



Advance Sheet



Kansas County and District Attorneys Association

February 26, 2008

The Importance of Being Diligent in Appellate Practice

By Thomas Stanton, KCDA A President

Welcome to another edition of the Advance Sheet. Providing a periodic review of the decisions of the Kansas Appellate Courts has been a service performed by the Kansas County and District Attorneys Association for many years. The Advance Sheet serves as a fast and efficient tool to aid prosecutors in staying abreast of appellate court decisions which affect our daily practice of law. The review of current appellate cases also allows prosecutors to observe trends in the ever-evolving world of common law so we may react quickly in our practice, as well as taking pro-active measures to respond to those trends.

As individual prosecutors it may sometimes be difficult to perceive the long-term effect of what might seem relatively simple issues in a case we are prosecuting. How many times have we considered an issue to be so clear cut that we do not think it could be perceived by an appellate court in any other manner than as we see it, only to be shocked and dismayed at the result of a defendant's appeal? The answer to that question is "too many times." It has become dangerous to assume that what we consider a proper and well-reasoned decision by a district court judge will be automatically affirmed in the appellate courts. It is equally as dangerous to believe a decision by a district court judge, which we believe could not possibly be affirmed on appeal because of its clear misinterpretation of the law, will assuredly be reversed by the appellate courts.

It is more imperative now than ever before that Kansas prosecutors be diligent in the area of appellate practice. While an issue might seem clear-cut to us to the point that filing a brief seems a waste of time, the better practice is to file briefs in every case on appeal. Failure to file a brief will result in the inability to present oral argument on appeal, and there is nothing more frustrating than to watch an oral argument where the prosecutor is not allowed to argue because no brief was filed. The frustration turns to sheer agony when the issue is one of extreme state-wide importance, which was not recognized as such by the prosecutor who handled the case in the district court and on appeal.

The preparation of briefs can be time-consuming and difficult, especially when dealing with an issue that a particular prosecutor has never faced. I urge all prosecutors to take advantage of the networking opportunities afforded by the sections associated with the KCDA A. It is likely that someone familiar with the area of law and the issues involved in a particular appeal will be willing to assist with the preparation of a brief. I also recommend that prosecutors contact the Solicitor General's section of the Attorney General's Office for assistance in attacking difficult appellate issues.

It has also become critical that prosecutors stay abreast of

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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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Diligence in Appellate Practice

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the orders issued by the appellate courts and respond to the orders. I have found that the judges and justices of the appellate courts expect a response to an order to show cause issued in a case even when the prosecutor agrees with the action proposed by the court. A review of appellate decisions will quickly confirm this position, as the failure of the State to respond to an order is very often made note of in

the text of the court's final opinion.

Most Kansas prosecutors are responsible for the prosecution of their case from filing through appeal. All stages are critical, but the appellate stage has become the battleground for some of the most important issues with which we deal as prosecutors. As prosecutors we must take seriously the responsibilities inherent in appellate practice.

Recent Opinions

HABEAS ISSUES

Murray v. State, # 96,995
Wyandotte Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the summary dismissal of his 60-1507 claim of ineffective assistance of counsel. The court found the motion was correctly dismissed because defendant could not show exceptional circumstances and because he waited 23 years before raising the issue.

State v. McConnell, # 97,253
Pawnee Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the denial of his request to appeal out of time. The court found no error in the denial because none of the *Ortiz* exceptions applied.

McKinney v. State, # 97,513
Wyandotte Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the denial of his 60-1507 motion arguing the district court erred when it ruled that he had received effective assistance of trial and appellate counsel. The court found no error.

Sinnett v. State, # 97,257
Reno Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the summary dismissal of his out of time appeal. The court found no error in the district court's finding that defendant's claims were barred by the time limitation and that defendant failed to establish manifest injustice to extend that time limitation.

EVIDENTIARY ISSUES

State v. Dunn, # 97,007
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Defendant appealed his conviction of possession of cocaine arguing the court erred in denying his motion to suppress evidence. The court found the entry into the home where the drugs were found was justified under the emergency exception to the Fourth Amendment. The officer entered the home in order to look for a victim because of a bloody knife on the front porch and blood on the defendant. The drugs were found in plain view.

State v. Clah, # 96,699
Shawnee Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

Defendant appealed his DUI conviction claiming the State committed prosecutorial misconduct when emphasizing defendant's refusal to submit to a breath test. Defendant's argument failed because the legislature has specifically decreed by statute that it is permissible to infer a driver's intoxication in part based on a refusal to take the test. The case was reversed and remanded for assessment of BIDS in accordance with *Robinson*.

State v. Hazel, # 95,952
Johnson Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the denial of his motion to suppress evidence found on his person. Defendant claimed the arresting officer had no reason to stop him because he had not yet received a description of the suspect. The court found no evidence in the denial because, while the arresting officer had not received the description from the witness, other officers had and they alerted the arresting officer to the defendant. Furthermore, defendant began to run upon seeing the officer.
State v. Baumfalk, # 96,893
Sherman Co., Not Published
Court of Appeals
Reversed and remanded

Defendant was appealed from his conviction of multiple drug crimes stemming from evidence found during a search of his home arguing the district court erred in not suppressing the evidence. The court agreed finding there was no evidence on the affidavit for defendant's home that corroborated the officer's allegations. The district court's finding that a nexus between the search warrants for defendant's business and his father's home cured the problem was an error.

State v. Shade, # 98,427
Lyon Co., Not Published
Court of Appeals
Reversed and remanded

The State filed an interlocutory appeal after the district court suppressed a breath test given by defendant as fruit of the poisonous tree because of un-Mirandized statements made by defendant that were the basis for the breath test. The court reversed finding that the questioning occurred during an investigative time and was investigative in nature, not custodial.

State v. Ridge, # 96,854
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Defendant appealed his conviction of robbery arguing the district court erred in admitting evidence of a show-up identification at trial. The court found no violation of defendant's due process in admitting the show-up identification. The court also considered defendant's use of another witness's inability to identify him at a show-up identification as part of his defense.

SENTENCING ISSUES

State v. Ferguson, # 97,067
Trego Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the district court's denial of her motion to withdraw her guilty plea arguing she was coerced by a codefendant to plead. The court found no evidence of the coercion, and even if there was coercion from a codefendant, only coercion from the State can reach the level of manifest injustice.

State v. Shaver, # 97,932
Sedgwick Co., Not Published
Court of Appeals
Appeal dismissed

Defendant appealed his sentence from his possession of cocaine conviction. The court dismissed finding defendant's

sentence to be within the presumptive guidelines.

State v. Hill, # 98,002
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part and dismissed in part

Defendant appealed his sentences from his multiple drug convictions arguing the district court erred in running the sentences in the two cases consecutively. The court affirmed the usage of defendant's past criminal history in determining his sentences and dismissed his claim that the court erred in running the sentences consecutively because they were both within the presumptive guidelines.

State v. Black, # 97,128
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Defendant appealed from an order of restitution in his conviction for criminal threat arguing the court had no authority to set his restitution because it had previously ordered the parties to agree upon an amount within 30 days and therefore did not have jurisdiction to set restitution after the 30 days. The court relied on *State v. Cooper*, 267 Kan. 15 (1999) and held that because defendant was on notice that restitution would be required the district court had jurisdiction to do so. Furthermore, defendant's claim that restitution was not based on any evidence is contrary to the record. There was evidence of a bill from the hospital, lost wages from the victim, and his clothing that was ruined.

State v. Reagan, # 97,293
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

Defendant appealed the district court's order revoking probation claiming it failed to consider non-prison options before ordering him to serve his underlying sentence and that the imposition of post-release supervision was an illegal sentence. The court affirmed the probation revocation

supporting the district courts finding that defendant demonstrated a pattern of intentional conduct that constituted a refusal to comply with the treatment program; furthermore, given his criminal history and brief duration of probation, defendant was not amenable to further probation. The court reversed the order imposing post-release supervision and remanded for correction of the sentencing order.

State v. Navarro, # 97,418
Seward Co., Not Published
Court of Appeals
Reversed

Defendant appealed his conviction of possession of marijuana with intent to sell arguing there was insufficient evidence to support the conviction. The court agreed finding that there was no evidence that linked him to the jointly owned shop where the drugs were found. Furthermore, there was no evidence showing a history of drug use or sale by the defendant and there were receipts explaining the large amount of cash found in his home.

State v. Toledo, # 97,532
Shawnee Co., Not Published
Court of Appeals
Affirmed

Defendant appealed her sentence from two counts of driving while suspended arguing the district court abused its discretion. The court affirmed finding no abuse of discretion by the district court in not ordering a PSI. The court "may" order a PSI when a defendant is convicted of a misdemeanor. Furthermore, the sentence was within the guidelines.

State v. Miller, # 97,912
Seward Co., Not Published
Court of Appeals
Sentence vacated and case remanded with directions

Defendant appealed his sentence maintaining the trial court failed on the record to consider placement in Labette. The court reversed disagreeing with the district court's finding that defendant was too old for placement at Labette.

State v. Daniels, # 98,521
Atchison Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the revocation of his probation arguing the district court lacked authority and grounds to revoke. The court found no error in the revocation of defendant's probation. Defendant admitted to multiple condition violations.

MULTIPLE AND MISCELLANEOUS ISSUES

State v. Herrman, # 96,759
Stafford Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the district court's judgment denying his presentence motion to withdraw his guilty pleas. The court found defendant's inability to enter the military following his conviction is a collateral consequence and the district court did not err in denying his motion to withdraw his guilty pleas.

State v. Brown, # 97,742
Reno Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the district courts refusal to grant a mistrial after a prosecution witness testified that Brown had invoked his Fifth Amendment right to silence. The court found the testimony was not elicited by the State and the error was harmless.

State v. Vogt, # 96,660
McPherson Co., Not Published
Court of Appeals
Affirmed

Defendant appealed his convictions of multiple drug offenses arguing that the district court wrongly admitted a prior drug conviction and that it erred in responding to a jury question. The court found no abuse of discretion by the district court in admitting defendant's prior conviction because it was relevant to show his intent

to possess the items in the trunk because both of the occupants were in constructive possession of them. Furthermore, upon review of the judge's response to the question submitted by the jury, it found no error in the response.

State v. Weaver, # 95,686
Johnson Co., Not Published
Court of Appeals
Affirmed

Defendant appealed his conviction of DUI arguing insufficiency of the evidence; the trial court erred when answering the jury's question, and improper jury instruction regarding the presumption of innocence. The court found sufficient evidence to support the conviction. A witness had given a description of defendant and the vehicle he was driving and his intoxicated state. Also, the arresting officer witnessed defendant occupying the vehicle while it was running. The court next found no error in the answer given to the jury. Neither party objected nor was the answer clearly erroneous. Finally, the court found that using the word "until" instead of "unless" when instructing the jury that defendant is innocent "until" proven guilty does not improperly express a belief that the jury would find him guilty.

State v. Williams, # 96,576
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part, vacated in part, and remanded

Defendant appealed his conviction of aggravated criminal sodomy contending he was denied the ability to present his theory of defense because he was not allowed to impeach the victim with her prior accusations of sexual assault. The court found no error in not allowing defendant to question the victim about the previous allegation. There was no evidence that the allegation had been false; therefore, it could not be used to impeach her. See *State v. Barber*, 13 Kan. App. 2d 224 (1989). Furthermore, it was not admissible under the rape shield statute. Defendant next challenged the sufficiency of the evidence. The court found there was sufficient evidence to support the conviction.

tion. Defendant's claim that the victim had hallucinated the events due to not taking her medication was not supported by the facts of the case. Finally, the court vacated and remanded for assessment of BIDS in accordance with *Robinson*.

State v. Alberty, # 96,957
Wyandotte Co., Not Published
Court of Appeals
Affirmed in part and reversed in part,
sentence vacated, and case remanded with
directions

Defendant appealed from his conviction of reckless aggravated battery arguing there was insufficient evidence and the trial court erred in not giving the lesser-included instruction of simple battery. The court found there was sufficient evidence to support the conviction. The court found that the lesser-included instruction should have been given because it is possible a jury could have found that the struggle that caused the injury was not a circumstance under which great bodily harm could have occurred or been foreseeable.
State v. Kitzman, # 97,098
Shawnee Co., Not Published
Court of Appeals
Affirmed

Defendant appealed multiple drug convictions arguing the district court: 1) erred in denying his motion to suppress evidence; 2) erred in denying his motion to dismiss based on his right to speedy trial; 3) erred in denying his request for an appeal bond and a stay of execution; and 4) there was insufficient evidence to support the convictions. The court found: 1) there was no error in denying the motion to suppress. The district court correctly applied the *Leon* good faith doctrine because the officer reasonably believed that the warrant was supported by probable cause. 2) There was no violation of his right to speedy trial. The case was charged within 174 days. 3) Based on the drugs and the paraphernalia found in the house, there was sufficient evidence to support the charges; and 4) because defendant was entitled to no relief from his appeal, this issue is moot.

State v. Reed, # 97,210
Wyandotte Co., Not Published
Court of Appeals
Affirmed

Defendant appealed his conviction of aggravated battery claiming the district court erred in denying his continuance to allow his attorney to develop a basis to withdraw his plea. The court found no error because defendant failed to show any prejudice resulting from his illegal arrest to serve as a cause for the withdrawal of his plea.

State v. Makupa, # 96,936
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part and reversed in part

Defendant appealed his conviction for domestic battery and criminal damage to property arguing insufficiency of evidence and error in admitting evidence. The court reversed the domestic battery claim because the State failed to sufficiently prove the age of either the defendant or the victim, but affirmed the criminal damage to property finding the State did prove the value of the car was more than \$500 and was "a total loss."

State v. Shore, # 97,833
Stanton Co., Not Published
Court of Appeals
Affirmed

Defendant appealed his conviction of voluntary manslaughter, alleging the district court erred in instructing the jury, in admitting evidence, and in refusing to disqualify the county attorney. The State cross-appealed, contending the downward sentencing departure was not supported by the evidence in the case. The court found the facts of this case did not warrant a "no duty to retreat" instruction. Also, there was no error in admitting statements defendant made to officers. Neither the defendant's emotional condition nor his lack of sleep on the morning of the interrogation interrupted the interview or caused him to provide inappropriate responses. Law enforcement officers had given him an opportunity to rest and calm down before conducting the interview. Further-

more, the weapons found on defendant at jail intake were relevant to the case and were not unduly prejudicial. Finally, the court found no abuse of discretion by the district court in not disqualifying the county attorney. The facts that counselor had represented the victim in a civil matter and had filed a CINC petition on behalf of defendant's younger brother did not require disqualification. With respect to the State's cross-appeal the court found the evidence of remorse, the defendant's lack of a violent criminal history, and the environment of violence in which the defendant was raised, when considered together, constituted substantial and compelling reasons to depart from the presumptive sentence for voluntary manslaughter.

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

Job Opening

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Life After Nifong

Editor's Note: This article is reprinted with permission from The Prosecutor magazine published by NDAA. This article appeared in the November/December 2007 issue, which was Volume 41, Number 6.

By Wally Kirby, President, National Association of Prosecutor Coordinators;
Executive Director, Tennessee District Attorneys General Conference

If the North Carolina matter involving the Duke University lacrosse team and the now infamous Mike Nifong taught us anything, it should be that the first obligation of a prosecutor is to seek justice in every case. There is a saying in the medical field that just maybe we, as prosecutors, should adopt—first do no harm. If this had been in the mind of Nifong at the outset of this case, we probably would not be where we are today. That is not to say, don't go after those when there is some evidence of guilt, but don't start out with both guns blazing. Have we, as prosecutors, learned our lesson? I hope so.

During the short time since Nifong, we have begun to realize that the time has come for us to no longer be reactive, but to be out front and let the public know what prosecutors really do. The time probably came a long time ago and we just did not realize it, or more probably, chose to ignore it. There is a real fine line that separates when we need to take action and when we are in the position of "responding" to an issue that has come up. That fine line is non-existent when we choose to be active and let the public know what prosecutors really are and do.

Two more recent cases have hit the news media recently that "slam" the actions of the district attorney. The first of

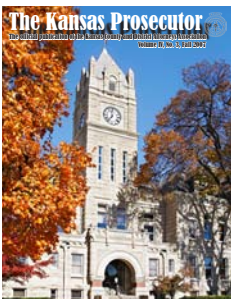
these involve the "Jena six" in Louisiana. Pete Adams, prosecutor coordinator of Louisiana, had told us that it was coming and it has. There the district attorney performed his duties in the right way and was hit with the race card. Should the defendant have been prosecuted as an adult? That is a call that prosecutors have to make every day and the district attorney made that tough call. Let's not forget that juveniles cannot be prosecuted as adults unless the judge agrees.

Another matter is more problematic and that involves the matter of the attorney general in Alabama. When faced with the question of the accomplice facing the death penalty and the shooter not facing the death penalty, District Attorney Robby Owen made the call that this would not be equitable. He got slammed, this time by the attorney general, who was not exactly a political ally of the district attorney. It is truly a sad day when someone who is not on the front lines every day and who is supposed to be a part of the justice system takes this approach in criticizing the prosecutor.

The point is this—no matter what "call" you make in these tough cases you will probably get criticized on some front. That comes with the territory. Many times the prudent thing to do (and more often

the ethical thing to do) is not to respond. This is very difficult, especially because district attorneys are elected officials. The public expects you to respond and does not understand that you may not ethically be able to do so.

What is the answer? We must get out front and quit being reactive. It is time to let the world know what prosecutors do other than put bad guys in jail. We need to talk about the crime prevention that we are involved in, about the training of law enforcement that we conduct, about the civic speaking engagements that we handle, about the panels and committees that we sit on, and the list goes on and on. We need to get the word out that we are the people who truly protect the public. Let's not be quiet until a crisis befalls us. Let's stand up and speak. One of my now retired district attorneys has often said that every day that you go to the office you may have to make the decision that will end your career. That is becoming more true today than ever before. But let's adhere to the definition (a portion of which was stolen from William Bilton, prosecutor coordinator of South Carolina) of a prosecutor—an attorney held to a higher standard; an attorney who always seeks justice.



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Spring 2008
Articles due: March 21

Fall 2008
Articles due: July 24

Winter 2008
Articles due: November 20

If you have ideas on article topics or would like to write an article for the Kansas Prosecutor magazine, please contact Mary Napier, editor, at mary@napiercommunications.com.

Calendar of Events

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



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