The Verdict

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

Court Review

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.

2008 INTOXILYZER CERTIFICATIONS VALID THROUGH 2008, EVEN THOUGH NEW REGULATIONS WERE ADOPTED IN MARCH 2008

In 2008, police departments were provided certifications from KDHE for their intoxilyzer machines that ran from January 1, 2008 to December 31, 2008. In March 2008, the KDHE revoked its regulations regarding certification of breath testing machines and adopted new regulations.

The new regulations required a slightly different application process. No application forms were ever sent out by KDHE under the new regulations. Nor were any new applications made by any agency pursuant to the new regulations.

In September 2008 it became apparent that attorneys were going to challenge the validity of the intoxilyzer certifications that were issued under the old regulations. KDHE sent all the police departments certifications back-dated to March 14, 2008 (even though they had not made any application and had not complied with the new regulations). KDHE's Breath Alcohol Supervisor testified in at least one

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A STEP BACK IN TIME

In this the 90th year since women received the right to vote, let's not forget that Kansas women were struggling to gain suffrage as early as 1859, over 150 years ago.

Prior to statehood, in 1859, three feminists, Clarina Nichols, Mother Armstrong and Mary Tenney Gray, attended the Wyandotte Constitutional Convention, representing Shawnee and Douglas County women's groups, to seek inclusion of a woman's right to vote in the new state's constitution. They were not allowed to speak, but were granted the unprecedented right to acquire and possess property and to retain the equal custody of their children. By 1861, they were able to convince the first Kansas legislature to give women the right to vote in school elections.

Article 2, §23 of the Kansas Constitution provided that "*the legislature, in providing for the formation and regulation of schools, shall make no distinction between the rights of*

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SPOTLIGHT ON: TOM KEMP

Thomas Kemp, *Elkhart*, spent much of his early life in Elkhart, Kansas and Bozeman, Montana, where he graduated from high school in 1970. His father was in auto sales and his mom was a homemaker. He is the next to the youngest, of four boys.

After graduating from high school, Tom and his buddies took Colin Fletcher's book, *The Man Who Walked Through Time* (often referred to as "The Hiker's Bible"), to heart and started out on a backpacking trek around the country, including traversing the width of the Grand Canyon.

When his hiking travel lust was satisfied, the open road still called to him and Tom became an over-the-road truck driver for 13 years. In 1978, he married and had a daughter, settling back in Elkhart. Elkhart is in the far southwest corner of Kansas. It borders Oklahoma and is just 8 miles from the Colorado border. For 15 years, he was a licensed insurance and

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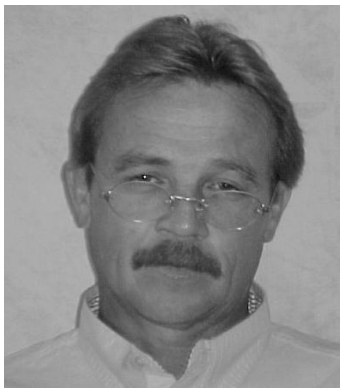
Spotlight On: Tom Kemp

real estate agent, conducting business in and around Elkhart. He served on the Elkhart City Council and was asked to be the city judge. He now owns and operates a flooring and carpet store in town. His oldest daughter lives three doors down from him with his grandson. She is a respiratory therapist. His second daughter is a trauma nurse at Oklahoma University Trauma Center. His youngest child, a son, helps with the carpet and flooring store and the light remodeling jobs for which they contract. He serves as a volunteer firefighter (working for KMJA member and Rolla judge, Charles Hull). He still enjoys hiking and plays the harmonica in his spare time.

Elkhart Municipal Court meets once per week. He enjoys being judge and, as a long-time Elkhart resident, he knows virtually everyone that comes before him. He states that this knowledge has never really caused any problems, as the people in the town realize he is just doing his job. But it does give him a deep understanding of how his townsfolk get themselves involved in various situations and by knowing them so well he is able to craft a punishment that is particularly appropriate to their situations.

Tom also enjoys attending the annual KMJA training session, and has not missed one since his appointment. He enjoys talking to his fellow judges, sharing stories and learning about ways to handle various issues.



Through his writings Colin Fletcher *"inspired a generation of young Americans to take up backpacking as means of filling a spiritual void,"* and to escape from the confusion of Vietnam-era America:

"After Vietnam, I was trying to figure out what to do with my life. So many of my friends had died from bullet holes," recalls Backpacker Magazine contributing editor Buck Tilton. *"I read The Man Who Walked Through Time, and it was the only thing that made sense to me. Fletcher's words gave meaning to backpacking. I loaded my pack exactly the way Fletcher did and carried a walking stick like his. He was my hero."*

Updates from O.J.A.

ANNOUNCING NEW JUDGES

Since our Summer 2010 issue, the following new municipal judges have been appointed or elected:

-Ken Lee	Downs
-Tiana McElroy	Cherryvale

2011 CONFERENCE

Mark your calendars! The Conference is April 18-19 at the Ramada Inn in Topeka. The programs on Monday afternoon will be held in the Supreme Court Courtroom in the Kansas Judicial Center, with a reception in the Atrium following from 5:00-6:00. Bus transportation will be provided.

Judge Dennis Challeen, from Winona, Minnesota will return to Kansas to kick-off the conference with a program titled *"Understanding and Sentencing the Criminal Disorder."*

Judge Challeen, who is now retired, writes regularly for the Winona Daily News. Go to their website WinonaDailyNews.com for his latest. He also has a new book out, *Swamp Water Jurisprudence*. Judge Challeen also wrote *The Norp Think Factor* in 1994 which he refers to extensively in his teaching. In 2004 he wrote, *Winning at Losing...When Criminal Justice Fails.*

Judge Challeen has always been well-received by the KMJA.

The conference agenda will also include an Appellate Court Update, a discussion of alternative methods of transportation and the rules regarding same, and a criminal records and identification update by KBI staff. The traditional programs are scheduled on Tuesday—Legislative Update, Nuts and Bolts program and an Update from the DMV. The ethics program will focus on Civility in the Courtroom.

TEXTING

According to Marcy Ralston the new texting law is a non-moving violation. However, if a person fails to comply, the DMV will suspend for it. The suspension code is: TX1

JUDICIAL DISCIPLINARY PANEL HAS NO TOLERANCE FOR REAL-LIFE JUDGE JUDY

By Adam Cohen, Reprinted, in part, from Time.com
August 18, 2010

When a defendant showed up on a traffic charge, Judge Judy delivered a zinger: *"If you drive like an idiot 'cause you're late for work, you're gonna have to pay for it."* Then she piled on: *"You can see your picture on the headlines of the Seattle Times, stupid young man who shouldn't be driving."*

Another defendant recalled that the tart-tongue jurist humiliated and bullied her until she broke down in tears. *"She frequently interrupted answers with insults,"* the woman recalled.

This bullying Judge Judy was not Judge Judith Sheindlin, the tough-talking former New York City Family Court judge who has the top-rated judge show on syndicated television. It was Judge Judith Raub Eiler, who sits at a county court in Seattle. Instead of high ratings and rich syndication fees, this Judge Judy's aggressive demeanor earned her a five-day suspension without pay courtesy of the Washington State Supreme Court.

Judge Eiler was elected to the bench in 1992 and has consistently been re-elected ever since. She first ran into trouble in 2004. The State Commission on Judicial Conduct brought her up on disciplinary charges for her insulting and demeaning judicial style. It pointed to multiple instances showing that she had engaged in *"a pattern or practice of rude, impatient and undignified treatment"* of the people who appeared before her.

Judge Eiler admitted to her misdeeds. She was required to participate in behavioral therapy and to refrain from similar conduct in the future. She completed the therapy, but soon she went back to her old ways. In 2008, the commission accused her of the same kind of abuse.

The Court gave several examples of the judge's demeanor involving defendants who appeared pro se and behaved respectfully toward the judge. In 1 case, a defendant had been cited for driving 15 miles an hour over the speed limit without a seatbelt. The following exchange took place:

> **Defendant:** *I was going with traffic.*
> **Judge:** *That's a bad idea.... [E]verybody's doing it doesn't cut it. Duh. ....*

> **Defendant:** *And I had out of state plates.*
> **Judge:** *That wouldn't matter in Washington.*
> **Defendant:** *Oh.*
> **Judge:** *We don't troll for stupid people out of state who speed over the speed limit that they think it is.*

She lectured another litigant for driving without proof of insurance in a condescending tone of voice:

> **Judge:** *The wise person takes that little bitty [insurance] card ... [a]nd you cut it out.*
> **Defendant:** *Okay.*
> **Judge:** *It's the same size as your driver's license, you slide it behind it then you don't have to come here.*

The judge scolded a defendant in an unnecessarily patronizing tone for speeding:

> *You know, that's the problem with mature people, they think, I see my exit so I have to get ahead, imagine that, ahead of those other trucks, then what did you probably do, you probably put on your brake to slow down to get off at the off-ramp making all those people behind you think that you were an idiot.*

The judge also interrupted litigants on occasion in a rude, impatient, and undignified manner, occasionally whistling at them and pounding on her desk to get their attention. Clerks in her court testified that the judge behaved as described "pretty much all the time" or at least "50 percent of the time." Several litigants and some attorneys testified to being "embarrassed" by the judge's "degrading" treatment, and feeling "mocked," "attacked," and "uncomfortable" in her courtroom.

Judge Eiler defended herself by saying she was just a "tough, no-nonsense judge" and that the case against her was overblown. She also made the claim that the court was trying to infringe on her freedom of speech. But her critics have argued that judges do not have a First Amendment right to abuse people just because they use words to do it. By that logic, bank robbers would have a First Amendment right to hand over notes saying *"This is a stickup."*

The Washington Supreme Court ruled this month that Judge Eiler had violated the state's judicial canons. However, the punishment ultimately handed down was much less than initially recommended.

The disciplinary counsel who originally brought the case urged the Commission to remove Judge Eiler from the bench permanently. The Commission instead recommended that she be suspended for 90 days without pay. The Commission said Eiler addressed attorneys, defendants and witnesses in "an impatient, undignified, discourteous, belittling and demeaning manner."

Only one of the members of the Disciplinary Commission came to Judge Eiler's defense.

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Real-Life Judge Judy

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Commission member, Pierce County Superior Court Judge John A. McCarthy, said that while Eiler was often loud and intimidating, there's no evidence she made incorrect decisions or that her integrity was in question.

"This case is about how she delivers justice and communicates with litigants in a fast-paced, high-volume court with limited time to listen to people, decipher the evidence and make a correct decision in small claims and traffic cases with a couple of minutes to hear each case," McCarthy wrote.

The Washington Supreme Court knocked it down to five days.

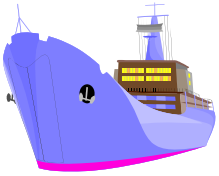
Judge Eiler's victims were mainly pro se litigants — people who go to court without a lawyer. Not understanding the law, they are often confused about how things work and, as a result, vulnerable — perfect targets for a bully.

"If I wanted people to love me, I wouldn't have chosen to be a judge," she told KIRO-TV, Seattle, *"I don't sugarcoat stuff...I don't use a lot of gobbledygook."*

Eiler said her desire to be efficient in her courtroom is sometimes misunderstood.

"I know that people consider me to be abrasive. Sometimes I'm abrupt," Eiler said. *"I don't think I'm rude. Blunt, but not particularly rude."*

Her attorney, Anne Bremner, said Eiler maintains order in a fast-paced courtroom with a high caseload. Eiler handles small claims and traffic infractions — often dozens of cases each day.



"Every day in court, she's trying to turn around a supertanker," Bremner said.

The Washington Supreme Court was not impressed.

"Statements by a judge implying that a litigant is an "idiot" or "stupid" and the rendering of other derisive comments about persons who are before the judge is not conduct that engenders respect for the judiciary or provides confidence in the impartiality of the justice system," wrote Justice Gerry Alexander, in an unsuccessful effort to argue for an even longer suspension.

Judge Eiler plans to run for re-election in November.

Traffic Issues for Judges and Adjudicators: A Self-Study Web Course

New or more experienced traffic judges and adjudicators who would like a refresher on traffic issues can now access a new self-study web-based program. The National Judicial College (NJC), with funding from the National Highway Traffic Safety Administration (NHTSA), developed the web-based program. The program is offered **free of charge** but prospective participants must register.

The self-study course contains five modules on the following topics: Fourth and Fifth Amendments, DUI, special populations, unlicensed and uninsured drivers, and commercial driver's licensing laws. The modules provide up-to-date information on each topic and provide learners with quizzes to gauge how well they learned the content. To complete the program and take the final exam only takes 8-10 hours. Learners have 30 days in which to complete the program. Once the learners pass the final exam, they will receive certificates of completion.

To register for this invaluable course for new traffic judges, please complete NJC's course application.

For questions about the course, contact Melody Luetkehans at 800-255-8343 or melody@judges.org.

THE NATIONAL JUDICIAL COLLEGE

NHTSA

MORE FAMOUS KANSANS

Jack Sock, Tennis Player, at 17, youngest player in the adult 2010 U.S. Open and won the U.S. Open Boys Championship. Overland Park, KS

Will Lowe, Rodeo Rider, 27, Three-time World Champion Bareback Rider, Holds record for longest professional ride at 94 seconds. Gardner, KS

case that the new regulations do not provide for or require reapplication for certification after the effective date of the new regulations. In other words, once the certifications were issued January 1, 2008 for the whole year, that certification remained valid. The agency would only have to comply with the new regulations when they renewed in 2009. Of course, the distribution of new certifications in September, backdated to March, complicate that argument.

So the issue in *State v. Ernesti*, ___Kan. ___ (August 27, 2010) was the admissibility of intoxilyzer tests performed after March 14, 2008, on machines and for agencies which were not certified under the new regulations.

The Kansas Supreme Court held that the January 2008 certification had continued validity through December 2008.

The general rule is that repeal of a statute terminates any rights accruing or prosecution commenced under the repealed statute. However, K.S.A. §77-425 states that the revocation of a regulation shall not be construed as *"affecting any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the regulation revoked."* Since police departments sought and obtained certifications from KDHE, they relied on the certification to legally perform breath tests for law enforcement purposes. Therefore it was an accrued right and as such, K.S.A. §77-425 preserves its validity. In addition, the general rule is that administrative regulations operate prospectively, not retroactively.

The breath test results should not have been suppressed.

JUDGE SHOULD PROCEED WITH CAUTION BEFORE DECIDING TO INTERVENE IN A TRIAL BY ASKING QUESTIONS; PROSECUTOR CANNOT COMMENT ON DEFENDANT'S POST *MIRANDA* SILENCE

Luther Kemble was charged with aggravated indecent liberties with a child under the age of 14 for inappropriately touching 8 year-old M.S.. During trial, M.S. testified at times that nothing happened, at times that a "touching" of her breast happened and at times she couldn't remember what happened. Repeatedly, the judge intervened in a way that strongly suggested that M.S. was not telling the truth when she said she couldn't remember and continued to heap praise on M.S. when she testified that the touching did occur. The judicial involvement was so significant, that the Court reversed Kemble's conviction and remanded the case for a new trial.

Justice Johnson, writing for the Court in *State v. Kemble*, ___Kan. ___ (September 3, 2010), said:

One can empathize with the frustration a trial judge might experience with a child witness who will not testify consistently with his or her prior statements, especially if the judge might perceive that the prosecutor's soft-spoken demeanor is impeding the search for the truth and precluding the just punishment of a perpetrator of the most despicable conduct in our society. Nevertheless, the judge cannot cross the line between being the impartial governor of the trial and being an advocate for the prosecution. The lines of demarcation separating the duties of each of the players in a criminal trial are sacrosanct, i.e., the prosecutor representing the people; the defense attorney representing the accused; the trial judge representing the interpreter of the law; and the jury representing the finder of facts. If any of those lines are crossed, the system that has held this nation in good stead for two and a quarter centuries has been compromised. Here, the trial judge crossed the line, not only refusing to follow the better practice of addressing the problem with counsel outside the jury's presence, but failing to exercise the appropriate caution in questioning a witness and making comments in front of the jury.

The defendant further argued, and the evidence supported the fact, that he was extremely intoxicated at the time of the alleged offense. He testified that he was in an alcohol-induced black out at the time. During closing statements, the prosecutor stated, *"He never said he was too drunk to remember until today."* The Court found this was prosecutorial misconduct. The violation by the prosecutor of a clear rule, expressed 34 years ago in *Doyle v. Ohio*, 426 U.S. 610 (1976) prohibiting a prosecutor from commenting on a defendant's post *Miranda* silence, makes this misconduct gross and flagrant. In addition, this wasn't' a spur-of-the-moment comment delivered extemporaneously under the stress of countering a defense argument. The prosecutor had the statement included on a PowerPoint she went through during its closing. This shows *"at least a colorable showing if ill will on the prosecutor's part"*, wrote Justice Johnson.

Kemble was denied a fair trial and is entitled to a new one.

WHAT'S A JUDGE TO DO WHEN A WITNESS ABSCONDS WITH THE EVIDENCE?

Tyrone Leaper was convicted of second-degree murder for fatally shooting Christopher Lovitch. At trial, Leaper's brother , Roderick, testified that he saw their cousin Travis with a gun, but not Tyrone. He also saw Travis hitting the victim. Although Roderick testified that Travis had a gun at the scene, he had not mentioned this detail when the police had earlier questioned him. To point out this discrepancy, the prosecutor handed him a copy of his transcribed police statement. When Roderick expressed difficulty in reading it, the State offered to play the audio tape of his interview. The judge excused the jury, and Roderick listened to his recorded

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interview.

When the jury returned, the State continued Roderick's cross-examination and eventually offered the tape into evidence. The defense objected, and the judge took the matter under advisement. Following the testimony of Roderick and another witness and the jury's departure for the day, the judge asked for the tape. However, the parties were unable to find it. The bailiff then entered the courtroom and said that a juror approached him and told him he had seen Roderick put the tape in his pocket and leave.

Roderick was brought back into the courtroom and denied taking the tape. He was searched and no tape was found. The next morning, the defense filed a motion for a mistrial, claiming that a juror's observation of Roderick taking the tape prejudiced Leaper and that no instruction could cure the problem. Since Roderick was the only exculpatory witness, the jury may be inclined to discredit his testimony because of the tape theft. The defense argued that if no mistrial was to be declared, then the court should poll the jury to determine if any other juror saw anything. The judge did not declare a mistrial and did not poll the jury. Leaper was convicted and appealed to the Kansas Supreme Court.

In *State v. Leaper*, ___Kan. ___ (September 3, 2010), the Kansas Supreme Court held, first, that this was not juror misconduct, because the juror was only reporting what he had seen. But the lack of juror misconduct does not mean that the judge does not have to investigate. He had a duty to question the juror and see if what he witnessed would impact his ability to be fair and impartial. He had a duty to similarly inquire regarding what, if anything, other jurors had seen. He may have considered a curative instruction or at least an admonition. This judge did nothing.

However, the majority continued, the judge's actions were harmless and did not effect the outcome of the trial. Roderick's veracity was already weak. The Court went on to detail why his testimony was suspect and why the evidence of guilt was overwhelming.

Justice Johnson wrote a concurring opinion, joined by Justice Beier and Rosen, agreeing with the result, but chastising the majority for assessing witness credibility to rationalize harmless error. *"The right to a fair trial, i.e. the guarantee of a fair and impartial process, is not conditioned upon the perceived quality of ones witnesses. We let the jury to decide whether to believe a witness."*

CONFLICT WHEN COUNTY COUNSELOR ADVISES BOARD OF COUNTY COMMISSIONERS AND THEN REPRESENTS IT IN QUASI-JUDICIAL MATTER INVOLVING THE SAME TOPIC

William Kassebaum was the Assistant County Attorney in Morris County. Davenport Pastures requested that the County pay it damages for two roads the county vacated that had provided access to its property. The Commissioners directed Kassebaum to write a letter to Davenport denying its request. Davenport appealed and the district court conducted a hearing on damages and awarded Davenport damages. The County appealed and the Court of Appeals ruled that the district court did not have any authority to conduct an evidentiary hearing on damages, the County was required to conduct such a hearing first. Kassebaum represented the County in all these proceedings.

The case was returned to the County for a "damages" hearing. Kassebaum met with the Board and advised them of the need for a hearing. He took two Commissioners to view the roads in question. The Commissioners decided they needed to hire an appraiser in advance of any hearing and Kassebaum recommended one that he believed to be "credible."

During the damages hearing, Kassebaum was the only legal counsel present and he cross-examined Davenport's experts. He also directly examined the County's appraiser. He made oral arguments to the Board. The Board took the matter under advisement and proceeded to continue to discuss it at five open Board meetings, where Kassebaum was present. Kassebaum advised the Commissioners to individually review the evidence, and write down on a piece of paper what they believed the damages to be and turn it in to him. They did so and Kassebaum presented the results at the next open Board meeting.

Since all three submitted a separate figure, Kassebaum advised them to discuss the matter and arrive at a final award. Kassebaum was present during this discussion. A figure was arrived at and Kassebaum was directed to write the Board's final decision, including specific findings and conclusions. The Board made a few changes to it and then signed it. Davenport received the final report in the mail.

Davenport appealed and Kassebaum again represented the County. Davenport objected to Kassebaum's dual roles and argued that because of it, Davenport was denied due process. The district court supported the County's decision and found there was nothing improper about Kassebaum's dual representation. Davenport appealed to the Court of Appeals. The Court of Appeals found that Davenport failed to establish that Kassebaum's dual role actually effected the Commission's decision.

In *Davenport Pastures, LP v. Morris County Board of County Commissioners*, ___Kan.___(September 10, 2010),

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the Kansas Supreme Court held that Davenport's due process rights had been violated. It found that although the mere appearance of impropriety is insufficient to constitute a due process violation, due process is violated when the *"probable risk of actual bias [is] too high to be constitutionally tolerable."* Analyzing the facts of this case, the Supreme Court held that the risk of bias in this case was intolerable. *"In our view, Kassebaum was improperly asked to be, if not "A Man for All Seasons," then a man for too many seasons."* The Board's decision to have its attorney play such a significant and multifaceted role in the hearing process violated its responsibilities to provide fair dealing and offends any reasonable definition of fair play for an adjudicative process. In his concurring opinion, Justice Biles wrote: *"On remand, the Board would be well-advised to figure out a structured decision-making process that will exhibit neutrality and detachment toward both sides in this dispute."*

U-TURN DOESN'T HAVE TO BE A "U"

Jeannette Trostle was driving her big rig down the highway and realized she needed to turn around. She was heading north and she wanted to go south. This was going to be a tricky maneuver because of the size of her vehicle, the limited shoulder area and the steep embankments on each side. She was going to have to turn left and then back up and maneuver to get going south. It would take more than one movement. As she attempted this, she was blocking all lanes of traffic. She had not even completed the left turn yet, when she got stuck in the mud and sank into the ditch. A tow truck had to come to remove the rig. Trostle was given a ticket for making an illegal u-turn in violation of K.S.A. §8-1546(a) (STO §51).

Although the statute has a heading that describes the section as "U-Turns." the statute actually reads as follows:

> *"The driver of any vehicle shall not turn such vehicle so as to proceed in the opposite direction unless such movement can be made in safety and without interfering with other traffic."*

At trial, Trostle argued that she wasn't making a "U" turn. That would have been impossible given the size of her truck. She was making a left turn, and then she would have to turn around and maybe even back up to get going in the other direction.

In *State v. Trostle*, ___Kan.App.2d ___ (September 17, 2010) the Court of Appeals pointed out that the language of the statute doesn't say anything about a "U" turn. It merely requires that you be turning so that you can go in the opposite direction, and that is what Trostle was doing.

"Whether she was going to be able to complete the maneuver in one move or would be required to make several moves before proceeding in the opposite direction does not change the analysis in this case. The statute requires evidence that the defendant was turning a vehicle so as to proceed in the opposition direction."

There is no dispute that is what Trostle was doing. Her actions caused traffic to be blocked, presenting a hazard to other vehicles on the roadway. Her conviction stands.

SMELL OF RAW MARIJUANA PROVIDES PROBABLE CAUSE TO SEARCH VEHICLE

Officers stopped Kenneth Goff for a nonfunctioning tag light. When the officer approached the car he smelled a strong odor of "raw" marijuana. He ordered Goff and his passengers out of the car. He searched the car and found marijuana cigarettes in a prescription bottle in the center console.

The officer testified that the smell was much stronger than would be explainable by the small pill bottle. He saw a padlocked tool box type locker in the back passenger seat. He asked Goff for the key. Goff told him he needed a warrant to search the locker. The officer indicated he didn't want to have to break the lock. Goff told the officer where the key was. The locker contained the mother load of marijuana.
Goff moved to suppress on two basis. *One*, the odor of raw marijuana is not sufficient to establish probable cause to search a vehicle. Only burning marijuana is sufficient. In *State v. Goff*, ___Kan.App.2d ___ (September 17, 2010), the Kansas Court of Appeals took little time to find that the odor of raw marijuana is sufficient to justify probable cause to search a vehicle.

And two, Goff argued that his statements regarding the location of the key were taken during a custodial interrogation without having received a *Miranda* warning. The Court of Appeals rejected this argument as well holding that as a traffic stop, it was *"generally exempt from the typical* Miranda *rules, and police are allowed to ask a moderate number of questions to confirm or dispel suspicions related to the scope of the stop...Here, the type of stop the officer conducted was an investigatory detention. A person may be seized and questioned by law enforcement officials without the encounter rising to the level of a custodial interrogation."*

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Court Watch

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CONSTRAINT INCIDENTIAL TO RELEASE ON BAIL ≠ CUSTODY FOR PURPOSES OF AGGRAVATED ESCAPE FROM CUSTODY STATUTE; CONFLICT BETWEEN COURT OF APPEALS PANELS RESOLVED

Kristie Urban had several drug charges pending. As a condition of her signature/PR bond, she was required to live in the Johnson County Residential Center. Urban ended up entering a guilty plea pursuant to a plea agreement and her sentencing was set out a couple months. Before that date arrived, she left the Center on a temporary pass and did not return. The State charged her with aggravated escape from custody under K.S.A. §21-3810. The district judge dismissed the case on the basis that she was not in "custody" pursuant to the language of the statute. He could have revoked her PR bond and placed her in custody pending her sentencing, but she had not been sufficiently restrained to constitute "custody" under the statute.

A complicating factor in this case was that under similar circumstances, two panels of the Kansas Court of Appeals had reached different conclusions. When this case came before it, the panel found that she had been in custody and could be charged with aggravated escape. *See, State v. Urban*, 40 Kan.App.2d 717 (2008). However, in an unpublished case, a different panel had found that this was not "custody." *See, State v. Hampton*, Slip Copy, 2004 WL 2160787 (Kan. App. September 24, 2004).

In *State v. Urban*, ___Kan. ___ (September 24, 2010), the Kansas Supreme Court sided with the *Hampton* panel and found that this was not "custody" as contemplated in K.S.A. §21-3810. That statute specifically states that *"'Custody' does not include...constraint incidental to release on bail"* and that is what this was.

The Court concludes by commenting on the *stare decisis* value of the unpublished case, *Hampton*, which was cited and argued by Urban.

"The Court of Appeals panel was correct that it had the right to disagree with a previous panel of the same court. See K.S.A. 20-3018(b) ... And the State is correct that unpublished decisions are generally afforded little precedential authority; indeed, they are not to be cited to a court unless they are significant for issue or claim preclusion or for law of the case or there is no published case on the same point of law. … We are not compelled today, and the district court was not compelled when it dismissed Urban's charge for aggravated escape, to decide this case as we do because of the Hampton *decision. Rather, our result is demanded by the plain language of the governing statute.* Hampton *is merely persuasive authority arising out of factually similar circumstances. We read it, as always, with interest and respect; but we are not bound to follow it."*

WHEN REQUIRED FOR SAFETY OF OFFICER OR SUSPECT, SUSPECT MAY BE MOVED SHORT DISTANCE DURING INVESTIGATORY DETENTION

Richard Barriger's truck was parked partially blocking traffic on a state highway at night. Barriger was relieving himself at the side of the road. When the Trooper approached him he noticed bloodshot eyes, the odor of alcohol and Barriger admitted drinking that night. He had trouble locating his license in his wallet. Because there were no paved shoulders, the area was poorly lit, and they were located at a curve in the road, the Trooper took Barriger one mile down the road to a parking lot to conduct field sobriety tests.

In *State v. Barriger*, ___Kan.App.2d ___ (October 1, 2010), the defendant argued that all evidence obtained in the parking lot must be suppressed because taking the defendant to a different location was an unlawful arrest without probable cause. The Court of Appeals disagreed and found that when it is required for the safety of the officer or suspect, a suspect may be moved a short distance during an investigatory detention if that is consistent with the purposes of the investigation, does not unduly prolong the duration of the detention, and does not otherwise turn the situation into the equivalent of a formal arrest.

MINOR MAY SIGN A DUI DIVERSION AGREEMENT AND BE BOUND BY ITS TERMS INCLUDING SENTENCE ENHANCEMENT UPON SUBSEQUENT DUI CONVICTIONS

In 2007, at the age of 21, Kristina Bishop was convicted of a third-time DUI offense. She had two prior DUI diversion agreements, one in 2002 (when she was 16) and one in 2004 (when she was 18). At sentencing, Bishop argued that since she was only 16 when she entered the 2002 DUI diversion agreement, she lacked capacity to contract and therefore it was not legally binding on her. It should not be counted as a prior, and she should only be sentenced as a second-time offender.

The sole issue in *State v. Bishop*, ___Kan.App.2d ___ (October 8, 2010) was whether a prior DUI diversion agreement entered into by a minor constitutes a prior conviction for sentence enhancement purposes. The Court of Appeals answered in the affirmative. The Court went back over 130 years to *State v. Weatherwax*, 12 Kan. 463 (1874), where a criminal defendant who was under the age of 18 argued unsuccessfully to the Kansas Supreme Court that he could not be bound by a personal recognizance bond. Minors 14 years and older are statutorily held to the same standard as an adult

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Court Watch

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when it comes to traffic offenses, including DUI. In addition, "age" is not a statutorily listed exclusion to entering DUI diversion under K.S.A.§22-2908(b)(1). Finally, the language in K.S.A. §8-1567 requiring that any convictions in a person's *lifetime* must be taken into account when determining the sentence to be imposed, *"clearly and strongly expresses a legislative intent to include any and all of an offender's prior convictions without regard to age."*

Even if this was not so clear, well-formed principles of contract law would support enforcement of the diversion agreement against Bishop. Contracts are enforceable against minors, but voidable if the minor disaffirms the contract in the manner required by the statutes. The minor must disaffirm *"within a reasonable time after attaining the age of majority." See*, K.S.A. §38-102. Here, Bishop made no attempts to disavow the agreement when she reached majority in 2004. In fact, she did not attempt to disaffirm until almost 6 years after she attained majority status, and then only when she was charged with a third-time DUI. This was not a "reasonable time" after reaching majority.

She was properly sentenced as a third-time DUI offender.

FRESH PURSUIT AND ONE PERSON "SHOW-UP"

Harold Windholtz walked in on Robin Galyardt breaking into his business in Pratt. As Galyardt left the scene, Windholtz and another witness, Cross, saw Galyardt and got his license plate number and make and model of car. Within a few minutes, Pratt police sent out an alert for the car. Within another 30 minutes, law enforcement officers from a neighboring county stopped a car matching the description and tags. Pratt officers called the witness, Cross, and transported him to the neighboring county to do a "one-man show-up" at the scene of the stop. Cross identified Galyardt as the burglar. The Pratt officer arrested Galyardt and searched his car, where he found specialized burglary tools.

The first issue in *State v. Galyardt*, ___Kan.App.2d ___ (October 6, 1010), was whether the Pratt officers had jurisdiction to arrest Galyardt outside of Pratt. The Court of Appeals held that they did. This was a case of fresh pursuit even though the officers were not in actual visual pursuit. The crime originated in Pratt, the officers acted without unreasonable delay, the pursuit was continuous and uninterrupted (there need not be continuance surveillance of the suspect or uninterrupted knowledge of the suspect's whereabouts), and the total time elapsed was short. This does not necessarily mean, as the defendant argued, that all that is needed for fresh pursuit is a police alert for a license plate. The Court must consider the totality of the circumstances.

The second issue was whether the "one-man show-up" was unnecessarily suggestive. The Court of Appeals found that although some parts of the identification procedure in this case were suggestive (i.e, the officer told Cross they thought they had found the car and suspect and asked if he would go to identify him), such "show-ups" have been allowed when done shortly after the commission of the offense.

In this case, after an analysis of "*Hunt* reliability factors" (See, *State v. Trammell*, 278 Kan. 265 (2004) and *State v. Hunt*, 275 Kan. 811 (2003)), the Court concluded that the district court did not err in refusing to suppress the identification.

The opinion ends with another discussion of whether the "degree of certainty" factor in weighing the reliability of an identification should be part of the PIK instruction (which was given in this case). The Court of Appeals held that *"[u]ntil our Supreme Court squarely addresses the issue, we must decline to hold that the inclusion of the witness certainty factor as an indicator of reliability of eyewitness identification is clear error."*

ATTORNEY DISBARRED FOR PATTERN OF BIZARRE, DISRUPTIVE AND DISCOURTEOUS BEHAVIOR

In a string of violations almost too bizarre to believe, a Kansas attorney was disbarred for, among other things, a continuous pattern of rude, discourteous, and disruptive behavior toward municipal court clerks, prosecutors, court security officers and judges. You have to read it to believe it. *See, In the Matter of Romious*, ___Kan. ___ (October 8, 2010).

MUST BE A SHOWING OF EXTRAORDINARY NEED TO COMPEL A JUDGE TO TESTIFY ABOUT MATTERS OBSERVED IN PERFORMANCE OF JUDICIAL DUTIES

Asking a district judge to testify is a serious matter and creates sensitive problems requiring delicate attention. Generally, absent a showing of extraordinary need, a judge may not be compelled to testify about matters observed as a consequence of the performance of his or her official duties. This rule allows judges to perform as arbiters of the law without fear of having to provide explanatory testimony, and it prevents juries from being unduly influenced by judges' robes. A judge should only be required to testify if he or she possesses factual knowledge; the knowledge is highly pertinent to the jury's task; and the judge is the only possible source of testimony on the relevant factual information. *See, State v. Comprehensive Health of Planned Parenthood*, ___Kan. ___(October 15, 2010) in which the Court discusses whether or not and to what extent Shawnee County District Judge Anderson would be allowed to testify at trial regarding his role in and possession of documents associated with the Inquisition launched in Shawnee County by then Attorney General Phill Kline regarding abortions performed in the state.

YOGA IMAGERY ON PARKING TICKETS

If you received a parking ticket with yoga poses printed on it, would that make you more likely to be calm and tranquil about getting the ticket?

The city of Cambridge, Massachusetts thinks so. It is looking to cultivate a Zen-like demeanor among parking offenders with the New Age-themed tickets its handing out these days.

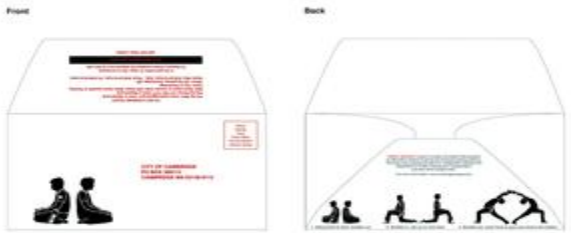
"It's trying to debunk the idea that all parking tickets are a hostile action, because I don't think they are," Susan E. Clippilnger, the city's transportation chief told the Boston Herald.

According to the Herald, the parking ticket makeover in Cambridge—home to Harvard and MIT—is part of a public art project by the city's artist-in-residence, Daniel Peltz. In addition to the 40,000 new parking tickets Cambridge printed, the city is incorporating mood-enhancing imagery in its approach to parking enforcement, as the Herald notes:

"There are new street signs explaining traffic rules in offbeat ways: '10,000 Excuses,' a mural of excuses given by ticketed drivers; and plush, stuffed 'soft boots' to give the ultimate parking penalty a warmer, fuzzier feel."

The artist explained, *"I got a boot once, and I didn't feel bad for me. I felt bad for the car. It looked so humiliated, "* he said. *"With the soft boot, the car can't be humiliated; its' been cared for."*

Other examples, include signs placed for no reason, that say things like *"If you are reading this sign, you're reading this sign."* Or, "Yes" with an arrow pointing one direction and "No" with an arrow pointing another direction.



JUROR FINDS DEFENDANT GUILTY ON FACEBOOK, BEFORE VERDICT

A Michigan juror who indicated in a Facebook post that she believed the defendant in her case is guilty—-before the case went to verdict—-wound up on the hot seat, too, in the Macomb County trial.

The defendant was convicted of resisting arrest after an alternate was substituted for juror Hadley Jons, 20, according to the Associated Press.

Jons apparently wrote this August 11 note to her friends on Facebook, saying that she was *"actually excited for jury duty tomorrow...it's gonna be fun to tell the defendant they're GUILTY.:P"*

The defense lawyer's 17-year-old son discovered the Facebook post by Jons as he was researching jurors on-line for his mother, according to the newspaper. It was posted before the defense had even started its case.

Circuit Judge Diane Druzinski told Jons at her "show-cause" contempt hearing that it didn't matter whether she used Facebook to express an opinion or simply spoke to a friend about the case.

"You violated your oath. ... You had decided she was already guilty without hearing the other side," the judge said.

She was ordered to write an essay about the 6th Amendment to the U.S. Constitution, which guarantees the right to a fair and public trial by an impartial jury, and pay a $250 fine. Jons also apologized to the judge for her behavior. Her attorney commented that he felt the punishment was appropriate.

The Macomb Daily

Step Back in Time

(Continued from page 1)

males and females." What was meant by this phrase did stir up a little controversy.

Carrie B. Winans believed that this provision gave her the right to vote in the general election for the Shawnee County Superintendent for Public Instruction. She went to the voting booth, presented her ticket, and was denied the ability to vote. She sued.

After briefly setting out the issue, with absolutely no discussion of the legal issue raised, in a one sentence, unanimous opinion, the Kansas Supreme Court wrote:

"We hardly suppose it necessary to enter upon an argument on this question, as probably no lawyer in the state, whatever his opinion may be on the general question of "woman suffrage" seriously thinks that women have a legal right to vote for either state or county superintendent of public instruction."

Winans v. Williams, 5 Kan. 133 (1869).

This author has been unable to find any other cases in which the Court has used the *"no lawyer in the state would take this seriously"* standard in rendering its decision.

This did not deter our great-great grandmothers.

Although it was defeated, in 1867 Kansas became the first state in the Union to consider woman's suffrage on a statewide ballot.

In 1873, the issue of women actually casting a ballot again raised its head. This time it was not a general election, but the election for treasurer of the Nemaha County school district. Lawrence Wheeler received 70 votes (10 of which were from women). George Adams received 70 votes (20 of which were from women). A special election was held and Wheeler won with 60 votes. However John Brady, who was the incumbent, refused to relinquish the office because there was "no duly qualified successor." Wheeler brought a lawsuit to force him to hand over the books and papers of office.

Brady argued that women had the right to vote. When each candidate received 70 votes it had the same effect as if there had been no election. The subsequent call for a second election was not signed, as required, by the majority of electors of the district (when you count women as voters), therefore it was null and void as well. Wheeler argued, conversely, that based on *Winans, supra*, women did not have the right to vote in the election, so they were not counted as electors for the purpose of determining the number of signatures necessary for a special election.

In *Wheeler v. Brady*, 15 Kan. 26 (1875), the Kansas Supreme Court held that, unlike *Winans*, this was not a general election, in which women were clearly not entitled to vote. Section 1, Article 5 of the Kansas Constitution read:

"Every white male person, of twenty-one years and upward, belonging to either of the following classes, who shall have resided in Kansas six months next preceding any election, and in the township or ward in which he offers to vote at least thirty days next preceding such election, shall be deemed a qualified elector; First, citizens of the United States, second, persons of foreign birth who shall have declared their intention to become citizens conformably to the laws of the United States on the subject of naturalization."

Article 4, section 2 of the Kansas Constitution provided for the right to vote in township elections, again excluding women. Other constitutional provisions established various officers that would be elected positions (i.e. governor, secretary of state, superintendent of public instruction, etc). The Constitution also provided that *"all officers whose election or appointment is not otherwise provided in the Constitution, were to be chosen or appointed as proved by statute."*

The statute regarding school district elections stated that *"the inhabitants qualified to vote at a school meeting, lawfully assembled, shall have power...to choose a director, clerk and treasurer."* (Gen. Statute 918). The next statute went on to state:

"The following persons shall be entitled to vote at any district meeting: First, *all persons possessing the qualifications of electors, as defined by the constitution of the state, and who shall be residents of the district at the time of offering to vote at said elections;* second, *all white female persons over the age of twenty-one years, not subject to the disqualifications named in section second, article fifth, of the constitution of this state, and who shall be residents of the district at the time of offering to vote."* (Gen.Statute 919).

Therefore, the Court reasoned, women had the right to vote in school district officer elections. Since the special election petition was not signed by a majority of voters in the district once you included women in the count, the petition was insufficient to allow for the special election. Brady did not have to turn over the office and the voters had to start anew.

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"We ask the judges to render true and unprejudiced opinions of the law, and wherever there is room for a doubt to give its benefit on the side of liberty and equal rights to women, remembering that "the true rule of interpretation under our national constitution, especially since its amendments, is that anything for human rights is constitutional, everything against human right unconstitutional."

Susan B. Anthony, speech "On Women's Right to Vote" 1873

Step Back in Time

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Justice Valentine, writing for the Court, made a bold statement for his time:

"[W]hat is there to prevent the right of suffrage in school-district elections upon women? There is nothing in the nature of things, or in the nature of government, which would prevent it. Women are members of society, —members of the great body politic, citizens,—as much as men, with the same natural rights, united with men in the same common destiny, and are capable of receiving and exercising whatever of political rights may be conferred upon them."

[Justice Daniel Mulford Valentine hailed from Ottawa and served on the Court for 24 years, a record obtained by only a handful of justices, and beaten by even fewer, one of which was the first woman on the Court, Chief Justice Kay McFarland].

It was 1881 before the first woman was sworn in as an attorney in Kansas, Jennie Mitchell Kellogg. But, she still couldn't vote in a general election.

In 1887, women in Kansas won "municipal suffrage" giving them the right to vote in city elections and run for local office. They wasted no time. By April 1887, Susannah Medora Salter was elected mayor in Argonia (Sumner County), becoming the first woman mayor in the nation. By the close of 1889, a total of 15 Kansas cities had a woman elected as mayor.

Topeka Suffragettes

In 1897, Topekan Lutie Lytle became only the third African American woman lawyer in the United States, and the first African American woman lawyer admitted to the Kansas bar. In 1898, she joined the faculty at her alma mater, Central Tennessee, and became the only female law instructor in the world at the time. But she did not have the right to vote.

In 1911, the suffrage amendment was resubmitted to the Kansas legislature and passed by a vote of 94 to 28. In 1912, Kansas became only the 8th state in the Union to grant women the right to vote.

By 1918, Kansas had elected its first woman to statewide office, a lawyer, Lorraine Elizabeth Wooster, as superintendent of public instruction. Lizzie, as she was called, also served as vice-president of the National Association of Women Lawyers.

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The Suffrage Song Book

Copyright 1909

By Henry W. Roby

WOMAN'S RIGHTS

Sung to the tune of : Battle Hymn of the Republic

It is the right of every woman
To mark out her path in life,
And to be a saint or soldier,
Or a true and loving wife;
To fill the soul with gladness,
And recall the world with strife,
As she goes marching on.

CHORUS:
Glory, glory, hallelujah!
Glory, glory, hallelujah!
Glory, glory, hallelujah!
As she goes marching on.

It's her right to serve the nation
In its every hour of need,
Her right to sit in judgment
On her country's faith and creed,
And show the world her courage
By some high, heroic deed,
As she goes marching on.

CHORUS.

It's her right to train the children
In the home and in the school,
To help in framing statutes
And determine who shall rule,
And, like man, to cast her ballot
For a statesman or a fool,
As she goes marching on.

CHORUS.

Topeka Woman's Suffrage Rally

Step Back in Time

(Continued from page 12)

In 1919, the first woman was elected to the Kansas House of Representatives, Minnie Grinstead, Crawford County. At first the men of the House were skeptical, to say the least. *"They believed*," reported the *Kansas City Star* (November 17, 1920), "*that Mrs. Grinstead would be a 'fussy' member, and that she would scold and find fault, and 'nag' them for smoking cigars. They had visions of having to speak in whispers when they wished to express their thoughts in the plain Kansas language."*

Although Representative Grinstead did oppose tobacco use and introduced a bill to strengthen the state's anti-smoking statute (didn't we just address that in the 2010 Legislature?), she impressed those with whom she served, and in 1921 three additional women joined her in the Kansas House of Representatives. Minnie later returned to Liberal where she was elected Probate Judge.

In 1920, the 19th Amendment was ratified and women earned the right to vote and run for office at all levels of government.

Kansas women have continued to pave the way. Here are just a few early pioneers in the field of politics:

In 1926, Mabel Chase, Kiowa County, became the first woman elected Sheriff in the United States.

In 1930, Kansans elected Kathryn O'Loughlin McCarthy, Hays, to the U.S. House of Representatives and in 1978 they sent Nancy Landon Kassebaum to the U.S. Senate (only the second woman to be elected to the Senate in her own right, not preceded by a husband or appointed to fulfill an unexpired term).

In 1949, Georgia Neese Clark Gray, Richland, became the first woman to serve as Secretary of the U.S. Treasury Department, her signature appearing on all U.S. Currency minted from 1949-1953.

Happy Birthday 19th Amendment!

Much of the information for this article was obtained from documents on *Kansas Memory*, a website created by the Kansas State Historical Society, to share its historical collections via the internet. http://www.kansasmemory.org, and the *Kansas Historical Society* website, http://www.kshs.org.

Kansas Memory

Kansas State Historical Society

RATIFICATION OF THE 19th AMENDMENT

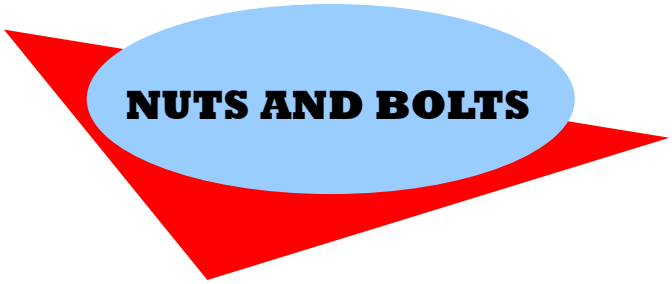
When thirty-five of the necessary thirty-six states had ratified the 19th amendment to the United States Constitution, the battle came to Nashville, Tennessee. Anti-suffrage and pro-suffrage forces from around the nation descended on the town. And, on August 18, 1920, the final vote was scheduled.

One young legislator, 24 year-old Harry Burn had, up to that time, voted with the anti-suffrage forces. But his mother had urged that he vote for the amendment and for suffrage. It was a letter from his mother asking him to vote in favor of the amendment that helped change his mind. Mrs. J. L. Burn (Febb Ensminger) of Niota, Tennessee, had written a long letter to her son, a copy of which he held during the voting session on August 18, 1920. The letter contained the following:

> ***Dear Son: Hurrah and vote for suffrage! Don't keep them in doubt! I notice some of the speeches against. They were bitter. I have been watching to see how you stood, but have not noticed anything yet. Don't forget to be a good boy and help Mrs. Catt put the "rat" in ratification.***
>
> ***Your mother***

After much debating and argument, the result of the vote was 48-48. Burn's vote broke the tie in favor of ratifying the amendment. He asked to speak to the House the next day and told them he changed his vote because his mother asked him to and that she had always taught him that *"a good boy always does what his mother asks him to do."*

Women marching on Nashville before the historic vote making Tennessee the last state to ratify the 19th Amendment



Question: When a defendant held in jail is taken to a hospital for medical attention, do courts routinely discharge the defendant from custody to avoid medical expenses?

Answer: Judges should consider many factors in deciding whether or not to release a defendant from custody. The reason the defendant is in custody, the risk to public safety if released, the likelihood of the defendant re-appearing in court at a later time and the health of the defendant are just few of the considerations. This question really comes from a concern that the City will be in a position to have to pay the defendant's medical expenses if not released.

Kansas caselaw is pretty clear that the sheriff and/or arresting agency is responsible for furnishing medical attention to a prisoner in need. If the prisoner is being held on a state charge, the county would pay. If the prisoner is being held on a city charge only, the city would be responsible for payment. *See*, *Wesley Medical Center v. City of Wichita et. al*, 237 Kan. 807 (1985); *Dodge City Medical Center v. Board of County Commissioners of Gray County*, 6 Kan.App.2d 731 (1981); *Mt. Carmel Medical Center v. Board of County Commissioners of Labette County*, 1 Kan.App.2d 374 (1977).

K.S.A. §22-4612 states that a city or city law enforcement agency shall be liable to pay a health care provider for health care services rendered to persons in the custody of said agencies at either the billed rate or the Medicaid rate, whichever is less. If the defendant is covered by an individual or group health plan, the city becomes a secondary source of payment, with the private health insurance being primary.

If the only other source of payment is another governmental agency, such as SRS, the first public entity with an obligation to pay must pay. *See, Dodge City Medical Center v. Board of County Commissioners of Gray County, id.*

K.S.A. §22-4613 states that *"A law enforcement officer having custody of a person shall not release such person from custody merely to avoid the cost of necessary medical treatment while the person is receiving treatment from a health care provider unless the health care provider consents to such release,* ***or unless the release is ordered by a court of competent jurisdiction."***

"A court of competent jurisdiction" is not defined anywhere in the Kansas statutes but is generally used to mean a court that properly/legally/statutorily has jurisdiction over the defendant or the action at issue. Black's Law Dictionary defines it as : *"The court that has the power and authority to do a particular act; one recognized by law as possessing the right to adjudicate a controversy."* A municipal judge would be a court of competent jurisdiction when dealing with a defendant who is being charged or has been charged through the municipal court.

K.S.A. §21-4603d(a)(8) allows the district judge to order the defendant, upon conviction, to repay the amount of any medical costs incurred by any law enforcement agency or the county upon conviction. *See also*, *State v. Durham*, 38 Kan.App.2d 791 (2007). There is no similar provision in the code of procedure for municipal courts. However, K.S.A. §12-4509, dealing with conditions of probation, does state that the Court is not limited to only the dispositions listed, therefore repayment for medical expenses could be a condition of probation. Your city could always charter out of K.S.A. §12-4509 (or any other provision) and adopt substitute provisions to provide for repayment of medical expenses as an acceptable disposition if your city attorney does not believe the "not limited to" language is sufficient.

Some cities have agreements with their respective counties to have the county pick up the tab and then submit the bill to the City for reimbursement, since counties can sometimes work out more favorable reimbursement rates with local hospitals and health care providers for indigent defendants.

See also, The Verdict, Fall 1998, p. 4.

Question: Does the Municipal Court have indirect contempt power to incarcerate for non-payment of fines? Please review In re Administration of Justice Eighteenth Judicial District 269 Kan. 865 (2000).

Answer: Yes. K.S.A. §12-4510 specifically states that *"failure to pay in the manner specified may constitute contempt of court."* A show cause order must issue, be served on the accused, and if it is possible that you may jail the defendant, you must advise him or her of the right to court appointed counsel and appoint an attorney if the accused cannot afford one. *See*, Kansas Municipal Court Judges Manual, Chapter 17 for a detailed description of contempt powers, procedure and sample forms.

The only court case to question this authority was the *In re: Eighteenth Judicial District* case cited above. In his **dissenting** opinion, which carries no precedential value, Judge Leben stated that failure to pay a fine is not direct contempt of court, but indirect contempt of court. He went on to state that municipal courts have no inherent authority to punish for indirect contempt of court and any such authority would have to be statutorily granted. He concludes that there is no statutory authority. However, he fails to address the specific statutory authority for such action contained in K.S.A. §12-4510.

In full consideration of and with due respect for Judge Le-

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Nuts and Bolts

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ben's opinion, the Municipal Court Judges Manual Committee stands behind the material contained in Chapter 17 of the Manual and believes that municipal courts do have the authority to punish for indirect contempt of court for failure to pay a fine as long as the proper procedures are followed.

Question: I had a request filed by an attorney from another state seeking to appear "pro hac vice." What is that?

Answer: *Pro hac vice* is Latin meaning *"for this occasion or this particular purpose."* It usually refers to a lawyer who has not been admitted to practice in a particular jurisdiction but who is admitted there temporarily for the purpose of conducting a particular case.

It is against the law to practice law in Kansas without being duly licensed by the Supreme Court to do so. K.S.A. §21-3824. However, Kansas, like most states and the federal courts, does have a procedure to allow admission of attorneys *pro hac vice* (for a particular case or appearance). *See*, Kansas Supreme Court Rule 116 and D.Kan.Rule 83.5.4.

If an attorney is licensed and in good standing in another state, he or she may make a motion before any Kansas court to appear on a particular case only. However, the out-of-state attorney must be associated with a Kansas attorney in good standing who shall sign all pleadings and appear with the out-of-state attorney at all court appearances. The motion must be made by the Kansas attorney with a supporting verified affidavit from the out-of-state attorney containing certain information set out in the Rule. The out-of-state attorney must have a motion and affidavit on file for each cased he or she wishes to appear in.

Question: With the recent changes in reinstatement fees, do we collect the reinstatement fee that existed at the time the person was suspended (and received a letter from the DMV stating the reinstatement fee) or the reinstatement fee that is in effect at the time the person pays the fee?

Answer: It is the opinion of the Kansas Municipal Court Judges Manual Committee that the "surcharge" that has been imposed in the last two years in K.S.A. §8-2110(e) is an administrative fee that is assessed on top of the reinstatement fee. The reinstatement fee has remained $59 as stated in the letter, it is simply an additional surcharge imposed by the Supreme Court (2010 SC 30) that has been adopted As a new surcharge or special assessment, it is assessed at the time the person pays the reinstatement fee. Had the person paid the reinstatement when first notified, he or she could have avoided the surcharge. Those who wait to pay assume the risk that the amount may change by legislative enactment or court order.

Question: Can municipalities charge 3rd or more DUI offenses as misdemeanors?

Answer: Maybe.

According to *City of Junction City v. Cadoret*, 263 Kan. 164 (1997), municipal courts do not have jurisdiction over third-time DUI offenses because said offenses are classified as felonies under state law. However, read on because some post *Cadoret* history is in order.

Given the jurisdictional limits set out in *Cadoret*, what if the offense is charged as a first or second offense, over which cities do have jurisdiction, but turns out to really be a third or subsequent offense? Or what if a person has two prior offenses, but one was uncounseled with no waiver so it cannot be counted as a prior for sentencing purposes? Can the City charge the defendant as a second-time offender? Does the city have jurisdiction based on the charge or based on a simple numeric count of prior offenses (regardless of whether those priors will be allowed to be counted as priors under existing caselaw)?

A defendant is not required to reveal his or her prior convictions, the prosecution has the burden of proving priors. The defendant can even lie about his priors. So what if all the evidence before the Court is that the defendant is a second-time offender, he is charged as a second-time offender, and then several years later when he is facing a felony DUI offense in district court, he asks to strike the prior municipal conviction because the court was without jurisdiction, making him a third-time offender, instead of a fourth-time offender?

Meet *State v. Elliott*, 281 Kan. 583 (2006), where the Kansas Supreme Court indicated it was going to look beyond the face of the complaint for jurisdiction. Regardless of whether a DUI is charged as a first or second, regardless of whether or not the priors can be used to enhance the defendant's sentence, regardless of whether or not the Court is aware of the priors, if a defendant has two prior DUI convictions, the municipal court has no jurisdiction over the next one. The *Elliott* Court failed to explain how it reconciles its decision with *City of Dodge City v. Wetzel*, 267 Kan. 402 (1999) .

In *Wetzel*, the Supreme Court found that the defendant's municipal court conviction as a second-time offender was not void, even though by the time the conviction was final, it was actually a third DUI (defendant had an intervening conviction in another county by the time he was finally convicted and sentenced as a second-time offender following a *de novo* appeal). The result was the defendant ended up with three misdemeanor DUI convictions, all valid according to the *Wetzel* court. However, according to *Elliott*, one of those would not be valid.

See, Verdict, Summer 2006, p. 1 for a complete discussion

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Nuts and Bolts

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of the *Elliott* decision.

Needless to say, this had significant ramifications on DUIs and many other criminal charges filed in municipal courts that result in felony enhancement based on number of prior offenses.

In 2007 the legislature changed several statutes in an attempt to address the *Elliott* problem. First, K.S.A. 2009 Supp. §12-4104 was amended to give municipal courts concurrent jurisdiction with district courts on all DUI, domestic battery, theft, possession of marijuana and worthless checks, even enhanced violations. K.S.A. §22-2601 was amended to give district courts exclusive jurisdiction (except as provided in K.S.A. §12-4104) over all cases charged under the **state statutes**. And finally, K.S.A. §8-1567 was amended to allow jurisdiction over enhanced DUIs charged in municipal court. *See*, Verdict, Summer 2007, p. 1 for full discussion of changes.

Following these changes, in 2007, the Attorney General issued an opinion that municipal courts have subject matter jurisdiction to hear certain ordinance violations that could be prosecuted as felony crimes in district court. Convictions under such ordinances will be misdemeanor convictions - not felony convictions. Moreover, a municipal court has jurisdiction in third and subsequent driving under the influence (DUI) violations where: (1) the ordinance violation occurred on or after July 1, 2006; and (2) the city has enacted an ordinance subsequent to July 1, 2007 giving its municipal court jurisdiction over third and subsequent DUI ordinance violations. *See*, AG Opinion 2007-26.**

In 2009, subsection (r) of K.S.A. §8-1567 was amended to further address the court's ability to have up-to-date information regarding the defendant's criminal history, because the problem of discovering the defendant's lifetime criminal history has always been a challenge. That subsection requires that upon filing of the complaint and prior to conviction the city attorney must request and receive a record of all prior convictions from the division of motor vehicles and the KBI (although convictions prior to 1996 were all wiped off by the DMV several years ago). It then goes on to **require** that if the charge would be **"punishable as a felony"** the city attorney is **required** to forward the case to the county or district attorney for prosecution.

Therefore, it would appear that as to DUI charges, if the DMV and/or KBI record would indicate that it is a third or subsequent DUI and it would be punishable as such, the city attorney is required to send the case to the district attorney. However, if it is a third or subsequent offense and could not be punished as such (because there is no valid waiver, for example), the city could prosecute the case in municipal court as a misdemeanor.

In addition, in 2009, K.S.A. §12-4517 was amended to require that the municipal court judge ensure that all persons arrested for DUI are fingerprinted either at booking or upon first appearance in court. Again, this was done in an effort to make sure DUI convictions are recorded in a timely manner so courts will be able to locate them at sentencing. It is not unusual for repeat DUI offenders to have several pending at the same time in differing jurisdictions.

The whole point of these changes was not to try felonies in municipal court, but to prevent defendants from later arguing that the municipal court lacked jurisdiction over a prior conviction and thereby avoid enhanced penalties. Regardless of how a prior conviction may have been sentenced, subsequent courts are not bound by prior designations. So, for example, if a person was treated as a first-time offender in municipal court, but they were really a second-time offender (so under any theory the municipal court had jurisdiction), the third offense could be charged as a third offense. The district court is not bound by the designation given by another court if the prosecution is able to prove additional priors. However, conversely, under some circumstances, the prosecution is able to rely on a journal entry to prove priors listed in the journal entry. *See, State v. Kralick*, 32 Kan.App.2d 182 (2003).

Judges should also be cognizant of the fact that the DUI law also contains a "no plea bargaining provision." Therefore, it would appear to be a violation of that provision for a prosecutor to charge a person as a misdemeanant when the prosecutor knows the defendant to be at the felony level (and punishable as such) in an attempt to avoid the mandatory penalties. *See*, K.S.A. §8-15679(s) and STO §30(o).

If your city has adopted the STO or the UPOC, these documents do **not incorporate the enhanced jurisdiction. *See,* Editor's Note following §30 of the STO. Therefore, if you are relying on the AG opinion, your city would have to adopt an ordinance also granting concurrent jurisdiction.

See also, *State v. Mosely*, Slip Copy, 2010 WL 3636271 (Kan. App. September 10, 2010), p. 22, *supra*, wherein the panel held that based upon *Elliott*, where a municipality had not incorporated the enhanced jurisdiction of K.S.A. *2009 Supp. §8-1567(q)(1)(B)*, a municipal court conviction for a third-time DUI offender was void.

Question: In the middle of a trial, right before the officer was about to testify about some incriminating statements the defendant made, the defense attorney objected to the testimony on the basis of the violation of Jackson v. Denno. He said his client was entitled to a Jackson v. Denno hearing, and none having been provided the officer could not testify regarding the statements made by the defendant. Is this true? What is a Jackson v. Denno hearing?

Answer: In *Jackson v. Denno*, 378 U.S. 368 (1964), the

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Nuts and Bolts

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United States Supreme Court held that a defendant in a criminal case has a due process right to have a fair and reliable determination of the voluntariness of any confession. We most often see the request for such a determination as part of a motion to suppress. However, the right to a hearing on the voluntariness of the confession has also been codified in Kansas at K.S.A. §22-3215. This statute provides that a defendant may move to suppress a confession or admission prior to trial by making a written motion setting out the grounds. If the motion alleges grounds which, if proven, would make the confession inadmissible, the court is required to conduct a hearing on the merits of the motion. The burden is on the prosecution to show the confession or admission is admissible. The statute goes on to state that if there was no opportunity to make the motion prior to trial or if the defendant was not aware of the grounds for the motion, the court, in its discretion, may entertain the motion during trial.

If the motion is made during trial, as in your example, the correct procedure would be to require counsel to state the reason for the motion. If the reason stated would be sufficient to suppress the confession, you would "pause" the trial and have a hearing solely on the issue of the voluntariness of the confession or admission. After a ruling is made, you

Part of ad campaign in Texas to combat game-day drinking and driving.

KMJA MOURNS LOSS OF JIM WELLS

James Edward Wells passed away on September 19, 2010. He was an active member of the KMJA from its infancy. He served for over 25 years on the Municipal Judges Testing and Education Committee and was a former President of the organization. .

Jim was born July 27, 1932 in Seattle, Washington. He graduated from Washburn Rural High School in 1950. He attended the University of Washington and received a B.A. from Washburn University in 1954. In 1963, he received his legal degree from the Washburn University School of Law.

Judge Wells is preceded in death by his mother, Florence Kirkpatrick, Topeka, and his loving wife of over 30 years, Lorene Wells in 1985. His is survived by his four children, Doug Wells (Jeanine), Topeka, Chris Dennis, Ozawkie, Sheryl Wells, Lowell, MA and Wendy Wells (Boyd Jantzen), Topeka; 6 grandchildren, 6 great-grandchildren, and his dear companion of many years, Maxine Dever.

Judge Wells proudly served his country as a Captain in the United States Air Force for a six year period. In this commission he supervised over 200 dedicated men stationed in Tokyo, Japan. Judge Wells had an extensive professional career beginning with practicing law from 1963-1978. Wells served as the Assistant City Attorney for Topeka, Kansas. In 1964, Wells was instrumental in the revision of City of Topeka ordinances, as well as the analysis of ordinances for constitutionality. From 1965-1967, he was the Attorney for Shawnee County Welfare Department. In 1968, he performed services as the Motor Carrier Hearing Examiner for the Kansas Corporation Commission. His career continued to advance when he was appointed the Workmen's Compensation Director for the State of Kansas in 1969. Continuing his community service, he was appointed the General Counsel of the Kansas Corporation Commission in 1971. He was promoted to Commissioner of the Kansas Corporation Commission in 1974. Judge Wells was most proud of the service he provided to the City of Topeka as the Municipal Judge, where he served from 1979-1994 for three different mayors, McCormick, Wright and Felker, the longest in Topeka's modern history. He was instrumental in making monumental functionality, structural, organization and revenue changes. After Judge Wells retired as Municipal Court Judge, he was commissioned as the District Court Judge Pro Tem, for Shawnee County. He tirelessly served in this capacity from 1996-2008. He also proudly served as a member of the Supreme Court on Judges Judicial Testing, as well as the President of the Kansas Municipal Judges Association.

The Judge was a tireless servant of the people throughout his career. His high level of community consciousness, responsibility and dedication resulted in many contributions of his personal time and legal expertise in many capacities. He was even called Santa Judge for his yearly visit to the jail on Christmas day to review records of prisoners to seek a means to release them for the holidays.

Those wishing to honor Judge Wells memory may choose to make a contribution to Midland Hospice or American Cancer Society in care of Davidson Funeral Home. Online condolences may be left at davidsonfuneral.com.

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 of interest to municipal courts.

SIGNING A FALSE NAME AND SSN ON BOOKING DOCUMENTS IS NOT FORGERY

Unpublished Decision

Antonio Rodriguez was arrested in 2004 for transporting an open container. While being booked into the jail (which they apparently do for an open container charge in Seward County) he gave a fictional name and a fictional social security number. He signed several booking documents with this false information. Four years later an officer in Liberal discovered Rodriguez's 2004 lie. He was charged with and convicted of forgery.

In *State v. Rodriguez*, Slip Copy, 2010 WL 3324093 (August 20, 2010), Rodriguez argued that his actions could not be classified as forgery because no one was deprived of any property right as a result of his actions. The Court of Appeals agreed.

Forgery is defined as knowingly "*with the intent to defraud"* endorse a written instrument so that it purports to have been endorsed by another person, either real or fictitious, without that person's consent. *"Intent to defraud"* is defined as *"an intention to deceive another person and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property." "Property"* is defined as *"anything of value, tangible or intangible, real or personal."* Since the State could not establish that Rodriguez falsified the documents with the intent to induce a person or agency to transfer or alter a property right, he could not be guilty of forgery. The inability of the State to properly record his convictions and review his criminal history as a result of the deception, was not a property right.

DUI OFFENDER WHO GETS SEVERAL DUIS IN A SHORT TIME FRAME IN DIFFERENT JURISDICTIONS CAUSES MASS CONFUSION IN RENO COUNTY

Unpublished Decision

Municipal judges can appreciate this next set of facts as something not at all uncommon in our courts as DUI offenders try to juggle and conceal cases in other jurisdictions.

Charles Rowland pled guilty to a 3rd time DUI in Reno County. However, he was really a 4th time offender. In addition, on the same day he ran over to Sedgwick County and pled to yet another DUI, this time as a 1st time DUI, misdemeanor. (They were apparently unaware of any of his priors).

The Reno County case had been set over for a presentence investigation, when the defendant's shenanigans in Sedgwick County were discovered. However, the judge found that since Rowland pled to and was found guilty of a 3rd time DUI, it was limited to the penalties for a 3rd time offender. Although the parties had a plea bargain for the mandatory minimums (48 days in jail followed by 88 days house arrest), the judge gave Rowland a year in jail and told him he would not review the case for probation until at least 90 days had been served. Just shy of 90 days, Rowlands filed a motion to set aside the plea arguing that the State had violated the plea agreement by recommending Rowland be sentenced as a 4th time offender. The judge denied that motion, but instead said he would set aside the sentencing because of the violation of the plea agreement. He then assigned the case to another judge for re-sentencing. (Are you following this?)

At resentencing, the State argued that the new judge did not have any jurisdiction to resentence the defendant. The new judge took the issue under advisement. After getting wind of the jurisdictional argument, the original judge swooped in and took the case back. The State again argued to the original judge that he had no jurisdiction to resentence the defendant. The judge argued that he wasn't modifying a sentence, he was instead resentencing, a "do-over" more or less, and he felt this was proper because the State had violated the defendant's due process rights by not following the plea agreement. The judge chastised the State for making a jurisdictional argument.

In *State v. Rowland*, Slip Copy, 2010 WL 3324677 (August 20, 2010), the Court of Appeals found it did not have jurisdiction to hear an appeal by the prosecution under these facts unless the issue is one of statewide importance. It found that this was not, and refused to consider the case.

However, in *dicta*, the Court did state that the district judge had no jurisdiction to "resentence" the defendant

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pursuant to *State v. Trostle*, 41 Kan.App.2d 98 (2009). It also found that the State was not bound by its plea agreement because the new conviction resulted in a change of circumstance sufficient to relieve the State of its obligation.

"FAMILY RELATIONSHIP," FOR PURPOSES OF DOMESTIC BATTERY, INCLUDES FORMER STEPPARENTS AND STEPCHILDREN WHO NO LONGER RESIDE TOGETHER

Unpublished Decision

Joseph Hulse was married to Janie. Janie had a son, Blake, from a previous relationship. The three of them lived together in Lindsborg off-and-on for several years, during which time they obtained a divorce. They had three children together after the divorce, but never remarried, and continued to cohabitate for approximately 10 years, when, Hulse moved out and maintained his own residence.

Six or seven years later, Blake, by now 19 years-old, was still living at the same house with his mom (Janie) when Hulse came over. Blake tried to get him to leave but he refused and grabbed Blake by the throat and pushed him up against the door.

The City of Lindsborg charged Hulse with domestic battery and he was convicted in municipal court and, on appeal, in district court. On appeal to the Court of Appeals, Hulse argues that he cannot be convicted of domestic battery because there was no family relationship between he and Blake.

The Court of Appeals disagreed. In *City of Lindsborg v. Hulse*, Slip Copy, 2010 WL 3323810 (August 20, 2010), the Court noted that the city ordinance (UPOC §3.1.1(a)(2)) and the state statute (K.S.A. §21-3412a(a)) define a *"family or household member"* to include former stepparents and stepchildren who presently reside together or *"who have resided together* ***in the past.****"* Hulse and Blake fit that definition. The conviction stands.

A FORGETFUL WITNESS IS NOT NECESSARILY AN "UNAVAILABLE" WITNESS

Unpublished Decision

K.F., a juvenile, along with others, was held at gunpoint while gunman robbed Crystal Ferguson's apartment. It turns out K.F. knew the gunmen, and in fact, K.F. was to make sure Crystal was home, to make sure the door was unlocked and to "get on the floor and scream like she was scared." She revealed all of this to detectives who questioned her after the robbery. K.F. pled to aggravated robbery in exchange for dismissal of a conspiracy charge in juvenile court.

K.F. was called to testify in the trial of one of the gunmen, Mark Phillips. She was designated as a hostile witness. She testified that what she had told the detectives was not true and that she just told them what they wanted to hear. She denied knowledge of who the gunmen were. She stated there were many things she did not remember. At times her memory was refreshed by looking at the police interview transcript, at times it was not. Over the defendant's objection, the State introduced an audio tape (with transcription) of K.F.'s interview with detectives. Phillips was convicted.

On appeal, Phillips argues that his right to confrontation was denied when he was unable to adequately cross-examine K.F. due to her lack of memory. Letting in the audiotape of her conversation with police since he did not have a chance to cross-examine her, was error. The ultimate question was whether or not K.F. was "available" for trial.

In *State v. Phillips*, Slip Copy, 2010 WL 3324437 (August 20, 2010), the Court of Appeals held that K.F. appeared at trial. She did remember some things. She did not assert her Fifth Amendment rights and refuse to testify, nor did she have a **complete** loss of memory, both of which would have engaged the Confrontation Clause. Loss of memory is a well-established subject for cross-examination. The Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defense may wish. In this case, defense counsel did cross-examine K.F. for several pages of trial transcript. The Court cited *State v. Hobson*, 234 Kan. 133 (1983) as very close factually with the same result. The defendant's right to confrontation was not denied.

ICE PICK IS CLEARLY A DANGEROUS WEAPON

Unpublished Decision

Michael Purcell was arrested and while being booked, a 6-inch long ice pick was found on him (among various other illegal items). He was charged with criminal use of a weapon in violation of K.S.A. §21-4201 (a)(2) (UPOC §10.1(a)(2)).

Unlawful use of a weapon is knowingly:

> *"(2) carrying concealed on one's person, or possessing with intent to use the same unlawfully against another a...dangerous knife, straight-edged razor, stiletto or any other dangerous or deadly weapon or instrument of like character…"*

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Purcell argued that this statute is unconstitutionally vague because seemingly innocuous items (such as common tools) could be construed as being *"dangerous, or deadly weapons or instruments of like character."*

In *State v. Purcell*, Slip Copy, 2010 WL 3488811(Kan. App. August 27, 2010) the Court of Appeals examined the meanings of the words "instrument", "utensil" and "weapon" and concluded that not all instruments are weapons, because not all instruments are designed to be used to injure or kill someone. But all weapons meet the definition of "instrument." Therefore, a "dangerous instrument" is an instrument that is likely to produce death or seriously injury when used as a weapon. Regardless of whether the instrument (or tool) is designed for an innocuous purpose, if a person carries a tool or instrument concealed on his person with the intent to use it unlawfully against another, he has violated the statute. The statue conveys a sufficiently definite warning of the conduct proscribed when measured by common understanding and practice, and the statute is not susceptible to arbitrary and discriminatory enforcement.

Although an ice pick is generally considered a tool or instrument designed for an innocuous purpose (i.e. to break up a block of ice), it shares similar characteristics with the items listed in the statute and it is likely to cause death or serious injury when used as a weapon. The statute is not unconstitutional and Purcell's conviction stands.

ONE THREAT, THREE PEOPLE THREATENED = THREE CHARGES

Unpublished Decision

Kelly, Shawn, Katie, Amanda and Kameron King were all in Kelly's house. There had been on-going drama that day among them. Kelly was the mother of King's children. They had split up and she was seeing someone else. King was in a jealous rage most of the day, culminating in the events at Kelly's house. Shawn (Amanda's husband) and King began to fight. King threatened to shoot Shawn if he didn't leave the house in 10 seconds. While making this threat he reached behind his back as if he had a gun. Katie and Amanda were within 15 feet of Shawn during this exchange. Katie, Amanda and Shawn left, leaving Kelly in the house, with King outside trying to kick in the door. Eventually, King set the house on fire.

King was charged and convicted of, among many other things, three counts of criminal threat resulting from the threat made to Shawn in front of Katie and Amanda. The issue in *State v. King*, Slip Copy, 2010 WL 3488659 (Kan. App. August 27, 2010) was whether this was multiplicitous, requiring only one conviction, not three. King argued that the "unit of prosecution" should be the number of threats made, one. The prosecution argued that the "unit of prosecution" was the number of people threatened, three.

The Court of Appeals held that King was properly convicted of three separate charges. K.S.A. §21-3419(a)(1) states, in pertinent part:

"A criminal threat is any threat to (1) Commit violence communicated with intent to terrorize another, ...or in reckless disregard of the risk of causing such terror…"

When a person intends to terrorize more than one person with a single threat or makes a single threat in such disregard of others that it terrorizes more than one person, the Court opined, the legislature has made it a separate crime with respect to each person terrorized. Here, King acted intentionally regarding one victim, Shawn, and recklessly with regard to the other two, Katie and Amanda. The jury could have reasonably found three separate offenses, thus they are not multiplicitous.

Editor's Note: *But see*, State v. Whetstone, *43 Kan. App.2d 650 (2010), where a different panel seems to have come to the opposite conclusion.*

OFFICER STOPS VEHICLE FOR VIOLATION OF ORDINANCE, BUT CITES THE WRONG ORDINANCE

Unpublished Decision

Officer Hayes stopped Brock Gibby for "excessively loud music heard at a distance of 50 feet or more from the car." He cited Manhattan municipal ordinance §31-19 as the basis for his stop. After the stop, he found marijuana and drug paraphernalia. Well, it turns out, it was undisputed that §31-19, was not applicable. The correct code section was §22-54.

The officer did not have a lapse of memory, he actually believed §31-19 was applicable, when it was not. He made a mistake of law the Court of Appeals held in *City of Manhattan v. Gibby*, Slip Copy, 2010 WL 348815 (Kan. App. August 27, 2010). Does such a mistake require suppression of the evidence (marijuana and paraphernalia)?

Reasonable suspicion is a particularized and objective basis for suspecting that the person stopped is involved in criminal activity. When deciding if an officer had good reason to make a stop, a reviewing court must examine the officer's suspicion in light of all the circumstances, giving deference to a trained law enforcement officer's ability to distinguish between innocent and suspicious circumstances.

In this case, Officer Hays heard loud music coming from Gibby's car from over a block away. This was a violation of city ordinance, just not the one he

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thought it was. It is immaterial that he made a mistake as to the code section violated. He had a reasonable suspicion of criminal activity and therefore, Gibby's car was properly stopped.

NO VIOLATION OF PRIVACY WHEN COURT MAKES A CONDTION OF PROBATION THAT DUI DEFENDANT COMPLY WITH MENTAL HEALTH EVALUATION

Unpublished Decision

Deseria Dickerson was convicted of DUI. As a condition of her probation, she was required to *"comply with mental health recommendations."* She argued that this was an unlawful invasion of her privacy because it gave probation officers access to all of her mental health records, not just those pertaining to alcohol or drugs. The district court overruled her objection, stating that Dickerson was simply ordered to comply with recommendations, not hand over all of her medical records. She appealed.

In *State v. Dickerson*, Slip Copy, 2010 WL 3564733 (Kan. App. September 3, 2010), the Court of Appeals held that the purpose of establishing conditions of probation is to make probation conducive to a defendant's rehabilitation. The district court had noted that this was "necessary so that she has the potential for success in this probation." Therefore, because it was aimed at aiding her rehabilitation, it was a reasonable condition of probation.

STATE HELD TO THE CHARGING DOCUMENT

Unpublished Decision

Oliver McWilliams was convicted of making a false claim to the Medicaid program. He was being paid by the program to be personal care attendant (PCA) for his wife. As part of the agreement, he was paid $7.75 per hour for assisting her. He was also paid $20 a night for "sleep cycle support." The signed PCA form, however, made it clear that a PCA cannot submit hours for the time that the patient is hospitalized. McWilliams was accused of submitting invoices for (and receiving payment for) 183 hours of work while his wife was in in the hospital.

McWilliams argued that he was working because his wife was not getting proper care in the hospital. The nurses were shorthanded and could not provide for her adequately, so he assisted. He was charged with making a false claim under K.S.A §21-3846(a)(1), which reads:

> *"(a) Making a false claim, statement, or representation to the Medicaid program is, knowingly and with intent to defraud, engaging in a pattern of making, presenting, submitting, offering or causing to be made, presented, submitted or offered:*

> *(1) Any false or fraudulent claim for payment for any goods, service, item, facility, accommodation for which payment may be made, in whole or in part, under the Medicaid program, whether or not the claim is allowed or allowable."*

There is little doubt that McWilliams violated the statute. However, he was charged with:

*"knowingly and intentionally with the intent to defraud...submitted...to the Kansas Medicaid program, false and fraudulent statements...**for personal care services which were not provided** by Oliver McWilliams, and were therefore not allowable under the Kansas Medicaid program…"'*

The Court of Appeals opined in *State v. McWiliams*, Slip Copy, 2010 WL 3564738 (Kan. App. September 3, 2010), the evidence did not support a guilty finding to the charge because there was no dispute that McWilliams did actually perform personal care services for his wife.

"A conviction cannot be upheld when the State fails to prove the offense charged, even if the evidence establishes some other offense the State did not charge." McWilliams was charged with making claims for services that were not provided, when all the evidence established that he did provide the services for which he billed. Even though the State was only required to prove that he charged for services that he wasn't authorized to charge for (services while his wife was hospitalized), that is not what they charged him with in the complaint and the prosecution is required to prove the complaint **as charged**. His conviction was reversed.

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DID YOU KNOW?

Twenty-three percent of the U.S. population lived in rural areas in 2008, but rural fatalities accounted for 56 percent of all traffic fatalities. There were 34,017 fatal crashes resulting in 37,261 fatalities. Where land use was known, rural areas accounted for 55 percent (18,762) of the fatal crashes and 56 percent (20,905) of the fatalities, as compared to urban areas which accounted for 44 percent (14,911) of the fatal crashes and 43 percent (15,983) of the fatalities.

Source: NHTSA, Traffic Safety Facts, DOT HS811 164

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AN ACTION TAKEN IN A COURT THAT DOES NOT HAVE JURISDICTION IS VOID, THEREFORE RE-TRIAL IN ANOTHER COURT THAT HAS JURISDICTION IS NOT DOUBLE JEOPARDY

Unpublished Decision

Jerri Mosely was convicted, following a trial, in Lenexa Municipal Court of a second-time DUI. Prior to sentencing, it was discovered that Mosely was actually a third-time offender. The prosecutor dismissed the case in municipal court and the Johnson County District Attorney's office filed the case as a third-time felony DUI. The district court dismissed the case on the basis of double jeopardy and the prosecution appealed.

In *State v. Mosely*, Slip Copy, 2010 WL 3636271 (Kan. App. September 10, 2010), the Kansas Court of Appeals found that this was not double jeopardy because an action taken in a court that is without jurisdiction is void. Since municipal courts do not have jurisdiction over third or subsequent DUIs, any action taken by the municipal court on a third or subsequent DUI is void pursuant to *State v. Elliott*, 281 Kan. 583 (2006).

Editor's Note: *The opinion does not mention the concurrent jurisdiction language of K.S.A. 2009 Supp. §12-4104 K.S.A. §22-2601 and K.S.A. 2009 Supp. §8-1567(q)(1)(B), nor AG Opinion 2007-26. See, also, pp. 15-16, supra, for additional discussion of this issue. It does appear from the briefs filed in the case that Lenexa had not adopted an ordinance pursuant to K.S.A. 2009 Supp. §8-1567(q)(1)(B) which would have arguably created jurisdiction in the municipal court even when the defendant has two or more prior convictions.*

PROBABLE CAUSE FOR DUI ARREST

Unpublished Decision

Charles Bottenberg was stopped for speeding. The officer did not notice anything about the driver at first, but when he returned to the car to give Bottenberg his citation he noticed a strong smell of alcohol and that his eyes were bloodshot and watery. Bottenberg admitted to having a few beers. The officer administered several field sobriety tests. Bottenberg failed one test, a balance test. He was arrested for DUI.

The issue in *State v. Bottenberg*, Slip Copy, 2010 WL 3662825 (Kan. App. September 10, 2010) was whether this was sufficient probable cause to arrest the defendant for DUI. Since the facts were agreed to, the Court reviewed *de novo* whether or not there was probable cause. The Court found that the officer did have sufficient probable cause to arrest Bottenberg for DUI. In cited *State v. Shaw*, 37 Kan.App.2d 485, *rev. denied* 284 Kan. 950 (2007)as factually similar and in support of this finding.

NO JAIL TIME CREDIT FOR HOUSE ARREST ON A DUI

Unpublished Decision

John Abildgaard was convicted of a third-time DUI and sentenced to 365 days in jail, to serve 90 days (48 hours in jail and 88 days of house arrest). After 46 days on house arrest, Abildgaard lost his job and could no longer afford to pay for the house arrest supervision. In addition, there was evidence that while he was on house arrest Abildgaard had tested positive for alcohol in violation of the terms of house arrest.

Abildgaard asked to serve the rest of his 90 days (42 days in jail), getting credit for the 46 days on house arrest he had already done. The prosecution objected and argued he should be required to spend 90 in jail, with no jail time credit for house arrest. The district court sided with the prosecution and ordered Abildgaard to serve the original 90-day sentence in jail. He appealed.

In *State v. Abildgaard*, Slip Copy, 2010 WL 3662966 (Kan. App. September 10, 2010) the Court of Appeals found that no state statute provides jail time credit for house arrest. Abildgaard argued that in the narrow context of K.S.A. §8-1567(f)(1), house arrest is the equivalent of jail time because it allows up to 88 days of the mandatory 90 days to be served on house arrest. True, the Court opined, but this statute is not mentioned in K.S.A. §21-4614 and §21-4614a as one of the enumerated circumstances in which jail time credit is allowed. House arrest is not imprisonment, but an "alternative disposition." The defendant is not entitled to any jail time credit for his 46 days on house arrest, particularly in light of the fact that he violated the conditions of house arrest by consuming alcohol while on house arrest.

WITHDRAWAL OF PLEA WHEN AGREED UPON SENTENCE IS ILLEGAL, BUT TO HIS BENEFIT

Unpublished Decision

William Thompson entered a plea agreement with the State to plead to a fourth-time DUI. He was to serve 72 hours in jail followed by 12 months of house arrest.

While on house arrest, Thompson tested positive for methamphetamine. At the hearing to revoke his house arrest and transfer his custody to the jail, the district court found that based upon *State v. Rauch*, Slip Copy, 2008 WL 3367603 (Kan. App. 2008), house arrest had been an illegal sentence. The *Rauch* court held that house arrest is not an option for a fourth-time offender. The judge ordered Thompson to jail for 12 months, with credit for the time he

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had already served on house arrest. Based upon the district court's ruling, Thompson sought to withdraw his plea, arguing that had he been advised that house arrest was not a possibility, he would not have entered the plea agreement.

The Court of Appeals found, in *State v. Thompson*, Slip Copy, 2010 WL 3732002 (Kan.App. September 17, 2010), that district courts have no authority to place fourth-time DUI offenders on house arrest, so the sentence was illegal. However, Thompson is not allowed to withdraw his plea.

Thompson was represented by competent counsel; he was satisfied with his attorney's representation; he was not promised anything in exchange for his plea, and his plea was voluntary. The plea agreement set out that Thompson could be subject to a year of imprisonment. He stated that he understood the Court was not bound by the plea agreement. When a plea agreement includes an agreement to recommend an illegal sentence, the Court of Appeals opined, the defendant should only be allowed to withdraw that plea when the illegal sentence impermissibly increases the defendant's term of imprisonment. This plea did not increase his term, in fact, his situation was improved by serving the time on house arrest instead of jail. In addition, at sentencing it was made clear that if the defendant violated the terms of his house arrest "he spends his time in jail."

Editor's Note: *Although the issue of jail time credit for house arrest was not at issue in this case, note that unlike the panel in* State v. Abildgaard, *Slip Copy, 2010 WL 3662966 (Kan. App. September 10, 2010), this panel had no trouble with the Court's order giving jail time credit for time on house arrest.*

SHAWNEE COUNTY PRACTICE OF 60 DAY SANCTION IN 72 HOUR INCREMENTS *AT DISCRETION OF COURT SERVICES OFFICER* IS ILLEGAL

Unpublished Decision

Jeremiah Spencer was convicted of making a false information for falsifying his insurance card (indicating he had insurance when he did not). The district judge sentenced him, pursuant to a common practice in Shawnee County, to 18 months in jail, but placed him on probation. He was to serve 60 days in jail as a condition of probation and the Court stated from the bench, *"Court Services...can put you into custody on their own order for up to 72 hours at a time, not to exceed 60 days."*

Everyone agreed that a sentence giving court services the ability to impose jail time was improper. But the State argued that the judge was just misstating how jail sanctions work in Shawnee County. It is typical, the State argued, pursuant to K.SA. §21-4603d(a)(3) (which allows a court in felony cases to include confinement of up to 60 days as a condition of probation), for the Court to order, as was set out in the actual sentencing journal entry, jail time may be served *"as a sanction by order of the court at the request of the supervising officer for specific technical violations. Periods not to exceed 72 hours per occasion."*

Apparently, the procedure in Shawnee County is, when a jail sanction is necessary, the Court Services Officer delivers a custody slip **to the district judge for signature** and order of jail time. Therefore, the judge is making the final decision, not the Court Services Officer.

In *State v. Spencer*, Slip Copy, 2010 WL 3731585 (Kan. App., September 17, 2010), the Court of Appeals found that Spencer's sentence was illegal because ***as it was pronounced from the bench***, it gave the probation officer the ability to impose jail time. It is irrelevant what the journal entry of sentencing said. A journal entry that imposes a sentence at variance with the sentence pronounced from the bench is erroneous and must be corrected to reflect the actual sentence imposed. The case was remanded for resentencing.

DRIVER VIOLATED SOME STATUTE, JUST NOT SURE WHICH ONE: DRIVING ON RIGHT SIDE OF ROADWAY (STO 38) OR DRIVING ON ROADWAYS LANED FOR TRAFFIC (STO 46)

Unpublished Decision

From approximately two blocks away, Officer observed driver northbound on a two-lane street in Ulysses, Kansas at 2:00 a.m. The officer, who was proceeding in the oppo-

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The Hon. Karen Arnold-Burger, Overland Park, and the Hon. William Kelly, Kentwood, Michigan take a break from their teaching at the National Judicial College to pose for the camera

****CORRECTION****

Updates to DMV from Summer 2010 Issue

Question: If an out-of-state driver has an interlock restriction on their out-of-state license and comes to Kansas to get a license, will the restriction follow them?

Answer: Generally when a restriction is on their license their licensing state has listed them as "not eligible", therefore they would not be able to get a Kansas license. However if the national check shows "eligible," we would issue a Kansas license.

Unpublished Opinions

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site direction, saw one headlight cross over the double yellow line in the center of the road before crossing back into its lane of traffic. This was all recorded on the officer's dashcam, however due to the lighting and distance it was difficult to observe the driver's actions on the video.

The driver was stopped and eventually arrested for DUI.

K.S.A. §8-1522(a) (STO §46) states that whenever a roadway is divided into two or more clearly marked lanes, vehicles must be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

K.S.A. §8-1514(a) (STO §38) states that vehicles shall be driven on the right half of the roadway except when passing a vehicle going the same direction or when an obstruction exists making it necessary to drive left of center.

The defendant alleged he was stopped for a violation of K.S.A. §8-1522(a) (STO §46) and since there was no evidence that his actions were not safe (as required by a long line of recent cases), he was illegally stopped.

The State argued that the defendant violated K.S.A. §8-1514 (a) (STO §38).

The officer could not specifically identify which statute the driver violated, stating that he was familiar with the traffic laws and he knew driver's can't cross the double yellow lane divider, because it is a "no passing zone."

The district court opined that K.S.A. §8-1514(a) (STO §38) only applied when there were no lane markings. The judge indicated that there was some evidence that the driver went over the center line momentarily, since there was no evidence that the driver's actions were unsafe, the judge sustained the motion to suppress based on a bad stop.

The State appealed. *See*, *State v. Garza*, Slip Copy, 2010 WL 3853222 (Kan. App. September 24, 2010).

The Court of Appeals found that K.S.A. §8-1522(a) (STO §46) applies when a driver crosses the white dotted lines or fog line for traffic going in the same direction and a driver violates K.S.A. §8-1514(a) (STO §38) when a driver crosses the center line of roadway (the double yellow line).

In this case, since the district judge had already found that the driver crossed the double yellow line briefly, the safety of the maneuver is not at issue. Crossing the double yellow line under K.S.A. §8-1514(a) (STO §38) us an absolute liability offense. There was sufficient basis for the stop. The Court of Appeals reversed the district court and remanded the case for trial.

REVOCATION OF PROBATION BASED IN PART ON AFFIDAVIT OF PROBATION OFFICER

Unpublished Decision

Joshua Huckaby was convicted of a felony in Kansas. However, under the terms of the interstate violator's compact, Huckaby's probation was supervised in his state of residence, Missouri. While on probation, he was arrested in Missouri with an assault rifle, ammunition and marijuana. A motion to revoke his probation was filed in Kansas.

The prosecutor in Kansas attempted to subpoena Huckaby's Missouri probation officer, but received a letter from the Missouri Department of Corrections stating that it would not authorize its officers to testify in foreign jurisdictions for civil proceedings and would not do so in this instance. So, the prosecutor offered an affidavit from the probation officer regarding Huckaby's violations. The trial court found that there was good cause to waive witness confrontation and admitted the affidavit. Huckaby also testified and admitted possessing cocaine while on probation, failing to report to his probation officer, failing to report to a group home for treatment, and having a positive urine test for drugs. The district judge revoked his probation and sent him to prison.

In *State v. Huckaby*, Slip Copy, 2010 WL 3853189 (Kan. App. September 24, 2010), Huckaby argued that his due process rights were violated by revoking his probation based on his probation officer's affidavit. The Court of Appeals disagreed. Probation revocation hearings are not the equivalent of criminal prosecutions and a more flexible process is allowed. A trial court must balance the probationers right to confront an adverse witness against the prosecution's reasons for arguing that confrontation is undesirable or impractical. In addition, the Court must assess the reliability of the evidence the prosecution offers in place of live testimony.

In this case, the Missouri DOC letter was sufficient to establish the impracticality of direct confrontation. In addition, the defendant's own testimony admitting the violations supported the reliability of the affidavit.

OFFICER'S OBSERVATION OF SPEED CAN BE SUFFICIENT BASIS TO STOP A VEHICLE

Unpublished Decision

Officer on routine patrol saw a vehicle traveling at what appeared to him to be "a high rate of speed" in a 35 mph zone. There was no measurement device used (i.e. radar, lidar, etc.). Upon pursuing the vehicle, he also thought he saw the driver fail to signal a lane change. Officer stopped the vehicle for the signal violation (although the signal violation could not be seen on the dashcam video) and

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subsequently developed probable cause for a DUI arrest. The driver was not cited for the signal violation or for speeding.

In denying the defendant's motion to suppress, the district judge found that regardless of whether the defendant signaled (which was hotly contested), the observation by a trained officer of the vehicle's "high rate of speed" was sufficient to meet to burden for reasonable suspicion to stop the car. The judge found that the dashcam video supported a finding that the vehicle was traveling fast. The driver was convicted of DUI.

The issue in *City of Prairie Village v. Starkweather*, Slip Copy, 2010 WL 3853186 (Kan. App. September 24, 2010) was whether there was sufficient reasonable suspicion to stop the car. The Court of Appeals found that there was substantial competent evidence to support the district court's finding.

The Court cited *State v. Guy*, 242 Kan. 840 (1988) and *State v. Whitehurst*, 13 Kan.App.2d 411 (1989) for the proposition that the utilization of a private car's speedometer (the officer's) plus the estimate of an experienced officer is sufficient to support a speeding conviction. The Court also favorably cites 8 Am.Jur.2d, Automobiles §978 for the proposition that *"reasonable suspicion may be based on evidence from a properly qualified officer and a substantial variance between the speed limit and the observed speed."*

The fact that the officer did not cite the driver in this case with speeding does not preclude speeding as a basis for reasonable suspicion to stop the car. The officer's underlying motive or pretext is irrelevant in determining whether the stop was legal. There was substantial competent evidence that the driver was speeding and that was enough to pull the car over.

WHAT COLOR MUST A TAIL LIGHT BE?
Unpublished Decision

Barbara Smith was in Junction City, stopped at a stop sign, preparing to turn left. The officer behind her noticed that the cover of her left rear turn signal was broken. Although it was partially covered with gray duct tape, the lower portion was not covered and emitted white light from the exposed bare bulb as she turned on her left turn signal.

The officer charged Smith with a violation of a city ordinance that mirrors K.S.A. §8-1721(b) and STO §161. It requires that when signaling, rear lights must emit a red or amber light or any shade of color between red and amber. At trial, Smith argued her turn signal was not defective.

The Verdict

Smith argued that the ordinance did not expressly exclude white tail lamps.

In *City of Junction City v. Smith*, Slip Copy, 2010 WL 3853329 (Kan. App. September 24, 2010) the Kansas Court of Appeals had no trouble finding that the ordinance is clear and requires that tail lamps emit only red or amber lights when turning.

"If the ordinance did not prohibit white light, then it could also be interpreted as not prohibiting blue, purple, green, or any other color light-no color would actually be prohibited. Furthermore, as other state courts have noted in examining this issue, the prohibition of white light in a turn signal serves the general purpose of clarity and conformity in auto signals by ensuring that white light is emitted from only a car's reverse lights. (citations omitted)"

Editor's Note: *This case took a somewhat tortuous path with the municipal judge granting a motion to suppress and the city prosecutor appealing that ruling to the district court. The district court judge "reversed" the municipal court ruling on the motion to suppress and "remanded" the case back to the municipal court for trial. Smith pled guilty in municipal court and then appealed to the district court for a trial de novo and requested a jury trial. She was convicted by a jury and appealed to the Court of Appeals.*

This author is unable to find any statutory authority for the city prosecutor to "appeal" a ruling on a motion to suppress to the district court, or for the district judge to "reverse" and remand. In addition, K.S.A. §22-3609(4) states that there is no right to a jury trial in the case of a municipal court appeal on a traffic infraction. However, these issues were not before the Court of Appeals as the case finally reached the Court, so they were not addressed.

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The Verdict

FALL 2010 Issue 53

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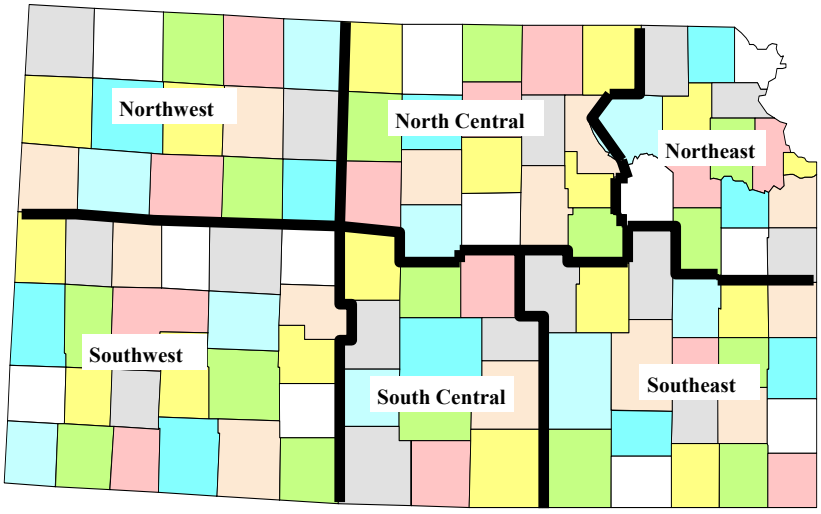

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