Approved 2-22-89
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Wint Winter, Jr. at
Chairperson

10:00 a.m./~~p.m.~~ on February 13, 1989 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~: Senators Winter, Yost, Bond, Feleciano, Gaines, D. Kerr, Martin, Morris, Oleen, Parrish, Petty and Rock

Committee staff present:

Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Revisor of Statutes
Jane Tharp, Committee Secretary

Conferees appearing before the committee:

Bud Grant, Kansas Chamber of Commerce and Industry
Charles Simmons, Department of Corrections
JoAnn Peavler, East Topeka Neighborhood

Bud Grant, Kansas Chamber of Commerce and Industry, requested a bill be introduced concerning shoplifting (See Attachment I). Following his explanation, Senator Yost moved to introduce the bill. Senator Bond seconded the motion. The motion carried.

Senator Bond requested a bill be introduced concerning results of breath tests (See Attachment II). Following his explanation, Senator Bond moved the bill be introduced. Senator Yost seconded the motion. The motion carried.

Senator Parrish requested a bill be introduced to provide right of assignment. Following her explanation, Senator Parrish moved the bill be introduced. Senator Petty seconded the motion. The motion carried.

The chairman welcomed a group of girl scouts who were from across the state visiting the Legislature.

Senate Bill 211 - Criminal procedure; consecutive sentences.
Senate Bill 212 - State reception and diagnostic center.
Senate Bill 213 - Corrections; relating to female inmates.
Senate Bill 214 - Persons committed to secretary of corrections; transporting such persons.

Charles Simmons, Department of Corrections, explained each bill and why the department needs the changes. During his explanation of Senate Bill 211, Elwaine Pomeroy, Kansas Parole Board, was recognized. He stated he was opposed to Senate Bill 211. During committee discussion, a committee member referred to Senate Bill 213 and inquired, where did you plan to do those evaluations if that plan didn't work out. Mr. Simmons replied in Topeka at the SRDC unit. We are trying to consolidate services of programs in one location. The committee member stated concern if this would be a minimum training center and possible changes in the future. Mr. Simmons stated the department intends to abide by the commitment. They have tried to work with the residents in the neighborhood and have tried to be receptive to their concern. The committee member referred to line 54 and inquired why the word rehabilitation was stricken. What is your intent? Mr. Simmons explained it provides the department would enter into a program agreement. Another committee member referred to Senate Bill 212 and was concerned if the budget is retrained, what would happen in giving evaluations? Could be setting up liability situation if not giving everyone the same evaluation? Mr. Simmons replied our approach

Senate Bills 211, 212, 213 and 214

was it was better to utilize the resources. We don't believe there would be a liability factor involved. Considerable committee discussion was held concerning what has happened to the jury when found guilty of a felony, and using the local community mental health center for evaluations. The chairman pointed out a proposal to amend Senate Bill 212 in line 43 of the bill to strike "may be paroled or". Committee discussion was held concerning the proposed amendment. Also discussion was held concerning deleting the word rehabilitation.

JoAnn Peavler, East Topeka neighborhood, testified she was speaking for the residents of an East Topeka neighborhood known as the Belmont Addition. This area was developed during and after WWII and is considered low to middle income with many retired citizens. This housing area lies immediately north, across Highway 40, from the land owned by the state that now comprises the Kansas Reception and Diagnostic Center and the Kansas Correctional Vocational Training Center. A copy of her testimony is attached (See Attachment III). A committee member inquired what would your feeling be if the department did not house male maximum security and use it for female prisoners? She replied I am opposed to housing maximum security prisoners.

The chairman announced hearing on the bills will be rescheduled at a later date.

Senator Morris moved to approve the minutes of February 6, 1989 and February 8, 1989. Senator Gaines seconded the motion. The motion carried.

The meeting adjourned.

Copy of the guest list is attached (See Attachment IV).

Copy of handout from Audrey C. miller is attached (See Attachment V).

Copy of a handout from Larry Sanders is attached (See Attachment VI).

Copy of a handout from Mary Quiett is attached (See Attachment VII).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 2-13-89

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Charles Simmons	Topeka	DOC
Elvirene J Pomeroy	Topeka	Ks Parole Bd
Jo Ann Pearlu	Topeka	East Top Neighborhood
Jim McBride	Topeka	Observer
S Therese Bangert	"	KCCD
Mary Quist	"	EAST END N.A.
Audrey Speller	Topeka	N/A
Patricia Henshall	Topeka	OJA
Jim Clark	Dover	KCDAA
Lucy Sanders	Topeka	E.E.N.A.
Brenda Frey	Newton	Girl Scouts
Brenda Martin	Elkhart	" "
Lilli Anderson	LIBERAL	GIRL SCOUTS
Krista Linder	Pittsburg, Ks.	" "
Kamie Jones	Wichita, KS.	Girl Scouts
April Behrendt	Haysville, KS	" "
R Frey	Topeka	KTLA
Linda Jewett	Colby, KS	Girl Scouts
Melissa D. Sharp	Russell, KS	Girl Scouts
Joy Biddle	Guymon OK	Girl Scouts
Jim McBride	Topeka	Observer
Lora Sloan	Topeka	Doc
Enora Armstrong	Intern	Inter
Anthony Hensley	Topeka	State Rep.
Paula Sue Hearnes	Intern Lawrence	Sen Feleciano
M. Hawver	Eureka	dep. Jayhawk

Attachment IV
Senate Judiciary
2-13-89

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 2-13-89

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Mary Mouse	Garden Plain	Girl Scouts
Tammy Shearer	Hays	Girl Scouts
Rachael Sarmer	Great Bend	Girl Scouts
Jean Stump	Burlington	Girl Scouts
Shelley Fisher	Emporia	" "
Ruth Wilkins	Topeka	" "
Martha Fee	Hutchinson	" "
Frances Shearer	Hays	Girl Scout
[illegible]	[illegible]	[illegible]
Mary Wolverton	Topeka	City Council

Attachment IV
Senate Judiciary
2-13-89

Bill Request

As Amended by Senate Committee

Session of 1985

SENATE BILL No. 44

By Committee on Judiciary

1-17

AN ACT concerning theft; providing certain civil remedies therefor.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) Any person who commits theft shall be civilly liable to the owner of the property in an amount equal to:

(1) Actual damages equal to the full retail value of the property;

(2) a civil penalty of not less than $100 or more than $1,000, as determined by the court; and

(3) attorney fees and court costs.

~~(b) If a minor commits theft, the parent or guardian of the minor shall be civilly liable for:~~

~~(1) The amount provided by subsection (a), if the theft is found to be the result of neglect by the parent or guardian; or~~

~~(2) the amount provided by subsection (a) or the maximum amount recoverable in actions pursuant to K.S.A. 38-120 and amendments thereto, whichever is less, if the theft is not found to be the result of neglect by the parent or guardian.~~

~~(c)~~ *(b)* A conviction, plea of guilty or *nolo contendere* or adjudication of the offense of theft shall not be a prerequisite to the bringing of an action pursuant to this section.

~~(d)~~ *(c)* As used in this section, "theft" means theft as defined by K.S.A. 21-3701 and amendments thereto.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

Attachment I
Senate Judiciary
2-13-89

Overland Park

February 07, 1989

Senator Dick Bond
State Capitol
Topeka, KS 66612

Re: Proposed amendment to DUI law regarding evidentiary foundation necessary to admit results of breath tests administered pursuant to K.S.A. 8-1001 et seq.

Dear Senator Bond:

Since the introduction in 1982 of mandatory minimum jail sentencing for first time DUI offenders, defense attorneys in DUI cases have increasingly attacked the admissibility of breath test results. With the introduction of the per se .10 charge in 1985, these attacks have steadily increased to the extent that many DUI and .10 cases are lost due to the court not admitting the breath test results. Most of these cases are lost on technical challenges to the test procedure that should not affect the admissibility of the results but should go to the probative weight to be given the results.

The proposed bill would provide a badly needed legislative guideline for the courts to use in determining the admissibility of the test results. Because little case law exists on the standards for admitting test results, courts use differing standards which result in the improper exclusion of reliable test results. While the case law is limited at best, the language of the proposed bill does parallel the standard given by our appellate courts in the cases of Shawnee v. Gruss, 2 Kan. App.2d 131 (1978) and State v. McNaught, 238 Kan. 567 (1986). (See copies attached and highlighted).

I have attached a copy of similar legislative language from the State of Alaska. In addition, our own K.S.A. 8-1002(i)(j) provide for legislative foundation standards for the admissibility of test results in DUI driver license suspension cases.

Finally, I have contacted the Department of Health and Environment, MADD and several prosecutors who would support such a bill.

Attachment II
SJC
2-13-89

Law Department

City Of Overland Park • City Hall • 8500 Santa Fe Drive • Overland Park, Kansas 66212 • 913-381-5252 • FAX 913-381-9387

Please contact my office for any assistance you might need in getting this legislation adopted.

Sincerely,

Michael R. Santos,
Assistant City Attorney

MRS/dkc
Attachment

cc: Robert Watson, CA
Myron Scafe, Chief

AN ACT CONCERNING DRIVING UNDER THE INFLUENCE OF ALCOHOL OR DRUGS; RELATING TO THE EVIDENTIARY FOUNDATION NECESSARY TO ADMIT THE RESULTS OF BREATH TESTS ADMINISTERED PURSUANT TO K.S.A. 8-1001; AND ADDING A NEW SECTION 8-1007 TITLED EVIDENCE; FOUNDATION FOR ADMISSIBILITY OF TEST RESULTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF KANSAS:

SECTION 1. New Section 8-1007 is hereby added and shall read as follows:

The following testimony shall constitute sufficient evidentiary foundation to admit the test results of a breath test administered pursuant to K.S.A. 8-1001 et. seq.:

a. Testimony by the law enforcement officer who administered the breath test, that at the time the test was administered the officer was trained and certified by the Department of Health and Environment to conduct human breath testing; and

b. Testimony by the law enforcement officer who administered the test that the device used to test the person's breath was certified by the Department of Health and Environment to test human breath; and

c. Testimony by the law enforcement officer who administered the test that the device used to test the person's breath was functioning properly and the test was administered according to the operating protocol established by the Department of Health and Environment for that breath testing device.

Upon submission of the above foundation testimony, the results of a breath test shall be presumed valid and no further evidentiary foundation shall be necessary. Once the validity of the test result has been established, evidence challenging the test or the test result shall be considered only as to the probative weight to be given the test results and not as to the admissibility of the results.

Citation
AK ST s 28.35.033
AS s 28.35.033

Rank(R)
R 2 OF 7

Database
STAT-ALL

Mode
F LOCATE

ALASKA STATUTES

Title 28. Motor Vehicles.

Chapter 35. Miscellaneous Provisions.

Article 2. Operating While Intoxicated; Implied Consent.

Sec. 28.35.033. Chemical analysis of breath or blood.

(a) Upon the trial of a civil or criminal action or proceeding arising out of acts alleged to have been committed by a person while operating or driving a motor vehicle or operating an aircraft or a watercraft while intoxicated, the amount of alcohol in the person's blood or breath at the time alleged shall give rise to the following presumptions:

(1) If there was 0.05 percent or less by weight of alcohol in the person's blood, or 50 milligrams or less of alcohol per 100 milliliters of the person's blood, or 0.05 grams or less of alcohol per 210 liters of the person's breath, it shall be presumed that the person was not under the influence of intoxicating liquor.

(2) If there was in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the person's blood, or in excess of 50 but less than 100 milligrams of alcohol per 100 milliliters of the person's blood, or in excess of 0.05 grams but less than 0.10 grams of alcohol per 210 liters of the person's breath, that fact does not give rise to any presumption that the person was or was not under the influence of intoxicating liquor, but that fact may be considered with other competent evidence in determining whether the person was under the influence of intoxicating liquor.

(3) [Repealed, s 13 ch 129 SLA 1980.]

(4) If there was 0.10 percent or more by weight of alcohol in the person's blood, or 100 milligrams or more of alcohol per 100 milliliters of the person's blood, or 0.10 grams or more of alcohol per 210 liters of the person's breath, it shall be presumed that the person was under the influence of intoxicating liquor.

(b) For purposes of this chapter, percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per 100 milliliters of blood.

(c) The provisions of (a) of this section may not be construed to limit the introduction of any other competent evidence bearing upon the question of whether the person was or was not under the influence of intoxicating liquor.

(d) To be considered valid under the provisions of this section the chemical analysis of the person's breath or blood shall have been performed according to methods approved by the Department of Public Safety. The Department of Public Safety is authorized to approve satisfactory techniques, methods, and standards of training necessary to ascertain the qualifications of individuals to conduct the analysis. If it is established at trial that a chemical analysis of breath or blood was performed according to approved methods by a person trained according to techniques, methods, and standards of training approved by the Department of Public Safety, there is a presumption that the test results are valid and further foundation for introduction of the evidence is unnecessary.

(e) The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of the person's own choosing administer a chemical test in addition to the test administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person does not preclude the admission of evidence relating to the test taken at the direction of a law enforcement officer; the fact that the person under arrest sought to obtain such an additional test, and failed or was unable so to do, is likewise admissible in evidence.

(f) Upon the request of the person who submits to a chemical test at the request of a law enforcement officer, full information concerning the test, including the results of it, shall be made available to the person or the person's attorney.

(d) To be considered valid under the provisions of this section the chemical analysis of the person's breath or blood shall have been performed according to methods approved by the Department of Public Safety. The Department of Public Safety is authorized to approve satisfactory techniques, methods, and standards of training necessary to ascertain the qualifications of individuals to conduct the analysis. If it is established at trial that a chemical analysis of breath or blood was performed according to approved methods by a person trained according to techniques, methods, and standards of training approved by the Department of Public Safety, there is a presumption that the test results are valid and further **foundation** for introduction of the evidence is unnecessary.

(s 1 ch 83 SLA 1969; am s 6 ch 104 SLA 1971; am s 13 ch 129 SLA 1980; am ss 18 -- 20 ch 117 SLA 1982; am E.O. No. 67, s 2 (1987))

HISTORICAL NOTES

Effect of amendment. -- The 1980 amendment, in subsection (a), inserted "or driving" and "or breath" in the introductory paragraph, deleted "as shown by chemical analysis of the person's breath" following "time alleged" in the introductory paragraph, inserted the language beginning "or 50 milligrams" and ending "210 liters of his breath" in paragraph (1), inserted the language beginning "or in excess of 50" and ending "210 liters of his breath" in paragraph (2), and repealed paragraph (3), which read: "If there was 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of intoxicating liquor."

The 1982 amendment, in subsection (a), substituted "or operating an aircraft or a watercraft while intoxicated" for "under the influence of intoxicating liquor" in the introductory language and added paragraph (4); in subsection (b), substituted "this chapter" for "this section" and "100 milliliters" for "100 cubic centimeters"; and in subsection (d), inserted "or blood" in the first and third sentences.

The 1987 amendment, effective July 1, 1987, substituted "The Department of Public Safety" for "The Department of Health and Social Services" in three places in subsection (d).

A. S. s 28.35.033
AK ST s 28.35.033
ND OF DOCUMENT

LES

been issued a temporary li-
ıspension, revocation or can-
as been stayed by a court or
f vehicles.
985, ch. 47, § 2; July 1.

ıction permit for class A or
hicles. (a) Any person who is
of age may apply to the di-
ruction permit to operate a
motor vehicle, as prescribed
, and amendments thereto.
ts discretion, after the appli-
ully passed all parts of the
than the driving test, may
icant an instruction permit
e the applicant while having
ıch person's immediate pos-
a class A or class B motor
public highways for a period
subject to the following re-
person having the instruction
te a class A motor vehicle at
ccompanied by a holder of a
er's license, who has had at
driving experience and who
t beside the driver; or
having the instruction per-
class B motor vehicle at any
panied by a holder of a valid
lriver's license, who has had
driving experience and who
t beside the driver.
ary of revenue may adopt
ons for the implementation
f this section.
38, ch. 38, § 1; July 1.

'ROCESS AGAINST
RESIDENTS

ournal References:
in Kansas Civil Procedure," Eli-
.L.R. 515, 522 (1984).

ournal References:
Bounty: An Analysis of Kansas'
ohn F. Kuether, 23 W.L.J. 494,

ANNOTATIONS
ıble to toll statute of limitations
of process available. Garrison v.
653 P.2d 824 (1982); reversed,
K. 236, 662 P.2d 1191 (1983).
not complete until pleadings and
endant; cannot be completed if
whereabouts of defendant unknown. Garrison v. Vu, 233 K. 236, 238, 239, 662 P.2d 1191 (1983).

18. Cited; improper to allow retrospective application of procedural statute (60-203) where vested defense exists prior to effective date thereof. Jackson v. American Best Freight System, Inc., 238 K. 322, 323, 325, 709 P.2d 983 (1985).

8-402.

CASE ANNOTATIONS

14. Substituted service not complete until pleadings and notice delivered to defendant; cannot be completed if whereabouts of defendant unknown. Garrison v. Vu, 233 K. 236, 238, 239, 662 P.2d 1191 (1983).

15. Cited; improper to allow retrospective application of procedural statute (60-203) where vested defense exists prior to effective date thereof. Jackson v. American Best Freight System, Inc., 238 K. 322, 323, 325, 709 P.2d 983 (1985).

8-403.

CASE ANNOTATIONS

1. Cited; improper to allow retrospective application of procedural statute (60-203) where vested defense exists prior to effective date thereof. Jackson v. American Best Freight System, Inc., 238 K. 322, 323, 325, 709 P.2d 983 (1985).

Article 6.—FAIR TRADE

8-605.

Attorney General's Opinions:

County attorneys; prosecution in another venue; additional compensation. 88-50.

8-611.

History: L. 1969, ch. 50, § 1; L. 1985, ch. 49, § 1; Repealed, L. 1988, ch. 211, § 11; July 1.

Revisor's Note:

Later act, see 21-3757.

CASE ANNOTATIONS

1. Specific charge of setting back odometer should be made under this statute and not under 21-4403 (deceptive commercial practices). State v. Kliewer, 210 K. 820, 821, 822, 823, 826, 827, 504 P.2d 580 (1972).

2. Cited; applicability of 75-3202 specifically covering state employees as opposed to general nature of 21-3904 examined. State v. Wilson, 11 K.A. 2d 504, 506, 728 P.2d 1332 (1986).

Article 10.—DRIVING UNDER INFLUENCE OF ALCOHOL OR DRUGS; RELATED PROVISIONS

Cross References to Related Sections:

Rules and regulations concerning laboratories, persons performing tests and devices, see 65-1,107.

Breath tests, unlawful acts, see 65-1,109.

8-1001. Tests for alcohol or drugs; request by officer, grounds; consent implied; administration of tests, when; procedures; immunity from liability; warning statement; search warrant, admissibility of test; availability of test result. (a) Any person who operates or attempts to operate a motor vehicle within this state is deemed to have given consent, subject to the provisions of this act, to submit to one or more tests of the person's blood, breath, urine or other bodily substance to determine the presence of alcohol or drugs. The testing deemed consented to herein shall include all quantitative and qualitative tests for alcohol and drugs. A person who is dead or unconscious shall be deemed not to have withdrawn the person's consent to such test or tests, which shall be administered in the manner provided by this section.

(b) A law enforcement officer shall request a person to submit to a test or tests deemed consented to under subsection (a) if the officer has reasonable grounds to believe the person was operating or attempting to operate a motor vehicle while under the influence of alcohol or drugs, or both, and one of the following conditions exists: (1) The person has been arrested or otherwise taken into custody for any offense involving operation or attempted operation of a motor vehicle while under the influence of alcohol or drugs, or both, in violation of a state statute or a city ordinance; or (2) the person has been involved in a motor vehicle accident or collision resulting in property damage, personal injury or death. The law enforcement officer directing administration of the test or tests may act on personal knowledge or on the basis of the collective information available to law enforcement officers involved in the accident investigation or arrest.

(c) If a law enforcement officer requests a person to submit to a test of blood under this section, the withdrawal of blood at the direction of the officer may be performed only by: (1) A person licensed to practice medicine and surgery or a person acting under the supervision of any such licensed person; (2) a registered nurse or a licensed practical nurse; or (3) any qualified medical technician. When presented with a written statement by a law enforcement officer directing blood to be withdrawn from a person who has tentatively agreed to allow the withdrawal of blood under this section, the person authorized herein to withdraw blood and the medical care facility where blood is withdrawn may rely on such a statement as evidence that the person has consented to the medical procedure used and shall

not require the person to sign any additional consent or waiver form. In such a case, the person authorized to withdraw blood and the medical care facility shall not be liable in any action alleging lack of consent or lack of informed consent. No person authorized by this subsection to withdraw blood, nor any person assisting in the performance of a blood test nor any medical care facility where blood is withdrawn or tested that has been directed by any law enforcement officer to withdraw or test blood, shall be liable in any civil or criminal action when the act is performed in a reasonable manner according to generally accepted medical practices in the community where performed.

(d) If there are reasonable grounds to believe that there is impairment by a drug which is not subject to detection by the blood or breath test used, a urine test may be required. If a law enforcement officer requests a person to submit to a test of urine under this section, the collection of the urine sample shall be supervised by persons of the same sex as the person being tested and shall be conducted out of the view of any person other than the persons supervising the collection of the sample and the person being tested, unless the right to privacy is waived by the person being tested. The results of qualitative testing for drug presence shall be admissible in evidence and questions of accuracy or reliability shall go to the weight rather than the admissibility of the evidence.

(e) No law enforcement officer who is acting in accordance with this section shall be liable in any civil or criminal proceeding involving the action.

(f) (1) Before a test or tests are administered under this section, the person shall be given oral and written notice that: (A) Kansas law requires the person to submit to and complete one or more tests of breath, blood or urine to determine if the person is under the influence of alcohol or drugs, or both; (B) the opportunity to consent to or refuse a test is not a constitutional right; (C) there is no constitutional right to consult with an attorney regarding whether to submit to testing; (D) if the person refuses to submit to and complete any test of breath, blood or urine hereafter requested by a law enforcement officer, the person's driving privileges will be suspended for at least 180 days; (E) if the person submits to and completes the test or tests and the test results show an alcohol concentration of .10 or greater, the person's driving privileges will be suspended for at least 30 days; (F) if the person refuses a test or the test results show an alcohol concentration of .10 or greater and if, within the past five years, the person has been convicted or granted diversion on a charge of driving under the influence of alcohol or drugs, or both, or a related offense or has refused or failed a test, the person's driving privileges will be suspended for at least one year; (G) refusal to submit to testing may be used against the person at any trial on a charge arising out of the operation or attempted operation of a motor vehicle while under the influence of alcohol or drugs, or both; (H) the results of the testing may be used against the person at any trial on a charge arising out of the operation or attempted operation of a motor vehicle while under the influence of alcohol or drugs, or both; and (I) after the completion of the testing, the person has the right to consult with an attorney and may secure additional testing, which, if desired, should be done as soon as possible and is customarily available from medical care facilities and physicians. After giving the foregoing information, a law enforcement officer shall request the person to submit to testing. The selection of the test or tests shall be made by the officer. If the person refuses to submit to and complete a test as requested pursuant to this section, additional testing shall not be given unless the certifying officer has probable cause to believe that the person, while under the influence of alcohol or drugs, or both, has operated a motor vehicle in such a manner as to have caused the death of or serious injury to another person. In such event, such test or tests may be made pursuant to a search warrant issued under the authority of K.S.A. 22-2502 and amendments thereto or without a search warrant under the authority of K.S.A. 22-2501 and amendments thereto. If the test results show a blood or breath alcohol concentration of .10 or greater, the person's driving privileges shall be subject to suspension, or suspension and restriction, as provided in K.S.A. 8-1002 and amendments thereto and K.S.A. 1988 Supp. 8-1014. The person's refusal shall be admissible in evidence against the person at any trial on a charge arising out of the alleged operation or attempted operation of a motor vehicle while under the influence of alcohol or drugs, or both.

(2) Failure of a person to provide an adequate breath sample or samples as directed shall constitute a refusal unless the person

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ability caused by a me
to any ingested alcoho

(3) It shall not be a
did not understand th
required by this sectio

(g) Nothing in this
strued to limit the adn
alcohol or drug conce
obtained pursuant to a

(h) Upon the requ
mitting to testing und
of the results of the tes
able to such person.

History: L. 1955, c
60, § 1; L. 1973, ch. 4
§ 4; L. 1978, ch. 36, §
3; L. 1985, ch. 48, § 3
L. 1986, ch. 40, § 2;
July 1.

Cross References to Relatec

Preliminary screening test

Law Review and Bar Journ

"S.B. 699—A Comment on
Law," Joseph Brian Cox and
230, 237 (1982).

"The New Kansas DUI La
Practical Problems," Gerard
341, 344, 345, 348, 349 (198

"The New Kansas Drunk D
Matthew D. Keenan, 31 K.L
422 (1983).

"Survey of Kansas Law: Cr
son, 32 K.L.R. 395 (1984).

"Criminal Law: Rescinding
Blood Alcohol Tests," Glen
(1985).

"Constitutional Law: Comp
stricted by the Fourth Amen
S.Ct. 1611 (1985)]," Christi
W.L.J. 123, 128, 129 (1985).

"Right to Counsel in DUI
kovich, 54 J.K.B.A. 32 (1985)

Attorney General's Opinions:

Maximum speed limits; cert
public records; disclosure of

Search warrants; use in mu

Doctors of chiropractic can
physician." 87-42.

Tests for alcohol or drugs;

CASE ANNC

27. Admission of evidence
cohol test not violation of U
accused not entitled to expla
fusing test. State v. Compton,
695, 664 P.2d 1370 (1983).

28. Statute, being integral
not violative of Kan. Const., A
233 K. 972, 973, 980, 666 P.

shows that the failure was due to physical inability caused by a medical condition unrelated to any ingested alcohol or drugs.

(3) It shall not be a defense that the person did not understand the written or oral notice required by this section.

(g) Nothing in this section shall be construed to limit the admissibility at any trial of alcohol or drug concentration testing results obtained pursuant to a search warrant.

(h) Upon the request of any person submitting to testing under this section, a report of the results of the testing shall be made available to such person.

History: L. 1955, ch. 61, § 1; L. 1967, ch. 60, § 1; L. 1973, ch. 41, § 1; L. 1977, ch. 38, § 4; L. 1978, ch. 36, § 1; L. 1982, ch. 144, § 3; L. 1985, ch. 48, § 3; L. 1985, ch. 50, § 1; L. 1986, ch. 40, § 2; L. 1988, ch. 47, § 13; July 1.

Cross References to Related Sections:

Preliminary screening test of breath, see 8-1012.

Law Review and Bar Journal References:

"S.B. 699—A Comment on Kansas' New 'Drunk Driving' Law," Joseph Brian Cox and Donald G. Strole, 51 J.K.B.A. 230, 237 (1982).

"The New Kansas DUI Law: Constitutional Issues and Practical Problems," Gerard Little, Jr., 22 W.L.J. 340, 341, 344, 345, 348, 349 (1983).

"The New Kansas Drunk Driving Law: A Closer Look," Matthew D. Keenan, 31 K.L.R. 409, 410, 411, 414, 419, 422 (1983).

"Survey of Kansas Law: Criminal Law," Robert A. Wason, 32 K.L.R. 395 (1984).

"Criminal Law: Rescinding Initial Refusals to Submit to Blood Alcohol Tests," Glen Peter Ahlers, 24 W.L.J. 386 (1985).

"Constitutional Law: Compelled Surgical Intrusions Restricted by the Fourth Amendment [Winston v. Lee, 105 S.Ct. 1611 (1985)]," Christina L. Medeiros Morris, 25 W.L.J. 123, 128, 129 (1985).

"Right to Counsel in DUI Investigations," Emil A. Tonkovich, 54 J.K.B.A. 32 (1985).

Attorney General's Opinions:

Maximum speed limits; certain violations not matters of public records; disclosure of records. 85-7.

Search warrants; use in municipal courts. 86-148.

Doctors of chiropractic cannot use the term "chiropractic physician." 87-42.

Tests for alcohol or drugs; who may administer. 87-64.

CASE ANNOTATIONS

27. Admission of evidence of refusal to take blood alcohol test not violation of U.S. or Kansas constitution; accused not entitled to explanation of significance of refusing test. State v. Compton, 233 K. 690, 692, 693, 694, 695, 664 P.2d 1370 (1983).

28. Statute, being integral part of whole subject of act, not violative of Kan. Const., Art. 2, § 16. State v. Reves, 233 K. 972, 973, 980, 666 P.2d 1190 (1983).

29. Division of vehicles required to issue subpoenas to compel arresting officer and relevant witnesses to testify on question of refusing blood chemical test and reasonableness thereof. Wulfkuhle v. Kansas Dept. of Revenue, 234 K. 241, 242, 671 P.2d 547 (1983).

30. Enhancement of sentence under 8-1567(d) requires succeeding offenses be committed after conviction for preceding offense. State v. Osoba, 234 K. 443, 445, 672 P.2d 1098 (1983).

31. If blood test, regardless of compliance with DWI statutes, is taken under appropriate conditions, results are admissible in civil action. Divine v. Groshong, 235 K. 127, 133, 679 P.2d 700 (1984).

32. Initial refusal to take test may be rescinded; rules governing subsequent consent outlined; right to counsel not required prior to blood test. Standish v. Department of Revenue, 235 K. 900, 902, 903, 904, 683 P.2d 1276 (1984).

33. Driving under influence statute (8-1567) not vague nor denial of equal protection or ex post facto. State v. Campbell, 9 K.A.2d 474, 477, 681 P.2d 679 (1984).

34. Two-hour lapse from driving time to blood test goes to weight, not admissibility, of evidence. State v. Armstrong, 236 K. 290, 689 P.2d 897 (1984).

35. No right to counsel before submitting to or refusing blood-alcohol test, purpose of implied consent law reviewed. State v. Bristor, 236 K. 313, 314, 319, 322, 691 P.2d 1 (1984).

36. Before statute invoked, both arrest and request to submit to test must be made; test administered only with consent. State v. Pitchford, 10 K.A.2d 293, 295, 697 P.2d 896 (1985).

37. Affidavit, per se, insufficient to support suspension of license; constitutional requirements not met. Carson v. Division of Vehicles, 237 K. 166, 174, 175, 699 P.2d 447 (1985).

38. Cited; suppression of blood alcohol test results and statutory presumption substantially impair state's case. State v. Hunninghake, 238 K. 155, 156, 157, 708 P.2d 529 (1985).

39. Cited; vehicular homicide (21-3405), DUI (8-1567) convictions; intoxylizer test procedures, independent test (8-1004) discussed. State v. McNaught, 238 K. 567, 582, 713 P.2d 457 (1986).

40. Prior to 1985 amendment, failure to verify chemical test refusal report on oath per 54-101 et seq. invalidated challenged suspension. Dewey v. Kansas Dept. of Revenue, 11 K.A.2d 72, 713 P.2d 490 (1986).

41. Refusal to take breath test not reasonable if based on belief breathalyzer machine malfunctioning. In re Appeal of Ball, 11 K.A.2d 216, 719 P.2d 750 (1986).

42. Cited in opinion in holding no lien created under 58-201 by reference to other statutes. Hartford Ins. Co. v. Overland Body Tow, Inc., 11 K.A.2d 373, 375, 724 P.2d 687 (1986).

43. Driver's silence when requested to submit to test may constitute refusal to submit to test. In re Hamstead, 11 K.A.2d 527, 529, 729 P.2d 461 (1986).

44. Cited; admission of blood sample not contaminated by transfusion admissible in murder prosecution. State v. McKibben, 239 K. 574, 583, 722 P.2d 518 (1986).

45. Application of statute before and after 1985 amendments examined. State v. Louis, 240 K. 175, 727 P.2d 483 (1986).

46. Refusal to submit to blood tests (f) does not permit

issuance of search warrants for blood samples subsection (g). State v. Adee, 241 K. 825, 833, 740 P.2d 611 (1987).

47. Admissibility of blood alcohol test performed with consent but without notices contained in K.S.A. 1985 Supp. 8-1001(f)(1) examined. State v. Doeden, 12 K.A.2d 245, 738 P.2d 876 (1987).

48. Cited; "reasonable opportunity" to have additional alcohol concentration test (8-1004) examined. State v. George, 12 K.A.2d 649, 652, 754 P.2d 460 (1988).

8-1002. Test refusal or failure; suspension of license; notice; hearing; procedure. (a) Whenever a test is requested pursuant to this act and results in either a test failure or test refusal, a law enforcement officer's certification shall be prepared. The certification shall be signed by one or more officers to certify:

(1) With regard to a test refusal, that: (A) There existed reasonable grounds to believe the person was operating or attempting to operate a motor vehicle while under the influence of alcohol or drugs, or both; (B) the person had been placed under arrest, was in custody or had been involved in a motor vehicle accident or collision; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001 and amendments thereto; and (D) the person refused to submit to and complete a test as requested by a law enforcement officer.

(2) With regard to a test failure, that: (A) There existed reasonable grounds to believe the person was operating a motor vehicle while under the influence of alcohol or drugs, or both; (B) the person had been placed under arrest, was in custody or had been involved in a motor vehicle accident or collision; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001 and amendments thereto; and (D) the result of the test showed that the person had an alcohol concentration of .10 or greater in such person's blood or breath.

(3) With regard to failure of a breath test, in addition to those matters required to be certified under subsection (a)(2), that: (A) The testing equipment used was certified by the Kansas department of health and environment; (B) the testing procedures used were in accordance with the requirements set out by the Kansas department of health and environment; and (C) the person who operated the testing equipment was certified by the Kansas department of health and environment to operate such equipment.

(b) For purposes of this section, certification shall be complete upon signing, and no additional acts of oath, affirmation, acknowledgment or proof of execution shall be required. The signed certification or a copy or photostatic reproduction thereof shall be admissible in evidence in all proceedings brought pursuant to this act, and receipt of any such certification, copy or reproduction shall accord the department authority to proceed as set forth herein. Any person who signs a certification submitted to the division knowing it contains a false statement is guilty of a class B misdemeanor.

(c) When the officer directing administration of the testing determines that a person has refused a test and the criteria of subsection (a)(1) have been met or determines that a person has failed a test and the criteria of subsection (a)(2) have been met, the officer shall serve upon the person notice of suspension of driving privileges pursuant to K.S.A. 1988 Supp. 8-1014. If the determination is made while the person is still in custody, service shall be made in person by the officer on behalf of the division of vehicles. In cases where a test failure is established by a subsequent analysis of a breath or blood sample, the officer shall serve notice of such suspension in person or by another designated officer or by mailing the notice to the person at the address provided at the time of the test.

(d) The notice shall contain the following information: (1) The person's name, driver's license number and current address; (2) the reason and statutory grounds for the suspension; (3) the date notice is being served and the effective date of the suspension, which shall be the 45th day after the date of arrest or until a hearing has been held pursuant to this section, whichever date is sooner; (4) the right of the person to request an administrative hearing; and (5) the procedure the person must follow to request an administrative hearing. The notice of suspension shall also inform the person that all correspondence will be mailed to the person at the address contained in the notice of suspension unless the person notifies the division in writing of a different address or change of address. The address provided will be considered a change of address for purposes of K.S.A. 8-248 and amendments thereto if the address furnished is different from that on file with the division.

(e) If a person refuses a test or if a person is still in custody when it is determined that the person has failed a test, the officer shall take any license in the possession of the person and, if the license is not expired, suspended,

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copy of the notice
any licenses taken,

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viously served. If th
tion (a) are not met,
the administrative p
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(g) If the perso
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schedule a hearing
alleged violation occ
jacent thereto. The
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mail to the person n
place of hearing in a
(l). The person's driv
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suspension shall not
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the hearing request.

(h) (1) If the offic
refused the test, the
be limited to wheth
officer had reasonab
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a motor vehicle whi
alcohol or drugs, or
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revoked or canceled, shall issue a temporary license effective until the date of suspension stated in the notice. If the test failure is established by a subsequent analysis of a breath or blood sample, the temporary license shall be served together with the notice of suspension. A temporary license issued pursuant to this subsection shall bear the same restrictions and limitations as the license for which it was exchanged. The officer shall also provide the person with a copy of the officer's certification as set forth in subsection (c). Within five days after the date of certification of the test refusal or test failure, the officer who effected service shall forward the officer's certification and a copy of the notice of suspension, along with any licenses taken, to the division.

(f) Upon receipt of the law enforcement officer's certification, the division shall review the certification to determine that it meets the requirements of subsection (a). Upon so determining, the division shall proceed to suspend the person's driving privileges in accordance with the notice of suspension previously served. If the requirements of subsection (a) are not met, the division shall dismiss the administrative proceeding and return any license surrendered by the person.

(g) If the person mails a written request which is postmarked within 10 days after service of the notice, if by personal service, or 13 days after service, if by mail, the division shall schedule a hearing in the county where the alleged violation occurred, or in a county adjacent thereto. The licensee's request for subpoenas must be made in accordance with the notice provided pursuant to subsection (d) and may extend only to the law enforcement officer or officers certifying refusal. Upon receiving a timely request for a hearing, the division shall mail to the person notice of the time, date and place of hearing in accordance with subsection (l). The person's driving privileges shall be suspended in accordance with the notice of suspension served upon the person and the suspension shall not be stayed nor shall the temporary license be extended as a result of the hearing request.

(h) (1) If the officer certifies that the person refused the test, the scope of the hearing shall be limited to whether: (A) A law enforcement officer had reasonable grounds to believe the person was operating or attempting to operate a motor vehicle while under the influence of alcohol or drugs, or both; (B) the person was in custody or arrested for an alcohol or drug related offense or was involved in a motor vehicle accident or collision resulting in property damage, personal injury or death; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001 and amendments thereto; and (D) the person refused to submit to and complete a test as requested by a law enforcement officer.

(2) If the officer certifies that the person failed the test, the scope of the hearing shall be limited to whether: (A) A law enforcement officer had reasonable grounds to believe the person was operating a motor vehicle while under the influence of alcohol or drugs, or both; (B) the person was in custody or arrested for an alcohol or drug related offense or was involved in a motor vehicle accident or collision resulting in property damage, personal injury or death; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001 and amendments thereto; (D) the testing equipment used was reliable; (E) the person who operated the testing equipment was qualified; (F) the testing procedures used were reliable; (G) the test result determined that the person had an alcohol concentration of .10 in such person's blood or breath; and (H) the person was operating a motor vehicle.

(i) At a hearing pursuant to this section, or upon court review of an order entered at such a hearing, an affidavit of the custodian of records at the Kansas department of health and environment stating that the breath testing device was certified and the operator of such device was certified on the date of the test shall be admissible into evidence in the same manner and with the same force and effect as if the certifying officer or employee of the Kansas department of health and environment had testified in person. Such affidavit shall be admitted to prove such reliability without further foundation requirement. A certified operator of a breath testing device shall be competent to testify regarding the proper procedures to be used in conducting the test.

(j) At a hearing pursuant to this section, or upon court review of an order entered at such hearing, in which the report of blood test results have been prepared by the Kansas bureau of investigation or other forensic laboratory of a state or local law enforcement agency are to be introduced as evidence, the report, or a copy of the report, of the findings of the forensic examiner shall be admissible into evi-

dence in the same manner and with the same force and effect as if the forensic examiner who performed such examination, analysis, comparison or identification and prepared the report thereon had testified in person.

(k) The suspension period imposed pursuant to this section shall begin upon the expiration of the temporary license granted under subsection (e), whether or not a request for hearing is made. If a timely request for hearing is made, the hearing shall be held within 45 days of the date the request for hearing is received by the division. If the division is unable to hold a hearing within 45 days of the date upon which the request for hearing is received, the division, at the end of the 45-day period, shall issue temporary driving privileges to the person to be effective until the date of the hearing, which shall be held at the earliest available opportunity. No temporary driving privileges shall be issued for continuances requested by or on behalf of the licensee. If the person whose privileges are suspended is a nonresident licensee, the license of the person shall be forwarded to the appropriate licensing authority in the person's state of residence if the result at the hearing is adverse to such person or if no timely request for a hearing is received.

(l) All notices affirming or canceling a suspension under this section, all notices of a hearing held under this section and all issuances of temporary driving privileges pursuant to subsection (k) shall be sent by first-class mail and a U.S. post office certificate of mailing shall be obtained therefor. All notices so mailed shall be deemed received three days after mailing.

(m) The division shall prepare and distribute forms for use by law enforcement officers in giving the notice required by this section.

History: L. 1955, ch. 61, § 2; L. 1985, ch. 48, § 4; L. 1985, ch. 50, § 2; L. 1986, ch. 40, § 3; L. 1988, ch. 47, § 14; July 1.

CASE ANNOTATIONS

2. Inadvertent failure to provide blood test results for DUI (8-1567) no justification for suppression of results. State v. Wanttaja, 236 K. 323, 324, 691 P.2d 8 (1984).

3. Prior to 1985 amendment, failure to verify chemical test refusal report on oath (8-1001) per 54-101 et seq. invalidated challenged suspension. Dewey v. Kansas Dept. of Revenue, 11 K.A.2d 72, 713 P.2d 490 (1986).

4. Cited; refusal to submit to blood tests does not permit issuance of search warrants for blood samples (8-1001(f), 8-1001(g)). State v. Adee, 241 K. 825, 829, 833, 740 P.2d 611 (1987).

5. Cited; admissibility of blood alcohol test performed with consent but without notices contained in K.S.A. 1985 Supp. 8-1001(f)(1) examined. State v. Doeden, 12 K.A.2d 245, 251, 738 P.2d 876 (1987).

8-1004. Same; additional test by own physician; effect of denial. Without limiting or affecting the provisions of K.S.A. 8-1001 and amendments thereto, the person tested shall have a reasonable opportunity to have an additional test by a physician of the person's own choosing. In case the officer refuses to permit such additional testing, the testing administered pursuant to K.S.A. 8-1001 and amendments thereto shall not be competent in evidence.

History: L. 1955, ch. 61, § 4; L. 1985, ch. 48, § 6; L. 1985, ch. 50, § 3; July 1.

Law Review and Bar Journal References:

"S.B. 699—A Comment on Kansas' New 'Drunk Driving' Law," Joseph Brian Cox and Donald G. Strole, 51 J.K.B.A. 230 (1982).

CASE ANNOTATIONS

4. Cited; vehicular homicide (21-3405), DUI (8-1567) convictions; intoxylizer test procedures (8-1001), independent test discussed. State v. McNaught, 238 K. 567, 582, 713 P.2d 457 (1986).

5. Individual believing breath test unreliable may have independent blood test administered at their expense. In re Appeal of Ball, 11 K.A.2d 216, 219, 719 P.2d 750 (1986).

6. Cited; admissibility of blood alcohol test performed with consent but without notices contained in K.S.A. 1985 Supp. 8-1001(f)(1) examined. State v. Doeden, 12 K.A.2d 245, 252, 738 P.2d 876 (1987).

7. "Reasonable opportunity" to have additional alcohol concentration test depends upon circumstances of each case. State v. George, 12 K.A.2d 649, 653, 654, 754 P.2d 460 (1988).

8-1005. Evidence; test results admissible in prosecutions; weight to be given evidence. Except as provided by K.S.A. 1987 Supp. 8-1012 and amendments thereto, in any criminal prosecution for violation of the laws of this state relating to operating or attempting to operate a motor vehicle while under the influence of alcohol or drugs, or both, or the commission of vehicular homicide or manslaughter while under the influence of alcohol or drugs, or both, or in any prosecution for a violation of a city ordinance relating to the operation or attempted operation of a motor vehicle while under the influence of alcohol or drugs, or both, evidence of the concentration of alcohol or drugs in the defendant's blood, urine, breath or other bodily substance may be admitted and shall give rise to the following:

(a) If the alcohol concentration is less than .10, that fact may be considered with other competent evidence to determine if the defendant was under the
both alcohol and drugs

(b) If the alcohol c
more, it shall be prima
defendant was under t
to a degree that rende
of driving safely.

(c) If there was pre
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fendant incapable of dr

History: L. 1955, c
ch. 60, § 2; L. 1970, ch
42, § 1; L. 1976, ch.
144, § 4; L. 1985, ch.
40, § 4; L. 1986, ch. 4
§ 15; July 1.

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"S.B. 699—A Comment on
Law," Joseph Brian Cox and
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Alcohol Influence," Craig S
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Practical Problems," Gerard
343 (1983).

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Matthew D. Keenan, 31 K.L

"Criminal Law: Rescinding
Blood Alcohol Tests," Glen P
387 (1985).

Attorney General's Opinions:

Driving under influence;
Tests for alcohol and drugs;
86-59.

CASE ANN

21. Instruction, while acce
initional portion from element
233 K. 702, 704, 705, 664 P.

22. The phrase "you shall p
is permissive, not mandatory;
clause of U.S. constitution.
708, 710, 664 P.2d 869 (1983

23. Statute, being integral
not violative of Kan. Const.,
233 K. 972, 974, 980, 666 P.

24. Cited in holding blood
taken under appropriate condi
tion. Divine v. Groshong, 235
700 (1984).

25. Two-hour lapse from dr
to weight, not admissibility,
strong, 236 K. 290, 689 P.2d

26. Results of blood alcoh

fendant was under the influence of alcohol, or both alcohol and drugs.

(b) If the alcohol concentration is .10 or more, it shall be prima facie evidence that the defendant was under the influence of alcohol to a degree that renders the person incapable of driving safely.

(c) If there was present in the defendant's bodily substance any narcotic, hypnotic, somnifacient, stimulating or other drug which has the capacity to render the defendant incapable of safely driving a vehicle, that fact may be considered to determine if the defendant was under the influence of drugs, or both alcohol and drugs, to a degree that renders the defendant incapable of driving safely.

History: L. 1955, ch. 279, § 1; L. 1967, ch. 60, § 2; L. 1970, ch. 51, § 3; L. 1973, ch. 42, § 1; L. 1976, ch. 49, § 1; L. 1982, ch. 144, § 4; L. 1985, ch. 48, § 7; L. 1986, ch. 40, § 4; L. 1986, ch. 41, § 1; L. 1988, ch. 47, § 15; July 1.

Law Review and Bar Journal References:

"S.B. 699—A Comment on Kansas' New'Drunk Driving' Law," Joseph Brian Cox and Donald G. Strole, 51 J.K.B.A. 230, 232 (1982).

"Admissibility of Delayed Chemical Analysis to Establish Alcohol Influence," Craig Shultz and Dan Monnat, 5 J.K.T.L.A. No. 5, 21 (1982).

"The New Kansas DUI Law: Constitutional Issues and Practical Problems," Gerard Little, Jr., 22 W.L.J. 340, 343 (1983).

"The New Kansas Drunk Driving Law: A Closer Look," Matthew D. Keenan, 31 K.L.R. 409, 415 (1983).

"Criminal Law: Rescinding Initial Refusals to Submit to Blood Alcohol Tests," Glen Peter Ahlers, 24 W.L.J. 386, 387 (1985).

Attorney General's Opinions:

Driving under influence; "per se" violation. 85-133.

Tests for alcohol and drugs; weight to be given evidence. 86-59.

CASE ANNOTATIONS

21. Instruction, while acceptable, should separate definitional portion from elements of offense. State v. Reeves, 233 K. 702, 704, 705, 664 P.2d 862 (1983).

22. The phrase "you shall presume," as used in statute, is permissive, not mandatory; does not violate due process clause of U.S. constitution. State v. Price, 233 K. 706, 708, 710, 664 P.2d 869 (1983).

23. Statute, being integral part of whole subject of act, not violative of Kan. Const., Art. 2, § 16. State v. Reves, 233 K. 972, 974, 980, 666 P.2d 1190 (1983).

24. Cited in holding blood tests from arrested driver, taken under appropriate conditions, admissible in civil action. Divine v. Groshong, 235 K. 127, 132, 138, 679 P.2d 700 (1984).

25. Two-hour lapse from driving time to blood test goes to weight, not admissibility, of evidence. State v. Armstrong, 236 K. 290, 689 P.2d 897 (1984).

26. Results of blood alcohol test properly suppressed where not delivered as required by 8-1002. State v. Wanttaja, 9 K.A.2d 441, 444, 680 P.2d 922 (1984); reversed 236 K. 323.

27. Pretrial suppression of blood alcohol content substantially impairs state's ability to prosecute; interlocutory appeal (22-3603) permitted; physician-patient issue (60-427) raised. State v. Pitchford, 10 K.A.2d 293, 294, 697 P.2d 896 (1985).

28. Suppression of blood alcohol test results and statutory presumption substantially impair state's case. State v. Hunninghake, 238 K. 155, 157, 708 P.2d 529 (1985).

29. Definition of "alcohol concentration" applicable to city ordinance; trial court correct by instructing jury to use definition herein. City of Ottawa v. Brown, 11 K.A.2d 581, 584, 585, 730 P.2d 364 (1986).

30. Cited; blood alcohol concentration as cause of accident, but not presumptive of intoxication in workers compensation cases (44-501) examined. Poole v. Earp Meat Co., 242 K. 638, 643, 750 P.2d 1000 (1988).

8-1006. Same; submission of other evidence; preservation of samples not required. (a) The provisions of K.S.A. 8-1005 and amendments thereto shall not be construed as limiting the introduction of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of alcohol or drugs, or both.

(b) Nothing in this act shall require any samples of blood, breath or urine to be preserved for or furnished to the person for independent testing.

History: L. 1955, ch. 279, § 2; L. 1985, ch. 48, § 8; L. 1985, ch. 50, § 4; L. 1986, ch. 40, § 5; L. 1988, ch. 47, § 16; July 1.

8-1008. Alcohol and drug safety action program; evaluation and supervision of persons convicted of violation of 8-1567 or comparable city ordinance; certification of programs; fees, disposition. (a) Community-based alcohol and drug safety action programs certified in accordance with subsection (b) shall provide:

(1) Presentence alcohol and drug evaluations of any person who is convicted of a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute;

(2) supervision and monitoring of all persons who are convicted of a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute, and whose sentences or terms of probation require completion of an alcohol and drug safety action program, as provided in this section, or an alcohol and drug abuse treatment program, as provided in this section;

(3) alcohol and drug evaluations of persons whom the prosecutor considers for eligibility or finds eligible to enter a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute;

(4) supervision and monitoring of persons required, under a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute, to complete an alcohol and drug safety action program, as provided in this section, or an alcohol and drug abuse treatment program, as provided in this section; or

(5) any combination of (1), (2), (3) and (4).

(b) The presentence alcohol and drug evaluation shall be conducted by a community-based alcohol and drug safety action program certified in accordance with the provisions of this subsection to provide evaluation and supervision services as described in subsections (c) and (d). A community-based alcohol and drug safety action program shall be certified either by the administrative judge of the judicial district to be served by the program or by the secretary of social and rehabilitation services for judicial districts in which the administrative judge declines to certify a program. In establishing the qualifications for programs, the administrative judge or the secretary shall give preference to those programs which have had practical experience prior to July 1, 1982, in diagnosis and referral in alcohol and drug abuse. Certification of a program by the administrative judge shall be done with consultation and approval of a majority of the judges of the district court of the district and municipal judges of cities lying in whole or in part within the district. If within 60 days after the effective date of this act the administrative judge declines to certify any program for the judicial district, the judge shall notify the secretary of social and rehabilitation services, and the secretary of social and rehabilitation services shall certify a community-based alcohol and drug safety action program for that judicial district. The certification shall be for a four-year period. Recertification of a program or certification of a different program shall be by the administrative judge, with consultation and approval of a majority of the judges of the district court of the district and municipal judges of cities lying in whole or in part within the district. If upon expiration of certification of a program there will be no certified program for the district and the administrative judge declines to recertify or certify any program in the district, the judge shall notify the secretary of social and rehabilitation services, at least six months prior to the expiration of certification, that the judge declines to recertify or certify a program under this subsection. Upon receipt of the notice and prior to the expiration of certification, the secretary shall recertify or certify a community-based alcohol and drug safety action program for the judicial district for the next four-year period. To be eligible for certification under this subsection, the administrative judge or the secretary of social and rehabilitation services shall determine that a community-based alcohol and drug safety action program is capable of providing, within the judicial district: (1) The evaluations, supervision and monitoring required under subsection (a); (2) the alcohol and drug evaluation report required under subsection (c) or (d); (3) the follow-up duties specified under subsection (c) or (d) for persons who prepare the alcohol and drug evaluation report; and (4) any other functions and duties specified by law. Community-based alcohol and drug safety action programs performing services in any judicial district under this section prior to the effective date of this act may continue to perform those services until a community-based alcohol and drug safety action program is certified for that judicial district.

(c) A presentence alcohol and drug evaluation shall be conducted on any person who is convicted of a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute. The presentence alcohol and drug evaluation report shall be made available to and shall be considered by the court prior to sentencing. The presentence alcohol and drug evaluation report shall contain a history of the defendant's prior traffic record, characteristics and alcohol or drug problems, or both, and a recommendation concerning the amenability of the defendant to education and rehabilitation. The presentence alcohol and drug evaluation report shall include a recommendation concerning the alcohol and drug driving safety education and treatment for the defendant. The presentence alcohol and drug evaluation report shall be prepared by a program which has demonstrated practical experience in the diagnosis

rience in the diagnosis of alcohol and drug abuse. The duties of persons who prepare the presentence alcohol and drug evaluation report may also include appearing at sentencing and probation hearings in accordance with the orders of the court, monitoring defendants in the treatment programs, notifying the probation department and the court of any defendant failing to meet the conditions of probation or referrals to treatment, appearing at revocation hearings as may be required and providing assistance and data reporting and program evaluation. The cost of any alcohol and drug education, rehabilitation and treatment programs for any person shall be paid by such person, and such costs shall include, but not be limited to, the assessments required by subsection (e). If financial obligations are not met or cannot be met, the sentencing court shall be notified for the purpose of collection or review and further action on the defendant's sentence.

(d) An alcohol and drug evaluation shall be conducted on any person whom the prosecutor considers for eligibility or finds eligible to enter a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute. The alcohol and drug evaluation report shall be made available to the prosecuting attorney and shall be considered by the prosecuting attorney. The alcohol and drug evaluation report shall contain a history of the person's prior traffic record, characteristics and alcohol or drug problems, or both, and a recommendation concerning the amenability of the person to education and rehabilitation. The alcohol and drug evaluation report shall include a recommendation concerning the alcohol and drug driving safety education and treatment for the person. The alcohol and drug evaluation report shall be prepared by a program which has demonstrated practical experience in the diagnosis of alcohol and drug abuse. The duties of persons who prepare the alcohol and drug evaluation report may also include monitoring persons in the treatment programs, notifying the prosecutor and the court of any person failing to meet the conditions of diversion or referrals to treatment, and providing assistance and data reporting and program evaluation. The cost of any alcohol and drug education, rehabilitation and treatment programs for any person shall be paid by such person, and such costs shall include, but not be limited to, the assessments required by subsection (e).

(e) In addition to any fines, fees, penalties or costs levied against a person who is convicted of a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute, or who enters a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of that statute or such an ordinance, $110 shall be assessed against the person by the sentencing court or under the diversion agreement. The $110 assessment may be waived by the court or, in the case of diversion of criminal proceedings, by the prosecuting attorney, if the court or prosecuting attorney finds that the defendant is an indigent person. Except as otherwise provided in this subsection, the clerk of the court shall deposit all assessments received under this section in the alcohol and drug safety action fund of the court, which fund shall be subject to the administration of the judge having administrative authority over that court. If the secretary of social and rehabilitation services certifies the community-based alcohol and drug safety action program for the judicial district in which the court is located, the clerk of the court shall remit, during the four-year period for which the program is certified, 15% of all assessments received under this section to the secretary of social and rehabilitation services. Moneys credited to the alcohol and drug safety action fund shall be expended by the court, pursuant to vouchers signed by the judge having administrative authority over that court, only for costs of the services specified by subsection (a) or otherwise required or authorized by law and provided by community-based alcohol and drug safety action programs, except that not more than 10% of the money credited to the fund may be expended to cover the expenses of the court involved in administering the provisions of this section. In the provision of these services the court shall contract as may be necessary to carry out the provisions of this section.

(f) On the effective date of this act, the director of accounts and reports shall pay from the alcohol and drug safety action program fund to the clerk of each court for deposit in the alcohol and drug safety action fund of the court an amount of money determined by mul-

tiplying the number equal to the unencumbered balance in the alcohol and drug safety action program fund on the effective date of this act by the number equal to the percent of the total amount of money credited to the alcohol and drug safety action program fund which was remitted by the clerk of the court to the state treasurer and credited to that fund during the period from July 1, 1982, to the effective date of this act. Prior to the payment the state treasurer shall certify to the director of accounts and reports the amount remitted by each sentencing court and credited to the alcohol and drug safety action program fund during the period from July 1, 1982, to the effective date of this act. After such payment the director of accounts and reports shall transfer all the money which remains in the alcohol and drug safety action program fund to the state general fund and at the time of the transfer all liabilities of the alcohol and drug safety action program fund are imposed on the state general fund. After such transfer, the alcohol and drug safety action program fund is hereby abolished.

(g) The secretary of social and rehabilitation services shall remit all moneys received by the secretary under this section to the state treasurer at least monthly. Upon receipt of the remittance, the state treasurer shall deposit the entire amount in the state treasury and credit it to the certification of community-based alcohol and drug safety action programs fee fund, which is hereby created. All expenditures from such fund shall be made in accordance with appropriation acts upon warrants issued pursuant to vouchers approved by the secretary of social and rehabilitation services or a person designated by the secretary.

History: L. 1982, ch. 144, § 10; L. 1983, ch. 37, § 1; L. 1985, ch. 51, § 1; July 1.

Law Review and Bar Journal References:

"The New Kansas DUI Law: Constitutional Issues and Practical Problems," Gerard Little, Jr., 22 W.L.J. 340, 342, 344 (1983).

Attorney General's Opinions:

Diversion agreements involving restriction of driver's license. 85-1.

Alcohol and drug safety action fund; under control of municipal court. 85-68.

Alcohol and drug safety action fund under control of municipal court. 86-14.

Cities of first class; council member serving as chief attorney for state agency. 88-9.

CASE ANNOTATIONS

1. Statute, being integral part of whole subject of act, not violative of Kan. Const., Art. 2, § 16. State v. Reves, 233 K. 972, 974, 980, 666 P.2d 1190 (1983).

8-1009.

CASE ANNOTATIONS

1. Statute, being integral part of whole subject of act (L. 1982, ch. 144), not violative of Kan. Const., Art. 2, § 16. State v. Reves, 233 K. 972, 975, 980, 666 P.2d 1190 (1983).

8-1011. Immunity from liability for damage to vehicle operated by or in control of person arrested or in custody. A law enforcement officer, and the state or any political subdivision of the state that employs a law enforcement officer, arresting or taking custody of a person for any offense involving the operation of or attempt to operate a motor vehicle while under the influence of alcohol or drugs, or both, shall have immunity from any civil or criminal liability for the care and custody of the motor vehicle that was being operated by or was in the physical control of the person arrested or in custody if the law enforcement officer acts in good faith and exercises due care.

History: L. 1985, ch. 48, § 5; July 1.

8-1012. Preliminary screening test of breath for alcohol concentration; request by officer, grounds; notice required; refusal to take test is traffic infraction; use of results of test; additional tests. A law enforcement officer may request a person who is operating or attempting to operate a motor vehicle within this state to submit to a preliminary screening test of the person's breath to determine the alcohol concentration of the person's breath if the officer has reasonable grounds to believe that the person: (a) Has alcohol in the person's body; (b) has committed a traffic infraction; or (c) has been involved in a motor vehicle accident or collision. At the time the test is requested, the person shall be given oral notice that: (1) There is no right to consult with an attorney regarding whether to submit to testing; (2) refusal to submit to testing is a traffic infraction; and (3) further testing may be required after the preliminary screening test. Failure to provide the notice shall not be an issue or defense in any action. The law enforcement officer then shall request the person to submit to the test. Refusal to take and complete the test as requested is a traffic infraction. If the person submits to the test, the results shall be used for the purpose of assisting law enforcement officers in determining whether an arrest should be made and whether to request the tests authorized by

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History: L. 1986, (

Cross References to Relate

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Breath tests, unlawful act

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Search warrants; use in n

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[redacted] amendments thereto. A law [redacted] person based [redacted] be inadmissible in any civil or criminal action except to aid the court or hearing officer in determining a challenge to the validity of the arrest or the validity of the request to submit to a test pursuant to K.S.A. 8-1001 and amendments thereto. Following the preliminary screening test, additional tests may be requested pursuant to K.S.A. 8-1001 and amendments thereto.

History: L. 1986, ch. 40, § 1; July 1.

Cross References to Related Sections:

List of approved screening devices, see 65-1,107.
Breath tests, unlawful acts, see 65-1,109.

Attorney General's Opinions:

Search warrants; use in municipal courts. 86-148.

8-1013. Definitions. As used in K.S.A. 8-1001 through 8-1010, 8-1011, 8-1012, and K.S.A. 1988 Supp. 8-1014, 8-1015, 8-1016, 8-1017 and 8-1018, and amendments thereto, and this section:

(a) "Alcohol concentration" means the number of grams of alcohol per 100 milliliters of blood or per 210 liters of breath.

(b) (1) "Alcohol or drug-related conviction" means any of the following: (A) Conviction of vehicular battery or aggravated vehicular homicide, if the crime is committed while committing a violation of K.S.A. 8-1567 and amendments thereto or the ordinance of a city or resolution of a county in this state which prohibits any acts prohibited by that statute, or conviction of a violation of K.S.A. 8-1567 and amendments thereto; (B) conviction of a violation of a law of another state which would constitute a crime described in subsection (b)(1)(A) if committed in this state; or (C) conviction of a violation of an ordinance of a city in this state or a resolution of a county in this state which would constitute a crime described in subsection (b)(1)(A), whether or not such conviction is in a court of record.

(2) For the purpose of determining whether an occurrence is a first, second or subsequent occurrence: (A) "Alcohol or drug-related conviction" also includes entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging commission of a crime described in subsection (b)(1) which agreement was entered into during the immediately preceding five years, including prior to the effective date of this act; and (B) it is irrelevant whether an offense occurred [redacted]

(c) "Division" means the division of motor vehicles of the department of revenue.

(d) "Ignition interlock device" means a device which uses a breath analysis mechanism to prevent a person from operating a motor vehicle if such person has consumed an alcoholic beverage.

(e) "Occurrence" means a test refusal, test failure or alcohol or drug-related conviction, or any combination thereof arising from one arrest, occurring in the immediately preceding five years, including prior to the effective day of this act.

(f) "Other competent evidence" includes: (1) Alcohol concentration tests obtained from samples taken two hours or more after the operation or attempted operation of a vehicle; and (2) readings obtained from a partial alcohol concentration test on a breath testing machine.

(g) "Samples" includes breath supplied directly for testing, which breath is not preserved.

(h) "Test failure" or "fails a test" refers to a person's having results of a test administered pursuant to this act, other than a preliminary screening test, which show an alcohol concentration of .10 or greater in the person's blood or breath.

(i) "Test refusal" or "refuses a test" refers to a person's failure to submit to or complete any test, other than a preliminary screening test, in accordance with this act.

History: L. 1988, ch. 47, § 6; July 1.

8-1014. Suspension and restriction of driving privileges for test refusal, test failure or alcohol or drug-related conviction. (a) Except as provided by subsection (d), if a person refuses a test, the division shall, pursuant to K.S.A. 8-1002 and amendments thereto:

(1) On the person's first occurrence, suspend the person's driving privileges for 180 days; and

(2) on the person's second or a subsequent occurrence, suspend the person's driving privileges for one year.

(b) Except as provided by subsection (d), if a person fails a test, the division shall, pursuant to K.S.A. 8-1002 and amendments thereto:

(1) On the person's first occurrence, suspend the person's driving privileges for 30

days, then restrict the person's driving privileges as provided by K.S.A. 1988 Supp. 8-1015 for an additional 60 days; and

(2) on the person's second or a subsequent occurrence, suspend the person's driving privileges for one year.

(c) Except as provided by subsection (d), if a person has an alcohol or drug-related conviction in this state, the convicting court shall:

(1) On the person's first occurrence, suspend the person's driving privileges for 30 days or until the person has completed educational and treatment programs required by the court, whichever is longer, then restrict the person's driving privileges as provided by K.S.A. 1988 Supp. 8-1015 for an additional 330 days; and

(2) on the person's second or a subsequent occurrence, suspend the person's driving privileges for one year or until the person has completed the treatment program required by the court, whichever is longer.

(d) If a person's driving privileges are subject to suspension pursuant to this section for a test refusal, test failure or alcohol or drug-related conviction arising from the same arrest, the period of such suspension shall not exceed the longest applicable period authorized by subsection (a), (b) or (c), and such suspension periods shall not be added together or otherwise imposed consecutively. In addition, in determining the period of such suspension as authorized by subsection (a), (b) or (c), such person shall receive credit for any period of time for which such person's driving privileges were suspended while awaiting any hearing or final order authorized by this act.

If a person's driving privileges are subject to restriction pursuant to this section for a test failure or alcohol or drug-related conviction arising from the same arrest, the restriction periods shall not be added together or otherwise imposed consecutively. In addition, in determining the period of restriction, the person shall receive credit for 150 days of any period of suspension imposed for a test refusal arising from the same arrest.

(e) If the division has taken action under subsection (a) or (b) and such action is stayed pursuant to K.S.A. 8-259 and amendments thereto or if temporary driving privileges are issued pursuant to subsection (k) of K.S.A. 8-1002 and amendments thereto, the stay or temporary driving privileges shall not prevent the court from taking the action required by subsection (c).

(f) Upon entering an order suspending, restricting or suspending and restricting a person's driving privileges pursuant to this section, the court shall require the person to surrender to the court any license in the person's possession. The court shall transmit any such license to the division, together with a copy of the order. At the time provided by the order for restriction of the person's driving privileges, the division shall issue without charge a driver's license which shall indicate on the face of the license that restrictions have been imposed on the person's driving privileges and that a certified copy of the order imposing the restrictions is required to be carried by the person for whom the license was issued any time the person is operating a motor vehicle on the highways of this state. If the person is a nonresident, the division shall forward a copy of the order to the motor vehicle administrator of the person's state of residence. If, at the time the order is issued, the person has completed any period of suspension required by this section, the judge shall furnish to the person a copy of the order, which shall authorize the person to drive subject to the restrictions imposed pursuant to this section pending issuance of the restricted license as provided in this subsection.

History: L. 1988, ch. 47, § 7; July 1.

8-1015. Same; authorized restrictions of driving privileges; penalty for violation. (a) When K.S.A. 1988 Supp. 8-1014 requires the division to place restrictions on a person's driving privileges, the division shall restrict the person's driving privileges to driving only under the following circumstances: In going to and returning from the person's place of employment; in going to and returning from a mandated alcohol education or treatment program; and in exceptional circumstances specific to the offender.

(b) (1) When K.S.A. 1988 Supp. 8-1014 requires a court to place restrictions on a person's driving privileges, the court shall restrict the person's driving privileges to driving only under the following circumstances for a period of 60 days: In going to and returning from the person's place of employment; in going to and returning from a mandated alcohol education or treatment program; and in exceptional circumstances specific to the offender.

(2) Upon expiration of the 60-day period provided by subsection (b)(1), the court shall restrict the person's driving privileges as pro-

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(d) Violation of restric
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History: L. 1988, ch.

**8-1016. Same; ignitio
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(b) If the division appr
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(3) In addition to restricting a person's driving privileges as provided in subsection (b)(1) and in addition to or in lieu of restricting a person's driving privileges as provided in subsection (b)(2), the court may restrict the person's driving privileges to driving only a motor vehicle equipped with an ignition interlock device, approved by the division and obtained, installed and maintained at the person's expense. Any fine imposed by the court for the conviction shall be reduced by the court in an amount equal to the expense incurred by the person for obtaining, installing and maintaining the ignition interlock device.

(c) Upon expiration of the period of time for which restrictions are imposed pursuant to this section, the licensee may apply to the division for the return of any license previously surrendered by the licensee. If the license has expired, the person may apply to the division for a new license, which shall be issued by the division upon payment of the proper fee and satisfaction of the other conditions established by law, unless the person's driving privileges have been suspended or revoked prior to expiration.

(d) Violation of restrictions imposed under this section is a misdemeanor subject to punishment and suspension of driving privileges as provided by K.S.A. 1987 Supp. 8-291 and amendments thereto.

History: L. 1988, ch. 47, § 12; July 1.

8-1016. Same; ignition interlock devices; approval by division. (a) The secretary of revenue shall adopt rules and regulations for:

(1) The approval by the division of models and classes of ignition interlock devices suitable for use by persons whose driving privileges have been restricted to driving a vehicle equipped with such a device; and

(2) the calibration and maintenance of such devices, which shall be the responsibility of the manufacturer.

In adopting rules and regulations for approval of ignition interlock devices under this section, the secretary of revenue shall insure that those devices approved do not impede the safe operation of a motor vehicle and have the fewest opportunities to be bypassed so as to render them ineffective.

(b) If the division approves an ignition interlock device in accordance with rules and regulations adopted under this section, the division shall give written notice of the approval to the manufacturer of the device. Such notice shall be admissible in any civil or criminal proceeding in this state.

(c) The manufacturer of an ignition interlock device shall reimburse the division for any cost incurred in approving or disapproving such device under this section.

(d) Neither the state nor any agency, officer or employee thereof shall be liable in any civil or criminal proceeding arising out of the use of an ignition interlock device approved pursuant to this section.

History: L. 1988, ch. 48, § 1; L. 1988, ch. 47, § 18; July 1.

8-1017. Same; circumvention of ignition interlock device; penalty. (a) No person shall:

(1) Tamper with an ignition interlock device for the purpose of circumventing it or rendering it inaccurate or inoperative;

(2) request or solicit another to blow into an ignition interlock device, or start a motor vehicle equipped with such device, for the purpose of providing an operable motor vehicle to a person whose driving privileges have been restricted to driving a motor vehicle equipped with such device; or

(3) blow into or start a motor vehicle equipped with an ignition interlock device for the purpose of providing an operable motor vehicle to a person whose driving privileges have been restricted to driving a motor vehicle equipped with such device.

(b) Violation of this section is a class C misdemeanor.

History: L. 1988, ch. 48, § 2; July 1.

8-1018. Test refusal or failure not public record; not to be considered for liability insurance. A test refusal or test failure shall not be a part of the public record and shall not be considered by any insurance company in determining the rate charged for any automobile liability insurance policy or whether to cancel any such policy under the provisions of subsection (7)(c)[*] of K.S.A. 40-277 and amendments thereto.

History: L. 1988, ch. 47, § 19; July 1.

* Reference should apparently be to K.S.A. 40-277 generally.

8-1019. Victim impact statement and restitution requirements. (a) As used in this section, "alcohol or drug-related offense" means: (1) A violation of K.S.A. 8-1567 and amendments thereto, or any ordinance of a city or

resolution of a county prohibiting the acts prohibited by that statute; or (2) any other offense arising out of the operation or attempted operation of a motor vehicle while under the influence of alcohol or drugs, or both.

(b) Prior to the sentencing of a person convicted of an alcohol or drug-related offense which resulted in serious bodily injury to a person or the death of a person, the court shall cause reasonable attempts to be made to notify the victim or the victim's family, who shall be given an opportunity to make a victim impact statement as to the impact of the offense on the victim's life or the lives of the victim's family members.

(c) Any court sentencing a person convicted of an alcohol or drug-related offense which resulted in personal injury to a person, the death of a person or injury to a person's property may require, in addition to any other penalty provided by law, that the convicted person pay restitution as a condition of probation or parole.

History: L. 1988, ch. 47, § 4; July 1.

Cross References to Related Sections:

Aggravated vehicular homicide, see 21-3405a.
Vehicular battery, see 21-3405b.
Implied consent law, see 8-1001 et seq.

Article 11.—ABANDONED AND DISABLED VEHICLES

8-1102. Motor vehicle abandoned on public highway or property open to use by public; public agency may impound; disposition; motor vehicle abandoned on private property; criminal trespass; impounding and disposition of vehicle. (a) (1) When a person abandons and leaves a motor vehicle on a highway or other property open to use by the public for a period of time in excess of 48 hours, the public agency having jurisdiction and control of such highway or other property open to use by the public may remove the motor vehicle from such highway or other property open to use by the public and place or store it in a safe and convenient place.

(2) Any motor vehicle which has been impounded as provided in this section for 30 days or more shall be disposed of in the following manner: If such motor vehicle has displayed thereon a registration plate issued by the division of vehicles and has been registered with the division, the public agency or its designated agent shall mail a notice by certified mail to the registered owner thereof, addressed to the address as shown on the certificate of registration, and to the lienholder, if any, of record in the county in which the title shows the owner resides, if registered in this state, stating that if the owner or lienholder does not claim such motor vehicle and pay the removal and storage charges incurred by such public agency on it within 15 days from the date of the mailing of the notice, that it will be sold at public auction to the highest bidder for cash. The public agency shall use reasonable diligence in determining the title owner, or if from a nontitle state, the registered owner, of the vehicle, and shall inquire by mail of the office of the register of deeds of the county in which the title shows the owner resides, if registered in this state, as to whether there are any lienholders of record.

After 15 days from date of mailing notice, the public agency or designated agent shall publish a notice once a week for two consecutive weeks in a newspaper of general circulation in the county where such motor vehicle was abandoned and left, which notice shall describe the motor vehicle by name of maker, model, serial number, and owner, if known, and stating that it has been impounded by the public agency and that it will be sold at public auction to the highest bidder for cash if the owner thereof does not claim it within 10 days of the date of the second publication of the notice and pay the removal and storage charges, and publication costs incurred by the public agency. If the motor vehicle does not display a registration plate issued by the division of vehicles and is not registered with the division, the public agency or designated agent after 30 days from the date of impoundment, may publish a notice in a newspaper of general circulation in the county where such motor vehicle was abandoned and left, which notice shall describe the motor vehicle by name of maker, model, color and serial number and shall state that it has been impounded by said public agency and will be sold at public auction to the highest bidder for cash, if the owner thereof does not claim it within 10 days of the date of the second publication of the notice and pay the removal and storage charges incurred by the public agency.

When any public agency or its designated agent has complied with the provisions of this section with respect to an abandoned motor vehicle and the owner thereof does not claim it within the time stated in the notice and pay the removal and storage charges and publica-

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History: L. 1961, c
60, § 1; L. 1970, ch. 6
§ 12; L. 1978, ch. 37,
§ 1; July 1.

Cross References to Relate

Removal of certain vehicl

Attorney General's Opinions

Registration of Vehicles; a
85-63.

CASE ANN

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No. 58,052

STATE OF KANSAS, *Appellee*, v. THOMAS R. MCNAUGHT, *Appellant*.

(713 P.2d 457)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Vehicular Homicide—Driving under Influence—Media Coverage—Permitting Spectators to Wear MADD and SADD Buttons in Courtroom—Admissibility of Evidence—Testimony of Witnesses Not Endorsed on Information—Jury Instructions—Motions for Acquittal, New Trial and Dismissal Denied—Error in Sentencing.* The record is examined in a criminal action in which the defendant was convicted of vehicular homicide (K.S.A. 21-3405) and driving under the influence of alcohol (K.S.A. 1984 Supp. 8-1567), and it is held that the district court did not err (1) in permitting photographic, audio, and television coverage of the preliminary hearing and the trial; (2) in overruling defendant's motion to prohibit spectators at the trial from wearing MADD and SADD buttons; (3) in its rulings pertaining to the admission of evidence; (4) in permitting two witnesses to testify whose names were not endorsed on the information; (5) in its instructions to the jury; and (6) in overruling defendant's motions for dismissal, judgment of acquittal, and for a new trial. The trial court erred in the sentence imposed.

2. SAME—*Media Coverage of Courtroom Proceedings—Balancing of Constitutional Guarantees and Due Process Rights.* The propriety of granting or denying permission to the news media to broadcast, record, or photograph court proceedings involves weighing the constitutional guaranties of freedom of the press and the defendant's right to a public trial on the one hand and, on the other hand, the due process rights of the defendant and the power of the courts to control their proceedings in order to permit the fair and impartial administration of justice.

3. SAME—*Media Coverage of Courtroom Proceedings—Due Process Rights of Accused Not Denied by Television Trial Coverage.* The due process rights of an accused are not inherently denied by television trial coverage, and no per se constitutional rule prohibits permitting broadcast or photographic coverage of criminal proceedings.

4. SAME—*Pretrial Publicity—Change of Venue—Burden of Proof on Defendant to Show Prejudice in Community.* The usual remedy for adverse pretrial publicity is a change of venue and this should be so whether the adverse publicity is in the form of a printed newspaper or television exposure. The burden of proof is on the defendant to show prejudice in the community from media publicity, not by speculation, but as a demonstrable reality.

5. SAME—*Media Coverage of Courtroom Proceedings—Prejudicial Effect—Burden of Proof.* Where a trial court permits photographic, audio, and television reproduction of the trial proceedings, the defendant has the burden to prove prejudice by showing that media coverage prevented the defendant from presenting his defense or in some way affected the ability of the jury to judge defendant fairly.

6. TRIAL—*Courtroom Decorum—Trial Court Discretion.* In the administration

of justice, the trial judge is charged with the preservation of order in his court and with the duty to see that justice is not obstructed by any person or persons whatsoever. The decision of whether the jury was or possibly could have been influenced by actions of spectators rests within the sound discretion of the trial court, the exercise of which will not be disturbed unless it appears that prejudice resulted.

7. SAME—*Sentencing—Imprisonment and Restitution May Not Be Imposed Together.* Under K.S.A. 1984 Supp. 21-4603(2), a trial court may not impose imprisonment, which mandates incarceration, with either probation or suspension of sentence, because to do so would be to decree mutually exclusive penalties. Restitution may only be ordered in conjunction with probation or suspended sentence.

Appeal from Shawnee district court; ADRIAN J. ALLEN, judge. Opinion filed January 17, 1986. Affirmed in part and reversed in part.

Mark L. Bennett, Jr., of Marshall, Davis, Bennett & Hendrix, of Topeka, argued the cause, and *Wilburn Dillon, Jr.*, of Tilton, Dillon, Beck & Crockett, of Topeka, was with him on the briefs for appellant.

Arthur R. Weiss, assistant district attorney, argued the cause, and *Robert T. Stephan*, attorney general, and *Gene M. Olander*, district attorney, were with him on the brief for appellee.

The opinion of the court was delivered by

PRAGER, J.: This is a direct appeal by the defendant, Dr. Thomas R. McNaught, from jury convictions of vehicular homicide (K.S.A. 21-3405), a class A misdemeanor, and driving under the influence of alcohol (DUI) (K.S.A. 1984 Supp. 8-1567), a class A misdemeanor. The defendant was acquitted of involuntary manslaughter (K.S.A. 1984 Supp. 21-3404), leaving the scene of an injury accident (K.S.A. 8-1602), failure to render aid (K.S.A. 1984 Supp. 8-1604), and failure to report an injury accident (K.S.A. 1984 Supp. 8-1606). Following the convictions, the trial court imposed sentences on each count and the defendant appealed.

This case arose out of a tragic automobile accident which occurred on July 29, 1984, at about 8:32 p.m. on Northwest 46th Street north of the city of Topeka in Shawnee County. Just prior to the accident, Kathleen (Kathy) Bahr was riding a bicycle in a westerly direction. The bicycle was struck in the rear by an automobile driven by the defendant in a westerly direction on 46th Street. The evidence showed that, following the impact, Kathy Bahr's body struck the hood of defendant's vehicle, h ng the right side of the windshield, and she was then t over the back of the car. The bicycle became attached to

the front side of the defendant's vehicle. Defendant testified that, just prior to the accident, he had stopped at 46th Street and Rochester Road and then proceeded west on 46th Street with his cruise control set at 50 to 55 miles per hour which was within the posted speed limit. He testified that looking ahead he could see no objects when suddenly there was a bang on his windshield. He thought that someone must have thrown a rock or brick at his car and he did not want to stop three or four miles from home on a dark highway. It reminded him of a previous experience he had had in 1958 when a rock was dropped from an overpass onto his car as he was driving. Dr. McNaught felt that he should go home and report the occurrence to the police. He kept driving and watching the fracture move across the windshield. He was beginning to think he should stop when he saw a patrol car's red lights in his rear view mirror. Defendant then stopped his car and remained inside until instructed by Deputy Sheriff Jeff Ritchie to open the car door.

Deputy Ritchie testified that he first observed defendant's vehicle on 46th Street with its bright lights on, traveling at a high rate of speed and emitting sparks from under its right side. The officer flashed his bright lights on and off but received no response from the oncoming vehicle. Ritchie continued to notice the sparks as the vehicle passed. Ritchie then turned his car around and pursued the vehicle. He caught up with it approximately one mile down the road. The vehicle stopped in the middle of the roadway without pulling over to the shoulder. Defendant asked the officer what the problem was. The officer looked at the defendant's vehicle and noticed a smashed windshield covered with blood and hair. Officer Ritchie showed the defendant a bicycle which had fallen from underneath defendant's car as it hit a bump just before it came to a stop. The defendant said that someone had thrown a brick at his vehicle approximately one mile back.

Shortly thereafter, Trooper Thomas Wilson of the Kansas Highway Patrol arrived at the scene to assist Ritchie. Trooper Wilson noticed that defendant's eyes were watery and bloodshot, and that he was swaying when walking. The trooper noticed a mild odor of alcohol on defendant's breath. Trooper Thomas Wilson gave the defendant a horizontal gaze nystagmus test. Trooper Wilson then placed defendant under arrest for driving

under the influence of alcohol. Wilson thereafter turned defendant over to Sergeant William Hudson of the Shawnee County Sheriff's Department who took defendant to the courthouse and performed a breath alcohol intoxilyzer test which tested .136 percent blood alcohol.

The defendant was charged by Sgt. Hudson with driving under the influence of alcohol, failure to render aid at an injury accident, failure to report an injury accident, and leaving the scene of an injury accident. Later, after Kathy Bahr died, defendant was charged in the complaint with involuntary manslaughter (K.S.A. 1984 Supp. 21-3404) in addition to the charges already made by Sgt. Hudson. Further facts will be provided in the discussion of points raised on the appeal.

The case was tried to a jury in Shawnee County District Court. The evidence presented by the parties was highly conflicting. Defendant testified, in substance, that from 4:15 p.m. to 6:30 p.m. he and a friend had consumed three highballs, each consisting of one and one-half ounces of bourbon, ice, and Tab. Dr. McNaught and the friend then sat down to dinner at 6:30 p.m, during which Dr. McNaught drank a four ounce glass of red wine. Dr. McNaught's dinner companion left the house at 7:00 p.m. He testified that Dr. McNaught had no trouble walking or talking and displayed no effect of the alcohol at that time. Dr. McNaught testified that he had nothing else to drink after his friend left, and he then sat down to read a book. At around 8:30 p.m. he became hungry for something sweet. He drove to Sutton's North Plaza where he purchased two bags of candy and returned to his car. He experienced no difficulty in walking, talking, paying for the candy or driving his car. Dr. McNaught then proceeded to drive his vehicle proceeding home on 46th Street and the collision occurred.

There was evidence presented by defendant that the drivers of two other vehicles traveling on 46th Street had barely avoided striking the bicycle and had to suddenly turn aside in order to avoid a collision. The defendant also presented expert testimony that Kathy Bahr possibly had been struck by another automobile as she lay on the pavement after the collision with Dr. McNaught's vehicle.

The case was tried in a highly professional manner by able ısel for both sides and was submitted to the jury. The jury

acquitted Dr. McNaught of the felony charge of involuntary manslaughter, leaving the scene of an injury accident, failure to render aid, and failure to report an injury accident. It found defendant guilty of vehicular homicide and driving under the influence of alcohol, both misdemeanors. Defendant filed a motion for a new trial which was denied. The court then sentenced defendant, and he filed a timely appeal. Defendant in his brief on appeal raises 13 separate points involving claimed errors at the pretrial and trial stages and in the imposition of sentence.

The defendant's first two issues on appeal involve the presence of cameras and audio recording devices in the courtroom at the preliminary hearing and again at the trial. Defendant maintains that the court's allowance of photographic, video, and audio reproduction of the preliminary hearing and of the trial was inherently coercive to the jury and prevented a fair and impartial trial. The record shows that, prior to the preliminary hearing and in response to a telephone inquiry from the court, defense counsel wrote a letter to the judge objecting to cameras and audio reproduction of the preliminary hearing, which had been requested by the news media pursuant to a Supreme Court rule. Defendant filed a motion to establish his objections of record with a copy of the letter attached. Judge Allen wrote a letter to defense counsel explaining his reasons for allowing photographs and audio reproduction at the preliminary hearing. Judge Allen stated in his letter as follows:

"The basis of your objection is the fact that potential jurors may see broadcasts and therefore photographing and audio reproduction at the preliminary hearing stage would be highly inflammatory and prejudicial to the defendant, particularly since this case has been the subject of numerous newspaper articles and television and radio station stories already.

"Criminal cases are commonly the subject of pretrial publicity and they always have been so the basis of your objection addresses a matter which is familiar to our legal system and satisfactory methods have been devised to meet the problem without denying the news media of their privilege to report the news through the opportunity to voir dire jurors and, whenever necessary, change venue.

"In this particular case, it is my opinion that the traditional methods devised by the law for handling this problem are appropriate to this case and that it would not be a proper exercise of the court's discretion to deny the news media its privilege of photographing and audio reproduction of the preliminary hearing in this case."

Simply stated, defendant maintains that the photographing

and audio reproduction of the preliminary hearing was inherently corruptive to potential jurors and thus had the effect of preventing a fair and impartial trial later. A determination of this issue requires us to consider the background and development of news media coverage of court proceedings in Kansas. In 1937, the American Bar Association adopted Canon 35 of the Canons of Judicial Ethics prohibiting broadcast and photographic coverage of court proceedings. For a discussion of the historical background of Canon 35 see *Chandler v. Florida*, 449 U.S. 560, 66 L.Ed.2d 740, 101 S.Ct. 802 (1981). In 1952, Canon 35 was amended to prohibit television coverage of judicial proceedings. The State of Colorado was the first state to amend Canon 35 to permit broadcast or photographic coverage of the judicial proceedings in the state courts. The prohibition in Canon 35 continued in effect when the American Bar Association replaced the Canons of Judicial Ethics in 1972 with the Code of Judicial Conduct. The Kansas Supreme Court, in Rule No. 601 of the Rules Relating to Judicial Conduct, adopted Canon 3A(7) (225 Kan. cxxi), which prohibited televising and taking pictures of the courtroom and the area adjacent thereto, subject to stated exceptions not involved here.

In 1978, the American Bar Association's Committee on Fair Trial—Free Press proposed that television, radio, and photographic coverage of court proceedings be permitted whenever the trial judge determined that such coverage would be unobtrusive and would not distract the attention of trial participants. However, the proposal was not adopted by the ABA House of Delegates. Since that time, the federal courts have continued to adhere to the prohibitions against the taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom.

In 1981, the Supreme Court of Kansas amended the Code of Judicial Conduct under Supreme Court Rule 601, exempting the Supreme Court from the prohibition. Canon 3A(7)(d) (228 Kan. cxxxi). By order dated January 6, 1981, the court adopted a new Supreme Court Rule No. 1.07 (235 Kan. lvii), which permitted the use of audio tape recorders to record any portion of a hearing before the Supreme Court. Such recordings were to be closely supervised to prevent distracting participants in the hearing or impairing the dignity of the proceedings or to prevent in any way

the interference with the administration of justice. Thereafter, in April of 1981, the Supreme Court permitted the use of cameras by the news media to photograph proceedings before the Supreme Court during hearings conducted during the week of May 4, 1981, and later at proceedings held in June of 1981. On July 10, 1981, the Supreme Court entered an order providing for a one-year experiment for photographic and television news media coverage of Supreme Court proceedings commencing September 14, 1981, under restrictive procedures which limited the number of TV cameras and required a media pooling arrangement. By order entered June 16, 1982, the use of cameras by the news media was expanded to include the use of cameras in proceedings before the Court of Appeals. Television coverage in the Kansas appellate courts was made permanent. Since that time, the news media has been permitted television coverage in the appellate courts upon request.

In 1983, the photographing and recording of proceedings before the district courts of Kansas on an experimental basis was considered. On December 15, 1983, the court authorized the news media and educational television stations to photograph and tape record public proceedings before the district courts of the 3rd, 5th, 10th, and 18th judicial districts during the calendar year of 1984. This was to be subject to certain procedures and conditions specifically adopted by the court in Supreme Court order 83 SC 14 (236 Kan. vii [Adv. Sheet No. 3]). The privilege granted by the Supreme Court order was to be exercised by the news media for the purpose of news dissemination and education only. Condition No. 2 of the order vested in the trial judge the power to limit and control audio and television coverage in the following language:

"2. The privilege granted by Supreme Court Order 83 SC 14 does not limit or restrict the power, authority or responsibility of the trial judge to control the proceedings before the judge. The authority of the trial judge to exclude the news media or the public at a proceeding or during the testimony of a witness extends to any person engaging in the privilege authorized by Supreme Court Order 83 SC 14."

The order also contained other specific restrictions on the use of cameras and audio reproduction in trial court proceedings, including the requirement that the administrative judge of each district designate a media coordinator to work with the judges and the media in implementing the privilege conferred by the

rule. All of these restrictions were designed to prevent disruption or interference with the judicial proceedings involved. On December 27, 1984, the Kansas Supreme Court, in response to certain objections, modified the conditions and proceedings in certain aspects and authorized the district courts in 13 of the 31 judicial districts to allow television cameras at proceedings during the calendar year 1985. Again the trial judge was given full power, authority, and responsibility to control media coverage at the trial, so that a fair trial would be insured. On December 20, 1985, the Supreme Court ordered that the rule remain in full force and effect until March 1, 1986.

Generally speaking, the propriety of granting or denying permission to the media to broadcast, record, or photograph court proceedings involves weighing the constitutional guaranties of freedom of the press and the right to a public trial on the one hand and, on the other hand, the due process rights of the defendant and the power of the courts to control their proceedings in order to permit the fair and impartial administration of justice. The courts also generally agree that the constitutional right to a public trial does not entitle the press to broadcast, record, or photograph court proceedings, because the right to a public trial is primarily for the benefit of the defendant, and because the requirement of a public trial is satisfied when members of the press and public are permitted to attend a trial and to report what transpires.

The effect of television coverage of judicial proceedings on the due process right of criminal defendants was the subject of the decision in *Chandler v. Florida*, 449 U.S. 560. In *Chandler*, the United States Supreme Court held that the due process rights of an accused are not inherently denied by television trial coverage, and that no per se constitutional rule prohibits the states from permitting broadcast or photographic coverage of criminal trial proceedings. The court pointed out, however, that depending upon the circumstances under which such coverage takes place, a due process violation might result. The courts have cautioned that there may be circumstances under which such coverage should be prohibited, particularly when it would have a substantial adverse effect on a trial participant. Whether b ast or photographic coverage of court proceedings, partic- u criminal trials, violates the constitutional rights of trial

participants, particularly criminal defendants, depends upon the circumstances under which such coverage takes place. Suggested relevant circumstances are the location of the broadcast or photographic equipment in the courtroom; the degree of distraction or disruption, if any, caused by their presence; and the effect of the presence and use of such equipment on the defendant's ability to present his case. There are many cases discussed in depth on this subject in an excellent annotation, Media Coverage of Court Proceedings, contained in 14 A.L.R. 4th 121. The leading case is *Chandler v. Florida*, mentioned heretofore.

The problem of media audio and television coverage of a preliminary hearing, as distinguished from a trial proceeding, is somewhat different, because a preliminary hearing is a pretrial proceeding for the determination of probable cause, and trial jurors are not present so as to be personally affected by the media coverage of the preliminary hearing. It is well recognized, however, that adverse publicity at a preliminary hearing may endanger the ability of a defendant to receive a fair trial in situations where prospective trial jurors read or hear the adverse publicity and are affected in their judgment should they later sit as jurors.

In *Kansas City Star Co. v. Fossey*, 230 Kan. 240, 630 P.2d 1176 (1981), this court discussed in depth the question as to when a district court may close a preliminary hearing, a bail hearing, or any other pretrial hearing, in order to avoid the prejudicial effect of media publicity on the fairness of a future trial. In that case, it was held that a trial court may close a preliminary hearing, jail hearing, or any other pretrial hearing, including a motion to suppress, and may close a record only if:

(1) The dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and

(2) the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means.

The usual remedy for adverse pretrial publicity is a change of venue and this should be so whether the adverse publicity is in the form of a printed newspaper or television exposure. In *State v. Richard*, 235 Kan. 355, 364, 681 P.2d 612 (1984), it was noted that this court has repeatedly held that one moving for a change of venue has the burden of establishing prejudice, and specific

facts and circumstances must be established which indicate that it will be practically impossible to obtain an impartial jury in the original county to try the case. In *State v. Crump,* 232 Kan. 265, Syl. ¶ 6, 654 P.2d 922 (1982), the following rules were stated concerning a change of venue in criminal cases:

"A change in venue in a criminal case lies within the sound discretion of the trial court. The burden of proof is cast upon defendant to show prejudice in the community which will prevent him from obtaining a fair and impartial trial. Media publicity alone has never established prejudice per se. Defendant must show prejudice has reached the community to the degree it is impossible to get an impartial jury."

To the same effect is *State v. Taylor,* 234 Kan. 401, 404, 673 P.2d 1140 (1983), which holds that when a change of venue is requested, the defendant must show that prejudice exists in the community, not by speculation, but as a demonstrable reality.

In applying these rules to the factual circumstances shown in the record in the case now before us, it is clear that defendant has not shown that his rights were adversely affected by media coverage in the courthouse during the preliminary hearing, nor has he presented evidence that any individual juror's ability to judge the defendant fairly was influenced by media coverage prior to trial. The voir dire of the jurors was not transcribed for the record nor were any affidavits or testimony obtained from any juror as to the effect of pretrial publicity. We hold that defendant's first point on appeal is without merit.

As to the defendant's second point on the appeal, that the trial court erred in allowing photographic, audio, and video reproduction of the trial proceedings, we have likewise concluded that the defendant has failed to show prejudice resulting from media coverage at the trial. The record shows that the trial court on several occasions admonished the jurors to refrain from hearing or reading media reports of the trial. In *Chandler v. Florida,* 449 U.S. 560, the United States Supreme Court stated that to demonstrate prejudice in a specific case, a defendant must show something more than juror awareness that the trial is of sufficient interest to attract the attention of the media. In this case, the defendant has failed to show in the record that the media coverage in the courthouse prevented defendant from presenting his defense or in any way affected the ability of the jury to judge d ant fairly. We hold this point to be without merit.

third issue raised on the appeal is that the trial court erred

in overruling defendant's motion in limine to prohibit the wearing of Mothers Against Drunk Driving (MADD) and Students Against Drunk Driving (SADD) buttons by spectators at the trial on the basis that display of the buttons was inherently coercive to the jurors and prejudicial to the defendant's right to a fair trial. The trial court denied the defendant's motion, stating that defendant had not furnished the court with any authority in support of his motion. Following defendant's conviction, he also alleged as one of the grounds in his motion for a new trial that the trial court erred in overruling his motion in limine to prohibit the display of MADD and SADD buttons by spectators at the trial.

One of the fundamental rights of a criminal defendant is his right to a public trial. Trial court proceedings are generally required to be open and public, and a public trial is one which is public in the ordinary, common-sense meaning of the term. A public trial is not solely a private right of the parties, but one involving additional interests, including those of the public. The concept of a public trial implies that doors of the courtroom be kept open and that the public, or such portion thereof as may be conveniently accommodated, be admitted, subject to the right of the court to exclude objectionable characters. As long as the doors of a courtroom are open so that a reasonable proportion of the public is allowed to attend, the right to a public trial is satisfied. See 75 Am. Jur. 2d, Trial § 33, p. 146, and cases cited therein.

In the administration of justice, the trial judge is charged with the preservation of order in his court and with the duty to see that justice is not obstructed by any person or persons whatsoever. A large measure of discretion resides in the trial court in this respect, and its exercise will not be disturbed on appeal unless it appears that prejudice resulted from the denial of a legal right. One of the ideals of criminal jurisprudence is that a defendant is entitled to a trial in a calm judicial atmosphere, to mininize any possibility of a decision being rendered on speculation or emotion rather than on the facts and logical reasoning. On occasions, however, the decorum of the courtroom has been distrubed by demonstrations by spectators. On such occasions, in determining whether or not a defendant was denied a fair trial, the decision of whether the jury was or possibly could have been influenced is one which is necessarily left to the sound discretion of the trial

court, the exercise of which will not be disturbed unless it appears that prejudice resulted from the disturbance. In this regard, see the excellent annotation on "Disruptive Conduct of Spectators in Presence of Jury During Criminal Trial as Basis for Reversal, New Trial, or Mistrial" as contained in 29 A.L.R. 4th 659.

These same principles of law are recognized in the Kansas cases. In *State v. Franklin*, 167 Kan. 706, 208 P.2d 195 (1949), the defendant was charged with murder in the second degree and, while the defendant was testifying in his own behalf, the mother of the victim of the homicide arose in the courtroom and screamed, "He killed my son," repeating it four times. The Supreme Court on appeal stated that the real concern of the matter was whether the outburst had the effect of denying the defendant the fair trial to which he was entitled. The court stated that it realized that there are instances in which, depending upon the particular facts and circumstances, outbursts of emotion, weeping, fainting, applause, or other demonstrations could be considered so highly prejudicial to the rights of a defendant as to require the granting of a new trial, but the court did not feel that the case before it would fall within that class. The court stated that it was within the sound discretion of the trial judge to determine the effect of such outbursts or demonstrations and, in the absence of a clear showing that the jury was improperly affected thereby to the prejudice of the defendant, the ruling of the lower court in denying a new trial would not be disturbed. We also note *State v. McMahan*, 131 Kan. 257, 291 Pac. 745 (1930), where it was held that unless it is shown by the defendant that the demonstration was of such a character as to have influenced the jury or affected its verdict, it cannot be regarded as a ground for reversal of a conviction.

In the case now before us, the defendant contends that the display of MADD and SADD buttons by spectators at the trial was inherently coercive and prejudicial to the defendant. The question of prejudice resulting from the display of MADD and SADD buttons by spectators is one of first impression in Kansas. Cases in other jurisdictions have addressed the same or similar issues.

In *State v. Johnson*, 479 A.2d 1284 (Me. 1984), the defendant convicted of manslaughter arising out of an automobile collision. It was held that a mere showing of awareness on the part of the jury of a well-known organization such as MADD was insufficient to demonstrate actual prejudice so as to require reversal as a matter of constitutional due process.

In *Smith v. State*, 460 So. 2d 343 (Ala. Crim. App. 1984), the defendant Smith was convicted of murder resulting from a head-on automobile collision. The evidence showed that the defendant was given a blood alcohol test and the results greatly exceeded the statutory level of intoxication. On appeal, the defendant contended that the presence of Mrs. Dee Fine in the courtroom influenced the jury's decision. Mrs. Fine was well known as being instrumental in organizing MADD in Alabama. The appellate court held that no prejudice had been shown and affirmed the conviction.

In *State v. McMurray*, 40 Wash. App. 872, 700 P.2d 1203 (1985), defendant appealed his conviction of negligent homicide. The defendant had pleaded guilty to DUI arising out of the same accident. On appeal, defendant contended that his trial was unfair, because MADD members attended the trial. The opinion does not specifically state whether the MADD members displayed buttons to indicate their affiliation with MADD. The Washington Court of Appeals found no prejudice had been shown arising from the MADD members' attendance at the trial which would justify reversing the conviction.

In *State v. Franklin*, ____ W.Va. ____, 327 S.E.2d 449 (1985), the Supreme Court of Appeals of West Virginia held that the obvious presence of members of organizations dedicated to stiffer penalities for drunk drivers, who were wearing badges, did irreparable damage to defendant's right to a fair trial and that the defendant's conviction should be reversed. In that case, on voir dire at the outset of the trial, a woman appeared for jury duty wearing a large bright yellow MADD lapel button. Apparently the local sheriff had handed her the button and told her where to sit. Although the prospective juror was immediately excused, the sheriff and other members of MADD remained highly visible throughout the trial. The defense counsel repeatedly requested a mistrial or alternatively asked the court to order removal of MADD buttons or the spectators wearing them from the courtroom. The trial court took no action, although from 10 to 30 MADD demonstrators prominently displayed MADD buttons

and sat directly in front of the jury throughout trial. The defendant contended that this demonstration by the MADD members deprived him of a fair and impartial trial. The trial court conducted an extensive voir dire on the subject of MADD and dismissed two potential jurors as a result of the voir dire but refused to take any other action against the MADD presence.

The appellate court noted the right to public access to a criminal trial should be coordinated with the constitutional right of a defendant to a fair trial. The appellate court concluded that, under the factual circumstances shown in that case, the spectators were clearly distinguishable from other visitors in the courtroom and, led by the sheriff, they constituted a formidable, albeit passive, influence on the jury. The appellate court stated that it could not say that the presence of the spectators wearing MADD buttons, combined with the presence and activities of the uniformed sheriff leading them, did not do irreparable damage to the defendant's right to a fair trial by an impartial jury.

The record in the case now before us does not show the factual circumstances present on this issue. The record is absolutely silent regarding the number of MADD and SADD members attending the trial or how many of them wore buttons. During oral arguments in this case, defense counsel contended that there were always 20 to 30 members of MADD in the courtroom. The prosecutor stated that there were only three to four such persons present wearing buttons. Defense counsel contended that one juror voiced some concern about the incident to Judge Vickers after trial. The prosecution denied that allegation. The record does not contain an affidavit or the testimony of any person that the jurors showed any concern about the matter.

We have carefully considered this issue and concluded that the defendant has failed to show that he was prejudiced in any way by the wearing of MADD and SADD buttons by spectators in the courtroom. A reading of the record and a consideration of the verdicts of the jury in this case show that the members of the jury carefully considered the evidence and were not prejudiced against the defendant. As noted heretofore in the opinion, the jury acquitted the defendant of involuntary manslaughter, the only felony charge, and also acquitted the defendant of leaving the scene of an injury accident, failure to render aid, and failure to r[illegible]rt an injury accident. The jury found the defendant guilty

of vehicular homicide and driving under the influence of alcohol, both misdemeanors. The trial judge was present at all times throughout the trial and had a full opportunity to observe the conduct of the spectators and consider any effect they might have on the jury. We cannot say as a matter of law that the trial court abused its discretion in refusing to require the spectators to remove their buttons or in denying the defendant's motion for a new trial. Under all of the circumstances, we have concluded that the defendant has failed to show that he was prejudiced in any way by the conduct of the spectators, and we hold that he is not entitled to a reversal of his conviction based upon this issue.

The fourth issue raised on appeal is that the trial court erred in refusing to admit evidence offered by the defense that the defendant had taken and passed a polygraph test. The rule in Kansas is that, in the absence of a stipulation between parties, the results of a polygraph examination are not admissible into evidence. See *State v. Mason*, 238 Kan. 129, 708 P.2d 963 (1985), citing many prior Kansas decisions. It has been said that one of the primary reasons for disallowing polygraph evidence is the weight commonly placed upon the evidence by the jury, which results in the jury function being usurped. *State v. Martin*, 237 Kan. 285, 293, 699 P.2d 486 (1985). In the present case there was no stipulation, and the trial court did not err in refusing to admit the results of the polygraph examination.

The fifth point raised on the appeal is that the trial court erred in admitting the results of the intoxilyzer test into evidence. The defendant first contends that the machine was not shown to be sufficiently accurate or reliable to allow the results of the breath test to be considered by the jury. The Kansas Court of Appeals has addressed the foundation necessary to admit the results of such a test, stating that testimony which establishes a breathalyzer test machine has been approved and certified by the State as of the date of the test is sufficient foundation testimony to establish the validity of the test results from the machine. *City of Shawnee v. Gruss*, 2 Kan. App. 2d 131, 576 P.2d 239, *rev. denied* 225 Kan. 843 (1978); *State v. Bristor*, 9 Kan. App. 2d 404, 682 P.2d 122, *rev'd on other grounds*, 236 Kan. 313, 691 P.2d 1 (1984). In this case the intoxilyzer test was given to defendant on July 29, 1984. The State presented testimony from the supervisor of the breath/alcohol program of the Kansas Department of

Health that the particular intoxilyzer machine was tested on July 24, 1984, and again on July 31, 1984, and was functioning properly. Furthermore, he testified that at the time the test was given the particular intoxilyzer met all of the requirements required by law. This evidence was sufficient to show the reliability of the breath test conducted on the defendant and to provide a foundation for its admission into evidence.

The defendant next argues that the intoxilyzer test was not administered at the direction of the arresting officer pursuant to K.S.A. 8-1001, which states that such test shall be administered at the direction of the arresting officer. Simply stated, Trooper Wilson arrested the defendant but he did not administer the intoxilyzer test which was administered later by Sgt. Hudson. Because of an agreement between the Highway Patrol and the Shawnee County sheriff's office covering territorial jurisdiction, the sheriff's department had supervisory jurisdiction over the highway where the accident occurred in this case. It is clear that State Highway Trooper Wilson, after placing the defendant under arrest, turned the defendant over to Sgt. Hudson at the scene of the accident. Hudson read defendant his *Miranda* rights, booked the defendant into jail, conducted the test, and also filed the notice to appear which made him the arresting officer. We have no hesitancy in holding that the statute was satisfied, because the intoxilyzer test was administered by one of the arresting officers.

The defendant next contends that the defendant was not advised of his right to have an independent test of his breath conducted by a person of his own choosing nor was he afforded such opportunity to have such a test conducted at the time of his arrest. Although K.S.A. 8-1004 allows such an independent test, there is no requirement that the arresting officer advise the person arrested that he has a right to an independent test. The defendant also argues that the results of the test should not have been admitted, because the sample of defendant's breath was not retained by the State for testing at a later time by an expert of defendant's choosing. In *State v. Young*, 228 Kan. 355, 363, 614 P.2d 441 (1980), this court held that an arresting officer is not obligated to advise a person of his statutory right to an independent chemical test by a person of his choosing and that the failure of the arresting officer to automatically furnish the defendant with a sample of his breath is not a denial of due process. See also *Standish v. Department of Revenue*, 235 Kan. 900, 683 P.2d 1276 (1984), where the court discusses the warnings required, in addition to the *Miranda* warnings, which an officer making a DUI arrest should make. For the above reasons, we hold that the trial court did not err in admitting the results of the intoxilyzer test into evidence.

The defendant next contends that the trial court erred in admitting the results of tests conducted by officers to show the visibility of the victim's bicycle reflectors. Defendant argues that these tests were not disclosed pursuant to a discovery order and that the tests were not conducted under conditions similar to those existing at the time of the accident. The State contended that the tests were conducted solely for the purpose of determining whether Kathy Bahr's bicycle reflectors were visible from a distance of 100 to 600 feet as required by K.S.A. 8-1592. Such evidence was not contemplated by the prosecution nor were the tests conducted until after defendant's voir dire examination stressed the lack of visibility of the victim's bicycle. We find no error in the admission of this evidence. The test results were relevant on the issue whether the bicycle reflectors satisfied the requirement of the statute that they be visible from 100 to 600 feet to an oncoming vehicle with low beam lights. The jury was made well aware that the test was conducted on level ground using stationary vehicles while the accident occurred on a hill while both the bicycle and defendant's car were moving. We hold that the trial court did not commit error in admitting the evidence.

The seventh issue on the appeal is whether the trial court erred in allowing the testimony of Steve Hale and Eileen Burnau, whose names were not endorsed on the information. Late endorsement of witnesses is covered by K.S.A. 1984 Supp. 22-3201(6). In *State v. Costa*, 228 Kan. 308, 315, 613 P.2d 1359 (1980), it was held that the endorsement of additional witnesses on an information is a matter of judicial discretion and will not be the basis for reversal absent proof of an abuse of discretion. The test is whether or not the rights of the defendant were unfairly prejudiced by the late endorsement. The purpose of the endorsement requirement is to prevent surprise to the defendant and to give him an opportunity to interview and examine the

witnesses for the prosecution in advance of trial. See also *State v. Royal*, 234 Kan. 218, 670 P.2d 1337 (1983). The record shows that the name of Steve Hale was on a list of Soldier Township personnel furnished to the defense prior to the preliminary hearing. The defendant subpoened Hale for the preliminary, although Hale did not testify. The trial court permitted the prosecution to call Steve Hale as a witness but provided the defense an opportunity to interview him before he testified. We hold that, under the circumstances, the defendant was not prejudiced. Eileen Burnau testified at the preliminary hearing where she was cross-examined by the defense. She did not testify any differently at the trial. Under the circumstances, we hold that the trial court did not abuse its discretion in permitting her to testify at the trial.

The eighth and ninth points raised on the appeal concern the trial court's refusal to give certain instructions requested by defendant and also certain instructions submitted to the jury. We have considered the arguments of counsel and find no error. The propriety of instructions given to the jury is to be gauged by consideration of the instructions as a whole; each instruction must be considered in conjunction with all the others. *State v. Price*, 233 Kan. 706, 664 P.2d 869 (1983). Considered as a whole, the instructions as given adequately instructed the jury on all phases of the case.

The tenth point raised is that the trial court erred in its answers to questions asked by the jurors during deliberations. We cannot say that the trial court erred in any way in its responses to the two questions presented to the court by the jury.

The eleventh issue on appeal is whether the trial court erred in overruling defendant's motion for dismissal or, in the alternative, defendant's motion for acquittal. Simply stated, the defendant challenges the sufficiency of the evidence to sustain the two guilty verdicts in this case. A trial judge, passing on a defendant's motion for judgment of acquittal or for dismissal because of insufficiency of the evidence, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact therefrom, a reasonable mind or a rational trier of fact might fairly conclude guilt beyond a reasonable doubt. *State v. [illegible]ke*, 237 Kan. 668, 703 P.2d 1362 (1985). We have no hesitancy

in holding that the record reflects sufficient evidence to show that the defendant was driving under the influence of alcohol and in a manner which deviated from the standard of care of a reasonable person. The jury was undoubtedly impressed by the fact that, following the impact of the deceased's body with defendant's windshield, he failed to stop and drove a mile down the highway, even though the deceased's bicycle was being dragged under defendant's car. The evidence presented at the trial was sufficient to satisfy the legal requirements and to sustain the two guilty verdicts.

The twelfth point on appeal is that the trial court erred in denying defendant's motion for a new trial. The basis of the motion includes all of the points previously discussed and rejected in this opinion. We find no error.

The last issue raised in the brief of defendant is that the trial court imposed an illegal sentence. Prior to the sentence being imposed in this case, the trial court conducted an evidentiary hearing at which both the State and the defendant presented evidence. The trial court was also furnished a presentence report, a copy of which is not provided in the record. Counsel were then permitted to make their arguments as to what sentence would be appropriate. At the close of the hearing, the court imposed the following sentence: Defendant was sentenced to the custody of the Shawnee County jail for a period of one year for the offense of vehicular homicide (K.S.A. 21-3405) and for a period of six months for the offense of driving under the influence as defined by K.S.A. 1984 Supp. 8-1567. These terms are the maximum imprisonment authorized for these offenses. The court ordered the sentences to run consecutively. In addition, the defendant was ordered to pay a fine of $2,500 for vehicular homicide and a fine of $500 for driving under the influence. The fines imposed are the maximum fines provided as a penalty for each offense. The trial court thus imposed the maximum imprisonment and fines allowed by law for the offenses of which defendant had been convicted.

The trial court, however, did not stop at that point. The trial court ordered that, upon his release from jail, the defendant enroll and successfully complete an alcohol/drug abuse program at Ridgeview Institute in Georgia. Defendant was further ordered to pay the parents of Kathleen Bahr restitution in the

amount of $13,318.08, which included the cost of the funeral, tombstone, incidental expenses, and a $5,000 fee for the special prosecutor. The trial court further ordered that the defendant's driver's license be revoked pursuant to statute and be surrendered to the court when the conviction becomes final. The trial court further ordered that completion of the program at Ridgeview Institute and complete payment of restitution were conditions to be complied with before defendant's driver's license could be returned. Finally, defendant was assessed the statutorily required alcohol and safety program fee, probation services fee, and the costs of the action. The defendant was released on bond pending his appeal.

The defendant first challenges his sentence on the basis that the court ignored the statutory mandates of K.S.A. 21-4601 and K.S.A. 21-4606. K.S.A. 21-4601 provides, in substance, that, in imposing sentence, a convicted defendant should be dealt with in accordance with his individual characteristics, circumstances, needs, and potentialities; that dangerous offenders be correctively treated in custody for long terms as needed; and that other offenders be dealt with by probation, suspended sentence, or fine whenever such disposition appears practicable and is not detrimental to the needs of public safety and the needs of the offender. K.S.A. 21-4606 provides that the court in imposing sentence shall fix the lowest possible term of imprisonment which, in the opinion of the court, is consistent with the needs of the defendant and the seriousness of the defendant's crime. That statute then lists a number of factors to be considered by the court in fixing the term of imprisonment.

In substance, defense counsel argues that the trial court completely disregarded the requirements and the factors set forth in the two statutes. He points out that Dr. McNaught had no prior history of alcohol abuse or of any misconduct and that the jury acquitted him on the only charge involving intentional or wanton misconduct. Defendant argues that the sentence was so excessive as to amount to an abuse of judicial discretion.

We have considered the entire record of the trial, the evidence presented at the time of sentencing, and the remarks of the court when it imposed sentence. We have concluded that the trial
urt did not abuse its discretion in the imposition of the max-
um jail sentence and the maximum fine for each of the charges

for which the defendant was convicted. Generally, when a sentence is within the statutory limits set forth by the legislature, it will not be disturbed on appeal absent special circumstances showing an abuse of discretion or that the sentence is the result of prejudice, oppression, or corrupt motive. *State v. Coberly*, 233 Kan. 100, 661 P.2d 383 (1983). Prior to the imposition of sentence, the trial court obtained all possible information about the defendant's past history, the nature of the offenses, and the defendant's personal problems. There was evidence presented that the defendant has an alcohol problem which he has refused to recognize. The trial court may well have concluded that the imposition of jail time along with the fines were necessary to get his attention so that defendant would do something about his problem because, until defendant recognized his problem, he was a potential danger to the traveling public. We must also recognize that by imposing sentence in the Shawnee County jail, the trial court in its discretion could place the defendant upon parole when a showing was made later that a parole was indicated in the case. We hold that the trial court did not abuse its discretion in imposing the maximum jail sentences and fines and in making the jail sentences to run consecutively. Revocation of defendant's driver's license was authorized by K.S.A. 1984 Supp. 8-1567(j).

At that point, the sentence was legal under the statute. However, the court, having imposed the maximum penalty provided for each offense, then, without placing defendant on probation, ordered defendant to pay restitution to the Bahr family and to enroll in and successfully complete an alcohol treatment program in the State of Georgia. Also after revoking defendant's driver's license as required by statute, the court required that defendant's driver's license be restored only after full restitution and after the alcohol treatment had been completed and paid for. The court also ordered defendant to pay the alcohol and safety program fee of $85 and the probation services fee of $25, even though the defendant had not been placed on probation at the time of sentence.

The fixing and prescribing of penalties for criminal offenses is a legislative function, and a sentence must be imposed within the statutory authority. *State v. Freeman*, 223 Kan. 362, 369, 574 P.2d 950 (1978). K.S.A. 1984 Supp. 21-4603(2) provides:

"(2) Whenever any person has been found guilty of a crime, the court may adjudge any of the following:

"(a) Commit the defendant to the custody of the secretary of corrections or, if confinement is for a term less than one year, to jail for the term provided by law;

"(b) impose the fine applicable to the offense;

"(c) release the defendant on probation subject to such conditions as the court may deem appropriate, including orders requiring full or partial restitution;

"(d) suspend the imposition of the sentence subject to such conditions as the court may deem appropriate, including orders requiring full or partial restitution; or

"(e) impose any appropriate combination of (a), (b), (c) and (d).

"In imposing a fine the court may authorize the payment thereof in installments. In releasing a defendant on probation the court shall direct that the defendant be under the supervision of a court services officer.

"The court in committing a defendant to the custody of the secretary of corrections shall fix a maximum term of confinement within the limits provided by law. In those cases where the law does not fix a maximum term of confinement for the crime for which the defendant was convicted, the court shall fix the maximum term of such confinement. In all cases where the defendant is committed to the custody of the secretary of corrections, the court shall fix the minimum term within the limits provided by law."

In *State v. Chilcote*, 7 Kan. App. 2d 685, 647 P.2d 1349, *rev. denied* 231 Kan. 801 (1982), the Kansas Court of Appeals addressed the same basic issue presented in this case and held that, under K.S.A. 21-4603(2), the trial court may not sentence a defendant to imprisonment in an institution and also require the defendant to pay restitution. In *Chilcote*, defendant argued that the trial court could not order restitution in conjunction with imprisonment and restitution may not be ordered unless the sentence is suspended pursuant to K.S.A. 21-4603(2)(d) or unless probation is granted pursuant to K.S.A. 21-4603(2)(c). The Court stated:

"In the instant case, the judge combined K.S.A. 21-4603(2)(a) (imprisonment) with an order of restitution; restitution may only be ordered pursuant to subsection (c) of that statute, which provides for release on probation subject to restitution, or subsection (d) thereof, providing for the suspension of sentence subject to restitution. Thus, the trial court has combined all of subsection (a) with only the restitution portion of either subsection (c) or (d). Said statute, at subsection (e), gives the trial court authority to 'impose any *appropriate* combination of (a), (b), (c) and (d).' (Emphasis added.) Appellant points out that subsection (e) does not say 'or any parts thereof,' and contends that the trial court therefore lacks authority to combine only *parts* of various subsections. We conclude that appellant is correct in this contention. In applying 21-4603(2)(e), a
urt may only impose sentences which are combinations of entire subsec-
he use of the word 'appropriate' implies that the combination of penalties

under the statute should be harmonious. Thus the trial court may not impose imprisonment, which mandates incarceration, with either probation or suspension of sentence, because to do so would be to decree mutually exclusive penalties. As we construe the statute, restitution may only be ordered in conjunction with probation or suspended sentence. It follows that incarceration coupled with restitution is not an 'appropriate combination' under subsection (e)." 7 Kan. App. 2d at 689-90.

The Court of Appeals remanded the case to the trial court with orders to vacate that part of the sentence requiring the defendant to make restitution.

The principles of law applied in *State v. Chilcote* are also applicable under the facts of this case. Here the maximum sentences of imprisonment and the maximum fines were imposed by the court. The court then, without placing the defendant on probation or suspending sentence, ordered restitution paid and, in addition, that defendant participate in a treatment program. The court also imposed other conditions which are usually imposed as conditions of probation. We hold that the trial court erred in ordering imprisonment, fines, restitution, and imposing the other conditions. Of course, should the trial court opt to resentence defendant within the time allowed for the revision of sentences, the court may cause the defendant to appear before it for resentencing. The trial court also has the authority to parole defendant from a portion of the sentence at some future date and impose appropriate conditions, including restitution. In view of our holding on this point, we do not consider it necessary to consider the other objections which defense counsel has raised in his brief pertaining to the conditions imposed in sentencing.

At the oral argument, counsel for defendant raised a point which had not been raised before the trial court and which had not been raised in his brief on appeal. That point was whether the employment of an associate prosecutor pursuant to K.S.A. 19-717 and selected by the victim's family, denied defendant due process of law. We decline to consider that issue, because it was neither timely raised nor presented to the trial court for its consideration.

The judgment of conviction is affirmed. That portion of the sentence imposing imprisonment and a fine on each count is affirmed. That portion of the sentence ordering restitution and imposing other conditions is vacated and set aside.

(576 P.2d 239)

No. 49,280

CITY OF SHAWNEE, KANSAS, *Appellee,* v. JOHN J. GRUSS, *Appellant.*

Petition for review denied April 28, 1978.

SYLLABUS BY THE COURT

1. AUTOMOBILES—*Driving under the Influence of Intoxicating Liquor—Independent Chemical Test.* Under K.S.A. 8-1004, a breathalyzer test operator is not required to inform the person being tested of his right to have an independent test taken by some other authorized person or agency.
2. SAME—*Driving under the Influence of Intoxicating Liquor—Breathalyzer Test—Foundation to Admit Test Results.* Testimony which establishes that a breathalyzer test machine has been approved and certified by the State as of the date of the test in question is sufficient foundation testimony to establish validity of test results from the machine.
3. SAME—*Driving under the Influence of Intoxicating Liquor—Breathalyzer Test—Foundation to Admit Operator's Testimony.* Testimony which establishes that the operator of a breathalyzer machine has been certified by the State of Kansas and is presently certified as an operator, and that the test he conducted is in accordance with the operational procedure of said breathalyzer machine is sufficient foundation for the operator's testimony relative to the results of the test.

Appeal from Johnson district court, division No. 3; BUFORD L. SHANKEL, judge. Opinion filed March 24, 1978. Affirmed.

David R. Gilman and *J. Steven Schweiker,* of Overland Park, for the appellant.

James T. Wiglesworth, assistant city attorney, for the appellee.

Before SWINEHART, P.J., REES and SPENCER, JJ.

SWINEHART, J.: The appellant, John J. Gruss, was convicted in the Municipal Court of Shawnee, Kansas, of driving under the influence of intoxicating liquor. He appealed to the district court, where his case was tried *de novo* to a six-member jury. He appeals the jury's verdict.

At the trial, breathalyzer test results showing that the appellant's blood alcohol content was .11 percent were admitted over his objections. K.S.A. 8-1005 states that a blood alcohol content of .10 percent by weight establishes a presumption of intoxication. The only question on appeal is whether the trial court erred in admitting the breathalyzer test results.

The appellant argues that the admission of the breathalyzer results constituted prejudicial error. The testimony presented at trial showed some evidence of intoxication other than the breathalyzer results (*i.e.,* erratic driving, belligerent behavior, and name-calling). Under the facts and circumstances of the case, we concur with the appellant that the admission of the test results

would be prejudicial if it was erroneous; however, for reasons discussed below, we find that the trial court did not err in admitting the breathalyzer results.

The appellant contends that the breathalyzer evidence was incorrectly admitted because the City of Shawnee failed to lay a proper foundation. He attacks the sufficiency of the foundation testimony on the following grounds:

(1) The breathalyzer operator failed to examine the appellant's mouth for foreign substances prior to the test;

(2) the operator failed to observe the appellant for a period of twenty minutes immediately prior to the test;

(3) the operator was not qualified to administer the test;

(4) the machine was not properly certified;

(5) the test ampoule was not properly certified as containing the correct chemical compound; and

(6) the appellant was denied a reasonable opportunity to have an additional chemical test by a physician of his own choosing.

K.S.A. 1977 Supp. 65-1,107 authorizes the secretary of health and environment to promulgate rules and regulations affecting breath testing, including testing procedures and certification, and periodic testing of operators and machines. Those guidelines are found at K.A.R. 1977 Supp. 28-32-1, *et seq.* Briefly summarized, the regulations require initial inspection of the testing machine for accuracy with yearly testing and certification thereafter, and initial training of operators with periodic proficiency testing and yearly certification. The regulations also require that breath testing machines be operated strictly in accordance with the manufacturer's operational manual. Summers, a chemist with the Kansas Department of Health and Environment, and Officer Morris, who administered the breath test, both testified concerning the requirements contained in the manufacturer's checklist for the Smith Wesson 900A, which was used to test the appellant's breath. The checklist requires that the test subject be observed for a twenty-minute period during which time he must not belch, regurgitate or ingest any substance. Belching, regurgitating or ingesting within twenty minutes of the breath test could substantially affect the test results, according to their testimony.

The facts important to the determination of this appeal occurred during the time span from the arrival of the appellant at the Shawnee Police Department through his taking of the test.

The appellant was divested of his personal property upon arrival at the police station. After preliminary questioning for purposes of police records, he was placed in the drunk tank where he remained, with the exception of two or three times when he was permitted to make phone calls in the hall to his wife and to his attorney. There was no water fountain in the drunk tank. The telephone was out of the sight of the officers who gave the test; however, they testified that the area did not contain a water fountain. The undisputed testimony was that the officers did not visually inspect the appellant's mouth for foreign substance, but they did testify that, during the twenty-minute observation period, he did not belch, regurgitate or ingest any substance.

Considering first the appellant's contention that the test results were inadmissible because he was not observed for a twenty-minute period prior to testing, we find that there was a conflict in the testimony regarding this fact. The appellant testified that he was observed for less than ten minutes. The officer testified that he observed the appellant for twenty minutes before testing him. Although we agree with the appellant that failure to observe the test subject for twenty minutes before administering the test would invalidate the results, the question of whether the appellant actually was observed for twenty minutes is a question of fact to be resolved by the trial court. The officer's testimony that he did watch the defendant for twenty minutes constitutes substantial, competent evidence supporting that finding of fact and it, therefore, will not be disturbed on review.

Considering next the appellant's contention that the officer did not inspect his mouth for foreign substance, we find the argument to be without merit. The officer's testimony that the appellant did not belch, regurgitate or ingest any substance during the twenty-minute observation period creates a *prima facie* showing that he had no foreign substance in his mouth at the time of testing. The appellant presented no evidence to rebut that showing.

The appellant also challenges the qualifications of the operator and the breathalyzer machine. It is sufficient to say that the Kansas Department of Health and Environment has established a program for certifying breath testing machines and operators. Both the operator and apparatus in question were currently certified at the time the appellant was tested. The current certification, in addition to the officer's testimony that he had passed all of

the periodic proficiency tests required (which measure both his proficiency and the machine's accuracy), shows the appellant's argument to be without merit.

Appellant argues that the test ampoule was not shown to contain the proper chemical compound. The ampoule used was shown to be part of a lot spot-checked and certified to contain the proper chemicals by the Wisconsin Alumni Research Foundation. It is impossible to require more, for once an individual ampoule is opened for testing it cannot be resealed. The ampoule was shown to have been properly certified and, therefore, the appellant's allegation of error is without merit.

The appellant's final argument is that the test results should have been excluded because he was not notified of his right to have an independent blood alcohol test conducted by a physician of his own choice under K.S.A. 8-1004. Significantly, the statute does not require police officers to inform an individual of this right. The reasoning of the Kansas Supreme Court in *Hazlett v. Motor Vehicle Department*, 195 Kan. 439, 407 P.2d 551, is persuasive. There, the court declined to add by judicial gloss the requirement that police officers inform a person who refuses to submit to chemical testing for intoxication that his refusal will result in an automatic suspension of his driver's license under K.S.A. 8-1001. Here, the appellant had the benefit of an attorney's advice concerning the test. Never having asked to take an independent test, he will not now be heard to allege error.

Judgment affirmed.

The Honorable Senator Winters and Members of the Judiciary Committee

Thank you for this opportunity to express my views opposing SB 213. My name is JoAnn Peavler. I have been a resident of East Topeka since 1945 and am a native Kansas. I speak for myself and the residents of an East Topeka neighborhood known as the Belmont Addition. This area was developed during and after WW II and is considered low to middle income with many retired citizens. This housing area lies immediately north, across Highway 40, from the land owned by the State that now comprises the Kansas Reception and Diagnostic Center and the Kansas Correctional Vocational Training Center.

When Kansas lands were being settled over a century ago, the legislature wisely set aside areas for school purposes. The tract that now comprises these two penal institutions was among those so designated. On February 22, 1864, an act by the Kansas Legislature provided for the sale of school lands. The adjoining property owner had the option of purchasing this "set aside" property because he State then realized not <u>all</u> these properties would be needed for school purposes. However, the tract where KRDC & KCVTC now stand was <u>not</u> offered for sale and so was only designated for school purposes.

Prior to the end of the 19th century the legislature approved funding of that site for a Coloured Vocational-Technical School. Keep in mind that at this time this area was several miles outside the City of Topeka. The school was built as a campus style facility and several cottages and dorms were also constructed for students and faculty. After the end of WW II, with a decline in enrollment and the advent of a more desegregated society, the school was closed.

Our Kansas governing body then proposed and implemented the plan that the existing classroom buildings be converted to a Reception & Diagnostic Center where all male prisoners of the State be evaluated to determine an appropriate placement for their rehabilitation. Many neighborhood meetings were held in an attempt to allay fears by local residents on this drastic change of the properties use. I well remember the correctional personnels' remarks at those meetings. Remarks like: stating the necessity for this type of facility to be near resources such as the Menninger Mental Hospital; remarks that the double fence with barbed wire topping and with guard towers and armed guards need not concern us, since the fence would be located nearly a block and a half from our neighborhood school that held over 200 of our children, but the <u>bottom</u> line was the statement that the State already owned the land.

Over the past 25 years, since that facility has been in operation, there have been power outage problems and escapes that have put deep fear in our neighborhood residents.

Attachment III
SJC
2-13-89

But, time marches on and in a few short years an additional penal institution on this property was approved by our Kansas lawmakers to be known as Kansas Correctional Vocational Training, or KCVTC. This facility, while still on the "school lands" property was to be constructed for "First time, youthful, non-violent male offenders" and was proposed and build directly across the road from a new housing development called Eastgate. By this time the City had grown so that the entire area was not within the Topeka City limits. Again neighborhood meetings were held to discuss concerns, which were many. But the bottom line again was that the State already owned the property and could therefore use it for this purpose. I should state that the one concession that the Department of Corrections agreed to was that KCVTC would only be used for first time non-violent youthful male offenders and be a minimum security facility. A few years later a dorm to house female inmates was built at the northeast edge of this complex.

Last year, despite neighborhood objections, the facility changed to an all female inmate facility, housing minimum and medium security individuals. Now it appears if SB 213 passes, not only will that facility be housing maximum security female inmates but chances of additional buildings and extensive expensive security measures will need to be instituted. Our East Topeka citizens have had enough. I urge you to oppose SB 213. We have had many meetings with Secretary Endell and Roger Worholz and others to no avail. These meetings cannot be categorized as negotiations: they are merely confrontations in that we were told what the D.O.C. is going to do. However, less than one year ago, Secretary Endell made no bones about the fact that he might propose legislation to have female felons evaluated at KRDC; he also stated he had no plans to house maximum security inmates at KCVTC. Do you wonder at our dismay?

It is not my nature to just complain about a problem but I just may have a viable option. There is vacant State-owned property just to the northwest of 6th and Fairlawn here in Topeka. It is very near and within sight of Interstate 70. Let Kansas be up front about the fact that we do have women maximum security prisoners. Perhaps this facility could gain the reputation as a tourist attraction. there are other advantages.

1. It would be in close proximity to the Menninger Foundation.
2. It would be easy for inmates visitors to find; being adjacent to an interstate.
3. It may reduce recitivisium by the fact that "normal" activities nearby could be an incentive for the inmate to change her attitude and behavior.

But the bottom line is that the State already owns the property.

Again, thank you for this opportunity to express the views of my neighborhood. I would be pleased to respond to any question.

Senator Wint Winters
Senate Committee on Judiciary

Senate Bill 213
Against

Purpose: Without understanding the purpose of the changes, I am left with these questions:

1. What useful purpose will these changes effect?

2. What is the purpose of eliminating the important word, rehabilitation? Do we choose to eliminate the process of rehabilitation for women?

3. What is the purpose of eliminating the esisting evaluation and diagnostic process at KCIL? Will it not be much more costly to duplicate the excellent existing structure of the Diagnostic and Reception Center at other state institutions? Or will women receive a less thorough evaluation and diagnostic plan?

4. Without clear and simple answers to these questions, will there not be continued question of credibility about the changing of the Kansas Correctional and Training Center to a maximum security prison with the phantom threats of a high fence, safety problems, and lower property values in the neighborhood?

5. The existing facility, staffing, and curriculum (KCTVC) have served a useful purpose. Why should this effective use and plan be changed simply because there are women only to be incarcerated?

Clarifying these issues could simplify a solution which could be acceptable to most citizens.

Audrey C. Miller

Audrey C. Miller, Volunteer Services

Attachment IV
Senate Judiciary
2-13-89

Statement on Senate Bill 213
To the Kansas Senate Committee on Judiciary:

By Larry Sanders
Representing East End Neighborhood Association of Topeka
February 13, 1989

To the Members of the Kansas Senate Committee on Judiciary, with regards to Senate Bill No. 213:

Thank you very much for providing this opportunity to present to the Committee some input and perspectives regarding the proposed changes to K. S. A. 75-5220 and K. S. A. 75-5229.

My name is Larry Sanders and I am appearing on behalf of the East End Neighborhood Association of Topeka, the majority of whose members live in an area directly adjacent to the Kansas Correctional Training Vocational Center in Topeka.

It has been with keen interest that we have followed the chain of events leading to the bill before you. And while we are all aware of the imminent judicial pressure the Kansas correctional system is about to bear, we must not, in our attempt to answer that pressure, trade one legal problem for yet another.

Senate Bill 213 would strike the clause "the Kansas correctional institution at Lansing" (on lines 38 and 39) and replace it with "a correctional institution designated by the secretary of corrections" (on lines 39 and 40). Next, the word "rehabilitation" (on line 54 and again on line 60) would be struck and finally the entire portion of the clause beginning on the line following (line 61); "at the Kansas correctional institute at Lansing or at another appropriate state institution, *other than a correctional institution* (my emphasis), in the manner prescribed in K. S. A. 75-5209 and amendments thereto, or at a local governmental or private facility which has been approved by the secretary for these purposes" has been struck in favor of "in accordance with procedures prescribed by the secretary of corrections."

Senators, we in Kansas have enough court problems without inviting more. This bill, as written, would leave the State wide open to charges of discrimination. It is indeed quite easy to imagine a large, messy, publicly loud and vociferous civil rights case being brought against the State shortly after such an amendment were to become law.

By not providing a specific reception and diagnostic center for the female felon population, we create unequal treatment under the law.

Attachment VI
Senate Judiciary
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By allowing the power to determine just where such reception and diagnosis should occur at any given time to rest with one individual we subject the legal liability of the entire state correctional system to the whims and follies of one such individual; or worse yet, we subject that individual to a responsibility larger than is necessary.

And lastly, by removing the word "rehabilitation" from K. S. A. 75-5229, we are in fact admitting that the Sate of Kansas no longer cares enough to acknowledge that along with incarcerating the criminal, male **or** female, comes the responsibility to attempt to return to society a fully functioning, taxpaying, responsible human being.

Therefore, Senators, when considering this bill, I urge that you consider the following:

1. Can we as a State afford even the **potential** legal pitfalls?

2. Do we as a State have a responsibility to attempt to rehabilitate the law-breaker?

3. Are you, as our Senators and lawmakers, comfortable with such a concentration of power in an appointed position?

I would like to thank the Senate Committee on Judiciary, Chairman Winter, Senators, for your time and attention this morning, and for your allowing me a part in this important process.

Larry Sanders
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Committee to Save K.C.V.T.C.

Senate Bill no. 213

I would like to thank you for giving me this time to speak against the changes being proposed for KSA 75-5220 and 75-5229.
I have been a life long resident of Topeka, I reside in Eastgate, which is the residentAL area across from KCVTC. I'm also the president of EastEnd Neighborhood Improvement Assocation,which was formed to help our neighborhood from deterionating down to a slum from the changes that occured last year at KCVTC.

This Statue,as it reads now is the onlything that kept KCVTC from becoming a maxium security prison last year. If the changes being proposed in section B is changed to read " A correctional institution designated by the secretary of corrections". This will give the secretary of correction the power to put any female felon at KCTVC, even the ones just entering the system. Regardless of the security status there.
That initself puts our State as well as my neighborhood at far greater risk than we already face. It will give the power to change the security status at KCVTC only to the secretary of corrections. It will tAKE AWAY what little input I might beable to make as a private citizen,as well as taking power and authority away from you, our lawmakers and giving it to one man ,or department. It gives the secretary of corrections far greater power or authority than any department or man should have.
Theres suppose to be a check and balance in our goverment. This change will absoulty take the check and balance out of our goverment!

Govern Hayden met with me and another neighbor for about 25 minutes this past august. He assured us that KCVTC would not become a maxium security prison as long as he was governor, Nor does think any prison should be in any residental area. Yet these changes being proposed would allow KCVTC to become maxium security.
I can't think of any good reason to deny any woman incarcerated a chance at rehabilation. Only a program that is planned and recommended in accordance with procedures prescribed by the secretary of corrections. The check and balance system is once again done away with and too much authority is given to one man.

Incarcerated women won't have a chance at rehabilation. According to Websters dictionery, rehabililation means to restore to a condition of constructive activity. While program means only a proposed project or entertainment. Rehabililation would be much more benafical to the woman incarcerrated, as well to society and to taxpayers. A vast majority of women rehabilated make it after prison.
What percentage would return to prison with only a program being

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Committee to Save
K.C.V.T.C.

offered to them is any ones guess. A return to prison is an added expence to all of us.

How would droping rehbililation programs help these women return to society per say rehabililated?

Rehabilation can give self confidence, and self confidence makes a person succed in life.

I would hope you, as our lawmakers give these changes serious thought befor giving one man so much authority over human beings weather their incarcerated or living in a residential area across from a prison. and help keep checks and balance in our goverment.

Again, Thank you for this time to speak my thoughts on these changes.

Mary Quiett

Mary Quiett, Chairperson
3516 SE 10th St.
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KCVTC

The Topeka Capital-Journal, Friday, May 20, 1988

Women's prison still planned

Continued from page 1A

the male population at KCVTC, and the remainder will be paroled out under the new, more liberal computation of good-time credits."

Simmons said the attorney general's opinion will have no effect on Endell's plan to ultimately convert KCVTC to an all-women's prison.

A number of residents in the Eastgate subdivision of East Topeka, aided by their local legislators, have mounted strong opposition to the proposed conversion, and Stephan's opinion theoretically should have strengthened their campaign against the plan.

Stephan issued the opinion in response to a request from three Leavenworth-area lawmakers, Sen. Ed Reilly and Reps. Martha Jenkins and Clyde Graeber, all Leavenworth Republicans. They also are opposed to the secretary's proposal because it would close one of the state institutions in their area and also could deprive one of the prison industries in Leavenworth of part of its work force.

Simmons said, "There will be a number of female inmates who will remain at KCIL. We had planned to leave a number of them who work for some of the private industries there, specifically Zephyr and Heatron."

Zephyr, which makes sheet-metal products, and Heatron, which manufactures heating elements for various appliances, are owned by entrepreneur Fred Braun and use workers from KCIL and the state penitentiary at Lansing.

The opinion, which is not legally binding, said a law passed in 1973 provided Department of Corrections officials some legal standing to put women prisoners at KCVTC by repealing provisions in an earlier law that had barred confinement of women at the center.

The opinion noted that previous DOC administrations have used the 1973 law as a basis for their authority to assign women to KCVTC, and said, "This position is evidenced by the fact that there are currently female inmates at KCVTC and have been for some time."

About 25 women are housed in one of the units at KCVTC.

The opinion said it could be argued that female offenders might eventually be placed at KCVTC, but added, "Specific legislative directions would preclude the secretary from sending female offenders directly to KCVTC rather than to the correctional institution at Lansing."

Endell asked legislative leaders ahead of the 1988 legislative wrap-up session to introduce bills that would have repealed the requirement that female offenders be sent first to KCIL and would have eliminated the prohibition against evaluating women anywhere except KCIL. But the bills were not introduced, and the directives remain in the statutes.

The opinion noted, "These were provisions Secretary Endell sought to have amended this legislative session, and we agree that such amendments are necessary to accomplish the desired goal of having female offenders receive at least a portion of their evaluation at the State Reception and Diagnostic Center."

As part of his plan to convert KCVTC into a women's prison, Endell had proposed that the women receive their evaluations upon entry to the state's penal system at the reception center, which is adjacent to KCVTC.

Simmons said, "It would be easier on operations if the entire facility was female, and the evaluations could be part of that.

"We wanted to bring some females there for diagnostic evaluation. We planned to use the diagnostic staff that's there during the day. We would bring them back to the parent facility at the end of the day so there'd be no mixing of the males and females at the reception center.

The attorney general's opinion also cited a 1970 law that specified that KCVTC was intended for the confinement of male prisoners only, and that it was a minimum-security institution. That law, however, was repealed when the 1973 amendments were passed.

February 13, 1989

Bill Requests

Bud Grant

SB 211 - Criminal procedure; consecutive sentences.

SB 212 - State reception and diagnostic center.

SB 213 - Corrections; relating to female inmates.

SB 214 - Persons committed to secretary of correction; transporting such persons

Chuck Simmons, Legal Counsel, Office of Secretary of Corrections

Joan Peavler, Opposed to SB 213 - Neighborhood

Mary Quiett, East End Neighborhood Improvement Assoc., Topeka, Opposed to SB 213

Audrey Miller, Neighborhood & Inmates, SB 213, Opposed

Larry Sanders, East End Neighborhood Assoc., SB 213, Opposed

Elwaine Pomeroy, SB 211 & SB 212

Approve minutes of February 6, 1989 and February 8, 1989

Please announce the 3:30 P.M. meeting today with House Judiciary in 313-S concerning victims rights.