



Advance Sheet



Kansas County and District Attorneys Association

April 2007

2007 Legislative Update

By Richard Samaniego, Associate

The Legislature completed work on an impressive 48 items of business on April 4, 2007 to mark the end of the regular session and consideration of most legislation for the year. Prolonged negotiations by the House and Senate Budget Conferees over the State Appropriations Bill (24 rounds to be exact) contributed to the lengthy schedule, which inevitably left several bills pending upon adjournment, including several crime bills of interest to the KCDA.

The House and Senate will reconvene on April 25 for the veto session. Although the veto session was traditionally intended only for consideration of items vetoed by the governor and the Omnibus Appropriations Bill, it is now customarily used to wrap-up unfinished business from the regular session (hence the common reference to the "wrap-up session.") House and Senate Leadership have indicated that they intend to complete the bills left pending in conference including HB 2062, the Omnibus Crime Bill.

HB 2062 was coined the Omnibus crime bill since several pieces of legislation were amended into the bill throughout the legislative process. The subject of the original bill related to the criminal use of explosives; a subject matter that was a perfect fit for the potentially explosive issues that were amended into the bill. Besides the original provisions amending the statute on criminal use of explosives, HB 2062 creates a special application in sentencing for a third or subsequent conviction of burglary (SB 97); enacts Alex's Law dealing with crimes against unborn children (HB 2006); and new criminal provisions regarding controlled substances and paraphernalia including the creation of the Controlled Substances Monitoring Task Force (HB 2359). The bill also authorizes and expands the law

regarding battery against a mental health employee (HB 2001).

Most relevant to our membership, however, is a provision amending KSA 21-3219 related to the use of force. KSA 21-3219 was enacted by the 2006 Legislature in SB 366 which was commonly referred to as the "stand and defend" bill. This legislation was added into a conference committee report late last session and did not go through the full committee hearing process before it passed into law. During the interim, several Prosecutors expressed serious concerns of the unintended consequences of granting immunity from prosecution for the use of force. As a result, the KCDA introduced SB 268 in Senate Judiciary earlier this year, but the bill was met with strong opposition by the NRA and held in committee.

A compromise amendment was eventually offered by Senator Derek Schmidt (Independence) on the Senate Floor to add a new section (c) to KSA 21-3219 authorizing a prosecutor to commence a criminal prosecution upon a determination of probable cause that the use of force was not justified. Although the Association lobbied for a more thorough solution, Senator Schmidt amended this language to ensure some guidance on the intent of the legislature. Not surprising, a similar Florida law was just recently cited in an attempt to get murder charges dismissed and Florida has no legislative or judicial guidance on the issue. The Senate adopted the conference committee report and the House is expected to adopt the report for final passage of HB 2062 when they return for the wrap-up session.

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About this publication...

The Advance Sheet is the official publication of the Kansas County & District Attorneys Association. General members of the KCDAA include county attorneys, district attorneys, assistant county attorneys, and assistant district attorneys. City prosecutors, members of the Kansas Bureau of Investigation, and prosecutors with the Attorney General's office are eligible for associate membership with the Association.

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Other issues pending adoption of the conference committee report include:

- House Sub. for SB 14, which would provide for good-time credits of inmates to be raised from the current 15 percent to 20 percent and allow the Kansas Department of Corrections (KDOC) to grant eligible inmates the ability to earn 60 days of good-time credit on a one-time basis upon program completion.
- SB 166, which contains clarifying amendment to Jessica's Law; the provisions of HB 2360 relating to arrest powers of law enforcement officers; SB 204 relating to requirements for offender registration and adding unlawfully manufacturing controlled substances to the offender registry.
- SB 31, relating to municipal court jurisdiction (Eliot Fix). The Judiciary Conference Committee agreed to deleted Sec. 3 & 5 prohibiting prosecutors from entering into a diversion agreement with an illegal alien. The bill also contains provisions of HB 2393 related to municipal court fines and restitution.
- SB 35, containing HB 2012 & 2269 (DUI penalties), SB 52 (concerning a violation for speeding not more than 10 miles per hour, as passed by the House Committee) and providing for incarceration in a KDOC facility for a third or subsequent DUI conviction for the provision of substance abuse treatment. The Senate rejected the adoption of the conference committee report.

The last bill of interest to the KCDAA for this update and literally the last bill introduced in the Senate this session was SB 391 creating the Kansas criminal code recodification commission. Last session, the legislature passed HB 2555 extending the Kansas Criminal Justice Recodification, Rehabilitation, and Restoration Committee (the 3-Rs Committee) until March 31, 2007. SB 391 would simply continue the recodification work under the newly formed Recodification Commission. Membership in the commission still includes a county attorney or district attorney appointed by the Kansas County and District Attorneys Association. Judge White will remain the reporter for the commission along with Judge Brazil as assistant reporter. The final report of the commission would be due January 11, 2009. The Senate passed SB 391 on the final day of the regular session and it is now in the House pending further action.

For questions or comments, please feel free to contact Richard A. Samaniego at (785) 232-5855 or rsamaniego@kearneyandassociates.com.

Recent Opinions

HABEUS ISSUES

State v. Johnson, # 95,115
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Johnson appealed multiple convictions claiming the trial court properly denied his request for records and documents concerning his previous convictions. The Court found that Johnson had failed to furnish the trial court with any information upon which it could determine a need for the records.

Also, 22-4509 requires an indigent defendant to file a 60-1507 before the trial court is required to supply free transcripts.

State v. Vincent, # 95,333
Wyandotte Co., Not Published
Court of Appeals
Affirmed

Vincent appealed his conviction of aggravated robbery arguing that the district court erred in not giving the defendant's requested bailment instruction and in not granting a hearing on his ineffective assistance of

counsel claim. The Court held that because the defendant was allowed to testify that he had rented the van from the victim and that the victim initiated the confrontation, the jury was free to believe that testimony or not. With regard to the ineffective assistance of counsel claim, the Court found that because he raised a claim of conflict of interest and not ineffective assistance of counsel, his claim is without merit. Furthermore, the district court appointed a new attorney for sentencing after the defendant raised the conflict claim.

State v. Brown, # 94,832
Shawnee Co., Not Published
Court of Appeals
Reversed and remanded with directions

Brown appealed the denial of his out-of-time appeal claiming the court failed to fully inform him of the time limitation. The Court held that Brown was not properly informed of the 10-day time frame and should be allowed the out-of-time appeal under Ortiz.

State v. Ronquillo, # 95,718
Saline Co., Not Published
Court of Appeals
Affirmed

Ronquillo appealed the denial of his motion for an order of nunc pro tunc requesting credit for time served on community corrections. The Court held that time spent under supervised probation is not required to be credited when probation is revoked unless it was time spent in a county jail, a residential treatment center, a conservation camp, or a community correctional residential services facility.

State v. Llamas, # 95,519
Ellis Co., Not Published
Court of Appeals
Affirmed

Llamas appealed the district court's denial of his motion to set aside his plea arguing that it was involuntary because he entered it based only on representations by his trial counsel that he would not get a fair trial in Ellis County. The Court affirmed finding no error by the district court because trial counsel had spent considerable time discussing with Llamas the issue of possible prejudice and bringing this issue to the court's attention constituted good lawyering, not coercion.

State v. Dobbels, # 94,808
Johnson Co., Not Published
Court of Appeals
Reversed and remanded with directions

Dobbels appealed the district court's denial of his motion to dismiss for violation of his statutory right to a speedy trial. The district court, interpreting 22-3402(3), found that the defendant's requested continuance of the trial date affected an automatic 90-day extension of the trial deadline date, which could be utilized by the State, enlarging the speedy trial limit for the State from 180 days to 270 days. The Court reversed his convictions and remanded with directions to dismiss the case finding that the district court's interpretation of 22-3402(3) was not warranted.

State v. Colson, # 95,571
Pratt Co., Not Published
Court of Appeals
Reversed and remanded with directions

Colson plead guilty to attempted manufacture of methamphetamine. He failed to file a timely direct appeal, and then appealed his sentence. The Court found that the defendant was able to meet an Ortiz exception and had jurisdiction to appeal. It reversed and remanded for resentencing consistent with McAdam.

Stevenson v. State, # 96,082
Franklin Co., Not Published
Court of Appeals
Reversed and remanded

Stevenson appealed the district court's dismissal of his 60-1507 motion, claiming a denial of his due process rights. The Court agreed and reversed the dismissal finding the movant was neither present nor represented by counsel at his original 1507 hearing and was therefore denied the opportunity to argue for an extension of the time limitation "to prevent a manifest injustice."

State v. Sypher, # 96,099
Franklin Co., Not Published
Court of Appeals
Reversed and remanded

Sypher appealed the district court's refusal to permit the defendant to file a late direct appeal following an Ortiz hearing. The

Court reversed and remanded for further proceedings because the original Ortiz hearing did not affirmatively establish whether the defendant was aware of the 10-day filing limitation.

State v. Aguilar, # 95,249
Wyandotte Co., Not Published
Court of Appeals
Affirmed

Aguilar appealed the district court's denial of her presentence motion to withdraw her plea arguing ineffective assistance of counsel, duress, and failure of the court to inform her of the maximum penalty upon a plea of guilty. The Court held that the district court did not abuse its discretion in denying her motion finding that her plea was knowingly and voluntarily given.

State v. Mills, # 95,732
Ottawa Co., Not Published
Court of Appeals
Reversed and remanded with directions

Mills appealed from a judgment dismissing his motion to file an untimely direct appeal arguing the district court erred in summarily dismissing the motion. The trial court had dismissed the motion under the assumption that Mills had already filed a direct appeal. The Court found that Mills had filed an appeal to correct an illegal sentence, not a direct appeal; therefore, the trial court erred in dismissing the motion without an Ortiz hearing.

State v. Jones, # 95,654
Mitchell Co., Not Published
Court of Appeals
Affirmed

Jones appealed the district court's summary denial of his motion to file a direct appeal out of time. The Court found no abuse of discretion because Jones was informed of his rights and failed to attempt to file a direct appeal or seek the assistance of counsel to do so on his behalf. State v. Ortiz, 230 Kan. 733, 736 (finding that a defendant properly informed of his appellate rights may not let the matter rest...and then claim that he did not waive his rights to appeal).

State v. Huerta, # 95,893
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Huerta appealed the trial court's denial of his motion to withdraw his plea after sentencing. The Court found that Huerta failed to show anything that he was not aware of and said at the hearing that he understood the consequences and several times said he wished to enter a guilty plea.

EVIDENTIARY ISSUES

State v. Moroney, # 94,087
Johnson Co., Not Published
Court of Appeals
Affirmed

Moroney appealed his felony conviction for DUI arguing that the trial court erred in refusing to give the defendant's proposed instructions and abused its discretion in allowing certain evidence to be introduced by the State. The defendant claimed that his Intoxilyzer test was flawed because he suffers from GERD and proposed jury instructions that would convey to the jury that alcohol from burps, belches, hiccups, or regurgitation within twenty minutes of taking the test would skew the results. The Court held that instead of appropriately instructing the law the proposed instructions addressed disputed factual issues and were not neutral in tone or content. Next, the defendant argued that the State's expert was not qualified to testify regarding the absorption rate of alcohol in the human digestive system. The Court held that the witness had the prerequisite education, knowledge, experience, and training to give her opinion as to an absorption rate.

State v. Thomas, # 95,385
Reno Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded

The State appealed the district court's dismissal of charges of one count of manufacture of methamphetamine and one count of attempted manufacture of methamphetamine against Thomas. The Court held that the transfer of the crushed pseudoephedrine tablets from the hotel room to her car, seen

in the light most favorable to the State, could cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief that Thomas attempted to manufacture methamphetamine; therefore, the trial court erred in dismissing the attempt charge. However, because the defendant lacked all of the ingredients to manufacture methamphetamine and the State failed to provide precedent that possession of pseudoephedrine and methamphetamine sufficiently supported the charge of manufacture.

State v. Mollenelli, # 94,550
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded

Mollenelli appealed his conviction and sentence for DUI contending the trial court erred in excluding testimony and in assessing fees to reimburse BIDS. The Court held that the testimony was hearsay and could not consider the argument that it was an exception to the hearsay because that argument was not made at the trial. Furthermore, the Court found defense counsel had not laid a proper foundation for the testimony. With regard to the reimbursement to BIDS, the Court reversed and remanded to the district court to consider the defendant's ability to pay attorney fees and the financial burden payment would impose.

State v. Ewing, # 95,171
Barber Co., Not Published
Court of Appeals
Affirmed

Ewing appealed his conviction of stalking arguing insufficiency of evidence. The Court held that the evidence seen in the light most favorable to the State was sufficient for a rational factfinder to conclude that Ewing intended to and did cause the victim to fear for her safety, since Ewing had continually threatened and verbally attacked the victim.

State v. Rivera, # 95,045
Douglas Co., Not Published
Court of Appeals
Affirmed

Rivera appealed his multiple sexual offender convictions claiming they were not sup-

ported by sufficient evidence and the district court erred in denying his motion for a new trial based on juror misconduct. The Court held that the juror misconduct claim could not be substantiated. The only evidence provided by the defendant was an affidavit from his cellmate indicating that his cellmate had discussed the case with a prison volunteer. With regard to the sufficiency of the evidence, the Court found that the victim's testimony was substantially corroborated by other witnesses and is not comparable to State v. Matlock, 233 Kan. 1 (1983) (finding the victim's accusation was so improbable as to defy belief).

State v. Alberty, # 95,059
Miami Co., Not Published
Court of Appeals
Affirmed

Alberty appealed his convictions for three counts of the sale or delivery of cocaine and three counts of the unlawful use of a communications facility to facilitate drug transactions, arguing that the district court abused its discretion in allowing the late endorsement by the State of a witness and that the court erred in failing to give an eyewitness identification instruction. The Court held that the officer's testimony was not of a 'climatic and highly damaging nature' as to prejudice the defendant. He could not have been surprised by the officer's testimony because of the previous witnesses identifying him. The Court held that the defendant's argument with regard to the eyewitness identification instruction was without merit because the officer was only one of three eyewitnesses.

State v. Ogden, # 94,848
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Ogden appealed his DUI conviction claiming there was a lack of reasonable suspicion to stop him, there were violations of the order in limine, and there was an admission of inadmissible evidence. The Court held that the stop was valid because Ogden had pulled over on his own, prior to the officer activating his emergency lights, and the continuance of the stop was reasonable based on the odor of alcohol and the defendant's

blood shot eyes. The Court also found that because it was a bench trial, the violation of the order in limine did not prejudice the defendant due to the sufficient intelligence and expertise of the judge to rely on an adequate legal theory. Furthermore, there was other evidence admitted that supports the decision and proved the defendant had been drinking. Ogden also argued that his denial to submit to a breath test should not have been used in court because KSA 8-1012 was applicable to his situation. The Court denied this argument and held that KSA 8-1001 was applicable because he was arrested, booked, read the implied consent form and then refused to take a breath test.

State v. Irby, # 95,349
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Irby challenged his rape and aggravated criminal sodomy convictions claiming they are unconstitutional under the Due Process Clause of the 14th Amendment because they contain a blanket proscription of consensual intimate contact. In Taylor, this court held the State has a compelling interest in the well being of children and may exercise its police powers to protect them from adult sexual predators. The same reasoning applies here.

State v. White, # 95,511
Ellis Co., Not Published
Court of Appeals
Affirmed

White appealed his conviction for DUI challenging the district court's denial of his motion to suppress, claiming that the arresting officer lacked reasonable suspicion to detain him and administer sobriety testing. White argued that while the initial stop was valid, the circumstances were insufficient to warrant further detainment. The Court held that this case was not similar to Davenport, where it was found to be illegal to pull an individual over after an officer smelled alcohol on his breath. In this case, White was legally stopped in a DUI checklane and further detained based on the smell of alcohol.

State v. James, # 95,653
Butler Co., Not Published
Court of Appeals
Affirmed

James appealed multiple drug convictions claiming the district court erred in not suppressing the evidence that was found after an impound and inventory search. The Court held that the impoundment and subsequent inventory search were legal due to the officer's reasonable belief that the truck might have been stolen, and because it was on a dirt road where it was a hazard and in the lane of traffic.

State v. Smith, # 96,189
Cowley Co., Not Published
Court of Appeals
Reversed

The State filed an interlocutory appeal arguing that the district court erred in suppressing evidence found in Smith's purse. The Court found that Smith gave voluntary consent to the search during a legal seizure of her person.

State v. Molleker, # 96,539
Ellis Co., Not Published
Court of Appeals
Affirmed

Molleker appealed his DUI arguing the district court erred in denying his motion to suppress evidence because the arresting officer did not have probable cause to make the arrest. The Court held that the court did not err in allowing the officer to testify about the walk and turn test after he refreshed his memory with the police report he had prepared. Furthermore, regardless of whether the evidence was properly admitted, the walk and turn test was not the primary evidence used by the State to arrest the defendant.

State v. Graves, # 95,984
Atchison Co., Not Published
Court of Appeals
Affirmed

Graves appealed his conviction for driving under the influence of drugs or alcohol challenging the sufficiency of the evidence to support his conviction. The Court upheld the conviction finding that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

State v. Lopez, # 94,504
Johnson Co., Not Published
Court of Appeals
Affirmed

Lopez appealed from his conviction for possession of methamphetamine contending the district court erred in denying his motion to suppress physical evidence seized during his detention, and there was insufficient evidence to support his conviction. The Court held the officer had reasonable suspicion to stop and confront Lopez based on the witness' testimony that he had attempted to steal a pair of sunglasses and the pat-down, resulting in the finding of the drugs, was legal because the officer reasonably feared for his safety. The Court found Lopez's argument that there was sufficient evidence to support the conviction, which was the methamphetamine in the leather pouch found near the defendant after the altercation between himself and the officers.

State v. Stone, # 94,770
Johnson Co., Not Published
Court of Appeals
Affirmed

Stone appealed multiple drug convictions asserting that the district court should have suppressed the information obtained by the arresting officer's warrantless search of a laptop computer. The Court held that the officer did not search the hard drive of the computer, thus distinguishing it from State v. Rupnick, 280 Kan. 720 (2005). Furthermore, the admission of the disputed evidence, the defendant's name taken from the laptop, had little if any, likelihood of having changed the result of the trial. Thus, any error was harmless.

State v. Sturgeon, # 94,814
Kiowa Co., Not Published
Court of Appeals
Affirmed in part and dismissed in part

Sturgeon appealed his conviction and sentence for possession of methamphetamine and drug paraphernalia claiming that he was impermissibly detained for the arrival of the K-9 unit. The Court held the stop did not last longer than was necessary to effectuate the purpose of the stop and did not violate the Fourth Amendment. Sturgeon also ar-

gued that the trial court erred in disregarding testimonial evidence that the drugs were not his. The Court found no error and that the trial court was not required to credit the evidence that was contradicted and unreliable. Next Sturgeon argued that the trial court erred in denying admission of a negative field urinalysis test. The Court found no error because Sturgeon failed to lay any foundation for submitting the evidence, failed to certify the test, and did not meet the Frye standards.

State v. Hohenadel, # 94,856
Johnson Co., Not Published
Court of Appeals
Reversed and remanded with directions

Hohenadel appealed his convictions for DUI, transporting an open container, and failure to register his vehicle raising two issues: 1) whether the district court erred in denying his motion to dismiss for failure to prosecute, and 2) whether the district court erred in admitting the breath test. The Court found that the time after the district court dismissed Hohenadel's motion to dismiss should have been accounted to the State, not Hohenadel. The district court erred and the defendant was denied his right to a speedy trial.

State v. Nodgaard, # 95,747
Douglas Co., Not Published
Court of Appeals
Affirmed

Nodgaard appealed the district court's denial of his motion to suppress his breath test results and his subsequent conviction of DUI. Nodgaard argued that the evidence should have been suppressed because he requested a blood test and an attorney, prior to taking breath test. He further argued that even though he is not entitled to counsel prior to the breath test, the request for one triggered an affirmative requirement on the part of law enforcement officers to see that such rights are exercised after testing is completed. The Court found that the reading of the complied consent effectively notified the defendant of his rights to counsel and because there was no further request after the implied consent, there was no duty to the officer.

State v. Argon, # 95,967
Johnson Co., Not Published
Court of Appeals
Affirmed

Argon appealed his DUI conviction arguing that the district court erred in not suppressing evidence gained from the traffic stop. Argon claimed the officer did not have reasonable suspicion to stop his car because he was not required to signal when turning from Birch Street, not a city maintained street, onto Johnson Drive. The Court found that the officer had an objectively reasonable good faith belief that Argon's conduct violated the law based on the stop sign at the end of the street.

State v. Jordan, # 95,725
Reno Co., Not Published
Court of Appeals
Affirmed

Jordan appealed her convictions arguing that the police officer who arrested her did not have a reasonable suspicion to stop her and that she never waived her right to remain silent because she never signed a written waiver of her rights. The Court found that because Jordan was committing a traffic violation when the police officer stopped her, she listened to the deputy read her the Miranda warning, and she was not coerced, her statements were admissible and the district court did not err in denying her motion to suppress the contraband.

State v. Holguin-Ocon, # 95,377
Sedgwick Co., Not Published
Court of Appeals
Affirmed

The defendant appealed his conviction of DUI claiming the district court erred in denying his motion to suppress evidence of the breath test result because the arresting officer unreasonably interfered with his right to have an additional test of his blood alcohol level. The Court held that the officer's statements to the defendant that he would have to pay for the additional test, and that the blood test would probably result in a higher BAC could not be construed as an unreasonable interference or coercion.

State v. Woods, # 95,309
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Woods appealed his conviction for possession of cocaine contending the evidence was insufficient to convict him. The Court affirmed the finding that there was substantial evidence that the cocaine was his including the fact that he admitted the purse in which the cocaine was found was his and that he may have left the cocaine in the purse the last time he used it.

State v. McCoy, # 95,338
Johnson Co., Not Published
Court of Appeals
Affirmed

McCoy appealed his conviction for aggravated assault of a law enforcement officer, arguing an error in admission of evidence, insufficiency of the evidence, and cumulative error. He also challenged his sentences based upon Apprendi. The Court agreed that the district court erred in admitting certain evidence, testimony by one officer that the other officer feared for his safety and had he been hit by McCoy's truck, the other officer may have died, but deemed that the error was harmless because the other officer gave identical testimony. The Court then rejected the rest of McCoy's arguments finding them to be without merit.

State v. Yotter, # 95,436
Harvey Co., Not Published
Court of Appeals
Reversed and remanded

Yotter appealed her drug convictions challenging the denial of her motion to suppress evidence and claiming her convictions were multiplicitous. The Court found that the search of the defendant's purse was unlawful. Even though she consented to the search, it was unlawful because the officer had informed her he would escort her out of the grocery store and the search occurred while they were still in the store. The Court found that a reasonable person in those circumstances would perceive that she could not disregard the officer's request.

State v. Swander, # 95,446
Saline Co., Not Published
Court of Appeals
Affirmed

Swander appealed his DUI conviction arguing that the investigating officer could not have had a reasonable suspicion to stop his vehicle since the police dispatcher had identified a gold vehicle and his car was silver. He also argued that the officer did not have probable cause to arrest him based solely on the officer's observations. The Court held that because the officer's personal observations of the defendant's behavior in his car corroborated what was described to the police dispatcher in this case, there was reasonable suspicion to stop and detain him despite the mistake about the color of his vehicle. Furthermore, under all of the facts here, there was sufficient probable cause observed by the officer to warrant an arrest for DUI including the fact the defendant admitted to drinking beer and his blowing a .230 at the county jail.

State v. Martin, # 96,126
Douglas Co., Not Published
Court of Appeal
Reversed

Martin appealed the district court's denial of his motion to suppress evidence found in his pocket after he was detained and arrested, arguing that his initial detention was illegal. The Court held that Martin was illegally seized when the officers detained him for a wants and warrants check because the officers themselves testified that they saw no suspicious movements and had no idea what Martin's intentions might have been when they initially stopped him.

State v. Link, # 95,207
Ellis Co., Not Published
Court of Appeals
Affirmed

Link appealed his conviction of DUI claiming there was insufficient evidence to support a finding that he possessed an alcohol concentration of .08 or more because the stipulated facts did not include the Breathalyzer results. The Court held that the language of the stipulation implies that the defendant failed the Breathalyzer and the results of the

test, Link blew a .172, were admitted at the preliminary hearing. The evidence was sufficient to support the DUI.

State v. Miller, # 95,726
Reno Co., Not Published
Court of Appeals
Affirmed

Miller appealed the district court's denial of his motion to suppress and the use of his criminal history in determining his sentence. The defendant argued the officer's stop and seizure of his person was unconstitutional because the officer did not have reasonable suspicion to run a warrant check. The Court found that the seizure occurred after the defendant fled and was caught by the officer, not when the officer asked for the defendant's name. The Court also noted that had the defendant not fled the officer's request, but that the defendant would take a seat on the curb while he ran a warrant check may have been an illegal seizure, but because he ran and discarded drugs during the chase the officer had reasonable suspicion to detain him. The criminal history issue has been previously decided against the defendant in Appendi.

State v. Everett, # 96,830
Riley Co., Not Published
Court of Appeals
Reversed and remanded with directions

The State appealed from the district court's order granting defendant's motion to suppress marijuana found during a traffic stop. The Court reversed the finding that because the officer had a legitimate reason to stop the car, a traffic violation, and an officer is not required to have a reasonable suspicion before requesting the narcotics detection dog to assist with the stop the district court erred in suppressing the evidence.

State v. Tomas-Pasqual, # 94,135
Saline Co., Not Published
Court of Appeals
Affirmed

The defendant appealed from his conviction of rape arguing insufficiency of the evidence and error in the trial court's refusal to instruct the jury on the crime of aggravated sexual battery. The Court found that the testimony of the victim, which was corroborated by the

nurse and several other witnesses was sufficient, and the court did not err in refusing to instruct on the crime of aggravated sexual battery because it is not a lesser-included of rape, nor was not charged by the prosecutor.

State v. Gray, # 94,462
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Gray appealed his conviction of possession of cocaine, arguing the district court improperly allowed the State to introduce evidence of prior marijuana convictions to impeach him. The defendant contended the impeachment evidence was outside the scope of this direct examination and was irrelevant. The defendant failed to make these objections at trial. Even if he had the Court found that a statement made by the defendant that he did not use drugs entitled the State to explore the statement to explain to the jury the proper context of the defendant's denial.

State v. Carter, # 95,040
Johnson Co., Not Published
Court of Appeals
Affirmed in part and remanded with directions

Carter appealed his convictions for one count of aggravated burglary and one count of criminal damage to property claiming that an unoccupied screened porch attached to an occupied home does not constitute an "occupied building or structure" for statutory purposes. He claimed the porch was used primarily as a passageway to the backyard and is not part of the occupied residence. The Court held that the porch satisfied the "any building" language of 21-3716. The defendant also argued that the court abused its discretion in finding a statement he made to the officer about why he was at the scene as hearsay. The Court found that the statement was properly excluded because of its low reliability or truthfulness. The Court also found that because the jury was informed about Carter's rights and that he could not be compelled to testify, the trial court did not err in refusing to give his proposed jury instruction.

State v. White, # 95,055
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

White appealed his conviction for giving a worthless check, arguing the trial court erred in excluding evidence relevant to his defense and in assessing BIDS. The Court found that he was allowed to present extensive evidence to support his version of the events and the two instances of behavior that were excluded were not relevant to his theory of defense. The Court reversed and remanded for a BIDS assessment in compliance with Robinson.

State v. Hernandez, # 95,187
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Hernandez appealed his conviction of two counts of trafficking contraband in a correctional institution arguing that the State failed to prove a necessary element of the crime, that the administrator of the institution did not consent to the contraband, and that the trial court erred in denying his motion for judgment of acquittal. The Court held that the statute does not require the warden to personally testify that an inmate has acted without his consent.

State v. Bryson, # 95,387
Reno Co., Not Published
Court of Appeals
Affirmed

Bryson appealed his multiple drug convictions claiming the district court erred in denying his motion to suppress evidence seized from his residence based on a search warrant because the information used to support the warrant failed to provide any evidence of actual drug activity. The Court found that the totality of the circumstances supported a substantial basis for concluding that probable cause existed for the warrant. An experienced narcotics officer had corroborated both the anonymous tip and the concerned citizen's report to the police.

State v. Overby, # 95,888
Johnson Co., Not Published
Court of Appeals
Affirmed

Overby appealed his conviction of criminal use of a financial card claiming insufficient evidence to support the charges. The Court found after reviewing the evidence, not reweighing it as the defendant requested, that a rational factfinder could have found Overby guilty beyond a reasonable doubt.

State v. Pywell, # 96,255
Norton Co., Not Published
Court of Appeals
Affirmed

Pywell appealed his DUI conviction contending that the arresting officer did not have reasonable suspicion to detain him after an initial traffic stop ended, and that the delays in the officer's investigation while he was being detained violated his 4th amendment rights. The Court held that because the trailer had inoperable tail lights, the initial stop was justified and the smell of alcohol along with the cooler of beer in the truck provided the officer with a reasonable belief that Pywell had been driving under the influence so as to require the trooper to investigate further.

State v. Hale, # 95,605
Douglas Co., Not Published
Court of Appeals
Affirmed

Hale appealed his misdemeanor conviction of theft of lost property, claiming the evidence was insufficient to support his claim and that the trial court abused its discretion in sentencing him by considering unproven allegations. The defendant also argued that it was not given the 24-hour period for which to report lost property according to 47-230 because the cattle were retrieved from his property within 16 hours of them being gone. The Court held his argument was erroneous because the defendant failed to provide authority wherein the courts have interpreted 21-3703 to require a 24-hour grace period before a defendant can be found to have failed to take reasonable steps to restore lost property. Also, Hale had the opportunity to give notice when the deputy sheriff contacted him and asked if he had

seen the calves. With respect to the unproven allegations, the Court found that the trial court made clear that the troubled relationship between the defendant and the victim was shown through the evidence proven at trial and the district court did not abuse its discretion.

State v. Mossburgh, # 95,822
Clay Co., Not Published
Court of Appeals
Reversed

Mossburgh appealed his possession of methamphetamine conviction challenging the sufficiency of the evidence. No drugs were found on Mossburgh's person and he was convicted based on the drugs found in a barn at the house he was visiting. He did not have exclusive control over the property. Furthermore, there was no testimony that the defendant had been in or near the barn or had ever been convicted for any prior drug involvement. The Court held that the State failed to prove actual or constructive possession. Finally, the drugs were not in plain view of the defendant and he made no incriminating statements about the drugs.

SENTENCING ISSUES

State v. Austin, # 95,573
Saline Co., Not Published
Court of Appeals
Reversed and remanded

Austin appealed a ruling ordering him to pay \$14,326 in restitution arguing that the amount of restitution ordered was not based upon the evidence. The Court found that the restitution amount was not fair because the amount included the value of items that were returned to the victims of the burglary and because the fair market value of the other stolen items was not properly found. The Court reversed and remanded for an evidentiary hearing to determine the fair market value.

State v. Engelking, # 95,556
Cowley Co., Not Published
Court of Appeals
Affirmed

Engelking appealed his sentence from conspiracy to manufacture methamphetamine

and attempted manufacture of methamphetamine arguing that he should have been sentenced under K.S.A. 2005 Supp. 65-4152(a)(3) instead of K.S.A. Supp. 65-4159(a) because they overlap and the first carries a less severe penalty. The Court held that while the statutes are similar they are not identical; therefore, the trial court did not err in imposing sentence under 4159(a).

State v. Morris, # 94,521/95,883
Butler Co., Not Published
Court of Appeals
Reversed and remanded with directions

Morris appealed the district court's revocation of his probation claiming the State waived the right to execute a probation violation warrant by failing to take reasonable steps to effect execution of the warrant in a timely fashion. The Court reversed the case because the State failed to present evidence that any efforts were made to execute the warrant.

State v. Anderson, # 95,440
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Anderson appealed claiming his sentence was illegal and that the trial court erred in not appointing him an attorney before ruling on his motion to correct an illegal sentence. The Court held that the original sentence was wrong as result of an incorrect PSI, not as the result of a stipulation by the State; therefore, the trial court acted within its jurisdiction to correct the sentence. The new sentence is within the proper sentencing range.

State v. Briggs, # 96,347
Saline Co., Not Published
Court of Appeals
Reversed in part, vacated in part, and remanded with directions

Briggs appealed the district court's revocation of his probation. The Court agreed with the defendant's argument that his commission of another crime before resentencing for the conviction in this case did not constitute a violation of probation because probation had not yet been imposed.

State v. Headgepath, # 94,341
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Headgepath plead guilty to two counts of aggravated indecent liberties with a child and was sentenced as a persistent sex offender due to his criminal history. He appealed his sentencing contending he is not a persistent sex offender because one of his previous convictions was not a sexually violent crime. The Court found that because the facts of his previous conviction would now constitute indecent liberties with a child and not aggravated incest, like it was in 1992, allowed the district court to find that he was a persistent sex offender even though the crime of aggravated incest is not included in the statute as a violent sexual crime.

State v. Martin, # 95,819
Sedgwick Co., Not Published
Court of Appeals
Sentence vacated and remanded for resentencing

Martin appealed multiple convictions arguing the district court erred in ordering an upward dispositional departure. The Court agreed, finding that a fiduciary relationship between Martin and her codefendant son was not an appropriate factor to use to depart from the presumption of probation. It further held that K.S.A. 2005 Supp. 21-4716(c)(3) bars the use of the "callous and cowardly" factor utilized in this case to sentence Martin to prison.

State v. Strong, # 93,075/93,076
Johnson Co., Not Published
Court of Appeals
Affirmed

Strong appealed his burglary and theft convictions claiming the trial court abused its discretion in consolidating the cases for trial. The Court found that the timing of the events, the similar character of the crimes, and the connection between the crimes in each case supported the consolidation. Furthermore, Strong failed to show he was prejudiced by the consolidation. Strong also argued that the court improperly enhanced his sentence. The Court held that Strong's lack of amenability to probation may serve

as a substantial and compelling reason for imposing a departure sentence.

State v. Reich, # 94,759
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Reich was convicted of aggravated robbery and aggravated kidnapping and appealed the district court's failure to provide lesser-included offense instructions. The Court held that Reich's requested instruction, 'obtaining by threat control over property' pursuant to K.S.A. 21-3701(a)(3), is not a lesser-included crime of robbery or aggravated robbery. State v. Sandifer, 270 Kan. 591 (2001).

State v. Alderete, # 94,388
Sumner Co., Not Published
Court of Appeals
Reversed and remanded with directions

Alderete appealed his conviction of child abuse claiming the trial court erred in failing to instruct that aggravated battery was a lesser-included offense of abuse of a child. The Court agreed and reversed and remanded for a new trial on that basis.

State v. Crawford, # 95,712
Reno Co., Not Published
Court of Appeals
Affirmed in part, sentence vacated in part, and remanded with directions

Crawford appealed his conviction of possession of ephedrine with intent to manufacture methamphetamine contending his postrelease supervision period of 36 months exceeds the statutory limit for his sentence. The State agreed and the sentence was reduced to 12 months.

State v. Lawrence, # 95,186
Cloud Co., Not Published
Court of Appeals
Sentence vacated and case remanded with directions

Lawrence appealed his 18-month probation supervised by community corrections asserting that his probation should be supervised by court services. The trial court announced a "clear need" for sentencing to community corrections. The court remanded to the

trial court for a more specific determination regarding whether the defendant qualified for supervision.

State v. Jenkins, # 95,078
Johnson Co., Not Published
Court of Appeals
Affirmed

Jenkins appealed his probation revocation arguing the district court failed to file the order extending his probation before his probation expired. The Court held that because the defendant signed the voluntary extension of probation prior to the late filing by the district court the extension was timely filed pursuant to K.S.A. 60-206(a) and K.S.A. 21-4611(c)(8). Jenkins had signed the extension on Friday, the final day of his probation was Saturday, and the court filed the extension on Monday. The trial court had the jurisdiction to revoke the probation.

State v. Moss, # 95,094
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Moss appealed the trial court's summary denial of his motion to correct an illegal sentence arguing that the trial court committed reversible error by not appointing counsel and holding a hearing in violation of 22-3504. While the trial court did deny his motion without giving reasons for the denial, Moss had filed multiple motions with the trial court raising exactly the same issue. Under those circumstances, the trial court did not err by summarily denying his motion.

State v. Harris, # 95,269
Johnson Co., Not Published
Court of Appeals
Affirmed

Harris appealed his criminal history score and the trial court's use of this score in calculating his sentence of criminal possession of a firearm arguing that his prior felony convictions constituted an element of the charged offense and therefore, should have been excluded from his criminal history score. The Court found that because Harris had two prior felonies and only one is required for criminal possession of a firearm, the second was properly used in his criminal history score and the sentence was affirmed.

State v. Parker, # 95,439
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Parker appealed the revocation of his probation arguing the trial court abused its discretion by revoking his probation because his actions were committed in defense of another, not aggravated battery. Because revocation of probation lies within the sound discretion of the trial court, this Court does not reweigh evidence, and the evidence in the record supports the trial court's findings, the trial court did not abuse its discretion.

State v. Blackmon, # 95,696
Wyandotte Co., Not Published
Court of Appeals
Reversed and remanded for resentencing

Blackmon was convicted of second-degree unintentional murder and was sentenced to a downward departure of 38 months, instead of the presumed 131 months. The State appealed. The Court found that the only basis for the sentencing court's downward departure was the court's personal opinion the jury should have convicted the defendant of involuntary manslaughter and not second-degree unintentional murder, which did not constitute a substantial and compelling reason for the departure.

State v. Simmons, # 95,096
Sedgwick Co., Not Published
Supreme Court
Affirmed

Simmons appealed the district court's summary denial of his pro se motion to correct an illegal sentence filed pursuant to 22-3504(1) contending it was error for the district court to deny his motion without appointing counsel and conducting an evidentiary hearing. The Court cited *State v. Mebane*, 278 Kan. 131, 138 (2004) in holding that a motion to correct an illegal sentence under 3504 does not automatically entitle a defendant to appointment of counsel and an evidentiary hearing, unless it finds substantial issues of law or fact were raised. The defendant also argued that his motion did present substantial issues of law or fact and, thus, its summary denial was erroneous. The Court held the defendant's argument that his sentence for aggravated robbery was

illegal because he was not the defendant who used the weapon in the crime, is not within the limited definition of illegal sentence for 3504 purposes. Therefore, the district court did not err in its summary denial of the motion

State v. Kester, # 93,988
Johnson Co., Not Published
Court of Appeals
Affirmed

Kester appealed his conviction and sentence for aggravated criminal sodomy and aggravated indecent liberties with a child claiming the trial court erred in admitting evidence of prior bad acts under 60-455. The Court found that the trial court did not err in allowing witnesses to describe prior sexual abuse by Kester because it was relevant and probative to the issue of intent, plan, and mode of operation.

State v. Peterson, # 95,027
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Peterson appealed his conviction of possession of cocaine and escape from custody, arguing that the district court erred in its determination that his criminal history score was A. The court found that Peterson's challenge to his criminal history was resolved adverse to him in a prior proceeding and applied the doctrine of collateral estoppel and affirmed the sentence.

Glaze v. State, # 95,323
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Glaze appealed from the district court's summary denial of his motion to correct an illegal sentence without holding an evidentiary hearing or appointing counsel claiming that because he claims the charges against him are multiplicitous his motion contains triable issues of law and fact. The Court held that his argument fails. *State v. Edwards*, 281 Kan. 1334, 1337 (2006) (holding that an allegation that a conviction is multiplicitous with another conviction is not a claim that the sentence is illegal for failing to conform to the character or the term of punishment authorized by law.

State v. Najera, # 95,305
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Najera appealed from the trial court's order revoking his probation arguing it was error to revoke his probation because his failure to comply with the conditions was not intentional but due to him being deported to Mexico. The Court held the defendant failed to obey the laws of the United States and failed to show there was an abuse of discretion by the trial court in revoking his probation.

State v. Trice, # 95,356
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

Trice appealed his conviction and sentence for aggravated interference with parental custody contending the prosecutor misstated the law of intent in his closing argument. Some of the prosecutor's statements discussing the taking of the child were a mischaracterization of the law and were outside the wide latitude allowed prosecutors. However, other comments by the prosecutor and the defense attorney did properly and repeatedly inform the correct legal standard of specific intent; therefore, the comments were harmless error. The Court reversed for an assessment of the defendant's ability to reimburse BIDS.

State v. Thompson, # 95,563
Saline Co., Not Published
Court of Appeals
Reversed and remanded for resentencing

Thompson appealed the imposition of a 24-month probationary sentence resulting from his guilty plea of criminal threat instead of the presumptive 12-month sentence. The Court reversed and remanded for resentencing because the district court did not make the requisite findings before imposing a period of probation exceeding the presumptive term.

Kendrick v. State, # 95,693
Norton Co., Not Published
Court of Appeals
Affirmed

Kendrick appealed the court's denial of his request to serve his probation in Kansas concurrently with his incarceration in Florida. The Court held that a Kansas prisoner, who has absconded from his parole in Kansas, has no right to be returned immediately to Kansas once he waives his extradition because parole is a matter of grace and not a right. Furthermore, Kendrick did not receive an increased penalty for being forced to serve the remainder of his sentence when returned to Kansas; he avoided punishment by being outside the custody of the State for six years. His sentence simply picked up from where it left off when he absconded; any additional time he served in Florida was due entirely to his criminal conduct in that state.

State v. Granger, # 95,872
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Granger appealed the district court's revocation of her probation. The Court found that Granger admitted that she violated her probation and there was no abuse of discretion in the court's imposition of her underlying sentence.

State v. Willis, # 96,113
Butler Co., Not Published
Court of Appeals
Dismissed

Willis appealed the imposition of a border box sentence. The Court dismissed the case for lack of jurisdiction. *State v. Bost*, 21 Kan. App. 2d 560, 570-71 (1995) (holding that the imposition of incarceration in a border box case constitutes a presumptive sentence for purposes of appeal).

State v. Strobe, # 95,325
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Strobe appealed the district court's summary denial of his second motion to correct an illegal sentence. The Court found no abuse of discretion because Strobe's claims, even if

valid, would not render his sentence illegal under 22-3504(1). Moreover, his claims either had been previously addressed or could have been raised in prior proceedings.

State v. Duskie, # 95,949
Saline Co., Not Published
Court of Appeals
Dismissed in part, reversed in part, and remanded with directions

Duskie appealed the revocation of his probation claiming he was denied a hearing within a reasonable time after the State's motion to revoke probation was filed. The Court dismissed Duskie's claim that laches bars the State from revoking his probation and reversed and remanded for a hearing on the reasonableness of the State's efforts to locate Duskie.

State v. Boswell, # 96,469
Saline Co., Not Published
Court of Appeals
Affirmed in part and dismissed in part

Boswell appealed from the sentence imposed in his 2005 conviction for possession of methamphetamine with intent to sell challenging the inclusion of his prior juvenile adjudications in his criminal history score. This issue has previously been decided against the defendant in *Apprendi*. The Court dismissed the defendant's claim that the district court should have granted a dispositional departure sentence because he never filed a motion seeking a dispositional departure.

State v. Owens, # 95,491
Sedgwick Co., Not Published
Court of Appeals
Reversed and remanded

Owens appealed his convictions and sentences for aggravated robbery and battery, contending the district court abused its discretion in refusing to consider defendant's plea agreement with the State before insisting on starting defendant's trial. Prior to the trial the defendant had failed to sign the plea agreement, but did request the judge consider the agreement. The defendant also failed to object to the judge beginning trial after denying the request. The Court however allowed the issue on appeal and reversed the finding that the district court did not consider the defendant's plea in the context

of the procedure provided by 22-3210; therefore the requirements of the statute were not satisfied. The district court failed to articulate any reason, good or otherwise, for rejecting the defendant's request to plead.

State v. Johnson, # 95,582
Reno Co., Not Published
Court of Appeals
Affirmed

Johnson appealed the district court's summary dismissal of his motion to correct an illegal sentence arguing the district court was required to provide him with appointed counsel and a hearing, regardless of whether his motion raised substantial issues of law or fact. The Court held this position was rejected in *State v. Duke*, 263 Kan. 193, 195-96 (1997) (holding that a district court may summarily dismiss a motion to correct an illegal sentence if the motion fails to raise substantial issues of law or fact).

MISCELLANEOUS AND MULTIPLE ISSUES

State v. Buddenhagen, # 95,316
Crawford Co., Not Published
Court of Appeals
Affirmed

Buddenhagen appealed from his multiple drug convictions arguing that the trial court erred in denying his motion to suppress evidence. The defendant contends that the police lacked sufficient cause to impound his vehicle. The Court held that because the search was incident to a valid arrest, pursuant to the automobile exception, and only searched for contraband, the search was constitutional. The defendant then argued that the trial court improperly instructed the jury that it could consider his prior drug use in determining whether he was in possession of methamphetamine in violation of 60-455. The Court held that because the defendant denied knowledge of the drugs, the trial court did not err in allowing evidence of his prior use. The defendant next argued that the trial court erred in failing to provide a limiting instruction regarding his prior use of methamphetamines. The Court found that "the failure to give a prophylactic limiting instruction is not inevitably so prejudicial as to require automatic reversal, and may actu-

ally be found to be harmless error." *State v. Grunby*, 144 P. 3d 647, slip op. at 12 (2006). In this case it was harmless error because of the way it was introduced to the jury. The defendant finally argued that the trial court erred in sentencing him for a level 1 crime instead of a level 4. The Court followed *State v. Fanning*, 281 Kan. 1176 (2006) and found that attempted manufacture of methamphetamine and possession of drug paraphernalia with intent to manufacture are not identical offenses.

State v. Levy, # 94,012
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Levy appealed from his conviction and sentencing for aggravated burglary arguing that the pretrial identification procedure was unduly suggestive, caused irreparable misidentification, and violated his due process rights. The Court held that the initial procedure was not unduly suggestive because the identifier did not select a photograph from the lineup. However, it did find that the process was unduly suggestive when the officers showed the witness a single picture of the defendant immediately prior to seeing the defendant in an in-person lineup. Even though it was unduly suggestive, after weighing the Hunt factors along with the totality of the circumstances the Court found the pretrial identifications was sufficiently reliable for admission. Levy next argued that the trial court erred in not removing a juror who had commented on the guilt of the defendant prior to the trial. The Court held there was no error because the comment was made out of frustration and the juror, after being questioned by the judge, assured the court she would be an impartial juror. Levy finally argued that the district court erred in giving a deadlocked jury instruction. The Court held that because the instruction was given before the jury retired there was no reversible error.

State v. Wright, # 94,862
Thomas Co., Not Published
Court of Appeals
Affirmed

Wright was convicted of selling marijuana to an individual working for the police department during a controlled buy. The defendant

appealed raising multiple issues. First, he claimed the trial court's definition of sale in the jury instructions misstated the law violating his right to a fair trial. The Court held that the instruction was a correct statement of law and even if it was incorrect, the defendant's admission to exchanging marijuana for money makes the point moot. Next, the defendant argued that the trial court erred in allowing the State to amend its complaint to add charges for distribution of marijuana. The Court held that because the defendant's rights were not substantially prejudiced there was no error. *State v. Bischoff*, 281 Kan. 195 (2006). Then the defendant argued that the district court violated his rights to a fair trial by allowing the State to introduce evidence of uncharged prior bad acts. The Court held that his rights to a fair trial were not violated because the evidence was used to prove he had a predisposition to commit the crimes and rebut his defense of entrapment. Finally, the defendant claimed the officers exceeded the scope of the search warrant. The Court held that the officers could reasonably have held marijuana or paraphernalia, both listed on the warrant, and once it was opened the seizure did not exceed the scope of the warrant.

State v. Ruffus, # 94,442
Barton Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

Ruffus appealed his multiple convictions alleging trial and sentencing errors. Ruffus first challenged the district court's instruction on an initial aggressor's limited right to use force in self-defense, contending the evidence at trial did not support the instruction. The Court held that the actions taken by the defendant, including entering the trailer and detaining an occupant supported an initial aggressor's instruction. Next, Ruffus argues that the trial court erred in giving instructions for kidnapping under 21-3420(a) when he was only charged with 21-3420(b). The Court held that while the trial court jurisdiction to convict the defendant of kidnapping under 3420(a), the erroneous instruction had no ultimate effect on the jury's verdict; the defendant was convicted under 3420(b). Next, Ruffus contends his convictions for kidnapping and battery violate double jeopardy as both are based upon

a single course of conduct. Because they do not require the same elements to be proven the Court found double jeopardy did not exist in this case. Ruffus then challenged his voluntary manslaughter conviction claiming the State failed to provide sufficient evidence to prove he fired the fatal shot. The Court held that the State's evidence supported the finding that the defendant had fired the fatal shot. Furthermore, the use of deadly force was unreasonable even if the jury had found he was acting in self-defense. Ruffus finally argued that his kidnapping conviction should be reversed because he was not found guilty of burglary or murder, and the district court failed to review his ability to repay BIDS. The Court found that his acquittal of burglary and murder does not affect the kidnapping conviction. The Court reversed and remanded solely for the district court to review the order to repay BIDS.

State v. Bradley, # 93,724
Johnson Co., Not Published
Court of Appeals
Affirmed

Bradley appealed from his convictions for three counts of burglary of a motor vehicle claiming the trial court erred in denying his motion to suppress evidence and in sustaining the State's motion for a dispositional durational departure from the presumed sentence. The Court held the officer did have reasonable suspicion to detain the defendant based on the totality of circumstances; it was 3 a.m., the defendants were dressed in black, had flashlights, and were looking into cars. With regard to the sentence, the Court held that because there was a substantial and compelling reason given for each the dispositional and durational, it was a valid departure.

State v. Hill, # 94,981
Lyon Co., Not Published
Court of Appeals
Affirmed

Hill appealed his convictions and sentences for multiple drug offenses making multiple arguments. First, Hill argued that the State did not prove beyond a reasonable doubt that he possessed anhydrous ammonia. The Court held there was sufficient evidence such as, the accessibility to anhydrous ammonia, the possession of equipment to hook up to a nurse tank, the odor of anhydrous am-

monia, and the white smoke seen billowing from the barn, that a jury could find beyond a reasonable doubt he possessed anhydrous ammonia. Next, Hill argued that the State failed to provide sufficient evidence that he obstructed legal process. The Court held his refusal to cooperate did impede a felony narcotics investigation. Also, the omission in the charging document that the obstruction was a felony does not violate Apprendi. Hill next claimed his right against self-incrimination was violated when the State elicited testimony of his response to a post-arrest, pre-Miranda question as to whether he lived at the residence. The Court held that he was under arrest and the court erred in allowing the statement in; however, the error was harmless because the jury was not required to find that Hill resided there in order to find him guilty of manufacturing methamphetamines.

State v. Darby, # 95,185/95,298
Saline Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

Darby challenged the district court's decision on his motion to withdraw his plea agreement arguing that because he did not have any preliminary hearing, the district court lacked jurisdiction to accept his guilty pleas, his pleas were not freely and voluntarily given, and finally that the district court applied a "to correct manifest injustice" standard, instead of, the "good cause shown" standard required when a motion is filed prior to sentencing. The Court held the district court did have jurisdiction to hear the pleas that were freely and voluntarily given, but the district court did apply an erroneous legal standard in evaluating his motion to withdraw pleas.

State v. Flores, # 95,647
Lyon Co., Not Published
Court of Appeals
Affirmed

Flores appealed from the district court's denial of his motion to set aside his 2002 guilty plea to one count of indecent liberties with a child contending his counsel wrongly advised him about the immigration consequences from his conviction, thereby resulting in manifest injustice. The Court held that

deportation from a felony conviction is a collateral consequence and was not manifest injustice. The defendant then argued that counsel was ineffective for failing to notify him of the deportation issue. The Court held that while counsel failed to advise Flores of the deportation issues, counsel did not advise him that he would not be deported. The Sixth Amendment does not require the court or counsel to advise defendants of the collateral consequences of their guilty pleas.

State v. Sudduth, # 93,266/93,267
Johnson Co., Not Published
Court of Appeals
Affirmed and remanded with directions

Sudduth appealed his convictions and sentences for multiple robberies raising nine issues: 1) the evidence was insufficient to support the robbery conviction; 2) the district court erred in admitting evidence of a prior robbery under K.S.A. 60-455; 3) the district court erroneously admitted hearsay evidence about the prior robbery in violation of the Confrontation Clause; 4) the district court excluded evidence necessary for Sudduth to present his theory of defense; 5) the district court erroneously denied Sudduth's motion to suppress his post-Miranda statements; 6) the district court should have given a lesser-included offense instruction on theft by extortion; 7) cumulative errors denied Sudduth a fair trial; 8) the journal entry of sentencing reflected an incorrect total term of imprisonment; 9) Sudduth's sentence was unconstitutionally increased by a criminal history that was not proved to a jury beyond a reasonable doubt. The Court held: 1) the defendant's argument that because he did not verbalize a threat or display a weapon fails and the robbery conviction is affirmed; 2) the circumstances of the prior robbery used to prove identity were similar enough that the probative value was not outweighed by the prejudicial nature; 3) the statements used were not testimonial and therefore the Confrontation Clause did not apply; 4) the district court properly excluded the evidence because defense counsel used an improper method to introduce it; 5) the conversation was initiated by Sudduth and was properly allowed in as evidence; 6) threat by extortion is not a lesser included offense of robbery, State v. Blockman, 255 Kan. 953 (1993); 7) there was no cumulative error; 8) the State

conceded the error in the journal entry and is remanded for correction; 9) *State v. Ivory*, 273 Kan. 44 (2002) allows the use of prior convictions to enhance sentences.

State v. Thuko, # 94,228
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Thuko appealed his conviction of rape and attempted rape arguing the trial court abused its discretion in consolidating the cases. The Court found that while the cases were dissimilar in the set of victims and the dates, they were similar in that Thuko parted with each victim prior to the rape at approximately the same location and two of the witnesses were the same. The defendant next argued that his right to speedy trial was violated. The Court found that the defendant's four continuances significantly impacted the length of time between his arraignment and the trial. Thuko also argued prosecutorial misconduct. The Court held that the prosecutor was drawing a reasonable inference between the strangulation marks on the victim and Thuko attempting to control the victim from resisting the rape.

State v. Paul, # 95,105
Saline Co., Not Published
Court of Appeals
Affirmed

Paul appealed his conviction for sale of methamphetamine and possession of drug paraphernalia arguing that the district court violated his right to a speedy trial and erred in determining the severity level of the methamphetamine sale offense. Paul argued that because the previous two convictions had been entered on the same day, even though the acts occurred on different days, should be counted as only one conviction. The Court found the delay in the trial was in large part due to the defense because of the withdrawal of original counsel upon the defendant's request and the multiple continuances by the new attorney upon the defendant's behalf. The Court held there was no error with the severity level determination finding that the sentencing date was irrelevant and that the prior convictions met the sequential relation requirements.

State v. Sanders, # 95,457
Saline Co., Not Published
Court of Appeals
Reversed and remanded with directions

Sanders was arrested in Texas for failing to pay ordered child support and was twice extradited to Kansas. Sanders pled guilty and was charged for the extraditions and BIDS fees. Sanders questioned the extradition costs claiming he was jointly and severally liable for the charges with the others being extradited by the sheriff. Sanders appealed, challenging the extradition costs and BIDS fees. The Court reversed and remanded with directions because the trial court failed to hold a hearing to consider the reasonableness of the extradition costs, which Sanders questioned, before imposing them on him and it did not consider his financial circumstances before assessing BIDS.

State v. Kirk, # 95,711
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Kirk was convicted of burglary and theft; he appealed arguing that the prosecutor's improper comments made during closing warrant the overturning of his convictions. The Court found the prosecutor's comments about what Kirk was doing at the scene of the crime and his failure to explain to the police why he was on the golf course at 3 a.m. were fair comments on the evidence.

State v. Payne, # 95,381/95,382
Sedgwick Co., Not Published
Court of Appeals
Appeal dismissed

Payne appealed the denial of his pro se motion for jail time credit. The Court dismissed for lack of jurisdiction because the defendant filed his motion in Sedgwick County, but was confined at the Hutchison Correctional Facility in Reno County.

State v. McConkey, # 95,528
Lyon Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded

McConkey appealed her conviction and sentence for DUI arguing the court erred

in refusing to give an instruction on the defense of compulsion and for ordering her to reimburse BIDS. The Court reversed and remanded for consideration of attorney fees in accordance with Robinson, but affirmed the DUI conviction. The district court did not err in not giving the compulsion instruction because the defendant had an adequate alternative to the commission of the crime. She claimed she was forced to drive drunk to escape her abusive ex-husband, but she was not stopped until she was 20-25 miles from his home. She could have stopped and called the police or a ride prior to being stopped by the police.

State v. Williams, # 95,843
Riley Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded

Williams appealed his conviction and sentence from drug crimes raising four issues: 1) failure to instruct on the lesser included offense of misdemeanor obstruction of official duty; 2) imposition of a felony sentence for possession of marijuana; 3) violation of 6th and 14th Amendments as outlined in *Apprendi v. New Jersey*, by imposing enhanced sentences based on prior convictions without requiring those convictions to be submitted to a jury and proven beyond a reasonable doubt; and 4) ordering him to reimburse BIDS without considering his ability to pay. The Court found there was no merit to the first and third contentions, but there was to the second and fourth. The Court held: 1) the defendant failed to request the lesser included instruction and there was no real possibility that the jury would have rendered a different verdict; 2) the district court erred in imposing a felony sentence and not a misdemeanor based on prior convictions because the prior conviction did not occur until after the commission of the instant offense; 3) the inclusion of prior conviction in criminal history is not a violation of *Apprendi*; and 4) the requirements of Robinson were not met because the district court failed to assess the financial resources of the defendant and the nature of the burden that payment of the fees would impose.

State v. Hernandez, # 94,873
Wyandotte Co., Not Published
Supreme Court
Affirmed

Hernandez appealed his convictions and sentences of first-degree felony murder and criminal discharge of a firearm claiming: 1) the trial court's jury instruction on the underlying felony of criminal discharge of a firearm was clearly erroneous; 2) the trial court's failure to instruct the jury on lesser included offenses of voluntary manslaughter and involuntary manslaughter under the aiding and abetting theory was clearly erroneous; and 3) the prosecutor's comments during closing argument constitute prosecutorial misconduct.

The Court held: 1) the jury instruction was not erroneous. The victim was killed by a bullet fired into a vehicle, whether it was the defendant or another who fired the bullet that actually caused the victim's death is irrelevant as long as the jury found the defendant participated in the crime and that the victim's death resulted from that crime; 2) the defendant failed to establish any reason for the Court to reconsider the standard that lesser included instructions are not appropriate in cases in which the evidence of the underlying felony is strong; 3) the statement by the prosecutor about the State's witness being candid was undisputed and immaterial to Hernandez's convictions, his statement about the witness being cooperative referred to accurately cited sworn testimony, and the statements by the prosecutor in his closing about the witnesses being honest and volunteering information was not his opinion. Furthermore, the prosecutor pointed out that both witnesses had admitted other facts that cast each of them in an unfavorable light, allowing the jury to make the inference those witnesses were being truthful when testifying. These statements were not outside the wide latitude extended to prosecutors, nor were they so gross and flagrant as to deny the defendant a fair trial. However, the statement by the prosecutor that the defendant's testimony was ludicrous and unsupported by any evidence in the case violated the first prong of the test, but because there was no ill will, nor was the comment gross or flagrant, it did not deprive the defendant of the right to a fair trial.

State v. Berkstresser, # 94,131
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Berkstresser appealed the district court's instructions to the jury, his sentence, and the order of restitution from his convictions of aggravated battery and criminal possession of a firearm. He first claimed the trial court erred in not giving a multiple acts instruction. The Court held that because there was no testimony that would prove the gunshots were part of separate criminal acts or motivated by "fresh impulse," the trial court did not err in not providing the instruction. The Court also held there was no error in not giving a lesser-included instruction for aggravated battery for the gunshots. State v. Whitaker, 260 Kan. 431, 435 (1996) (a through and through bullet wound, which damaged no organs or bones, was great bodily harm as a matter of law). Also, because Berkstresser intentionally fired his weapon there was no basis for giving a reckless aggravated battery instruction. Berkstresser also argued his sentence was improper because the trial court included in its computation of his criminal history a prior aggravated battery, which is an element of his criminal firearm possession charge. The Court held that a prior conviction that is an element of a non-base offense may be included in the criminal history score for the base offense. State v. Vontress, 266 Kan. 248, 260 (1998). Berkstresser finally challenged the assessment of restitution contending the district court was obligated to consider his financial resources and ability to pay before imposing that obligation. The Court held that because the defendant failed to object to the restitution at sentencing and waived his hearing for determining restitution his claim has no merit.

State v. Pope, # 94,673
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Pope appealed his conviction for one count of second-degree murder raising issues concerning: 1) the jury instructions, 2) admission of photo evidence, and 3) allowing the lead investigator to sit at the prosecutor's counsel table. The Court held: 1) because the jury needed to decide whether Pope was

the aggressor, the instruction that one who provokes cannot claim self-defense instruction was not an error, 2) that the photos were relevant because they demonstrated how the witness and the police identified Pope as the suspect immediately after the shooting, and 3) that there was no abuse of discretion in allowing the chief investigator to sit at the prosecution's table.

State v. Dinh, # 94,878
Saline Co., Not Published
Court of Appeals
Affirmed

Dinh challenged his conviction of felonious DUI contending the district court's failure to memorialize its preliminary hearing findings binding him over for trial resulted in two errors; he was denied due process of law and the district court lacked jurisdiction to proceed with a jury trial. The Court found that Dinh was personally present at the hearing with counsel, where evidence was presented, and district court made a probable cause finding to bind him over; therefore, he received full due process. Moreover, the lack of a journal entry filed in this case did not implicate due process of law, or deprive the district court with jurisdiction.

State v. Toll, # 95,713
Saline Co., Not Published
Court of Appeals
Reversed and remanded

The State appealed the trial court's dismissal of its case against Toll. Toll had been charged with criminal sodomy and when the State requested a continuance, due to the arresting officer not being present, the court dismissed the case with prejudice for failure to prosecute. The Court held the dismissal was an abuse of discretion, it was the first continuance by the State and the court failed to examine alternative means to sanction the prosecutor.



Calendar of Events

KCDAA 2007 Spring
 Conference
 June 10-12, 2007
 Hyatt Regency Hotel
 Wichita, Kansas



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