Approved Ginger Barr 1-30-90
Date

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL & STATE AFFAIRS.

The meeting was called to order by Representative Ginger Barr at
Chairperson

1:34 ~~a~~.m./p.m. on January 16, 1990 in room 526-S of the Capitol.

All members were present except:
Representatives Douville - Excused
Peterson
Sprague

Committee staff present:
Lynne Holt, Kansas Department of Legislative Research
Mary Ann Torrence, Revisor of Statutes' Office
Juel Bennewitz, Secretary to the Committee

Conferees appearing before the committee:

Mike Santos, Attorney, City of Overland Park
Paul Morrison, District Attorney, Johnson County
Trooper Douglas Peck, Kansas Peace Officers Association (KPOA)
Jim Rumsey, Lawrence, Kansas
Jerry Simpson, Executive Director, Kansas Lottery
Reverend Richard Taylor, Kansans for Life at Its Best

SB 296

Mike Santos was a proponent of the bill making a plea for a uniform standard for evidentiary foundation, Attachment No. 1.

Paul Morrison supported the bill stating DUI defense attorneys make the current evidentiary foundation overly technical, Attachment No. 2.

Committee discussion:

1. Mr. Morrison explained the difference between admissibility and weight of evidence.
2. It was established that DUI evidentiary foundation is statutory but otherwise the same as that of other evidentiary foundation.
3. The machines used have to be certified by Kansas Department of Health and Environment (KDHE).
4. There is nothing to prevent the attorneys and judges from meeting in a pre-trial conference which might alert the prosecuting attorney to any "crazy" defenses planned by the defense.

Trooper Douglas Peck supported the bill emphasizing the accuracy of the machines used for breathalyzer tests, Attachment No. 3.

Reverend Taylor spoke as a proponent of the bill. He expressed surprise at the existence of a book of prepared defenses for DUI cases. The Chairman asked Reverend Taylor to submit a written statement for the committee record.

Jim Rumsey appeared on behalf of Ron Smith as an opponent of the bill, Attachment No. 4, challenging the admissibility of evidence and accuracy of the machines used.

Committee discussion:

1. Mr. Rumsey stated he would supply information to the committee regarding the differences in the machines used in determining intoxication levels.
2. Blood alcohol content (BAC) is considered more accurate than a breathalyzer or urine test. There are also variables with BAC though there are fewer arguments to be used against its results.
3. Depending on the court, the number of cases lost or dropped as a result of current evidentiary standards is considered significant but less than half.
4. The Supreme Court has ruled that breath and BAC tests are not considered invasion of privacy.

5. The arresting officer has the option as to which test will be used though a suspect can request a BAC. Refusal of the officer's choice of test results in an automatic suspension of license.
6. The estimate was that 5-10% of DUI cases go to jury trial, the balance is disposed of by pleas of guilty.

Staff was requested to check the Supreme Court for statistics regarding the number of DUI cases resulting in jury trials.

Jerry Simpson presented an update of the Kansas lottery, Attachment No. 5.

When asked by Chairman Barr, Mr. Simpson had no objection to the introduction of a resolution by the Committee to continue the lottery.

Committee discussion:

1. Lottery revenues are divided as follows:
   60% - EDIF funds ($27.6 million)
   30% - County reappraisal fund ($13.8 million)
   10% - Department of Corrections Building fund ($4.6 million)
2. Approximately 1½% of total operating revenue ($1-2 million) is used for advertising. A 3% increase has been requested for FY 1991 which is comparable to similar lotteries.
3. There is no contract with the multi-state lottery but it has a positive effect on the state lottery by an increased player base and jackpots.
4. Net sales refers to total sales minus free tickets, prior to any other deductions.
5. The lottery staff has just completed a report by county, city, representative and senatorial districts on the allocations of EDIF funds since the inception of the lottery.
6. There is no prohibition by the lottery against ads reflecting how revenues are spent.
7. The breakdown of lottery funds is approximately:
   45% - prizes
   30% - state gaming fund
   5% - retailers selling the product
   6.7%-vendors
   13.3%-administrative costs (salaries, advertising, etc.)
8. The percentage for reappraisal cost by county should be available from the Department of Revenue.
9. Staff advised that historically funding has been mixed with general funds.

Representative Sebelius offered a motion to introduce a resolution to continue the lottery, seconded by Representative Roper. The motion was adopted.

Chairman Barr requested KDLR budget staff work with her to provide the necessary lottery information to the Committee.

The meeting was adjourned at 2:54 p.m. The next meeting of the Committee will be January 18, 1990, 1:30 p.m. in Room 526-S.

Attachment No. 6 is Reverend Taylor's submitted statement.

GUEST LIST

FEDERAL & STATE AFFAIRS COMMITTEE

DATE Tuesday, January 16, 1990

(PLEASE PRINT) NAME	ADDRESS	WHO YOU REPRESENT
SUD GRANT	TOPEKA	KCCI
Dick Taylor	Topeka	Life & H&B Bests
Carol Unruh	Topeka	KS Co'r Dist Attys Assn
JIM RUMSEY	1031 VERMONT LAW, KS	KANSAS BAR ASSN
Alan E. Sims	Overland Park	City of Overland Park
MICHAEL SANTOS	OP	City of Overland Park
Barbara Frick	Topeka	KS lottery
MAXINE ECKERT	Wetmore	
Dr. Roger Carlson	Topeka	KS. Dept. Health & Env.
Helen Stephens	Topeka	Ks. Peace Officers Assn.
Doug/As A. Peck	Emporia	Ks. Peace Officers Assoc.
CLIFFORD F. HACKER	EMPORIA	KS PEACE OFFICERS ASSOCIATION
[illegible]	McPherson	Intern - Rep. Ethel Jameson
Myron E. Scafe	Overland Park	Police Dept.
Rod J. Morrison	Olath	Johnson County District Attorney
Jim Edwards	Topeka	KCCI
Ken Bahr	Topeka	Fourth Financial Corp.
Ethel Peterson	Dodge City	KNEA
[illegible]	Topeka	Observer
Mike Keegan	Topeka	KS. Auto Dealers Reg. with Coalition
BARB REINERT	"	KS LEAGUE of WOMEN VOTERS
JERRY SIMPSON	"	KS LOTTERY

Overland Park

January 16, 1990

Representative Ginger Barr
Chairperson of the House Federal & State Affairs Committee
State Capitol
Topeka, Kansas 66612

RE: SENATE BILL NO. 296 CONCERNING ADMISSIBILITY OF BREATH OR BLOOD TEST RESULTS IN DUI CASES

Dear Representative Barr and Committee Members:

Since the introduction in 1982 of mandatory minimum jail sentencing for first time DUI offenders and the per se .10 charge in 1985, defense attorneys have increasingly attacked the admissibility of blood and breath alcohol test results. In many DUI cases, even though the arresting officer has meticulously followed the statutory requirements for administering a breath test the results are not admitted into evidence because of vague and oftentimes frivolous objections to the evidentiary foundation necessary to admit the results. These defense objections are not challenges to the certification of the officer or the testing device, or even that the officer did not follow the required state protocol -- officers invariably comply with these requirements. The objections are generally esoteric, and at best speciously imaginative. Examples include objections that the officer did not comply with state agricultural regulations concerning measuring devices, that the officer did not hear the defendant secretly belch prior to the test, that the officer's watch was not working properly when he checked the twenty-minute period prior to the test, or that the officer failed to ask the defendant whether he had a lung removed prior to administering the test (even though the results are not affected by the size or capacity of the defendant's lungs). Such objections are clearly not the basis for suppressing the results of a properly administered test.

The only valid and logical foundation evidence necessary to admit DUI test results is whether the officer was certified by the state to conduct human breath testing, whether the testing device was certified by the state to test human breath and whether the officer followed the written state protocol for operating the machine. Once these foundational elements have been established

Federal & State Affairs Comm.
Attachment No. 1
January 16, 1990

Law Department

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

the test results should be admitted. The defendant's objections to the results are relevant only as to the probative value or weight to be given the results not its admissibility.

Because of the unique, creative and obscure nature of many of these objections there is no case law on point to guide the Courts. Senate Bill 296 would provide badly needed legislative guidelines for the courts to use in determining the admissibility of DUI breath and blood test results. While the case law is limited, the language of the proposed Bill does parallel the general standards for admissibility of test results 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) (Copies attached). In addition, the existing language of K.S.A. 8-1002(i)(j) provides for similar evidentiary standards in DUI drivers license suspension hearings (Copy attached). Finally, the State of Alaska has enacted similar legislation concerning the admissibility of DUI test results. (Copies attached).

We believe that Senate Bill No. 296 would enable prosecutors and law enforcement officers to fairly and effectively apply the DUI laws previously enacted by this legislature.

Myron Scafe
Chief of Police

Michael R. Santos
Assistant City Attorney

MRS/akb

Attachments

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(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.

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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

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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.

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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

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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, breaking the right side of the windshield, and she was then thrown over the back of the car. The bicycle became attached to

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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

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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 counsel 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

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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

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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 broadcast or photographic coverage of court proceedings, particularly criminal trials, violates the constitutional rights of trial

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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 defendant fairly. We hold this point to be without merit.

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

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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

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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 was convicted of manslaughter arising out of an automobile

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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 report 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

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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

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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. Falke*, 237 Kan. 668, 703 P.2d 1362 (1985). We have no hesitancy

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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

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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 court did not abuse its discretion in the imposition of the maximum jail sentence and the maximum fine for each of the charges

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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:

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"(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 trial court may only impose sentences which are combinations of entire subsections. The use of the word 'appropriate' implies that the combination of penalties

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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.

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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-

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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 influe
both alcohol and drugs.

(b) If the alcohol conce
more, it shall be prima facie
defendant was under the in
to a degree that renders th
of driving safely.

(c) If there was present
bodily substance any narcot
nifacient, stimulating or oth
the capacity to render the d
of safely driving a vehicle,
considered to determine if
under the influence of dru
and drugs, to a degree th
fendant incapable of drivin

History: L. 1955, ch.
ch. 60, § 2; L. 1970, ch. 5
42, § 1; L. 1976, ch. 49,
144, § 4; L. 1985, ch. 48,
40, § 4; L. 1986, ch. 41, §
§ 15; July 1.

Law Review and Bar Journal R

"S.B. 699—A Comment on Kan
Law," Joseph Brian Cox and Dona
230, 232 (1982).

"Admissibility of Delayed Chem
Alcohol Influence," Craig Shul
J.K.T.L.A. No. 5, 21 (1982).

"The New Kansas DUI Law:
Practical Problems," Gerard Lit
343 (1983).

"The New Kansas Drunk Drivi
Matthew D. Keenan, 31 K.L.R.

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

Attorney General's Opinions:

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

CASE ANNOT

21. Instruction, while accept
initional portion from elements
233 K. 702, 704, 705, 664 P.2

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

23. Statute, being integral p
not violative of Kan. Const., A
233 K. 972, 974, 980, 666 P.2

24. Cited in holding blood
taken under appropriate condit
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

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Citation
AK ST s 28.35.033
AS 28.35.033

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ALASKA STATUTES

Title 28. Motor Vehicles.
Chapter 35. Miscellaneous Provisions.
Article 2. Offenses Related to Alcohol and Controlled Substances; Implied Consent.

Sec. 28.35.033. Presumptions and 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.

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(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.

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

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

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STATE OF KANSAS
Tenth Judicial District

OFFICE OF DISTRICT ATTORNEY

PAUL J. MORRISON
DISTRICT ATTORNEY

JOHNSON COUNTY COURTHOUSE
P.O. BOX 728, 6TH FLOOR TOWER
OLATHE, KANSAS 66061
913-782-5000, EXT. 5333

January 16, 1990

TO: SENATE COMMITTEE OF THE JUDCIARY

RE: SENATE BILL #296

Good Morning:

I am here today to provide comments in support of Senate Bill #296. While this is not one of the most highly visible pieces of legislation, it is one of the most important. I say this for several reasons.

First, it is estimated that over two thousand DUI cases are filed in our county each year. It is one of the most frequent criminal violations filed. I do not need to tell the members of this committee the toll that drunk driving exacts from our society. The most effective law enforcement tool in proving DUI cases is the use of the breath test to show the level of intoxication.

Unfortunately, in recent years the foundation questions required for getting the breath test into evidence have become overly technical. In some situations, it is more difficult to get the breath test results into evidence than almost any other sort of scientific test known to law enforcement. It should not be this way. This fact, coupled with the fact that DUI cases are oftentimes heard by lay judges and part-time traffic judges who are unfamiliar with the many intricacies of the law, makes for a bad situation. It is fairly common for a judge to refuse to let in breathalyzer results simply because of the fact he is confused as to whether or not there is any merit to the defendant's claims.

I personally am familiar with several DUI defense attorneys who openly admit that their goal at trial is to confuse the judge to the point of refusing to let the breathalyzer results in. Senate Bill #296 affords the proper balance between securing the rights of the defendant and giving a fair opportunity to law enforcement to try their case. Obviously, the breath device must be certified as should the operator. Additionally, if there is a technical challenge to either the machine or the procedure used, Senate Bill #296 allows the defendant to bring those matters

before the court. However, those particular challenges are to be assessed against the weight of the breath result as opposed to its admissibility. This is a well established principal used in the Kansas Code of Evidence as it relates to many other aspects of criminal procedure in Kansas.

Sincerely,

Paul J. Morrison
District Attorney

TO: Senate Committee on Judiciary

FROM: Trooper Douglas A. Peck, K.P.O.A. District 8 Governor, testifying on behalf of the Kansas Peace Officers Association

DATE: January 16, 1990

RE: Senate Bill 296 as amended by Senate Committee

We Support Senate Bill 296

Senate Bill 296 addresses a problem that now exists in our court system. Too much time is spent by the court, the law enforcement officer and the prosecuting attorneys trying to explain a machine and its workings. Engineers have designed the machines and proven their accuracy. These results have been checked and confirmed by the Kansas Department of Health and Environment. The officer that operates the machine does not need to be an engineer to operate the machine correctly. If proper protocol, as established by the Kansas Department of Health and Environment for the operator and machine, is followed then the operator does not need to be qualified to explain the inner workings of the machine to be able to administer an accurate and correct test.

Tax payer dollars will be saved if Senate Bill 296 is passed, because expert witnesses willnot have to be called and their fees paid nor will the court be spending unnecessary time to reestablish the integrity and accuracy of the machines which the Kansas Department of Health and Environment has already established and certified.

Thank you very much for your time and consideration on this issue.

Federal & State Affairs Comm.
Attachment No. 3
January 16, 1990

SB 296
January 16, 1990

Madam Chairman, members of the House Federal and State Affairs Committee. I am Ron Smith. I represent the Kansas Bar Association.

KBA opposes SB 296. We believe it to be an unnecessary intrusion into the inherent judicial power to determine which evidence is relevant to a given proceeding.

Lesser but effective alternatives can obtain similar results.

Separation of Powers

The legislature's historic and appropriate role is to decide what activity constitutes a crime, and define it. The legislature has wide latitude to determine what kind of litigation is allowed in Kansas, and how such proceedings are handled so long as the power exercised otherwise is constitutional.1/ This power is not exclusive exercised by the legislature. Whether to admit or disallow evidence in a criminal or civil trial is an inherent power of the Judicial Branch.2/ If the legislature begins determining when key factual evidence is admissible, we believe you cross over the line from legislating policy into exercising judicial powers, an assumption of power upon which the Court is not obligated to defer to legislative wisdom.3/

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[1]We offer no opinion whether SB 296 is constitutional. However, many DUI prosecutions are tried to the court instead of a jury. For the legislature to require the admissibility of certain evidence when a judge hears a case raises a distinct separation of powers question.

[2]*Burrus v. Silhavy*, 155 Ind. App. 558, 563, 293 N.E.2d 794, 797 (1973), cited with approval in *State v. Quick*, 226 Kan. 308, 597 P.2d 1108 at 1111-1112 (1979).

[3]Unless, of course, the court acquiesces in the legislative policy, such as Judicial Council development of Civil and Criminal Proce-

(Footnote Continued)

Federal & State Affairs Comm.
Attachment No. 4
January 16, 1990

Foundations for Admissibility

As policy, you decided two years ago you want to crack down on DUI offenders. That is fine. Courts, however, must be concern with the prejudicial impact of improperly admitted evidence and protect a person's rights to due process.

Professor Mike Barbara wrote, "The law takes nothing for granted. . . . Authentication or identification is a prerequisite to establish the relevancy of any . . . evidence."4/ Admissibility of evidence is never presumed. All evidence must have an appropriate "foundation" before it can be admitted. Blood alcohol tests should not have lesser standards. Since it is a judicial power to declare what the law is and whether laws are constitutional,5/ admissibility of evidence in furtherance of that power generally is within the sound discretion of the trial judge.6/ Most blood alcohol tests are admissible.

Essentially, section 1(a) is a legislative determination that a if law enforcement is satisfied that a "sufficient evidentiary foundation" is laid for admission of breath test results when the three subsections are completed, the test results should be admissible whether or not strong persuasive arguments are present against such admission. It is impossible for legislators to anticipate all the ways that a blood alcohol test could be rendered evidentially worthless by testing authorities or law enforcement officers before, during and after taking the breath test. While KBA generally has policy favoring laws that help prosecutors protect the public from crime, SB 296 might reward sloppy evidence-gathering procedures. It allows inexperienced prosecutors to get key factual evidence in front of a jury that

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(Footnote Continued)
dure and evidentiary statutes. Under separation of powers theory, the court is under no obligation to do so.

[4]Barbara, *Kansas Criminal Law Handbook*, Second Ed., Kansas Bar Association, p. 24-1 (1987).

[5]"It is the function and duty of this court to define constitutional provisions. . . . It is the nature of the judicial process that the constitution becomes equally as controlling upon the legislature of the state as the provisions of the constitution itself. . . . Any attempt by the legislature to obliterate the constitution so construed by the court is unconstitutional legislation and void. Whenever the legislature enacts laws prohibited by judicially construed constitutional provisions, it is the duty of the courts to strike down such laws." *State v. Nelson*, 210 Kan. 439, 444-445, 502 P.2d 841 (1972)

[6]*City of Wichita v. Jennings*, 199 Kan. 621, 433 P.2d 351 (1967).

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otherwise might be inadmissible.7/ Encouraging sloppy prosecutions is not good public policy.

Chain of Custody

SB 296 also interferes with the concept of "chain of custody."8/ The burden of proof of all material facts is on the prosecutor. How do judges read SB 296 with their duty to insure that prosecutors establish a chain of custody in DUI matters? SB 296 requires no showing the test results were properly taken, stored, conducted by the lab in accordance with protocol and then properly brought to court as evidence in a particular case. Subsection (b) totally controls the preliminary requirements to admissibility of the test results.9/ Is a judge to exclude chain of custody requirements if they conflict with SB 296?

Scientific Basis for Evidence

SB 296 ignores whether the *scientific* community is satisfied that a breath test, properly administered, is providing accurate data on blood alcohol levels. Before a scientific opinion or test result may be received in evidence, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field.10/ In a courtroom, the fact that a given test result has been received into evidence in prior proceedings does not automatically insure

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[7]We say "might" because the law of Kansas is that if witnesses testify to the general reliability and acceptance of certain tests within the scientific community, even if there is expert testimony to the contrary, it is proper to admit the evidence and place it before the jury for their determination as to the weight such evidence should receive. *State v. Washington,* 229 Kan. 47, 622 P.2d 986 (1981).

[8]A party offering an object, or test result, into evidence must show it is reasonably certain there have been no material alterations of the object since it was first taken into custody. This "chain" of proof is first determined by the trial judge, but the ultimate question of weight of proof is for the jury. *State v. Tillman,* 208 Kan 954, 494 P.2d 1178 (1972).

[9]SB 296 says "Upon admission of the foundation testimony provided in subsection (a), *no further evidentiary foundation shall be necessary.*" In fact, other evidentiary information is necessary, unless it is the purpose of the bill to destroy chain of custody rules.

[10]*State v. Washington, supra,* P2d at 991, citing with approval *Frye v. United States,* 54 App. D.C. 46, 293 F. 1013 (1923).

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continued use. Obviously, well-conducted BAT test results are used in Kansas courts and elsewhere.11/

Scientific evidence tends to carry considerable weight with lay jurors.12/ However, SB 296 automatically makes test results admissible without a required showing by the prosecution of continued scientific reliability, contrary to established Kansas case law.13/

SB 296 says, in effect, that so long as KDHE continues to certify the test as "functioning properly," the evidence must be admitted, leaving it to jurors whether to believe the evidence. Judges make determinations on the admissibility of evidence before the jury hears it. SB 296 allows the evidence in, then allows defendant to try and mitigate the damage. That is fundamentally unfair.

Challenging Test Procedures

The legislation precludes defendant from inquiry as to how the evidence was obtained before the evidence is admitted into evidence.14/ The defendant cannot inquire whether the

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[11] *People v. Morse*, 325 Mich. 270, 38 N.W. 2d 322 (1949); *Popp v. Motor Vehicle Department*, 211 Kan. 763, 508 P.2d 991 at 995 (1973).

[12] "(A) jury of laymen should not, on a case-by-case basis, resolve a dispute in the scientific community involving the validity of a new scientific technique. Courts should be reluctant to resolve the disputes of science. *It is not for the law to experiment, but for science to do so.* Without the Frey test, juries would be compelled to make determinations regarding the validity of experimental or novel scientific techniques. As a result one jury might decide that a particular scientific process is reliable, while another jury might find the identical process is not. Such inconsistency of the admissibility of a given scientific technique or process in criminal cases would be intolerable." *State v. Washington, ibid.*

[13] *State v. Washington, supra,* 622 P.2d at 992. As an example, scientists might be able to prove that chewing certain types of gum prior to taking the breath test alters the results. Under SB 296, that bit of evidence, wholly exculpatory to the question of level of intoxication, could not be offered to preclude introduction of a possibly flawed yet prejudicial test result.

[14] Nothing in subsection (a) requires the officer testifying showing he administered the test properly. All he shows is (1) he was trained and certified, (2) the device used was certified by KDHE to test breath, and (3) the device was functioning properly and the test was administered according to KDHE protocol.

testing machine which gives the reading was located too close to police radio equipment, which tends to disrupt the test's accuracy. Under SB 296, even if the answer is yes (thus establishing unreliability of the test results), the test still can be admitted into evidence.

The Real Problem -- and a Solution

Last summer KBA's Legislative Committee inquired as to the reasons for SB 296. Apparently, the testing officer is often required to appear at DUI trials even when the test results are not in controversy. In some instances this creates case backlogs and witness unavailability. If this is the problem then it is legitimate. However, we believe it can be solved without SB 296.

Generally, in a DUI arrest at least two officers testify, the one that makes the arrest, and the other that administers the BAT.15/ If the intent of SB 296 is to eliminate the need for testimony of one of these officers, it fails. *Nothing in SB 296 precludes a defendant from subpoenaing these officers to testify at trial.*16/

Felonies. A preliminary hearing is held shortly after a felony arrest.17/ Felony prosecutions requiring BAT testing are comparatively few.18/ Even so, defense counsel, the prosecutor and the court can learn at the preliminary or the pretrial conference whether defendant intends to raise the issue of the method of testing or BAT results. Prosecutors can schedule officer testimony accordingly.19/

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[15]Sometimes these officers are one and the same. Other times, a third officer might be needed to testify that the machine was properly calibrated prior to being used for a BAT.

[16]If the prosecution argues SB 296 is intended to preclude subpoenaing such officers, it raises a serious question concerning Sixth Amendment rights to confrontation.

[17]K.S.A. 22-2902.

[18]Primarily these are vehicular homicide or other felonies where alcohol and automobile driving causes serious injury or death.

[19]K.S.A. 22-3217 allows conferencing between prosecutor, defense counsel and the court on "all matters as will promote a fair and expeditious trial." Courts have broad powers to compel information and consensus on issues at pretrial conferences. *State v. Quick*, 226 Kan. 308, 597 P.2d 1108 at 1112 (1979).

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Or, felony defendants can seek a pretrial motion *in limine* to attempt to preclude the prosecution from offering the BAT evidence unless the prosecution establishes its admissibility through normal channels, that is, use of the testing officer's testimony.20/ Felony defendants can use motions to suppress evidence as a means of challenging the sufficiency of the state's case, including the BAT results.21/

Misdemeanors. The problem SB 296 seeks to resolve is really with misdemeanors, and appeals of misdemeanor convictions for DUI. There is no preliminary hearing or pretrial conference procedure in city or county misdemeanor actions. When the defendant pleads not guilty, a trial date is set and on that date all witnesses must appear. If convicted, a misdemeanor defendant can appeal direct to the district court for a new trial, sometimes "from the beginning."22/

If the legislature were to require in *misdemeanor DUI prosecutions that sometime after counsel was appointed for defendant there be a pretrial conference on whether BAT results or testing procedures is to be an issue,* that would allow prosecutors to learn whether test results are an issue and schedule a more efficient use of an officer's time.23/

Recommendation

We suggest House Substitute for SB 296 be introduced that simply authorizes judges or the prosecutor to request a pretrial conference in misdemeanor DUI cases to discuss BAT test results. It is important this conference be held only after defendant is

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[20] *State v. Quick, supra.* See also Rothblatt and Leroy, *The Motion In Limine In Criminal Trials: A Technique for the Pretrial Exclusion of Prejudicial Evidence,* 60 Kentucky L.J. 611, 621 (1972) and Davis, *Motion in Limine -- A Neglected Trial Technique,* 5 Washburn L.J. 232 (1966).

[21] K.S.A. 22-3215.

[22] K.S.A. 22-3610 allows the appeal *de novo* if the judge at the misdemeanor trial was a district magistrate or municipal judge. Many times if a DUI misdemeanor is contested, the administrative judge reschedules the trial in front of a district judge, where appeal is limited to a normal on-the-record appeal to the Court of Appeals.

[23] The procedure could be quite informal, including telephone conference calls. Limiting the procedure to DUI prosecutions limits the use. As stated before, such pretrial conferencing already is allowed in felony prosecutions.

represented by counsel.[24]/ If defendants desire to contest the test results, the prosecutor then knows what witness list he shall need at trial.

We prefer this alternative to SB 296. Thank you.

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[24]Under *Miranda v. Arizona*, 384 U.S. 436, a DUI defendant probably should not be asked to admit the BAT results absent advice of counsel.

FSA
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1-16-90

Federal and State Affairs Committee Members:

The Lottery is beginning its third year of operation and positive efforts have been made to enforce the administrative and fiscal operation of the enterprise. The sales and marketing plan has been revised to reflect changes in the marketplace, the retail base, the player base and game design.

The marketing strategy for the first two years has involved the promotion of a "grassroots" public acceptance of the Lottery through the use of public events and a weekly television show. Now that this acceptance has been established, marketing strategy is turning to two different areas: entertainment value of the Lottery products and product value in both player prize return and state revenue benefits. These marketing objectives should enable the Lottery to maintain its current player base and create a strong foundation for continued growth and revenue enhancement.

This new marketing strategy has proven effective in the first half of FY 1990. On the instant ticket side, over 14 million tickets have been sold in the first six months of the fiscal year. This reflects the strategy of increasing the value of the ticket to the player by enhancing the overall cash prize payout, offering more entertainment value by utilization of multiple plays on each ticket and designing tickets with popular gaming themes.

Federal & State Affairs Comm.
Attachment #5
January 16, 1990

On-line "lotto" game sales exceeded projections for the first half of FY 1990. Record jackpots near the beginning of the fiscal year have paid off in high sales levels and an expanded player base.

At present, 2,326 retailers are selling Lottery products. Of these, 928 also sell on-line tickets and an additional 292 sell pull tab games.

To satisfy not only the legislative statute but also to strengthen the player base, the Lottery has contracted for an extensive research project involving the Lottery player and non player profile and perceptions. The results will enhance future game design and provide valuable assistance in long range planning.

The first six months of FY 1990 show a total net ticket revenue of $34,726,514. This is broken down into $16,211,005 for prizes paid to winners and operating costs of $7,099,437, which includes retailer and vendor commissions. The transfer to the state for the six month period was $10,432,206. This, added to previous transfers in FY 1988 and FY 1989 of $35,844,271, creates a grand total transferred to State Gaming Revenue fund and County Reappraisal fund of $46,276,477.

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1-16-90

ISANS FOR LIFE AT ITS BEST!
Rev. Richard Taylor, Box 888, Topeka, Kansas 66601

Phone (913) 235-1866 Office 1273 Harrison
(3 Blocks South of Statehouse)

A Proud Land

House Federal & State Affairs Committee
Hearing on Senate Bill 296

January 16, 1990
Richard Taylor
KANSANS FOR LIFE AT ITS BEST!

As pastor of a church in Salina back in the 50's, one of the first things I learned from an active AA member in my church was this. "As long as you have sympathy and mercy for a drunk you keep him drunk."

As long as we have sympathy and mercy for drinking drivers, we will keep them on the road.

When a lawyer friend in Topeka gave me the attached material, I could not believe that persons would place money in their pockets ahead of efforts that are trying to drive the drunk off the road.

Please support Senate Bill 296.

Richard Taylor

"Of our political revolution of 1776 we are all justly proud," said Abraham Lincoln on Washington's birthday in 1842. He went on to say "how proud the title of that land" where persons declare their freedom from alcoholic beverages because they "shall find a stronger bondage broken, a viler slavery manumitted, a greater tyrant deposed. . .perfect liberty!" With per-person consumption at nearly half the national average, thousands of Kansans enjoy that perfect liberty. Concerned users and non-users are united in this R-E-A-L effort to prevent alcoholism, highway tragedy, and other suffering caused by our most abused recreational drug.

Rehabilitation — Help alcohol-dependent persons adjust to life without the drug.
Education — Inform children, youth & adults of effect of alcohol on mind & body.
Amount — Encourage persons to be non-users and encourage users to use less.
Law — Pass and enforce laws that reduce consumption and suffering.

client comes to you for help, be confident you have the answers!

Richard E. Erwin, Marilyn K. Minzer, Leon H. Greenberg, Herbert M. Goldstein, and Arne K. Bergh

As the prosecution of drunk driving offenses continues to get tougher, turn to this well-known authority to prepare your cases thoroughly and **win them.**

Case-winning strategies.

From pinpointing the elements of the defense to delivering the argument to the jury, this three-volume set directs you step-by-step through your case:

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- how the prosecution's burden of proof relates to admissibility of chemical test evidence
- how to present motions to suppress and to strike prior convictions
- how to select the jury, with jury instructions for every aspect of the case
- how the defendant's refusal to submit to a chemical test can affect his acquittal or conviction on license revocation.

Logically arranged so you don't waste time.

You'll find the guidance necessary to prepare your cases, arranged in the actual sequence of a case. The sections include The Offense, Pretrial Considerations, The Arresting Officer, The Examining Physician, Chemical Tests Generally, Affirmative Defense, Argument to the Jury, and Jury Instructions. From the moment you take a drunk driving case to the final verdict, everything is set out for you in full detail.

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The scientific and mathematical information required to understand these chemical testing procedures is spelled out in clear, non-technical terms:

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- intoximeter 3000
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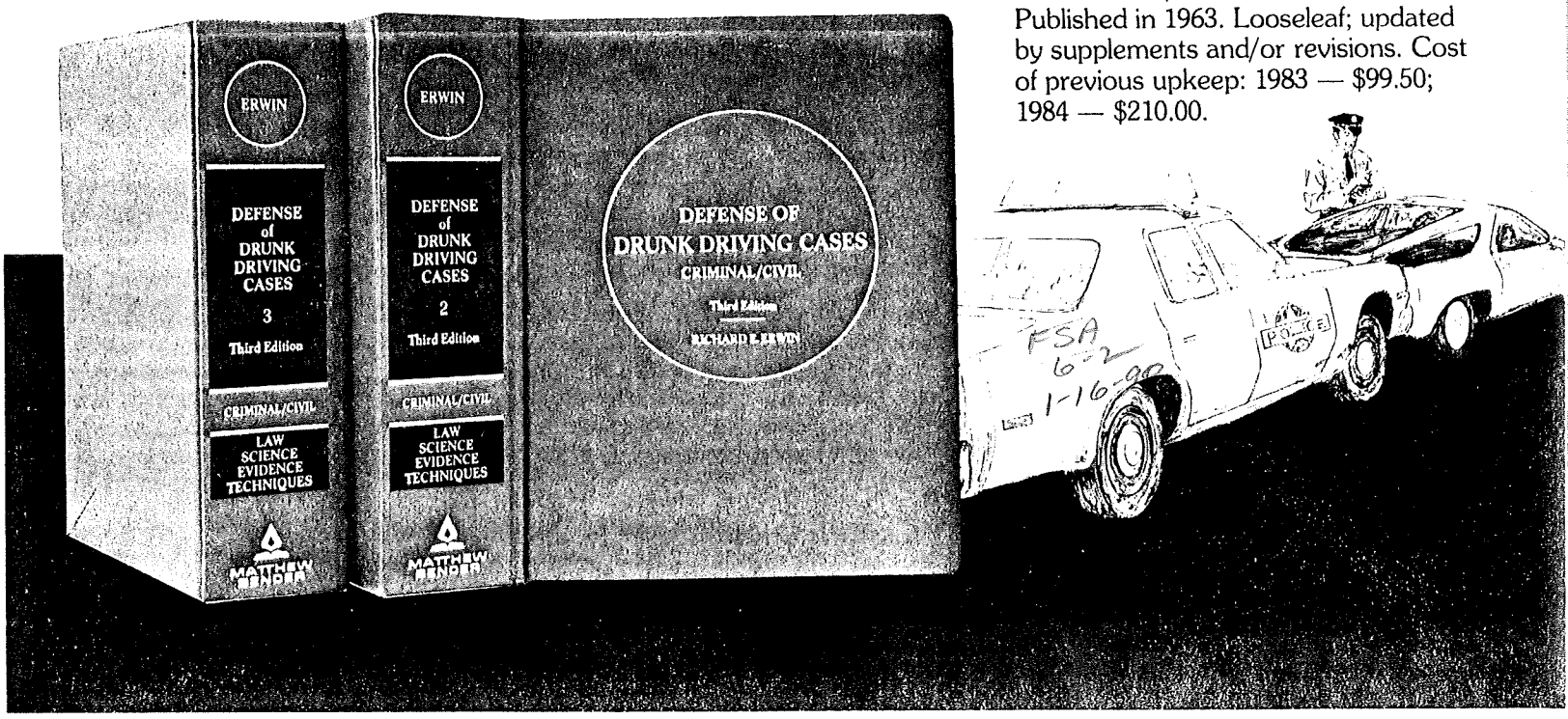

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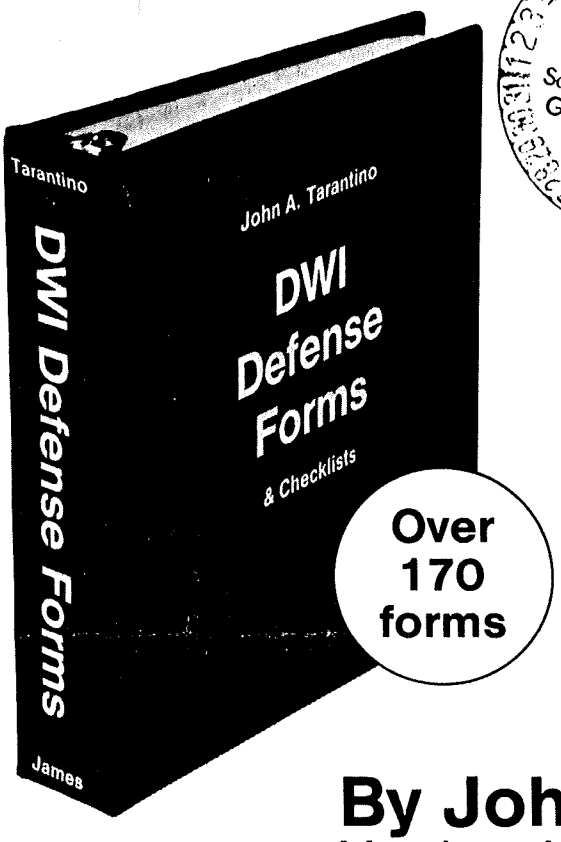

DWI Defense Forms

& Checklists

By John A. Tarantino
Member, ABA National Committee on Drunk Driving

How to handle a growing DWI caseload

Drunk driving has grown into the most frequently encountered criminal case in the courts today, with over 1½ million arrests annually across the nation.

This growth in the number of arrests — combined with stiffer penalties, fewer constitutional safeguards, increased judicial/police cooperation, repeated grass roots lobbying efforts, and harsher public attitudes — is bringing more and more of these DWI cases into both civil and criminal lawyers' offices.

DWI cases are also growing more complex. Per se statutes, new machine technology, police roadblocks, Miranda warnings, preservation of ampoules and breath samples, and machine error coverups have increased the time required to mount an effective defense.

These increases in the number and complexity of DWI cases have made managing a DWI caseload more difficult. Now, for the first time, there is a book designed to streamline your DWI practice. One of the

Details inside

Also available. **Defending Drinking Drivers** by Walter Frajola, Ph.D., and John Tarantino, Esq., explains how to attack drunk driving tests. See the order form on the back page for more details.

MATTHEW BENDER

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(Over, please)

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New!

DEFENSE OF SPEEDING, RECKLESS DRIVING AND VEHICULAR HOMICIDE CASES

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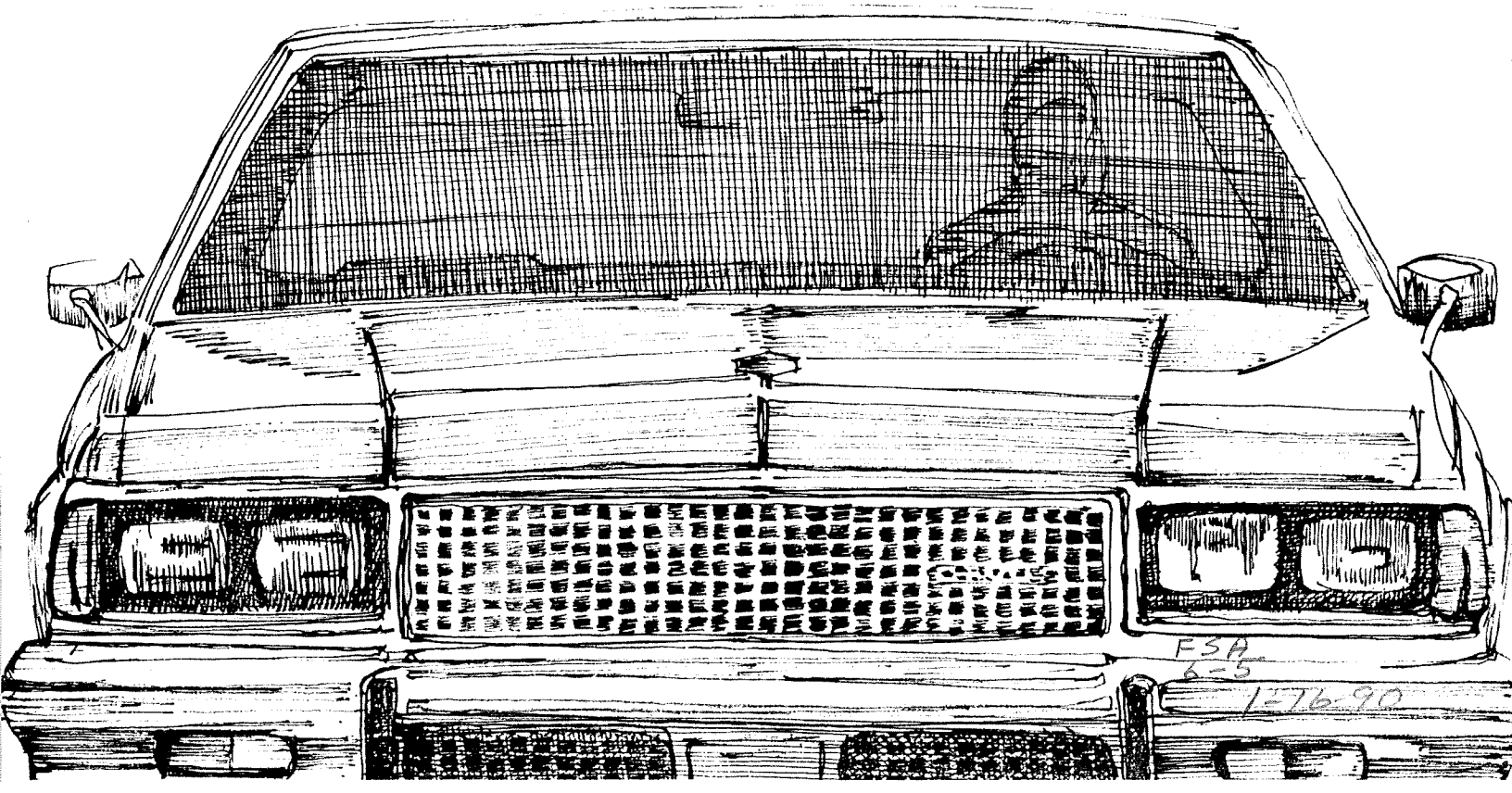
Practical, no-nonsense guide to *radar, VASCAR* and other speed detection methods — and how to use their results in litigation.



Lawyers Are Finding Ways to Circum Stricter Statutes Against Drunken Driving

11·2·84

By Eileen White

Staff Reporter of The Wall Street Journal

John was arrested in July for driving while intoxicated and leaving the scene of an accident he had caused. A police videotape showed John unable to walk a straight line and, in slurred speech, refusing to submit to a breath or blood test.

A few years ago, John, a 58-year-old Southern California engineer who would not give his last name while discussing his case, would probably have pleaded guilty and received a suspended sentence or probation. This year, facing a minimum sentence of three months in jail under California's new drunken-driving laws, he hired an attorney with experience in 500 drunken-driving cases.

A drunken-driving specialist wasn't hard to find. Since stiffer penalties for driving while intoxicated were enacted by virtually all states in the past four years, defending drunken drivers has become a booming and lucrative legal specialty. "Lawyers are turning out in droves for seminars on drunken driving," says Minneapolis attorney Donald Nichols, who conducts such seminars. "This is probably the fastest growing area of the law."

Thirty states now mandate jail sentences for repeat offenders, and six require even first offenders to serve time in jail. Thirty-seven states automatically suspend or revoke drivers' licenses for refusal to take a sobriety test.

Plea Bargaining

Moreover, attorneys in certain states can no longer rely on traditional drunken-driving defense tactics like plea bargaining and probation. Eleven states now prohibit plea bargaining, which the National Transportation Safety Board says "distorts" a drunken driver's record by hiding multiple offenses.

In this tougher environment, drunken-driving cases, which had traditionally been assigned to law firms' junior associates, are now going to experienced lawyers. These lawyers are charging three to 10 times as much to defend clients under the new laws as their firms used to charge under the old laws. Fees range from about $3,500 to $5,000 for a first offense, to as much as $15,000 for a drunken-driving case involving manslaughter. "The stakes are higher," says an attorney. "People who can afford it will pay practically anything to stay out of prison."

Lawyers are trying a wide range of psychological, medical and technological defenses to keep their clients out of jail. Lawrence E. Taylor, a partner in the Glendale, Calif., firm of Giometti, Powell & Taylor, tries to "put the breathalyzer on trial" to prove his clients' innocence. A breathalyzer machine measures the body's blood-alcohol content. Mr. Taylor presents expert testimony about radio interference, faulty maintenance or incompetent use by police.

John McShane of the Dallas firm of McShane & Wilson uses what he calls a "recovery defense." Working with a doctor who testifies that alcohol is a mentally debilitating disease over which drunken drivers have no control, Mr. McShane builds a case for treatment rather than incarceration.

'Psychic Scarring'

E. Stewart Jones, a lawyer in Troy, N.Y., specializes in defending first offenders who allegedly caused death or injury. He puts forensic psychologists on the witness stand to discuss the "self-imposed prison of psychic-scarring" in which his clients dwell. Mr. Jones says the technique works best for clients from a "pristine background."

If expert testimony doesn't sway judges or juries, lawyers sometimes use legal technicalities. Mr. Taylor tries this constitutional conundrum: If the defendant was too drunk to drive, could he have been sober enough to understand his Miranda rights? Other attorneys hire investigators to prepare pre-sentence documents that describe the defendant in more glowing terms than the probation officer's report does. National Legal Services Inc., a private Atlanta firm, visits a defendant's hometown and custom-designs a community-service sentence as an alternative to jail time.

'The stakes are higher' in drunken-driving cases, says an attorney. 'People who can afford it will pay practically anything to stay out of prison.'

A study to be released next week by the National Institute of Justice suggests that lawyers may be having an effect on the disposition of drunken-driving cases. After the state of Washington imposed mandatory minimum penalties in 1980, the number of jury trials doubled in Seattle, and the number of guilty verdicts decreased to 60% from 80%. Cheryl Martorama, a researcher who worked on the study, says this is because, in all but the most technical cases, attorneys advise clients to demand a jury trial. And, says Mr. Taylor, "Juries are more likely than judges to identify with the poor guy on trial. They think, 'that could be me.' "

Supporters of stringent laws are trying to counter drunken-driving lawyers through educational programs aimed at the country's 21,000 traffic-court judges. The National Highway Traffic Safety Administration says more than 2,000 judges have completed a curriculum that it helped to develop.

Performing a Service

But some lawyers claim they are performing a service to the community by keeping drunken drivers out of jail. As part of Mr. McShane's recovery defense, alcoholic drunken drivers voluntarily participate in residential alcohol-treatment programs before trial. Mr. McShane, himself a recovering alcoholic, says that the treatment benefits society more than a jail term would. "If an alcoholic just goes to jail with no treatment for his disease, he'll get out and drive drunk again," Mr. McShane says. "Sooner or later he'll kill somebody." But he concedes that he doesn't know whether his treatment program prevents his clients from becoming repeat offenders, because he doesn't keep track of clients' long-term progress.

In any case, lawyers shouldn't be held solely responsible for thwarting the new laws, says H. Lawrence Ross, a sociologist at the University of New Mexico and author of a book on drunken-driving laws. Drunken-driving cases are typically handled by municipal and county prosecutors who are no match for a state-of-the-art defense, Mr. Ross says. Perhaps more importantly, he adds, judges are still accorded wide discretion in deciding the length of jail sentences.

Meanwhile, drunken-driving lawyers are delivering what their clients demand. Mr. Taylor, John's attorney, negotiated a guilty plea to reckless driving, which carries a $400 fine and unsupervised probation for two to three years. John says that the lawyer saved him the expense of a jury trial, which would have cost about $10,000, and a huge increase in automobile insurance, because reckless driving isn't an alcohol-related offense. John's legal bill was $4,500. From John's point of view, the only black cloud is the possibility of a civil suit brought by the driver of the other car, who received facial injuries.

But most people can't afford a drunken-driving specialist. One hundred public defenders handle 2,000 drunken-driving cases a year in Philadelphia, along with the rest of their caseloads. The public defenders win acquittal in only about 10% of the cases that go to trial.

"The disparity is just plain unfair," says Municipal Judge Arthur D. Jackson Jr. of Dayton, Ohio. "You go out the door. The welfare mother goes to jail."

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