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January 12, 2016

To: House Judiciary Committee

From: Douglas E. Wells

Re: HB 2289

Dear Chairman Barker and Judiciary Committee,

I am a lifetime Kansas resident who has practiced law in Kansas for the last 36 years. I have served on the Kansas DUI Commission as the representative of the Kansas Bar Association. I am speaking in favor of HB 2289 with one suggested change that I will describe in my written testimony.

This Bill proposes changes in two existing implied consent statutes. The proposed changes are addressed in the statute dealing with the contents of the officer's certification, K.S.A. 8-1002, the statute dealing with issues that can be raised at hearing in the civil license hearing, K.S.A. 8-1020(h), and the discovery of law enforcement reports prior to the driver's license hearing, K.S.A. 8-1020(f).

These changes would not affect criminal DUI charges. The changes would only effect civil hearings where an existing driver's licensee is attempting protect their driver's license from a sanction based upon a test failure or test refusal. These proposed changes would in no way affect punishment for a person charged or convicted of the criminal offense of DUI.

I will now topically address the changes as follows:

<u>Before a driver's license can be suspended or restricted, the vehicle stop should be legal.</u>

The proposed changes require that the officer had reasonable grounds to suspect a person is committing or has committed a crime or traffic infraction or was involved in an accident resulting in property damage or injury. Under these proposed changes, in the absence of an accident, the vehicle stop must be based upon reasonable grounds to believe that the law has been broken, hence

the stop must be legal and constitutional under the proposed changes.

These proposed changes are generated by the Kansas Supreme Court case of Martin v. Kansas Dept. of Revenue, 285 Kan. 625, 176 P.3d 938 (2008), which ruled that an existing driver's licensee may have their license suspended even if the vehicle stop was illegal or unconstitutional because the legislature had not preserved the legality and constitutionality of a traffic stop as a civil driver's license hearing issue that can be raised. For example, a car with a legally displayed Kansas State Wildcat bumper sticker can be stopped merely because it is a Wildcat car when there are no violations of the law thereafter subjecting the driver to suspension and ignition interlock. Under existing law the vehicle can be stopped for any reason.

Most law enforcement officers are good and honorable people. Any person, including an officer, can make a mistake. Any person, including an officer, can have a bad day and make decisions based upon a poor disposition or negative attitude. Any officer can misuse the power of their badge. By requiring the stop to be legal, mistakes and attitude problems can be eliminated as a basis for depriving a person of their license.

The founders of our country and state have limited government powers to make sure that these powers were exercised justly. Our founders have steadfastly approved the ability of a citizen to move freely unless there was a legal reason to stop the person. This reason to stop a person must be based on fact and law, not based on a guess, supposition or poor attitude.

While having a driver's license is a privilege that can be taken away by the state, once a license is issued, there is a property interest in protecting that license. This property right should not be able to be lost based upon an illegal or unconstitutional stop of the vehicle. It is fundamental to our system of citizen rights to require that a vehicle stop be legal in that it is based upon facts that justify the stop and facts that establish reasonable grounds to believe that the law has been broken. This section of the proposed changes merely codifies these basic principles of citizen rights, law enforcement officer responsibility, protection of a property interest, and the limitation of the powers of the state against a private citizen's rights.

I have heard rumors that some people are claiming that these proposed changes would invalidate check lanes. This argument is inaccurate on multiple levels. First, nothing in the proposed changes will affect the criminal DUI case.

Second, check lanes are not approved or disapproved based upon statutory law. They are approved by court constitutional interpretation. See State v. Deskins, 234 Kan. 529 (1983) and Delaware v. Prouse, 440 U.S. 648(1979). Nothing in this proposed legislation will affect the constitutional interpretations permitting check lanes.

Modern society, especially in a heavily rural area, requires that a person be able to drive to secure an income, protect and provide for a family, and for the betterment of the person's life. Much of Kansas has no public transportation, making the ability to drive even more necessary than in a big metropolitan area. Before a person's ability to drive should be taken away, the stop of a vehicle should be legal and constitutional, not unlawful. These changes provide for these core values.

Discovery of law enforcement reports if fundamental.

Under the current law, a licensee is entitled to obtain a video or audio tape before the civil driver's license hearing. This makes sense, because even law enforcement officers can make a mistake or pre-judge a situation. The best evidence of how facts occurred is by viewing or listening those facts independently. Unfortunately, some law enforcement agencies choose not to use DVDs when they are available (Manhattan, Pottawatomie County) thereby limiting the search for the truth. Some law enforcement agencies do not use any DVD recorders. The Highway Patrol does not record breath tests in any of their facilities.

While discovery of video and audio taping that exists is provided under existing law, the providing of the written law enforcement reports is not required. Before taking a person's driver's license, their attorney should be able to view the narrative report and the alcohol drug influence report to provide the licensee a reasonable opportunity to protect their license. This requirement would not be cumbersome. The production of these documents would expedite hearings because testimony could be limited to the facts and issues of that case rather than requiring a fishing expedition to preserve all issues when the attorney for

the licensee has no clue what issues may exist if they have not been provided the officer's reports.

While law enforcement officer reports can be received through the criminal DUI case, many times the criminal DUI case is not even filed by the time the civil driver's license hearing occurs. Therefore, under existing law, the licensee must go to hearing without having reviewed these critical written reports and sometimes without videos when none exist. Due process mandates that these reports be made available before the driver's license hearing. The cost for the providing of the reports is provided in the amendments.

Conclusion

The changes that are requested in K.S.A. 8-1002 and 8-1020 are modest. They are based upon concepts of fairness. They are necessary so that a person receives a proper hearing before sanctioning of their fundamental ability to drive.

While it is necessary to protect the public from drunk drivers, these statutes necessarily occur after the driving has already occurred. After driving has occurred, public safety is not jeopardized by legislatively insuring that an existing licensee receives a full and fair hearing based upon a legal and constitutional stop and a properly administered breath test on a proper machine.

I respectfully urge passage of HB 2289.

Sincerely,

Douglas E. Wells

DEW/teb