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Alcohol Violations

ABC Needs to Serve Civil Citations on Scene At Least Until the Legislature Fixes the Law

Kite's Bar & Grill, Inc. v. Kansas Dept. of Revenue, ___ Kan.App.2d ___, ___ P.3d ____ (No. 110315 filed 06/27/14). KDOR suspended Kite's liquor license for 4-weekend days due to a minor obtaining or possessing alcohol on Kite's premises. A Riley County officer had located a 19-year old drinking in the bar and notified Kite's manager, but did not issue a citation. KDOR later mailed a citation and suspended the license. Kite's appealed, alleging strict liability was inappropriate and substantial compliance with the notice statute by ABC was insufficient. The Court of Appeals agreed with the notice argument and reversed the suspension. K.S.A. 41-106 is plain and unambiguous in requiring that a civil citation for a violation of the Kansas Liquor Control Act be delivered to the person committing the violation at the time of the violation and then a copy of the citation be mailed to the licensee within 30 days of the violation. Because ABC did not do so here, the citation it later mailed to Kite's was unenforceable and void.
NOTE: This case should not affect the enforceability of ordinances creating criminal violations for serving underage patrons.

Civil and Criminal Liability

Alleged Excessive Force Leads to Settlement

Engle v. City of Mission, Court and Case Number Unknown, profiled in Prairie Village Post 7/30/14. The multi-million dollar lawsuit against the City of Mission over a March 2013 incident at the Mission post office on Broadmoor has ended, but the terms of the agreement that led to its dismissal are being kept secret. Catrina Engle sued the city, then police chief John Simmons and officers Timothy Gift and Michelle Pierce, asking for $1.75 million in compensatory damages and $1.75 in punitive damages. The suit was dismissed voluntarily in late June by both sides with each party paying its own attorney's fees. The city was represented by attorneys for its insurance company. An open records request by PVPost.com for the terms of any agreement or any payments issued by the city were all met with the response that the information was "confidential and privileged per the insurance company's lawyer, Peter Maharry. Fisher Patterson Sayler & Smith." The Mission City Council held an executive session in June near the time of the dismissal, citing litigation as the justification for the closed meeting. A confidentiality agreement is reportedly in place over terms of any settlement. The insurance company's attorneys represented the city in the federal suit. During the post office incident, officers handcuffed Engle

and took her to the ground. She was charged with interfering with a police officer and disorderly conduct and found guilty by Mission City Judge Keith Drill in August 2013. She appealed the conviction and was found innocent on both charges in Johnson County District Court in November 2013. Mission City Attorney David Martin prosecuted that case for the city. In her federal lawsuit, filed before the district court trial, she alleged that police threw her to the ground, searched her purse, performed a cavity search and took her driver's license without consent. Her children were nearby when she was taken into custody. She claimed a violation of her Constitutional rights and emotional harm to the children. Simmons left the department the next month after the federal suit was filed. Pierce, the officer who initially interacted with Engle at the scene, also has left the department.

DL Hearings

Coercion to Take Test Will Invalidate the Result But only in a Criminal Proceeding

Hoeffner v. Kansas Dept. of Revenue, ___ Kan.App.2d ___, ___ P.3d ____ (No. 110323, filed 09/12/14). Dodge City officers improperly coerced Hoeffner into consenting to a (0.215) breath test when they repeatedly advised him that refusal would result in the seeking and issuance of a search warrant for his blood. Hoeffner was not involved in an accident involving death or serious bodily injury, so the officers' threats to get a warrant were empty threats pursuant to *State v. Weilert,* 43 Kan. App. 2d 403, 410, 225 P.3d 767 (2010) (applying K.S.A. 8-1001[d][3]), and *Cook v. Olathe Medical Center, Inc.,* 773 F. Supp. 2d 990, 1002 (D. Kan. 2011) (same). However, suppression does not apply to administrative hearings and the test results reflecting that Hoeffner had an alcohol concentration of .08 or greater in his blood were admissible in both administrative and court proceedings relating to the suspension of his driver's license. As such, we find substantial competent evidence supports the district court's decision to uphold the suspension of Hoeffner's license.

First Amendment

35 Foot Blanket Prohibition on Picketing Not Narrowly Tailored

McCullen v. Coakley, 568 U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (No. 12-1168, filed 06/26/14.). The Court struck down a Massachusetts law that creates a 35-foot "buffer zone" around reproductive healthcare facilities into which demonstrators are not allowed to enter. A 2008 case, *Hill v. Colorado,* upheld a similar law against a First Amendment challenge because it (1) addressed a legitimate state concern for the safety and privacy of individuals using the facilities, (2) was "content-neutral" in that it applied to all demonstrators equally regardless of viewpoint, and (3) regulated the "time, place, and manner" of speech without foreclosing or unduly burdening the right of demonstrators to communicate their message. Not so much with the Massachusetts law. The facts indicated most of the problems occurred on Saturdays, and a 7-day per week 35 foot blanket prohibition was not narrowly tailored enough. To meet the narrow tailoring requirement the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. The government failed to meet it's burden, and the court held the buffer zone "burden[s] substantially more speech than is necessary to further the government's

legitimate interests."

People have a First Amendment Right to Video Record Police in Public Places

Case Name Unknown - City of Indianapolis - profiled on PoliceOne.com on 03/01/14. The terms of a recently settled lawsuit in Indianapolis, Indiana will require the city's police force to remind officers that it's legal for civilians to videotape on-duty cops, but it will also cost the department more than just that. In addition to having to adopt an official policy recognizing the right for citizens to record law enforcement officials, the City of Indianapolis is also cutting a $200,000 check for a local man who was arrested and injured by police in 2011 after he refused to stop filming a nearby arrest. According to excerpts of the policy published on Thursday by WISH-TV, local law enforcement officials have 60 days to adopt a policy that states “police officers should not interfere with civilians who are observing or recording their actions by video or audio in public, so long as the civilians maintain a safe and reasonable distance if necessary from the scene of a police action, do not physically interfere with the officers’ performance of their duty and do not represent a physical danger to the officers, civilians or others.”

Forfeiture

Requesting Forfeiture Within 90 Days is Just a Suggestion

State v. $17,023 In U.S. Currency (more or less), ___ Kan.App.2d ___, ___ P.3d ____ (No. 111048, filed 07/03/14). The state waited five months before filing its notice of forfeiture. The district court dismissed the action holding the state failed to comply with "the 90-day rule." The Court of Appeals reversed. The failure of the seizing agency to file a notice of pending forfeiture within 90 days of the seizure of property under the Kansas Standard Asset Seizure and Forfeiture Act, K.S.A. 60-4101 et seq., does not deprive the district court of jurisdiction over the forfeiture action. But property seized for forfeiture must, upon request, be released to the owner or interest holder when the State fails to act within 90 days of the seizure by filing a notice of pending forfeiture or a judicial forfeiture action. K.S.A. 2013 Supp. 60-4109(a)(1).

Interrogation

Failure to Obtain a Proper Interpreter And Lying to the Suspect May Render Confession Involuntary

State v. Fernandez-Torres, ___ Kan.App.2d ___, ___ P.3d ____ (No. 110645, filed 09/26/14). Lawrence detectives interrogated the suspect in a non-custodial interview about his indecent liberties with a 7-year old girl. They used a Spanish-speaking parole officer to translate, but the translation was inaccurate and incomplete at times. The State sought interlocutory review of the district court's order suppressing inculpatory statements. The district court found the circumstances of the interrogation rendered the statements involuntary, including problems with the Spanish-language translation, the officer's false representations about evidence supposedly implicating Fernandez (telling the suspect a doctor found his skin cells on the victim's vagina), and the officer's poorly translated suggestion that some sort of momentary though improper touching of the girl could be dealt with. The Court of Appeals affirmed, finding the record evidence supports the district court's factual findings.

Search and Seizure

Trooper Two Step Still Works At Least in Tenth Circuit Cases

United States v. Salas, 2014 U.S. App. LEXIS 12387 (10th Cir. No. 13-7036, Okla. July 1, 2014). A police officer stopped Salas after the officer saw Salas' car twice cross the fog line on the right side of the highway. After issuing Salas a warning ticket for failure to stay in his lane, the officer returned Salas' documents and told him he was "good to go." Salas thanked the officer for giving him a warning, shook the officer's hand and began to leave. The officer asked Salas if he had time for a few more questions, and Salas replied, "Sure." After Salas denied having drugs in his car, the officer asked if he could search the vehicle. Salas consented to the search. The officer opened the trunk, which contained a suitcase. Inside the suitcase, the officer found approximately twenty pounds of methamphetamine. Salas was charged with possession with intent to distribute methamphetamine. Salas argued the methamphetamine should have been suppressed because the officer did not have reasonable suspicion or probable cause to stop him. Salas also argued he did not voluntarily give the officer consent to search the car. The court disagreed. Okla. Stat. § 11-309 provides that "a vehicle shall be driven as nearly as practicable entirely within a single lane." The Tenth Circuit has held that a single violation of a traffic statute virtually identical to § 11-309 can provide reasonable suspicion to conduct a traffic stop. Here, the district court found that the officer saw Salas' vehicle cross the fog line twice. Consequently, the officer had reasonable suspicion that Salas violated § 11-309 and was justified in conducting a traffic stop. Next, the officer's dash camera video showed that when the officer asked Salas if he could search the car, Salas replied, "Sure." The officer then asked Salas, "You sure you don't mind?" Salas replied, "No." Salas' relaxed demeanor and lack of physical coercion or intimidating body language or tone by the officer led the court to conclude Salas voluntarily consented to the search of his car.

Pat-Down Before Conducting Inventory Search of a Car Was Not Unreasonable Under the Circumstances

United States v. Garcia, 2014 U.S. App. LEXIS 8816 (10th Cir. No. 13-2155, N.M. May 12, 2014) While on patrol on a lightly traveled road, Officer Devos saw a car with a cracked windshield traveling in the opposite direction. Devos conducted a traffic stop and encountered Maner, the driver, and Garcia, the passenger. Devos arrested Maner for driving with a suspended driver's license and decided to have the car towed because it could not be driven safely with its cracked windshield. Before towing the car, department policy required Devos to inventory the contents of the car, which Devos had to do by himself because no other officers were available to assist him. Before conducting the inventory, Devos asked Garcia, who appeared to be nervous, to get out of the car. Devos recognized Garcia from a recent encounter. Two weeks earlier, Devos had deployed his Taser against Garcia after Garcia actively resisted arrest. In addition, Devos knew Garcia had a prior criminal history for armed robbery. Based on these facts, Devos decided to frisk Garcia for weapons before he turned his back on Garcia to conduct the inventory search. During the frisk, Devos found a gun magazine containing seven .380 caliber cartridges. The government indicted Garcia for being a felon in possession of ammunition. Garcia argued Devos

did not have reasonable suspicion that Garcia was armed and dangerous; therefore, the frisk was unlawful, and the ammunition should have been suppressed. The court disagreed. First, Devos' previous encounter with Garcia and Devos' knowledge that Garcia had a criminal history that included armed robbery supported a reasonable suspicion Garcia was presently armed and dangerous. Second, Devos had a reasonable concern for his safety because the stop occurred on an isolated road, at night, and Devos needed to turn his back to Garcia to conduct the inventory search. Based on the totality of the circumstances, the court concluded Officer Devos had reasonable suspicion under the Fourth Amendment to frisk Garcia.

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