



# Advance Sheet



**Kansas County and District Attorneys Association**

**December 2007**

## Important Dates for 2008

The new year and another legislative session is fast approaching – yes, it’s hard to believe - so be sure to mark your calendars of the following important dates for the upcoming legislative session. KCDA A wishes everyone Happy Holidays!

**Monday, January 14th**

First day of 2008 session; convene at 2:00 p.m.

**Monday, January 28th**

Last day for member or members to REQUEST to have bills drafted.

**Wednesday, February 6th**

KCDA A Board Meeting, Topeka, KS

Joint Law Enforcement Legislative Reception,  
Capitol Plaza, Topeka

**Thursday, February 7th**

Last day for Committees, except House Appropriations, Calendar and Printing and Taxation, House and Senate Federal and State Affairs, Senate Ways and Means, or other select committee, when authorized, to REQUEST to have bills drafted.

**Wednesday, February 13th**

Last day for Individuals to INTRODUCE bills.

**Friday, February 15th**

Last day for Committees, except by committees listed above, to INTRODUCE bills.

**Saturday, March 1st**

Last day to CONSIDER BILLS IN HOUSE OF ORIGIN, except by House Appropriations, Calendar and Printing and Taxation, House and Senate Federal and State Affairs, Senate Ways and Means, or other select committee, when authorized.

**Wednesday, April 2nd**

Last day to CONSIDER BILLS NOT IN HOUSE OF ORIGIN, except by committees listed above.

**Saturday, April 12th**

No bills considered after this date except BILLS VETOED BY GOVERNOR, OMNIBUS APPROPRIATIONS ACT AND OMNIBUS RECONCILIATIONS SPENDING LIMIT BILL.

Veto session approximately two and one-half weeks after last day of regular session. Sine Die—to be announced.

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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 KCDAAs 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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## Recent Opinions

### **HABEAS ISSUES**

*Chestra v. State*, # 97,195  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the district court's summary denial of her 60-1507 motion. The court found no error in the denial of her motion because it was outside the one-year time limitation and was successive.

*Dreiling v. State*, # 97,201  
Geary Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the district court's finding that his trial counsel was effective, arguing counsel was ineffective due to his failure to call an alibi witness. The court found the failure to call the alibi witness did not prejudice Dreiling's defense. The witness was a strong alibi witness; his information was inconsistent with other information and testimonies supplied to law enforcement. The decision not to call him was a strategic decision on part of defense counsel.

*State v. Rust*, # 97,414  
Geary Co., Not Published  
Court of Appeals  
Sentence vacated and case remanded with directions

Defendant appealed out of time from her sentence of 75 months imprisonment for her 2002 conviction of conspiracy to manufacture meth, arguing that her belated appeal should be honored due to an *Ortiz* exception and that she is entitled to relief under *McAdam*. The court agreed, vacated, and remanded for re-sentencing.

*State v. Lowrey*, # 97,048  
Dickinson Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the denial of his motion to file a direct appeal out of time.

The court held that even though there was nothing on record that the judge informed defendant of his 10-day time limit for appeal, neither defendant or defense counsel testified at the hearing. Therefore, the court was unable to determine whether counsel informed defendant of this limitation.

### **EVIDENTIARY ISSUES**

*State v. Thimmesch*, # 95,512  
Johnson Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the denial of her motion to suppress evidence seized during a search of her vehicle after a traffic stop arguing that her detention after the initial stop was unreasonable and that her "nervous" behavior was not sufficient to arouse reasonable suspicion. The court found her actions were enough to find the detention reasonable based on sufficient evidence.

*State v. Altum*, # 96,971  
Reno Co., Not Published  
Court of Appeals  
Affirmed

The State appealed arguing the district court erred in granting defendant's motion to suppress evidence seized during a warrantless search. The court affirmed finding that the search was unreasonable. The officer had done a previous *Terry* search that was unproductive and the only evidence he had that defendant might have an illegal substance was the smell of burnt marijuana. The court found that Kansas has not adopted the "plain smell" exception for warrantless searches of persons.

*State v. Vanbibber*, # 96,473  
Johnson Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed his conviction of DUI and open container challenging the sufficiency of the evidence and arguing the court erred in admitting a photo. The

court found there was sufficient evidence of intoxication from the field sobriety tests to support the conviction. Also, the photo of the alcohol containers was properly admitted.

State v. Porsch, # 97,147  
Clark Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed his conviction of aggravated criminal sodomy and furnishing alcohol to a minor arguing the court erred in allowing a video taped interview containing discussion of past sexual molestations of the victim to be played at trial. Defendant failed to provide a copy of the videotape upon review. The court affirmed. Defendant also claimed that comments made in closing by the prosecutor referring to defense counsel's statements not being supported by the evidence amounted to misconduct. The court found the comments were not attacking defense counsel's credibility, but were a fair commentary on the testimony presented at trial.

State v. Clendenon, # 94,965  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed in part, vacated in part, and remanded with directions

Defendant appealed from his conviction of drug possession and the trial court's denial of his motion to suppress evidence. The court found that when the defendant gave consent to search him for drugs, that included the officer sticking her hands in his pockets, and the act of pulling out his pockets from his pants did not limit her ability to search the pockets more thoroughly. The court vacated and remanded for assessment of BIDS fees according to *Robinson*.

State v. Hopkins, # 96,828  
Labette Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed her conviction for possession of marijuana contending the search

warrant issued in her case lacked probable cause and the good faith exception should not apply. The court disagreed and found the good faith exception did apply because there were no misleading statements to the judge by the officer applying for the warrant, there was nothing to suggest the officer's own judgment should have overridden the probable cause determination by the judge, and the defendant's complete identity and address added by the officer arose from the informant's detailed description of the location and was accurate.

State v. McKee, # 97,053  
Reno Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed multiple drug charges alleging the district court erred in denying his motion to suppress his statements given to police before he was advised of his rights under *Miranda* and in denying his attorney's motion to withdraw. The court found that the statements defendant sought to suppress were not made in response to an interrogation by police. Also, there was no error in denying counsel's motion to withdraw.

State v. Howell, # 95,836  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed his drug convictions contending the court erred in denying his motion to suppress evidence obtained during a traffic stop. The court found the traffic violation was sufficient for the stop and the defendant's action of reaching in his pants justified the *Terry* frisk.

State v. Robinson, # 96,426  
Johnson Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed his convictions for possession of cocaine and felony obstruction of official duty arguing the district court erred in denying his motion to suppress evidence. The court found the evidence was admissible under the theory of inevitable discovery.

State v. Nelson, # 97,824  
Rooks Co., Not Published  
Court of Appeals  
Affirmed

Defendant appeals from his conviction of DUI claiming the district court erred in failing to suppress two alcohol breath tests. The court found no error in admitting the tests. The trooper was properly trained and certified, and he testified that he administered the test in accordance with the KDHE protocol.

State v. Ryan, # 98,027  
Saline Co., Not Published  
Court of Appeals  
Affirmed

The State appealed the district court's granting of defendant's motion to suppress evidence seized after a traffic stop and search of his truck. The court found the motion to suppress was supported by substantial evidence, namely the officer's inconsistent statements leading the court to view the stop as unjustified from the beginning.

## **SENTENCING ISSUES**

State v. Selvey, # 96,803  
Sedgwick Co., Not Published  
Court of Appeals  
Sentence vacated and remanded

The court vacated defendant's sentence and BIDS fees from a 2002 conviction for manufacturing meth. The case was remanded for re-sentencing under *State v. McAdam* and for assessment of BIDS fees according to *Robinson*.

State v. Garcia, # 97,746  
Seward Co., Not Published  
Court of Appeals  
Affirmed in part and dismissed in part

Defendant appealed his sentence for possession of cocaine with intent to distribute arguing the district court abused its discretion when it sentenced him to imprisonment rather than drug treatment or Labette. The court affirmed the conviction.

tion and dismissed this argument because imprisonment was the presumptive legal sentence for his conviction; therefore, it was without jurisdiction to hear the argument.

State v. West, # 97,017  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the district court's order that he serve his prison sentence after the revocation of his probation, arguing the court erred in failing to consider Labette. The court found no error in not placing defendant in Labette. The court did address the issue on the record and defendant did not meet the eligibility requirements for placement at Labette.

State v. Zielke, # 96,317  
Neosho Co., Not Published  
Court of Appeals  
Reversed in part and dismissed in part

Defendant appealed the district court's order extending her probation, arguing the district court lacked jurisdiction to order the extension. The court found that a voluntary extension of probation was not equivalent to a request for revocation and reinstatement of probation and the 30-day grace period does not apply to voluntary extensions; therefore the district court did not have jurisdiction to revoke her probation.

State v. Olivarez, # 96,720; 96,721  
Ford Co., Not Published  
Court of Appeals  
Dismissed in part and remanded in part

Defendant appealed the district court's ranking of his crime severity level after his crime severity level after probation was revoked. The court dismissed the appeal because it was brought outside 130 days after the original imposition of sentence. The case was remanded for assessment of BIDS fees according to *Robinson*.

State v. Marquis, # 97,455  
Butler Co., Not Published  
Court of Appeals  
Affirmed

The State appealed the district court's departure sentence arguing the factors used did not justify the departure. The court affirmed the departure finding several factors that supported the granting of the departure, including: defendant was only 21 years of age and had a wife and young child to support, he was only 17 when he committed his last crime, and he was voluntarily attending AA and NA meetings. Furthermore, he had strong family support and he maintained employment.

State v. Niyonteze, # 97,497  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the revocation of his probation arguing that the court erred in ordering him to serve his sentence in prison as opposed to Labette. The court held that because defendant violated the terms of his probation after successfully completing Labette, the district court did not have to consider placing him there for a second time.

State v. Allen, # 95,628  
Johnson Co., Not Published  
Court of Appeals  
Convictions affirmed, sentence vacated, and case remanded with directions

Defendant appealed his convictions and sentencing for manufacture of meth and possession of drug paraphernalia, alleging the crimes are multiplicitous, and he should be resentenced to a severity level 4 drug offense. The court found, based on *Schoonover*, that the crimes are not multiplicitous. Because there was evidence at trial that defendant used the paraphernalia to manufacture the meth, he should have been sentenced to a severity level 4 drug offense.

State v. Clary, # 96,905; 96,906  
Reno Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the district court's revocation of his placement at Labette and order for him to serve his sentence in prison. The court found no error by the district court based on the facts that defendant failed to take the appropriate steps to apply for Labette, had a positive drug test, and failed to report to his ISO.

State v. Frost, # 97,443  
Riley Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed the district court's imposition of a post-release supervision term following the revocation of her probation, claiming the district court erred in imposing the term because the sentencing court did not include post-release supervision as part of her original sentence. The court found no error. The trial court's failure to mention the supervision term did not negate its existence.

## **MULTIPLE AND MISCELLANEOUS ISSUES**

State v. Parks, # 95,231  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed in part, reversed in part, and remanded with directions

Defendant appealed his felony DUI arguing that double jeopardy barred a third trial because his first two resulted in mistrials. The court held that when a defendant seeks a mistrial, double jeopardy would not prohibit the retrial. The case was reversed and remanded for assessment of BIDS fees in accordance with *Robinson*.

State v. Greathouse, # 96,036  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed his conviction for aggravated battery arguing he was denied a fair

trial by prosecutorial misconduct, the trial court's failure to instruct the jury on the privilege against self-incrimination, and the jury instruction on sympathy. The prosecutor's comments concerning his belief that the injuries were disfigurement by any definition and that defendant was guilty of the most serious aggravated battery were found to be within the wide latitude allowed during closing argument. Also, there was no need for instructions on self-incrimination because the witness that attempted to plead the fifth was trying to protect the defendant, not himself. Finally, the court found no error in giving the sympathy instruction due to the unique facts of this case.

State v. Ramirez, # 95,699  
Johnson Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed his conviction of DUI claiming KSA 8-1001(j), jury instruction, was unconstitutional because it made him choose between his Fifth Amendment right against self-incrimination and his Fourth Amendment right to be free of searches of his person when officers told him that if he did not submit to the breath test, his refusal would be used as evidence against him during trial. The court found the statute constitutional citing a previous decision *State v. Wahweotten*, 36 Kan. App. 2d 568 (2006), that addressed the same issue.

State v. Roberson, # 96,472  
Wyandotte Co., Not Published  
Court of Appeals  
Affirmed in part, vacated in part, and remanded with directions

Defendant appealed his conviction of and sentence for intentional second-degree murder, arguing instruction errors, evidentiary error, and cumulative error. The court found no error with the preliminary introduction to the instructions reiterating the requirement of intent. Also, defendant was not entitled to an affirmative defense instruction because voluntary intoxication is not an affirmative defense. The court then held there was no error in not admitting evidence of the State's witness' prior convictions because none of them involved

dishonesty or false statement. There was no cumulative error. The court vacated and remanded for assessment of BIDS fees according to *Robinson*.

State v. Tunnell, # 96,783  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed in part, vacated in part, and remanded with directions

Defendant appealed his conviction for aggravated battery and violation of a PFA arguing the trial court erred in failing to instruct the jury on voluntary intoxication, despite his failure to ask for the instruction. Due to defendant failing to request the instruction and the fact there was no evidence that he was intoxicated to the extent that his ability to form the requisite intent was impaired, the court found no error in not giving the instruction. The court vacated and remanded for assessment of BIDS fees according to *Robinson*.

State v. Gregor, # 96,021  
Saline Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed her conviction of aggravated assault on a law enforcement officer claiming the district court violated her due process rights by not ordering a competency evaluation and committed clear error by failing to give the jury a lesser included offense instruction. The court found that defendant pointed to no evidence suggesting her mental state prohibited her from understanding the nature and purpose of the proceedings against her or rendered her unable to make or assist in making her defense. Because defendant failed to object to the trial court's failure to give a lesser-included offense instruction and there was no real possibility the jury would have returned a different verdict, there was no error in failing to give it.

State v. Kotula, # 96,556  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed and remanded

Defendant appealed the denial of his motion to withdraw his plea after the PSI and the district court's imposition of a post-release supervision term. The court found that defendant was not misled, coerced, mistreated, or unfairly taken advantage of and that his plea was understandingly made. The State acknowledged the error in the post-release supervision term. The court remanded for correction of the journal entry.

State v. Howard, # 96,620  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed his conviction and sentence of aggravated battery arguing that he was improperly ordered from the courtroom during a ruling on evidentiary matters. The court held that because defendant did not object at the time it did not have authority to address the merits of his complaint.

State v. Jefferson, # 96,961  
Reno Co., Not Published  
Court of Appeals  
Affirmed

Defendant appealed his conviction of battery against a law enforcement officer arguing the trial court erred in failing to give a limiting instruction; the trial court erred in failing to give an instruction on simple battery, and cumulative error. The court found no error by the court in not giving a limiting instruction about defendants being in custody or by failing to give the lesser included of simple battery. His being in custody was an element of the offense and there was undisputed evidence of the battery being against a correctional officer so there was no need to give the instruction for simple battery. There was no cumulative error.

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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).

## Calendar of Events

KCDAA 2008 Spring  
Conference  
June 9-10, 2008  
Hyatt Regency Hotel  
Wichita, Kansas



## KCDAA Board of Directors

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*Happy  
Holidays*

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