SUPPLEMENT TO THE 14TH EDITION DUI LAW BOOK

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REASONABLE SUSPICION-VEHICLE IN MOTION

FLAT TIRE-PUBLIC SAFETY STOP-ASKING FOR LICENSE

City of Salina v. Dahl 432 P.3d 107, 2018 WL 6711256(12/21/18)
*****UNPUBLISHED*****
Officer observed a vehicle with a flat tire. He stopped the vehicle because he found it bizarre the driver would continue driving on a flat tire, to check on the driver's welfare, and to determine if the vehicle had been involved in a hit and run. A motion to suppress was filed. The court limited the suppression issue to whether the officer conducted a public safety stop or a traffic stop and found the officer exceeded the scope of a public safety stop. On appeal the City argued the officer conducted a public safety stop and developed reasonable suspicion to morph the stop into an investigative stop. **The court noted a public safety stop has three parts 1) citizen is in need of help or is in peril 2) the officer may take appropriate action to render assistance 3) if the officer determines the citizen is not in need of help any actions beyond that constitutes a seizure and protections of the 4th amendment. State v. Messner 55 Kan.657(2018) We do not have that here. The officer upon stopping the vehicle shifted the purpose of the stop –within less than 30 seconds—away from Dahl's need for help by asking for her license and insurance.**

REASONABLE SUSPICION-VEHICLE IN MOTION

VIDEO-DRIVING ON THE WRONG SIDE OF THE ROAD

State v. Bailey 423 P.3d 566, 2018 WL 3802063(08/10/18)
*****UNPUBLISHED*****
Officer testified Bailey had cut the corner and crossed over the center double yellow line in violation of K.S.A. 8-1514. Because of this violation the vehicle was stopped. There was a video but it did not show if the driver shorted the turn. According to the district court the video showed although Bailey's vehicle was not entirely in the wrong lane of travel it crossed the center line and did not stay completely within its lane. The appellate court reviewed the statute as well as the video AND the officer's testimony. **The appellate court indicated they are to review the record to determine whether the findings are supported by substantial competent evidence. Patterson 304 Kan. 272(2016) The appellate court considered the officers testimony in order to fully evaluate all of the substantial competent evidence presented at the suppression hearing.**

COMPLAINT
ATTEMPT TO OPERATE

NOT PREJUDICIAL-SLUMPED OVER THE WHEEL

State v. Barry 435 P.3d 595, 2019 WL 985434(03/01/19)
*****UNPUBLISHED*****
Barry was charged with Criminal Refusal K.S.A. 8-1025. After the **Ryce I** 303 Kan. 899(2016) the State amended the complaint to charge K.S.A. 8-1567. Barry then filed a motion indicating the new crime charged prejudiced his substantial rights. **This motion was filed prior to preliminary hearing.** The court found this not to have violated any rights. The Appellate Court indicated **K.S.A. 22-3201(e) the State may amend an information at any time before verdict if no additional or different crime is charged and if substantial rights of the defendant are not prejudiced. The court also indicated even the charging of a different crime maybe be allowed by an amendment to a complaint before trial provided the substantial rights of the defendant are not prejudiced. State v. Bischoff 281 Kan. 195(2006)** There was nothing in the record to support Barry's claim the amended complaint prejudiced his rights or impaired his ability to present a full and complete defense to the DUI charge. Barry also challenged the sufficiency of the evidence claiming he did not operate or attempt to operate the vehicle. Barry was slumped over the wheel when officers attempted to wake him. Barry woke up and attempted to start the car and put it in gear. Barry claimed the vehicle had a dead battery and could not have moved

or attempted to move the vehicle. **The court cited to State v. Penland 2004 WL 2496811(2004). In that case the car was inoperable due to a broken axle but the defendant was seen revving the engine and spinning the tires. It is not necessary to show movement to establish an attempt to operate a vehicle State v. Adame 45 Kan.App.2d 1124(2011)**

PROBABLE CAUSE/REASONABLE GROUNDS TO BELIEVE

EXPLAINING AWAY ALL EVIDENCE

State v. Base 405 P.3d 61, 2017 WL 5184384(11/09/19)
*****UNPUBLISHED*****
Trooper stopped Base for driving his truck left of center and weaving in his lane. Video indicated Base crossed the fog line traveling into the dirt on the passenger side of the road. Trooper stopped Base for failing to maintain his lane. Base had an odor of alcohol, somewhat slurred speech, bloodshot eyes and admitted to drinking. SFSTs indicated 5 clues on the one leg stand and 4 clues on the walk and turn. Base refused PBT and evidential breath test. **The court looked to K.S.A. 8-1522; State v. Marx 289 Kan. 657(2009) concluding there was no reason for Base to swerve as he did. This was not a momentary lane breach. Base tried to explain there was a dip in the road and that is why he crossed the center line but did not explain the remainder of his driving errors. As for his poor performance on the SFSTs Base indicated he had a bad back. Base's explanation of having a bad back does not negate the evidence of his poor performance on the SFSTs rather this explanation is one factor to consider in the totality of the evidence.** Base also argues his odor of alcohol and his admission to drinking was insufficient to support a DUI charge citing **State v. Arehart** 19 Kan.App.2d 879(1994). The Court found this case was clearly distinguishable and found there was sufficient evidence to find him guilty.

PBT

Berning v. KDOR 423 P.3d 567, 2018 WL 3946276(08/17/18)
*****UNPUBLISHED*****
This case deals with PC and the requesting to take a PBT. The court indicated the District Court did not have the pleasure of knowing the ruling in **State v. Robinson** 55 Kan.App.2d 209(2017), and therefore returned the case to the District court for further review.

SEARCHES

NOT NEAR THE VEHICLE-NO KNOWLEDGE WHEN GOT OUT-ANOTHER MAY HAVE GOTTEN IN

State v. Blanco 432 P.3d 111, 2018 WL 6816187(12/28/18)
*****UNPUBLISHED*****
Officer observed a vehicle driving with it's headlights off and attempted to stop the vehicle. The officer was able to get a good look at the driver but due to the pursuit policy could not get the vehicle stopped. A short time later the officer saw the driver standing about 20 yards away from the vehicle in a parking lot. When Blanco saw the officer he started to walk away. Blanco was eventually arrested for DUI and a search was done of his vehicle. The search found 155.3 grams of Marijuana. Blanco filed a motion to suppress the evidence found in his vehicle. **There was a review of State v. Ewertz 49 Kan.App.2d 8(2013); Arizona v. Gant 556 U.S. 332(2009) and Thornton 541 U.S. 615(2004) and NY v. Belton 453 U.S. 454(1981) and it was determined the officer had not maintained watch over Blanco's vehicle; they could not determine how long since he had exited, and were unaware whether anyone else had entered it. Blanco was standing 20 yards away and was not a recent occupant or suspect who was next to the vehicle. There was no exception to the warrant requirement. The State also argued good faith. The court noted good faith only applies when an issue is "settled caselaw" Because of State v. Karson 44 Kan.App.2d 306(2013) there is a split between two Gant interpretations. Therefore good faith exception cannot apply.**

JURISDICTION
SENTENCING

STROKE-YEARS PASSED BETWEEN SERVING CONSECUTIVE SENTENCES

State v. Blankenship 429 P.3d 625; 2018 WL 5726492(2018)
*****UNPUBLISHED*****
Defendant was sentenced to serve two consecutive DUI -- 12 months sentences which could be done with work release. Blankenship violated the rules and his work release was revoked. Blankenship filed a motion to reinstate and the court denied the motion. **Blankenship appealed and got an appeal bond and electronic monitoring.** Before the appeal was final Blankenship suffered a debilitating stroke. Blankenship had served the sentence in one of the cases but not yet the other. **3 years later Blankenship was ordered to finish his term on the second case. Blankenship made a number of arguments one being house arrest. The court rejected them all concluding it did not have authority since work release did not work out. It is true a district court cannot alter a sentence after imposing it. State v. Marinelli 307 Kan. 768(2018) However, Blankenship's request would not alter his sentence. Work release reflects the manner in which Blankenship might serve the DUI sentences—not the sentences themselves. The district court had discretion to request Blankenship again be considered for placement in the work release program.**

MIRANDA

PROPENSITY V. KNOWLEDGE

State v. Boggs 287 Kan. 298, 197 P.3d 441(2008)
Boggs was stopped for DUI. A glass pipe with marijuana residue was found under the passenger seat where Boggs was seated. Police could smell burnt marijuana on Boggs' clothing and Boggs eyes looked dilated. Boggs stated he had smoked marijuana about a month before the stop. **Boggs was charged with possession of marijuana and paraphernalia. Boggs attempted to keep the statement about his drug use out of the trial because it would be admitted solely for the purpose of showing he had a propensity for using drugs.** The trial court denied the motion holding in nonexclusive possession cases prior use of drugs could be considered by the jury. The jury was instructed the statement could only be considered for the purpose of proving the defendant's intent, knowledge and absence of mistake or accident in this case. **The appellate court distinguished between two types of cases: cases where the defendant provides an innocent explanation for his or her possession of contraband and cases where the defendant disputes possession of the drugs in question. In this case Boggs sole defense was not that he did not possess the glass pipe—he completely denied ever having possession of the pipe at all. Prior use of drugs nether proves nor disproves the validity of the assertion. This is precisely what K.S.A. 60-455 was designed to prevent.**

REASONABLE SUSPICION-VEHICLE IN MOTION

SEATBELTS—OPEN CONTAINERS

State v. Burket 425 P.3d 376, 2018 WL 4265364(09/07/18)
*****UNPUBLISHED*****
Burket's vehicle was stopped due to the passenger not wearing his seatbelt. The passenger was leaning forward in the vehicle and the officer could tell the seatbelt was not across his chest. Once the vehicle was stopped it was noted the passenger had his seatbelt on however the shoulder strap was behind his back. **The court noted K.S.A. 8-2503(a)(1) requires the seatbelt be properly fastened when the car is in motion. State v. Martynowicz 2013 WL 5303557(2013) states an officer had reasonable suspicion for traffic stop after seeing driver and passenger without seatbelts on while stopped at an intersection. Once the vehicle was stopped by the officer he found a can of beer in the vehicle**. During trial a photo of the can was admitted over objection due to the labels on the can being hearsay.

Burket cites **Gubbels 2007 WL 2580501(2007) Gubbels found the alcohol labels do not fall within a hearsay exception. The court did not follow Gubbels and allowed the photos. The appellate court found no error with this since the officer testified the cans had liquid in them; they smelled like alcohol; and had a brown tint as beer. Burket also indicated the photo did not indicate whether the cans contained beer or cereal malt beverage. Burket contends open containers which contain cereal malt beverage do not violate K.S.A. 8-1599. The statute prohibits transporting alcoholic beverages. K.S.A. 41-102 defines both alcoholic liquor or cereal malt beverage as an alcoholic beverage.**

IMPLIED CONSENT

AG ADVISORIES-SEVERABILITY

Cameron v. KDOR 430 P.3d 490, 2018 WL 6005402(11/16/18)
Williamson v. KDOR 429 P.3d 628, 2018 WL 5730137(11/02/18)
McGinnis v. KDOR 429 P.3d 627, 2018 WL 5728375(11/02/18)
Ackerman v. KDOR 423 P.3d 558, 2018 WL 3673168(08/03/18)
*****ALL UNPUBLISHED*****
All the above drivers were read the AG modified DC-27. It was modified to comply with both the **Ryce** and **Nece** decisions. All the drivers argued the implied consent law is facially unconstitutional and second the DC-70 form read to them was also unconstitutional and did not substantially comply with the statutes. The court correctly points out the only provisions of the law which were not read were the two provisions of the law that did not apply. They did not apply because they were found to be unconstitutional. Since those provisions were omitted did not apply to the driver their omission from being read or in printed form cannot be error. See **State v. Kaiser**, unpublished, 2010 WL 3853206(2010). There is a severability clause in the implied consent K.S.A. 8-1007. The ability to modify was shown in **State v. Limon** 280 Kan. 275(20050 and therefore the **Ryce** and **Nece** rulings do not render the Kansas Implied Consent law unconstitutional. By deleting the portions of the implied consent rendered unconstitutional in **Ryce** and **Nece** the officers who arrested drivers substantially complied with the law. In **Williamson** and **McGinnis**: The court noted three recent unpublished cases: **White v. KDOR** 2018 WL 1769396(2018); **Bynum v. KDOR** 2018 WL 2451808(2018) and **State v. Barta** 2018 WL 1883878(2018) all found the revised AG form to be in substantial compliance with the law.

SENTENCING-JAIL

GRADUATED SANCTIONS-DANGER TO THE COMMUNITY

State v. Dominguez ---P.3d---, 2019 WL 2147682(05/17/19)
*****UNPUBLISHED*****
Dominguez violated his probation including a new offense of DUI, DWS as well as admissions of consuming alcohol, using Methamphetamine and failing to pay court costs. The judge revoked his probation and ordered him to serve his original 19 month prison sentence. The judge found the safety of the public would be jeopardized by granting probation. **Dominguez argues the court abused its' discretion because the court did not adequately address his drug addiction which is the "apparent underlying cause of his legal troubles." Dominguez bears the burden to show the court abused its' discretion. Rojas-Marceleno 295 Kan. 525(2012) There are exceptions to requiring the court to give graduated sanctions. K.S.A. 22-3716(c)(8)(A). Sanctions are not required if the "court finds and sets forth with particularity the reasons for finding the safety of the public will be jeopardized or the welfare of the offender will not be served by such sanction. K.S.A. 22-3716(c)(9)(A).** The court did make findings on the record. Affirmed.

REASONABLE SUSPICION-VEHICLE NOT IN MOTION

JUST SLEEPING—NO SFSTS

State v. Fisher 429 P.3d 250, 2018 WL 5091859(10/19/18)
*****UNPUBLISHED*****
Fisher argues his jury conviction for DUI lacked evidence to support a finding he was too intoxicated to safely operate a vehicle. Fisher claimed he was sleepy and had just been awakened by officers. The review for the appellate court is to view the evidence in the light most favorable to the State and determine whether the evidence permitted a reasonable jury to find beyond a reasonable doubt Fisher was too intoxicated to safely operate a vehicle. **Fisher argues City of Norton v. Wonderly 38 Kan.App.2d 797(2007). The court indicated Wonderly deals with the issue of probable cause for arrest in the context of a motion to suppress evidence obtained post-arrest, while the issue in this case is sufficiency of the evidence. Wonderly is not applicable. Fisher displayed traits associated with intoxication: bloodshot eyes, difficulty comprehending questions, slurred speech, poor coordination and smelling of alcohol. The body cam footage showed Fisher sleeping behind the wheel of a running vehicle stopped at a stop sign in the lane of traffic. The footage also showed Fisher stumbling, struggling to follow directions or answer questions, and slurring his speech. Fisher was too intoxicated to safely operate a vehicle.** Affirmed.

OPERATE/ATTEMPT TO OPERATE

CALLER INDICATED DRIVING-ADMISSION

State v. Flenniken ---P.3d---, 2019 WL 2147872(05/17/19)
*****UNPUBLISHED*****
A caller alerted police to a possible domestic happening in a parking lot. The caller who testified indicated Flenniken pulled a vehicle up to the front of a restaurant and got out of the driver's seat. Once the officer arrived he observed the vehicle with its driver's side door ajar. Flenniken stated he had not driven the vehicle but conflictingly admitted to the officer he had driven from the theater to the restaurant which was across the same parking lot. Flenniken was arrested for DUI and BAC 0.185. At trial Flenniken did not dispute he was intoxicated but disputed whether he operated a vehicle while in a drunken condition. The court found him guilty. Flenniken appeals. **Two elements are required for a charge of DUI: driving and being under the influence. The driving element may be established by proof the defendant operated or attempted to operate a motor vehicle and the under the influence element may be established by proof of any of the factual circumstances set forth in K.S.A. 8-1567(a); See also Ahrens 296 Kan. 151(2012).** In light most favorable to the State, Flenniken's admissions were substantially consistent with the testimony of the caller in that he had driven across the parking lot. Evidence did establish Flenniken did operate a vehicle.

ADMINISTRATIVE HEARING
PBT

NEGATIVE INFERENCE FROM REFUSAL

Forrest v. KDOR 395 P.3d 840, 2017 WL 2399475(06/02/17)
*****UNPUBLISHED*****
Officer read the DC-70 to Forrest. Forrest consented, and BAC was 0.118. Forrest requested a DL hearing and was suspended. Appeal was made, and the district court reversed the hearing officer noting there was no reasonable grounds to believe Forrest had been operating his vehicle under the influence. **Forrest has the burden to prove the absence of reasonable grounds.** The district court failed to take into account the refusal to take the PBT. **The appellate court has previously held an officer may draw**

a negative inference from a driver's refusal to take a PBT. The refusal amounts to circumstantial evidence the driver knows he or she has been drinking and likely is sufficiently intoxicated he or she will fail the test. The refusal, therefore, properly may be considered in a driver's license revocation proceeding as bearing on reasonable grounds.

ANONYMOUS TIP
REASONABLE SUSPICION-VEHICLE IN MOTION

RELIABLE TIP-KNOWN CALLER-TERRY STOP

State v. Garcia 414 P.3d 1242, 2018 WL 1659801 (04/06/18)
*****UNPUBLISHED*****
Garcia claimed the officers did not have reasonable grounds to stop his vehicle. Officer responded to a identified caller about a vehicle they had seen in an area that had previous burglaries. On the way to the scene, the officer observed the described vehicle within a mile of the caller's location. The officer did not see any traffic infractions but stopped the vehicle. Garcia was the driver and the officer noticed: strong odor of alcohol, slurred speech, difficulties communicating, bloodshot eyes. Garcia admitted to drinking. SFSTs indicated impairment. Garcia was arrest and a search of the vehicle found a partially empty bottle of liquor. Garcia's motion to suppress was denied and he was found guilty. **A review by the appellate court noted State v. Slater 267 Kan.694(1999)—a traffic stop based on a tip is lawful when the tip is reliable. It was a known caller. Details of the call were sufficient in detail of the observed activities. Lastly the information and observations of the officer raised the reliability of the tip. A tip of suspicious but not criminal activity alone is not enough to support reasonable suspicion. State v. Chapman 305 Kan. 365(2016) However "the location, time of day, previous reports of crime in the area, and furtive actions of the suspects may well justify a stop. State v. Kirby** 12 Kan.App.2d 346(1987) This was a **Terry** stop. Affirmed.

MIRANDA

INVESTIGATION

State v. Haynes 430 P.3d 68, 2018 WL 6005172(11/16/18**)**
*****UNPUBLISHED*****
This case is not a DUI however its' cites State v. Jacques 270 Kan. 173(2000) custodial interrogation is defined as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way. Investigatory interrogation is the questioning of a person by an officer in a routine manner before the investigation has reached the accusatory stage and where the person is not in legal custody or deprived of his or her freedom in any significant way. Miranda warnings are required only for custodial interrogations, but not for investigatory noncustodial interrogations.

PRIOR CONVICTIONS

TEXAS-MODIFIED CATEGORICAL APPROACH

State v. Hernandez-Castanon 429 P.3d 628, 2018 WL 5779242(11/02/18)
*****UNPUBLISHED*****
Castanon had a prior DUI from Texas. The State wished to count that DUI. The State wanted to retroactively use the 2018 legislative change to the DUI allowing for out of state DUIs to count if they are "comparable". **The Court indicated the legislative change would not be used retroactively. The court indicated if a statute under which the defendant was previously convicted provides alternative ways of committing the crime –each with its own set of elements—a court can look at a limited set of documents to determine which set of statutory elements it should use for the purposes of comparing that prior conviction with the elements of the current comparable offense—this is called a "modified categorical approach" Texas has two alternative sets of**

elements. Because the crime is divisible the district court may consult a limited class of documents—charging docs, plea agreements, jury instructions, verdict forms and transcripts from the plea colloquies as well as findings of facts and conclusions of law from a bench trial—to determine which portion of the statute Castanon was convicted. Remand for sentencing.

SFSTS

MOVING DRIVER TO POLICE STATION

Homeier v. KDOR 416 P.3d 1046, 2018 WL 2073518(05/04/18)
*****UNPUBLISHED*****
Homeier was speeding and was eventually stopped. Homeier admitted to drinking. Due to the cold weather Officer requested Homier to accompany him to the sheriff's office to perform SFSTs. Homeier was not under arrest but consented to go. At the office, Homier exhibited 2 clues on the walk and turn and no clues on the one leg stand. Homeier refused testing. Homeier argues he was unlawfully arrested without probable cause when he was transported to the Sheriff's office**. Homeier cites City of Norton v. Wonderly 38 Kan.App.2d 797(2007) and City of Norton v. Schoenthaler, unpublished, 2007 WL 2410122(2007) Both cases were determined to be distinguishable. Unlike Wonderly the officer had more evidence of alcohol intoxication and driving impairment at the time of the arrest. Under Schoenthaler, that Court of Appeals panel found it a close call due to the lack of slurred speech, poor balance and bloodshot eyes. Here the court noted the officer have all of those things. Sloop v. KDOR 296 Kan. 13(2012) also was mentioned and determined to be distinguishable. The court noted they know of no Kansas law requiring an officer to immediately interrupt an investigation and arrest a defendant once the probable cause threshold is met.**

PROBABLE CAUSE TO ARREST/REASONABLE GROUNDS TO BELIEVE

REFUSED PBT—SPEEDING—OPEN BOX OF BEER

Jackson v. KDOR 422 P.3d 1206, 2018 WL 3596022(2018)
*****UNPUBLISHED*****
Jackson was speeding when stopped by officer. Officer detected an odor of alcohol and observed an open case of beer. SFSTs were performed. Jackson had limited clues: 3 of 8 clues on the walk and turn and no clues on one leg stand. She refused the PBT. She was arrested. Her BAC indicated above the legal limit. KDOR suspended her license. Jackson appealed claiming the officer lacked reasonable grounds to request the test nor probable cause to arrest her. The District court agreed with Jackson; KDOR appeals. **Totality of the circumstances found by the appellate court: Jackson did not drive erratically or commit any traffic infractions other than speeding; bloodshot and glassy eyes were removed as a indicator in 1997 by NHTSA and there are many factors which could give bloodshot eyes; nervousness and failure to maintain eye contact is not a NHTSA clue; refusal to submit to a PBT –although an officer may draw a negative inference from a driver's refusal this case was more akin to Chambers v. KDOR, unpublished, 2017 WL 1035442(2017)—in previous cases in which this court found PC to arrest the driver refused testing …there were generally other indicators of intoxication. Lastly admission of drinking, odor, and an open box of beer—while consumption is a precursor to DUI, consumption alone cannot provide PC for arrest.** Affirmed.

ADMINISTRATIVE HEARING

CONSTITUTIONAL ISSUES—MARTIN ABROGATED?

Jarvis v. KDOR ---P.3d---, 2019 WL 2063671(05/10/19)
*****UNPUBLISHED*****
The facts aren't as important as the issue of whether the 2016 amendment to K.S.A. 8-1020(p). **As we know Martin v. KDOR 285 Kan. 625(2008) held the exclusionary rule is not applicable to DL suspension proceedings. Jarvis now claims due to the amendment in 2016 the legislature indicated the district court shall "consider and determine any constitutional issue" including the "lawfulness of the law enforcement encounter." Whigham v. KDOR 2018 WL 1884742(2018) indicated Martin had not been abrogated and the exclusionary rule still does not apply in administrative DL suspension cases. The Whigham case has been granted petition for review. The Jarvis Court of Appeals panel found the plain language of the statute allows for a district court to consider and determine constitutional issues such as the lawfulness of the law enforcement encounter.**

SENTENCING-JAIL

GRADUATED SANCTIONS-ABUSE OF DISCRETION

State v. Lamb 430 P.3d 997, 2018 WL 6252914(11/30/18)
State v. Bailey 423 P.3d 56, 2018 WL 3802063(08/10/18)
*****BOTH UNPUBLISHED*****
Both defendants had violated their probation—both were charged with DUI and other criminal charges. Judges in both cases revoked their probation without considering graduated sanctions. Both defendants appealed claiming abuse of discretion. **The court indicated K.S.A. 22-3716 generally provides once the defendant has violated the conditions of probation the district court must apply graduated intermediate sanctions before the court can revoke probation. But under K.S.A. 22-1717(c)(9)(B) the court may revoke an offender's probation without imposing an intermediate sanction if the probation was granted as the result of dispositional departure. A court abuses it's discretion by taking action that is unreasonable ie. No reasonable person would agree with it. State v. Collins 303 Kan. 472(2015). The party arguing an abuse of discretion bears the burden of proving it. State v. Thomas 307 Kan. 733(2018) In both cases there was no abuse found.**

REASONABLE SUSPICION-VEHICLE NOT IN MOTION

PASSED OUT-OPERATING VEHICLE

Lane v. KDOR 417 P.3d 273, 2018 WL 2170209(05/11/18)
*****UNPUBLISHED*****
Lane had his license suspended for refusing to take the breath test. Lane claims the officer did not have the authority to request a breath test because the officer did not have reasonable grounds based on the fact there was no evidence Lane either drove or tried to drive while under the influence. The officer found Lane passed out and slumped over the cars steering wheel with the car running. The car was parked outside the lines in a parking lot but not 'cockeyed'. Lane was confused when awoken, smelled alcohol on his person and failed SFSTs. Lane also admitted to being drunk. Lane indicated: Officer did not see car move, feet on the gas or brake pedals, made no attempt to turn the steering wheel however he did fumble with it. Lane agreed he was unconscious when found by the officer. **The appellate court indicated the District Court decides whether an officer had reasonable belief based on the "the totality of information and reasonable inferences available to the arresting officer. State v. Johnson 297 Kan. 210(2013) Also Lane argued the officer checked the box the driver had**

operated a vehicle on the DC-27. The Kansas Supreme Court has never held failure to properly check the boxes on the DC-27 form mandate suppression of the form. State v. Baker 269 Kan. 383(2016) Affirmed.

SFSTS

NOT REQUIRED TO BELIEVE DRIVER-NOT FREE TO DEVISE NEW TESTS ON THE SPOT

State v. Larson 12 Kan.App.2d 198, 737 P.2d 880(1987)
Larson claims here whenever a driver tells an officer he has a physical impairment other than drunkenness which will cause him to fail field sobriety tests, the officer must have the driver perform tests which will not be affected by the impairment. Larson cited no authority for this proposition. The assertion may be rejected for several reasons. **First, the officer should not be required to believe everything a driver tells him or else drivers who *are* drunk might be able to escape detection if they can be inventive enough to avoid the tests. Second, the officer should not be free to devise new tests on the spot to try to avoid the asserted impairment. Such improvising could result in unreliable tests and would encourage discriminatory enforcement of the DUI laws.** Finally, drivers who fail field sobriety tests due to impairments other than drunkenness will be protected by the results of the blood or breath testing performed following arrest.

REASONABLE SUSPICION/PROBABLE CAUSE TO ARREST

MISTAKE OF LAW

State v. Lees 56 Kan.App.2d 542, 432 P.3d 1020(11/16/18)
Trooper stopped a vehicle in the belief the left brake light was not functioning properly. Lees' vehicle had three separate brake lights including the standard left and right brake lights, in addition to the top-middle brake light. The right and top-middle brake lights were both functional. Lees was arrested for DUI. **A motion to suppress was filed due to the fact the law required two working brake lights and without counting the broken left brake light Lee's vehicle had two operational brake lights. He was not in violation of the law which requires two functional lights. The State countered based on an objectively reasonable mistake of law the officer believed Lee's brake light was a violation. The State also argued good-faith exception. The Trooper made a mistake of law and it would have been an objectively reasonable mistake had it not been for Heien v. North Carolina 135 S.Ct. 530(2014). This case reviewed the same type of violation of law. Kansas adopted the Heien ruling in City of Atwood v. Pianalto 301 Kan. 1008(2015). The applicable Kansas statutes on stop lamps unambiguously require only two functioning brake lights. Simply because there are other statutes requiring headlight and taillights to be of equal height should not confuse an officer of the basic requirements a vehicle in Kansas must have only two functioning brake lights.** The State also attempted to suggest the Trooper was conducting an inspection under **K.S.A. 8-1759a**. The court found there was no indication the Trooper was conducting an inspection.

PROBABLE CAUSE TO ARREST/REASONABLE GROUNDS TO BELIEVE

CRASH-NO ODOR OF ALCOHOL-PRESCRIPTION MEDICATION

Leivian v. KDOR 432 P.3d 695, 2019 WL 166541(01/11/19)
*****UNPUBLISHED*****
Leivian jumped a curb drove over a grassy area crossed a driveway, crossed the road jumped the curb crashed through a fence and stopped when her car drove into a swimming pool. Leivian had slurred speech, poor balance and glazed eyes. Leivian admitted having some wine earlier in the day but also indicated she had consumed some prescription pain-relief and muscle-relaxant medication. No SFSTs

were performed because of the crash but a PBT indicated 0.038. The officer wanted her to take a blood test and took her to the hospital. The implied consent given had omitted the statutory notice regarding a driver's lack of a constitutional right to refuse testing and the potential criminal consequences for refusing a test. Leivian's sample was taken about 2 hours and 20 minutes after the crash occurred. The BAC was reported was 0.202. The district court found PC to request a breath test. Leivian appeals. **Leivian had been involved in a single-car crash traveling a significant distance after leaving the roadway. Single car crashes along with other indicators of impairment establishes reasonable grounds to request a blood test. Train v. KDOR unpublished, 2012 WL 603295(2012). Under these circumstances a reasonable prudent person in the position of the officer would have believed the cause of the crash was driver impairment due to drugs or a combination of drugs and alcohol. Leivian also had issues with the notices given. She received the notices that lacked the provisions deemed unconstitutional and therefore the officer substantially complied with the requirements. Affirmed.**

REASONABLE SUSPICION-VEHICLE IN MOTION

FAIL TO YIELD TO EMERGENCY VEHICLE

State v. McLarty 414 P.3d 1241, 2018 WL 1546282(03/30/18)
*****UNPUBLISHED*****
Officer had a vehicle stopped on the side of the road when McLarty's vehicle drifted toward his patrol car and came very close to hitting officer. The driver then swerved over back to the left and continued on. Officer completed stop and went after McLarty's car. McLarty was stopped and charged with DUI and failing to yield to an emergency vehicle. At a suppression hearing McClarty's passenger testified she had slowed down and merged over when the officer suddenly opened his door. There was a center turn lane that could have been utilized by McLarty however the officer did testified vehicles that are not turning should not use that lane. **The district court denied suppression due to McLarty's excessive speed and she failed to slow down or exercise due caution as required by K.S.A. 8-1530 a statute requiring motorists to yield to emergency vehicles. Citing State v. Ward, unpublished, 2006 WL 44386(2006), K.S.A. 8-1530(b)(1) required McLarty to use "due caution" based on the road and traffic conditions present.** The statute was violated. McLarty also blamed the officer for his behavior while parked. This argument was not properly before the court and was not addressed.

PROBABLE CAUSE TO ARREST/REASONABLE GROUNDS TO BELIEVE
FIELD SOBRIETY TEST

SUSPECTED DRUGS-MIXED RESULTS ON SFSTS

Manley v. KDOR 425 P.3d 375, 2018 WL 4264858(09/07/18)
*****UNPUBLISHED*****
Officer saw a truck driving with a burnt out headlight. The vehicle did not commit any traffic infractions or drive in any erratic manner. The vehicle was stopped and Manley had no identification but gave his name and DOB. The officer observed the following: eyes were a little glazed and droopy; no odor of alcohol; no admission of drinking; no trouble communicating nor slurring his words; walking without difficulty. The SFSTs showed: walk and turn was done in a quick manner but performed well; one leg stand showed four clues. The officer suspected drug use and had him perform the Romberg test. Manley performed this correctly. Manley admitted he took some over the counter medications but nothing illegal. He also admitted in the past he had gone to a rehab facility for meth addiction. During the stop Manley continued asking for water and the officer explained to the court excessive thirst may reveal meth impairment and a dry mouth may suggest marijuana impairment. Manley indicated he was dehydrated from work and he was diabetic. Manley was arrested and transported for further testing. When asked to take a breath test Manley refused however he asked can he change his mind later and the officer indicated No. A search warrant was requested but no judge could be contacted. A hearing was requested by Manley. Manley indicated the officer lacked probable cause to arrest and had no reasonable grounds to believe he was impaired. He also contended the officer violated his due process rights when the officer improperly

informed him he could not rescind a test refusal. Manley first argues **Molitor** 301 Kan. 251(2015) limits the use of SFSTs to providing evidence if a driver's has a specific blood alcohol content. **The court explained Molitor does not limit the use of a person's SFSTs to only providing an objective assessment whether the person has a specific blood alcohol content. Shadden 290 Kan. 803(2010) also supports the officer properly testified whether Manley showed signs of impairment based on their training and experience. The more difficult issue is whether the officers had reasonable grounds to believe. Sloop 296 Kan. 13(2012) was mentioned but the court found Leverenz unpublished 2015 WL 5750535 more useful.** Manley did not had unsafe or erratic driving. Manley indicated use of over the counter meds but denied illegal drug use and passed the PBT. The results of the SFSTs were mixed. Overall looking at the totality of the circumstances the officers did not have reasonable grounds to support a lawful arrest.

PROBABLE CAUSE/REASONABLE GROUNDS TO BELIEVE

MOLITOR-NO BAD DRIVING

State v. Martinez 404 P.3d 698, 2017 WL 5015409(11/3/17)
*****UNPUBLISHED*****
Martinez challenges the stop based on the officer did not have reasonable grounds to stop him. **The officer provided the following facts to the court: observed Martinez car leaving from a bar; Martinez activated his turn signal but did not turn for at least two blocks (which the officer indicated was not a traffic infraction) and Martinez traveled to another bar.** The Appellate Court found this did not create reasonable suspicion. They indicated no evidence Martinez was actually at the first bar. There was no indication Martinez had difficulty driving nor did he have any difficulty exiting his car or walking toward the second bar. **Factors seen must be assessed in the totality of the circumstances including circumstances suggesting sobriety citing Molitor 301 Kan. at 266(2015).** Therefore, the evidence obtained after the stop should be suppressed. Reversed.

SENTENCING

PIS-CONSECUTIVE DUI SENTENCES

State v. Martinez 423 P.3d 1062, 2018 WL4039405(08/24/18)
****UNPUBLISHED*****
Martinez had two DUI convictions. The judge ordered 12 months in jail in the cases, followed by 12 months of post-imprisonment supervision. As part of the underlying sentence, the court ordered Martinez to serve 72 hours in jail, followed by 4,320 hours on house arrest. The sentences were to run consecutively. There was a revocation hearing and PIS was revoked. Judge sentenced Martinez the remaining underlying sentence to be served in jail. **Two questions were answered on appeal. Do multiple consecutive DUI sentences require consecutive PIS periods?—No all jail imposed on consecutive sentence must be served and then there will be only one 12 month PIS sentence. May a defendant begin serving a PIS supervision period while serving an imprisonment sentence on another case? NO-- PIS does not start until all jail time has been completed.**

ANONYMOUS TIP/INFORMANT
REASONABLE SUSPICION-VEHICLE IN MOTION

PUBLIC SAFETY STOP-NO TRAFFIC INFRACTIONS

State v. Messner 55 Kan.App.2d 630, 419 P.3d 642(05/18/18)
Officers were called by store employees concerning Messner's behavior in the store. Messner had been in the store most of the night and would just stand and stare at walls. Messner was also picking at his skin. Messner began to leave the store. Dispatch sent the officers to check the welfare of an individual. Upon arrival at the store employees pointed out the white vehicle was pulling away and indicated they

believe he was "meth'd out due to all the sores on him." Officer followed the vehicle for about one mile and did not observe any traffic infractions. Officer radio'd his supervisor and asked why should he stop the vehicle and was told to "check his welfare"—make sure "everything is all right with him". The vehicle was stopped and Messner's comments were inconsistent and his speech and movements were slow. He was not sure what was wrong and did nothing to determine if there was a medical situation. Officer while speaking with Messner felt he should not be driving. Officer asked for Messner's driver's license. There was a drug dog present and alerted on the vehicle. Messner was charged with possession of meth, possession of drug paraphernalia and DWS. After a suppression hearing, a bench trial on stipulated facts occurred and Messner was found guilty. **The stop was determined to be a public safety stop based on Gonzales 36 Kan.App2d 446(2006) and Slater 267 Kan.694(1999) however the analysis does not stop there. The officer had indications there was something wrong with Messner and he could not rule out a medical condition. Instead of getting medical attention for Messner the officer moved into investigation by asking for a driver's license to run a warrant check. This runs afoul of a public safety stop—should be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." City of Topeka v. Grabauskas 33 Kan.App.2d 210(2004)**

JAIL

DEPORTATION-POST-IMPRISONMENT SUPERVISION

State v. Nunez ---P.3d ---, 2019 WL 1969593(05/03/19)
*****UNPUBLISHED*****
Nunez plead guilty to felony DUI and DWS in separate cases. The judge indicated he was not sure of Nunez immigration status and this could get him deported. Nunez indicated he understood. The judge sentenced him to 15 months for the DUI and 12 months in jail for the second case running them consecutive. He was to serve 9 months and then he was on PIS for 12 months. **Shortly upon release from jail Nunez was arrested by ICE and was deported. The State filed a motion to revoke. It was heard when Nunez had returned to Kansas and was present for the hearing. Nunez admitted he was unable to report because he had been deported and would likely be deported again because there was another ICE hold on him. Nunez admitted to not reporting.** Although Nunez had 127 days to serve the court did not order him to serve it because of his deportation situation. **Nunez appeals contending he could not report, through no fault of his own, because he had been detained by ICE and was deported. The State argued deportation is not a valid excuse for his failure to report and he committed a new crime by reentering the US without authorization after being deported. The court cited Contreras-Villegas 2015 WL 4578102(2015), unpublished, stating deportation does not excuse a probationer's duty to comply with the terms of his probation including the duty to report to his probation officer.** The court cited to several unpublished cases holding the same opinion. Affirmed.

PROBABLE CAUSE TO ARREST/REASONABLE GROUNDS TO BELIEVE

ENGLISH NOT FIRST LANGUAGE-MARX VIOLATION

State v. Patidar 422 P.3d 1207, 2018 WL 3596380(07/27/18)
*****UNPUBLISHED*****
Patidar was stopped for crossing the center line twice. The officer made note no objects in the road when the vehicle crossed over nor was weather a factor. **The court looked to Marx 289 Kan. 657(2009) The court indicated Marx is not the final word on the issue. State v. Miles 2017 WL 383790(2017) the extent of the breach was more than "incidental and minimal" and there was evidence of no obstructions in the road or weather being a factor. Based on these cases the officer in this case had reasonable suspicion to stop the vehicle**. Patidar also argued his SFST results and interactions with law enforcement after his arrest required suppression because English is not his primary language and he was not afforded an interpreter under K.S.A. 75-4351. **The statute requires appointment of an interpreter for an individual; subject to an officer's attempt to interrogate or is subject to an interrogation following an arrest. State v. Bishop 264 Kan. 717(1998) an officer's request to take a**

breath test involves the taking of physical or real evidence. This does not qualify as "communicative testimony," or an interrogation under the 5th Amendment. Also mentioned was State v. Leroy 15 Kan.App.2d 68(1990) only questions requiring suspects to communicate any personal beliefs or knowledge of facts meet the definition of communicative testimony that qualifies as custodial interrogation. Affirmed.

ATTORNEY ACTION/CONDUCT

VIDEO DESTROYED

State v. Patrick 425 P.3d 644, 2018 WL 43774269(09/14/18)
*****UNPUBLISHED*****
Patrick was arrested for DUI. A video was made of the stop on a body camera. The video was uploaded to the department's secure server. It is known all videos are retained for 2 years. Two years later the video was destroyed. The prosecutor did not file the case til almost 1 year after the video was made. The officer was not notified the video was going to be destroyed. At time of preliminary hearing the video could not be located. Due to the destruction of the video the defendant claimed a violation of due process. The court found no bad faith and determined the defendant must demonstrate the State had knowledge of the exculpatory value of the evidence at the time it was destroyed. **Citing State v. Beltz 2008 WL 2251236(2008) and State v. Cofield 2003 WL 22990120(2003) holding a lost video that might exonerate the defendant does not make it exculpatory.** Also admitted into evidence was a copy of the DC-70 form which Patrick claimed was in violation of the best evidence rule. The district court allowed for the copy. **The appellate court citing State v. Rodman 53 Kan.App.2d 106(2016) the best evidence rule is not an inflexible exclusionary rule but a preferred rule. State v. Gauger 52 Kan.App. 2d 245(2016) indicated a printout of an electronically generated invoice that was stored on a computer was properly admitted into evidence as an original document and did not violate the rule. However pursuant to K.S.A. 60-467(a) there was no exception for the DC-70 form.** The appellate court found the admittance of a copy was error but it did not affect the outcome of the trial. **Even if the copy had not been admitted the officer could have testified about the procedure he followed and the oral advisories he gave Patrick before requesting the test.** Admission did not affect the trial.

ADMINISTRATIVE HEARING

WITHDRAW OF A FINAL ORDER—RESCHEDULE HEARING

Pearson v. KDOR 56 Kan.App.2d 369, 430 P.3d 475(09/21/28)
Licensing hearing was scheduled. At time of the hearing the officer failed to appear. The hearing officer at that time dismissed the suspension order and personally served the order on the licensee's counsel. Later the hearing officer received notice the officer had been hospitalized and therefore he could not attend the hearing**. The hearing officer withdrew the dismissal order and reset the matter for hearing. Counsel for licensee objected to the withdrawal**. A hearing was set and an order was issued to suspend the license**. The district court held the hearing officer could withdraw the dismissal and rehear the matter citing Johnson v. KDOR 29 Kan.App.2d 455(2001).** The court finds the rescheduling of Pearson's case was a new hearing and not a final action. Pearson timely filed a petition for review from the second order affirming the suspension. **K.S.A. 77-613 does not contain any language allowing a hearing officer authority to reconsider, rehear or set aside a final agency action. Also K.S.A. 8-1030 and K.S.A. 8-259(a) do not grant any authority to resurrects the action against the licensee after the effective date of the order dismissing the action. Johnson v. KDOR –indicated it is permissible for a PARTY to request reconsideration, but the hearing officer is not a party.**

SENTENCING

GUILTY PLEA APPEAL—CRIMINAL REFUSAL

State v. Polk 425 P.3d 1275, 2018 WL 4517241(2018)
*****UNPUBLISHED*****
Polk plead guilty to Criminal Refusal K.S.A. 8-1025. Eventually his sentence was revoked for violations and he was to serve his underlying sentence. Polk appealed asking the court to vacate the sentences due to the fact State v. Ryce 306 Kan. 682(2017) found refusal to be unconstitutional. Kansas law does not allow a direct appeal of a criminal conviction following a guilty plea (K.S.A. 22-3210(d)(2)) without first filing a motion to withdraw the plea. There was also a request to set aside his sentence. This was also without merit.

REASONABLE GROUNDS TO BELIEVE-VEHICLE IN MOTION

NO FIELD SOBRIETY TESTS

Pruitt v. KDOR 405 P.3d 1243, ---WL ----(11/22/17)
Janda v. KDOR 425 P.3d, 2018 WL 4263321(09/07/18)
*****BOTH UNPUBLISHED*****
A review of the record indicates Pruitt committed numerous traffic infractions, refused to stop his vehicle in response to repeated demands and signals to do so; Pruitt continued to ignore commands to stop; walked with an unsteady manner; had bloodshot eyes; smelled of alcohol; slurred speech and at times incoherent; threatening the officer and two unopened containers of beer in the car. Pruitt was placed under arrest for flee and eluding and DUI**. The officer did not request standard field sobriety tests nor a PBT. A hearing was requested arguing the officer did not have reasonable grounds to request the test. The district court affirmed the hearing officer and suspended Pruitt's license.** The appellate court affirmed the district court's ruling. **Unlike Sloop, 296 Kan. 13(2012) the officer saw numerous traffic violations, refusing to stop, ignoring commands, unsteady walking, bloodshot eyes, odor of alcohol, speaking with slurred speech and at times incoherent and threatening the officer.**

PROBABLE CAUSE/REASONABLE GROUNDS TO BELIEVE

VIDEO—JUDGE NOT AGREEING WITH TROOPER

Readdy v. KDOR 401 P.3d 180, 2017 WL 3822720(09/01/17)
*****UNPUBLISHED*****
This is a KDOR appeal from the district court's decision the Trooper lacked reasonable grounds to believe he was operating a vehicle while under the influence. A video was produced indicating Readdy's vehicle was traveling approximately 90-100mph in a 60 zone when it moved from the far-left lane all the way to an exit lane. No turn signals were used. The vehicle did not react promptly but eventually stopped. Trooper could detect watery and bloodshot eye and detected the odor of alcohol coming from Readdy. Readdy indicated he consumed two nights before. The Trooper did not believe this. Readdy was argumentative at times and although the Trooper did not hear any slurred speech Readdy transposed a couple of numbers in his zip code and claimed to be going home. Readdy was heading in the wrong direction and once that was noted he changed his story. SFSTs showed 4 clues on the walk and turn and 3 on the one leg stand. There were problems with the PBT giving an error reading. The judge reviewing the video did not conclude the same observations as the Trooper and found no reasonable grounds for arrest. **The appellate court indicated licensee must show the court erred as a matter of law or abused its discretion. State v. Dupree** 304 Kan. 377(2016) The Appellate Court found the district court did not err as a matter of law. Factual findings were supported by evidence that is substantial when viewed in light of the record as a whole. In particular the district court carefully weighted the testimony presented at trial against the video. Affirmed.

IMPAIRMENT

NO TESTING FOR IMPAIRMENT-LEAVING THE SCENE

State v. Rivera 413 P.3d 806, 2018 WL 1352530(03/16/18)
*****UNPUBLISHED*****
Rivera had been drinking most of the day and then as he was heading home struck a pedestrian in the arm/hand. Rivera continued home. The pedestrian had broken bones and was transported to the hospital. The pedestrian reported a chevy pickup truck struck him. An officer went to investigate the crash and found pieces of broken glass and blood at the point of impact. The officer then headed into town looking for a truck that would have damage consistent with the crash. The officer located a truck outside Rivera's residence with damage. The officer attempted to make contact with Rivera at his residence, but no one answered the door. The officer left information on the windshield for the driver to call. The next morning Rivera called and spoke with the officer. Rivera admitted to drinking most of the day and that he probably was intoxicated and too drunk to drive that evening. **Rivera also indicated he thought he had hit a pheasant causing the damage to his vehicle. Rivera was charged with DUI and leaving the scene—he was found guilty at a bench trial. Rivera appealed arguing there was insufficient evidence to find him guilty of DUI. The court noted State v. Huff 33 KanApp.2d 942(2005) a fact finder can consider circumstantial evidence when determining if a person is incapable of safely operating a vehicle. Also, Rivera indicated the State must show he violated the Leaving the scene statute intentionally, knowingly or recklessly. State v. Heironimus 51 Kan.App.2d 841(2015). Rivera indicated he did not know there had been an accident and he thought he hit a pheasant. The court found sufficient evidence: it was daylight when the crash occurred and there was no evidence the pedestrians were not visible, there was significant damage and blood on the windshield and the fact Rivera would not answer the door when the officer came to inquire also indicates Rivera knew that he hit a person and intentionally left the scene.** Affirmed.

PRIOR CONVICTIONS

VEHICLE BROADLY DEFINED

State v. Schrader 308 Kan. 708, 423 P.3d 523(2018)
State v. Ramos 425 P.3d 376, 2018 WL 4263371(2018) *****UNPUBLISHED*****
Schrader objected to the inclusion of the Wichita DUI conviction of a DUI in his criminal history score. The State offered the journal entry and the underlying charging documents. The Court of Appeals agreed with Schrader the prohibited acts under the Wichita ordinance was broader than the state statutes and vacated Schrader's sentence and sent it back for hearing. **To establish a prior conviction as a DUI a sentencing court should compare the elements of the ordinance or statute of conviction to the elements of K.S.A. 8-1567. If the ordinance is divisible ie. Sets out one or more elements of the offense in the alternative a court may employ a modified categorical approach permitting review of certain documents for the limited purpose of determining which alternative of the DUI ordinance formed the basis for the prior conviction. Dickey I 301 Kan. at 1038-39(2015). However this inquiry is limited to determining which alternative version of the crime formed the basis for the previous conviction so that a comparison of the elements of the crime of conviction and the elements of K.S.A. 8-1567 can be conducted. In doing so the Court found they were almost identical in their definition however "vehicle" was more broadly defined than the state's definition. Citing Gensler 308 Kan 674(2018) it concluded the Wichita ordinance cannot be used to enhance a state DUI sentence. The Wichita DUI ordinance prohibits a broader range of conduct than the state statute.** Affirm the Court of Appeals decision vacating sentence and remanding it back for resentence.

COMPLAINT

AMENDING COMPLAINT

State v. Spencer 428 P.3d 822, 2018 WL 5091888(10/19/18)
*****UNPUBLISHED*****
Spencer was originally charged with K.S.A. 8-1567(a)(1)-alcohol concentration in excess of 0.08 at the time of driving. At the end of the evidence the State requested an amendment to the charges to K.S.A. 8-1567(a)(2)—the per se violation requiring a breath test result over 0.08 measured within three hours of driving. Spencer appealed his conviction for the court to allow the State to amend the complaint which prejudiced Spencer's substantial rights. It was clear throughout the trial the State intended to use the results from the test against the defendant. State acknowledged it made a mistake in charging the wrong subsection. The Appellate Court found the district court's decision to allow the State's amendment considerably decreased the burden on the State citing State v. Wade 284 Kan 527(2007) Spencer found himself because of the strategic trial decision to allow admission of the intox result without challenge essentially became a confession to the new charge. The District court abused its discretion when it allowed the State to amend the charge. It prejudiced Spencer's substantial rights to a degree that requires reversal.

REASONABLE SUSPICION-VEHICLE NOT IN MOTION
OPERATE OR ATTEMPT TO OPERATE

PUBLIC SAFETY-SLEEPING IN VEHICLE-PARKING LOT

State v. Stewart 413 P.3d 810, 2018 WL 1352497(03/18/19)
*****UNPUBLISHED*****
A coach arrived at a school on Saturday around 5am and saw a vehicle in the parking lot with its driver's side door wide open. The coach approached the vehicle and found Stewart sprawled out in the driver's seat appeared to be sleeping. A call was made to dispatch indicating a drunk person was in the parking lot. Officers arrived and found Stewart in the parking lot about 200 feet from the reported location. Officers could smell an odor of alcohol coming from Stewart's person. Stewart indicated he was resting before driving home. A DUI investigation began and Stewart was arrested. The district court suppressed the evidence stating Stewart was of legal drinking age, no indication he was trespassing, disorderly conduct or traffic violations and there was no indication Stewart had moved the vehicle or attempted to move it. The State appeals. The appellate court indicated the officer's observations were sufficient to proceed with a DUI investigation. **The initial contact was a Public Safety stop however the determination Stewart was not in peril was completed and the DUI investigation began. The fact the vehicle was located about 200 feet from the original call allowed officer to draw a reasonable inference as to how the vehicle moved within the parking lot. Darrow 304 Kan. 710 was cited indicating reasonable inferences when determining that fumbling with the gear shift was sufficient to be an attempt to operate the vehicle. The reasonable inference Stewart operated the vehicle and the indicators of his intoxication when viewed in light of common sense and ordinary human experience were sufficient to meet the low standard of reasonable suspicion required for the officer to proceed with the DUI investigation.**

ADMINISTRATIVE HEARING

DC-27-LEGIBLE COPIES

Stutsman v. KDOR 437 P.3d 102, 2019 WL 1303063(3/22/19)
*****UNPUBLISHED*****
Officer arrested Stutsman and requested he take a breath test. Stutsman blew 0.209. The officer then filled out the DC-27 manually. The DC-27 was not an electronic copy but a triplicate form. **When it was filled out the carbon copies didn't copy well so the officer on a few of the sheets went over them**

with a pen so that they were legible. However the form given to Stutsman was lacking the officer's initials on a few of the spaces as well as the signature of the officer. The district court reviewed all the forms and although he found the copy of the defendant to lack various things he did find substantial compliance when reviewing all the copies**. It was clear the entire form had been filled out but due to the copies it did not come through on them. Stutsman appeals claiming the copy received by Stutsman did not comply with the requirements of K.S.A. 8-1002. The Court of Appeals indicated substantial compliance is sufficient however the omissions on the form were not mere technicalities and the fact the form was not signed by the officer was not sufficient and did not comply.** Reversed.

SENTENCING-JAIL

GRADUATED SANCTIONS

State v. Taylor 432 P.3d 1028, 2019 WL 255396(01/18/19)
State v. Kab Abdi Issa 425 P.3d 643, 2018 WL 4373902(2018)
State v. Maloney 429 P.3d 903, 2018 WL 5728350(2018)
*****ALL UNPUBLISHED*****
Issa pled to one count of distribution of Marijuana and DUI. Issa received a controlling prison term of 49 months but granted a dispositional departure granting 36 month term of probation. The State filed a motion to revoke Issa's probation based on an arrest for possession of Marijuana on drug paraphernalia. Issa also failed to pay costs. At the revocation hearing, the State called the officer that arrested Issa and the officer explained the circumstances of the arrest. The court found Issa in violation and ordered the original sentence without any graduated sanctions. **Issa appeals on two issues: the State did not establish by a preponderance of the evidence he violated his probation and the court erred by ordering his prison sentence without imposing an intermediate sanction. Issa argued he had not been convicted of the charges that brought on the arrest and therefore there was no violation. The Court indicated the State does not have to show he has been convicted of a new crime only that he committed the crime. See K.S.A. 22-3716(c)(8)(A). The evidence presented demonstrates it is more probably true than not true that Issa committed the crime of possessing marijuana. Gumfoy 281 Kan. 1168(2006). Once a probation violation has been established the decision to revoke probation rests within the sound discretion of the district court. State v. Skolaut 286 Kan. 219(2008) As for the graduated sanctions—K.S.A.. 22-3716(c)(8)(A) the Court need not impose any intermediate sanction if the offender commits a new felony or misdemeanor while the offender is on probation.** Therefore the court was well within its' discretion of impose the underlying sentence.

SENTENCING-JAIL

CONSECUTIVE SENTENCES

State v. Vazquez-Mateo --- P.3d---, 2019 WL 2147653(05/17/19)
*****UNPUBLISHED*****
Mateo plead no contest to DUI 3rd and asked the court to allow him to serve his sentence concurrent with the sentence he was serving for his 2nd DUI. Mateo was aware of his impending deportation and wanted the immigration process to start sooner rather than later. The court ordered Mateo to serve his sentence consecutive to the sentence he was serving on his 2nd. Mateo appeals. **Concurrent or consecutive sentences are a decision that falls within the district court's discretion. Jamison 269 Kan. 564(2000). Unless the court has made a legal or factual error, abuse of discretion is the standard to review a decision made. Ward 296 Kan. 541(2011). There are no legal or factual errors and a reasonable person could agree with the district court's decision citing Brooks unpublished 2018 WL 929133(2018) and Angel unpublished, 2009 WL 929133(2009).**

REASONABLE GROUNDS TO BELIEVE-VEHICLE IN MOTION
PBT

UNAPPROVED DEVICE-NOT MANUFACTURER RECOMMENDATION

Vega-Gamboa v. KDOR ---P.3d---, 401 P.3d 685(09/15/17)
*****UNPUBLISHED*****
Officers stopped a vehicle traveling at a high rate of speed. Vega-Gamboa had a strong odor of alcohol; watery and bloodshot eyes, admitted to drinking and was sluggish getting out of the vehicle. No SFSTs were done. HGN was done (the court found Vega-Gamboa did not follow directions during this test) and a PBT was administered. **The officer indicated the device he used was a CDL-5. The officer believed 15 minutes had transpired before the test was administered but it had been only 13 minutes. The officer indicated 15 minutes is what is recommended. The appellate court found the officer did not reasonable grounds. However the PBT was erroneously admitted. The device used CDL-5 is not on the approved list of devices. See K.A.R. 28-32-14. (Editor's note—the CDL-5 is a form similar to the DC-27 when a driver is a CDL driver-it has nothing to do with PBT devices) The fact the PBT was not used according to manufacturers' recommendations—it should not have been admissible.** Affirmed.

ADMINISTRATIVE HEARING

CERTIFYING OFFICER MUST FILL OUT DC-27 CORRECTLY FOR KDOR TO HAVE JUSRIDICTION

Wall v. KDOR 54 Kan.App.2d 512, 401 P.3d 670(08/11/17)
The arresting officer completed the DC-27 form indicating Wall failed the breath test. However, the accompanying test results showed no breath sample was given. Wall requested a hearing. **The certifying officer failed to comply with the requirements of K.S.A. 8-1002(a)(1) because he did not indicate a test refusal and even if Wall had taken the test and failed the officer did not comply with K.S.A. 8-1002(a)(3). KDOR did not have subject matter jurisdiction as it was statutorily required to dismiss the administrative hearing. Wall should receive his license back. KDOR had no power to even hear the case and decide.**

REASONABLE SUSPICION-VEHICLE NOT IN MOTION

PUBLIC SAFETY v. INVESTIGATION

State v. Weaver ---P.3d---, 2019 WL 2147678(05/17/19)
*****UNPUBLISHED*****
Weaver's vehicle was pulled up to an intersection. **Weaver was in the driver's seat "slumped over with his head resting on the steering wheel."** Car was in drive. Cars were driving around it. 911 was called because Weaver was unconscious. Law enforcement also arrived on scene. **While EMS was attending to Weaver law enforcement started inquiring about possible impairment. Officers asked for driver license and kept it from Weaver prior to EMS leaving. Weaver was eventually arrested for DUI.** Weaver filed a motion to suppress evidence. Weaver argued lack of reasonable suspicion to stop his vehicle, unlawfully detained him after EMS cleared him and lacked PC to arrest him. **Judge found the officers were "mixing together a public safety stop with an investigation and suppressed the evidence." The District Court suppressed based on the safety stop was not sufficiently divorced from the DUI investigation and when the safety stop concluded the deputies did not have articulable reasonable suspicion to support extending the stop as a DUI investigation. Citing Gonzales 36 Kan.App2d 446(2006)** The State filed a reconsideration citing many cases asserting "an officer responding to a public safety dispatch is not required to ignore obvious indications of criminal activity until the public safety investigation is concluded before he begins considering whether he reasonable suspicion of criminal activity is present." **All cases cited by the**

State were traffic stops made by law enforcement for public safety. The appellate court citing Messner 55 Kan.App.2d 630(2018) indicated the deputies began conducting a DUI investigation before the public safety stop was ended contrary to well-settled Kansas law that a safety stop must be divorced from a criminal investigation. Affirmed.

IMPLIED CONSENT

SEARCH INCIDENT TO ARREST-REVISED NOTICES

State v. Williams 431 P.3d 901, 2018 WL 6424993(12/07/18)
*****UNPUBLISHED*****
Williams was found with his car parked on the highway with the engine running and lights on but in the wrong lane of travel. Williams was in the driver seat unconscious. Efforts were made to wake him up. When Williams awoke he was confused and had difficulty unlocking his door. He could not remember his address. He was unable to walk so no SFSTs were performed. Williams stipulated the officer had cause to arrest him for DUI. The revised implied consent notices were read. Williams agreed to take the test which indicated his BAC was above the legal limit. **Williams filed a motion to suppress arguing the implied consent advisories (the revised notices) were coercive and isolated his rights under the 4th amendment. There was a review of Birchfield v. North Dakota 136 S.Ct. 2160(2018) and State v. Perkins 55 Kan.App.2d 372(2018)—the search incident to arrest exception to the search warrant requirement is a categorical exception to the warrant requirement and permits an officer to demand a breath test from a person arrested for DUI violation. Thus a breath test—but not a blood test because it is more intrusive---may be administered as a search incident to a lawful arrest for drunk driving.** Affirmed.