is no difference between direct and circumstantial evidence in terms of probative value.” The Court also notes “[a] conviction of even the gravest offense can be based entirely on circumstantial evidence and the inferences fairly deducible therefrom. If an inference is a reasonable one, the jury has the right to make the inference.” *State v. McCaslin*, 291 Kan. 697, Syl. ¶ 8, 245 P.3d 1030 (2011).

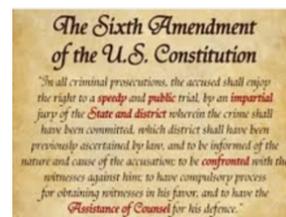
State v. Pettay, Kansas Supreme Court, decided June 6, 2014

Pettay was stopped while operating a vehicle and arrested for driving with a suspended license and no proof of insurance. The officer handcuffed Pettay and placed him in the patrol vehicle. While an officer stayed with Pettay who was in the patrol vehicle, the arresting officer searched Pettay’s vehicle and found a pipe with marijuana residue in it. After being taken to the station, Pettay waived his Miranda



rights and said the pipe was his and that he had smoked marijuana the night before his arrest. At the time of Pettay’s arrest, K.S.A. 22-2501 provided "When a lawful arrest is effected a law enforcement officer may reasonably search the person arrested and the area within *such person's immediate presence* for the purpose of (a) Protecting the officer from attack; (b) Preventing the person from escaping; or (c) Discovering the

fruits, instrumentalities, or evidence of a crime." (emphasis added) Pettay argued that the pipe and his statements should be suppressed because the pipe was not within his immediate presence once the officer handcuffed him and placed him in the patrol car. The Court agreed, and found that the good faith exception did not apply because the language of the statute is plain. The exclusionary rule is not a constitutional provision, but a rule the courts developed to prevent the government from benefiting from a violation of a defendant’s Fourth Amendment rights. The evidence should have been suppressed.



State v. Lewis, Kansas Supreme Court, decided June 13, 2014

Law enforcement sought out Lewis on post at Ft. Riley to question him about a previous encounter with law enforcement in Manhattan. The officer went to the Criminal Investigation Command (CID) office, and interviewed Lewis alone for about 10 minutes. After a break, the officer and a CID agent advised Lewis of his Miranda rights and he waived them and agreed to answer questions. After he was charged, Lewis argued that his statements should have been suppressed. The district court denied his request to suppress the statements. The Court held that the initial 10 minute interview may have been custodial, but that no information of any significance was disclosed by Lewis in that interview. When the two officers started the second interview, the Miranda warnings were given before Lewis made any additional statements, and there was no taint left from the first interview to make the statements made in the second interview involuntary. The statements were admissible.

State v. Prado, Kansas Supreme Court, decided July 28, 2014

Prado entered a written plea agreement with the State. When he appeared for his sentencing hearing, he said he didn’t understand why he was being convicted of the crime, and that his attorney had not

explained anything to him. Prado's attorney commented that he believed Prado was trying to tell the judge that the attorney did not explain things to him, and that Prado was saying he had not been properly counseled. The judge referred to the plea hearing where the judge had asked Prado whether he understood the plea, whether he had adequate time to talk to his attorney, whether he was satisfied with him attorney, etc., and denied the defendant's request to withdraw his plea. The Court held, as in Sharkey (above, decided April 11, 2014), that the judge should have done more to determine if there was a conflict between the defendant and his attorney, and that the court has the duty to protect the defendant's Sixth Amendment right to counsel.

State v. Burnett, Kansas Supreme Court, decided July 25, 2014

Burnett was charged with a murder that occurred at a residence. Burnett claimed that the residence was a drug house and that shootings had occurred at the same residence on several occasions. While evidence of a third party's possible motive can be admissible, a defendant also needs to show that a specific third party actually could have committed the offense, and Burnett did not have that evidence. The district court properly excluded the evidence of prior shootings at the residence. During his trial Burnett asked for a continuance to allow a redacted video of his interview by law enforcement to be prepared. The judge denied the request, saying he should have prepared that before the trial started. The Court held the judge's denial of the request for a continuance was proper, because Burnett did not show good cause to support his request. "Mere speculation" that a continuance would be helpful is not sufficient. After his first trial ended in a hung jury, Burnett filed a motion asking that a different attorney be appointed for him. The district court held a hearing, allowed the defendant to make his argument on the issues with his attorney, and allowed the attorney to respond. Based on the statements, the court didn't find that there was a basis to grant Burnett's motion, that Burnett did not allege a total breakdown in communication nor did he allege a conflict of interest. The denial of his motion for a new attorney was proper.

State v. Quartez Brown, Kansas Supreme Court, decided August 15, 2014

Brown filed a motion before his trial asking for appointment of a new attorney. There was no record of a hearing, but a note was entered on the case docket showing that the motion was withdrawn. At the time of sentencing, Brown raised the issue of not having a chance to present his motion. The Court held that there must be a record of a defendant's knowing and voluntary waiver of such a motion if that is done. Without such a record, the court was obligated to make inquiry as to whether there was an actual conflict of interest between Brown and his attorney such that his Sixth Amendment right to counsel was violated.

State v. Julian, Kansas Supreme Court, decided September 5, 2014

Julian was stopped due to a defective headlight. As the officer approached the stopped vehicle, he saw "furtive movements" and believed Julian was hiding something under a blanket in the vehicle. When Julian could not produce proof of insurance, he was arrested. The pat down of Julian uncovered marijuana, rolling papers, lighters and two knives. After adding possession charges to the basis for an

arrest and securing Julian in handcuffs and a patrol vehicle, the officer searched Julian's vehicle. That search yielded equipment useful in manufacturing methamphetamine. The Court held that this case was governed exclusively by K.S.A. 22-2501, which was in effect at the time of the traffic stop but declared unconstitutional and repealed prior to the Court's ruling. At the time of the stop, K.S.A. 22-2501 allowed a search incident to an arrest only to protect the officer's safety or to prevent an escape. The search of Julian's vehicle was to discover evidence of a crime, and so it was improper.

State v. Richard, Kansas Supreme Court, decided September 5, 2014

K.S.A. 60-455 allows evidence of a prior crime or civil wrong committed by the defendant to be admitted only "when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." When determining whether the evidence should be admitted, the court must find whether the fact to be determined is material, and if so, whether the material fact is disputed. If so, the court then determines whether the proposed evidence is relevant to prove that disputed fact. If the evidence is relevant, then the court must find that the probative value of the evidence outweighs the possible prejudice that could result to the



defendant if the evidence is admitted. In this case the defendant was charged with shooting the victim from his backyard while the victim sat in his second floor family room in his house. Evidence was admitted that Richard had previously discharged his gun into the air in his yard. The evidence of previously shooting his gun in his yard was not admissible to show it was likely that Richard shot his gun on this occasion, but it was admissible to show knowledge, identity and intent.

State v. Dority, Kansas Court of Appeals, decided May 16, 2014

Dority was charged with domestic battery in district court and waived his right to a jury trial. The complaint alleged that Dority intentionally or recklessly committed the battery. Dority claimed his conviction should be set aside because there were alternate means charged and there was not sufficient evidence to convict him of both alternates beyond a reasonable doubt. The Court pointed out that the decisions addressing alternate means deal with the requirement of jury unanimity. Where the judge is the factfinder in the case, there is no issue of alternate means. The evidence in this case included an officer's statements that the victim made statements at the time of the incident that the defendant shoved her and hit her. At the trial, the victim recanted her statements and said she didn't remember the defendant shoving her or hitting her. In finding Dority guilty, the judge said that using his "common knowledge and experience" it is common for a victim in a domestic violence case to recant their statements, and then the judge referred to the physical evidence and the consistency of the statements made at the time of the incident and found Dority guilty. Dority claimed that the judge relied on personal experience rather than on the evidence presented at the trial in making a decision. The Court held that the judge did not use his own special knowledge and experience, which would have been improper. The judge did use common knowledge and experience, as well as all of the evidence presented in the trial in determining the weight and credibility to be given to the testimony. The Court upheld Dority's conviction.

State v. Keenan, Kansas Court of Appeals, decided May 30, 2014

A citizen reported to law enforcement that Keenan was driving to his house with a child, and that Keenan was possibly intoxicated and had possibly violated a protection from abuse order. An officer was sent to Keenan's house, and was waiting when Keenan arrived. When Keenan got out, the officer immediately noted a strong odor of alcohol and that Keenan was stumbling while carrying the child to the house. Another officer arrived, and when they asked to speak to Keenan, he said he was going to put the child down in the house. Officers asked to enter the house and Keenan denied permission to do that, but the officers followed him in anyway. The officers stated they were concerned for the child's safety and also concerned that the DUI investigation would be corrupted if Keenan went in the house and consumed alcohol. The officers also believed they had probable cause to arrest Keenan based on the statements of their being a violation of the PFA. Keenan refused to perform any field sobriety tests, but based on their observations the officers arrested Keenan for DUI. Keenan filed a motion to suppress, alleging violation of his Fourth Amendment rights when the officers entered his home without a warrant. The State argued that the entry was justified based on probable cause to arrest and exigent circumstances. The Court found that the exigent circumstances in this case would either be the possible loss, destruction or concealment of evidence, or hot pursuit. The Court found that both theories provided a basis for the officers' entry into Keenan's house, and held that the motion to suppress was properly denied by the district court. The opinion sets out in detail the list of factors to consider in determining whether exigent circumstances exist, and points out that the particular facts will be very important in making the determination in any case. The opinion is not to be interpreted as establishing a bright line rule that in any DUI investigation officers have a right to enter the subject's house.

Decorum??

More things said in court...

Q: How many times have you committed suicide?

Q: Doctor, how many autopsies have you performed on dead people?

A: All my autopsies are performed on dead people.

Q: All your responses must be oral, OK? What school did you go to?

A: Oral.

City of Dodge City v. Webb, Kansas Court of Appeals, decided June 13, 2014

Webb was stopped because the tag light on his vehicle was not working and the officer could not read the expiration date on the tag. Webb had two passengers, and the officer noted a strong odor of alcohol from the vehicle. Webb denied that he had been drinking, and the passengers admitted to drinking. To try to determine if any of the odor was attributable to Webb, the officer asked him out of the vehicle. Once he was out of the vehicle, the officer noted a moderate odor of alcohol coming from Webb, and when the officer asked again, Webb said he had one beer. Webb performed field sobriety tests and failed those. The officer asked him to submit to a PBT, which he agreed to do. The results showed a BAC of .125. Webb argued that K.S.A. 8-1012 was unconstitutional, because it allows an officer to request a PBT, which has been ruled to be a

search, based only on a reasonable suspicion that a driver is under the influence of alcohol and/or drugs. The district court in this case made a specific finding that the officer had probable cause to request the

PBT, which is a higher standard. The Court agreed that there was probable cause and that the PBT was authorized. The Court therefore refused to address the claim of unconstitutionality of the statute only requiring reasonable suspicion. After Webb was arrested the officer gave the implied consent advisory and asked Webb to submit to a breath test. Webb refused. The officer then told Webb that if he would not take a breath test, the officer would get a search warrant and they would have blood drawn for a blood test. Webb stated that he was afraid of needles, and that he would take the breath test. Webb



argued that his consent to the blood test was coerced and therefore the breath test was an unconstitutional warrantless search. The Court said that if the officer's statement was factual (that the officer would be able to get a search warrant for blood to be drawn), then advising Webb of that was not coercive. The Court had already determined that the officer had probable cause to believe the Webb was operating a vehicle under the influence, and probable cause is the standard necessary to obtain a search warrant. The officer's statement accurately informed Webb of what would happen, and therefore the statements did not render Webb's consent to the blood test involuntary. (Note that K.S.A. 8-1001 allows an officer to direct medical personnel to draw blood for a blood alcohol test only if there has been an accident that resulted in death or serious personal injury as defined in the statute. However, that provision was not controlling here, since the officer specifically told Webb he would get a search warrant.) The motion to suppress the breath test results was properly denied.

State v. Garcia-Brown, Kansas Court of Appeals, decided July 3, 2014

Garcia-Brown was identified as a suspect in a sexual assault. The first officer to contact Garcia-Brown determined that he spoke Spanish and did not understand English. A second officer was called to interpret the conversation between Garcia-Brown and the first officer. Garcia-Brown agreed to go to a state office building to talk to the officers. Once there, the officers agreed that the second officer would just interview Garcia-Brown in Spanish, rather than having to translate the whole interview. The interview lasted about 10 minutes, Garcia-Brown was not in handcuffs, and he did not appear to be distressed. Garcia-Brown signed a written *Miranda* waiver that was in Spanish, and confessed to the crime. He then claimed that his statement should be suppressed because an interpreter was not appointed for him. The Court held that no interpreter was needed, because the interview was conducted entirely in Garcia-Brown's native language and it was therefore like the majority of law enforcement interviews that are conducted with English speaking subjects by an English speaking officer. The Court noted that while K.S.A. 75-4351 does require the appointment of a certified translator at certain stages of a criminal investigation, the statute does not provide for any sanctions if an interpreter is not appointed. But, as pointed out above, there was no reason to appoint an interpreter and K.S.A. 75-4351 was not applicable. In this case, the evidence showed that Garcia-Brown's confession was made after a knowing and voluntary waiver of his *Miranda* rights, and there was no basis to suppress the statement.

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You have the right to remain silent	Usted tiene el derecho a permanecer en silencio
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State v. Davis, Kansas Court of Appeals, decided August 22, 2014

Davis' case had previously been decided by the Court of Appeals on her claims of error relating to the order of restitution in her case. She appealed to the Kansas Supreme Court, which directed the Court of Appeals to review the case again in light of the recent decisions relating to what a court must do to order a defendant to pay restitution if it is not ordered at the time the rest of the defendant's sentence is ordered. In Davis' case, at the time of sentencing there was discussion on the record that restitution would be considered at a separate hearing that was scheduled for a specific date and time, and the prosecutor also pointed out that if restitution was ordered it would be part of Davis' sentence. In light of the Supreme Court's decisions in *State v. Hall*, *State v. Charles* and *State v. Frierson*, the Court held that in Davis' case the district court properly retained jurisdiction to order restitution at a later date. The restitution was based on the retail value of the merchandise Davis stole from the merchant victim. The Court held that where there was no other evidence of the value and there was no evidence as to why the retail value was inappropriate, there was no error in ordering the retail value as the restitution owed to the victim.

State v. Wines, Kansas Court of Appeals, decided August 29, 2014

Wines was convicted of DUI as a result of an incident that occurred January 7, 2012. Wines entered into a diversion agreement for a DUI on December 12, 2001. The diversion agreement was revoked and Wines was convicted of that DUI on August 14, 2002. Wines was later convicted of DUI on September 19, 2002. K.S.A. 8-1567 classifies a third DUI conviction as a felony if the defendant has a prior conviction that occurred in the preceding 10 years. If that criteria is not met, a third DUI is classified as a misdemeanor. The district court said that for purposes of determining the classification of the third DUI, the date of conviction of the first DUI after the revocation of the diversion is the date to use, rather than the date of the diversion agreement. Wines claimed that K.S.A. 8-1567 is unconstitutionally vague and that his 2001 diversion should not have been considered because it was outside the 10 year look back period. The Court said it was not necessary to address the unconstitutional claim. The Court also said it would not decide whether the date of the diversion agreement or the date of conviction after the diversion was revoked was the correct date to use. Wines did not challenge the fact that the first DUI diversion/conviction counts as a conviction. The Court did rule that the date of the occurrence of the third DUI offense is the date to use in determining the classification of the offense, not the date of conviction of that third offense. Since the second DUI conviction occurred within 10 years of the date of the third DUI incident, that is all that is needed to qualify the third offense as a felony.

Hoeffner v. Kansas Department of Revenue, Kansas Court of Appeals, decided September

Officers were looking for a vehicle that left the casino based on a report that the occupant of the vehicle had been involved in a disturbance at the casino. When an officer saw the vehicle that had been described, a traffic stop was made. Another officer arrived and both officers noted initial signs of an impaired driver – odor of alcohol, watery eyes, and admitted consumption of beer. Officers asked Hoeffner to submit to field sobriety testing, which he did and failed. Hoeffner refused to submit to a PBT at



the scene of the traffic stop, and was arrested. After being transported, the officers gave the implied consent advisory and asked Hoeffner to submit to a breath test. Hoeffner refused. Officers then told Hoeffner they would get a warrant to draw his blood if he wouldn't take the breath test. After some discussion, Hoeffner said that if they were going to test him one way or the other he might as well take a breath test. Even after that, Hoeffner still hesitated and was again told by officers that they would get a search warrant and draw blood if he refused. Hoeffner took the breath test and his BAC was .215. Hoeffner claimed that his consent to the breath test was coerced and therefore not voluntary, and that the test results therefore should not be used against him. This case looked at the statutory provisions that were also considered in *City of Dodge City v. Webb* (decided June 13, 2014) but came to a different conclusion. In *Webb*, the Court drew a distinction between when an officer can direct a medical person to draw blood, which is limited to the circumstances set out in the statute, and blood that was drawn based on a search warrant issued by a judge based on probable cause. The Court in *Webb* held that the officers had probable cause that would have provided the basis for a search warrant, so telling *Webb* that was not coercive. In Hoeffner's case, the panel said that whether there is a search warrant or not, the officer is the one who takes the driver and tells the medical personnel to draw the blood, so the statutory limits that set out the specific circumstances on when blood can be drawn are the same whether there is a search warrant or not. In *Webb* the Court observed that previously the statute provided that if a driver refused a test, no further testing could be given, but went on to find that the 2008 amendments to the statute eliminated that ban on any testing after a refusal. The Court in deciding Hoeffner's case disagreed, saying that the ban on any testing after a refusal is still in the statute, just in a different subsection. In addition, the Court held that although the statute has a provision that says "[n]othing in this section shall be construed to limit the admissibility at any trial of alcohol or drug concentration testing results obtained pursuant to a search warrant", that provision does not authorize a search warrant as part of the DUI investigation after a driver has refused a test, but only provides for admission of a test that was performed for some other reason separate from the DUI investigation. In this case the Court held "the implied consent statute continues to prohibit an officer from obtaining a search warrant after a test refusal." However, in Hoeffner's case, even that holding did not give him the relief he sought, since this case involved an administrative proceeding related to his driving privileges. The Courts have held that the exclusionary rule does not apply to administrative proceedings, so that evidence unlawfully obtained can still be considered. Even though the officers coerced Hoeffner into submitting to the breath test by threatening a search warrant that they would not have a legal basis to obtain, the test results could still be considered in the administrative process that led to suspension of his driving privileges.

State v. Glover, Kansas Court of Appeals, decided October 10, 2014

Glover entered into a plea agreement to resolve felony charges. At the hearing to enter his plea, the State offered a statement of the facts supporting the charge. The judge asked Glover if those facts were true. Glover replied "no, it is not." The proceedings were adjourned and Glover consulted further with this attorney. The court ultimately accepted Glover's plea and sentencing was set for a later date. Before the sentencing hearing, Glover filed a motion to withdraw his plea. K.S.A. 22-3210(d)(1) allows a defendant to withdraw a plea prior to being sentenced for the offense, if the defendant establishes "good cause". *State v. Edgar*, 281 Kan. 30, 127 P.3d 986 (2006), established the factors for courts to consider when evaluating whether the defendant has established good cause: (1) whether the defendant was represented by competent counsel; (2) whether the defendant was misled, coerced, mistreated, or unfairly taken advantage of; and (3) whether the plea was fairly and understandingly

made. *State v. Macias-Medina*, 293 Kan. 833, 268 P.3d 1201 (2012), also pointed out that in addition to the *Edgar* factors, the court can consider other relevant factors so as to not “distort the concept of good cause.” In arguing the case on appeal, the defendant argued that a defendant should be allowed to withdraw a plea before sentencing if they have changed their mind after having further time to reflect on their situation. The Court held that such a rule would change the standard from “good cause” to “no cause”, where the withdrawal of a plea would be automatic if requested prior to sentencing. Since this is contrary to the plain language of the statute, the Court refused to adopt this standard. Considering the *Edgar* factors, the Court held that the district court did not err when it denied Glover’s request to withdraw his plea.

State v. Herron, Kansas Court of Appeals, decided October 24, 2014

Herron entered a diversion agreement for charges of forgery and theft. In the diversion agreement she agreed to pay restitution of \$6,864.10. Due to violations of the diversion agreement, the agreement was revoked and Herron was convicted of the charges. At the time of sentencing, Herron advised the judge of her limited income from her part-time employment at a fast food shop, her limited funds available after paying her basic living expenses and child support, and asked the judge not to order her to pay restitution. The judge acknowledged Herron’s circumstances, but stated she did not believe she had discretion to waive restitution. Herron argued that if the judge found payment of restitution to be “unworkable”, that it could be denied, but after continuing the hearing to give the judge additional time to consider, the judge ordered restitution in the same amount as in the diversion agreement. The judge said that indigency alone did not make restitution unworkable, and said that it may take a long time, but Herron would need to pay the restitution. K.S.A. 21-4603d(b)(1) controls the district court’s consideration of restitution, and it says “[T]he court shall order the defendant to pay restitution . . . unless the court finds compelling circumstances would render a plan of restitution unworkable.” The burden is on the defendant to show that a restitution plan is unworkable, but the Court stated that generally, restitution should be ordered, and a denial of restitution would be the exception to the general rule. While probation can be extended to keep a defendant under supervision to assure payment of restitution, the Court held that likely Herron could only pay \$10 a month, and at that rate, Herron would be on probation for 57 years. The Court held that no reasonable person could find that plan to be workable. The case was remanded to allow the district court judge to consider the restitution order in view of whether the defendant has established that restitution is unworkable.

(Note that K.S.A. 12-4509 provides for a municipal court to order restitution as part of a sentence, and that statute states that the court may order that the defendant “make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant’s crime, in an amount and manner determined by the court and to the person specified by the court”.)

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State v. Fernandez Torres, Kansas Court of Appeals, decided October 24, 2014

The district court granted Fernandez Torres’ motion to suppress his statements to law enforcement, based on his claim that the statements were involuntary. The State appealed that ruling. The defendant was charged with aggravated indecent liberties with a child involving the young daughter of Fernandez

Torres' live-in girlfriend. Fernandez Torres was a native of Mexico and Spanish was his primary language. He had some trouble reading Spanish, and could not read English at all. He spoke English conversationally. The defendant was taken to the law enforcement center, and a probation officer that spoke Spanish was used as a translator. During the 2 hour interrogation, the law enforcement officer told Fernandez Torres that they had physical evidence that showed he inappropriately touched the victim, which was not true. The defendant several times denied that he had done that, but after the officer suggested that maybe he had too much to drink, the defendant did at one point say "maybe it was because I had been drinking." Evidence was presented that Fernandez Torres had some intellectual limitations and possibly a learning disability, which the Court said was a consideration in finding the statement was involuntary. Certified interpreters at the hearing testified that some of the translations used by the probation officer were not appropriate. In addition, false statements were made that gave Fernandez Torres the impression that the police had solid scientific evidence of his guilt. The false statements along with the inappropriate translation played on Fernandez Torres' limitations and resulted in an involuntary statement in violation of his rights. The district court correctly granted the defendant's motion to suppress.

State v. Haskell, Kansas Court of Appeals, decided October 31, 2014

Haskell allowed her daughter to have a party at Haskell's house where alcohol was served. Haskell was the disc jockey for the party and Haskell consumed alcohol during the party. Some of the people attending the party were under 21 years of age, and Haskell was aware of that. There was an incident at the party that resulted in serious injury to one of the guests, and the incident was reported to the police. Haskell was charged with unlawfully hosting minors consuming alcohol or cereal malt beverage under the state statute (a similar offense is part of many municipal codes). The charge alleges that the defendant allowed property under their control to be used "by an invitee of such person or by an invitee of such person's child . . ." in a way that resulted in a minor unlawfully consuming alcohol or cereal malt beverage. Haskell moved to dismiss the charge against her, arguing that under tort law, an "invitee" is a person who has an express or implied invitation to enter property. This tort usage includes the condition that either the invitee or both the invitee and the host benefit from the invitee entering the property, such as in the case of a business that is open to the public. The district court agreed with the interpretation and dismissed the charge. The Court reversed that decision, saying that under the general rules of statutory construction, words are given their ordinary meaning unless the context indicates that a more technical meaning is called for. Here, even though there is a technical definition in the area of tort law, the context of the misdemeanor charge did not call for a technical meaning. For purposes of this statute, an "invitee" is simply a person who is invited.

