



Advance Sheet



Kansas County and District Attorneys Association

October 2007

Fall Conference Approaching

The Fall KCDA A Conference will be held October 21-23, 2007 at the Capitol Plaza Hotel in Topeka, Kansas. Conference brochures and registration information were sent out by e-mail and mail. You can find a complete schedule of the sessions and speakers online at www.kcdaa.org.

This year, we implemented a way to register online with a check or credit card. You just have to go to www.kcdaa.org and click on the registration link. We hope this new way to register will make it faster and more convenient for all attendees.

The deadline to register for the conference is October 15, 2007. If you miss that deadline, you will need to register onsite at the conference. The conference will include sessions by Douglas J. Miles, Chief Deputy District Attorney; Jacqie Spradling, Assistant Attorney General; Tom Stanton, Reno County Deputy District Attorney; Chris Biggs, Kansas Securities Commissioner; and Paul Morrison, Kansas Attorney General. There also will be KCDA A section discussion groups.

Make sure you plan now to come to this exciting conference. If you would like more information, visit www.kcdaa.org or call the KCDA A office at 785-232-5822.

Speaker - Douglas J. Miles

Douglas J. Miles is a chief deputy district attorney of special divisions in the Fourth Judicial District Attorney's Office. After ten years as a public middle school teacher, Doug retired in 1981 to pursue a career in law. He attended the University of Colorado School of Law in Boulder, Colorado and graduated in 1984. He served as a judicial clerk for the Honorable Matt M. Railey, Fourth Judicial District Court Judge, for eighteen months before joining the Office of the District Attorney as a Deputy District Attorney in 1986. During his nineteen year tenure with the Fourth Judicial District Attorney's Office, Doug has worked as a County Court Deputy District Attorney, a Child Support Enforcement Attorney, supervisor of the Welfare/Food Stamp Fraud Division and, Chief Deputy District Attorney of the County Court Division and, since January 2007, Chief Deputy District Attorney of Special Divisions which includes the Special Victims Unit (felony sexual assault, child abuse, elder abuse and special needs victims), the Economic Crime Division, the Juvenile Division and the Intake (filings) Division.

Doug is a regular presenter for TESSA (formerly the Center for the Prevention of Domestic Violence), and is a current faculty member for the National Advocacy Center and the National Institute for the Prosecution of Domestic Violence.

Correction: In the August 2007 Advance Sheet, we failed to mention that there are three prosecutors on the Kansas Recodification Commission. One of those prosecutors is Steve Opat of Geary County. We regret the error.

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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 KCDA A 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

State v. Kaster, # 97,081
Marshall Co., Not Published
Court of Appeals
Reversed and remanded with directions

Defendant appealed the district court's summary denial of his motion to appeal out of time. The court reversed and remanded because the district court failed to address any of the *Ortiz* exceptions, and made no findings in summarily denying defendant's motion.

State v. Richardson, # 97,412
Reno Co., Not Published
Court of Appeals
Reversed and remanded with directions

Defendant appealed the denial of his motion to file his appeal out of time. The court reversed relying on the recent Kansas Supreme Court decision *State v. Thomas*, 283 Kan. 796 (2007) (holding that KSA 21-4721(c) does not deprive the appellate court of jurisdiction to review a defendant's out of time appeal that seeks relief under *State v. McAdam*).

State v. Wilson, # 96,406
Wichita District Court, Not Published
Court of Appeals
Reversed and remanded

Wilson appealed the summary dismissal of his motion to file an untimely direct appeal pursuant to *Ortiz*. The court agreed with defendant and reversed the district court's order, vacated his sentence, and remanded for resentencing consistent with *McAdam*. The court found that while defendant was advised of his right to appeal, neither the district court nor his attorney advised him as to the time limit for filing an appeal.

State v. Ellibee, # 96,168
Geary Co., Not Published
Court of Appeals
Affirmed

Defendant appealed from the trial court's summary denial of his motion to withdraw his guilty pleas claiming the trial court lacked subject matter jurisdiction to accept his guilty plea to aiding and abetting second-degree murder because the factual basis asserted by the state established first-degree felony mur-

der. The court found no abuse of discretion in the trial court's decision because our Supreme Court has held that "a defendant can be convicted of second-degree murder upon proof of facts which would establish first-degree murder." *State v. Webber*, 260 Kan. 263, 279-80 (1996). Furthermore, he was fully informed of the consequences of pleading guilty and the plea was made knowingly and voluntarily.

State v. Johnson, # 96,976
Seward Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the trial court's denial of his motion to withdraw his no contest plea prior to sentencing. The court found no abuse of discretion in denying the motion because the defendant was not misled or coerced, he entered the plea freely and knowingly, and the court will not withdraw a plea based on a mutual mistake of defendant's criminal history.

State v. Herr, # 96,372
Shawnee Co., Not Published
Court of Appeals
Affirmed

Defendant appealed from the district court's order denying his motion to withdraw his no contest plea, requesting the court to remand for an evidentiary hearing. The court found no abuse of discretion in denying the motion. Defendant had ample opportunity to present any evidence at the initial evidentiary hearing on his motion to withdraw plea.

State v. Peterson, # 97,240
Geary Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the district court's denial of his motion to withdraw his pleas, contending his trial counsel was ineffective in allowing him to enter pleas when counsel knew the defendant was under the influence of drugs and such pleas were the product of coercion and unfair treatment. The court found no abuse of discretion in denying defendant's motion. The district court specifically questioned the defendant as to whether he was under the influence of any

drugs or alcohol and whether he was making the plea voluntarily. Defendant responded that he was not under the influence and had entered the plea knowingly and voluntarily.

EVIDENTIARY ISSUES

State v. White, # 94,716
Johnson Co., Not Published
Court of Appeals
Affirmed

Defendant appealed his conviction of aggravated assault on a law enforcement officer claiming the trial court erred when it denied his motions in limine to exclude the evidence that he was on parole when arrested. The state recognized that *res gestae* is no longer applicable due to *State v. Gunby*; however, because defendant never objected to the admission of the fact that he was on parole during the trial and he admitted during opening and throughout trial that he was on parole, the court did not consider this issue. Defendant also argued the court erred in concluding that he had opened the door for his criminal history to be introduced as evidence. Even though the court found that defendant's comment about "raising hell in Iowa" did not constitute opening the door, it was a harmless error due to the overwhelming amount of evidence.

State v. Sutton, # 95,198
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Defendant appealed her conviction for aggravated escape from custody, arguing the state failed to prove she was being held in lawful custody at the time of her escape. The court affirmed finding that because she was placed in community corrections for the course of her probation she was in custody, and Sutton should have reasonably understood that she was not free to permanently leave the residential facility without first obtaining authorization from her community corrections officer.

State v. Wood, # 96,444
Ellis Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the district court's upholding of the magistrate court's revocation of his diversion and conviction based on

stipulated facts. He argues that because the diversion agreement contained no provisions outlining the procedures upon appeal, the agreement cannot be enforced. The court disagrees and affirms the conviction finding the defendant knowingly entered into the diversion, which is a binding contract and does not allow him to present evidence at trial. Furthermore, the Kansas' appellate statutes apply to the appeal from a trial on stipulated facts and are not required to be outlined in a diversion agreement.

State v. Honeycutt, # 96,079
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the denial of his motion to suppress contending the testimony of the police officers was inconsistent and that the officers' testimony that the defendant gave consent to enter his house was not believable. The court held that it would not reweigh the credibility of the testimony and affirmed.

State v. Green, # 96,366
Wyandotte Co., Not Published
Court of Appeals
Reversed and remanded with directions

Defendant appealed multiple drug convictions contending the district court erred in denying his motion to suppress illegally obtained evidence because the officers did not have reasonable suspicion to detain him. The court agreed based on three factors. First, the record was devoid of any testimony by the officers that they suspected Green had committed, was committing, or was about to commit a particular crime at the time of the stop. Second, the defendant ducking down in his car when officers drove by was not alone an overly furtive movement. Finally, assuming *arguendo* that the defendant intended to duck his head in order to avoid an encounter with the police, this furtive movement, absent accompanying suspicious circumstances, should not be considered a permissible basis for a *Terry* stop.

State v. Bluma, # 96,861
Johnson Co., Not Published
Court of Appeals
Reversed and remanded

The State filed an interlocutory appeal of the district court's order suppressing evi-

dence that led to defendant's arrest for DUI. Defendant was approached in a parking lot after the officer saw "suspicious activity at the stoplight." The officer did not turn on his emergency lights, and he parked away from the defendant's vehicle. The officer was alone and did not display his gun or any other weapon. The officer did not use any physical force until he arrested defendant. The state claims this constituted a consensual voluntary encounter and not a vehicle stop. The court agreed finding there was no evidence to suggest that the officer made any show of authority at the time he walked up to defendant's vehicle.

State v. Fitzgerald, # 95,812
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Defendant appeals his conviction of possession of methamphetamine claiming the search of his automobile was illegal. The court disagreed due to the large amount of cash found on the driver, coupled with the fact that the driver had already called his girlfriend to come get her truck before the officer had even arrested him, there was sufficient probable cause and exigent circumstances to lawfully search the truck. Additionally, the girlfriend's consent to search her truck, freely given, meant that the discovery of the illegal drugs was inevitable.

State v. Maness, # 96,024
Sedgwick Co., Not Published
Court of Appeals
Reversed and remanded

Defendant appealed her drug conviction contending the evidence used against her was obtained from an illegal search and seizure. The court agreed finding that the separate purchase of cold pills by two individuals who returned to an out-of-state vehicle, without more, does not rise to the level of reasonable suspicion.

State v. Stowell, # 96,091
Reno Co., Not Published
Court of Appeals
Affirmed in part and reversed in part

Stowell appealed the district court's denial of his motions to suppress in two cases and his subsequent convictions. The court found the motion to suppress the drugs found in the

first case should have been suppressed. There was no finding by the district court that the defendant had consented to the search. The drugs were found in a small pouch on the defendant's key ring that was taken from the vehicle's ignition after the defendant was handcuffed. The court found this search was not incident to lawful arrest and while the officers had a duty to not leave the keys in the ignition they should have returned the keys to the defendant after securing the vehicle. The court considered an inevitable discovery argument by the state, but did not agree with the argument because the officer testified he was not going to detain the defendant for driving while suspended. He was going to make him post the minimal bond from his child support warrant. With respect to the second motion to suppress statements made by the defendant during another stop, the court found that there was substantial competent evidence to support the finding that he had waived *Miranda*.

State v. Rojas, # 96,312
Finney Co., Not Published
Court of Appeals
Affirmed in part, dismissed in part, reversed in part, and remanded with directions

Defendant appealed the district court's denial of his motions to suppress evidence seized from his residence and incriminating statements he made after his arrest. The court found defendant's wife had voluntarily and freely consented to the search of the home. The court dismissed the other suppression claim because it was not properly preserved for appeal. The court reversed and remanded for proper BIDS assessment.

State v. McAlpine, # 96,574
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Defendant appealed his conviction and sentence for possession of cocaine, claiming there was insufficient evidence to prove that he possessed the cocaine. The court disagreed finding sufficient evidence in that defendant's fingerprints were the only fingerprints on the bag that contained the cocaine found in his girlfriend's house where he had been staying.

State v. Fritzemeier, # 97,016
Reno Co., Not Published
Court of Appeals
Affirmed

The State appealed the district court's suppression of the results of a blood test used in the prosecution for DUI, arguing that the defendant consented to the test. The court concluded that the defendant's response of "blah, blah, blah" and his silence after being told this would be taken as consent must be construed as a refusal and warranting suppression of the test results.

State v. Morton, # 97,848
Franklin Co., Not Published
Court of Appeals
Reversed and remanded with directions

The state appealed the district court's decision granting the defendant's motion to suppress. Based on the surrounding circumstances, the court found the interrogation was not custodial and the district court erred in granting the suppression motion. The officers had informed the defendant she was free to leave, she was not under arrest, she did not have to talk, and was not being detained.

State v. Moore, # 95,767
Geary Co., Not Published
Court of Appeals
Affirmed

Defendant appealed his multiple drug convictions arguing error in the admission of evidence and prosecutorial misconduct. The court found that although the evidence of the defendant's prior arrest was more prejudicial than probative and should not have been admitted it was a harmless error due to the overwhelming evidence against him. Although the prosecutor's statements, if taken out of context, might be interpreted in such a way that they required the defendant to rebut the state's evidence to prove his innocence, a review of the entire record indicates that the prosecutor was careful to clarify when asking about the defendant's failure to produce evidence that the state still bore the burden of proving the defendant's guilt.

State v. Matthews, # 95,785
Montgomery Co., Not Published
Court of Appeals
Affirmed

Defendant appealed his convictions and

sentences for making false claims to Medicaid challenging the sufficiency of the evidence. The court found that while there was not sufficient evidence to show that the defendant was the one who filled out the Medicaid time sheets, there was sufficient evidence to prove that the defendant intentionally aided and abetted his wife in the commission of the crime. Defendant also argued that the trial court erred in ordering him to pay restitution to the Kansas Medicaid program and to the Kansas Attorney General to cover investigation, litigation, and attorney fees without making any findings regarding his ability to pay. Defendant relied on *Robinson* for this argument, but the court found *Robinson* only applies to reimbursement of BIDS under KSA 22-4513(b). Defendant's restitution was ordered under 21-3851(a)(3), which does not contain the same language as 22-4513(b).

State v. Miller, # 96,514
Reno Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the district court's denial of his motion to suppress arguing that the search warrants issued were not supported by probable cause. The court agreed and found that there was not a sufficient nexus between defendant's activities and the safe house. However, the court found that the officers relied on the warrants in good faith, and therefore affirmed the denial of the motion. *United States v. Leon*, 468 U.S. 897 (1984).

State v. Bradley, # 94,810
Johnson Co., Not Published
Court of Appeals
Affirmed in part and remanded with directions

Defendant appealed his conviction of obstruction of official duty challenging the sufficiency of the evidence and the admission of certain testimony. The court found there was sufficient evidence viewed in the light most favorable to the state to show that the officer was carrying out his official duty when defendant struck him and tried to escape. The court did not address the testimony that the defendant now complains of because he did not properly object to it at trial. The case was remanded for assessment of BIDS fees according to *Robinson*.

State v. Saunstaire, # 95,788
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded

Defendant appealed his convictions for aggravated robbery, attempted aggravated robbery, fleeing or eluding, and criminal discharge of a firearm, contending the district court improperly admitted evidence of a show-up identification and denied his motion for appointment of new counsel. The court found that while the show-up identification was suggestive and even if the jury inappropriately considered the identification, it did not prejudice the defendant based upon the overwhelming circumstantial evidence presented in the case. The court further found there was not a sufficient conduct to rise to the level of a conflict of interest. The case was reversed and remanded for assessment of BIDS according to *Robinson*.

State v. Morales, # 96,621
Lyon Co., Not Published
Court of Appeals
Conviction reversed, sentence vacated, and case remanded with directions

Defendant appealed his conviction and sentence of possession of methamphetamine contending the district court erred in denying his motion to suppress his statements to police officers obtained after he had requested legal counsel. The court found that because the officers initiated the conversation by telling the defendant what the penalties would be if convicted in hopes of gaining incriminating statements from the defendant, their conduct was coercive. Defendant had requested attorney and was being walked over to jail. He never asked about the possible sentence.

State v. Orozco, # 96,135
Johnson Co., Not Published
Court of Appeals
Affirmed

Defendant appealed his conviction for possession of cocaine, arguing the physical evidence found should have been suppressed because the officer did not have reasonable suspicion to detain him. The court found no abuse of discretion because the defendant was not under the officer's authority until after the cocaine was in plain view.

State v. Brady, # 96,328
Douglas Co., Not Published
Court of Appeals
Affirmed in part and reversed in part; sentence vacated, and case remanded

Defendant appealed his felony conviction for DUI claiming the district court did not obtain a proper waiver of jury trial from him and erred in overruling his motion to suppress evidence. The court reversed the conviction and remanded for a new trial because the legal requirements for waiver of jury trial were not followed. The court found no abuse of discretion in the district court's decision overruling the defendant's motion to suppress evidence.

State v. Hagar, # 96,423
Ellis Co., Not Published
Court of Appeals
Reversed and remanded with directions

Defendant appealed from the trial court's judgment denying his motion in limine, arguing that the trial court erroneously ruled that hearsay statements from an unavailable witness were admissible as co-conspirator statements under 60-460(i)(2). The court agreed finding that the hearsay statements at issue were testimonial because they were given during a police investigation of a hit-and-run accident and during police interrogation. Because the declarant was unavailable to testify about these statements and because the defendant never had an opportunity to cross-examine the declarant, the admission of the declarant's statements violated defendant's right to confrontation under the Sixth Amendment.

State v. Blochlinger, # 96,714
Saline Co., Not Published
Court of Appeals
Reversed in part, vacated in part, and remanded with directions

Defendant untimely appealed under *State v. Ortiz* arguing that he should be resentenced under *State v. McAdam* to a drug severity level 3 felony for his conviction of attempted manufacture of methamphetamine. The court agreed and remanded for the defendant to be sentenced according to *McAdam* because the defendant met an *Ortiz* exception, he was not informed of his right to counsel on appeal, his appeal was treated as a direct appeal.

State v. Hughes, # 96,394
Butler Co., Not Published
Court of Appeals
Affirmed in part; reversed in part and remanded

Defendant appealed his convictions of DUI and open container arguing insufficient evidence. The court found there was sufficient evidence to support the convictions. Defendant appealed his convictions for possession of methamphetamine and possession of drug paraphernalia, contending the district court erred in denying his motion to suppress. The court found the district court did not specifically apply a required attenuation analysis to the search, and found the record on appeal was insufficient to enable analysis. The court reversed and remanded for additional findings and conclusions of law.

State v. Allen, # 96,892
Seward Co., Not Published
Court of Appeals
Affirmed in part and remanded with directions

Defendant appealed his conviction of aggravated battery arguing the prosecutor committed misconduct in comments made during closing argument and that the trial court erred in limiting his closing argument. The state conceded that the prosecutor's argument was improper, but found there was no likelihood of it altering the jury's verdict. The court found the district court's limiting of the defendant's closing was within its sound discretion. It did not prevent him from presenting his defense. The case was remanded for assessment of BIDS fees consistent with *Robinson*.

SENTENCING ISSUES

State v. Brown, # 96,570
Saline Co., Not Published
Court of Appeals
Reversed and remanded with directions

Defendant appealed both the district court's denial of his motion to dismiss the state's motion to revoke his probation and the associated extension of his probation, arguing that unreasonable delay by the state in its prosecution resulted in waiver of the violation. The court agreed and remanded with directions to discharge the defendant. Defendant violated probation in 2001 and was arrested in Alaska in 2002 for the warrant after a traffic stop.

Kansas failed to commence proceedings to return defendant to Kansas within 90 days and informed Alaska they were not going to seek his return.

State v. J.H. # 96,770
Finney Co., Not Published
Court of Appeals
Affirmed

Defendant was convicted under EJJJ and appeals the revocation of his probation and order to serve his 48-month adult criminal sentence, challenging the sufficiency of the evidence to establish the probation violation and the trial court's refusal to consider sentencing alternatives before sentencing him. The court found that even though the state did not admit the physical evidence that was found on him (brass knuckles) at the hearing there was substantial competent evidence to support the violation. Also, the court found that in accordance with K.S.A. 38-16,126(b) the EJJJ sentence is to be imposed upon the finding of a probation violation. There is no provision for discretion given to the trial court at this hearing.

State v. Koehn, # 97,045; 97,046
Harvey Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the revocation of his probation and the imposition of BIDS. The court found that because the defendant admitted to violating the terms of his probation and failed to refrain from drug use, there was no abuse of discretion in revoking his probation. Furthermore, the attorney fees were waived and therefore *Robinson* does not apply, and the assessment of a BIDS administrative fee does not require any determination of the defendant's ability to pay, but is required to be assessed by statute in the absence of defendant's affirmative claim of manifest injustice. *State v. Hawkins*, 37 Kan. App. 2d 195, 200 (2007).

State v. Holt, # 95,278
Johnson Co., Not Published
Court of Appeals
Remanded with directions

Defendant appealed the district court's imposition of an 18-month probation term following his conviction of one count of attempted possession of marijuana claiming

his presumptive probation term under KSGA was limited to 12 months, and the district court failed to make the required findings to extend the probation term to 18 months. The court remanded with directions for the district court to re-sentence defendant in accordance with KSA 21-4611(c)(3), but may sentence him to an 18-month probation term if it makes the necessary findings pursuant to KSA 21-4611(c)(5).

State v. Woods, # 95,520
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Defendant appealed his conviction and sentence for aggravated robbery claiming the trial court erred by not instructing on battery as a lesser-included offense of aggravated robbery. The court found that because the defendant did not object to the lack of battery as a lesser-included offense during the instruction conference nor did he request it and because the defendant presented an all or nothing type defense, there was no error in not including the battery instruction. Defendant also argued there was insufficient evidence at trial proving that he could reasonably foresee that an aggravated robbery would occur as a result of the battery. Based on the evidence that was presented a rational factfinder could have found beyond a reasonable doubt that robbery was foreseeable.

State v. Green, # 96,315
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the amount of restitution imposed by the trial court as part of his sentence for DUI. The court found that the proper inquiries into the values of the cars wrecked in the accident by the defendant were made and that a reasonable person could have ruled as the trial court did.

State v. Richmond, # 96,983
Johnson Co., Not Published
Court of Appeals
Affirmed in part and dismissed in part

Defendant appeals the trial court's orders transferring his probation to the Johnson Co. Res. Center and his BIDS fees. The court found that although the defendant's income was limited before the revocation hearing, he

never paid any amount toward the assessed costs, fees, and child support. The trial court properly transferred defendant's probation to JCRC. Defendant's appeal of the BIDS fee was dismissed because it was not timely appealed.

State v. Rudy, # 97,014
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Defendant appealed his sentence for felony DUI challenging the use of a 1973 conviction to enhance his sentence. The court found his 1973 conviction was properly used. The state provided a copy of the docket sheet from the case showing his entry of guilty plea. Defendant claimed his attorney entered the plea without his consent and therefore he was denied effective counsel and the conviction should not be used. The court disagreed finding he was represented, and even if he wasn't, the conviction was still valid because an uncounseled misdemeanor conviction that does not result in incarceration may be included in a defendant's criminal history for enhancement purposes.

State v. Watkins, # 96,218
Sedgwick Co., Not Published
Court of Appeals
Sentence vacated and remanded with instructions

Defendant appealed his sentence arguing it was illegal because the trial court failed to correctly credit him with 238 days of jail time credit that they assigned to his post release time he was serving for a prior conviction. The court agreed and credited him the time that he spent incarcerated prior to his conviction finding that he was not still serving his post release supervision term during the time he was incarcerated.

State v. Salsberry, # 96,325
Reno Co., Not Published
Court of Appeals
Reversed and remanded

Defendant appealed his sentence stemming from his fifth DUI arguing that his two prior DUI convictions were void for lack of subject matter jurisdiction because they were felonies and could not be tried in municipal court. Further, he argued that his due process rights were violated because he was not adequately

notified that he was charged with a fifth DUI. The court agreed and reversed for defendant to be resentencing as a third DUI. The court did not address the second issue due to the outcome of the first.

State v. Garay-Perales
Barton Co., Not Published
Court of Appeals
Sentence vacated and case remanded with directions

Defendant appealed his sentence claiming the trial court erred in departing from the sentencing guidelines on its own motion without giving notice of its intent to do so. The court found that because the trial court waited until sentencing hearing to announce its intent, it concluded that neither the defendant nor the state had a fair opportunity to marshal and present their arguments for or against the proposed departure before sentence was imposed.

State v. Tinder, # 97,104
Johnson Co., Not Published
Court of Appeals
Affirmed

Defendant directly appealed his sentence contending the district court erred in accepting the official record of prior convictions as evidence to prove his criminal history score, arguing doing so does not conform to statute or rules of evidence. The court found defendant's argument to be without merit.

State v. Orozco, # 97,189
Haskell Co., Not Published
Court of Appeals
Affirmed

Defendant appealed his prison sentence, contending that the trial court failed to consider placement at Labette. The court found no abuse of discretion in not granting Labette. The trial court had considered Labette, but felt the defendant had received "plenty of chances for treatment or to avail himself to cure his problem," and was not "truly serious about getting clean."

State v. Wright, # 97,243
Ford Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the trial court's revoca-

tion of probation and imposition of his underlying prison sentence contending the trial court abused its discretion in not considering a more structured probation with a drug treatment component. The court found that because the record showed the court granted a dispositional departure sentence, revoked probation twice for drug usage, and reinstated probation twice including placement in Labette, there was no abuse of discretion.

State v. Albano, # 96,611
Geary Co., Not Published
Court of Appeals
Affirmed

Defendant appealed her sentence for possession of methamphetamine, arguing the district court abused its discretion in refusing to consider outpatient treatment. The court found no abuse of discretion in not considering outpatient treatment because the sentence imposed was within the statutory limits.

State v. Drake, # 96,546
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Defendant appealed her sentence, arguing her sentencing judge erred in failing to recuse. Defendant did not properly preserve the issue in district court.

State v. Cooper, # 96,268
Saline Co., Not Published
Court of Appeals
Appeal dismissed

The State appealed on a question reserved from the trial court's decision to resentence defendant to concurrent sentences after finding that manifest injustice would result from the imposition of consecutive sentences. They dismissed because the issue the state raised is fact specific and not of statewide importance.

State v. Jackson, # 96,156
Johnson Co., Not Published
Court of Appeals
Affirmed

Defendant appealed from a district court's imposition of an upward dispositional departure following her guilty plea to theft and other charges. The district court found that because she continued to commit the same

type of crime despite previous probations that she was not amenable to probation. The court agreed that this was a substantial and compelling reason to depart.

State v. Muse # 97,188
Geary Co., Not Published
Court of Appeals
Affirmed in part and dismissed in part

Defendant appealed from the trial court's order revoking his probation and ordering him to serve his original sentence, claiming that his violations were minor and related to his substance abuse problems. Defendant also argued there was no claim of criminal activity. The court found no abuse of discretion in revocation and imposition. Defendant also argued the trial court erred in denying his motion to reduce his sentence. The court was without jurisdiction to hear this argument because the sentence was presumptive.

State v. Castillo, # 96,046
Saline Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the revocation of his probation and subsequent incarceration. The court found no abuse of discretion. Defendant stipulated to the violation.

State v. Foster, # 96,792
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the revocation of his probation. The court found no abuse of discretion by the district court. Defendant admitted the probation violation, and his psychologist testified that his "attitude toward treatment had been manipulative and minimally motivated for therapeutic change."

State v. Fugate, # 97,164
Franklin Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the trial court's restitution order stemming from his no contest plea for burglary and theft. The court found no abuse of discretion in ordering the restitution.

State v. Revels # 97,807
Franklin Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the district court's denial of his pro se motion to correct an illegal sentence. The court found no abuse of discretion in denying the motion. This claim should have been made on a direct appeal.

State v. Pena, # 96,907
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Defendant appealed his sentence of 15 months in prison after he pled guilty to criminal possession of a firearm, arguing that the trial court erred by failing to consider placement at Labette before imposing a prison sentence. The court found that because the defendant committed his crime while he was on felony bond, the imposition of a prison sentence was not a departure; therefore, the trial court was not required to consider Labette as an option.

State v. Jones, # 96,977; 97,289; 97,290
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the trial court's summary denial of his pro se motion to correct an illegal sentence under 22-3504(1). The court found the summary denial was not an abuse of discretion because the records of the case conclusively showed the defendant was not entitled to relief.

State v. Srader, # 96,397
Saline Co., Not Published
Court of Appeals
Affirmed in part and dismissed in part

Defendant appealed the denial of his motion for jail time credit raising the issue of whether credit can be granted to a defendant who spends time in a residential facility while on probation. The court found no abuse of discretion in denying the motion because the defendant mistakenly relied on 21-4614, which deals with an allowance for time spent incarcerated pending disposition of the case when the defendant is waiting. Also, the record did not reveal the defendant's placement in the two facilities was actually conditions of

his probation. Defendant's appeal of BIDS fees was dismissed because it was untimely.

State v. McDaniel, # 96,640
Reno Co., Not Published
Court of Appeals
Affirmed in part, sentence vacated, and case remanded

Defendant appealed her sentence for theft by deception and the district court's refusal to permit her to withdraw her plea after sentencing claiming the court failed to consider placing him at Labette. The court found that because the trial court did not put on the record that they considered Labette, the sentence must be vacated and remanded for consideration. The court found no abuse of discretion in the denial of her motion to withdraw her plea. It was voluntarily and freely entered into.

State v. Borrelli, # 96,840
Chase Co., Not Published
Court of Appeals
Reversed and remanded with directions

Defendant appealed the district court's revocation of his probation. The court reversed and remanded to the district court to determine whether the allegations contained in one of the state's revocation motions. The court further found the district court lacked jurisdiction to consider the state's amended motion to revoke because the alleged violations occurred after the defendant's probation had expired.

State v. West, # 96,928
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the district court's execution of his prison sentence following the revocation of his probation, claiming the district court's reasons for refusing placement at Labette were insufficient to comply with 21-4603(d)(g). The court found that the district court fulfilled its statutory duty when it noted for the record that the defendant was too dangerous to be at Labette.

State v. Holley, # 97,109
Sedgwick Co., Not Published
Court of Appeals
Sentence vacated and case remanded

The state appealed alleging that the district court imposed an ambiguous sentence. The

court reversed and remanded for imposition of new sentence because the simultaneous sentence to 180 days with a controlling sentence of 12 months was ambiguous.

MISCELLANEOUS AND MULTIPLE ISSUES

State v. Thompson, # 9,898
Montgomery Co., Not Published
Court of Appeals
Reversed and remanded with directions

Defendant appealed his conviction for drug offenses presenting several issues on appeal: the trial court 1) erred in giving a deadlocked jury instruction; 2) erred in the admission of evidence; and 3) erred in admitting into evidence transcripts of audiotape recordings and allowing the transcripts to go to the jury room during deliberation. The court reversed and remanded for a new trial finding the trial court erred in giving the deadlock jury instruction because the jury had already been deliberating when the instruction was given. Also, the admittance of his past cocaine sale conviction was erroneously admitted into evidence because it did not show a plan or common scheme but merely showed his propensity to commit a similar drug crime. Finally, the court concluded that the trial court erred in admitting the transcript without giving a cautionary instruction to the jury that the audiotape is not evidence and that the evidence is the audio recording itself.

State v. McClough, # 96,322; 96,323;
96,324
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part, vacated in part, and remanded with directions

Defendant appealed the convictions and sentences stemming from his theft of a Kwik Shop and a video store along with his escape from custody during transport to municipal court. He claims the district court erred in not giving lesser-included jury instructions, erred in failing to suppress his statements to police, and wrongful imposition of attorney fees. The court found no lesser-included was warranted for the aggravated robbery charge due to the presence of bodily harm and the evidence of the repeated striking of the victim by the defendant with a weapon. The court found no error in denying defendant's

motion to suppress. Defendant was not impaired at the time he gave the statement and he is the one who re-initiated the conversation with the officer. The court remanded for consideration of BIDS fees in accordance with *Robinson*.

State v. King, # 95,088
Crawford Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

Defendant appealed his convictions and sentences for rape and aggravated criminal sodomy claiming the trial court erred in not giving a limiting instruction with respect to evidence of the alleged rape and sodomy that occurred by him with the same victim on the same evening in Missouri and for his past crimes involving dishonesty and false statement. The court found according to *Gunby* a 60-455 limiting instruction should have been given to the jury with respect to the evidence of the Missouri crimes, but does not require a reversal in this case because there was no real possibility that the jury would have rendered a different verdict due to the nature of the events. With respect to the prior crimes involving dishonesty and false statement, there was no need for a limiting instruction because the defendant in his case-in-chief presented this evidence. Defendant next argued he was denied a fair trial due to prosecutorial misconduct. The court did not address defendant's first claim of prosecutorial misconduct because defense counsel did not object at trial to the state's *Doyle* line of questioning. The court then found there was no misconduct by the state during closing when it suggested that the defendant had a motive to be untruthful. The state did not offer her own opinion or belief that he was untruthful. The case was reversed and remanded for proper BIDS assessment in accordance with *Robinson*.

State v. Childers, # 95,601; 96,665
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the district court's denial of his motion to withdraw his plea. The court found he was properly informed of his rights and made the plea knowingly and voluntarily and was aware of the maximum sentence that could be imposed. The district

court did not abuse its discretion in denying his motion. Furthermore, the defendant's claim that the state did not provide a sufficient factual basis at the plea hearing was not raised by the defendant at his original motion to withdraw his plea and therefore cannot be raised on appeal.

In the Matter of R.R.C., # 97,566
Wyandotte Co., Not Published
Court of Appeals
Affirmed

The state appealed the district court's decision denying its motion to prosecute defendant as an adult. Instead of granting the motion for adult prosecution, the district court designated the case as an EJJJ. The court found no error by the district court because its decision complied with KSA 38-1636 and was supported by substantial competent evidence.

State v. Roberts, # 95,046
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Defendant appealed from multiple person felonies claiming insufficient evidence to support the convictions, ineffective assistance of counsel, and prosecutorial misconduct. The court found the officer's testimony that he saw the defendant at the crime scene with a gun and was found to have a victim's wallet in his pocket at the time of arrest was sufficient evidence to support the convictions. The court found that there was an error by defense counsel in that he stipulated to erroneous criminal history; however, this problem was fixed when the criminal possession of a firearm was dismissed. Furthermore, based on all the other evidence there was no real possibility the stipulation influenced the jury's decision as to defendant's guilt. Finally, the use of the inaccurate stipulation by the state during closing has been remedied and was harmless with respect to the other convictions given the overwhelming and compelling nature of the evidence against him.

State v. Ortega, # 96,052
Finney Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

Defendant appealed the district court's denial of his motion to withdraw guilty plea, the

court's failure to consider whether he was eligible for placement at Labette, and his order to reimburse BIDS. The court found that the plea agreement was knowingly and voluntarily entered into. Defendant was not represented at that phase by incompetent counsel and he was not misled or coerced into taking the plea agreement. The Court reversed and remanded for the district court to consider placement at Labette and to make further findings in accordance with *Robinson* to determine BIDS reimbursement.

State v. Johnson, # 96,526
Reno Co., Not Published
Court of Appeals
Reversed and remanded with directions

The state appealed the denial of its motion requesting an opinion from the head of the SRS treatment facility regarding defendant's competency to stand trial, a competency evaluation, and a competency hearing. The court held the district court abused its discretion when it denied the state's motion for an evaluation and hearing on whether defendant had been restored to competency. According to KSA 22-3305(2) when a treatment facility dismisses an involuntary mental commitment petition it "shall include in such notification an opinion from the head of the treatment facility as to whether or not the defendant is now competent to stand trial."

State v. Castleberry, # 96,629
Lyon Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

Defendant was convicted of multiple drug crimes and appealed the sufficiency of the evidence of his conspiracy and possession convictions and the district court's failure to give an unanimity instruction. The court found there was ample evidence to support the convictions. The overt act supporting the conspiracy was purchasing the scales and bags to separate the drugs for sale. The facts supporting the possession charges include the following: defendant had been seen driving the car that the drugs were found in, testimony of his sale of the same types of drugs had been given, the drugs were in plain view, and defendant had a large amount of cash found on his person. With respect to the unanimity instruction there was not a request for one at trial, and the court found

that the lack of one was not clearly erroneous. The jury was provided separate instructions on each charged crime and was instructed to decide each charge separately.

State v. Curry, # 96,846
Sumner Co., Not Published
Court of Appeals
Affirmed

Defendant appealed the district court's denial of his motion to withdraw his guilty plea claiming the district court incorrectly scored his criminal history. The court held that because the record revealed that defendant admitted that both of his Missouri burglary convictions occurred at fraternity houses where some university students resided and that he had a prior conviction for a residential burglary in Wyandotte Co.; therefore, there was substantial competent evidence supporting the district court's conclusion that defendant's criminal history score was "A."

State v. Smith, # 96,855
Sedgwick Co., Not Published
Court of Appeals
Affirmed

Defendant appealed from his plea agreement arguing there was an insufficient factual basis for the district court to accept his guilty plea. According to KSA 22-3602(a) he is prohibited from doing so because he has not moved to withdraw his guilty plea. Defendant next argued that his sentence was illegal for various reasons. The court found the sentences imposed were not departure sentences; therefore he cannot appeal them. Finally, defendant claims the state violated the plea agreement by allowing the family members of the victim to request a harsher sentence. This was not a violation of the plea agreement.

State v. Collins, # 96,393
Butler Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded

Defendant appealed her convictions and sentences for possession of marijuana and possession of cocaine, making the following claims: 1) the prosecutor committed reversible misconduct during closing argument; 2) the district court erroneously admitted hearsay statements; and 3) the district court erred by overruling her objection to the state's

peremptory challenge to remove a minority juror. The court held: 1) the comments that defendant's strategy of blaming someone who was not there to respond to the accusation was not burden shifting, but highlighting a weakness in the defendant's argument; 2) defendant did not preserve this issue for appeal; 3) the state's race-neutral reason for striking the venire person was hardly implausible or fantastic. The venire person had indicated that beyond a reasonable doubt meant to him that the state would prove beyond all certainty.

State v. Bowles, # 96,107
Shawnee Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

Defendant appealed his convictions for multiple child sex crimes, arguing the children's identification was unreliable, there was insufficient evidence to convict him, and sentencing issues. The court dismissed the first argument finding the defendant failed to make a timely objection. The court went on to find sufficient evidence to support the conviction, but the court reversed and remanded for resentencing. Defendant was sentenced based on an incorrect criminal history score for all but one of the convictions.

State v. Cogle, # 95,634
Dickinson Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

Defendant appealed his convictions of aggravated indecent liberties with a child and aggravated intimidation of a witness or victim, arguing the district court: 1) improperly allowed the defendant to proceed in sentencing with conflicted counsel; 2) failed to consider the defendant's allegations of ineffective assistance of counsel; and 3) improperly imposed an upward durational sentencing departure on the defendant's post-release supervision period. The court found 1) that while there is an affirmative obligation for the trial court to probe a potential conflict between a criminal defendant and defense counsel once a conflict has been raised, nothing in *Vann* suggests a district court is obligated to advocate for the defendant and suggest conflicts when the defendant does not even allege dissatisfaction with trial counsel; 2) because the

defendant did not raise his allegation of ineffective assistance of counsel the court cannot declare the trial representation to be deficient based on the record, defense counsel did not have an opportunity to explain his actions; and 3) while the district court's reliance on prior criminal history and the nature of the fiduciary relationship to impose the departure sentence was erroneous, it was harmless error because the district court also relied on the fact that the crime was sexually motivated. The case was remanded for assessment of BIDS fees according to *Robinson*.

State v. Saylor, # 95,808
Shawnee Co., Not Published
Court of Appeals
Affirmed

Defendant appealed his conviction of criminal possession of a firearm arguing the district court erred: 1) in determining that the police officers' initial entry into Saylor's home was a constitutional protective sweep; 2) in determining that the search warrant for Saylor's home was valid; and 3) in denying Saylor's motion for directed verdict of acquittal. The court found: 1) the entry was not a permissible protective sweep because the arrest was made outside the defendant's home, but because the officers were faced with "ambiguous information concerning potentially serious consequences" and had reason to believe that someone may have been injured by gunshots fired inside the defendant's home, there was sufficient evidence to establish that the emergency exception applied to the initial entry; 2) the court was not supplied with an adequate record to determine whether defendant was prejudiced by the search warrant. Defendant argued that it was invalid due to an incorrect address, but did not include the search warrant or the application for the warrant in the record. Furthermore, the court agreed with the district court that the good faith exception to the exclusionary rule would apply; and 3) there was sufficient evidence to deny defendant's motion for acquittal. A witness testified to seeing him holding a firearm in his home.

State v. Newman, # 95,330
Saline Co., Not Published
Court of Appeals
Affirmed

Defendant appealed his convictions and sentences for various person felonies claiming

numerous trial errors. The court found that even though defendant was not able to touch the victim's sex organs he was still guilty of sexual assault because there was sufficient evidence to prove that he touched her without consent and with the intent to arouse; furthermore, because defendant succeeded in touching the victim the trial court did not err in not giving the lesser-included of attempted sexual batter. The court next found there was sufficient evidence to support the convictions for burglary and criminal damage to property. Finally, the court determined that this was a multiple acts case and a unanimity instruction should have been given; however, defendant did not demonstrate clear error. He generally denied he had committed any wrongful acts and there was no real possibility the giving of the unanimity instruction would have resulted in a different outcome.

State v. Swarthout, # 94,823
Washington Co., Not Published
Court of Appeals
Affirmed in part, vacated in part, and remanded with directions

Defendant appealed his convictions of burglary and felony theft arguing there was insufficient evidence, that the trial court erred in responding to two questions asked by the jury during deliberations, that the trial court erred in failing to instruct on the lesser included offense of misdemeanor theft, and the prosecutor's questions during his cross-examination denied him a fair trial. The court found there was sufficient evidence to support the convictions. Defendant was essentially asking the court to reweigh testimony. The responses to the jury's questions were not improper. They were not coercive and did not place time constraints or pressures on the jury. Furthermore, the defendant did not object or oppose the responses given by the trial court, and asking this court to review them now is akin to invited error. Because defendant denied participation in the crimes an accomplice instruction would have been inappropriate. Finally, defendant did not show any of the prosecutor's questions were outside the wide latitude given to the state. Rather than shifting the burden of proof, the questions simply pointed out that defendant was on trial and had motivation to disagree with other testimony. The court vacated and remanded for assessment of BIDS fees according to *Robinson*.

State v. Murdock, # 95,365
Cloud Co. Not Published
Court of Appeals
Affirmed

Defendant appealed his conviction of aggravated battery by use of a deadly weapon claiming the district court erred in denying his motion for judgment of acquittal, by denying his motion for a mistrial due to ineffective assistance of counsel, and by prejudicing the jury while attempting to answer a jury question. The court found there was sufficient evidence to support the conviction and the district court's other decisions did not amount to an abuse of discretion. The district court should have discussed his response to jury questions with counsel prior to responding, but this error did not amount to abuse of discretion when looking at the judge's answer as a whole.

State v. Bostick, # 95,789
Shawnee Co., Not Published
Court of Appeals
Affirmed in part, reversed in part, and remanded with directions

Defendant appealed conviction and sentences for two counts of attempted aggravated criminal sodomy and indecent liberties with a child under 14 arguing that the trial court erred in allowing the jury to view videotaped interviews during deliberation that had been admitted into evidence that should have been edited before it was shown to the jury to remove some objectionable materials. Defendant also argued the district court erred in failing to give a lesser-included instruction regarding the aggravated indecent liberties charge. The court found because there is no evidence that the jury actually viewed the objectionable material and defendant never objected to the admission of the videotape there is no need to address this issue. The court found there was no clear error in the failure

to give a lesser-included instruction. At trial, Bostick's defense was such that he either did or did not lewdly touch the victim. The case was reversed and remanded for assessment of BIDS fees according to *Robinson*.

State v. McCullough, # 96,298
Sedgwick Co., Not Published
Court of Appeals
Affirmed in part, vacated in part, and remanded with directions

Defendant appealed her convictions arguing the district court erred in not giving an accomplice instruction, a voluntary intoxication instruction, and an attempted voluntary manslaughter instruction. The court found no error in not giving the instructions. While the witness may have been an accessory after the fact, she was not an aider or abettor and the accomplice instruction was not necessary. The witness was present during the attack, but was not involved. Also, the intoxication instruction was not necessary because there was no evidence to support a claim that the defendant was unable to form the requisite. Finally, the court found no error in not giving the voluntary manslaughter instruction because rather than arising from the heat of passion or from a sudden quarrel, the testimony evidenced defendant's calculated intent to carry out her crimes. The case was reversed and remanded for assessment of BIDS fees according to *Robinson*.

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

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Immediate Job Opening

Immediate opening for Assistant District Attorney, Third Judicial District, Topeka, Kansas. Applicant should have experience including preparation of cases for trial and trial experience. References and background review required. Position is for the prosecution of adult felony offenders. Latest technological equipment with excellent working environment. Compensation and assignment based on experience and area of interest. Health insurance, KPERS, professional colleagues and excellent staff. Please forward a resume, references and letter of interest to Ms. McGinnis, 200 SE 7th Street, Suite 214, Topeka, KS 66603 or by fax to (785) 291-4909.

Calendar of Events

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 Capitol Plaza Hotel
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