If you would like to submit an article or would like to see a topic addressed, please send it to Judge Steven R. Ebberts.

LEGISLATIVE
UPDATES

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

CONCEALED CARRY

SB152 amends KSA 32-1002 by providing that a person holding a concealed carry permit may carry a concealed firearm while legally hunting, fishing, or fur harvesting; and may possess a silencer for a firearm while legally hunting, fishing, or fur harvesting. This takes effect on July 1, 2011.

PROOF OF INSURANCE, INCREASED SPEED LIMIT, “DEAD RED” AND SEAT BELTS

HB 2192 becomes effective on July 1, 2011. There are several provisions in this bill that may be of interest to Municipal Court judges, including: a requirement for vehicle owners to display proof of liability insurance only at the time of original application for registration and removing the requirement when registration is being renewed; allowing a motorcyclist or bicyclist to proceed past a red light after

SPOTLIGHT ON: Judges Karen Arnold-Burger, Ryan Dixon & Scott Miller

Congratulations to Judge Karen Arnold-Burger!! On March 4, 2011, before a standing room only crowd at the Kansas Judicial Center, Supreme Court Room, she was sworn in as the 34th Judge of the Kansas Court of Appeals. Many, many, friends and colleagues were in attendance joining her and her family for the ceremony and celebration reception.

Karen Arnold-Burger was born in Kansas City, Kansas in 1957. In 1975, she graduated from Shawnee Mission North High School. Following high school, she attended Johnson County Community College for 1 year before beginning her undergraduate studies at the University of Kansas. In January 1979, she graduated with distinction from the University of Kansas with degrees in Political Science, Psychology and Personnel Administration. While at KU, she was awarded the Sunflower State Award for the outstanding woman majoring in political science. She received her J.D. from the University

(Continued on page 2)
Spotlight On:

of Kansas in August 1981.

Judge Arnold-Burger served as First Assistant City Attorney for the City of Overland Park before accepting a position as an Assistant U.S. Attorney in Kansas City, Kansas. She was appointed to the Overland Park Municipal Court in 1991, and was appointed Presiding Judge of that court in 1996. Governor Mark Parkinson appointed her to the Court of Appeals on January 6, 2011.

Judge Arnold-Burger has served as President of the Johnson County Bar Association, the Kansas Municipal Judges Association, and the Earl E. O'Connor Inn of Court. She currently serves on the Executive Board of the NCSCJ, a section within the Judicial Division of the American Bar Association. She has been an adjunct faculty member at the National Judicial College since 2000, and was elected by her fellow faculty members to serve on the Faculty Council beginning in 2010. She is a graduate of the Institute for Faculty Excellence in Judicial Education at the University of Memphis and is a frequent presenter at judicial programs nationwide. In 2006, she was awarded the Justinian Award for Professional Excellence by the Johnson County Bar Association. The award is given annually to an attorney who exemplifies integrity, service to the community and service to the legal profession.

She and her spouse have three grown children.

Judge Arnold-Burger has been a tremendous asset to members of this association...working tirelessly on many annual conferences, presentations, committees and serving as the Editor of this publication for years. The phrase “Thank you” could never describe the sincere appreciation members of this association have for her service and contributions!

(Continued on page 25)
sas.” Over the course of six years, several drafts were made to admit Kansas as a free-state. Finally, after becoming a national issue, the Republican platform of 1860 laid a track for Kansas to be admitted. Abraham Lincoln, an important key to the platform, was elected President. The Kansas bill was finally passed and signed by James Buchanan just a few months before Lincoln took office. On January 29, 1861, Kansas then became the 34th state.

As a result of being admitted as a Free-State, Kansas was now on the border of rebellion and the nation entered the Civil War. Kansas supplied 20,000 men before the war ended. The state also suffered the highest mortality rate of any of the Union states. Within its boundaries, one attack is proven to be most notorious—William C. Quantrill’s surprise attack on Lawrence. The City was a prime target for terror as it was known for being the headquarters of “Free-State sympathizers.” Quantrill and his men raided Lawrence, burning the City and killing nearly 150 people.

In the late 19th Century, settlement began to really transform the state. Immigrants brought their farming techniques to the great plains and rolling hills. As a result of the Civil War, beef was in short supply and the great cattle drive brought travelers and ranchers to the area. The transportation of several million longhorns from Texas to Kansas delivered cattle to the East.

From the beginning, Kansas faced many struggles and difficulties. On May 21, 1927, Kansas officially adopted a state flag. Among the State Crest and Seal illustrated on the flag, is the state motto, “Ad Astra Per Aspera,” which appropriately translates “To the Stars Through Difficulties.”

By the 20th Century, significant changes occurred in agriculture, industry, transportation, and communication. During World War I, agriculture took off as the demand for food increased. The transportation industry flourished with diesel-powered trains, commercial airlines, and highways. Communication also was revolutionized by radio and television.

REGISTRATION IS NOW OPEN FOR THE 2011 MIDWEST REGIONAL CHILD PASSENGER SAFETY CONFERENCE!

The Midwest Regional Child Passenger Safety Conference will be held May 10-12, 2011, in Hutchinson. The conference is devoted to child passenger safety. Conference registration fee is $25.00. For more information and to register, visit http://www.ktsro.org/conference.html or call Kansas Traffic Safety Resource Office at 1-800-416-2522.

The Verdict

To reflect on its rich history, the State of Kansas will celebrate its sesquicentennial throughout the whole year of 2011. A new logo and stamp were designed to commemorate the anniversary.

Events for Kansas’ 150 Celebration started a day early, on January 28 with Kansas Day at the Capitol. At the commemoration, key government dignitaries read a special resolution recognizing the important people and events in Kansas history. Honored guests representing Kansas’ past and present were also recognized, and Kansas Poet Laureate Caryn Mirrion-Goldberg read a poem she wrote specifically for the event.

The next day, on Kansas’ actual birthday Governor Sam Brownback signed a proclamation declaring January 29, 2011 as the Sesquicentennial of Kansas Statehood. Festivals, concerts, theatrical performances, quilt shows, and more took place across the state.

Kansas educators are taking advantage of the state’s milestone as well. Celebrate Kansas Voices was created in 2010 as an online learning community empowering learners to become witnesses, archiving local oral history, and then sharing that history safely on the Internet. Anyone is welcome to join the learning community. More information can be found at http://celebratekansas.ning.com/.

Kids Voting Kansas utilized the opportunity by partnering with the Kansas Museum of History. Together, they held an election for Kansas’ favorite notable person. Kids had the opportunity to go online and choose from 10 people with notable history in Kansas. In the end, Amelia Earhart won with a total of 429 votes. Kids Voting Kansas educates elementary and secondary students by involving them in the voting process in hopes of increasing lifelong voter participation.

The Kansas State Historical Society (KSHS) also helped educators in the classroom with ready-to-go lesson plans. Designed for elementary through high school age students, the plans cover topics from territorial Kansas to Kansas in the 20th Century. All materials are available to download at http://www.kshs.org/pl/ready-to-go-lesson-plans/15619.

Another way that Kansans honored the state’s 150th was through “Bake a Cake for Kansas Day”. Kansans were encouraged to bake and share a cake with their community and then post pictures on Kansas 150 facebook (http://www.facebook.com/Kansas150?ref-ts) and Flickr page (http://www.flickr.com/photos/kansas150/).

Many other celebrations that will be ongoing around the state includes an exhibit at the Kansas Museum of History, a Home on the Range concert in Hutchinson, and an Ad Astra...
Ball in Lawrence, just to name a few. For a complete list of Kansas 150 Celebrations visit http://www.travelks.com/s/index.cfm?aid=583.

Information for this article was found at http://www.kssos.org/forms/communication/history.pdf and www.kshs.org. Amanda Schuster is the Communications Specialist for the League of Kansas Municipalities. She can be reached at aschuster@lkm.org or (785) 354-9565. This article was reprinted with permission from the January 2011 issue of the Kansas Government Journal.

Man berates judge based on order releasing him from jail...

A Tennessee drug defendant was upset about being let out of jail.

The Defendant, Thorn Peters, shouted at the judge, saying he was being sent out in the snow in a tank top and pajama bottoms.

According to news accounts, Peters was released on his own recognizance after prosecutors dropped felony drug charges, conceding they couldn’t prove them.

The Judge, Bobby Carter, reminded Peters he’d been in jail for 19 months and said he wouldn’t be held any longer on just a misdemeanor marijuana charge.

Peters continued to berate the judge, asking if he was in contempt of court yet. Carter said no. Peters said the judge should prepare to declare him in contempt, promising he’d be back!

(Editor’s note: I have a feeling he will keep his promise!)

This being the year of the 150th anniversary of Kansas statehood, it seems appropriate to write about an event in early Kansas history that had an impact on many lives and on the courts and legal profession.

In the first volume of the Kansas State Reports is an Appendix which includes a resolution adopted by the Bar of Douglas County November 19, 1863, which contains the following:

“The fierce visitation that on the 21st day of August last piled our streets in ruin, and swept from our midst so many of our citizens, also thinned our ranks by taking from among us forever two loved and respected brothers. Eminent among the victims of that terrible morning was the lamented LOUIS CARPENTER.

We feel it proper, on this our first meeting since that awful day, that we should express our sense of the deeply afflicting bereavement which this court and bar, and the whole community, have sustained by his untimely death; therefore,

Resolved, That the members of this bar contemplate with profound grief the death of Judge CARPENTER.”

Some may wonder why it took from 1861, the year of statehood until 1864 to publish the first volume of the Kansas State Reporter. Of course some of that is due to not having modern typesetting, but there were other causes of delay, The Preface (written by Elliott Banks) to volume one alludes to one of the reasons for delay.

“THE profession, doubtless, are entitled to an apology from some source, for the delay attending the publication of this volume. Its preparation was commenced by my predecessor in office—the lamented CARPENTER—early in 1863. As the materials were deposited in the archives of the court, his industry and skill caught them up and fashioned them for the press. But that terrible calamity which took him from among us also swept away nearly all his labors on this volume. Only fragments of a few cases survived the flames of the guerrilla torch, on the 21st of August of that year.”
A ballad based on the raid on Lawrence portrayed William Clarke Quantrill as a Civil War era Robin Hood. The words to that ballad are as follows:

“Come all you bold robbers and open your ears
Of Quantrill (sic) the Lion heart you quickly shall hear
With his band of bold raiders in double quick time,
He came to lay Lawrence low, over the line.
Oh, Quantrill's a fighter, a bold-hearted boy,
A brave man or woman he’d never annoy.
He’d take from the wealthy and give to the poor
For brave men there’s never a bolt to his door.”

(Source: Charles J. Finger, Frontier Ballads (Carden City, NY; Doubleday, Page and Co., 1927)

Quantrill may have sought recognition from leaders of the Confederacy, but his activities seem to indicate that he fought for his own cause more than in support of the South. In Lawrence he and his raiders murdered some 150 people, burned and plundered most of the businesses in town.

Quantrill later left the Missouri-Kansas border area for Indian Territory (now Oklahoma) and Texas. They killed about eighty troops near Baxter Springs, Kansas and at Fort Gibson, in Indian Territory, they killed twelve Union Soldiers. He wrote an official report claiming that he had killed 150 Negroes and Union Indians in the Cherokee Nation. He signed the report “W.C. Quantrill, Colonel Commanding”.

In 1863 near Sherman, Texas, Quantrill camped and “mercilessly plundered the inhabitants”.

Confederate General McCulloch, apparently angered by Quantrill’s behavior had him and his men arrested, but they later escaped. In April, 1864 Quantrill and his raiders operated in eastern Indian Territory and western Arkansas near Fort Smith, where he joined with General Douglas Cooper who was planning to take Fort Smith. Quantrill apparently had no intention of providing assistance to General Cooper’s troops, but ordered nine civilians killed at the Creek Agency at Fort Gibson.

Thinking the Confederate charges against him had been dropped he sought but was never given a formal command in Texas. He took a small group of men to Kentucky to engage in guerrilla activities there. He was shot on May 10, 1865, and died in a prison in Louisville less than a month later.

(Continued from page 4)

(Continued on page 15)
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.

**JUDICIAL RECUSAL**

The defendant claimed error in the district court judge who presided over his jury trial not recusing himself from the case. To establish the error the defendant must show that the judge had a duty to recuse and that actual bias or prejudice warrants setting aside the conviction or sentence. Bias or prejudice will only be presumed if, using an objective standard, “the probability of actual bias is too high to be constitutionally tolerable.” The fact that the judge had presided in cases where Sawyer had other criminal charges does not require recusal. Quoting the Minnesota Court of Appeals, the Court pointed out that “for the many judicial districts that have fewer judges than repeat offenders, such a rule against presiding over cases involving familiar parties would be impossible” (a situation that many municipal court judges can easily relate to). Even though the judge had recused himself in a previous criminal case involving Sawyer, the Court said that it wouldn’t reach the question of whether that meant the judge was required to recuse in this case, because Sawyer could not establish the second requirement of showing actual bias or prejudice. *State v. Sawyer*, Docket #101624 (Kansas Court of Appeals)

**FINE MUST BE PROPORTIONAL TO CRIME**

Wurtz was prosecuted for selling marijuana and stipulated that his Lexus was subject to forfeiture because it was used in the course of his illegal commerce. Although property forfeiture actions are civil and not criminal, they are subject to the constitutional limitation that a fine not be grossly disproportional to the nature and severity of the conduct. The value of the Lexus was $8000 and Wurtz claimed this was grossly disproportional to the $250 he obtained from the drug transactions he committed in the vehicle. One of the statutory factors the court can consider in determining if forfeiture is disproportionate is the “totality of the circumstances regarding the investigation.” The Court said this means that the evidence that showed that Wurtz was a regular drug dealer on an ongoing basis and that the particular type of marijuana he sold was a high quality product can be considered along with the two specific transactions that were conducted using the Lexus to determine whether the value of the car is disproportionate. The Court also denied Wurtz’s claim that the forfeiture statute was unconstitutionally vague. *State v. Black* 1999 Lexus ES300, Docket #102,286 (Kansas Court of Appeals)

**PROBATION REVOCATION**

Robinson was placed on probation in a Crawford County District Court case on December 1, 2005 for a one year term. On March 14, 2006 the State filed a motion asking that his probation be revoked. As of March 1, 2006, Robinson was incarcerated in Arkansas on first-degree battery charges. On March 16, 2006, two days after the motion to revoke probation was filed, a detainer was placed on Robinson. After concluding his business in Arkansas, Robinson was transported to Crawford County on December 4, 2007 and appeared in court on the motion on December 5, 2007. The motion was set for an evidentiary hearing on December 28, 2007 and after hearing the evidence, the court revoked Robinson’s probation. While a court can revoke probation after the probationary period expires, due process requires that any such proceedings be conducted in a reasonable and timely manner. The Kansas Supreme Court has held that if a defendant is incarcerated, the lodging of a detainer satisfies the reasonable and timely requirements, even though the warrant is not actually executed. The State’s actions on Robinson’s probation met the required diligence standard and his claim that the State waived his probation violations was denied. *State v. Robinson*, Docket #103,152, 103,153 (Kansas Court of Appeals)

**COURT CANNOT OVERRIDE STATUTE REGARDING PRE-TRIAL RELEASE COSTS**

While facing charges of domestic battery and criminal threat, Gardner was released from custody on certain conditions, including that he wear an alcohol monitor. When the case was resolved by Gardner pleading guilty to the domestic battery charge, the court sentenced him and placed him on probation. As a condition, the court ordered that Gardner pay the cost of the alcohol monitor, which was $121.00. Under K.S.A. 2009 Supp. 22-2802 (15), a court can order a defendant to pay a maximum of $15.00 per week for pre-trial supervision costs. The State argued that the judge ordered Gardner to pay the cost of the alcohol monitor as a condition of his probation, so the limitation in K.S.A. 2009 Supp. 22-2802(15) did not apply. Under K.S.A. 21-4610 the court has discretion to order probation conditions and controls. Gardner was on pre-trial release for four weeks, so if the statute regarding pre-trial supervision costs controls, the maximum he could be ordered to pay is $60.00. The Court followed the fundamental rule of statutory construction that where there is a conflict between a general statute and a specific statute, the specific controls unless it appears the legislature intended otherwise. Here the court could not override the specific statute regarding the pre-trial release costs by referencing its broad powers over probation conditions. The specific limitation on the costs controls. *State v. Gardner*, Docket #103,312 (Kansas Court of Appeals)

(Continued on page 7)
Court Watch

(Continued from page 6)

DL SUSPENSION INVALID BECAUSE STATUTORY BREATH TEST REQUIREMENT NOT MET

Shrader was observed committing a traffic infraction by an officer in Oberlin. The officer was familiar with Shrader and based on prior information, believed his driver’s license was suspended. When the officer made contact with Shrader after the infraction, Shrader was unsteady on his feet, smelled of alcohol, had slurred speech, admitted to having a couple of drinks, had trouble producing his driver’s license and proof of insurance, and when he did produce them, had an expired insurance card and told the officer his driver’s license was “no good”. When asked by the officer, Shrader refused to submit to standardized field sobriety tests and also refused to submit to a preliminary breath test. The officer arrested Shrader for driving with a suspended driver’s license. When Shrader was in custody on that charge, the officer read and provided him with the Kansas Implied Consent Advisory and asked Shrader to submit to a breath test on the Intoxilyzer 8000. Shrader refused. The Kansas Department of Revenue suspended Shrader’s driving privileges, and the administrative action was upheld by the district court. Shrader claimed there was no basis for the suspension because under K.S.A. 8-1001(b) to be required to submit to an alcohol breath test, it must be shown that the officer had reasonable grounds to believe the driver was operating or attempting to operate a vehicle while under the influence of alcohol and/or drugs and that either the driver had been arrested or taken into custody for operating a vehicle under the influence of alcohol and/or drugs, or the driver was involved in a motor vehicle collision that resulted in property damage, personal injury or death.

The Court has determined the “reasonable grounds to believe” standard in K.S.A. 8-1001(b) to require a showing equivalent to probable cause, so that the evidence must be such that a reasonably prudent police officer would believe that guilt is more than a mere possibility. The indicators noted by the officer here, unsteady on his feet, moderate odor of alcohol, admission of drinking, and slurred speech, provide the “reasonable grounds to believe” required by the statute. However, the second statutory requirement for requesting submission to an alcohol breath test is not present here. While Shrader was arrested for an offense related to the operation of a motor vehicle, the second part of K.S.A. 1001(b) requires either that there was a collision involving the driver or that the arrest be for an alcohol-related driving offense. Shrader was not required under the statute to submit to the test the officer requested, so the administrative suspension of his driving privileges was overturned. Shrader v. Kansas Department of Revenue, Docket #103,176 (Kansas Court of Appeals)

CRIMINAL HISTORY SCORE BASED UPON MUNICIPAL COURT CONVICTIONS

Lackey entered into a plea agreement where he pled guilty to some felony drug charges in exchange for the dismissal of other charges. Before sentencing, after seeing the presentence investigation report scored Lackey with a criminal history score of “C”, Lackey moved to withdraw his pleas. The court denied that motion. The district court imposed a sentence consistent with the plea agreement, but because Lackey was on felony bond when the second offense was committed, the sentences were ordered to be served consecutively.

Lackey’s criminal history included convictions in Kansas City, Missouri Municipal Court for two domestic violence battery charges and one aggravated assault charge. The district court reviewed the municipal ordinances and determined the offenses were all comparable to misdemeanor battery charges under Kansas statutes. Under the Kansas Sentencing Guidelines Act, three convictions for person misdemeanor offenses count as a person felony conviction in a criminal history score. However, the KSGA also says that out of state convictions are scored based on the convicting jurisdiction’s classification of the offense. In Missouri, violations of municipal ordinances are considered civil actions for the recovery of a penalty. Lackey argued that because KSGA does not direct how to consider out of state convictions that are not classified as either felonies or misdemeanors by the convicting jurisdiction, then the legislature must have intended for those offenses to not be considered in a criminal history score. The Court of Appeals previously rejected this argument in a 1997 case, and again in another case in 1998. Since that time the legislature has had ample time to revise the statute and where it fails to do so, that gives rise to the presumption that the legislature agreed with the judicial interpretation. This panel of the Court likewise approved the district court’s interpretation of the defendant’s out of state municipal convictions on his criminal history score.

As to the denial of Lackey’s motion to withdraw his plea, Lackey claimed that there was a mutual mistake on both his part and the part of the State as to what his criminal history score was, which constituted good cause to allow his plea to be withdrawn. The Court reviewed the factors to be considered in a request to withdraw a plea prior to sentencing. Lackey was represented by competent counsel, he was not misled or coerced into entering a plea based on assurances or representations of what his criminal history score would be, and Lackey’s plea was fairly and understandably made, as he was advised in writing and by the judge at the plea hearing of the maximum possible sentences for each of the offenses he pled to. There was no error in denying his motion to withdraw his plea. In addition, consistent with prior Kansas Supreme Court rulings, there was no error in using Lackey’s criminal history to determine his sentence without having his criminal history proven to a jury, as Lackey ar-
Court Watch

having his criminal history proven to a jury, as Lackey argued is required under Apprendi. State v. Lackey, Docket #102,531, 102,532 (Kansas Court of Appeal)

COURT COSTS AND BIDS EXPENSES NOT CONSIDERED RESTITUTION FOR PURPOSES OF EXTENDING PROBATION

Hoffman appealed the district court’s revocation of his probation, claiming the court did not have jurisdiction to do so. In March, 2004 Hoffman was sentenced to serve 32 months in prison, but the sentence was suspended and he was placed on probation with Community Corrections for 36 months. Hoffman was ordered to pay court costs and fees, including some amounts for reimbursement for the indigent defense services provided to him. At the sentencing hearing, the State asked the judge to order Hoffman to pay $250 to the victim’s father for travel and cell phone expenses. The judge denied the request to order restitution. In July, 2005 Hoffman stipulated to violating his probation and the judge ordered him to serve 60 days and then reinstated him on probation on the original term. In January, 2007, without any hearing, the judge signed an order finding that Hoffman violated his probation and ordered that his probation be extended for one year unless Hoffman objected to that action prior to March 19, 2007. Hoffman was served with this order by his probation officer and both Hoffman and his probation officer signed the copy of the order. In August, 2007 the judge again found that Hoffman violated his probation and again ordered him to serve 60 days and placed him back on probation, extending the term for 36 months. In August, 2009 another motion to revoke probation was filed, and Hoffman moved to dismiss the motion, claiming that his probation expired in March, 2007 and there was no jurisdiction to revoke his probation. Hoffman said that under K.S.A. 2009 Supp. 21-4611(c)(8), the court had to either conduct a modification hearing or make a finding of judicial necessity to extend his probation.

While a court can extend probation as long as restitution ordered by the court remains unpaid, Hoffman did not owe restitution and the order for him to pay court costs and BIDS fees cannot be interpreted as restitution. While the defendant did sign a copy of the court’s January, 2007 order, there was nothing in the order to indicate that Hoffman was waiving any of his statutory or constitutional rights and agreeing to an extension of his probation. The Court was particularly concerned that Hoffman was not advised that he had the right to have a hearing and that at the hearing the court would have to make a finding of judicial necessity to extend his probation. Hoffman did not knowingly and voluntarily waive his rights, and the district court lacked jurisdiction to extend his probation beyond March, 2007. State v. Hoffman, Docket #103,133 (Kansas Court of Appeals)

BURGLARY OR THEFT?

A Topeka police officer was sent to a State Farm office due to a burglary alarm activating one evening, after the business was closed for the day. Upon arrival the officer saw a broken window on the front of the building and as he waited for other officers to arrive, saw a man inside the building who walked toward the front, appeared to notice the officer, and then turned and walked toward the back of the building. Shortly after that the officer heard glass break from the back of the building and the officer went around the outside of the building to the back, where he saw a man climbing out through a window. At the officer’s direction, the man raised his arms and the officer observed the man holding a rag in his hand. The defendant testified at trial that he had been out for a walk and noticed that work was being done on the State Farm building. Because he had done construction work before, Wilson decided to go inside and look around. Upon entering he thought he heard noises inside the building and called out, but as he looked around he did not see anyone. He decided he should leave and noticed the police officer outside. Thinking it would be better to talk to the officer outside, he went to the back of the building to exit through the window. Wilson testified that he had no intention upon entering or at any time while in the building to take anything from the building.

Wilson also argued that the evidence did not establish the specific intent required to convict him of burglary, that he had the intention to commit a theft in the building. The Court pointed out that intent can be inferred from the evidence considered as a whole. On appeal the Court does not reweigh the evidence, and the evidence was sufficient for a rational fact finder to find Wilson guilty beyond a reasonable doubt. State v. Wilson, Docket #103,082 (Kansas Court of Appeals)

DETERMINING WHOLESALE VS. RETAIL VALUE FOR RESTITUTION

Dr. Mark and Pam Hardin hired Hall to work as a veterinary technician at their clinic. Part of the benefits of being employed at the clinic was receiving discounts on products and services from the clinic, which employees were allowed to obtain with the understanding that outstanding bills for products and services would be paid prior to the next paycheck being issued. After about two months working at the clinic, Hall claimed a family emergency existed requiring her to fly to Florida. She requested an advance on her paycheck, which the Hardins provided without checking whether Hall owed any money for products. Suspicion arose as to Hall’s intention to return to Florida, which led to an investigation of her work on the computer systems at the clinic. Several irregularities were discovered, including that Hall had deleted the records regarding her purchases of products and treatment of her pets at the clinic. The Hardins contacted the police to report the theft. After a police investigation, Hall was charged with theft. Her defense was that she didn’t take anything, that any discrepancies in the computer records were due to her inexperience in using the system, and that the Hardins were
making the accusations against Hall because they were upset about the manner in which she left the clinic. Hall was convicted, sentenced to a prison term and granted probation. The sentence also ordered Hall to pay restitution of $10,860.38, which the district court later modified to $14,293.11.

When the district court ordered the restitution amount at sentencing, Hall challenged the amount requested by the State. The judge ordered the amount requested by the State without any evidence or other argument, and the judge told Hall she had thirty days to make a written challenge to the restitution ordered. Hall did make written objection to the restitution, and argued that the amount was based on the retail value of the products taken from the clinic, which was the improper measure of the loss. After conducting a restitution hearing which included extensive explanation from Hardin of the research and auditing done to determine the amount of the loss, the judge increased the amount of restitution. On appeal, Hall acknowledged that a court can reserve the question of restitution to be determined at a later date but argued that because the judge had ordered restitution at the time of sentencing, the only further action that could be taken on restitution was to correct arithmetic errors in setting the restitution amount. K.S.A. 22-3424(d) says that a defendant can request a hearing on restitution unless the defendant waives his or her right to such a hearing and consents to the restitution order. In Hall’s case at sentencing, the judge stated what the restitution amount would be, and gave Hall the opportunity to either waive her right to a hearing, in which case the restitution order would be final, or request a hearing. Since Hall requested a hearing, then the restitution issue was open and the judge could consider any evidence and make a determination of the appropriate restitution amount based on the evidence.

As a condition of probation, a judge may order a defendant to make restitution “for the damage or loss caused by the defendant’s crime.” The appropriate measure of restitution is generally the fair market value of the property. If fair market value cannot be readily determined the court can consider other evidence such as purchase price and condition, so long as reliable evidence is available. In this case, the fair market value of the veterinary products is the wholesale price that the clinic paid its suppliers for the products, not the retail price at which the clinic might have sold the product to its customers. The clinic has not lost the potential profit from the sale of the products, because if it replaces the product at its wholesale cost, it is still able to sell the products and earn the profit. When addressing Hall’s objection to the cost of the clinic’s audit being ordered as part of the restitution, the Court held that the reasonable cost of an audit is proper for restitution if the audit was necessitated by the defendant’s criminal conduct. State v. Hall, Docket #102,297, 102,663 (Kansas Court of Appeals)

**REASONABLE SUSPICION AND VOLUNTARY CONSENT FOR PBT**

As a result of Edgar entering a driver’s license check lane in Cowley County, an officer initiated a DUI investigation. The officer had Edgar perform a walk and turn test, which he performed satisfactorily except for missing heel to toe on one step, and a one leg stand test, which Edgar performed appropriately. Despite his performance on those tests, the officer asked Edgar to submit to a preliminary breath test. Edgar argues that while the officer did have reasonable suspicion to initiate the DUI investigation, once he performed well on the standardized field sobriety tests the officer did not have a basis to request the PBT. Edgar asked the court to suppress the results of the PBT and the judge denied that suppression motion. The statute provides that an officer can request a driver to submit to a preliminary breath test if the officer has a “reasonable suspicion to believe that the person has been operating or attempting to operate a vehicle” under the influence of alcohol and/or drugs. The Court found that if the officer has reasonable suspicion to initiate an investigation, then the officer can conduct a reasonably thorough investigation to its completion. The fact that a driver passes one or more of the tests given does not dispel the reasonable suspicion, and the determination of whether there is a basis to request a PBT is made based on the totality of the circumstances. Here the officer’s request was based on reasonable suspicion.

Edgar also claimed the judge erred in denying his motion to suppress because his consent to the PBT was not voluntary. The legislature responded to challenges to administration of PBT in a DUI investigation by enacting an implied consent statute, which provides that any person operating or attempting to operate a vehicle within the state is deemed to have provided consent to submitting a PBT as long as the officer can establish the “reasonable suspicion” to believe that the person is under the influence. While the statute does mandate that the officer give certain advisories before asking the driver to submit to the PBT, the statute also provides that failure to give the advisories is not a defense to any action based on the PBT. In Edgar’s case, the officer did not include the advisory that failure to submit to the PBT is a traffic infraction, and added a non-statutory advisory that Edgar did not have the right to refuse the test. The judge properly denied the motion to suppress. State v. Edgar, Docket #103,028 (Kansas Court of Appeals)

**ON SCENE ID CONSIDERED UNNECESSARILY SUGGESTIVE**

After seeing a movie at the mall, Orabuena was approached by a couple of males and robbed of some cash and a Bic
Court Watch

lighter. Orabuena was also hit in the head with a gun during the robbery. Police responded to Orabuena’s 911 call, and found suspects in the area where the robbery occurred. One officer had a suspect in her patrol car, and drove to where Orabuena was and asked him to identify whether or not the suspect was involved in the robbery. This type of one-on-one confrontation has been approved by the courts where time is critical and delay in identification could impede the police investigation. However, in this case, the judge correctly found that the procedure used was unnecessarily suggestive, because the identification could have been done at the police station. Having found the identification process to be unnecessarily suggestive, the Court then looks at several factors to determine whether the identification is nevertheless reliable. In this case, all of the factors support the judge’s determination that the possibility of misidentification was highly unlikely. In this case, all of the factors support the judge’s determination that the possibility of misidentification was highly unlikely. In this case, all of the factors support the judge’s determination that the possibility of misidentification was highly unlikely.

Reed claimed the court erred by not giving the unanimity instruction he requested based on his argument that the State alleged multiple acts to support the charge. The State characterizes the case as an alternate means case, which does not require a unanimity instruction. The questions turns on whether there is a single offense which could have been committed in more than one way (alternative means) or whether there are several acts alleged, any of which on their own would constitute the crime charged (multiple acts). In the case of alternative means, the jury must be unanimous as to guilt, but not as to the specific acts constituting the offense, as long as there is substantial evidence of each of the alternate means. In a multiple acts case, the jury must be unanimous as to which act or incident constitutes the crime. Reed was charged with aggravated robbery, which can be committed either by use of force or by threat of bodily harm. This was an alternative means case and there was substantial evidence to support each of the alternative means. State v. Reed, Docket #102,390 (Kansas Court of Appeals)

VALID PUBLIC SAFETY STOP

Kacsir was driving on I-70 near Topeka and a highway patrol trooper was parked on the shoulder of the road after 10:00 p.m. Kacsir and another car pulled over and stopped less than 100 yards in front of the trooper’s vehicle. The trooper pulled his car forward to see if the occupants needed assistance, and as he did so, one of the vehicles pulled back out onto I-70 and drove off. The trooper turned on his emergency lights approached Kacsir to make sure the driver was alright and that there were no mechanical problems with the vehicle. While checking on Kacsir, the trooper detected an odor of alcohol and that Kacsir’s eyes were bloodshot. At that point the trooper determined that a DUI investigation should be conducted and Kacsir was not free to leave. Kacsir was convicted of DUI. Kacsir asked the court to suppress the evidence from the DUI investigation, claiming that the detention constituted an illegal seizure.

While the Court rejected the State’s argument that Kacsir’s contact with the officer was a voluntary encounter, the Court did find that it was a valid public safety stop, and therefore not an illegal seizure. Kacsir also claimed error in the prosecutor’s policy that a diversion application will not be considered unless submitted within 30 days of the defendant’s first court appearance. While the statutes regarding deferred prosecution do require the prosecutor to consider the interests of justice and the benefit to the community in granting diversion, nothing in the statutes prevent a prosecutor from establishing and enforcing rules for their individual diversion program. State v. Kacsir, Docket #102,559 (Kansas Court of Appeals)

DEFENDANT’S PRIOR CONVICTION TESTIMONY PREJUDICIAL

Cook was charged with felony possession of marijuana. At trial Cook testified and his description of the events was significantly different from the description offered by the law enforcement officers, including the fact that Cook claimed one of the officers planted the marijuana on him. During the State’s cross-examination of Cook, the prosecutor was allowed to question Cook regarding a previous conviction for possession of marijuana, a case where Cook was still on probation at the time of this trial. When Cook objected to the prosecutor eliciting this information, the prosecutor told the judge the questions could be asked because Cook was lying in his testimony and the questions showed Cook’s bias. However, there was no showing of how the evidence of the prior conviction fit in the requirements of K.S.A. 60-455. That requires that to allow evidence of the prior conviction it must be relevant to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Here the prosecutor’s only purpose in using the evidence of the prior conviction was to try to establish Cook’s propensity to possess marijuana, and the prior conviction evidence is not admissible for that purpose. In addition, the prior conviction cannot be used to impeach Cook’s credibility. Because this evidence was so prejudicial, it could not be considered harmless error. State v. Cook, Docket #102,375 (Kansas Court of Appeals)

RESULTS OF ADMINISTRATIVE SEARCH WARRANT UPHELD, EVEN THOUGH NOT RELEVANT TO PURPOSE OF WARRANT

An administrative search warrant was issued pursuant to the Sedgwick County fire code. A Maize police officer was present during the search of a former airplane hangar, and the officer took note of the VINS from two vehicles that were in the hangar. There was a third vehicle present, but the VIN could not be observed so the officer noted the license plate number of that vehicle. When checking later based on that
Court Watch

number of that vehicle. When checking later based on that information, the officer discovered that two of the three vehicles were stolen. McCammon moved to suppress the evidence claiming that the scope of the administrative search warrant was exceeded. The State claimed that McCammon did not have standing to challenge the search because he did not establish an interest in the property. However, a lessee is considered to have standing to object to an unlawful search during the time he or she is entitled to occupy the leased property. The Court found that neither observing the VIN from the outside of the vehicles nor recording those numbers constituted a seizure that raised Fourth Amendment concerns, even though that information was not relevant to the purpose of the administrative search warrant. The motion to suppress was properly denied. After the suppression motion was denied, McCammon stipulated to the facts set forth in the probable cause affidavit and acknowledged that they were sufficient to support a conviction of the charges. McCammon cannot now argue that the evidence was insufficient to support his conviction. *State v. McCammon*, Docket #102,713 (Kansas Court of Appeals)

**STATE HAS BURDEN TO PROVE EACH ELEMENT OF OFFENSE**

The Pratt Police Department conducted undercover drug investigations focusing on Kevin Witten. Using two different informants, controlled buys were arranged where individuals purchased methamphetamine from Witten. Witten lived 333 feet from Liberty Middle School, and a convenience store nearby where part of one of the transactions took place was 854 feet from Liberty Middle School. Kansas law provides for enhanced penalties for drug transactions that take place “...on, or within 1,000 feet of any school property upon which is located a structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades one through 12.” One of the officers testified that the Liberty Middle School building was owned by a Unified School District known as U.S.D. 382, but there was no evidence what activity, if any, the school district conducted in the Liberty Middle School. The Court did not buy the State’s argument that the jurors were from the area and therefore knew, from their own common sense and experience, that the Liberty Middle School was used for student instruction. The State has the burden to prove each element of the offense beyond a reasonable doubt, and it cannot be left for the jury to “speculate or infer through its own observations that the structure complies with the statutory definition of a school.” *State v. Witten*, Docket #103,476, 103,477 (Kansas Court of Appeals)

**PRIOR INCONSISTENT STATEMENT AND VOLUNTARY INTOXICATION**

Brown lived with Nakisha, after at one time being married to Nakisha’s mother. Nakisha had two children, L.H., age 10, and M.H., age 2. On the night of the incident that led to charges against Brown, Nakisha had gone out with her sisters, leaving Brown to babysit L.H., M.H. and their four male cousins. The children were watching television, while Brown was in another part of the house. L.H. reported that after having fallen asleep, she was awakened by Brown jerking her arm and taking her downstairs. L.H. said that Brown was talking nasty to her, and said that if he couldn’t get anything else from her he could at least “rub on your butt.” L.H. ran out of the house and across the street to where her great-grandmother lived, but was not able to get anyone to answer the door. She then went to the house behind, but was again unable to get an answer. Brown was outside the great-grandmother’s house, and L.H. said that Brown had chased her. L.H. went to another house down the block where her uncle lived and she was able to get assistance. The uncle contacted police as well as Nakisha, and L.H. made statements to the uncle, Nakisha and the police officer about what had happened. As part of the investigation, L.H. was interviewed by an interview specialist and a video tape of the interview was introduced as evidence in the trial. Brown was convicted of attempted aggravated indecent liberties with a child and aggravated indecent solicitation.

Brown argued on appeal that error was made in admitting prior inconsistent statements of L.H. which were admitted through the testimony of L.H.’s uncle, Nakisha and the police officer. Brown did not object to any of this testimony at the trial, and the Court generally does not review an issue of improper admission of evidence if a timely and specific objection was not made when the evidence was offered at trial. Brown argued that the Court should consider the issue because it involved the fundamental fairness of his trial as well as prejudicing the jury against him. The Court cited *State v. Johnson*, 286 Kan. 824 (2008), which found that a defendant could not claim deprivation of the right to confront a witness about prior inconsistent statements made to others when that witness testified at trial, like L.H. did in this case. The Johnson Court then went on to say that the claim was actually a claim of prejudice by the admission of the prior statements, but dismissed that claim due to the lack of a contemporaneous objection.

Brown also claimed error in the trial court’s failure to give a voluntary intoxication instruction. Voluntary intoxication is not a defense to a specific intent crime, but can be considered to negate the intent element in a specific intent crime. The Court found that the aggravated indecent solicitation charge is a specific intent crime, but found no error in the failure to give an instruction in Brown’s case. While there was evidence that Brown was “drunk” and acting strange at the time of the incident, the evidence did not establish that he was so intoxicated.
that his mental faculties were so affected that he could not have formed the intent necessary to establish the crime. Brown did not request the Court to give an instruction on voluntary intoxication. The evidence and arguments offered by Brown at trial were primarily that the State had not satisfied its burden of proving the charges, due to inconsistencies between L.H.’s pre-trial, recorded interview and her trial testimony. Instructing the jury on voluntary intoxication would be inconsistent with Brown’s theory of his defense. Brown also claimed error in the court’s “deadlocked jury” instruction, where the court urges the jury to come to a verdict and states that if they don’t, there will have to be another trial and that would be burdensome on those involved. This instruction has been rejected by the appellate courts previously, but the standard for determining whether giving the instruction requires a new trial is whether it was clearly erroneous, and that the defendant has to show a real possibility that the verdict would have been different had the instruction not been given. Brown does not meet that burden. State v. Calvin Brown, Docket #100,881 (Kansas Supreme Court)

NO LEGISLATIVE MARGIN OF ERROR IN DUI STATUTES

Finch was charged with DUI under K.S.A. 8-1567(a)(2) which states "No person shall operate or attempt to operate any vehicle within this state while: . . . the alcohol concentration in the person's blood or breath, as measured within two hours of the time of operating or attempting to operate a vehicle, is .08 or more." Finch submitted to a breath test on the Intoxilyzer 5000. At trial the police officer testified about the routine testing done on the Intoxilyzer machine, and the variations in the test results done on the standard solution. In cross-examining the officer, Finch asked the officer about a margin of error on the Intoxilyzer, but the officer testified there was no margin of error and gave an explanation of why the routine testing produced variations in the measure of alcohol in the standard solution. At the close of the State’s evidence, Finch moved for judgment of acquittal, arguing that the margin of error in the Intoxilyzer established reasonable doubt of Finch’s guilt. In considering the motion, the judge indicated he believed that the evidence would have to show a breath test result of .087 in order to be reliable evidence of a blood alcohol level of .08. The judge also had doubts about the officer’s testimony that there is no margin of error in the Intoxilyzer 5000, stating that he heard evidence from a chemist in a different case that there “is in fact a variation in the Intoxilyzer 5000.” The judge granted the motion for judgment of acquittal.

The Court looked at the statutory language in the charge against Finch which required the State to prove: 1) that Finch operated or drove a vehicle; 2) that while driving, Finch had an alcohol concentration in his blood or breath of .08 or more "as measured" within two hours of operating or driving a vehicle; and 3) that the driving occurred on the date alleged in the complaint and in Douglas County. The Court pointed out that the legislature could provide for consideration of a margin of error in the DUI statutes, but has chosen not to do so. However, the Court did not go so far as to approve the State’s characterization of the charge in this case as a “per se” violation. The State does not have to prove the defendant’s actual blood alcohol concentration at the time of driving or at the time of the test, and also does not have to prove any adverse affect of the alcohol on the defendant’s ability to operate a vehicle for the charge under this subsection of the DUI statute. If the State admits evidence of the required elements of the offense, it has established a prima facie case that allows the case to be determined by the finder of fact, but does not compel a conviction as a matter of law. The State’s evidence can be challenged and questioned, and the jury must determine the facts and apply the law to those facts to reach a verdict. It was error for the judge to enter judgment of acquittal rather than letting the jury decide the case.

The judge’s statements in entering the judgment of acquittal were that he had heard evidence in a different case that he was considering in this case and apparently affected his decision. The Court pointed out that this type of evidence is not part of what a judge can take judicial notice of under K.S.A. 60-460(c)(2), State v. Finch, Docket #101,136 (Kansas Supreme Court)

INVESTIGATORY DETENTION NOT SUPPORTED BY REASONABLE SUSPICION EQUALS ILLEGAL SEIZURE; SPEEDY TRIAL

Officer Brown stopped Thomas as she was walking along the street, believing that she was another individual that Brown was looking for to serve a subpoena. After brief conversation, Brown determined that Thomas was not the individual who needed to be served. Brown went on to ask Thomas some information such as her address and social security number. During this contact, Brown told Thomas she was not under arrest and told her more than once she was free to go. However, obtaining this information from Thomas sparked memory in Brown of previous incidents involving Thomas and illegal drug dealing. Still, after obtaining the answers to his questions, Brown told Thomas goodbye, shook her hand, and Thomas turned and walked away. After they were 10’-15’ apart Brown called out to Thomas asking whether he could ask a few more questions. Thomas turned around, came back to where Brown was and agreed to answer questions. Brown began asking more questions about his previous encounter with Thomas, her use of illegal drugs, and the acquaintance of Thomas that was also involved in the prior drug incident. Brown used his shoulder radio to request that another officer come to his location, and began asking Thomas more pointed questions about her possession or use of drugs earlier that day. Thomas told the officer she did not have drugs on her and emptied her pockets. When the officer pressed Thomas to be honest and asked whether he could check her pockets, she threw up her hands and said she had two cocaine pipes that
Court Watch

she had just found on the ground. Brown again used his
shoulder radio to see about a female officer being available to
pat Thomas down, and then Brown placed Thomas under ar-
rest.

Thomas moved to suppress the evidence found during the
second encounter with Brown, arguing that the evidence was
obtained as a result of an investigatory detention that was not
supported by reasonable suspicion, and therefore an illegal
seizure. The Court considered the totality of the circumstanc-
es, including Brown’s call for back-up and the fact that Brown
did not advise Thomas that she was free to go during the se-
cond encounter, and found that the second encounter was an
investigatory detention. There was not reasonable suspicion
that Thomas had committed or was about to commit a crime.
While Brown located Thomas in an area known for drug deal-
ing and also had prior knowledge of Thomas being involved
in drug activity, there was no evidence that Thomas was under
the influence or in possession of any drugs at the time that
Brown detained Thomas. The evidence obtained as a result of
that detention should have been suppressed.

Thomas also claimed her speedy trial rights were violated.
The issue turned on the fact that Thomas waived her right to
preliminary hearing, but was arraigned 15 days after that.
Thomas pointed to K.S.A. 22-3206(3), which says that if a
defendant waives preliminary hearing, the arraignment shall
be conducted at the time scheduled for that hearing. Howev-
er, K.S.A. 22-3402(2) requires that a defendant be brought to
trial within 180 days of arraignment. Thomas’s argument was
a violation of her speedy trial rights, so the specific statute
dealing with speedy trial requirements is the controlling provi-
sion. Whether or not the arraignment should have been done
at an earlier date does not impact the determination of speedy
trial in this case. State v. Thomas, Docket #98,123 (Kansas
Supreme Court)

EXPUNGEMENT TERMINATED
SEX OFFENDER STATUS

Divine was convicted of lewd and lascivious behavior in
2003, which required him to register under the KORA as a sex
offender for 10 years. However, after completing his proba-
tion successfully and waiting three years, Divine petitioned
for expungement of his conviction. The district court granted
the expungement when the judge approved an agreed journal
entry that was signed by Divine’s attorney and the State’s
attorney. Divine then asked the court to relieve him of the
obligation to register as a sex offender, since the expungement
meant that he no longer had a conviction that triggered the
registration requirement. The expungement statute states that
if expungement is ordered, the defendant is treated as if he or
she had not been arrested, convicted of or diverted from the
offense. The statute lists specific exceptions as to where the
defendant is required to disclose the expunged offense or the
expunged offense can be considered, but registration under
KORA is not one of the statutory exceptions. The State
pointed out that in 2001 the legislature amended the KORA
to specifically state that a person required to register under
the act can not obtain an order from the court relieving that
obligation. However, in this case Divine was not seeking
relief of his obligation to register. The expungement means
that Divine no longer can be considered to have that offense
on his record and terminated his status as a sex offender as a
matter of law. State v. Divine, Docket #102,907 (Kansas
Supreme Court)

FACTORS WARRANTING REMOVAL OF
DEFENSE COUNSEL

Smith was charged with aggravated robbery involving an
incident at a convenience store. The clerk at the store
picked the defendant out of a line-up, and at the trial posi-
tively identified the defendant as the person who committed
the robbery. At trial, the State introduced surveillance tape
from the convenience store, which provided several views
of the face of the person committing the robbery. During
the trial, Smith asked for a different attorney to be appoint-
ed to represent him. Rumsey, the defendant’s attorney, told
the judge that he had personally viewed the surveillance
tape several times and was convinced that it showed the
defendant committing the robbery. Rumsey also told the
judge that Smith wanted to take the stand and testify that he
was receiving worker’s compensation benefits so had no
motive to commit a robbery, and also that he had physical
limitations that would prevent him from being able to com-
mit the robbery. Rumsey told the judge that he had explained
to Smith several times that he could not allow false
testimony to be presented. In denying Smith’s motion for a
new attorney, the judge told Smith that any attorney would
be bound by the same ethical considerations of not being
able to present false testimony, so there was no basis to
remove Rumsey from the case.

To warrant removal of counsel, a defendant must establish
justifiable dissatisfaction with present counsel, which cannot
be remedied by the appointment of new counsel. This
means the defendant must show a conflict of interest, an
irreconcilable conflict, or a total breakdown of the commu-
nication between the client and the attorney. The district
court in this case did not go far enough to determine wheth-
er such a condition existed. The problem as explained by
Rumsey was that Rumsey personally believed that the sur-
veillance tape showed the defendant committed the robbery,
and that if the defendant testified that he had an injury and
had received worker’s compensation benefits, that would
allow the possibility that an inference could be made that
the defendant did not commit the offense. In his statements
to the judge, Rumsey indicated that the defendant had in-
fact received worker’s compensation benefits. So the prob-
lem really was not that the testimony the defendant wanted
lead to what Rumsey himself believed was a false inference, namely that the defendant did not commit the offense. The Court said that Rumsey stepped outside his role as defense attorney and, in his mind, became the fact finder and determined that Smith was guilty. “[I]f Rumsey's refusal to introduce evidence on Smith's behalf was based upon Rumsey's out-of-bounds determination of guilt, rather than on the falsity of the evidence, Smith's dissatisfaction was justified.” The Court reversed and remanded the case with instructions to appoint new counsel for Smith for his new trial. *State v. Smith*, Docket #99,655 (Kansas Supreme Court)

**ANOTHER “CRAWFORD” CONFRONTATION CLAUSE CASE**

Bryant was convicted of second degree murder, being a felon in possession of a firearm, and using a firearm in the commission of a felony. The charges stemmed from an incident where police were called to a gas station at 3:25 a.m. with a report of a shooting, and found Covington lying on the ground with a gun shot wound in his abdomen and in great distress. When the police arrived they asked “what happened” and Covington replied that “Rick shot him.” As the police were asking other questions such as who shot him and where the shooting occurred, Covington reported that he had been at Bryant’s house talking through the door and heard Bryant’s voice responding to him from inside the house. As Covington turned to walk away, he was shot through the door. Covington drove himself to the gas station. Within 5 – 10 minutes of police arriving at the gas station EMS arrived and took Covington to the hospital, where he died within the next few hours. At trial the State presented the statements Covington made at the scene through the testimony of the police officers who were there. Bryant argued that those statements were testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004) and that since Bryant did not have the opportunity to cross-examine Covington, those statements violated his rights under the Confrontation Clause and the officers should not have been allowed to testify as to Covington’s statements.

When the United States Supreme Court decided issued their decision in *Crawford*, they held that to preserve a criminal defendant’s rights to confront the witnesses against them, prior testimonial statements can not be admitted at trial the witness must be unavailable and there must have been a prior opportunity to cross-examine the witness. The Court did not set the parameters of what constitutes a testimonial statement, but did specify that at a minimum, preliminary examination testimony, testimony before a grand jury or at a prior trial, or a police interrogation would constitute testimonial statements. In later cases the Court looked more closely at what type of statements to police would qualify as testimonial and drew a distinction between statements made to police to help meet the needs of an “ongoing emergency”, which are non-testimonial, and statements made when there is no ongoing emergency and the primary purpose is to “establish or prove past events potentially relevant to later criminal prosecution.” The Court held that “when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the “primary purpose of the interrogation” by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs.”

In applying the test to Bryant’s case, the court looked at the fact that a weapon was involved and that the defendant had current medical issues, but also said the degree of informality of the contact with law enforcement is important. In addition, the Court said that the statements made by both law enforcement and the witness at the time provide insight as to the “primary purpose” of the encounter. In this case, when the officers arrived at the scene they did not know who the victim was, whether the incident occurred at that location or elsewhere, whether the assailant was at that location or not, and whether or not the basis of the reason for the attack was limited to Covington as a target or whether other members of the public could be at risk. The situation was informal, and the questions being asked by the officers were to meet the ongoing emergency situation. The statements by Covington were therefore non-testimonial, and their admission in Bryant’s trial did not violate Bryant’s Confrontation Clause rights. *(Continued on page 15)*
Court Watch
(Continued from page 14)

In a strong dissent, Justice Scalia states that rather than clarifying the law with regard to the Confrontation Clause, the Court has made itself the “obfuscator of last resort.” Scalia vehemently disagrees with the majority’s characterization of the scene as an ongoing emergency, and also with the determination that the statements are non-testimonial. Michigan v. Bryant, _____ U.S. _____ (2011) (United States Supreme Court)

Step Back in Time
(Continued from page 5)

Quantrill was not the Robin Hood figure portrayed in song, but rather a ruthless killer.

Much information for this story came from an article in the Oklahoma Historical Society’s Encyclopedia of Oklahoma History and Culture, by James L. Huston.

Patrick Caffey

Legislative Updates
(Continued from page 1)

waiting a "reasonable period of time" and the light does not change, but cyclists still must yield to all other traffic in doing so; when vehicle operators are overtaking a bicycle travelling in the same direction, the operator of the passing vehicle must maintain a distance of no less than three feet from the bicycle; the Secretary of Transportation is authorized to raise the speed limit to 75 mph on any separated multilane roadway; Speeding convictions in speed zones of 55 mph or more, where the speeding is not more than 10 mph over the speed limit, is not reportable to DMV; the existing provision for not reporting to DMV convictions of speeding of not more than six mph over the limit in speed zones of 30 mph to 54 mph remains unchanged; and the uniform act regulating traffic (KSA 8-2204) is amended to include any violation of Article 25 of Chapter 8 of the KSA (Seat belt violations). It also amends KSA 8-2503 by deleting the subsection exempting child restraint system requirements and combining the existing subsection (a) and (b) into one subsection. It also amends KSA 8-2504 by clarifying municipal courts must not assess a fine more the $10 for an adult violating the seat belt law and cannot charge court costs; and municipal courts may not fine a person age 14 through 17 more than $60 for not wearing their seat belt and cannot assess court costs for this violation.

(Editor’s note: There have been several bills proposed and some passed by each house of the Legislature that may be of interest to Municipal Courts. However, to the best of the Editor’s knowledge, the above bills are the only pertinent ones that have been signed by the Governor at press time. Expect action and proposed legislation to commence once the Legislature reconvenes for the closing session beginning April 28. Updates will follow in the Summer edition of The Verdict.)

REMINDER
2012 KANSAS MUNICIPAL JUDGES CONFERENCE

Please mark your calendar for the 2012 Annual KMJA Conference in Wichita, Kansas April 29 through May 1 at the Marriott Hotel

“Cartoon copyrighted by Mark Parisi, printed with permission.”
Alcoholic Energy Drinks—Making a come back....

According to a recent article written by Sam Womack and published in the Omaha World-Herald, some controversial alcoholic energy drinks have been revamped - they no longer contain caffeine - and are back in stores.

The dangerous combination of caffeine and alcohol in those beverages - known as a "blackout in a can" - got them pulled from store shelves in many states.

But the drink companies swiftly reformulated the concoctions. The caffeine-free formulas received approval from the Alcohol and Tobacco Tax and Trade Bureau, and the drinks went back on sale before the beginning of this year.

Once the Nebraska Liquor Commission received notice of the approval, it green-lighted the fruit-flavored malt beverages for purchase in the state, said Hobert Rupe, the commission's executive director.

The manufacturer of Four Loko, Phusion Projects of Chicago, saw the direction that regulators were leaning and announced in November that it would remove caffeine, guarana and taurine - common ingredients in energy drinks - from its alcohol products.

Just a week after the Nebraska Liquor Commission halted shipments of the caffeinated alcoholic beverages popular with young adults, Phusion began shipping out the reformulated Four Loko.

Four Loko is one of the more widely known energy-booze drinks because of an incident in October in which several Washington Central University students were found unconscious after consuming large amounts of Four Loko and other alcoholic beverages.

Four Loko cans are still 23.5 ounces, contain 12 percent alcohol and come in eight flavors, including fruit punch and lemonade. Phusion's website compares the drinks' alcohol content to wine and says flavored booze is "nothing new."

But even the new version is dangerous, said Cassie Greisen, associate director of Project Extra Mile, a Nebraska advocacy group.

"It's still a large can with a lot of alcohol," she said, describing the drinks as a "binge in a can."

People might equate one can of the fruity drinks to a beer, which has a much lower alcohol content at 4 to 5 percent, Greisen said.

"It gives the illusion that you're not drinking as much alcohol as you are," she said.

Project Extra Mile also is concerned that the product's candy-colored cans, low price and fruity taste appeal to young or underage drinkers. And 90 percent of underage drinking is binge drinking, Greisen said.

She called Four Loko and Joose "second-generation alcopops." Alcopops refer to drinks such as Mike's Hard Lemonade and Smirnoff Ice, which have been known to appeal to young girls.

IMPAIRED DRIVING COURSE

The National Judicial College in Reno, NV is offering a course on impaired driving case essentials August 15-18, 2011. The tuition fee is $985 and the conference fee is $245, but scholarships are available.

For additional details please contact the National Judicial College at 1-800-255-8343 or visit WWW.JUDGES.ORG
K.S.A. 20-348 authorizes the district court to tax the county for the attorney fees of an indigent person confined pursuant to the Sexually Violent Predator Act (SVPA) in a habeas corpus proceeding under K.S.A. 60-1501.

AG Opinion 2011-5
March 7, 2011

Persons who remain in the custody of the Kansas Department of Corrections and reside at a facility for the purpose of alcohol or substance abuse evaluation or treatment may not have their address distributed as required by the Kansas Open Records Act because of the federal preemption of Kansas statutes concerning individually identifiable health records or patient identity. The restriction may be waived by consent of the individual.

AG Opinion 2011-6
March 11, 2011

A city or county may regulate the manner of openly carrying a loaded firearm on the person of a concealed carry permit holder. A city or county may regulate the manner of openly carrying a loaded firearm on the person of a non-holder of a concealed carry permit holder. A city or county may regulate the manner of openly carrying a loaded firearm in the immediate control of a non-holder of a concealed carry permit holder, whether on public or private property. A city or county may not regulate the manner of openly carrying a loaded firearm in the immediate control of a holder of a concealed carry permit when such holder is on public property.
challenge to the basis for the traffic stop or that the arresting officer had a reasonable suspicion to believe Arias had been driving under the influence of alcohol. Thus, the issue before the Court was whether the arresting officer had probable cause to arrest Arias. “Even assuming, as we must, that Arias could not understand the officer’s instruction and that he passed the field coordination tests, there is a mountain of uncontroverted evidence to support probable cause to arrest. The arresting officer observed erratic driving, that Arias had bloodshot eyes, that there was an odor of alcohol about him, and the PBT result was .08 or more. These are uncontroverted circumstances that undeniably support an informed and reasonable belief that Arias had been driving under the influence of alcohol and should be arrested. We conclude that as a matter of law the district court erred in its ruling that there was no probable cause to arrest Arias.”

The case was reversed and remanded for further proceedings.

SCHEDULING OF PRETRIAL CONFERENCE SETTING MAY HAVE VIOLATED DEFENDANTS RIGHT TO SPEEDY TRIAL
Unpublished Decision


On January 2, 2009 the City filed a formal complaint against Roy alleging she committed a DUI, drove while her license was canceled, suspended, or revoked, and made an improper right turn on December 4, 2008. On January 9, 2009 Roy's counsel filed his entry of appearance, and by the same filing entered a plea of not guilty, and waived arraignment on behalf of Roy. A hearing “for disposition or further scheduling” was set for February 4, 2009. On February 4, 2009 the case was set for a pretrial conference on March 4, 2009. On March 4, 2009, the case was set for trial on May 13, 2009. On May 13, 2009 the City moved for a continuance of trial, which was granted to June 24, 2009. On June 24, 2009 the City moved for a continuance of trial, which was granted to July 15, 2009. On July 15, 2009 Roy moved to dismiss the municipal court case contending that her speedy trial rights were violated in the municipal court because 187 days had elapsed from her arraignment until commencement of trial. The municipal court denied the motion and Roy was convicted at trial.

Roy appealed her convictions to the district court. On both December 21, 2009, and January 11, 2010, the district court heard arguments of counsel. The only evidence presented to the district court was Roy's municipal court file, a memo from the Municipal Court Judge regarding changes to the municipal court rules, and the municipal court rules incorporating these changes. On January 25, 2010, the district court announced its decision. The court sustained Roy's Motion to Dismiss based upon the facts as the Court understood them.

But, the district court failed to state any findings of fact or conclusions of law during this hearing. The district court directed Roy's counsel to prepare a journal entry. Both parties, however, submitted similar proposed journal entries which were signed by the district court. These journal entries memorialized the district court's decision granting the motion to dismiss but did not include any findings of fact or conclusions of law.

The City appealed the adverse judgment dismissing the municipal court charges. The City argued that the days Roy was set for a pretrial conference, from February 4, 2009, to March 4, 2009, should not count for speedy trial purposes. The City characterized that time as a continuance by Roy to be placed on a pre-trial docket and that Roy “acquiesced in or requested” the “continuance”.

Because there was a limited Municipal Court record to review and because the District Court failed to state any findings of fact or conclusions of law, the Court of Appeals reversed and remanded with directions for further proceedings. Specifically, on remand, the district court is advised to make factual findings and/or conclusions of law in responding to the following questions:

1. When was the earliest practical day Roy could have been brought to trial given the circumstances of this case?
2. Were the City's two continuances of trial granted for good cause? What effect does this finding have on the district court's legal conclusion whether Roy's speedy trial rights were violated?
3. Was the February 4, 2009, setting of the case for a pretrial conference on March 4, 2009, a motion for continuance of trial or acquiescence to a continuance by Roy? What effect does this finding have on the district court's conclusion of law whether Roy's speedy trial rights were violated?
4. What is the statutory or legal basis for the district court's conclusion of law regarding whether Roy's speedy trial rights were violated?

DEFENDANT'S DISRUPTIVE ACTIONS AND YELLING “BITCH” IN CROWDED THEATER ARE NOT “FIGHTING WORDS”, BUT ARE SUFFICIENT TO SUPPORT CONVICTION FOR DISORDERLY CONDUCT
Unpublished Decision

On June 20, 2009, H.A.-G., a juvenile, decided to attend a movie at the Legends 14 Theatres in Wyandotte County with some teenage friends. After the movie started H.A.-G. began laughing and talking loudly with another girl. The theater general manager, John Buckner, asked both girls to leave. The girls started to argue and slowly exited the theater. When they reached the doorway, the girls began to curse and Buckner heard H.A.-G. yell out the word “bitch” at a volume that everyone in the theater could hear. Gary

(Continued on page 19)
(Continued from page 18)

Todd, an off-duty police officer who worked security for the theater, was at the entrance and witnessed H.A.-G. yell “bitch” loudly into the theater. Several moviegoers turned and looked to see what was causing the disturbance. Todd then approached H.A.-G. and placed her under arrest.

H.A.-G. was charged in juvenile court with one count of disorderly conduct in violation of K.S.A. 21-4101, a class C misdemeanor and was convicted. She appeals her juvenile adjudication of one count of disorderly conduct in the case of In Re H.A.-G., 2011 WL 427954 (Kan. App. February 4, 2011).

H.A.-G.’s primary claim was that her disorderly conduct adjudication could not be grounded solely on her speech because her speech did not rise to the level of “fighting words.” The district court agreed that H.A.-G.’s statements were not fighting words, but the district court found her argument to be relevant only with regard to a disorderly conduct charge brought under K.S.A. 21-4101(c). The district court found that under K.S.A. 21-4101(b), “‘...the mere disturbance of a lawful assembly could support a disorderly conduct adjudication even if the defendant did not engage in speech rising to the level of fighting words. Based on the evidence, the district court found that H.A.-G.’s actions, including her disruptive conduct in her seat prior to yelling “bitch” into the theater, were sufficient to support an adjudication of disorderly conduct under K.S.A. 21-4101(b).’” Affirmed.

COURT MUST CONSIDER ALTERNATE METHODS TO SATISFY DUI SENTENCE

In the case of State v. Adam, Slip Copy, 2011 WL 867608 (Kan. App. March 11, 2011), Adam contends, Inter alia, that the district court erred when it failed to consider his financial resources and alternative methods of payment when imposing the mandatory $1,500 fine for his third felony DUI conviction. K.S.A. 21-4607(3) requires the sentencing court to take the defendant’s financial resources into account when determining the amount and method of paying a fine. Although the DUI statute imposes a mandatory fine, K.S.A.2010 Supp. 8-1567(j) establishes an alternative method for payment of a fine, providing that the sentencing court may order a person convicted of DUI to serve community service specified by the court, “[I] lieu of payment of a fine imposed pursuant to this section.” Since the method of paying the fine is discretionary, the district court must consider the defendant’s financial resources when deciding how the defendant should pay the fine. Accordingly, that portion of the district courts decision was vacated and remanded for further consideration. (Editor’s Note: For those courts utilizing the current version of the Standard Traffic Ordinance for Kansas Cities (“STO”), STO 30(h) authorizes the court to order community service in lieu of fines.)

ATTEMPT TO OPERATE MOTOR VEHICLE DUI - SUFFICIENCY OF THE EVIDENCE

April 8, 2009 was not a good day to hunt morel mushrooms for Buddy Ahrens. Ahrens spent the afternoon of that day drinking a few beers with friends and hunting mushrooms. The group stopped hunting before dark and went to Darrell’s house. According to Ahrens, he took a nap at Darrell’s and did not have anything more to drink before leaving with Richie around 10 p.m. Ahrens drove into Kingman to take Richie home. While driving Ahrens was stopped by a Kingman County Sheriff’s Deputy for equipment and traffic regulation violations; namely, not have a functioning tail light or brake light. During the traffic stop, the deputy noticed the smell of alcohol on Ahrens’ breath and asked him about it. Initially Ahrens denied drinking any alcohol but later admitted to drinking two alcoholic beverages at around 2 p.m. In addition to the smell of alcohol, the deputy noticed that Ahrens “wasn’t making much sense,” his speech was slurred, and his eyes were glassy and bloodshot. Suspecting that Ahrens was under the influence, the deputy asked him to complete some field sobriety tests, including the walk-and-turn and the one-leg-stand where he missed several clues in each test. Ahrens was arrested for suspicion of DUI.

The State charged Ahrens with operating or attempting to operate a motor vehicle while under the influence of alcohol. The case proceeded to jury trial where Ahrens was convicted and sentenced for DUI. Ahrens asserted there was insufficient evidence to support a conviction that he was attempting to operate a motor vehicle while under the influence. Ahrens appealed his conviction in State v. Ahrens, Slip Copy, 2010 WL 7678589 (Kan. App. February 18, 2011). Ahrens argues that “[there was no evidence that [he] tried, but failed, to operate the vehicle. The evidence supported that he operated his vehicle because he was driving it when observed and stopped by the deputy. The police stop ended his operation of the vehicle.”

The court concluded it is precisely the fact that the police stop ended his operation of the vehicle that proves the alternative theory of attempt. Because Ahrens testified that he was driving his friend home and had not yet dropped off his friend, it is reasonable to conclude that had Ahrens not been stopped by the Deputy, then he would have continued on at least to his friend’s house and then possibly to his own. By initiating the stop, the deputy intercepted Ahrens as he was committing the crime of driving under the influence, which effectively prevented Ahrens from continuing to commit the crime of driving under the influence thereby meeting the statutory definition of attempt in Kansas. Affirmed.

(Continued on page 20)
DUI – SUPPRESION
LACK OF REASONABLE SUSPICION TO STOP AND SEARCH MOTOR VEHICLE

Just before 6pm on November 2, 2009, Ronnie Blaylock was stopped by a deputy based upon an alleged non-functioning tag light in an area around some oil wells that the deputy later described as an area where police had been finding “meth trash”. During the course of the deputy's contact with Blaylock he noticed what appeared to be a beer can partially covered by a sock. The deputy also detected an odor of alcohol coming from Blaylock’s breath. Blaylock performed filed sobriety tests and did not show any clues of impairment. The deputy then asked Blaylock if he had any open alcoholic beverages in his vehicle. Blaylock replied he did and produced the can from the console, which can was still cold. Blaylock admitted the can was his. The deputy then searched the vehicle for more open cans and discovered marijuana and a pipe in a box under the seats. Blaylock was arrested and charged with one count of possession of marijuana and a pipe in a box under the seats. Blaylock filed a motion to suppress, arguing the seizure and subsequent search of his vehicle were illegal.

The State appealed the district court's suppression of the fruits of a search of Blaylock's vehicle in State v. Blaylock, Slip Copy, 2011 WL 420730 (Kan. App. January 28, 2011), based on the lack of reasonable suspicion to support a stop of the vehicle. The State argues that reasonable suspicion to stop the vehicle was based on a defective tag light, driving left of center, and failure to signal turn. However, during trial Blaylock presented substantial evidence that the tag light was working and he was in that location to pump the wells. Moreover, the district court was not persuaded that there was sufficient evidence to support the remaining traffic charges. Concluding that it could not reweigh the evidence on the question of defective tag light and that the driving errors, if any, were not articulated by the officer as supporting his stop, the Court of Appeals affirmed the district court decision.

DEFENDANT “OPENS THE DOOR” TO HIS CHARACTER BY CLAIMING TO BE LICENSED MINISTER

Wendell T. Caesar was arrested and charged with Burglary and Theft on December 18, 2008 stemming from the theft of flat screen television at a home in Wichita. The jury ultimately found Caesar guilty of burglary but could not reach a decision on the theft charge. The district court sentenced Caesar to 32 months in prison, with 12 months' post release supervision. Caesar appealed claiming, among several grounds, that the district court erred in admitting evidence of his prior crimes involving dishonesty.

One issue in State v. Cesar, Slip Copy, 2011 WL 427460 (Kan. App. February 4, 2011) was whether the state could impeach Caesar’s testimony with prior crimes involving dishonesty. The district court relied on State v. DeLespine, 201 Kan. 348, 440 P.2d 572 (1968), to conclude Caesar had in fact opened the door to his credibility by testifying that he worked with gang-affiliated youth in the community, gave a “needy individual” a $20 donation, and prayed with “Dave”, the man who Cesar claimed was trying to sell him the television. Accordingly, the district court allowed the State to present evidence of Caesar's prior crimes involving dishonesty.

The Court of Appeals held: “Caesar’s statements at trial clearly exceeded the scope of background information and were an attempt to bolster his credibility, character, and reputation to the jury. Accordingly, the district court did not abuse its discretion in admitting Caesar's prior crimes involving dishonesty.” Affirmed.

SINGLE BRIEF EXCURSION OVER LANE MARKER DOES NOT PROVIDE REASONABLE SUSPICION TO SUPPORT TRAFFIC STOP


Shortly after 11 p.m. on March 16, 2009, a Seward County Sheriff’s Deputy saw a pickup truck traveling west on a four-lane road. He saw the truck straddling the westbound lanes for several seconds with its driver's side tires in the left lane. The truck then “drifted” back into the right lane and continued drifting close to, though not striking, the curb. The truck then “drifted” to the left again but did not cross the lane marking, back to the right, and again to the left within the lane. At that point, the deputy activated the emergency equipment on his patrol car. The truck stopped about a block later. The deputy approached the truck. Stephen Eisenhauer was the driver and only occupant. Upon further investigation Eisenhauer was arrested for driving under the influence of alcohol (DUI).

Eisenhauer moved to suppress the evidence obtained at the traffic stop arguing the deputy did not have a reasona-
Unpublished Opinions

(Continued from page 20)

Eisenhauer’s arrest because the statute “requires reasonable suspicion to make the traffic stop. At the hearing on Eisenhauer’s motion, the deputy testified that he stopped Eisenhauer based upon the belief that Eisenhauer had failed to maintain a single lane as required by K.S.A. 8-1522(a). The deputy did not observe any safety issue with respect to Eisenhauer straying from the outside lane of travel and he did not express any concern that the driver was either intoxicated or falling asleep as a basis for making the stop.

In its opinion, the Court of Appeals laid out a detailed analysis of prior and pending appellate decisions, including recent decisions by the Kansas Supreme Court regarding similar cases (State v. Marx, 289 Kan. 657, 674, 215 P.3d 601 (2009), in order to reach its final decision in Eisenhauer’s case. A majority concluded, with Judge Atcheson dissenting, that the District Court did not err in suppressing the evidence obtained as a result of the stop because: “Eisenhauer’s single brief excursion over the lane marker would not provide the officer reasonable suspicion to make the traffic stop that led to Eisenhauer’s arrest because the statute “requires more than an incidental and minimal lane breach.”

**DOES “TAG NOT ON FILE” JUSTIFY A TERRY STOP?**

Unpublished Decision

Eric Kramer was stopped for displaying a tag that was “not on file”. The deputy who stopped Kramer noticed signs of impairment and conducted field sobriety tests, which Kramer failed. Kramer refused a preliminary breath test and was taken into custody. At trial, the court granted Kramer’s motion to suppress the evidence resulting from the traffic stop because, although the deputy who conducted the stop testified at trial regarding other suspicious activity of Kramer, the deputy’s express reason for stopping Kramer was because his license tag was “not on file.”

The issue in *State v. Kramer*, Slip Copy, 2011 WL 768034 (Kan. App. February 25, 2011), was whether the information from dispatch that a vehicle’s tag is not on file would provide an officer with a reasonable and articulable basis for believing that a violation of K.S.A. 2008 Supp. 8-142, “failure to register a vehicle”, had occurred thus justifying a stop. The Court of Appeals found in this instance that it did. Reversed and remanded with directions.

**LAYING IN BED NEXT TO DRUG PARAPHERNALIA COMBINED WITH OTHER INCRIMINATING CIRCUMSTANCES SUFFICIENT TO CONVICT**

Unpublished Decision

Police executed a search warrant at Harold Lacy’s residence during the early morning hours of May 15, 2008. Drugs and paraphernalia were found throughout the residence. Lacy was charged and convicted of possession of cocaine, possession of drug paraphernalia, and possession of marijuana. In the case of *State v. Lacy*, Slip Copy, 2011 WL 427601 (Kan. App. February 4, 2011), Lacy appealed arguing that there was insufficient evidence to support his convictions.

The Court of Appeals reviewed the record from the District Court proceedings in the light most favorable to the prosecution to determine whether a rational fact finder could have found the defendant guilty beyond a reasonable doubt. The Court found: “In the present case, a considerable quantity of drugs and paraphernalia were found throughout Lacy’s residence in plain view and mixed in with his personal possessions. Lacy was also discovered in a bed next to some of the drug paraphernalia. Considering all the evidence in the light most favorable to the State, incriminating circumstances linked Lacy to the drugs and paraphernalia.” Thus, the Court concluded that a rational fact finder could have found the defendant guilty beyond a reasonable doubt. Affirmed.

**PUBLIC SAFETY STOP?**

Unpublished Decision

In the case of *State v. Link*, Slip Copy, 2011 WL 768012 (Kan. App. February 25, 2011), the State appeals from the district court’s decision granting Robert T. Link’s motion to suppress.

On September 12, 2009, just after 2 a.m., Link was traveling in the right lane of the highway where he drifted toward the center line before jerking back in his lane of travel. Link’s vehicle did not touch the center line or the fog line. About a mile further Link exited off the highway and at the stop sign at the end of the exit ramp Link “stabbed the brakes” and did not make a smooth stopping motion. Link turned right and immediately pulled onto the shoulder and came to a complete stop. There were no open businesses or residences in the immediate area. A deputy who had observed these actions then pulled over behind Link’s vehicle, activated his lights, and made contact with the driver, who he later identified as Link. The deputy testified that he never observed Link commit a traffic infraction, but was concerned that perhaps there was some distraction inside the vehicle or that the driver or a passenger was not feeling well. He also thought the vehicle may have had a mechanical problem. The deputy asked Link what was going on and Link stated that he was done driving. It was at this point the deputy smelled an odor of alcohol coming from Link. The deputy investigated further and ultimately arrested Link for DUI.

Link filed a motion to suppress, arguing he was stopped and seized without a reasonable articulable suspicion of illegal activity and therefore the evidence obtained as a
result of the unlawful stop and seizure should be suppressed. The district court granted Link's motion to suppress, finding there was not a valid public safety stop. The majority of the Court of Appeals affirmed the lower court ruling holding there must be a specific and articulable reason to check a person's welfare, and courts still must weigh the risk to the public that would occur if an immediate stop is not conduct- ed against the right of an individual to be free from such stops. In this instance, the district court explicitly found that the deputy failed to articulate an objective and specific rea- son to check on Link's safety and welfare. Judge Leben dis- sented, arguing that the actions of the deputy were reasona- ble and “...common sense should lead a prudent law- enforcement officer to check on the safety of someone pulled off at the side of the road in the middle of the night with no one else around to provide help if it's needed.”

EYEWITNESS TESTIMONY

Unpublished Decision

In this case of State v. McConnell, Slip Copy, 2011 WL 781544 (Kan. App. March 4, 2011), Michael McConnell appeals his conviction for nonresidential burglary and theft and, for the first time on appeal, challenges the sufficiency of the evidence against him—specifically, McConnell argues that the testimony of two eyewitnesses were insufficient to support his convictions and requests the Court apply the eye- witness reliability standards espoused in State v. Hunt, 275 Kan. 811, 817-18, 69 P.3d 571 (2003). Those factors are: “(1) the opportunity of the witness to view the actor during the event; (2) the witness’ degree of attention to the actor at the time of the event; (3) the witness’ capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness’ identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly.” 275 Kan. at 817-18, 69 P.3d 571.

ANOTHER MOTION TO DISMISS FOR VIOLATION OF SPEEDY TRIAL

Unpublished Decision

The Court of Appeals held that even if it agreed to apply the Hunt factors at this stage, they do not undermine the substan- tial nature of the evidence against McConnell by the eyewitnesses who were able to testify about the length of time they observed him, that they “got a good look” at him, their vantage point, the lighting, a consistent physical description of McConnell throughout the proceedings, accurate description of his automobile, etc. Affirmed.

Donald Moloney was charged with several misdemeanor an traffic counts including DUI. On May 13, 2009, Moloney appeared before the Shawnee County District Court, waived formal arraignment, and pled not guilty. Moloney was not in custody on the charges. Several hearings and continuances were sought by both parties, but at the last setting, which was a trial, the State requested another con- tinuance, but Moloney objected and moved to dismiss the case based upon a statutory speedy trial violation. The Court calculated that 181 days was chargeable to the State since arraignment and Moloney’s motion was granted. The State appealed.

In the case of State v. Moloney, Slip Copy, 2011 WL 420723 (Kan. App. January 28, 2011) the Court of Ap- peals reviewed the record and concluded that there was a total of 236 days from Moloney’s waiver of arraignment on May 13, 2009, to the trial date on January 4, 2010. Be- cause of Moloney’s continuance requests, 56 of these days were chargeable to Moloney. That left a difference of 180 days chargeable to the State, which is within the speedy trial deadline of K.S.A. 22-3402(2). Thus, the court con- clude the district court erred by granting Moloney’s motion to dismiss based on a statutory speedy trial violation. Re- versed and remanded. (Editor’s Note: Although this case is not directly related to speed trial provisions in Municipal Courts, it serves as a good reminder regarding calculations of time attributable to the respective parties when speedy trial issues are raised as well as a reminder to review the conclusions reached by the Kansas Supreme Court in Overland Park v. Friske, 226. Kan. 496, 601 P.2d 1130 (1979) concerning speedy trial calculations under the Code of Procedure for Municipal Courts.)

“TWO SECOND” RULE SUPPORTS VALID REASON TO MAKE A TRAFFIC STOP

Unpublished Decision

A Kansas highway patrol trooper watched John Noel follow a semi-truck closely. Based upon the “2-second fol- lowing rule” found in the Kansas driving handbook, the trooper estimated that Noel was following too closely. Thus, the trooper stopped Noel. Having received infor- mation from other law enforcement officials regarding Noel transporting marijuana and then smelling a strong odor of marijuana emanating from Noel’s truck, the troop- er searched the truck and found 20 pounds of marijuana. The State charged Noel with possession of marijuana with intent to distribute and a drug tax stamp violation.

In the case of State v. Noel, Slip Copy, 2011 WL 767853 (Kan. App. February 18, 2011), Noel sought to overturn his convictions arguing the district court erred by not granting his motion to suppress based upon an invalid stop. The Court of Appeals affirmed his convictions holding that: “ A traffic violation provides an objectively valid reason to make a traffic stop, even if the stop is a pretext. Because the trooper had a reasonable suspicion that Noel was following too closely, a traffic violation, we hold the stop was reasonable.”

(Continued on page 23)
It seems Brian Lewis Reynolds and his girlfriend, Trisha Quinn, were not getting along. They were at home and began to argue. At some point during the argument, Reynolds decided to leave the residence, but on his way out the door he could not resist destroying all of the Christmas presents he had purchased but not yet given to Quinn. Reynolds was subsequently charged with one count of domestic battery and one count of criminal damage to property. At trial, Reynolds moved for judgment of acquittal which was granted on the domestic battery charge, but denied on the criminal damage charge.

On appeal, in the case of State v. Reynolds, Slip Copy, 2011 WL 1004633 (Kan. App. March 18, 2011) Brian Reynolds argues that there was insufficient evidence to convict him of criminal damage to property because there was no evidence presented that he damaged property owned by another person – in essence, there was no property transfer constituting a gift. The State conceded the error. The case was reversed and remanded with directions to vacate Reynolds’ conviction.

OUT OF STATE DUI CONVICTIONS UNDER SIMILAR LAW CAN BE USED TO ENHANCE SENTENCE

Robert Shaw pled no contest to driving under the influence, 4th offense, was convicted and sentenced. Shaw was previously convicted 5 times for DUI in Arkansas. On appeal Shaw claims that it was improper to use his Arkansas convictions to sentence him as a fourth-time offender in Kansas insisting that the Arkansas DUI convictions shouldn’t be considered because K.S.A. 8-1567 explicitly requires the conviction to be a violation of section 8-1567, not another state’s statutes. Shaw also challenged the $2,500 fine assessed against him arguing the Court should have considered his financial resources when determining the method to be utilized to pay the fine; i.e., the Court should have considered community service as an alternate method to make payment.

In the case of State v. Shaw, Slip Opinion, 2011 WL 426105 (Kan. App. February 4, 2011), the Court of Appeals considered Shaw’s arguments and held that the qualifying phrase, “of this section”, refers to section 8-1567 in its entirety, not just its subparagraphs. Therefore, an out-of-state conviction for the same acts prohibited in Kansas by K.S.A. 8-1567 is a conviction for a violation “of this section” - which includes out-of-state convictions under subsection (n)(2). With regard to the Shaw’s challenge to the $2500 fine, it was error for the district court not to considering community service as an alternative payment option.

COURTS MAY MAINTAIN JURISDICTION TO ORDER RESTITUTION AFTER SENTENCING

In the case of State v. Smith, Slip Copy, 2011 WL 781616 (Kan. App. March 4, 2011), Douglas M. Smith was convicted of aggravated burglary. At the conclusion of his sentencing hearing, the State requested that the court retain jurisdiction to consider the issue of restitution at a later hearing. Neither party objected. At a later hearing the court ordered Smith to pay $4,580.83 in restitution. Smith appealed his sentence and the order of restitution arguing, inter alia, that the district court did not have jurisdiction to order restitution after the date of sentencing. Smith contended, upon a strict reading of K.S.A. 22-3424(d), that restitution was part of the sentence and could not be ordered or modified after the district court imposed sentence. K.S.A. 22-3424(d) provides: “If the verdict or finding is guilty, upon request of the victim or the victim’s family and before imposing sentence, the court shall hold a hearing to establish restitution.” (Emphasis added.) Notwithstanding this language, the Court of Appeals, citing State v. Cooper, 267 Kan. 15, 18, 977 P.2d 960 (1999), held that a sentencing court may reserve restitution issues for a later determination after sentence has been imposed, the court shall hold a hearing to establish restitution.” (Emphasis added.) Notwithstanding this language, the Court of Appeals, citing State v. Cooper, 267 Kan. 15, 18, 977 P.2d 960 (1999), held that a sentencing court may reserve restitution issues for a later determination after sentence has been imposed.

Can We Be (Facebook) Friends?

By Hon. Steve Leben, Kansas Court of Appeals, Topeka, leben@kscourts.org

A couple of months after I had presided over a complex civil jury trial, I had lunch with one of the attorneys who had been involved in the case. He and I had been associates at the same firm many years ago, and we thought it was a good time to catch up after the trial. Over lunch, the conversation turned to Facebook. He used it quite a bit, and he explained to me that he had actually developed quite a relationship with one very good client through Facebook which turned out to be the only means of communication that particular client really used. He invited me to communicate with him through Facebook too, but I didn’t have an account and really didn’t want to.

As a trial judge, being affirmed is a good thing, even when the appellate court invokes the “right for the wrong reason”
rule to do so. My decision not to enter a Facebook friend-
ship with an attorney may have been that type of decision.
Four conflicting judicial ethics advisory opinions have
been given in the past two years on whether attorneys and
judges may be friends on Facebook or similar social net-
works. Lest you unwittingly create a problem for yourself
or a judge, I think it’s worth taking a minute to consider the
differing views on this.

In Florida Advisory Opinion 2009-20, the Florida Judicial
Ethics Committee concluded that a lawyer should not be a
Facebook friend of a judge:

The issue ... is not whether the lawyer actually is in a po-
sition to influence the judge, but instead whether ... the
identification of the lawyer as a “friend” on the social net-
working site conveys the impression that the lawyer is in a
position to influence the judge. The Committee concludes
that such identification in a public forum of a lawyer who
may appear before the judge does convey this impression
and therefore is not permitted.

The Florida committee rejected follow-up suggestions that
a judge could just accept as friends all attorneys who ask
and that a judge could place a disclaimer on the judge's
Facebook page explaining that Facebook friends are only
2010-6.

Other ethics advisory opinions have suggested that a judge
may have attorneys or other court participants as Facebook
friends but that such relationships may lead to recusals:

- A New York advisory committee noted that a judge
“generally may socialize in person with attorneys who
appear in the judge’s court” so that using technology to
do so shouldn’t create an ethics violation for the judge.
But the committee also cautioned that the public nature
of these online friendships might create the appearance
of a particularly strong bond so as to require disclosure,

- A Kentucky committee said a judge could be a Face-
book friend with persons who appeared in court, in-
cluding attorneys, social workers, and law enforcement
personnel. But the committee said it had “struggled
with this issue” of judicial ethics and noted that several
judges who had initially joined social-networking sites
had since limited or ended their participation. The
Kentucky committee urged judges to be “extremely

- A South Carolina advisory committee concluded that a
judge could be a Facebook friend with law enforce-
ment officers so long as they didn’t discuss anything
related to the judge’s position in the online commu-

For the judge, there seems good reason for caution. One
state advisory committee concluded that a judge wasn’t
ethically permitted to have attorneys as Facebook
friends; other states’ advisory committees have been con-
cerned that such publicly proclaimed friendships may
lead to recusals. There are judicial ethics rules that lend
support to these concerns. Rule 1.3 provides that a judge
shall neither lend the prestige of office to others or allow
others to do so; if an attorney indicated to clients that he
or she was a close friend of the judge — and mentioned
the online connection to bolster the claim — that would
seem to fit within Rule 1.3 if the judge had reason to
know about it. Rule 2.11 provides that a judge shall recu-
se when the judge’s impartiality might reasonably be
questioned. For the attorney, getting a friendly judge
recused may be unwise and getting a judge into an ethi-
cally problematic situation might turn into conduct preju-
dicial to the administration of justice, which violates the
Kansas rules for attorney discipline. A judge in North
Carolina was publicly reprimanded for having ex parte
Facebook communication with one attorney in a domes-
tic dispute while the dispute was in progress. In re Terry,
N.C. Inquiry No. 08-234 (April 1, 2009). The attorney in
that case — confronted in the evening with an improper
Facebook communication from the judge — may have
felt afraid not to respond and was clearly in an awkward
situation. But by responding, the attorney violated the
lawyer disciplinary rules on ex parte communication too.
Certainly the rules don’t prohibit friendships between law-
yers and judges, and that probably carries over to Face-
book. One can argue that transparency is actually furthered
when the friendship is documented and partially carried
out online. But caution may be appropriate for the reasons
noted in the Florida advisory opinion, to avoid recusals,
and to avoid communications that otherwise might become
problematic.

About the Author: Hon. Steve Leben has been a
member of the Kansas Court of Appeals since June
2007.
Judge Arnold-Burger and family

Swearing in by Judge Greene

Judge Arnold-Burger and husband Kirk

Judge Arnold-Burger and family in Supreme Courtroom

Gallery of Guests, Dignitaries and Friends

Kansas Court of Appeals En banc

(Continued from page 2)
Judge Arnold-Burger joins the Court

Judge Jan Carlin, Judge Arnold-Burger, Judge Julie Robinson

The Hall of Justice

Judge William Kelly, Judge Arnold-Burger, Denise Kilwein

(Continued on page 27)
Congratulations to Judge Ryan Dixon who was recently appointed as the newest member of the Overland Park Municipal Court bench!

Judge Dixon was born and raised in Overland Park. His father was a police officer in Overland Park until his retirement in 1993. He then became the Chief of Police in Edwardsville followed by Fort Scott and now he is the Assistant Chief in the newly created Johnson County Community College police department.

His father and mother work at Johnson County Community College. He has two sisters, two nieces and a nephew. He is not married and has no children (but hopes to one day soon).

Ryan was an athlete in high school. He played football and baseball at Shawnee Mission South High School. He played baseball at Butler County Community College, then on to Virginia Commonwealth University and finally graduated in 1994 and played baseball at K-State where he has also received his degree in political science.

Ryan graduated from University of Kansas School of Law in 1998 and is a member of the Kansas and Missouri Bar. He began his legal career in private practice focusing primarily in criminal defense. In 2005, Ryan moved to Antigua, Guatemala in Central America and attended a Spanish language immersion school. On his return, he became the part-time municipal judge in the City of Olathe Municipal Court where he utilized his Spanish language skills on a daily basis while serving with Administrative Judge Jon Willard. Most recently, Ryan was appointed to a full-time judge position in the City of Overland Park with the departure of Judge Karen Arnold-Burger to the Kansas Court of Appeals.

He traveled extensively throughout Guatemala, Honduras, El Salvador, Costa Rica and Panama. He also lived in Cartagena, Colombia for about 5 weeks. Not only did he learn the language but he came away with a better understanding of the Latin culture and how wonderful it is. Living alone and learning a new language in Central America was difficult to say the least but he wouldn't change a thing about that experience and would recommend it to anyone.

"I am proud to have served in the City of Olathe for the past five years and now with the City of Overland Park. During my career, I have been blessed to have the opportunity to serve with three great judges in Jon Willard, Keith Taylor and Karen Arnold-Burger. All of them have had a great impact on me personally and professionally."

Congratulations to Judge Dixon!

Overland Park Judge Ryan Dixon

"I am proud to have served in the City of Olathe for the past five years and now with the City of Overland Park. During my career, I have been blessed to have the opportunity to serve with three great judges in Jon Willard, Keith Taylor and Karen Arnold-Burger. All of them have had a great impact on me personally and professionally."

Congratulations to Judge Dixon!

Lawrence Judge Scott Miller

Judge Miller, a licensed attorney, is a graduate of the University of Kansas School of Law. Scott is a native of Hays, and prior to law school, he earned an undergraduate degree in Philosophy from Kansas State University. Following graduation from law school, he returned to Hays and worked for the firm of Glassman, Bird & Braun and the Ellis County Attorney’s Office. He was also appointed City Attorney for the City of Ellis. In 1998, Miller relocated to Lawrence and began working for the City of Overland Park as a prosecutor. He held this position until 2005, when he became a staff attorney for the City of Lawrence. In early 2011, he was appointed to the municipal judge position vacated by Judge Randy McGrath upon his retirement. During his career, Miller has been an active member of the Kansas Bar Association’s Ethics Grievance Panel, and has regularly presented on legal topics to groups of lawyers and non-lawyers.

Scott is an avid reader. He enjoys participating in sporting events as well as being a spectator, but as the years pass there seems to be more watching and less doing. The days when KU and K State play each other cause him quite a bit of cognitive dissonance. In his spare time, Miller enjoys travel, walks with his Great Dane, Astrid, and spending time with his family and friends.

Please welcome Judge Miller to the bench and to the KMJA!
The Verdict

Spring 2011  Issue 55

C/O Topeka Municipal Court
214 SE 8th St.
Topeka, KS  66603
(785) 368-3776 ▶ Fax-(785) 368-3782
sebberts@topeka.org

All KMJA dues should be sent to:

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

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

BOARD OF EDITORS

THE VERDICT

Editor….Steve Ebberts (Topeka)
Correspondents…
….Brenda Stoss (Salina)
….Pat Caffey (Manhattan)
….Karen Wittman (Silver Lake)
Contributors…
….Karen Arnold-Burger

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

KMJA BOARD OF DIRECTORS

President……………………………..Steve Ebberts (Topeka)
President-Elect……………………..James Campbell  (Ottawa)
Secretary…………………………….Gregory Keith (Haysville)
Treasurer…………………………….Kay Ross (Plainville)
Past-President………………………Brenda Stoss (Salina)

Directors:
Northwest District………………….Dorothy Reinert (Atwood) 2012
Southeast District…………………..Fred W. Johnson (Oswego) 2012
North Central District………………..Scott Condrey (Concordia) 2011
Southwest District…………………..Charles Hull (Rolla) 2011
South Central District……………..Faith Magie (Colwich) 2013
Northeast District…………………..Moe Ryan (KCK) 2013

MUNICIPAL JUDGES’ TESTING AND EDUCATION COMMITTEE

Tom Buffington………….Marquette
Jay Emker………………….Lindsborg
Cathy Lucas…………………Sublette

Karen Arnold-Burger…….Overland Park
Brenda Stoss………………Salina
Steve Ebberts……………..Topeka

MUNICIPAL COURT MANUAL ADVISORY COMMITTEE

Jay Emker………………….Lindsborg
Dorothy Reinert………………Atwood

Connie Sauv………...Ottawa
Karen Arnold-Burger…….Overland Park
Tom Buffington……….Marquette

Bette Lamouring……..Maryville
James Wilson……….Mulvane