



# Advance Sheet



Kansas County and District Attorneys Association

August 2007

## Legislative Interim Report: Month in Review

By Richard Samaniego, Associate

### Special Committee on Judiciary

The Special Committee on Judiciary held the first meeting of the Interim August 16 and 17. The Committee is chaired by Senator John Vratil (Leawood) and vice-chaired by Representative Mike O’Neal (Hutchinson). Topics of discussion included: increased penalties for aggravated incest (2007 SB 233), interference with parental custody (2007 SB 182), and establishment of a statewide DA system (2007 SB 254). The committee will be making recommendations on these items at the next scheduled meeting.

The next Judiciary meeting will be held August 27, 2007 to discuss operations of the Kansas Parole Board.

### Kansas Recodification Commission

The Kansas Recodification Commission met Wednesday, July 25 for their second meeting as a new stand alone commission separate from the former 3Rs Committee. The Commission was authorized by the 2007 legislature with the passage of Senate Bill 14 and is funded with \$150,000.00 from the state general fund through the Judicial Council.

The Commission is chaired by Kansas University Professor Tom Stacey and vice-chaired by Chief Ed Klump (Topeka). The Commission is comprised of 15 members representing several sectors involved in the criminal justice system. Prosecutors are well represented on the Commission with Kim Parker (Sedgwick County) appointed on behalf of the Kansas County and District Attorneys Association and former KCDAA board member, Jacqie Spradling, representing the Attorney General’s Office.

The next meeting of the Commission was scheduled for August 22, 2007 and topics of discussion included introduction of the new staff attorney, Brett Watson, and a discussion of approach to culpability issues.

The next subcommittee meeting was scheduled for August 23, 2007. The subcommittee will be meeting monthly to discuss proportionality of sentencing and to study proposals for the 2008 legislative session.

### Kansas Sentencing Commission

The Kansas Sentencing Commission formed a new Subcommittee at its June meeting to study proportionality in the criminal code. The subcommittee held its first meeting July 25, 2007. The subcommittee is chaired by KCDAA past president Tom Drees and the subcommittee members include: Attorney General Paul Morrison, Patricia Biggs, Helen Pedigo, Representative Janice Pauls, Rick Kittel (KU), Pastor Junius Dotson, and Chris Mechler.

The next subcommittee meeting was scheduled for August 23, 2007. The subcommittee will be meeting monthly to discuss proportionality of sentencing and to study proposals for the 2008 legislative 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.

For information about membership, advertising, or general facts about the KCDAA, contact the executive staff:

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# Legislative Interim Report

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## “Three Strikes” Legislation Proposed

Senator Derek Schmidt (Independence) met with stakeholders to discuss proposed legislation to implement a “three strikes” policy for third time offenders. The legislature recently passed similar legislation relating to presumptive prison for third or subsequent burglary with the passage of HB 2062. As you recall, this legislation was supported by the KCDAA and has taken many years to be adopted into law. Building on this concept, Senator Schmidt is proposing to broaden this policy to other

felonies. Unlike other so called “three strikes” laws, the proposed legislation will keep the discretion open for durational departures, but will shut the door on dispositional departures for these repeated offenses.

If you have any questions or feedback on any of the interim topics of discussion, please feel free to e-mail Richard Samaniego at [rsamaniego@kearneyandassociates.com](mailto:rsamaniego@kearneyandassociates.com) or call (785) 232-5822. We are always interested in your comments and expertise.

## Recent Opinions

### **HABEAS ISSUES**

State v. Holman, # 95,897  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the district court's ruling that no *Ortiz* exceptions applied to excuse his untimely notice of appeal. The Court found, based on the defendant's signing of an acknowledgement and waiver and defense counsel's testimony at the *Ortiz* hearing that he fully informed the defendant of his right to appeal within 10-days, there was substantial evidence to support a finding that the defendant was informed and aware of his right to appeal within 10-days, and that no exception applied.

State v. Hopkins, # 95,909  
Barton Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed from a district court's ruling that his untimely notice of appeal did not meet any *Ortiz* exception. The Court found substantial evidence

supported the court's decision and affirmed. Defendant had signed a plea agreement, which specifically explained his right to appeal and counsel testified that he always explains the right to appeal to his clients when going over a plea agreement.

State v. Hunter, # 96,116  
Pratt Co., Not Published  
Court of Appeals  
Reversed and remanded with directions

Defendant appealed the district court's denial of his motion to appeal out of time after an *Ortiz* hearing. The Court reversed finding defendant was never informed of his right to appeal or the right to appellate counsel and transcripts, if he were indigent at the time of sentencing.

State v. Gebhardt, # 96,242  
Saline Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the district court's denial of his untimely notice of appeal. The Court held there was substantial evidence in the record that the defendant was aware of the 10-day time limit to ap-

peal; therefore, no abuse of discretion by the district court.

State v. Franklin, # 96,923  
Reno Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the denial of his motion to withdraw his guilty pleas, claiming they were coerced. The Court found nothing in the record indicating the trial court acted unjustly or unfairly, and the fact that the defendant relied on advice from his family and his attorney does not constitute coercion allowing withdrawal of a plea that was voluntarily and knowingly made.

State V. Allen, # 95,948  
Cowley Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the district court's denial of his motion to file a direct appeal out of time. The Court held that even though the district court improperly told the defendant that he could not appeal his conviction if he pled guilty, he was not entitled to reversal because his attorney did inform him of his right to appeal and the time limitation on that right.

State v. Kelley, # 96,362  
Coffey Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the denial of her motion to file an appeal out of time. The Court found that because defense counsel testified that he had discussed the possibility of an appeal with the defendant at her sentencing and she advised him that she elected not to appeal, there is substantial competent evidence supporting the district court's findings.

## **EVIDENTIARY ISSUES**

State v. Brungardt-Sturgeon, # 95,574  
Pratt Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed her multiple drug convictions claiming the affidavit in support of a search warrant did not establish probable cause linking illegal drugs to her residence and the good faith exception does not apply. The Court found there was either probable cause to believe that drugs would be found in the defendant's residence, or there was at least such evidence that the officer, on receiving the warrant from the magistrate, would have a good faith belief that the warrant was valid because none of the four *Leon* exceptions were present.

State v. Smith, # 96,058  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed his conviction for involuntary manslaughter claiming it was not supported by sufficient evidence. Based on the defendant's own testimony that he had a gun, that he fired that gun, that he fired that gun in close range of the victim, and that he fired the gun at least once intentionally and out of anger, the Court held the jury's verdict is supported by sufficient evidence.

State v. Pedraza, # 95,016  
Johnson Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed drug charges claiming the district court erred in denying his motion to suppress drugs found in a duffel bag that was in the locked trunk of an automobile that he was a passenger in. The driver of the vehicle gave consent to search the duffel bag and defendant claims he did not have authority to give such consent. The Court found that because the defendant neither manifested

any ownership in the duffel bag nor displayed any expectation of privacy in the bag or its contents, it was reasonable for the searching officer to believe that the driver's consent was valid to search the duffel bag. Furthermore, defendant argued that the sentencing court erred when it did not consider him for placement in Labette. The Court found no error because defendant was on probation or parole at the time of this offense.

State v. Steinli, # 95,957  
McPherson Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed her conviction of burglary and theft arguing she could not be convicted of burglary because of the structure involved in the case, there was insufficient evidence to support her conviction, and she was entitled to lesser included instructions. The Court found the shed in which the victims kept horse feed was a structure because one half of the shed was completely enclosed and required the defendant to lift a 2x4 wooden latch out of metal slots which secured to door. Because defendant admitted to the detective that she was on the property and loading horses, the sufficiency of evidence argument has no merit. Finally, defendant did not object to the jury instructions or ask for a lesser included and the Court found no error.

State v. Schiffelbein, # 96,087  
Finney Co., Not Published  
Court of Appeals  
Affirmed in part, vacated in part, and remanded with directions

Defendant appealed her conviction of criminal damage to property, claiming statements made by the prosecutor during closing argument constitute prosecutorial misconduct. The Court found that while the comments by the prosecutor attacked the credibility of a defense witness the comments were fairly based on the facts in evidence and were not state-

ments of personal opinion. The Court reversed and remanded for the district court to assess BIDS fees in accordance with *Robinson*.

State v. Smith, # 96,090  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed his conviction of DUI and failing to provide proof of insurance claiming there was insufficient evidence and prosecutorial misconduct. The Court found there was substantial competent evidence to support the conviction. The arresting officer noticed a beer bottle in the car, there had been an accident, and there was a strong odor of alcohol, along with other indicators. With respect to the no proof of insurance, there was undisputed evidence that the defendant did not produce insurance to the officer and the jury had the option to believe the officer or not believe him. Furthermore, the comments made by the prosecutor were not misconduct. Even though the bottle of beer was not admitted into evidence, there was testimony by the officer that he saw one in the car, but was unable to find it because he believed the defendant threw it in the ditch with other beer bottles while he was assisting the driver of the other vehicle involved in the accident. Also, the prosecutor's comments about the defendant's inability to complete field sobriety tests and his swaying all over the place, was supported by the video of the tests and the officer's testimony that the defendant failed them.

State v. Long, # 96,236  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed in part, vacated in part, and remanded with directions

Defendant appealed his convictions and his sentences for burglary and theft claiming prosecutorial misconduct and insufficiency of evidence. The Court held the DNA of the defendant found in the victim's home along with stolen items

from the home found on the defendant was sufficient evidence to support the convictions. The Court found the prosecutor's statements were within the wide latitude given prosecutors because the comments implied what the evidence allowed the jury to infer. Reversed and remanded for assessment of BIDS fees in accordance with *Robinson*.

State v. Cabral, # 96,379  
Reno Co., Not Published  
Court of Appeals  
Reversed and remanded

Defendant appealed the district court's denial of his motion to suppress evidence obtained during a protective sweep of his home prior to his arrest. The Court reversed because the officer testified that the defendant was not under arrest at the time he made the sweep and protective sweeps must be done only incident to a lawful arrest. Furthermore, consent by defendant after the fact to search the rest of the house did not effectively remove the taint from the prior illegal search.

State v. Wilson, # 96,507  
Leavenworth Co., Not Published  
Court of Appeals  
Reversed and remanded

Defendant appealed the district court's denial of his motion to suppress evidence obtained in the course of an investigatory detention. The Court, after reviewing the record, found no facts, which would lead a reasonably prudent person under the circumstances to believe that his safety or the safety of others was at risk.

State v. Tipton, # 96,410  
Reno Co., Not Published  
Court of Appeals  
Reversed and remanded with directions

State appealed from the district court's determination that the State's evidence was insufficient to establish probable cause that the defendant either manufactured or attempted to manufacture methamphetamine. The Court found

there was sufficient evidence taken in the light most favorable to the State to support a probable cause finding. All of the items used in the manufacture of methamphetamine were openly displayed in a vehicle in which the defendant was a passenger and in the immediate vicinity of the place where he was seated.

State v. Moses, # 96,806  
Douglas Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed his convictions of possession of marijuana and possession of drug paraphernalia claiming the district court erred in denying his motion to suppress evidence. The Court held that the initial stop and running of defendant's identification to ensure that it was not the individual listed on the warrant was a seizure, but it was justified. Upon running the name the officers found out the defendant was not the individual on the warrant they were attempting to serve, but did have a warrant out for his arrest as well. The search and scope of the search incident to the arrest for this warrant were not challenged.

## **SENTENCING ISSUES**

State v. Upshaw, # 95,550  
Saline Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed his possession of methamphetamine conviction contending the trial court abused its discretion in denying his motion for a continuance and not allowing him to enter drug treatment. The Court disagreed finding no abuse of discretion by the trial court in denying the continuance because defendant had ample opportunity and plenty of notice regarding his sentencing and waited until the last minute to hire counsel; furthermore, counsel adequately represented him on the limited issues. Also, the trial court did not err in denying drug treatment under 21-4729

because defendant did not object to his criminal history at the time of his plea, which included a juvenile adjudication for a level 7 aggravated assault.

State v. Lane, # 95,997  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the revocation of his probation. The district court had continued the hearing and ordered a neurological test be done, but did not order the State to pay for the testing and defendant never informed the district court he was unable to pay for the test. The test was never completed and the district court revoked probation. The Court found no abuse of discretion.

State v. Peters, # 94,913  
Johnson Co., Not Published  
Court of Appeals  
Sentence vacated and case remanded

Defendant appealed his sentence stemming from his conviction of DUI, fleeing and eluding, and obstruction. The Court found the facts of this case did not support an upward departure sentence. Defendant was sentenced on the same day for convictions by the same jury and the charges were to run consecutive. Not allowing defendant to serve presumptive probation for one of the convictions because he was sentenced to county jail for one of the other convictions was an abuse of discretion by the district court. Had the sentences been ordered to run concurrent, as in *State v. Benoit*, 31 Kan. App. 2d 591 (2003), instead of consecutive the outcome may be different.

State v. Simmons, # 95,722  
Reno Co., Not Published  
Court of Appeals  
Sentence vacated and case remanded

Defendant appealed his sentence after being convicted of manufacturing methamphetamine contending he is entitled to be resentenced in accordance with *State*

*v. McAdam*. Bound by Supreme Court precedent, *State v. Barnes*, 278 Kan. 121 (2004), the Court agreed and remanded for defendant to be resentenced as if he had been convicted of a severity level 3 drug felony.

State v. Luong, # 95,998  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the district court's revocation of his probation. The Court found there was substantial compelling evidence to support the revocation. Drugs and a handgun were found in the defendant's apartment.

State v. Artega, # 96,241  
Finney Co., Not Published  
Court of Appeals  
Sentence vacated and case remanded with instructions

Defendant appealed sentence for a level 3 cocaine sales plea contending the trial court erred in not considering placement in Labette before imposing sentence. The Court agreed and remanded.

State v. Holmes, # 96,300  
Miami Co., Not Published  
Court of Appeals  
Affirmed in part, vacated in part, and remanded with directions

Defendant appealed the sentence imposed after he pled guilty to two counts of involuntary manslaughter while driving under the influence. The Court held the State did follow the plea agreement and recommended the counts be ran concurrently. The prosecutor said that they would be performing its obligation under the plea agreement, but did not directly say that it be ran concurrent. The district court made the finding that it was parting from the agreement and running the sentences consecutively. This along with the prosecutor's statements allowed the Court to find defendant's due process rights were protected. Remanded for

assessment of BIDS fees in accordance with *Robinson*.

State v. Gallegos, # 96,679  
Seward Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the sentence for her sixth lifetime DUI contending the trial court should have considered work release as an alternative to jail time. The Court disagreed finding the defendant did not show the sentence was a result of prejudice, partiality, oppression, or corrupt motive; furthermore, the trial court expressly considered work release but decided against it given the defendant's past history of DUI.

State v. Taylor, # 95,074; 95,074; 95,075  
Pottawatomie Co., Not Published  
Court of Appeals  
Sentences vacated and case remanded with directions

Defendant appealed the sentences imposed for his criminal damage to property convictions, claiming the sentences were illegal. The Court vacated finding the 12-month sentence imposed for each of the class B misdemeanors was an illegal sentence. The maximum for a class B misdemeanor is 6 months. Also, the illegality of the sentences may not be corrected by nunc pro tunc order because it was not a clerical type error.

State v. McBride, # 95,782; 95,802  
Shawnee Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the district court's revocation of his probation contending the evidence establishing that he violated the conditions of his probation was either insufficient or should have been suppressed. The Court found there was substantial competent evidence proving the probation violation.

State v. Lopez, # 95,680; 95,681; 95,685  
Finney Co., Not Published  
Court of Appeals  
Affirmed in part, sentence vacated, and  
case remanded with directions

Defendant appealed his sentence for his  
fourth DUI claiming that he did not  
receive notice of the maximum penalty  
he could face and that the court failed  
to consider, on the record at sentenc-  
ing, his ability to pay attorney fees. The  
Court found defendant was notified  
of the maximum sentence because the  
complaint alleged "two or more" prior of-  
fenses and defendant was informed of the  
maximum penalty for this. Reversed and  
remanded for assessment of BIDS fees.

State v. Barbe, # 96,164  
Johnson Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the district court's  
decision denying him probation after his  
conviction of felony DUI. The Court  
found no abuse of discretion in denying  
probation. While awaiting sentencing on  
house arrest, defendant failed multiple  
breath tests and had been drinking on as  
many as 18 days.

State v. Sekely, # 96,278  
Sedgwick Co., Not Published  
Court of Appeals  
Dismissed

Defendant appealed the district court's  
denial of his request for house arrest. The  
Court dismissed because the sentence  
was within the statutory limits and the  
district court imposed the sentence that  
was agreed to by both parties in the plea  
agreement.

## **MISCELLANEOUS AND MULTIPLE ISSUES**

State v. Rush, # 95,506  
Wyandotte Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed his burglary and  
theft convictions claiming his right to  
speedy trial was violated because 274  
days passed between his arrest and pre-  
liminary hearing. The Court found his  
right to speedy trial was not violated be-  
cause most of the delay was attributed to  
Rush's failure to comply with the district  
court's order to submit to a competency  
evaluation, and because there was no  
other prejudice in the delay. Defendant  
also argued prosecutorial misconduct  
because he was asked to explain why his  
blood and fingerprints were found at  
the scene. Defendant argued this shifted  
the burden of proof to him. The Court  
disagreed finding the prosecutor's ques-  
tions were relevant to rebut defendant's  
testimony that he had never been at the  
crime scene. Finally, defendant argued  
judicial misconduct when the judge in-  
terrupted him and informed him some of  
his evidence would not be admitted due  
to it being irrelevant. The Court found  
the judge's interruptions and comments  
in the case were not misconduct. After  
reviewing the record, the Court found  
the judge's comments were an attempt to  
assist defendant through his direct exami-  
nation; defendant was pro se.

State v. Walker, # 95,958  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the trial court's  
denial of his motion to withdraw his  
guilty plea. The Court found no abuse  
of discretion in denying his motion. The  
trial court found the defense counsel's  
statement that he told defendant the best  
he could hope for would be Labette more  
credible than the defendant's statement

that counsel guaranteed he would get  
Labette if he signed the plea agreement.

State v. Caudill, # 96,630  
Reno Co., Not Published  
Court of Appeals  
Affirmed in part and dismissed in part

Defendant appealed the district court's  
denial of her motion to withdraw her  
plea. The Court found that she made  
her plea knowingly and voluntarily.  
The Court found the fact that the law  
changed with respect to the charge-  
able severity level for the possession of  
methamphetamine paraphernalia and  
defendant's claim she would not have en-  
tered into the agreement had she known  
it would change, but it did not change  
the voluntariness of the plea. The Court  
dismissed the appeal for review of BIDS  
fees because it was not timely submitted.

State v. Ornelas, # 95,999  
Wyandotte Co., Not Published  
Court of Appeals  
Affirmed

Ornelas appealed his convictions of  
burglary, aggravated robbery, and theft  
claiming he was denied a fair trial due to  
prosecutorial misconduct during closing  
argument. During closing, the prosecutor  
told the jury not to reward the defendant  
by acquitting him and that defendant's  
witnesses were not the state's friends.  
The Court found the comments were  
improper, but did not constitute revers-  
ible error. The comments were isolated  
and did not constitute gross and flagrant  
misconduct.

State v. Gray, # 96,148  
Barton Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the district court's  
denial of his motion to withdraw his  
no contest plea arguing that he did not  
knowingly and voluntarily enter his plea  
and the district court abused its discre-  
tion in denying the motion. The Court

found no error. Defendant read and signed the plea agreement and the district court informed defendant of the charges, explained the potential sentences and found a factual basis for the charges.

If you have any questions or comments on these opinions, please feel free to e-mail Karl Wenger at [karl.wenger@washburn.edu](mailto:karl.wenger@washburn.edu).

### **Job Opening**

There is an immediate opening for Assistant Ford County Attorney. Salary based on experience. Benefits include health insurance, KPERs, life insurance, vacation, sick leave. Good working environment. Please mail résumé, references and letter of interest to John G. Sauer, Ford County Attorney, Attention: Dedra Tepe, PO Box 1057, Dodge City, KS 67801; e-mail to [dtepe@fordcounty.net](mailto:dtepe@fordcounty.net); or fax to (620) 227-4626.

You can now view unpublished opinions at [www.kcdaa.org](http://www.kcdaa.org) in the members only section.

If you need log-in information, contact Kari Presley in the KCDAAs office at [kpresley@kearneyandassociates.com](mailto:kpresley@kearneyandassociates.com).

*The KCDAAs Legislative Committee is still soliciting Legislative Proposals for the KCDAAs legislative agenda for the 2008 Legislative Session. This input from the membership will be considered by the Committee in making its recommendations to the KCDAAs Board of Directors. All RFPs were to be submitted by July 31, 2007, but they are still being accepted.*

*You can find the Legislative Request for Proposal form on [www.kcdaa.org](http://www.kcdaa.org) in the Legislative section. Send yours into the KCDAAs office today!*

## **Mark your calendar for the 2007 Fall Conference October 21-23 at the Capitol Plaza Hotel in Topeka, Kansas.**

Watch the website, [www.kcdaa.org](http://www.kcdaa.org), for registration and conference information. This information will be sent out as soon as it is available.

Registration fees for the Fall Conference have changed to:

\$50 - Members

\$75 - Associate Members

\$300 - Non-Members

You won't want to miss this great opportunity to get all of your CLE hours and network with your fellow members!

# Calendar of Events

KCDAA 2007 Fall  
Conference  
October 21-23, 2007  
Capitol Plaza Hotel  
Topeka, Kansas

**Early Registration Fees for Fall 07:**

\$50 - Members  
\$75 - Associate Members  
\$300 - Non-Members



# KCDAA Board of Directors

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