

MUNICIPAL APPEALS

Everything you ever wanted to know about appeals
and some things you don't.

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The right to appeal is statutory

- No Right to appeal is granted under the constitution.
 - *Griffin v. Illinois*, 351 U.S. 12
 - *State v. Gill*, 287 Kan. 289 (2008)
 - Jurisdiction to entertain an appeal is conferred by statute pursuant to [article 3, § 3](#) of the Kansas Constitution. (appellate jurisdiction as may be provided by law).
- Ks. Statutory right to appeal from municipal court is K.S.A. 22-3609. See also 12-4601; 12-4602.

THINGS THAT CAN BE APPEALED

- Convictions
- Sentencings
- Findings of contempt. 22-3609(1)
- Guilty pleas
- City can appeal questions of law.
 - See *Marysville v. Sain*, 2015 WL 423831
- Must be a final judgment. K.S.A. 22-3609

THINGS THAT CANNOT BE APPEALED

- **Probation revocations.** *Wichita v. Patterson*, 22 Kan.App.2d 557 (1996). (Can only appeal final judgments).
 - (But diversion revocations may be appealed IF that waiver is not explicit in the diversion contract. *Lenexa v. Bell*, No. 105,874., 2012)
- **Modifications of sentencings**, or refusal to modify a sentence. *Wichita v. Mesler*, 8 Kan.App.2d 710 (1983).
- Any sentence that has an **open issue of restitution**. Until restitution is ordered or closed, it is not a final judgment and not appealable.
 - *State v. Hall*, 298 Kan. 978 (2014); and
 - *Lenexa v. Millstead*, No. 110,285 (2014).

NOTIFYING DEFENDANT OF RIGHT TO APPEAL

- Is court required to notify def. in writing? No.
- How do I prove he was notified of his right to appeal?
 - Notation should be made in court file. Not a fatal defect of the court.
 - Court may allow appeal out of time IF Def. was not notified of his right to appeal.
- Is time to appeal waived if Def. was not notified of right to appeal? Maybe. *Dodge City v. Ibarra*, 35 Kan.App.2d 643 (2006), citing *Ortiz* fundamental fairness doctrine.

Dodge City v. Ibarra, 35 Kan.App.2d 643 (2006)

- Convicted of DUI. \$750 OR appearance bond was set.
- Def. timely appealed but did not sign appearance bond, and did not post bond \$.
- Def. attorney said didn't realize it had to be posted since it was an OR bond. Did not think he had to sign it.
- Held: Court applied the *Ortiz* fundamental fairness standard:
 - not informed of his or her right to appeal,
 - was not furnished with an attorney to exercise those rights,
 - or had counsel who failed to perfect and complete the appeal. *State v. Ortiz*, 230 Kan. 733 (1982).

State v. Ortiz, 230 Kan. 733 (1982):

Possible exceptions to filing an appeal out of time:

- Not notified of right to appeal;
- Attorney screwed up; OR
- No attorney appointed to represent Def. on appeal.
- FUNDAMENTAL FAIRNESS

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SETTING A BOND

- What is the difference between an Appeal bond and an Appearance bond?
 - Appeal bond is governed by K.S.A. 12-4602.
 - Appearance bond is governed by K.S.A. 22-3609.

DOES A BOND HAVE TO BE POSTED IN ORDER TO PERFECT AN APPEAL?

- **Appearance bond does**; appeal bond does not.
- If the Judge sets an **appearance** bond, it must be posted in order to perfect the appeal.
 - *Salina v. Aldridge*, 14 Kan.App.2d 108 (1989).
 - *City of Dodge City v. Olivas*, 324 P.3d 1153 (2014).
- If the Judge sets an **appeal** bond, you are not required to pay that amount **within 14 days** in order to perfect the appeal. *Salina v. Eldridge*, 10 Kan.App.2d 108 (1989). **But it does have to be paid** at some point in time during the appeal. See *City of O.P. v. Brooks*, 304 P.3d 364, No. 108,961 (2014).

APPEARANCE BOND

- Failure to post an appearance bond is a JURISDICTIONAL DEFECT requiring dismissal of the appeal!

K.S.A. 22-3609

O.P. v. Barron, 234 Kan. 522 (1983).

IS A SIGNATURE ON APPEARANCE BOND REQUIRED?

- *Dodge City v. Reyes*, 35 Kan.App.2d 756 (2006) held that a timely filed appeal that is **signed by surety only** still perfects the appeal.
- But in general, Def. must sign appearance bond. Lack thereof is a jurisdictional defect.
 - 22-3602(2).

WHAT IS THE DIFFERENCE BETWEEN APPEAL BOND AND APPEARANCE BOND?

- Sometimes hard to tell.
- *Salina v. Lara*, 261 P.3d 979, No.105,121 (2011).
 - Sent. for DUI. **Appearance** bond set of \$785 plus \$84 cash.
 - 6 days later, Def. filed notice of appeal and asked **district court Judge** to set an **appeal** bond. Judge set it at \$500.
 - Posted \$500.
 - Held: Appearance bond was not posted, and appeal not perfected.

- Top two cases to know when distinguishing between an appearance bond and an appeal bond:

 - *City of Salina v. Aldridge*, 14 Kan.App.2d 108 (1989)
 - *City of Newton v. Kirkley*, 28 Kan.App.2d 144 (2002).
- Whether the defendant in a municipal court case is sentenced to jail is a factor in the ultimate determination of whether the defendant is given an appearance bond or an appeal bond under K.S.A. 12-4602.

DEFINITION OF ”APPEARANCE BOND”

- The definition of “Appearance Bond” is consistent within both the criminal code and the municipal code. 22-2202(2) provides “ ‘Appearance bond’ means an agreement with or without security, entered into by a person in custody by which the person is bound to comply with the conditions specified in the agreement.” In the municipal context, 12-4113(a) similarly provides that “ ‘Appearance bond’ means an undertaking, with or without security, entered into by a person in custody by which the person is bound to comply with the conditions of the undertaking.”

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- The operative phrase in both definitions is that the appearance bond is entered by persons “in custody”. 22-2209 defines “custody” as the restraint of a person pursuant to an arrest. 22-2801 states “any person charged with a crime shall, at first appearance before a magistrate shall be released upon the execution of an appearance bond. . . . Sufficient to ensure appearance. . .

CAN THE APPEARANCE BOND FROM THE MUNICIPAL CASE BE CONTINUED AS THE BOND IN DISTRICT COURT?

- YES. K.S.A. 12-4602.
- *City of O.P. v. Brooks*, 304 P.3d 364, No. 108,961 (2014):
 - Citations issued for paint and storage. Def. FTA.
 - Arrested. Posted \$500 bond. Convicted and sentenced to \$500 each count. No jail penalty.
 - Court ordered \$1098 **appearance** bond.
 - Timely appealed. No money posted.
 - Q: appeal perfected?

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- Yes, under two different scenarios. Court said since no jail penalty ordered, appearance bond was actually an appeal bond. So bond was not required to be posted. But also perfected because court said IF it could be determined to be an appearance bond, the appearance bond was already in place. (BUT DIFFERENT AMOUNT).

- “Under either of the scenarios discussed above, the court obviously wanted to enter a bond as a result of the case. By default then, since Brooks was not given a jail sentence, the bond was an appeal bond under [K.S.A. 12-4602](#), which states: **“The appearance bond may continue in effect throughout the appeal; however, the municipal judge may require a separate appeal bond.”** The court in *Aldridge* recognized that the municipal judge may require an appearance bond and a separate appeal bond from the defendant. [14 Kan.App.2d at 109](#). **As an appeal bond, it is not jurisdictional, and since Brooks timely filed his notice of appeal he should be given the opportunity to pay the appeal bond within a reasonable time as ordered by the municipal court in order for the district court to hear the case. [K.S.A.2012 Supp. 22-3609](#) does not require an appeal bond as part of the 14-day filing scenario and the filing of an appeal bond within 14 days is not a jurisdictional requirement. See [Aldridge, 14 Kan.App.2d at 110](#).”** *Brooks* at ?

IS POSTING THE APPEARANCE BOND SUFFICIENT NOTICE OF APPEAL?

- No. Must also file an actual notice of appeal. See *O.P. v. Nikias*, 209 Kan. 643 (1972): failure to file written notice of appeal is juris. defect.
- Must serve municipal prosecutor (city attorney) with notice of appeal.
 - 22-3609(3)
 - But see *Junction City v. Somrak*, 46 Kan.App.2d 1120 (2012).
 - Held: no time requirement on which to serve the city attorney. Must serve but 22-3609 does not say within 14 days.
 - Best practice: Serve at time appeal is filed.

WHERE DOES THE BOND MONEY GO?

- If post it with the municipal court, they send to district court. District Court takes out their filing fee.
- Upon conviction, district court releases the bond back to the city upon the filing of the J.E.
- City either keeps it as fine, or refunds overage.

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- District Court filing fee must be paid, so I suggest if you are allowing a surety bond for appeal that you at least obtain the filing fee in cash or cashier's check

APPEALS TO DISTRICT COURT ARE DE NOVO

- 22-3610. What is definition of De Novo?
 - Trial starts anew. Prior proceedings “leave no footprint.”
- Can you use prior testimony from municipal court to impeach a witness in district court? How would that be admissible, if the prior proceeding “leaves no footprint”?
 - See *Liberal v. Witherspoon*, 28 Kan.App.2d 649 (2001). “A witness who waives his or her protection from self-incrimination in a municipal court trial is not unfairly prejudiced when statements made at the trial are introduced at a subsequent de novo trial.” CAN USE TESTIMONY FROM MUNICIPAL COURT

TIME TO APPEAL

- K.S.A. 22-3609(2): Def. has 14 **calendar** days to file appeal from municipal to district.
- If 14th day falls on a weekend or day clerk is unavailable, extends to the next accessible day. K.S.A. 60-206
 - Was previously 10 **working** days.

WHEN DOES THE TIME TO APPEAL BEGIN TO RUN?

- Oral pronouncement from the bench, or filing of JE?
 - Oral pronouncement from the bench in muni. court

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- The municipal code's provisions regarding judgment read: “If the accused person is found not guilty, judgment shall be rendered immediately. If the accused person is found guilty, sentence shall be imposed and judgment rendered without unreasonable delay.” K.S.A. 12-4507. “When a judgment is rendered, the municipal judge or clerk of the municipal court shall enter such judgment on the docket; however, the omission of this duty shall not affect the validity of the judgment.” 12-4508.
 - *State v. Moses*, 227 Kan. 400 (1980).

WHAT IF THE TIME TO APPEAL IS MISSED?

- In general, the failure to file a timely appeal is a JURISDICTIONAL DEFECT. The court lacks jurisdiction to hear the appeal and it must be dismissed. Cannot be waived by the courts.
- *Lenexa v. Higgins*, 16 Kan.App.2d 499 (1992).
- *City of Bonner Springs v. Clark*, 3 Kan.App.2d 8, 10 (1978)
- *City of Overland Park v. Nikias*, 209 Kan. 643 (1972).

What if Def shows up in Municipal Court to appeal but is out of time?

- Defendants have 14 days to file a notice of appeal and post an appearance bond.
- If Def appears on the 15th day, does the Municipal Court Clerk have to accept the appeal paperwork and the appearance bond?
- Is that a decision to be made at the municipal level or a jurisdictional question that can only be answered at the District Court? *Ortiz* issues?

Should municipal clerk or municipal judge refuse to accept notice of appeal out of time?

- No. Because there may be a lawful reason for filing out of time, a motion to dismiss the appeal for being out of time should be up to the prosecutor. Not a clerk or municipal judge function.

ARE THERE ANY EXCEPTIONS TO JURISDICTIONAL APPEAL REQUIREMENTS?

- *State v. Ortiz*, 230 Kan. 733 (1982):
 - Not notified of right to appeal;
 - Attorney screwed up; OR
 - No attorney appointed to represent Def. on appeal.

IF DISMISSED FOR LACK OF JURISDICTION, WHAT HAPPENS TO THE CASE?

- It is remanded back to municipal court for sentencing as if the appeal had never been filed.
- The stay on the conviction is lifted.

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- Can equate this to a lack of jurisdiction in municipal court. If convicted in municipal court, and later discover court lacked jurisdiction, conviction is vacated, case is filed in district court, and there is no jeopardy because of lack of jurisdiction.
 - Jurisdictional defects mean court cannot hear case.

WHAT IF DEF. DISMISSES THE APPEAL, OR FAILS TO APPEAR?

- Remanded to municipal court for imposition of sentence.

IF APPEAL IS DISMISSED, CAN CITY REFILE IN
MUNICIPAL COURT WITHOUT JEOPARDY
HAVING ATTACHED?

- Yes, if no jeopardy attached in district court.
Depends upon the reason for the dismissal.

Salina v. Amador, 279 Kan. 266 (2005)

- Def. was convicted of battery and CDP.
- Appealed. Appeal was dismissed without prejudice because City's request to continue was denied.
- City refiled in municipal court.
- Held: Not double jeopardy. "A dismissal '**without prejudice**' generally means that there is no decision of the controversy on its merits, and leaves the whole subject in litigation as much open to another application as though no suit had ever been brought."
- City could also have appealed the dismissal to the Court of appeals. *Amador* at 267.

- “(d)efendant's municipal court conviction had been stayed by his appeal to district court, district court's dismissal of defendant's appeal without prejudice vacated all proceedings in municipal court, and, since dismissal by district court had been made prior to district court hearing any evidence or swearing any witnesses, jeopardy did not attach at district court level.”
- The conviction was stayed when appeal was filed.

DISTINCTION BETWEEN REMAND FOR IMPOSITION OF SENTENCE V. REFILED CASE

- Key to being able to retry in city is the dismissal **without prejudice**.
- If Def. fails to appear in district court and appeal is dismissed, is municipal conviction automatically reinstated?
 - Yes. Would then be sentenced in City
- If dismissed because city not ready to proceed, can start over at city with new trial. No jeopardy has attached.

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- K.S.A. 21-3108(4)(c):
 - “(4) A prosecution is not barred under this section:
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 - (c) If subsequent proceedings resulted in the invalidation, setting aside, reversal or vacating of the conviction, unless the defendant was adjudged not guilty.”

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- *Amador*: “If the City was free to prosecute the defendant again in a trial de novo in district court under *Lydon*, it follows that a second prosecution in municipal court after a dismissal of the appeal by the district court without prejudice would not violate double jeopardy. A second prosecution at the district court level carries a much heavier consequence for a defendant who would not have the benefit of a de novo review on appeal, while the defendant in this case was still entitled to a de novo appeal after a second conviction in municipal court.”

If def. pays fine in full, is that a waiver of right to appeal?

Not clear under the law. I don't think so. Because can appeal a guilty plea, and paying a fine in municipal court is an automatic plea of guilty (for a traffic violation), then I don't believe paying the fine means your right to appeal is waived.

But I do not believe that is certain.

CAN THE APPEAL BE REINSTATED IN DISTRICT COURT ONCE IT IS DISMISSED?

- Depends upon circumstance.
- *City of O.P. v. Pavelcik*, 248 Kan. 444 (1991).
 - Municipal clerk did not process the appeal with “diligence and care.” Prosecutor was not present. Court dismissed the appeal. Should not have been dismissed. Once dismissed, could be reinstated.

IF DEF/APPELLANT FAILS TO APPEAR IN DISTRICT COURT, WHAT OPTIONS DOES THE CITY HAVE?

- City can move to dismiss the appeal and remand for sentencing.
 - *O.P. v. Barnett*, 10 Kan.App.2d 586 (1985).
- Can City ask for a warrant and keep the case in district court?
 - Yes. Up to Judge. But why would City want to do that when a dismissal of the appeal would reinstate the conviction?

WHERE IS THE APPEAL FILED?

- Either the district court or the municipal court.
 - 22-3609 says district court.
 - But 22-3609(2) says “Municipal court clerks are hereby authorized to accept notices of appeal and appearance bonds under this subsection and shall forward such notices and bonds to the district court.
- If filed in municipal court, the court clerk must forward to district court. If timely filed with municipal clerk, such filing is the equivalent to filing in district court. *City of Girard v. Clinton*, 29 Kan.App.2d 692 (2001).

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- Failure of clerk to notify district court of appeal does not nullify appeal.
 - *O.P. v. Pavelcik*, 248 Kan. 444 (1991).
 - *Garnett v. Zwiener*, 229 Kan. 507 (1981).

WHAT CHARGES GET APPEALED?

- The “Original charging document” goes to district court. The appeal by an accused person is allowed in all cases by 12-4601(a).
- 22-3610(a) which states that “[w]hen a case is appealed to the district court, such court shall hear and determine the case on **the original complaint....** The case shall be tried *de novo* in the district court.”
- This **implies** all counts are reinstated for the appeal, which would mean even those acquitted.

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- BUT SEE *State v. Derusseau*, 25 Kan.App.2d 544 (1998), which specifically states **acquittals** at the municipal level are considered double jeopardy if retried in district court.
 - Once acquitted, always acquitted.

CAN A DEFENDANT APPEAL A GUILTY PLEA?

- Yes.
 - *City of Dodge City v. Frey*, 26 Kan.App.2d 559 (1990)
 - Held: prohibition in 22-3602(a) against appeals from guilty pleas does not apply to municipal pleas.
- All original charges are appealed unless they were acquitted. Includes dismissed charges. *City of Wichita v. Maddox*, 271 Kan. 445 (2001).

WHAT IF THE COMPLAINT IS DEFECTIVE?

- If the city has submitted a defective complaint on appeal to district court, they can file a new complaint and the case can proceed without arraignment. *City of Wichita v. Maddox*, 271 Kan. 445 (2001).
 - No contest plea to DUI. 4 traffics dismissed.
 - Appealed. All 5 charges went to district court. Arraigned on DUI only.
- Maddox also indicates that the Def. need not be arraigned in district court at all, regardless of whether the complaint was defective. If same complaint as in municipal court, no arraignment nec. *Maddox* at

DEFENDANT'S RIGHT TO COUNSEL AT THE DISTRICT COURT LEVEL

- Does Def. get to have appointed counsel on a municipal court appeal?
 - Yes, BUT Def. must fill out financial affidavit just like any other court appointed case. District court determines eligibility. *O.P. v. Estell*, 225 Kan. 599 (1979).
- Who pays for appointed counsel?

City.
- Judge may order the Def. to repay for appointed counsel.
12-4509(f)(13)

Who pays for appointed counsel in district court on an appealed case?

- CITY!
- Judge may order the Def. to repay for appointed counsel. 12-4509(f)(13)

IF CONVICTED IN DISTRICT COURT, WHERE DOES FINE MONEY GO?

City gets the fine money, less the district court filing fee.

O.P. v. Estell and McDiffet, 225 Kan. 599 (1979).

If pay district court, they will forward to city.

IF CONVICTED IN DISTRICT COURT, WHO MONITORS PROBATION?

- Up to district Judge. District Court case at that point, so same as any other district court conviction.
- However, nothing says that if municipal court has probation officers that they can't monitor.

JURISDICTION

- Where does the appeal go if the city is divided by two counties?
 - Location of offense?
 - Or location of courthouse?
 - A: Location of courthouse! *City of Mulvane v. Roberts*, 31 Kan.App.2d 366 (2003).

ISSUES OF ABSTRACT OF CONVICTION FROM MUNICIPAL COURT

- Municipal courts should notify DMV of conviction within 10 days. K.S.A. 8-2115
- You have 14 days to appeal. So conviction may have already been abstracted prior to appeal.
- Many fingerprint machines notify KBI automatically at time the prints are taken.
- District Court is supposed to notify DMV and KBI of the appeal in order to rescind the conviction.

Expungement

- Pending SB22: If passed, has added language to the expungement statute indicating if expunged in district court, and it was an appeal from municipal court, the district court can now order the expungement and notify municipal court, and municipal court will also expunge without a separate motion and filing fee.

Right to jury trial on appeal

- There is NO right to a jury trial if the appeal is for traffic; tobacco; or contempt.
- All other charges, jury trial request must be on file within 10 days of assignment to Judge, unless “undue hardship or prejudice to the defendant.”
- 22-3609(4).

APPEALS TO COURT OF APPEALS OF A CHARGE ORIGINATING IN MUNICIPAL COURT

- No different from any other appeal from district court.

Appeals by City

- City can appeal a question of law. K.S.A. 12-4601
- The appeal shall stay all further proceedings from the judgment appealed from. **No appeal shall be filed until after the sentence has been imposed.**

Appeals by City

- Appeals by City on questions of law must go to the District Court...not the Court of Appeals or Supreme Court. *City of OP v. Travis*, 253 Kan. 149 (1993).
- In *Travis*, after trial on DUI and other traffic violations, the Municipal Judge found Def guilty of DUI incapable of safely operating but **not guilty** of DUI over .08. Def appealed conviction. City did not appeal but filed motions at the District Court level asking the District Judge to allow the City to present evidence under both theories of DUI arguing that the Municipal Judge erred by finding guilty under one theory of DUI and not guilty under another. The District denied the motion and the Def was convicted of DUI incapable of safely operating. City appealed the question of law to Supreme Court under K.S.A. 22-3609.

Appeals by City

- Supreme Court found it had no jurisdiction to consider the City's question of law as that issue should have been argued to the District Court. *Travis at 153.*

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- K.S.A. 12-4601(b) provides the procedure for the City to appeal to the district court the question of law whether the municipal judge had authority to acquit the defendant of what the City alleges is less than the entire offense of DUI. An appeal by the City upon that question of law would have stayed all further proceedings in the defendant's appeal to the district court. Because the City appealed the district judge's refusal to allow it to present evidence of defendant's BAC of .10 or more as a question of law pursuant to K.S.A. 22-3602(b)(3) rather than appealing the municipal judge's finding the defendant *not guilty* of driving with a BAC of .10 or more pursuant to K.S.A. 12-4601(b), we are without jurisdiction to determine the question of law.

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- Appeal dismissed.
 - (What is the court saying? That the city could have appealed the not guilty verdict? Can't do that. . . .)

Can the city file an interlocutory appeal?

- There does not seem to be a provision to do so.
- K.S.A. 12-4601 sets out provisions for appeals from municipal court. It says city can appeal question of law. However, also says cannot do so **until sentencing has occurred.**
- K.S.A. 22-3603: interlocutory appeals from district court. “quashing a warrant or a search warrant, suppressing evidence or suppressing a confession or admission an appeal may be taken by the prosecution. . . .”
- **No similar provision in municipal code.**

22-3602. Appeals by defendant, when; appeals by prosecution; transfers to supreme court

- (b) Appeals to the court of appeals may be taken by the prosecution from cases before a district judge, or a district magistrate judge who is regularly admitted to practice law in Kansas, as a matter of right in the following cases, and no others:
 - (1) From an order dismissing a complaint, information or indictment;
 - (2) from an order arresting judgment;
 - (3) upon a **question reserved by the prosecution**; or
 - (4) upon an order granting a new trial in any case involving a class A or B felony or for crimes committed on or after July 1, 1993, in any case involving an off-grid crime.

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- If the prosecution appeals upon a **question reserved**, (22-3602) the question must be one which calls for an answer which will **aid in the correct and uniform administration of the criminal law**, and the question will not be entertained on appeal merely to demonstrate errors of a trial court.

State v. Rodgers, 225 Kan. at 244, 589 P.2d 981.

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- (c) Procedures for appeals by the prosecution enumerated in subsection (b) shall be as provided in supreme court rules.
 - (d) Appeals to a district judge may be taken by the prosecution from cases before a district magistrate judge who is not regularly admitted to practice law in Kansas as a matter of right in the cases enumerated in subsection (b) and from orders enumerated in [K.S.A. 22-3603](#), and amendments thereto.

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- **Supreme Court Rule 4.02:** Interlocutory appeals:
(a) Notice of Appeal. When an appeal is taken to the Court of Appeals under K.S.A. 22-3601(a) (appellate jurisdiction) and 22-3603, (interlocutory by the state) the notice of appeal must be filed with the clerk of the district court not later than 14 days after entry of the order from which the appeal is taken. A copy of the notice of appeal must be served on defense counsel or on the defendant, if unrepresented.

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- I do not believe the intent of the legislature is to allow interlocutory appeals for the city in a municipal case.
 - Note: 22-3602 governs appeals from district courts and uses the language “question reserved”. 12-4601 says “question of law.” Either way, 12-4601 requires a sentence prior to an appeal.

Should the Judge set an appearance bond even if Def. says won't appeal?

- I have begun to do this in every case, so that it is already set in case they change their mind about appealing.