KANSAS DUI LAW-15th Edition

2020 Supplement

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City of Hutchinson v. Smith 462 P.3d 198, 2020 WL 2091077 (05/01/20)
City of Junction City v. Franklin 457 P.3d 947, 2020 WL 855471(02/21/20)
City of Manhattan v. Laub 450 P.3d 844, 2019 WL 5481333(10/25/19)
State v. Acree 459 P.3d 834, 2020 WL 1313806(03/20/20)
State v. Auman 455 P.3d 805, 2019 WL 5656146(11/01/19)
State v. Blick 451 P.3d 488, 2019 WL 5849915(11/08/19)
State v. Blide 451 P.3d 490, 2019 WL 5849817(11/08/19)
State v. Blocker 460 P.3d 847, 2020 WL 1814303(04/10/20)
State v. Blyth 120,502(06/12/20)
Bourne v. KDOR 449 P.3d 1232, 2019 WL 5089919(10/11/19)
Brungardt v. KDOR 120,409(06/12/20)
State v. Butcher 445 P.3d 772, 2019 WL 3756235(2019)
State v. Butler 451 P.3d 487, 2019 WL 5849805(11/08/19)
Campbell v. KDOR 460 P.3d 844, 2020 WL 1814284 (04/10/20)
State v. Chavez-Majors 454 P.3d 600, 2019 WL 6973703(12/20/19)
State v. Claerhout 453 P.3d 855, 2019 WL 6646457(12/06/19)
State v. Clayton 461 P.3d 863, 2020 WL 1969417(04/24/20)
State v. Derusseau 451 P.3d 490, 2019 WL 5849809(11/08/19)—other traffic
State v. Doyle Peeples 455 P.3d 429, 2020 WL 110868(01/10/20)
State v. Dunn 460 P.3d 844, 2020 WL 1814277 (04/10/20)
State v. Evans 451 P.3d 492, 2019 WL 6041497(11/15/19)
State v. Fleming 454 P.3d 621, 2019 WL 6972878(12/20/19)
Fordham v. KDOR 461 P.3d 867, 2020 WL 2089738 (05/01/2020)
State v. Hammerschmidt 453 P.3d 1185, 2019 WL 5850299(11/08/19)
State v. Heineken 460 P.3d 392, 2020 WL 1646805 (04/03/20)
State v. Kellum 460 P.3d 394, ---WL---(04/03/20)
State v. Klenklen 459 P.3d 840, 2020 WL 1492768 (03/27/20)
State v. Lyman 455 P.3d 393, 2020 WL 111496(01/10/20)
Madison v. KDOR 455 P.3d 428, 2020 WL 110838(01/10/20)
Meats v. KDOR 447 P.3d 980, 2019 WL 3978377(09/23/19)
State v. Mejia --- P.3d ----, 2020 WL 2602059 (05/22/20)
State v. Mendez-Esparza 449 P.3d 1231, 2019 WL 5089853(10/11/29)
State v. Miller 120,475(05/08/2020)
Mitchell v. Wisconsin 588 U.S. ___, 139 S.Ct. 2525, 204 L.Ed.2d 1040(2019)
Molina v. KDOR 456 P.3d 227, 2019 WL 6795547(12/13/19)
State v. Mulloy 459 P.3d 210, 2020 WL 1223509(03/13/20)
Murray v. KDOR 457 P.3d 216, 2020 WL 741545(02/14/20)
State v. Nieder 458 P.3d 997, 2020 WL 1074715(03/06/20)
State v. Ogorzolka 451 P.3d 490, 2019 WL 5849812(11/08/19)
State v. Reed 461 P.3d 864, 2020 WL 1969435(04/24/20)
State v. Reider 458 P.3d 307, 2020 WL 967859(02/28/20)
Reilly v. KDOR 462 P.3d 195, 2020 WL 2089635 (05/01/2020)
Ruppe v. KDOR 449 P.3d 1230, 2019 WL 5089723(10/11/19)
Scott v. KDOR 120,717(05/08/20)
Steinlage v. KDOR 459 P.3d 213, 2020 WL 1222948(03/13/20)
Strickert v. KDOR 462 P.3d 649, 2020 WL 1223226(03/13/20)
State v. Vaughan 120,432
Walker v. KDOR 462 P.3d 197, 2020 WL 2090798(05/01/2020)
Weippert v. KDOR 451 P.3d 492, 2019 WL 6041814(11/15/19)

IMPLIED CONSENT

DC-70—SEARCH INCIDENT TO AN ARREST—CONSENT—SUBSTANTIAL COMPLIANCE

City of Hutchinson v. Smith 462 P.3d 198, 2020 WL 2091077(05/01/20)
Scott v. KDOR 120,717(05/08/20)
BOTH UNPUBLISHED
Smith was arrested for DUI. He was read the revised DC-70 which was modified since the **Ryce** and **Nece** opinions. He agreed to take the test. The record supports a finding Smith knowingly and voluntarily consented to the breath test. The district court found him guilty of DUI. On appeal Smith raises a number of points that have already been addressed by the court. **1. The reading of the modified DC-70 after the Ryce and Nece decision does NOT render a consent involuntary or otherwise impermissibly coerced. 2. Active consent to take a breath test does not violate his 4th Amendment rights. 3. Although the actual language of the statute requires the reading of provisions that have been found facially unconstitutional does not make the reading of the modified provisions wrong. Although the DC-70 did not literally comply with K.S.A. 8-1001(k) it did conform to the law governing consent set out by Ryce and Nece. A substantially compliant DC-70 form was legally sufficient to give notice. See Barnhart v. KDOR 243 Kan. 209(1988); Demague v. KDOR unpublished 2013 WL 5975985(2013). There were no irregularities (technical or otherwise) in the DC-70 notice read to Smith. Failing to inform someone of an unconstitutional statute can't be an irregular performance of an obligation to provide a substantially accurate statement of the relevant law.** Affirmed.

FIELD SOBRIETY TESTS

HGN-SUPPRESSION

City of Junction City v. Franklin 457 P.3d 947, 2020 WL 855471(02/21/20)
UNPUBLISHED
At 2am officer noticed a vehicle driving in the middle of a two lane road. He swerved within his lane and entered a lane without signaling, exited a roundabout without signaling and then drifted over the center line of the road. The vehicle was stopped. Franklin's eyes were bloodshot and watery and there was a strong odor coming from him. Franklin's speech was not slurred but was "abnormal." The officer noticed a cane in the backseat. Franklin indicated he takes medications including oxycodone. He just left the bar but was only drinking water. Due to the physical issues, the officer did the following testing: HGN, Alphabet test and counting test. HGN indicated impairment. The alphabet test was not done as instructed and some of the alphabet was done incorrectly. Franklin performed correctly the counting test. Franklin was arrested and asked to take a PBT; he declined. A motion to suppress was filed. The judge suppressed the PBT due to HGN was inadmissible under **Molitor**. The district court dismissed the case. **HGN test is admissible if the results of the test are proven to be scientifically reliable. In this case the prosecutor attempted to get information about the HGN results without proving the results were scientific. The judge indicated the officer claimed the results of the HGN test influenced everything he did thereafter.** There was also an issue of a firearm being seized. It was also suppressed.

REASONABLE GROUNDS-VEHICLE IN MOTION

SIDEWALK—LEGALITY OF STOP

City of Manhattan v. Laub 450 P.3d 844, 2019 WL 5481333(10/25/19)
Laub v. KDOR 452 P.3d 886, 2019 WL 6333951(11/27/19)
BOTH UNPUBLISHED
Officer observed Laub's vehicle drive over a street curb while making a right turn. Officer Laub conducted a stop and later arrested Laub for DUI. BAC 0.210. Laub moved to suppress evidence he was DUI solely on the legality of the traffic stop. Laub argued Officer lacked reasonable suspicion to stop him for being DUI because he ran over a street curb. Trial court denied suppression Laub appeals. Laub cites the following cases: **Molitor** 301 Kan. 251(2015); **State v. Ross** 737 Kan.App.2d 126(2007); **State v. Hess** 37 Kan.App.2d 188(2006) and **State v. Steadman**, unpublished, 2016 WL 5867482(2016). The Appellate Court indicates Laub's case is distinguishable from those above cases as none of those cases hinged on whether the officer had reasonable suspicion to make a stop based on a traffic infraction except **Ross**. **Laub citing Ross explains a driver may safely change lanes and move without maintenance of a single lane. Ross only crossed the fog line just once without any safety concerns, as Laub did here. The Ross court held drivers if they move from their regular lane of travel in an unsafe manner they may violate K.S.A. 8-1522(a) even if they do it just once. Laub's act of driving over the street curb was a more dangerous act than Ross' act of driving over the right edge of the fog line. The Officer indicated Laub's back right tire went over the curb and then back onto the roadway. Laub's tire left the roadway—his tire was on a space not designated as the street.** This case is distinguishable from **Ross**. **KDOR case: The appellate court cites K.S.A. 8-1575 and municipal code § 31-18: a person may not drive a vehicle on a sidewalk or sidewalk area except when using a permanent driveway or an authorized temporary driveway. Laub drove over the curb onto the sidewalk and across the crosswalk area before returning to the street. Laub cites to State v. Hess 37 Kan.App.2d 188(2006) and State v. Ross 37 Kan.App.2d 126(2007) where the vehicle was "hugging the vehicle" or "crossed the fog line once" respectfully. The court found these cases distinguishable.** Affirmed.

REASONABLE GROUNDS—VEHICLE NOT IN MOTION

DIRECT OR CIRCUMSTANTIAL EVIDENCE

State v. Acree 459 P.3d 834, 2020 WL 1313806(03/20/20)
UNPUBLISHED
A witness was awoken by a knock on his door. Acree claimed he had put his car in the ditch and asked the witness to help push the car out. The witness believing Acree was not "in his right mind" stated he would call 911 for help. Acree left. Deputy was dispatched and found a car in a ditch registered to Acree. Acree was in the backseat. Acree's speech was slurred; watery, bloodshot eyes. Acree admitted he was drunk but claimed he had not been driving. Acree was found guilty at bench trial of DUI. Acree appeals claiming there was no evidence of him driving. The court noted Acree is claiming sufficiency of the evidence. **Clearly the State is required to prove defendant drove while being under the influence. State v. Ahrens 296 Kan. 151(2012) however the State is not required to prove when Acree had driven a vehicle rather the State had to provide competent evidence: he had done so while under the influence of alcohol. In order to be convicted of operating a vehicle under the influence there must be some evidence, direct or circumstantial, the defendant drove the vehicle. State v. Kendall** 274 Kan.

1003(2002). The court will not reweigh the evidence and determined a rational fact-finder could find beyond a reasonable doubt Acree drove his car while under the influence. Affirmed.

ADMISSIBLE EVIDENCE

VIDEO—EXCULPATORY INFORMATION--DISCOVERY

State v. Auman 455 P.3d 805, 2019 WL 5656146(11/01/19)
UNPUBLISHED
Friday before trial for aggravated battery while DUI the State provided Auman with a video. In the video there were a number of unidentified witnesses along with a discussion between officers about how the glare from the setting sun, not Auman's impairment, could have caused the collision. During the entire legal process the State made a number of video requests to the agency for digital media. Given the State's delay in getting the video to defense counsel and its' potential exculpatory value, compounded by speedy trial issues, the court dismissed the case. **Our Supreme Court has afforded courts discretion to determine the appropriate sanction in a given case. State v. Johnson 286 Kan. 824(2008). In determining the sanction the court can take into account the reasons for the delay and the extent of the prejudice. State v. Jones 209 Kan. 526(1972).** The collision happened in May 2016 and the trial was October 2018. The court even noted this is not a blame game between the prosecutor and the law enforcement agency. **Most of the requests for the video came within a week of the scheduled trial. The Court noted the State could have waited to file the case until it had received all discovery information from law enforcement. The exculpatory information in the video was in the possession of the State from the date of the crash.** The court did not abuse its' discretion in dismissing the case.

VEHICLE IN MOTION-ACCIDENT

EXCLUSIONARY RULE—PUBLIC SAFETY STOP

Bourne v. KDOR 449 P.3d 1232, 2019 WL 5089919(10/11/19)
UNPUBLISHED
Officers found vehicle parked in a ditch. Bourne was sitting in the driver's seat and unresponsive. An ambulance was called and medical staff got Bourne in the ambulance. Bourne told paramedics he had "8 beers." Officers could smell an odor of alcohol coming from him, bloodshot eyes, somewhat slurred speech and delayed responses to the paramedic's questions. Paramedics determined Bourne was uninjured. SFSTs were performed and showed impairment. Bourne was arrested. Bourne argues officers lacked probable cause to initially contact and detain him. **The court cited Martin v. KDOR indicating the exclusionary rule did not apply in the administrative hearing context. However K.S.A. 8-1020(p) was amended and some drivers have argued the exclusionary rule now applies in the admin hearing context. Whigham v. KDOR 2018 WL 1884742, rev. gtd (2018) suggests the exclusionary rule still does not apply regardless of the amendment. The District Court believed this was a public safety stop. Paramedics and officers could approach Bourne to see if he was in need of help. Officers cannot deviate from community caretaking duties by investigating Bourne for a crime before the paramedics had determined Bourne no longer needed assistance. Officers do not have to ignore obvious indications Bourne was under the influence.** The Appellate Court found this was a voluntary encounter. An officer's encounter with a person is voluntary if under the totality of the circumstances, the officer's conduct establishes to a reasonable person the person can refuse the request or end the encounter

State. Reiss 299 Kan. 291(2014). The Appellate Court found this both a public safety stop and a voluntary encounter.

EXPERT

IGNITION INTERLOCK

State v. Blick 451 P.3d 488, 2019 WL 5849915(11/08/19)
UNPUBLISHED
This is not a DUI case. However this case is a probation revocation where there was testimony concerning the ignition interlock device. **Leah Lichti, the Smart Start Ignition territory director for Kansas, testified Blick's ignition device recorded the presence of alcohol on a number of dates.** Also a supervisor of Blick testified Blick had indicated he could not come to work because he was unable to start his vehicle due to the device. Blick also told other employees he could bypass the interlock device "if he could just find the wiring diagram". The supervisor also testified Blick calculated the exact amount of alcohol he could consume over specific periods of time while being able to start the vehicle due to the margin of error built into the interlock device. There was a request from Blick to reduce his postrelease supervision so the case was sent back to determine this.

DISMISSALS

DELAY IN JUDGES DECISION

State v. Blide 451 P.3d 490, 2019 WL 5849817(11/08/19)
State v. Hammerschmidt 453 P.3d 1185, 2019 WL 5850299(11/08/19)
State v. Ogorzolka 451 P.3d 490, 2019 WL 5849812(11/08/19)
ALL UNPUBLISHED
Blide filed a motion to suppress based on problems with the notices given before the breath test. The cases **Ryce** and **Nece** were working their way through the court and caused a significant delay. 515 days had elapsed when the **Ryce** and **Nece** cases were determined. During this time the court had it under advisement 360 days after the opinions for which the court was waiting were decided. At a status conference to discuss the rulings Blide moved to dismiss the charges based on speedy trial. The Appellate Court states "the State bears the responsibility for ensuring the accused is provided with a speedy trial in accordance with K.S.A. 22-3402. **The defendant is not required to take any affirmative action to ensure his right to speedy trial is observed State. Adams 283 Kan. 365(2007) If a delay is caused by a defendant's application or fault, including the filing of a motion to suppress, that delay pauses the running of speedy trial clock. State v. Brownlee 302 Kan. 491(2015) In State v. Downing 257 Kan. 561(1995) the court noted at most two or three weeks could be charged to the defendant while the district court takes a motion to suppress under advisement but found keeping a motion to suppress under advisement for 179 days was an unreasonable time and not attributable to the defendant. Regardless of the novel issues raised a motion to suppress remaining under advisement for nearly a year is unreasonable. However the legislature expressly forbids dismissals on statutory speedy trial grounds in these circumstances, the district court erred by dismissing this case. K.S.A. 22-3402(b), (g). Ogorzolka**: Delay was 500 days after the motion to suppress was filed and 360 days after the **Ryce** and **Nece** decisions were issued. Reversed and remanded.

JAIL

IMMEDIATE SANCTIONS—SAFETY CONCERNS

State v. Blocker 460 P.3d 847, 2020 WL 1814303(04/10/20)
UNPUBLISHED
Judge revoked Blocker's probation on three cases all DUI offenses. Blocker stipulated to the allegations of the violations. Blocker asked to be placed back on probation. **The statutory scheme at the time required the imposition of intermediate sanctions for at least two successive violations before a defendant could be ordered to serve an underlying sentence unless a specific exception applied. K.S.A. 22-3716(c)(9)(A). A district court can rely on the public safety exception to bypass intermediate sanctions. The court must provide case-specific reasons for doing so—tying the defendant's particular circumstances to valid safety considerations. State v. Clapp 308 Kan. 97692018); State v. Miller 32 Kan.App.2d 1099(2004) The court noted his criminal history was replete with DUI convictions, his unsuccessful participation in about half a dozen substance abuse treatment programs and his inability to remain sober. All facts were known to all of the participants and the connection between those facts and the district court detailed reasonable was unmistakable.** Affirmed.

REASONABLE SUSPICION-VEHICLE NOT IN MOTION

PUBLIC SAFETY STOP—NO TRAFFIC INFRACTIONS

State v. Blyth 120,502(06/12/20)
UNPUBLISHED
At about 3am, officers observed Blyth's vehicle stop at a stop sign and then proceed through the intersection. Shortly thereafter the officers turned in the same direction as Blyth. About a quarter mile down the road the officers saw Blyth's vehicle with its headlights on and the engine running, stopped beside the roadway in the grass. The officers activated their emergency lights and pulled in behind Blyth's vehicle and approached Blyth. The officer knocked on the passenger side window and asked Blyth if she was okay. She indicated she was okay but she was lost. The officer noticed an open container. Once the window was down the officers noticed Blyths's eyes were droopy, speech slurred and there was an odor of alcohol coming from inside the vehicle. Blyth was eventually arrested. Blyth challenges her arrest by claiming the deputies did not have a reasonable suspicion she had committed any traffic violation or crime to justify the traffic stop. **The district court noted this was a public safety stop and cited State v. Schuff 41 Kan.App.2d 469(2009). Public safety or community caretaking reasons may justify an encounter between an individual and police even when no civil or criminal infractions have occurred, so long as the encounter is based on objective, specific, and articulable facts. There is a three prong test for public safety: 1) Officers have a right to stop and investigate as long as there are objective, specific and articulable facts from which a law enforcement officer would suspect a citizen is in need of help or is in peril 2) the officer may take appropriate action to render assistance if the citizen is in need of aid 3) once the officer is assured the citizen is not in need of help or is not in peril any actions beyond that constitute a seizure implicating the protections provided by the 4th Amendment. Also noted a public safety stop is to be totally divorced from the detection investigation, or acquisition of evidence relating to the violation of a criminal statute. The Appellate Court also cited Nickelson v. KDOR 33 Kan.App.2d 359(2004) and State v. Morris 276 Kan. 11(2003).** Affirmed.

ADMINISTRATIVE HEARING

DC-27—ORIGINAL SIGNATURE

Brungardt v. KDOR 120,409(06/12/20)
UNPUBLISHED
A DC-27 form must be filled out to memorialize the fact an officer provided the notices to a driver when they are wanting a breath or blood sample and in signing the document the officer certifies either a refusal or results of the test and that the officer followed the mandatory protocols. The Intoxilyzer 9000 has now digitalized these forms. **The officer explained using the Intox 9000 creates an electronic signature at the beginning of the process before administering the test by physically signing on a screen that captures the image electronically. The machine then affixes this recorded electronic signature image to the applicable forms as the officer fills them out. Brungardt challenges this "electronic signature" claiming the statute requires the certification "shall be complete upon signing and no additional acts of oath, affirmation, acknowledgment or proof of execution shall be required. K.S.A. 8-1002(b). The district court found that because K.S.A. 8-1002(b) states the certification is complete upon signing the officer's physical signature had certified BLANK forms due to him signing them before they were complete. The Appellate Court indicates Kansas has long recognized "signing" a document encompasses more than the physical act of manually writing a person's name. "Signing" is merely the act of affixing that signature. The Appellate Court also noted how members of the court electronically sign pleadings Supreme Court Rule 1.1(a)(1); electronic signatures in traffic citations K.S.A. 8-2119(b), and the Uniform Electronic Transactions Act K.S.A. 16-1602(i).** Reversed.

PRIOR CONVICTIONS
DIVERSION

VOLUNTARY VICTIM—EVIDENTIARY RECORD

State v. Butcher 445 P.3d 772, 2019 WL 3756235(2019)
UNPUBLISHED
Butcher pled guilty to 2nd degree murder. This charged stemmed from a DUI fatality. **As consideration for a departure from the standard sentence Butcher claimed the victim volunteered to be a passenger with an obvious impaired driver. The court should have considered the victim's voluntary entry into the car as a mitigating factor. The court noted Butcher claimed the degree of harm was less than typical for the crime. Butcher never argued the victim participated in the criminal conduct associated with Butcher's conviction.** This argument was denied. **Also during the sentencing the district court was made aware by the prosecution of a 2008 DUI Diversion that was NOT listed in the PSI. The journal entry or the actual Diversion agreement was not presented to the court. Butcher cited State v. Atkisson 308 Kan. 919(2018) in which many circumstances cited by the district court considering the defendant's departure were drawn from sources outside the evidentiary record and those facts carried significance with the district court. Atkisson was distinguishable.** The District Court in this matter did not rely heavily and in fact it was just briefly mentioned by the State to make the point the incident put Butcher on notice about the dangers of drinking and driving. **Clearly since the information was not in the PSI report or otherwise admitted as evidence it should not have been referred to. However any error was harmless.** Affirmed.

FIELD SOBRIETY TEST

ONE TOOL—COMPETING EVIDENCE

State v. Butler 451 P.3d 487, 2019 WL 5849805(11/08/19)
UNPUBLISHED
Butler claimed the officer lacked probable cause to arrest him. The Court of Appeals noted the following evidence: Butler was speeding, Butler failed to stop for officers lights for 1.5 miles, Butler tried 2 times to give officer cards there were not his license and seemed confused when trying to complete the task. Officer smelled alcohol, and Butler admitted to drinking 3 beers. The court also found Butler exhibited slurred speech and had trouble getting out of his car established probable cause. Butler was found guilty of DUI. Although there was information to suggest impairment Butler claims there was evidence of sobriety. **The court states competing evidence of sobriety does not negate initial evidence of intoxication. State v. Edgar 296 Kan. 513(2013). There are some factors that do not point to impairment does not mean there cannot be a probable cause finding. Butler also claims since no field sobriety tests were conducted there cannot be a finding of probable cause. SFSTs are just one tool law enforcement can use to establish a DUI but it is not crucial to the determination. State v. Huff 33 Kan.App.2d 942(2005). The facts in this case are extremely similar to Homeier v. KDOR, unpublished, 2018 WL 2073518(2018), probable cause exists.** Affirmed.

MIRANDA
PBT

ON SCENE INVESTIGATION

Campbell v. KDOR 460 P.3d 844, 2020 WL 1814284(04/10/20)
UNPUBLISHED
Deputy first encountered Campbell, he was stopped on the side of the road and complaining of car trouble. Deputy did not, at that time, detect impairment and allowed Campbell to leave the scene. Upon leaving Campbell lost control of his vehicle and veered off the roadway. Deputy again stopped Campbell to determine what happened. Deputy gave Campbell his insurance information and spoke with Campbell a little longer about his concerns he had on his driving. At that time he detected alcohol. Deputy requested SFSTs however Campbell claimed a bad knees and back and refused. Deputy requested a PBT which was also refused. Campbell was arrested. Campbell claims Deputy had no reasonable suspicion to expand the stop once he handed papers back to Campbell. **Citing State v. Jimenez 308 Kan. 315(2018) information gathering must be limited to infraction prompting the stop or those other matters directly related to traffic code enforcement ie. ensuring that vehicles on the road are operated safely and responsibly. Deputy's questions were not an on-scene investigation into other crimes rather they were directly related to the traffic stop itself. The comments related to the fitness of the driver or the vehicle.** Campbell also argues the deputy did not have reasonable suspicion to request SFSTs. **Observable indicia of intoxication which can support reasonable suspicion are the smell for alcohol and the driver's admission to having consumed alcohol in addition to the initial cause of the stop. Molitor 301 Kan. 251(2015). Because Campbell did not successfully complete any sobriety tests, the Deputy had reasonable suspicion to require another test, the PBT. K.S.A. 8-1012: PBT results shall be used for the purpose of assisting law enforcement officers in determining whether an arrest should be made and whether to request tests authorized under K.S.A. 8-1001. An officer may draw a negative inference from a driver's refusal to take a PBT Forrest v. KDOR 56 Kan.App.2d**

121(2018) The refusal amounts to circumstantial evidence the driver knows he or she has been drinking and would likely fail the test.

BLOOD/URINE

EXIGENT CIRCUMSTANCES

State v. Chavez-Majors 454 P.3d 600, 2019 WL 6973703(12/20/19)

Chavez-Majors was involved in a collision and was nonresponsive at the scene. The crash was in El Dorado State Park. Officers could detect a strong odor of alcohol coming from him. EMS arrived. EMS explained to the officer, Chavez-Majors had serious head injuries and was in critical condition. He was going to be taken to Wichita for treatment. A witness to the crash indicated Chavez-Majors had been driving a motorcycle at a high rate of speed. He lost control and fell off the motorcycle sliding into a pedestrian that was in the parking lot. Officer read the implied consent form to unconscious Chavez-Major and then directed EMS personnel to draw blood. Blood was drawn. BAC 0.14. Defendant filed motion to suppress based on 4th amendment violation. **The court cited Schmerber v. California 384 U.S. 757(1966) and indicated a warrantless blood draw was reasonable under the exigent circumstances plus probable cause exception. The three-prong test for considering whether a warrantless blood draw fit within this scheme: 1. there must be exigent circumstances which justify the taking of the blood 2. There must be probable cause to believe the defendant had been driving while impaired and 3. The procedure used to extract blood must be reasonable. See State v. Murry 271 Kan. 223(2001)** In this case it was shown to have probable cause and exigent circumstances however based on the recent opinion of **Mitchell v. Wisconsin** 139 S.Ct. 2525(2019) the Supreme Court remanded to review these circumstances in light of **Mitchell**. Affirmed and remanded with directions.

ADMISSIBLE EVIDENCE

2ND DEGREE MURDER—DIVERSION—USE OF PRIOR TO SHOW RECKLESSNESS

State v. Claerhout 453 P.3d 855, 2019 WL 6646457(12/06/19)

Claerhout was charged and convicted of 2nd degree murder in connection with a drunk driving fatality. K.S.A. 6-455(a) allows for prior crime or civil wrong admissible if it is relevant to prove some other material fact including notice, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. **Prosecution in this case wanted to bring up a prior diversion for DUI to show Claerhout had been educated to the reality of driving while intoxicated was dangerous and his decision to drive while intoxicated was therefore reckless. The Court of Appeals reviewed a number of federal and state courts allowing this type of evidence to be admitted for the limited purpose to show requisite knowledge, malice, and recklessness. The Supreme Court agreed with the Court of Appeals and other jurisdictions to allow for admissibility of the prior diversion. The jury reasonably could have concluded from the diversion Claerhout was on notice that driving while intoxicated is risky behavior and his decision to engage in that behavior demonstrated reckless conduct.** The analysis does not end there the evidence introduced to prove probative evidence must outweigh its potential for producing undue prejudice. The prejudice is minimal. The evidence he was intoxicated was substantial and uncontroverted; Claerhout conceded intoxication as well as driving in excess of the limit and his driving caused the death. **Since the charge was 2nd degree murder Claerhout wanted a voluntary intoxication instruction to show he could not have formed the requisite intent for recklessness. The court reviewed a number of cases and stated in all these cases evidence of**

intoxication was treated by the courts evidence of recklessness. The district court did not err in refusing the requested instruction.

SENTENCE-JAIL/PENALTIES

HOUSE ARREST—CRIMINAL HISTORY

State v. Clayton 461 P.3d 863, 2020 WL 1969417(04/24/20)
UNPUBLISHED
Clayton had a criminal history of "A" and 5 prior DUI convictions. The plea agreement called Clayton to serve 48 hours followed by 90 days house arrest. Upon completion of house arrest Clayton was to be released on 12 months post imprisonment supervision. The sentencing judge taking into account all of his criminal history sentenced him to 90 days in jail with no house arrest. On appeal, Clayton contends the court should have granted his request to serve his sentence on house arrest**. A judicial action constitutes abuse of discretion if 1. No reasonable person could take the view of the court; 2. The action is based on an error of law; or 3. The action is based on an error of fact. Clayton argues only number 1. K.S.A. 8-1567(i)(1) "nothing in this provision shall be construed as preventing any court from considering any convictions or diversions occurring during the person's lifetime in determining the sentence imposed. The Appellate Court has upheld the refusal to grant house arrest under similar facts as here State v. Castillo unpublished, 2015 WL 64555509(2015).** Affirmed.

FINES/FEES

KBI FEE

State v. Doyle Peeples 455 P.3d 429, 2020 WL 110868(01/10/20)
UNPUBLISHED
This is not a DUI case. Peeples pled to a number of counts of forgery and theft and some other charges were dismissed. The journal entry reflected a $400 KBI fee imposed but it did not indicate in which charge this was associated with. Peeples indicated the KBI fee was associated with a possession charge that was dismissed due to the plea. K.S.A. 28-176(a) requires the fee be imposed "if …. Laboratory services…are provided, in connection with the investigation." **The State provided no information at the plea or sentencing regarding any lab testing having been performed. In State v. Goeller 276 Kan.578 (2003), overruled on other grounds by State v. Dickey 301 Kan. 1018(2015) lab fees required for each of the three separate tests performed in relation to three separate offense. Here the record contains no evidence showing any testing actually occurred. Accordingly there was no basis for the district court to impose the fee.**

JAIL

VIOLATION OF PROBATION

State v. Dunn 460 P.3d 844, 2020 WL 1814277 (04/10/20)
UNPUBLISHED
During probation for a DUI, Dunn tested positive for alcohol use and admitted to the court he had violated his probation. The court imposed a 34 day jail sanction and continued Dunn's probation with increased drug and alcohol treatment. The jail sanction reflected the 34 days Dunn had spent in county jail since his arrest for the probation violation. Dunn appealed challenging the court's decision to

impose the jail sanction. **Once a violation has been established the decision of whether that violation warrants revocation or some other sanction is with the discretion of the court. State v. Skolaut 286 Kan. 219(2008).** The court was in its' authority to do what it did. The appellate court reviewed his argument even though he affirmatively ask the court to treat his 34 days as a sanction.

OPERATE OR ATTEMPT TO OPERATE

MOTORIZED MINIBIKE--SHIRLEY

Espinoza v. KDOR 462 P.3d 663, 2020 WL 2503268(05/15/20)
UNPUBLISHED
Espinoza was driving a small motorized minibike. It had a 2.5 horsepower, 80cc, single transmission and a top speed of 24mph. Espinoza drove the minibike on a public street. It did not have headlights or taillights. Officer stopped Espinoza—he was eventually arrested for DUI. He was giving the notices and refused. Espinoza had a CDL license. Because of this refusal he was disqualified for life from holding a CDL license. He requested a review. The main issue argued: **By riding a motorized bicycle—does that exempt Espinoza from the implied consent statutory scheme? K.S.A. 8-126(w) defines motorized bicycle as having two/three wheels and propelled by human power or a motor that has not more than 3.5 brake horsepower, not more than 130cc and a speed of no more than 30mph. Espinoza clearly fulfills the definition of a motorized bicycle. K.S.A. 8-126(u) defines "motor vehicle" as every vehicle, other than a motorized bicycle…" Espinoza acknowledges K.S.A. 8-1485 and K.S.A. 8-126(gg) both define vehicle as "every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, excepting electric personal assistive mobility devise or devices moved by human power or used exclusively upon stationary rails or tracks."** The district court found the statutory definition to include Expinoza's minibike. Espinoza argues this definition should not apply to his minibike because the definition of vehicle is general and the definition of motor vehicle is more specific. **The District Court discussed Shirley v. KDOR 45 Kan.App.2d 44(2010) in which the minibike was a "vehicle" defined in K.S.A. 8-1485(c) as required by the implied consent law. The Appellate Court indicated the district court got it right but for the wrong reason. The Appellate Court looked to the Uniform Commercial Driver's License Act stating a CDL holder is disqualified for life upon the second or a subsequent occurrence of any offense, test refusal or test failure. The Appellate Court looked to the definition of noncommercial vehicle: every vehicle which is self-propelled, and every vehicle which is propelled by electric power obtained from overhead trolley wires but no operated upon rails except vehicles moved solely by human power and motorized wheel chairs. K.S.A. 8-2,142(c).** Espinoza's vehicle does fit the description of a noncommercial vehicle and therefore he can be disqualified due to prior refusals and test failures including this one. Affirmed.

REASONABLE GROUNDS TO BELIEVE/PROBABLE CAUSE TO ARREST

SUBJECTIVE TESTS—SFSTS NOT NECESSARY

State v. Evans 451 P.3d 492, 2019 WL 6041497(11/15/19)
UNPUBLISHED
Evans was observed driving 111mph in a marked 60mph zone. Trooper initiated his lights however Evans decelerated so quickly the trooper had to move into the next lane to keep from rear-ending Evans. Evans told the trooper he did not have a license and was arrested. It was also determined Evans was to have ignition interlock on his vehicle and none was visible in Evans vehicle. While in the trooper's patrol car the trooper noticed an odor of alcohol beverage and Evans eyes were bloodshot.

Evans refused to take a PBT. The trooper requested Evans to take the evidential breath test. BAC 0.085. Evans had no slurred speech, no difficulty communicating and no balance, dexterity, or coordination problems. Evans moved to suppress the evidence due to lack of probable cause. The State argued Evans had committed a serious traffic infraction threatening the safety of the officer and others, the odor of alcohol on Evan's breath, bloodshot eyes and Evans refusal to take the PBT. Evans also indicated the trooper should have asked him to perform field sobriety tests. It was clear Evans was lawfully arrested for failing to produce a driver's license. **K.S.A. 8-1001 and State v. Kraemer 52 Kan.App.2d 686(2015) the officer may develop reasonable grounds after the person has been lawfully arrested but before the request to take a breath test. Field sobriety tests are not necessary to establish probable cause. A number of cases were reviewed dealing with subjective observations such as odor of alcohol and bloodshot eyes. See Casper v. KDOR 309 Kan. 1211(2019) City of Wichita v. Molitor 301 Kan. 251(2015); Sloop v. KDOR 296 Kan. 13(2012) State v. Pollman 41 Kan.App.2d 20(2008); City of Norton v. Wonderly 38 Kan.App.2d 797(2007) and Jackson v. KDOR, unpublished, 2018 WL 3596022(2018).** The erratic driving and bloodshot eyes tip the scale in favor of finding there were reasonable grounds to believe Evans was DUI. Further the PBT refusal was circumstantial evidence Evans knew he had been drinking and likely would fail the test. **Forrest v. KDOR** 56 Kan.ASpp2d 121(2018) rev. den. (2019).

FIELD SOBRIETY TESTS

INNOCENT INFERENCES-REWEIGH EVIDENCE

State v. Fleming 454 P.3d 621, 2019 WL 6972878(12/20/19)
UNPUBLISHED
Baker failed to use his turn signal while turning and was stopped. Baker's eyes were watery and bloodshot. Baker fumbled for his license and indicated he did not consume any alcohol before driving. Later Baker indicated he drunk a beer earlier. Walk and Turn test indicted Baker could not keep his balance during the instruction phase, stepped off the line, failed to touch heel to toe several times and took eight instead of nine steps. During the one leg stand he put his foot down several times and swayed significantly. Baker was arrested and refused a blood draw. Baker was charged with DUI and was found guilty. He appeals claiming the court lacked sufficient evidence to convict him. **Baker does not argue he passed these sobriety tests instead he argues each of these facts can give rise to innocent inferences that might negate his guilty. Because the State failed to produce evidence refuting each of the innocent explanations he provides the evidence was insufficient to convict. The Appellate Court indicates when reviewing evidence it must be most favorable to the prosecution and cannot reweigh evidence or make witness credibility determinations. This court has previously recognized several of the indicators in Baker's case as evidence of impairment. See State v. Wahweotten 36 Kan. App. 2d 568(2006) (defendant's bloodshot eyes and slurred speech); State v. Moore 35 Kan. App. 2d 274(2006) (defendant's difficulty communicating, delayed actions, and odor of alcohol); State v. Huff 33 Kan. App. 2d 942(2005) (defendant's erratic driving, bloodshot eyes, fumbling to find his driver's license, and the odor of alcohol) formed a substantial basis for his conviction. These reasonable inferences are sufficient to support Baker's conviction.** Affirmed.

REASONABLE GROUNDS TO BELIEVE/PROBABLE CAUSE TO ARREST

REFUSED SFSTS—NO MOVING VIOLATIONS

Fordham v. KDOR 121,410(05/01/2020)
UNPUBLISHED
Officer did not observe Fordham commit any moving violations however Fordham's tags were expired. Officer did not immediately pull Fordham over however allowed for him to drive into a subdivision and park in his driveway. Officer saw the following: open alcohol containers in the vehicle, bloodshot eyes, poor balance and coordination from Fordham. The district court found the stop was valid for expired tags. Fordham struggled to produce his license and refused to take either the field sobriety tests or a breath test. Fordham did not testify. **Based on all these observations, the Court and appellate court agreed the initial encounter was justified and constitutional, the officer had probable cause for the arrest and grounds to request the test. The advisories were correct and appropriate and he refused to take the test. There was an argument concerning the correct advisories(revised DC-70) and that was denied.** KDOR's suspension was affirmed.

IMPLIED CONSENT
ADDITIONAL TESTS

AMBIGUOUS STATEMENT—BONDED OUT

State v. Heineken 460 P.3d 392, 2020 WL 1646805(04/03/20)
UNPUBLISHED
Heineken was arrested for DUI and read the advisories. In doing so, the Deputy informed Heineken he had the right to get additional testing after he completed the official testing. The testing was completed. While waiting Heineken asked the officer about the possibility of obtaining an additional blood test. The deputy indicated Heineken could go to a hospital and have blood drawn. Something Heineken could do on his own. Heineken was allowed to use his phone while still in the testing room. He texted someone and then called his daughter about getting a ride home. There was no mention concerning testing. After testing was done Heineken had no further questions for the Deputy. Heineken bonded out of jail two and a half hours after the stop. Heineken files to suppress the results of the breath test on the grounds he was denied a reasonable opportunity to obtain additional testing. District court suppressed the test. **Under K.S.A. 8-1004 if a law officer refuses to permit additional testing the results of the tests are not to be considered to be "competent evidence." What is considered to be a "reasonable opportunity to have an additional test performed depends on the circumstances of each case. State v. George 12 Kan.App.2d 649(1988).** Although Heineken asked about the possibility of additional testing, he did not request to call a physician or hospital. Heineken did not request to be taken to a doctor or hospital. **A suspect's invocation of his or her statutory right to additional testing under K.S.A. 8-1004 must be unambiguous and unequivocal. Ambiguous statements concerning a desire to obtain a blood test does not obligate the deputy to clarify. Mitchell v. KDOR 32 Kan.App.2d 298 (2004); State v. Eichem, unpublished, 2005 WL 2949404(2005).** This is what we have in this matter. Heineken's statements at most are ambiguous and far from an unequivocal request for additional testing. There was no evidence in the record Heineken sought or attempted to seek additional testing even after he bonded out of custody. Reversed and Remanded.

EXPERT

CDR—DOWNLOAD—FOUNDATION

State v. Kellum 460 P.3d 394, ---WL---(04/03/20) rev. req.(2020)
UNPUBLISHED
Kellum was involved in a two car double fatal crash. Kellum's vehicle was equipped with a crash data recorder (CDR). The detective did not have the equipment to download the information and requested an officer with another agency to assist. The detective was present when the download was done. He observed no issues with the download and after review of the data obtained was certain the data was not corrupted. At trial the State did not call the officer that had the equipment to download the data but relied on the detective's knowledge of the device and his ability to review and report the data. **Kellum objected to the detective's testimony due to lack of foundation since the officer who actually downloaded the information was unavailable to testify. Evidentiary foundations come in all shapes and sizes, so there is no one size fits all rule beyond the idea that the evidence be reliable enough to consider. There must be substantial competent evidence supporting the district court's decision. Woessner v. Labor Max Staffing 56 Kan.App.2d 780(2019) Although the CDR data is not hearsay, "Kansas Courts require foundation testimony of the method of recording and the proper functioning of a mechanical device before the information obtained from the device is admissible State v. Estill 13 Kan.App.2d 111(1988).** While the detective was not trained on using the CDR download equipment he knew from personal experience how to use it. He watched others download information about 15-20 times. Detective saw no glitches, connection troubles, or any other download problems when the officer obtained the date from Kellum's CDR. The detective also commented the damage to the vehicles suggested a high-speed impact collision and it did correspond to the data that was obtained by the CDR. **Kellum relied on State v. Hurd, unpublished, 2016 WL 3128771(2016). Hurd was about a download of a cellphone. In dicta, it was mentioned the technician who downloaded the information from the phone should have testified to identify the software used and establish the technician's familiarity with the software and confirm its' accuracy.** The detective in this case identified the equipment used and established familiarity with the software used to download the CDR information. Affirmed.

ADMISSIBLE EVIDENCE

HEALTH ISSUES—SFSTS

State v. Klenklen 459 P.3d 840, 2020 WL 1492768(03/27/20)
UNPUBLISHED
Klenklen was charged and found guilty of DUI by jury. **He appeals claiming the State failed to produce direct evidence showing Klenklen was so impaired he could not operate his vehicle.** Klenklen had testified he had a number of health issues and could not perform the SFSTs appropriately. However during trial the following evidence was presented: (1) Klenklen had been speeding; (2) both officers noticed Klenklen had an odor of alcohol in his vehicle and during the SFSTs; (3) Klenklen had bloodshot and kind of watery eyes; (4) Klenklen was heavily smoking and had a mint in his mouth—an indication he was attempting to mask the smell of alcohol; (5) Klenklen was driving on an expired driver's license; (6) Klenklen had a prior DUI; (7) there was an open and partially full bottle of Bud Light in the center rear console cupholder within Klenklen's reach; (8) Klenklen's speech was slurred; (9) Klenklen appeared sluggish; (10) Klenklen exhibited a lack of balance at several points during the SFSTs; (11) Klenklen had difficulty following officer's instructions; (12) Klenklen failed the SFSTs; (13) Klenklen kept changing his

story a bit each time, but ultimately admitted to drinking Bud Light beer earlier in the day; (14) there was a small empty bottle of Fireball whiskey in Klenklen's vehicle; and (15) Officer noticed Klenklen had an odor of alcohol in the patrol car. Specifically, both officers testified based on what they saw, they believed Klenklen was impaired to the point it would affect his ability to safely drive his vehicle. **A rational fact finder could find beyond a reasonable doubt he was operating his vehicle while under the influence that rendered him incapable for safety operating.** Affirmed.

EXPERT

DAUBERT—STATES MOTION TO EXCLUDE

State v. Lyman 455 P.3d 393, 2020 WL 111496(01/10/20)
This is not a DUI case but explores the **Daubert** decision and dealing with expert witnesses. The State filed a motion in limine requesting an expert be precluded from testifying based on **Daubert v. Merrell Dow Pharm.** 509 U.S. 579(1993) Initially the court indicated **the Daubert Standard had been legislative adopted in Kansas and applied it In re Care & Treatment of Cone 309 Kan. 321(2019).** The District Court found the expert to be qualified and then proceeded to the next step and held the expert's proposed testimony was not reliable under Daubert. **The Appellate Court cited U.S. v. Nacchio 555 F.3d 1234(2009) the party presenting the expert must show reliability and relevance. The district court noted some of the listed Daubert factors had not been met: 1) technique or theory had not been tested 2) it had not been subject to peer review and publication 3) it had not been generally accepted in the scientific community. The court also considered factors that were NOT listed in Daubert 1) the test being used in the case was contrary to several fundamental tenets of Kansas evidence laws 2) research was not conducted independent of litigation—quoting Daubert—"what's going on here is not science at all but litigation"3) looked at treatment of expert in other cases.** It was determined the District Court judge did not abuse his discretion in determining the expert could not testify.

ADMINISTRATIVE HEARING

NO REASON FOR TRAFFIC STOP

Madison v. KDOR 455 P.3d 428, 2020 WL 110838(01/10/20)
UNPUBLISHED
Madison claimed at the DL hearing the officer lacked reasonable suspicion to initiate the traffic stop. Madison claimed although **Martin v. KDOR** 285 Kan. 625(2008) states the validity of the traffic stop was irrelevant for the purposes of an administrative appeal the legislature amended K.S.A. 8-1020 allowing the district court to consider any constitutional issue including the lawfulness of the traffic stop. The District Court agreed with Madison concerning the amendment and found the stop was constitutionally defective and did not uphold Madison's license suspension. **The Appellate Court agreed with the trial court in there was sufficient evidence indicating there was no valid reason for the stop but the court did not stop there. Citing Jarvis v. KDOR 56 Kan.App.2d 1081(2019) rev. grnt (12/17/19) the legislature has made it clear by its' amendment the initial police encounter is a justiciable issue in a DL suspension case. The court also cited to Sloop v. KDOR 296 Kan. 13(2012) K.S.A. 8-1001 requires a person be "arrested or otherwise taken into custody" meaning the arrest must be lawful. In this case, the officer lacked reasonable suspicion to initiate a traffic stop and the findings by the court were supported by substantial competent evidence.** Affirmed.

ADMINISTRATIVE HEARING

$50 FEE—TEST REFUSAL

Meats v. KDOR 447 P.3d 980, 2019 WL 3978377(09/23/19)
UNPUBLISHED
Meats made identical arguments as in **Creecy v. KDOR** 310 Kan. 454(08/23/19) **The $50 fee to request a hearing under K.S.A. 8-1020(d)(2) is unconstitutional on its face because it requires a payment of a fee without provision for indigency.** Also Meats argued the advisory form DC-70 did not substantially comply with K.S.A. 8-1002(k)(4)(A) and K.S.A. 8-1013(i) in it does not substantially differentiate the refusal or failure to complete an evidentiary test and a refusal to submit to a prearrest PBT which is not subject to sanctions. **As in Creecy, the court noted the phrase "evidentiary test" which K.S.A. 8-1013(i) refers to in its' definition of "test refusal" is sufficient to distinguish the postarrest BAC test from the prearrest PBT and the language in the DC-70 form used in this case nearly mirrors the statutory language.**

PRIORS

OUT OF STATE—COMPARABLE

State v. Mejia --- P.3d ----, 2020 WL 2602059 (05/22/20)
Mejia was charged with a felony DUI based on three prior convictions out of the State of Missouri. The judge refused to bind over Mejia on the felony and the State appealed. Mejia argued **State v. Wetrich** 307 Kan. 552(2018) requires the court to use the standard for determining the comparability of out-of-state criminal convictions to Kansas crimes for the purposes of computing defendant's criminal history. The Appellate Count indicated this is an improper standard for dealing with DUIs. First **State v. Reese 300 Kan. 650(2014) indicated the Kansas DUI law is a self-contained statute meaning what is required or good for Chapter 21 isn't necessarily so for DUI. Wetrich therefore is not controlling for DUI. The court also looked to State v. Gensler 308 Kan. 674(2018) and indicates this is not the correct standard now with the Legislative changes that have occurred since being published.** Also the Appellate Court noted the Kansas Legislature amended the DUI law to indicate convictions include a violation of any law of another jurisdiction that would constitute an offense that is comparable to DUI. **The Legislature added the following language to clarify: For the purpose of determining whether an offense is comparable the following shall be considered 1. The name of the out of jurisdiction offense 2. The elements of the out of jurisdiction offense and 3. Whether the out of jurisdiction offense prohibits similar conduct to the conduct prohibited by the closest approximate offense. The recent amendment to K.S.A. 8-1567 displays a legislative intent to avert Wetrich's the same as or narrower than test for comparable out of state convictions when it comes to DUIs. The appellate court reiterated the particular facts supporting the defendant's out of state conviction are not relevant and cannot be considered. The appellate court stated "what we understand the Legislature to mean functionally eliminates any material Wetrich-type problem resulting from inconsistent determinations of comparability in the district courts, since the vast majority of out of state convictions for DUI offense should be counted under K.S.A. 8-1567(i). The Appellate Court went so far in their opinion to look at other statutes from other states and concluded: the Kansas Legislature intends no dispensation from the recidivist provisions of K.S.A. 8-1567 for a driver with a conviction for DUI**. There was a dissent by Schroeder however all issues were specifically address by majority opinion. The district court erred in not counting the Missouri prior DUIs. Reverse and Remanded.

SEARCH WARRANT

FOREIGN NATIONAL—VIENNA CONVENTION

State v. Mendez-Esparza 449 P.3d 1231, 2019 WL 5089853(10/11/29)
UNPUBLISHED
Mendez-Esparza refused to take a breath test. The officer applied for and obtained a search warrant. During the encounter the officer notice Mendez-Esparza had a limited term driver's license and she was not an American citizen. The officer asked Mendez-Esparza if she wanted him to notify the Mexican Consulate. She indicated she wanted him to. During the process of filling out the paperwork to contact the Consulate, Mendez-Esparza became argumentative and refused to respond or sign the documents. The officer took that to mean she no longer wished to notify the Consulate. The court found her guilty and an appeal was made. Mendez-Esparza sought an appeal on two grounds—1) officers could not seek a search warrant for a breath test after a suspect had refused to consent and 2) denying her right to notify the Consulate. **The Appellate Court noted City of Dodge City v. Webb 305 Kan. 351(2016) there is nothing in the statutory scheme prohibiting law enforcement from obtaining and executing a warrant to obtain a search warrant.** Mendez-Esparza asserts without authority or explanation the denial of the assistance of the Consulate is equivalent to a denial of her right to counsel. Therefore the results of the testing must be suppressed. **The State did agree foreign nationals have a right when arrested to have protection under the Vienna Convention. However suppression is not an appropriate remedy. The Appellate Court indicated by notifying the Consulate it does not guarantee defendants any assistance at all—only a right of foreign nationals to have their consulate informed of their arrest or detention—not to have their consulate intervene. Citing State v. Rosas 28 Kan.App.2d 382(2000) suppression of evidence was not an appropriate remedy for a violation of the Vienna Convention because the Vienna Convention's purpose is to benefit consular posts in their performance, not grant rights to individuals.**

REASONABLE SUSPICION-VEHICLE IN MOTION

EXPANDING THE STOP

State v. Miller 120,475(05/08/2020)
UNPUBLISHED
This is not a DUI case however the officer did have suspicion the driver was under the influence. Officer, at 2am, observed a vehicle with no working taillights, heavy rear-end damage and a broken-out rear windshield. **The vehicle made a very aggressive left turn from the right lane through a red light and the vehicle was stopped. The officer suspected the driver to be under the influence. The driver tried to explain they were going to the Walmart to get parts for the car. The officer did not believe this was plausible because the driver was from Ottawa. The officer explained Walmart would not have the parts to fix the car and he drove from Ottawa, Kansas to northern Johnson County to pick up a friend to go to Walmart at 2am. The driver's appearance was described as: pupils constricted, speech and body movement were rapid. It also appeared the driver and Miller, a passenger, did not seem to know each other. A drug dog was called. There was a number of innocent explanations for the behavior of the driver however there was no explanation for his constricted pupils. The district court determined the officer had reason to extend the traffic stop for the purpose of conducting a drug investigation. The Appellate Court cited State v. Chapman 23 Kan.App.2d 999(1997) and State v. Jones 300 Kan. 630(2014).** Affirmed.

SEARCH WARRANT
IMPLIED CONSENT

UNCONSCIOUS—WARRANTLESS BLOOD DRAW

Mitchell v. Wisconsin 588 U.S. ___, 139 S.Ct. 2525, 204 L.Ed.2d 1040(2019)
Mitchell was stopped and appeared to be very drunk. Mitchell was stumbling and slurring his words. SFSTs were not performed due to his inability to stand. PBT 0.24. Mitchell was arrested and while being transported to the police station his condition began to deteriorate. Mitchell lost consciousness. Officer transported him to the hospital. Standard Advisories were read to Mitchell and he did not respond. Mitchell remained unconscious during the blood draw. BAC 0.22. Mitchell moved to suppress the results based on a violation of the 4th amendment. **The court indicated when police have probable cause to believe a person has committed a drunk driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test they may almost always order a warrantless blood test to measure the driver's BAC without offending the 4th Amendment. The court did not rule out the possibility that in an unusual case a defendant would be able to show his blood would not have been drawn if police had not been seeking BAC information and police could not have reasonably judged a warrant application would interfere with other pressing needs or duties.** There were a number of dissents.

PROTOCOL—20 MIN

DEPRIVATION V. INTOXILYZER TURNED ON

Molina v. KDOR 456 P.3d 227, 2019 WL 6795547(12/13/19)
Molina appealed his suspension claiming KDHE protocol was not followed in administering the test. BAC 0.218. Molina failed to subpoena the testing officer for the hearing. Molina argues the time sequence claiming the deprivation period began at 1:10 and the machine was turned on at 1:30 the test would have begun 59 seconds before the alcohol deprivation period ended. Molina's speculative hypothetical is based on the assumption the deprivation period ended when the officer turned on the machine not when the test was actually administered to Molina three minutes later. This is inconsistent with KDHE's protocol for the Intox 9000. **The whole point of the alcohol deprivation period is to assure the test subject has neither placed alcohol in his or her mouth during the deprivation period nor allowed some other substance in the test subject's body which could interfere with the accuracy of the test which is about to be administered. It would make no sense for there to be a time lapse between the end of the deprivation and observation period and a later breath test. Court cites Ruppe v. KDOR, unpublished, 2019 WL 5089723(2019) and Bryant v. KDOR, unpublished, 2009 WL 112821(2009) The 20 minute deprivation period ends when the Intox 9000 breath test is actually administered not when the machine is turned on.**

ALTERNATIVE CHARGES

ENDANGERING A CHILD—JURY UNANIMITY

State v. Mulloy 459 P.3d 210, 2020 WL 1223509(03/13/20)
UNPUBLISHED
Mulloy was charged with aggravated endangering a child and DUI. She was acquitted of DUI however found guilty of agg endangering. There was a sufficiency argument that will not be reported here, however there was an argument claiming aggravated child endangerment is an alternative means crime for which the State failed to present sufficient evidence to support each alternative means. The State argues it is not an alternative means crime. The court noted: **Under the test set forth in State v. Brown 295 Kan. 181(2012), the statutory language "causing or permitting" does not present two alternative means of committing the crime of aggravated endangerment of a child. Rather, the phrase "causing or permitting" merely describes a factual circumstance that may prove a distinct, material element of aggravated child endangerment—namely, placing a child in a situation in which the child's life, body, or health was endangered. In other words, the actus reas of K.S.A. 2019 Supp. 21-5601(b)(1) is to place a child in a dangerous situation and the phrase "causing or permitting" merely describes this material element. Thus, the phrase "causing or permitting" does not describe alternative means; rather, it describes options within a means. The inclusion of this language in the jury instructions did not make this an alternative means case triggering concerns of jury unanimity.**

ANONYMOUS TIP
OPERATE OR ATTEMPT TO OPERATE

SITTING BEHIND THE WHEEL—VEHICLE RUNNING—USE OF WORD "HE"

Murray v. KDOR 457 P.3d 216, 2020 WL 741545(02/14/20)
UNPUBLISHED
An anonymous tip was received concerning an erratic driver. Throughout the conversation the tipster described the driver as "he" and "that driver." The dispatcher did not confirm whether the tipster was using the generic "he" or that the driver was in fact male. The Murray contended she was not driving. About 10 minutes after receiving this information, Officer found a white Jeep with a black top legally parked off of the Road in an entrance to a farm field. Officer approached the Jeep, which was running but not in gear. He found Murray in the driver's seat and passenger in the passenger's seat. Officer noticed an open bottle of Fireball whiskey on the Jeep's dash and a 12-pack of beer on the floorboard. The owner of the vehicle was Murray. When asked who was driving Murray responded "there are two people here you do the math". Murray was uncooperative through the process. At some point Murray did state she was not the driver. She admitted to drinking. Murray was arrested and requested to take a breath test. She refused. Murray requested a hearing claiming the officer did not have reasonable grounds to request the test because there was no evidence she was driving. **The district court here cited several facts in the record supporting its finding that Murray was the driver: Only 10 minutes passed between the call to dispatch and Officer finding Murray behind the wheel of the vehicle; the description of the Jeep's erratic and aggressive driving was consistent with a car being driven by an intoxicated person; Murray was in the driver's seat when Officer arrived; the car belonged to Murray, and she had only met the passenger the night before; Murray admitted to drinking, was extremely inebriated, and there were multiple open containers in the vehicle; officer was entitled to discount**

Murray's self-serving account of why she was behind the driver's seat. Appellate Court does not reweigh evidence and therefore found the court's reasoning sound and supported by the record. "Using the ways of the world, it is not uncommon for someone to refer to inanimate objects as 'he' or 'she', and for all anyone knew that night, the 911 caller was simply focusing on the vehicle itself." The court's consideration of this evidence was reasonable, and its factual findings are supported by substantial competent evidence in the record. **State v. Darrow** 304 Kan. 710(2016) was briefly discussed.

FIELD SOBRIETY TEST
IMPLIED CONSENT

GOOD FAITH—RYCE—EXPERT TESTIMONY

State v. Nieder 458 P.3d 997, 2020 WL 1074715(03/06/20)
UNPUBLISHED
Nieder appeals his DUI conviction on three issues. First the implied consent read to Nieder had the offending language addressed in **Ryce I** and **Ryce II** however the trooper when reading the document to Nieder in 2015 would have no idea he would be violating his rights based on the 2016/2017 rulings. **The court found good faith citing State v. Perkins 310 Kan. 764(2019) allowing for the admissibility of the breath test.** Second Nieder contends the district court erred by allowing the trooper to testify about the results of the SFSTs without the use of expert testimony to interpret the results of the tests specifically the walk and turn and the one leg stand. **The court cited to State v. Shadden 290 Kan. 803(2010) noting an expert witness is not required to interpret the results of these tests.** Lastly Nieder argues he was denied equal protection of the law because other district court judges resolved similar motions while his motion remained undecided. **The court noted other cases were shown to be dissimilar due to defendants being charged with Criminal Refusal under K.S.A. 8-1025 and Neider being charged with DUI K.S.A. 8-1567 so it was questionable whether there was different treatment at all.**

SENTENCING—JAIL

VIOLATION OF POST IMPRISONMENT—REVOCATION

State v. Reed 461 P.3d 864, 2020 WL 1969435(04/24/20)
UNPUBLISHED
Reed was sentenced on two cases 17 CR 52: 12 months suspend all but 90 days with 12 months PIS. 17 CR 2390: 136 months in prison with 36 months probation. These were to run consecutive. She violated her probation more than once. She admitted to the violations. **Judge revoked her post-imprisonment supervision and ordered her to serve the rest of her one-year jail term and her post-imprisonment supervision period.** In the 17 CR 2390 the court extended Reed's probation by 24 months and ordered her to complete a residential program after completing her jail sentence in 17 CR 52. **Reed appeals claiming abuse only in the 17 CR 52 case. K.S.A. 8-1567(b)(3) allows a court to revoke supervision and order the defendant to serve "the remainder of the period of imprisonment, the remainder of the supervision period, or any combination or portion thereof. Although Reed had already served her sentence by appeal time, and the issue was moot, the Appellate Court indicated her arguments would not prevail on the merits.** Affirmed.

PRIOR CONVICTIONS

FELONY CONVICTION—COLLATERAL CONSEQUENCES

State v. Reider 458 P.3d 307, 2020 WL 967859(02/28/20)
UNPUBLISHED
Reider was charged with a 3rd felony. He had two DUI convictions and both were within the 10 year period. **However, one of the convictions was DUI within the City of Wichita and the Kansas Supreme Court had decided a DUI offense under the Wichita city ordinance in effect at the time of Reider's offense is defined more broadly than under Kansas law citing State v. Gensler 308 Kan. 674(2018). Because of that the Wichita conviction could not be considered. Reider than would only have one prior conviction that counted and he should have been found guilty of a misdemeanor and sentenced as such. The court notes Reider has now fully served his sentence and the Legislature amended the statute, effective May 23, 2019 to provide an illegal sentence may be corrected "at any time while the defendant is serving his sentence" K.S.A. 22-3404(a) Neither party requested we apply the amended statute to this appeal and the State has conceded Reider should be resentenced. The issue is considered moot however because of the collateral consequences of a felony conviction Reider has a right to be resentenced.** Vacated and Remanded.

IMPLIED CONSENT

CONSTITUTIONALITY

Reilly v. KDOR 462 P.3d 195, 2020 WL 2089635 (05/01/2020)
UNPUBLISHED
Reilly was arrested for DUI and read the DC-70 form. This was the revised DC-70 after the Ryce and Nece decisions were decided by the Kansas Supreme Court. Reilly contends the advisories were unconstitutionally coercive and also failed to inform him of the consequences of driving with an ignition interlock device. **Reilly argues the advisory was coercive because it stated "Kansas law *requires* you to submit to and complete one or more tests of breath, blood or urine to determine if you are under the influence of alcohol or drugs or both." During the relevant time period of Reilly's arrest K.S.A. 8-1001(k)(1) mandated law enforcement officers give the notice that Kansas law requires the testing. Reilly argues City of Lenexa v. Gross 2007 WL 2043580(2007). Gross is factually distinguishable from this case because it dealt with the PBT results and not the evidential breath test. The Court also pointed out a number of cases had rejected this unconstitutionality argument previously: Williamson 2018 WL 5730137(2018), McGinnis v. KDOR 2018 WL 5728375(2018), Bynum v. KDOR 2018 WL 2451808(2018). Reilly also suggests paragraph 8 is unconstitutional in that refusal to test can be used against you in court. Citing South Dakota v. Neville 103 S.Ct. 916(1983) a refusal, lawfully requested, is not coercive and does not violate privilege against self-incrimination. Reilly also challenged the advisories they did not state consequences of being required to drive with an ignition interlock device. Kansas law does not require a law enforcement officer advise a driver of all of the collateral consequences that might result from a test refusal.** They also suggested notice is not required for collateral consequences even though they may impact an individual's lifestyle. See also **Fordham v. KDOR** 121,410(05/01/2020)

PROTOCOL-20 MIN

IMMEDIATE PRESENCE—SUSTANTIAL COMPLIANCE

Ruppe v. KDOR 449 P.3d 1230, 2019 WL 5089723(10/11/19)
UNPUBLISHED
Ruppe claims the officer administering the test did not substantially comply with KDHE protocols claiming he had chewing tobacco in his mouth during the deprivation period and the testing. The court notes the protocol does not include a requirement the officer check the mouth of the subject prior to the administration of the test. **The only instruction requires the officer to keep the subject in their immediate presence and deprive the subject of alcohol for 20 minutes immediately preceding the breath test. Ruppe also claimed the officer did not keep him in their immediate presence for the required time. The court looked at a number of cases: Schroeder v. KDOR unpublished, 2018 WL 1546244(2018); Neiman v. KDOR unpublished, 2017 WL 2712949(2017) and State v. Anderson unpublished, 2006 WL 903169(2006) noting substantial compliance is all that is required to determine the protocol was filed.** In this case there was no violation of the protocol. Affirmed.

REASONABLE GROUNDS TO BELIEVE/PROBABLE CAUSE TO ARREST

CRASH—NO SFSTS

Steinlage v. KDOR 459 P.3d 213, 2020 WL 1222948(03/13/20)
UNPUBLISHED
The weather was below freezing and winds were extreme. A call was received about a car crash. Deputy observed a vehicle overturned in a field but the driver was not at the scene. Alcohol containers were found around the vehicle. While investigating, it was determined Steinlage had been the driver. Parents of Steinlage found Steinlage walking away from the crash toward their home and the parents picked him up. Steinlage explained he had a "problem" driving and the vehicle overturned. Deputy noticed Steinlage's speech was "a little slurred" These observations coupled with Steinlage strange behavior of leaving the crash and walking home in the freezing temperatures led Deputy to believe Steinlage had been driving impaired. No SFSTs were performed. PBT indicated over 0.08. Evidential BAC 0.207. Steinlage claims the Deputy did not have reasonable suspicion to request the test. The court cited to a number of cases **Poteet v. KDOR** 43 KanApp.2d 412(2010); **Hanchett v. KDOR**, unpublished, 2016 WL 6822802(2016); **State v. Spoon**, unpublished, 2004 WL 1176688(2004) to indicate evidence supports Steinlage had reasonable suspicion.

REASONABLE GROUNDS TO BELIEVE/PROBABLE CAUSE TO ARREST

TURN SIGNAL—EXTEND THE STOP

Strickert v. KDOR 462 P.3d 649, 2020 WL 1223226(03/13/20)
UNPUBLISHED
Officer observed Strickert fail to signal before making a turn. Strickert agreed he waited til he was stopped at the T-intersection before he activated his turn signal. He argued the statute K.S.A. 8-1548 only applies to vehicle in motion and not to vehicles that are stationary. **The court indicated a driver is absolutely liable if he or she fails to continuously signal a turn for 100 feet prior to the turn. State v. Greever, 286 Kan. 124(2008).** Once the vehicle was seized Strickert claimed the officer lacked reasonable suspicion to extend the stop. **The court noted the officer may only "request a driver's**

license and vehicle registration, run a computer check, and issue a citation." Citing State v. Golston 41 Kan.App.2d 444(2009) however the stop can be extended if the officer "has reasonable and articulable suspicion the driver has, is or is going to engage in some other illegal activity." The court in this case stated the totality of the circumstances provide reasonable suspicion. There existed a minimum level of objective justification sufficient for the investigative detention of the motorist citing **Pollman** 286 Kan 881(2008) Here the officer saw a traffic infraction; detected an odor of alcohol coming from Strickert; watery bloodshot eyes and Strickert's admission to consuming alcohol. Lastly Strickert claimed there was no probable cause for the arrest and therefore if the arrest is improper Strickert's refusal to take the evidential test did not warrant suspension of his driving privileges. The court recites a number of facts indicating the arrest was justified and affirmed the court in suspending Strickert's license. Affirmed.

FINES/FEES/COSTS

DORMENT/VOID—REVIVE A JUDGEMENT

State v. Vaughan 120,432(11/01/19)
UNPUBLISHED
In 2010 Vaughan was sentenced to his seventh DUI. While in prison in 2018 on unrelated charges Vaughan moved to dismiss his fines, costs and fee assessment claiming the judgement against him was dormant and void. In April 2018 a collection firm requested and was granted a garnishment to collect the amounts due and owing from Vaughan's inmate account. Vaughan filed a number of motions to dismiss this action. Vaughan appeals. 1. **Vaughan's fines and costs were not dormant or void. K.S.A. 60-2403(b) was amended in 2015 "no judgment for court costs, fees, fines or restitution shall be or become dormant for any purpose except as provided in this subsection." The amendment did not violate the plea agreement. Penalty for a criminal offense is the penalty provided by statute at the time of the commission of the offense. State v. Sylva 248 Kan. 118(1991) Even under the old statute the state could have revived a judgement and continued to collect. Vaughan also attempted to claim a challenge to his sentence through the garnishment proceeding indicating the judge failed to determine whether Vaughan was able to pay the fines and costs citing State v. Copes 290 Kan. 209(2010)** Judgement was final when pronounced and Vaughn did not appeal. There were other issues concerning appointment of counsel etc in this proceeding some of the issues were remanded back to the district court but will not be discussed here.

IMPLIED CONSENT

CONSTITUTIONALITY—SUSPENSION OF LICENSE

Walker v. KDOR 462 P.3d 197, 2020 WL 2090798(05/01/2020)
UNPUBLISHED
Walker was arrested for DUI. He challenges the constitutionality of **K.S.A. 8-1001(c)(2) which states "when requesting a test or tests of breath or other bodily substances other than blood or urine, under this section, the person shall be given oral and written notice that if the person refuses to submit to and complete the test or tests the person's driving privileges will be suspended for a period of one year." Birchfield v. North Dakota 136 S.Ct. 2160(2016) held the 4th Amendment permits warrantless breath tests in some cases. In Ryce 306 Kan. 682(2017) the Kansas Supreme Court did not invalidate the entire implied consent statutory scheme. And lastly, "compulsory testing for alcohol or drugs**

through drivers implied consent does not violate the Constitution, it is reasonable in light of the State's compelling interest in safety on the public roads." Martin v. KDOR 285 Kan. 625(2008). KDOR's decision to suspend Walker's license for his refusal was justified under the constitutionally valid statutory provision. There was also a challenge to the sufficiency of the evidence. Affirmed.

ADMINISTRATIVE HEARING

DC-27—UNDISPUTED EVIDENCE

Weippert v. KDOR 451 P.3d 492, 2019 WL 6041814(11/15/19)
UNPUBLISHED
Weippert was arrested for DUI. He appealed his suspension of his license. The DC-27 indicated the following: odor of alcohol, open container in the vehicle, failed SFSTs, slurred speech, bloodshot eyes, poor balance, admitting to consuming alcohol, and failed PBT. Weippert testified at the district court hearing indicating a multitude of issues: fighting pneumonia, muscles were weak, slope of driveway when performing SFSTs, and a bad ankle. The judge based some of his findings on facts on his personal knowledge of the street and intersection from his prior service on the city commission. The criminal matter in this case had required a motion to suppress in which was granted. The district court in the admin hearing indicated the suppression hearing had similar facts and then attached a copy of that order to his findings in the suppression matter. Based on the video, which was not part of the record on appeal, the district court found the officer without probable cause and suppressed the arrest and breath test. The district court reinstated his license. KDOR appeals. **Citing to Smith v. KDOR 291 Kan. 510(2010) the district court made some findings that were not supported by the record. Also citing Casco v. Armour Swift-Eckrich 283 Kan. 508(2007) "a factfinder cannot disregard undisputed evidence that is not improbable unreasonable or untrustworthy. Such evidence must be regarded as conclusive. Weippert was required to prove the officer did not have reasonable grounds to believe he was DUI. Weippert's testimony alone is insufficient to overcome the DC-27 conclusive evidence. K.S.A. 8-1020(t) states: the facts found by the hearing officer or by the district court upon a petition for review shall be independent of the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrence. The disposition of those criminal charges shall not affect the suspension or suspension and restriction to be imposed under this section." Using the suppression hearing information in the admin hearing was improper.**

OTHER TRAFFIC CASES OF INTEREST

LEAVING THE SCENCE/FAILURE TO REPORT

State v. Derusseau 451 P.3d 490, 2019 WL 5849809(11/08/19)
UNPUBLISHED
Officers were dispatched to a crash involving a tractor and a vehicle. A passenger on the tractor was hurt. It was determined the driver of the tractor, Derusseau, had left the scene. There was evidence of Derusseau drinking. Derusseau was charged with DUI and leaving the scene. At trial Derusseau was found guilty of both charges. Derusseau appeals claiming K.S.A. 8-1604 is vague because it creates an "impossible situation" for drivers involved in an injury accident by requiring them to give immediate attention to injured persons—which could require a driver to transport an injured person to the hospital—and also requiring the person to wait at the scene for law enforcement to arrive. **The court indicated a person of ordinary intelligence is provided with fair notice that whether it is an injury, noninjury, or attended property damage accident, a driver must remain on the scene until the driver**

reports certain information. The statute details the information the driver must give to law enforcement before the driver can lawfully leave the scene. The statute also adequately guards against arbitrary and unreasonable enforcement. ATTORNEY CONDUCT: Derusseau claimed the prosecutor's closing argument was focused on his lack of credibility and motive to lie. **Clearly a prosecutor cannot state his personal opinion about the reliability or credibility of a witness testimony but a prosecutor may make statements about a defendant's trustworthiness to point out inconsistencies in a defendant's statements and to argue evidence that reflects poorly on a defendant's credibility.** Citing **State v. Sprague** 303 Kan. 418(2015) and **State v. Williams** 308 Kan. 1320(2018) **The prosecutor can even suggest "the jury not to condone the defendant's behavior"** citing **State v. Adams** 292 Kan. 60(2011)