



Advance Sheet



Kansas County and District Attorneys Association

July 2007

LCC Approves 2007 Interim Committees

By Richard Samaniego, Associate

The Legislative Coordinating Council approved the final 2007 Interim Topics for Study by the Legislature Friday, July 6, 2007. The Legislative Coordinating Council (LCC) is the body responsible for the coordination and approval of topics for review by special committees during the interim. The LCC is composed of House and Senate Leadership including Chairperson Stephen Morris, President of the Senate; Vice-Chairperson Melvin Neufeld, Speaker of the House; Derek Schmidt, Senate Majority Leader; Anthony Hensley, Senate Minority Leader; Ray Merrick, House Majority Leader; Don Dahl, Speaker Pro Tem and Dennis McKinney, House Minority Leader. The following topics of interest to the Kansas County and District Attorneys Association were approved by the Council:

Special Committees

Special Committee on Federal and State Affairs: Representative Siegfried, Chair

Late term abortions: Review the Supreme Court ruling on late term abortions. Study the impact on Kansas Law and receive a briefing from the Kansas Attorney General regarding Kansas abortion law. Review the proviso attached by the House to the omnibus appropriations bill regarding late term abortions.

Special Committee on Judiciary: Senator Vratil, Chair

Operation of the Kansas Parole Board: Study the workings of the Kansas Parole Board to determine whether any changes need to be made. Review the Parole Board caseload to help decide if the

Board is the correct size, and if the Board is still needed in light of sentencing guidelines. Study whether the Board should continue to be empowered to pass parole eligible inmates indefinitely when the inmates have met all of the programming and treatment criteria of their agreement with the Department of Corrections.

Allow a Parent to Remove a Child from the Custodial Parent to Protect the Child from Abuse: Study 2007 SB 182, which would allow a parent to remove a child from the custodial parent or guardian on good faith and reasonable belief that the action is necessary to protect the child from being subject to mistreatment or abuse. The parent would have to report the action to the district or county attorney as soon as the circumstances allow.

Aggravated Incest: Study 2007 SB 233, which concerns aggravated incest. The bill would decrease the minimum age of the offense from sixteen years of age to fourteen. It also would increase the penalty for aggravated incest from a severity level 5, person felony to a severity level 1, person felony. Under current law aggravated incest includes lewd fondling with a person who is at least sixteen years of age but under the age of eighteen and who is known to the offender as a biological, step, or adoptive relative.

Establishment of District Attorney Offices: Review 2007 SB 254, which would establish a procedure for an election to

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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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2007 Interim Committees

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determine whether the office of county attorney should be abolished and the office of district attorney established. The election could occur either by a resolution or petition and would be submitted to the Secretary of State.

Vehicular Homicide: Study the current statutes related to vehicular homicide. Review whether district and county attorneys should have more discretion for filing charges related to vehicular homicide. Study whether mandatory drug testing should be required in all vehicular homicide cases. Review whether strong penalties should be an option for those individuals convicted of vehicular homicide.

Release of Inmates to House Arrest by the Secretary of Corrections: Review the issue of release of inmates to house arrest by the Secretary of Corrections. Study 2007 SB 306, which would clarify when defendants may be sentenced by the court to a house arrest program and when inmates in the custody of the Secretary of Corrections could be placed on a house arrest program.

Statutory Joint Committees

Joint Committee on Corrections and Juvenile Justice Oversight: Representative Owens, Chair

Juvenile Justice Community Corrections Core Programming: Study the core programs provided by juvenile justice community corrections agencies. Examine ways that would target funding in order

to minimize the time that youth would be involved in the juvenile justice system. Review the current funding for the core programs, including how the state allocates funding to local core programs and if there are possibilities to leverage non-state funding for core programs.

Joint Committee on Legislative Budget: Representative Sharon Schwartz, Chair
Juvenile Justice Community Corrections Core Programming: Study the core programs provided by juvenile justice community corrections agencies. Examine ways that would target funding in order to minimize the time that youth would be involved in the juvenile justice system. Review the current funding for the core programs, including how the state allocates funding to local core programs and if there are possibilities to leverage non-state funding for core programs.

State Board of Indigent's Defense Services: Study the entire system of delivering indigent defense services to indigent persons in the State. Review the methods of effectively and efficiently providing indigent defense services, including attracting and retaining public defenders and private attorneys. Study the future needs of the State Board of Indigent's Defense Services.

Questions or Comments? Please e-mail Richard Samaniego at rsamaniego@kearneyandassociates.com or call (785) 232-5822. You may also view the full text of the Interim Topics at the following link: <http://skyways.lib.ks.us/ksleg/KLRD/2007Interim/2007InterimTopics.pdf>.

Job Opening

ASSISTANT DISTRICT ATTORNEY, SEVENTH JUDICIAL DISTRICT – LAWRENCE, KANSAS Immediate opening for an assistant district attorney with a concentration on domestic violence. Successful candidate will be required to handle charging decisions and felony domestic case load. Minimum requirements: At least two years prosecutorial experience. Experience in prosecuting domestic violence cases, an understanding of the dynamics and psychological impact involved in domestic violence and specialized training in the area of domestic violence preferred. Salary commensurate with qualifications and experience. Please submit a letter of interest, resume, and references to Douglas County District Attorney, Attn: Cheryl Wright, 111 East 11th, Lawrence, KS 66044 or e-mail districtattorney@douglas-county.com.

Recent Opinions

HABEAS ISSUES

State v. Newkirk, # 95,433
Barton Co., Not Published
Court of Appeals
Reversed; sentence vacated and remanded with directions

The defendant appealed the trial court's denial of his motion to file an untimely direct appeal of his sentence. The Court agreed finding he was not fully informed of his appeal rights.

State v. Collins, # 95,456
Sedgwick Co., Not Published
Court of Appeals
Dismissed

The defendant appealed the district court's order finding that none of the exceptions recognized by *State v. Ortiz* apply to permit Collins' belated appeal. The Court disagreed and dismissed the appeal because the defendant read the agreement, and he fully understood its contents.

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

Brown appealed the district court's denial of his out-of-time appeal claiming the sentencing court failed to fully inform him of his appeal rights because he was unaware of the time limitation for filing an appeal. The Court found that while the defendant was informed of his right to appeal and the right to have counsel for that appeal he was not properly informed of the time limitation in which to bring that appeal.

EVIDENTIARY ISSUES

State v. Rodgers, #94,903
Johnson Co., Not Published
Court of Appeals
Affirmed

Rodgers appeals from his bench trial conviction for possession of cocaine arguing that the trial court erred in denying his motion to suppress evidence obtained during a search of his person. The Court disagreed finding that the encounter was voluntary; the defendant allowed the officers into the hotel room upon request and consented to the search of his person.

State v. Flying Out, # 96,722
Barber Co., Not Published
Court of Appeals
Affirmed

The defendant appealed the district court's decision denying his motion to suppress the results of a blood alcohol test he agreed to take after being arrested for DUI claiming his substantive due process rights were violated when he was not provided with accurate implied consent advisories relating to a commercial driver's license. The Court rejected this argument finding it had recently been decided against the defendant in *State v. Becker*, 36 Kan. App. 2d 828, 833-835, 145 P.3d 938 (2006).

State v. Vandever, # 95,762
Sedgwick Co., Not Published
Court of Appeals
Affirmed

The defendant appealed his conviction of attempted rape challenging the sufficiency of the evidence supporting the conviction. The Court found that because the defendant arrived at the scene to meet an undercover agent who posed as a 13-year-old girl in a chat room where the crime was to occur, the

jury was able to rely on the facts and make reasonable inferences.

State v. Barber, # 95,834
Wyandotte Co., Not Published
Court of Appeals
Affirmed

The defendant appealed his conviction of DUI arguing there was insufficient evidence to convict him. The Court held that the defendant's accident, his strong odor of alcohol, and his refusal to submit to testing were sufficient to support his conviction.

State v. Stenger, # 96,182
Shawnee Co., Not Published
Court of Appeals
Affirmed

Stenger appealed the district court's ruling that his crime of furnishing alcoholic beverages to a minor for illicit purposes was sexually motivated arguing that substantial competent evidence was not presented to support that it was sexually motivated and that imposing the requirement for a sex offender registration at sentencing violated *Apprendi*. The Court found that there was evidence to support the finding that the crime was sexually motivated and the defendant was sentenced in accordance with KSA 2006 Supp. 22-4902(c)(14), which allows the court to require an offender to register if it finds beyond a reasonable doubt the crime was sexually motivated. The Court found that *Apprendi* was not applicable to this case.

State v. Brown, # 96,412
Sumner Co., Not Published
Court of Appeals
Affirmed

The defendant appealed his convictions of aggravated assault of a law enforcement officer claiming there was insufficient evidence to support one of his

convictions and that the district court erred in answering a jury question during deliberations. The Court found the officer's testimony about fearing for his safety when the defendant loaded and pointed a gun at him was sufficient evidence to support his conviction. The Court also found the response to the jury's question during deliberation was not erroneous. The response was to clarify the difference between general intent and specific intent with respect to causing harm to the officers.

State v. Felder, # 96,538
Ellis Co., Not Published
Court of Appeals
Affirmed

Felder appealed the district court's decision denying his motion to suppress the results of blood alcohol tests he agreed to take after being arrested for DUI contending his substantive due process rights were violated when he was not provided the implied consent advisories relating to commercial driver's licenses, even though he was not driving a commercial vehicle at the time of his arrest. The Court found that Felder failed to establish either the existence of a substantive due process right involving the implied consent notices given by the officer or a violation of such a right. Rather, the premise of Felder's challenge to the notices, that they incorrectly state the law as applied to the holder of a commercial driver's license, is refuted by KSA 8-2,142(1), which allows a person to apply for a noncommercial driver's license following the expiration of the 30-day suspension.

State v. McGlothlen, # 95,431
Johnson Co., Not Published
Court of Appeals
Affirmed

The defendant appealed his conviction and sentence for aggravated intimidation of a witness, arguing evidentiary error

and a violation of *Apprendi*. The Court found no abuse of discretion because the evidence suppressed was cumulative and the Court allowed extensive testimony regarding the purported inconsistency the defendant felt the evidence would prove. The defendant's other claim was previously decided against him in *State v. Ivory*.

State v. Christman, # 96,489
Sedgwick Co., Not Published
Court of Appeals
Affirmed

The defendant appealed his conviction and sentence for forgery arguing insufficiency of the evidence and a violation of *Apprendi*. The Court held that even though the defendant was unsuccessful at cashing the check, due to the fraud protection at the bank, "delivery" of the check was completed. The defendant's *Apprendi* issue was previously decided against him in *Ivory*.

SENTENCING ISSUES

State v. Barber, # 95,780
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Barber appealed his conviction of attempted rape and aggravated sexual battery, arguing the district court erred by failing to instruct the jury on the defense of voluntary self-intoxication. While attempted rape is a specific intent crime, the defendant did not request the instruction; therefore, the trial court did not err in not giving the instruction.

State v. Schutte, # 95,791
Washington Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

Schutte appealed his sentence claiming the district court erred by classifying

manufacture of methamphetamine as a level 1 felony instead of a level 4 felony. The Court found that the charge of manufacturing was not identical to possession of drug paraphernalia did not require remanding the case for resentencing. The case was remanded for review of BIDS reimbursement in accordance with *Robinson*.

State v. Jackson, # 96,253
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part, vacated in part, and remanded with directions

Jackson appealed her conviction and sentence of making a false Medicaid claim arguing the trial court erred in not considering Labette correctional camp. The Court remanded to determine whether it is necessary to consider placement at Labette, or whether Jackson has served her 10-month sentence and the issue is moot. The Court vacated the restitution order due to the trial court's failure to consider sufficient evidence prior to entering restitution.

State v. Carrillo, # 96,571
Seward Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

Carrillo appeals his sentence contending the district court erred in overruling his objection to his criminal history. The Court found the inclusion was proper because the State provided substantial competent evidence that the defendant was the same John Carrillo who committed the crime in Colorado. The case was remanded for review of BIDS reimbursement in accordance with *Robinson*.

State v. Bethe, # 96,020
Saline Co., Not Published
Court of Appeals
Sentence vacated and case remanded
with directions

The defendant appealed his downward departure sentence resulting from his being found guilty of manufacturing methamphetamine arguing that he should have been sentenced to the lesser penalties of use of drug paraphernalia to manufacture methamphetamine instead. Based on the circumstances and facts of this case the Court found the defendant should have been convicted of the lesser penalty.

State v. Bribiesca, # 96,066
Reno Co., Not Published
Court of Appeals
Affirmed

The defendant appealed the district court's decision to revoke his probation claiming the district court abused its discretion in doing so and erred in refusing to modify the term of his sentence. The Court found no abuse of discretion in revoking the probation because the defendant had been given more than one opportunity to comply with probation. Furthermore, the trial court did not incorrectly declare that it had no discretion to modify the sentence, but stated it was not going to. The Court found no abuse of discretion in not modifying the sentence.

State v. Bettis, # 96,083
Wyandotte Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and
remanded with directions

The defendant appealed the trial court's denial of his motion to withdraw his plea, his dispositional departure sentence, and the order to reimburse BIDS. The Court found that Bettis made his plea freely, voluntarily, and intelligently

and had competent advice from his counsel; furthermore, he was not misled, coerced, mistreated, or unfairly taken advantage of. Bettis did not show good cause to withdraw his plea. The Court also found no error with the dispositional departure because there was substantial competent evidence to support the trial court's conclusion that he was not amenable to probation. Reversed and remanded for BIDS assessment consistent with *Robinson*.

State v. Jackson, # 96,295
Johnson Co., Not Published
Court of Appeals
Affirmed

The defendant appealed the revocation of his probation contending the district court abused its discretion in not reinstating his probation. The Court found no abuse. Jackson had shown he was not amenable to probation. He repeatedly had his bond forfeited for violating the terms of his bond prior to his sentencing and again violated the terms of probation after his sentence.

State v. Sisney, # 96,341
Miami Co., Not Published
Court of Appeals
Affirmed

The defendant appealed his sentence for various burglary charges claiming the district court erred in overruling his objection to his criminal history classification. The Court found no error in classifying his Virginia conviction for manufacture of explosives as a person felony, even though it had been classified as a non-person felony in prior cases, because there had never been a prior judgment on the merits, which determined the proper classification of the conviction.

State v. Larabee, # 96,794
Washington Co., Not Published
Court of Appeals
Affirmed

Larabee appealed the district court's sentencing decision arguing the State did not comply with the plea agreement. The Court found no violation of the plea agreement. While there was some ambiguity, the State never agreed to recommend a dispositional departure. The defendant would merely request such a departure.

State v. Hughes, # 96,874
Crawford Co., Not Published
Court of Appeals
Dismissed

The defendant appealed the sentence imposed by the district court for her no contest plea to abuse of child. The Court dismissed after finding it had no jurisdiction to hear it, the district court had imposed a presumptive sentence.

State v. Vaughn, # 96,575
Sedgwick Co., Not Published
Court of Appeals
Affirmed

The defendant appealed the imposition of consecutive misdemeanor sentences claiming that the imposition of the sentences, in total, exceed the statutory limit imposed by 21-4720(c) violating the Eighth Amendment prohibition against cruel and unusual punishment. Relying on the case *State v. Snow*, 282 Kan. 323 (2006) and the fact that legislature has refused to extend 21-4720(b)(4) to misdemeanors, which restricts the total sentence to twice the base sentence for felonies, the Court found that the sentence was not cruel and unusual.

MULTIPLE AND MISCELLANEOUS ISSUES

State v. Roberts, # 97,117
Crawford Co., Not Published
Court of Appeals
Affirmed

The State appealed the district court's finding at the conclusion of the preliminary hearing that there was no probable cause to bind the defendant over for trial. The affirmed Court found there was no direct evidence that Roberts stole the jeep or knew it was stolen when he acquired it.

State v. Merz, # 95,432
Osage Co., Not Published
Court of Appeals
Affirmed in part, reversed and vacated in part, and remanded with directions

Merz appealed his multiple drug-related convictions and sentences challenging jury instructions, sufficiency of the evidence, prosecutorial misconduct, cumulative trial error, and misclassification of severity level for sentencing. The Court found the officers statement that the containers were not approved "to the best of his knowledge" was insufficient evidence to establish that the containers holding the anhydrous ammonia were not approved containers. The Court did find there was enough evidence to support the conviction of conspiracy to manufacture methamphetamine. Because the definition of "manufacture" is relatively common and the jury had detailed information about the steps that must be taken to arrive at the finished product the trial court's failure to instruct the jury on the definition of "manufacture" was not clearly erroneous. With respect to the misclassification claim the Court relied on the holding in *Fanning*, 281 Kan. at 1183-84 that attempted manufacture of methamphetamine and possession of drug paraphernalia with intent to manufacture are not

identical offenses. Finally, the Court rejected the other claims finding his trial was not affected by them.

State v. Pineda, # 96,505
Seward Co., Not Published
Court of Appeals
Affirmed

The defendant appealed his conviction, sentence, and the order to reimburse BIDS. The Court found there was no error in failing to give the lesser-included aggravated battery because the evidence did not support a finding of reckless conduct. Because the trial court inquired about Pineda's employment status and ability to reimburse BIDS the *Robinson* requirements were satisfied.

State v. Johnston, # 95,703
Osage Co., Not Published
Court of Appeals
Affirmed in part, reversed and vacated in part, and remanded with direction

Johnston was a codefendant of the previously summarized case State v. Merz. The Court made the same findings as in that case.

State v. Dick, # 96,572
Reno Co., Not Published
Court of Appeals
Affirmed

Dick appealed the district court's denial of his motion to withdraw his no contest pleas claiming the district court abused its discretion because the plea was based upon a mutual mistake of his criminal history and that the district court erred in basing his sentence on criminal history that was not proven to a jury beyond a reasonable doubt. The Court affirmed finding on abuse of discretion relying upon KSA 21-4707(c)(4), which states that prior convictions discovered after a plea has been accepted are properly considered in a defendant's criminal history at sentencing. The defendant freely and

voluntarily entered into the plea agreement. The defendant's other argument has previously been decided against him in *State v. Ivory*, 273 Kan 44 (2002).

State v. McDaniel, # 94,940
Reno Co., Not Published
Court of Appeals
Affirmed in part, reversed and vacated in part

McDaniel appealed his multiple methamphetamine-related convictions, claiming the district court erred by giving the jury an aiding and abetting instruction and in sentencing him for both manufacturing and attempted manufacturing of methamphetamine. He further argues the evidence was insufficient to support his convictions. The Court found no error in giving the aiding and abetting instruction and the evidence was sufficient to support the convictions. The Court did vacate the defendant's conviction for attempted manufacturing of methamphetamine, but not for resentencing because it did not impact his total sentence.

State v. Droge, # 95,429
Harvey Co., Not Published
Court of Appeals
Affirmed

The defendant appealed his conviction for multiple crimes claiming there was insufficient evidence to prove criminal restraint and the court erred in not giving a unanimity instruction. The Court found sufficient evidence to support the conviction the defendant had tied the door shut attempting to prevent the victim from leaving. The Court also found that because the defendant's defense was that he was not the culprit, he was not prejudiced by the State's failure to specify which item served as the basis for the theft charge.

KCDAA Legislative Request for Proposals
(One Proposal per page – use additional pages as needed)

The KCDAA Legislative Committee is soliciting Legislative Proposals for the KCDAA legislative agenda for the 2008 Legislative Session. This input from the membership will be considered by the Committee in making its recommendations to the KCDAA Board of Directors.

This RFP is the first step in the process by gaining the input of the membership in changes needed to the Kansas Statutes for the benefit of prosecutors. Please submit your proposals with the information below as a minimum. Feel free to provide other information, background or cases that will aid the Committee in selecting and targeting the most critical issues. Thank you for your prompt attention to this matter.

1. Statute to amend: _____

2. Please describe the need for this change as it applies to the membership of the KCDAA across the state as well as the specific concern in your jurisdiction.

3. Draft Language – Please attach and if you are amending an existing statute, please attach a copy of statute with the change noted.

4. If known, any other Statutes affected:

5. Are you aware of any previous legislative efforts similar to this proposal? If so, when and by whom?

6. Other organizations that might support this legislative proposal? Oppose?

7. Legislators or others already contacted about the proposal:

Submit proposals to: KCDAA Office, 1200 W. 10th Ave, Topeka, KS 66604
Fax: (785) 234-2433 Email: skearney@kearneyandassociates.com
Deadline for submission is July 31, 2007

Calendar of Events

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



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