NO. 117,508

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

JOSEPH R. SHEPACK,
Plaintiff-Appellee,

v.

KANSAS DEPARTMENT OF REVENUE,
Defendant-Appellant.

BRIEF OF APPELLEE

Appeal from the District Court of Shawnee County
Honorable Teresa L. Watson, District Court Judge,
District Court Case No. 15-C-121

Douglas E. Wells, #10281
5891 SW 29th Street
Topeka, Kansas 66614-2486
785-273-1141 B
785-273-1383 Fax
doug@kansasdui.com

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ORAL ARGUMENT: 20 MINUTES

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KANSAS DEPARTMENT OF REVENUE

Appellant/Plaintiff

BRIEF OF APPELLEE

NATURE OF THE CASE

The Appellant/Defendant correctly recites the statutory authority for conducting judicial review and the outcome of the administrative hearing in paragraph 1 of the nature of the case. Defendant misstates the ruling of the district court on January 27, 2017. The Court did not rule on the issue of whether there were reasonable grounds to believe that Plaintiff was under the influence because its ruling that the arrest of Plaintiff was unlawful when it was not supported by probable cause was dispositive. R. 1 at 187. It is agreed that other issues raised by Plaintiff were not resolved by the district court and are not an issue in this appeal. It is agreed that KDOR's motion to alter or amend was denied, that timely appeal occurred, and there was no cross appeal.

STATEMENT OF ISSUES

1. Was there probable cause to support the arrest?

2. Is the issue of reasonable grounds to believe Shepack was under the influence properly before the appellate court?

STATEMENT OF FACTS

At trial, two witnesses testified, Plaintiff, Joseph Shepack, hereinafter referred to as "Shepack", and Master Trooper Shawn Taylor, hereinafter referred to as "Taylor". Taylor is a Master Trooper who had advanced training and had worked 13 years for the Highway Patrol with approximately 10 years involving solely traffic duties. R. 2 at 30-31. No other officer or witness testified.

On September 20, 2014 at approximately 9:47pm, Taylor came into contact with Shepack on the Kansas Turnpike. R. 2 at 5-6. A DVD recording was made of the arrest and investigation sequence. R. 2 at 27, R. 3, Plaintiff's exhibit 4.

The reason Taylor stopped Shepack was Shepack's failure to yield to the stopped patrol vehicle and failure to maintain a single lane of traffic. R. 2 at 8. Taylor indicated that Shepack straddled the dotted line when passing the already stopped trooper, not complying with the move over law. R. 2 at 56-57. The move over law was described by Taylor to require moving completely into the left lane when there is an ability to do so or to slow your speed when not able to move over because of traffic. R. 2 at 55. There was no testimony about other traffic at the time of the alleged violation of the move over law or the ability of Shepack to completely move into another lane and the DVD exhibit does not depict this sequence. Taylor confirmed that Shepack was driving slower than the posted speed limit but Taylor could not recall the specific speed. R. 2 at 58-59. Shepack admits

that he was weaving within the lane and that the stop of his vehicle was legitimate. R. 2 at 108, 136, 140. There was no testimony or evidence that Shepack was involved in an accident or collision and no accident or collision is depicted on the DVD. R.3, Plaintiff's exhibit 4. Prior to the stop of Shepack's truck, the DVD shows a car passing Shepack on the left without difficulty. R. 3, Plaintiff's exhibit 4 at count 1:38. The DVD also shows that Shepack continuously remained on the highway and that he did not suddenly stop or vary his speed. R.3, Plaintiff's exhibit 4.

Before seeing Shepack's vehicle, the officer heard dispatch descriptions about a 2012 Toyota Tacoma driving erratically, almost striking a guard rail. R. 2 at 34, 37. Objections by Plaintiff were made on the grounds relevance, citing Kansas Dept. of Revenue v. Martin, 285 Kan. 625, 176 P.3d 938 (2008), and hearsay. R. 2 at 30-33, 38, 40-42, 45. These objections were overruled. The alleged witness to the driving of Shepack before Taylor saw and stopped Shepack, Austin Kennedy, did not testify. Contrary to the declaration of Defendant at trial at the time of an objection, the dispatcher did not testify. R. 2 at 43.

Prior to Shepack's arrest for DUI, Shepack properly parked his car but it took longer than normal to stop. R. 2 at 9-10. Shepack had no problem retrieving his driver's license. R. 2 at 110. Shepack properly exited his vehicle, exiting slowly so that the opening of the door would not hit the trooper. R. 2 at 10, 108, 164. Shepack had no problems standing or walking. R. 2 at 111, 110.

Shepack's speech was not slurred and he had no difficulty communicating. R. 2 at 11-13, 110, R. 4, Plaintiff's exhibit 2. Shepack had no balance problems or problems standing or walking. R. 2 at 108,110, R. 3, Plaintifff's exhibit 4. Shepack did not lean on the vehicle. R. 2 at 13. Taylor did not see Shepack consume alcohol and there were no open containers of alcohol, only closed containers in the bed of Shepack's truck. R. 2 at 14-15. Taylor testified that Shepack's eyes were blood shot, watery, glazed, and droopy, later admitting that the condition of his eyes could be caused by a number of things other than alcohol consumption. R. 2 at 78, 97-98. Shepack testified that the condition of his eyes was caused from fatigue at the end of a long day. R. 2 at 11-112, 143. Shepack denied drinking before arrest. R. 2 at 75. Only after arrest did Shepack admit to drinking. R. 2 at 112-113.

When exiting his truck, Shepack dropped his toll ticket but picked it up and put it into his pocket. R. 2 at 71-72. Shepack did not agree to show it to the trooper. R. 2, 72. Taylor acknowledged that a person has the ability to decide whether to turn over a toll ticket. R. 2 at 103. Taylor did not have a warrant for the search and seizure of the toll ticket. R. 2 at 103. The trial court ruled that Shepack had no difficulty picking up the toll ticket. R1 at 191, see R. 3, Plaintiff's exhibit 4 at count 6:30. The court ruled that Shepack's demeanor was calm and he was cooperative according to the DVD. R. 1 at 191, R. 3, Plaintiff's exhibit 4.

The trial court ruled that after Taylor asked Shepack to move to the back of the truck, Shepack put his hands in his pockets. Taylor told Shepack to take his hands out of his

pockets, which he did. R. 1, 183, R. 3, Plaintiff's exhibit 4 at count 6:40. The Court ruled that the DVD indicates that Shepack then said "what do you want me to do?", at which point Taylor took Shepack's upper arm and led him to the back of the truck saying "come back here". R. 1, 183, R. 2 at 11, 67, 109, R. 3, Plaintiff's exhibit 4 at count 6:46. Shepack did not think he was given enough time to respond to the officer's request. R. 2 at 109. Trooper Taylor then said either you are going to follow my instructions or you are going to jail, whereupon Shepack said go ahead and take me to jail. R. 2 at 15, 68, 109. It was then Shepack's perception that the trooper had already decided to arrest him. R. 2 at 109-110, 163-164.

Immediately after pulling Shepack to the back of the truck, Shepack was handcuffed and placed under arrest. R. 2 at 15-16, 69, 110, R. 3, Plaintiff's exhibit 4 at count 7:01. Less than 2 minutes elapsed between the time that the trooper arrived at Shepack's door until Taylor began handcuffing Shepack. R. 3, Plaintiff's exhibit 4 at count 5:04 to 7:01. Taylor arrested Shepack for driving under the influence of alcohol, DUI. R. 2 at 16, 70, 148. The district court agreed that Shepack was arrested for suscipion of DUI. R. 1 at 184. Once Shepack was placed under arrest, the officer did not intend to release Shepack from the DUI charge. R. 2 at 16.

The officer testified that Shepack was not resisting. R. 2 at 67. Shepack did not intend to resist. R. 2 at 109. Shepack was placed under arrest for DUI, not failing to follow a lawful police order. R. 2 at 69-70. When objection was made on the ground of the question

being asked and answered to a repeated question about whether the arrest was based on failure to follow a lawful order, the objection was sustained. R. 2 at 70-71. No proffer was made and no testimony was received that the basis for arrest was resisting arrest or failing to follow a lawful police order.

On line 7 of the DC-27 form, the Law Enforcement Officer's Certification, Taylor did not mark boxes indicting clues of alcoholic beverage containers, failed field sobriety tests, slurred speech, difficulty communicating, admission of consumption, odor or failing a preliminary breath test (PBT). R. 4, Plaintiff's exhibit 2, R. 3 at 189-190. Taylor later testified that he made a mistake by not marking odor. R. 2, 6-7, 76. Other than that change on line 7 of the DC-27 form, Taylor testified that the DC-27 form was accurate and complete. R. 2 at 6-7. The testimony of Taylor indicated that the odor of alcohol just means that a person consumed of alcohol, not that Shepack was under the influence of alcohol. R. 2 at 14.

This constitutes the facts known at the time of the trooper's arrest of Shepack for DUI. Shepack told Taylor that Shepack did not believe that there was probable cause to arrest him. R. 2 at 117, 155, 157.

Before the DUI arrest, Taylor did not ask Shepack to perform field sobriety tests or a preliminary breath test. R. 2 at 16, 71. Only after arrest did Taylor request field sobriety tests or the preliminary breath test. R. 2 at 111, R. 3, Plaintiff's exhibit 4. When field sobriety tests were requested after arrest, Taylor did not specifically ask for a walk and turn

test, one leg stand test, alphabet test, finger count test, or reverse counting test. R. 2 at 28-29. Shepack declined the request for the unidentified field sobriety tests or the preliminary breath test because he was already under arrest and the officer had already made his decision. R. 2 at 111.

Before arrest, Shepack had not admitted to the consumption of alcohol, having denied drinking. R. 2 at 75. Only after arrest did Shepack admit to drinking. R. 2 at 112-113. Before the arrest for DUI, Taylor had not spoken with Austin Kelly, the declarant of the alleged driving of Shepack before Taylor stopped Shepack. R. 2 at 39. No evidence of the reliability of this declarant was provided.

After the initial summary of the implied consent law and a summary of issues raised, the district court ruled

> "Shepack's arguments are numerous. Only one will be discussed here because it is dispositive of the appeal. K.S.A. 2015 Supp. 8-1001(b), the implied consent law, requires that the underlying arrest be lawful. In order to be lawful, the arrest must be supported by probable cause. Sloop v. Kansas Dept. of Revenue, 296 Kan. 13, 20, 290 P.3d 555 (2012). . . ." R. 1 at 187.

Accordingly, the Court did not rule on the issue of whether there were reasonable grounds to believe that Shepack was under the influence but only ruled on the probable cause to arrest issue, finding that there was no probable cause to arrest. R. 1 at 191-192.

ARGUMENTS AND AUTHORITIES

1. **The arrest of Shepack was illegal because it was not supported by probable cause.**

a. Standard of Review.

The standard of review is substantial competent evidence. In Mitchell v. Kansas Dept. of Revenue, 41 Kan. App.2d 114, 200 P.3d 496 (2009), rev. denied (2009), the court articulated the standard of review as follows:

> "In reviewing a district's court's ruling in a driver's license suspension case, an appellate court typically applies a substantial competent evidence standard. Schoen v. Kansas Dept. of Revenue, 31 Kan. App.2d 820, 822, 74 P.3d 588 (2003). Substantial evidence is evidence possessing relevance and substance that furnishes a basis of fact from which the issues can reasonably be resolved. In other words, substantial evidence sufficient to reasonably support the conclusion reached by the district court. 31 Kan. App.2d at 822. However, where the issue raised in a driver's license suspension case involves strictly a legal question, the appellate court's review is unlimited. Martin v. Kansas Dept. of Revenue, 285 Kan. 625, 629, 176 P.3d 938 (2008). Interpretation of a statute is a question of law over which an appellate court has unlimited review. Genesis Health Club, Inc. v. City of Wichita, 285 Kan. 1021, 1031, 181 P.3d 549(2008)."

In Swank v. KDR, 294 Kan. 871, 881, 281 P.3d 135 (2012), the court ruled:

> "An appellate court generally reviews a district court's decision in a driver's license suspension case to determine whether it is supported by substantial competent evidence. Allen, 292 Kan. at 657 (citing Drake v. Kansas Dept. of Revenue, 272 Kan. 231, 233-34, 32 P.3d 705(2001)). Only when there is no factual dispute does the appellate court exercise de novo review. Allen, 292 Kan. at 657 (citing State v. Ingram, 279 Kan. 745, 752, 113 P.3d 228 (2005)." Swank, 294 @ 881.

In weighing the evidence, the District Court has the opportunity to observe the demeanor and presentation of the witnesses, an opportunity that no appellate court has, therefore an appellate court must confine itself to whether substantial competent evidence supports the district court ruling. Swank 294 Kan. at 882-83.

It is the responsibility of the District Court to weigh the evidence and determine the credibility of witnesses and the evidence. State v. Pham, 281 Kan. 1227, 1252, 136 P.3d 919 (2006), In re: Estate of Hjersted 285 Kan. 559, 571, 175 P.3d 810 (2008). In Hodges v. Johnson, 288 Kan. 56, Syl. ¶7, 199 P.3d 1251 (2009), the Court ruled:

> "When considering whether findings are supported by substantial competent evidence, the appellate court cannot re-weigh conflicting evidence or re-evaluate the credibility of witnesses on appeal."

If the evidence is uncontroverted, Appellant correctly recites that it is a legal standard of review. The evidence, however, was controverted. Controverted evidence includes, but may not be limited to:

* The reason that eyes were bloodshot – fatigue after a long day or alcohol,
* The reason for arrest – DUI only or resisting and obstructing or interference,
* Whether facts support a conclusion of resistive or combative behavior,
* Whether there were balance, standing, or walking problems,
* The promptness and compliance of Shepack to requests by the trooper,
* The demeanor of Plaintiff,

* The significance of the odor of alcohol,
* Whether the officer knew Shepack had been drinking alcohol after Shepack's initial denial before arrest,
* The reliability of Dustin Kelly, who did not testify, and the accuracy of his report,
* The significance of the lack of the dispatch witness,
* The timing of the arrest,
* Whether post arrest facts can be utilized in determining the basis for arrest,
* Whether Shepack's explanation of his route of travel reflected confusion, and
* Whether Shepack's actions represented a consciousness of guilt.

The facts are controverted therefore substantial competent evidence standard should be employed in reviewing this case.

b. Issues that were raised and not raised below.

The issue of whether the arrest for DUI was supported by probable cause was continuously raised on judicial review. R. 1 at 19-23, 58-63, R. 2 continuously, including at 6-21, 24, 28-29,108-117,189-190. There was no testimony or proffer that Plaintiff was or should have been arrested for resisting arrest or failure to follow a lawful police order. R. 2 at 16, 67, 69-71,148.

c. Analysis of the law.

In a test refusal case, K.S.A. 8-1020(h)(1)(B) provides that before a breath test is administered, the person must be in custody or under arrest when there is no accident or collision involving property damage, personal injury, or death. There was no accident or collision causing any property damage, injury or death bodily harm, therefore the issue of arrest or custody is an issue that is preserved.

A person must be under arrest or custody lawfully based upon probable cause. Sloop v. Kansas Dept. of Revenue, 296 Kan. 13, 20, 290 P.3d 555 (2012). The Sloop Court defined probable cause to arrest as follows:

> "Probable cause is the reasonable belief that a specific crime has been committed and that the defendant committed the crime. State v. Abbott, 277 Kan. 161, 164, 83 P.3d 794 (2002). Existence of probable cause must be determined by consideration of the information and fair inferences therefrom, known to the officer **at the time of the arrest**. Bruch, 282 Kan. at 775-76. Probable cause is determined by evaluating the totality of the circumstances. State v. Hill, 281 Kan. 136, 146, 130 P.3d 1 (2006). As in other totality of circumstances test, there is no rigid application of factors and courts should not merely count the facts or factors that support one side of the determination or the other. State v. McGinnis, 290 Kan. 547, 552-53, 233 P.3d 246 (2010); see Smith, 291 Kan. at 515 (holding that the defendant's list of factors did not negate the other factors presented).' Allen v. Kansas Dept. of Revenue, 292 Kan. 653, 656-57, 256 P.3d 845 (2011)." 296 Kan. at 20. (emphasis added.)

The Sloop Court, in determining what was necessary to establish probable cause, did not approve language that created a burden of showing that "guilt is more than a possibility". This language has been abandoned. 296 Kan. at Syl. 6.

The District Court was correct in limiting the decision of Campbell v. Kansas Dept. of Revenue, 25 Kan. App.2d 430, 962 P.2d 150, rev. denied 1998, based upon limitations of this opinion by the Sloop Court due to Campbell's consideration of an improper standard of probable cause, guilt being more than a mere "possibility". Campbell is not helpful or controlling. Furthermore, the Court correctly observed that the burden of proof in the Campbell decision was substantial competent evidence to support the lower court decision, whereas the Shepack district court exercised a de novo determination of probable cause. Interestingly, the Campbell analysis that the lower court decision should be sustained if it is supported by substantial competent evidence works against Defendant since judgment was granted to Plaintiff.

In the Sloop case, the Court found the following facts: blood shot and watery eyes, admission of consumption, impaired speech, 2 clues on the walk and turn test, and 1 clue on the one leg stand test. The Court ruled that the arrest for DUI was not based on probable cause in this administrative driver's license case, therefore the breath test evidence was impermissible and inadmissible. These facts were known before the arrest decision.

In City of Norton v. Wonderly, 38 Kan. App.2d 797, 172 P.3d 1205 (2007), rev. denied (2008), the appellate court evaluated whether there was probable cause to arrest. It described legal tests as follows:

> "Probable cause for an arrest is a higher standard than reasonable suspicion for a stop. See State v. Ingram, 279 Kan. 745, 752-53, 113 P.3d 228 (2005). Probable cause to arrest is that quantum of evidence that would lead a reasonably prudent police officer to believe that guilt

> is more than a mere possibility. City of Dodge City v. Norton, 262 Kan. 199, 203-04, 963 P.2d 1356(1997)."

While the language of "guilt being more than just a possibility" has been disapproved as a probable cause standard in Sloop v. Kansas Dept. of Revenue, supra @ syl. 6, the Wonderly opinion remains vital to the facts of this case as illustrated below.

The Wonderly Court ruled that there was no probable cause to arrest even though Wonderly disobeyed an order to get back into his truck, had blood shot eyes, smelled of alcohol, admitted to drinking, and was reported to have driven recklessly by named informants. The Court noted that Wonderly's speech was "fair" and "not particularly slurred". It further noted that Wonderly pulled his truck over in a normal manner, did not fumble his license, and had no problems getting out of the truck or walking.

If the facts of the Wonderly Court are insufficient to support a finding of probable cause to arrest, the facts of this Mr. Shepack's case are certainly insufficient to establish probable cause to arrest.

The mere odor of alcohol does not support a reasonable and articulable suspicion that a person is under the influence. City of Hutchison v. Davenport, 30 Kan. App.2d 1097, 54 P.3d 532 (2002). Reasonable articulable suspicion is a lesser burden of proof than probable cause to arrest. State v. Anderson, 281 Kan. 896, 902-903,136 P.3d 406 (2006), citing United States v. Sokolow, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L.Ed.2d 1 (1989).

The mere consumption of alcohol, and the admission thereof, does not equate to probable cause because the mere consumption of alcohol and the driving of a vehicle is not

illegal. City of Wichita v. Molitor, 301 Kan. 251, 266-67, 341 P3d 1275 (2015), State v. Reeves, 233 Kan. 702, 664 P.2d 862 (1983), State v. Arehart, 19 Kan. App.2d 879, 878 P.2d 227 (1994). The Molitor Court specifically held:

> "But it is important to keep in mind that the officer must reasonably suspect unlawful activity and it is not unlawful to simple drink and drive." 301 Kan. at 263.

The Molitor Court ruled that it is questionable whether two or three drinks would raise an alcohol concentration in a breath or blood test in a normal sized man to .08 or greater. 301 Kan. at 267(2015).

The Molitor court confirmed the Sloop court analysis of consideration of the interaction of all factors together in determining reasonable suspicion of DUI, rejecting the Court of Appeals criteria of first determining inculpatory factors that supported the officer's conclusion, then determining whether exculpatory facts "substantially dissipated" the officer's conclusion. The Molitor court ruled:

> "But in exercising the totality of circumstances test for reasonable suspicion, an appellate court should not engage in 'assessing each factor or piece of evidence in isolation. (citations omitted)' United States v. Jones, 701 F. 3d 1300, 1315 (10th Cir. 2012). The determination that reasonable suspicion existed obtains only after the interaction of all factors is assessed."

The criteria used by the Molitor court was reasonable suspicion, which the court evaluated as follows:

> "Granted, as suggested above, reasonable suspicion can be established with evidence that is less reliable than that which is required to establish guilt beyond a reasonable doubt or even to establish probable cause. But there is a threshold of reliability that still must be met." 301 Kan. at 263.

As noted above, an arrest must be based on probable cause, a higher standard than that which was considered by the Molitor court.

In Molitor, the Supreme Court found that there was no reasonable suspicion of driving under the influence as a matter of law under the following facts: Molitor stopped his vehicle striking the curb and stopping with the tire half way up the curb, there was a turn without a turn signal, watery and blood shot eyes, a strong odor of alcohol, and an admission of 2 or 3 beers. Speech was not slurred and there was no difficulty producing a license, insurance, or registration. Molitor did not lose balance while exiting the vehicle or walking. There was one clue on the walk and turn test and the one leg stand test with a PBT of .090. These facts were known before the arrest decision.

An arrest occurs when a person is physically restrained. State v. Hill, 281 Kan. 136, 143, 130 P.3d 1 (2006). Shepack was arrested when he was handcuffed, less than 2 minutes after Taylor approached the driver's door of Shepack's truck.

Defendant claims that other charges would have belatedly justified arrest after the DUI arrest already occurred. This claim is made by Defendant in spite of the repeated testimony of the trooper that the arrest was for DUI, not another charge. Certainly Master Trooper Taylor's testimony, as a 13 year trooper with 10 years enforcing traffic laws on the road and advanced training, about the basis of his arrest should be dispositive in establishing the reason for the arrest. No other officer testified or formulated a reason for arrest other than Taylor. This belief of Taylor is uncontroverted. Uncontroverted evidence,

which is not improbable or unreasonable, cannot be disregarded and must be regarded as conclusive. Sullivan v. Kansas Department of Revenue, 15 Kan. App.2d 705, 708, 815 P.2d 566 (1991). The Court was correct in ruling that the exclusive basis for the arrest was a claim of driving under the influence.

In an abundance of caution, however, I will debunk the belatedly alleged justifications for arrest in spite of the officer's testimony of the real reason for arrest, DUI.

Failure to obey a lawful police order, K.S.A. 8-1503, requires a willful failure or refusal to comply with a lawful order made for the purpose of regulating traffic. The minimal statement or conduct of Shepack did not constitute a willful failure or refusal to comply with a lawful order prior to arrest as he asked the question "what do you want me to do?" when asked to move to the back of the truck. Again, the trooper agreed and did not arrest Shepack for failure to obey a lawful police order.

The author of this brief has thoroughly scanned Kansas statutory law to look for an offense of resisting arrest to analyze the basis for a claim that an officer could make such an arrest. There is no crime of resisting arrest. The only statutory reference to resisting arrest is found at K.S.A. 21-5229, under the article dealing with principals of criminal liability, wherein the statute states that a person is

> "not authorized to use force to resist an arrest . . . even if the person arrested believes that the arrest is unlawful."

This section dealing with principals of criminal liability does not create a crime therefore a "crime" of resisting arrest would not justify an arrest.

The crime of interference with law enforcement is not applicable to the facts of this case, even if this assertion was otherwise supported and was made at the administrative hearing and at judicial review. There is no evidence supporting actionable false reporting to the officer, concealing, destroying or materially altering evidence, or obstructing or resisting service of process. Even if it was alleged that a person knowingly and willingly obstructed, resisted or opposed the discharge of an official duty or falsely reported information, there must be evidence that that Shepack substantially hindered or increased the burden of the officer in the performance of the officer's official duty. State v. Parker, 236 Kan. 353, 690 P.2d 1353 (1984), State v. Everest, 45 Kan. App.2d 923, 256 P.3d 890 (2011). There was no evidence that Shepack substantially hindered or increased the burden of the officer in the performance of the officer's official duty. Even if believed, Shepack's statements and actions were short in duration and inconsequential.

This analysis of Defendant's post arrest theories of potential arrest support a conclusion, even if the Court was required to rule on these issues, that there was no factual or legal basis for the arrest of Shepack for a non-DUI charge even if the officer testified, claimed, believed, or charged another crime other than DUI and failure to maintain a lane.

The issues of resisting, interference and failure to follow a lawful order were furthermore waived and abandoned by Defendant for the failure to assert these alleged crimes at the administrative hearing. See Angle v. Kansas Dept. of Revenue, 12 Kan. App.2d 756, 758 P.2d 222 (1988) rev. denied (1988). (Party may not raise a completely

new issue and produce new evidence before court not produced at the administrative agency hearing.), Zurawski v. Kansas Dept. of Revenue, 18 Kan. App.2d 325, 851 P.2d 1385 (1993). (Theory of administrative exhaustion and waiver of issues applies to the licensee and Kansas Dept. of Revenue.)

Even if properly asserted, the Defendant would have us believe that after an arrest occurs involving the driving of the vehicle, even when the officer never alleged that another crime was committed, that the Court can and should deem an arrest as being lawful if another charge could have been later imagined. This is inconsistent with the law. An arrest requires probable cause. Sloop v. Kansas Dept. of Revenue, 296 Kan. at 20. Probable cause is determined by what is known to the officer **at the time of the arrest**. Sloop, 296 Kan. at 20, Wonderly, 38 Kan. App.2d at 809, Swank v. Kansas Dept. of Revenue, 294 Kan. 871, 881, 281 P.3d 135 (2012), State v. Curtis, 217 Kan. 717, 538 P.2d 1383 (1975), . The Curtis Court quoted State v. Brown, 198 Kan. 473, 426 P.2d 129 (1967) as follows:

> ". . . an arrest without a warrant, to support an incidental search, must be made with probable cause. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man's believing that a crime has been committed at or before the time of arrest . . ." (p. 477, 426 P.2d p. 133.)" Curtis, 217 Kan. at 721.

The Fourth Amendment to the United States Constitution is violated when seizure and arrest are made without probable cause. Wonderly, 38 Kan. App.2d at 805, citing Dunaway v. New York, 442 U.S. 200, 216, 99 S .Ct. 2248, 60 L. Ed. 2d 824 (1979), State v. Payne, 273 Kan. 466, 473, 448 P.2d 419 (2002). In Wonderly, the court ruled that the officer could not support probable cause to arrest with evidence obtained after the arrest.

38 Kan. App.2d at 809. Similarly, Taylor cannot establish probable cause for arrest based on information or evidence obtained after Shepack was cuffed and arrested less than 2 minutes after Taylor approached the car.

For the first time in KDOR's Motion to Alter or Amend, R. 1 at 196-203, after the trial and district court decision, Defendant refers us to Davenpeck v. Alford, 543 U.S. 146, 225 S. Ct. 588, 160 L. Ed. 2d 537 (2004), State v. Beltran, 48 Kan. App.2d 857, 300 P.3d 92, rev. denied (2013) and McNeely v. United States, 353 F.2d 913 (8th Cir., 1965) for the general claim that the basis of the officer's arrest decision is meaningless to the court. The holdings in these cases are distinguishable from the facts in this Shepack case. This belated analysis is carried forward by Defendant on appeal. There is no evidence that this issue was raised at the administrative hearing, therefore the issue is waived. See Angle, supra, Zurawski, supra. The district court denied the motion to alter or amend, ruling as follows:

> "The Court should limit its consideration to matters that were before it when it entered the original judgment. Antrim, Piper, Wenger, Inc. v. Lowe, 37 Kan. App.2d 932, 939-40, 159 P.3d 215 (2007).
> Further, '(a) motion to reconsider is not a second chance for the losing party to make its strongest case or to dress up arguments that previously failed' Voelkel v. General Motors Corp., 846. P. Supp. 1482, 1483(D.Kan. 1994). 'A court's rulings are not intended as first drafts, subject to revision and reconsideration at a litigant's pleasure.' Koch v. Koch Industries, Inc., 6 F.Supp. 2d 1207, 1209 (D.Kan. 1998), aff'd 203 F.3d 1202 (10th Cir.), cert. denied 531 U.S. 926 (2000) (internal quotations and citations omitted.)" R.1 at 305-306.

In Devenpeck, supra, the Court describes that "(t)hose are lawfully arrested whom facts known to the arresting officer give probable cause to arrest." (emphasis added) 543 U.S. at 155. In the Shepack case, this experienced Master Trooper with advanced training

did not know or believe that Shepack obstructed, resisted or failed to follow a lawful police order in violation of the law. In Davenpeck, many officers believed that many statutes were violated at the time of the investigation even when the only violation that was alleged by the arresting officer was dismissed. In Davenpeck, fellow officers developed probable cause for arrest on other grounds at the time of the investigation.

In Shepack no other officer formulated probable cause or a belief of a crime other than DUI and a failure to maintain a lane infraction. Davenpeck is distinguishable because there were other officers who formulated beliefs that crimes occurred other than that for which Davenpeck was officially arrested. This is not so in Shepack. In Shepack, the charge that was known and believed by the arresting officer was deemed by the district court to be insufficient to provide probable cause for the arrest.

It is also noted that the Davenpeck Court relied upon Whren v. United States, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), which is also not similar to the Shepack case because Whren involved the issue of whether there was a reasonable, articulable basis for a stop rather than probable cause for an arrest. As previous noted, probable cause carries a higher burden of proof that the basis for a stop. The basis of the stop in Shepack is not in dispute.

Beltran is also distinguishable because it involved a search warrant that was being executed after being approved by a judge. In the execution of the search warrant, another person not named in the legal warrant was present who placed his hands in his pocket and

obstructed, causing issues of safety of the officers that they perceived at the time of the encounter. In its analysis, the Court described the temporary detention of Beltran under a Terry temporary stop and frisk for officer safety rational. The Terry temporary stop and frisk analysis for the safety of the officer is not similar to the virtually immediate handcuffing and arrest of Shepack for DUI. In Shepack, his arrest is final, not temporary, and is not based on officer safety. Again, the analysis of Sloop, Wonderly, and Swank, requiring that probable cause be determined at the time of the arrest, remains applicable to this Shepack case.

McNeely dealt with an officer that was determined to be uneducated in the law. The facts in the Shepack case are different. Trooper Taylor was a veteran of 13 years with the Highway Patrol, including 10 years of experience in traffic enforcement, who had advanced to the rank of Master Sargent following advanced training. On page 32 of brief of appellate, Defendant alleges that an experienced law enforcement officer is permitted to make inferences and deductions that may elude an untrained person. Taylor was experienced by agreement and he made inferences, deductions, and conclusions that the basis for the arrest was DUI only. While the factual and legal basis for even the conclusion that there was probable cause to arrest for DUI was properly found to be unacceptable to the district court, it is incontrovertible that the reason for the arrest was DUI only.

In McNeely, the defendant was fleeing the officer who was signaling for McNeely to stop. The officer observed objects being thrown from the car, which justified the arrest

of McNeely. On the day of the incident, after discovering the contents of the bag that was thrown from the car after the initial arrest for littering, the arresting officer changed the charges to illegal possession of burglary tools.

In Shepack, unlike McNeely, the arresting officer did not change the charges for arrest. Taylor continuously asserted that the arrest was for the charge of DUI on the date of the incident and throughout the litigation. Taylor continuously asserted that the arrest was not for any other offense. In McNeely, the officer's immediate investigation disclosed a new charge other than that for which McNeely was arrested. Shepack was arrested and charged with DUI at all stages. McNeely has no application.

From the beginning through trial, there was no testimony to support any other ground for arrest other than for DUI. To the contrary, at trial Taylor testified that he did not arrest Shepack for failing to follow a lawful order or for resisting. There was no testimony from any other witness as to the grounds or basis for arrest. The arrest must be based upon facts proven at trial, not based on imagination, speculation, guess work, a Ouija board, or magic 8 ball. See Molitor, 301 Kan. at 263. Even though Taylor arrested Shepack for DUI, the district court properly ruled that the arrest for DUI was not supported by probable cause.

Next, in interpreting K.S.A. 8-1001(b), Defendant misinterprets the basis for district court decision and the structure of the statute. Again, the exclusive issue determined by the district court was whether the arrest was supported by probable cause. R. 1 at 187. The

District Court found it unnecessary to rule on the first portion of K.S.A. 8-1001(b), reasonable grounds to believe driving under the influence, ruling only on the second portion of this statute, the legality of the arrest. It is of importance that the first issue of reasonable grounds is separated by the word "and" before describing the second issue, either accident or arrest, in K.S.A. 8-1001(b). There was no accident, leaving only the issue of the legality of the arrest.

The timing of when a test may be requested applies only to the first part of K.S.A. 8-1001(b), not to the second part of the statute, whether probable cause to arrest occurs. Use of the words "at the time of the arrest" refer only to the issue of reasonable grounds to take a test. Probable cause to arrest is a distinct issue to reasonable grounds, as confirmed by the separate statutory sections of the implied consent statutes describing these allegations and issues. See K.S.A. 8-1002 (a)(1)(A) & (B), K.S.A. 8-1020(h)(1)(A) & (B). Furthermore, the issue of probable cause to arrest is a constitutional issue as well as a statutory issue. Simply stated, the constitution trumps a statute.

It is fundamental to American jurisprudence, that if a statute *conflicts* with the Constitution, the Constitution wins. This principle is taught to every first year law student.

> "If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.
>
> * * * *
>
> Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written

> constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument." Marbury v. Madison, 5 U.S. 137, 178, 180 (1803)."

Furthermore, the legislature may not supersede the Court's interpretations of the constitution, Marbury v. Madison, 5 U.S. 137 (1803), Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405, (2000). A constitutional right and rule is superior to a statutory rule. Devine v. Groshong, 235 Kan. 127, 130, 679 P.2d 700 (1984).

The Kansas Court of Appeals reiterated the superiority of the Constitution over a statute in State v. Declerck, 49 Kan. App.2d 908, 916-17, 317 P.3d 794 (2014), as follows:

> "However, the question on appeal is whether K.S.A. 2011 Supp. 8-1001 as enacted deprived DeClerck of her rights guaranteed by the United States and the Kansas Constitutions. See Ybarra v. Illinois, 444 U.S. 85, 96 n.11, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979) (legislature cannot abrogate a person's Fourth Amendment right to be free from unreasonable searches and seizures, and United States Supreme Court will not hesitate to hold such statutes unconstitutional); State v. Lambert, 238 Kan. 444, 450, 710 P.2d 693 (1985)(legislature cannot enact a statute that effectively deprives individuals of rights guaranteed by the United States Constitution); Martin v. Kansas Dept. of Revenue, 36 Kan. App.2d 561, 566, 142 P.3d 735 (2006) (statute that defines rules in criminal, administrative, and civil cases cannot stand if statute infringes on constitutional rights), aff'd 285 Kan. 625, 176 P.3d 938 (2008)."

In making its ruling, the Declerck Court acknowledged that it was "acutely aware" of the terrible toll impaired drivers have on the highways, but that "constitutional protections have costs." 49 Kan. App. 2d at 919.

In Declerck, the Court ruled that K.S.A. 8-1001(b) is unconstitutional in violation of the Fourth Amendment of the United States Constitution to the extent that the State

argued that probable cause to believe that a traffic infraction occurred is required rather than probable cause to believe a person is DUI. The same analysis would apply to the argument of Defendant that a test is deemed consented to if a person is arrested or otherwise taken in to custody for a violation of a non-DUI statute or ordinance. This analysis would also be unconstitutional. A lawful arrest based on probable cause for DUI must precede the request for a breath test before the issue of reasonable grounds to request the breath test can be addressed under K.S.A. 8-1001(b), even assuming that the issue of reasonable grounds is properly before this court.

There was no probable cause to arrest for DUI and there is no factual or legal basis to arrest for any other offense for reasons previously articulated. The change in K.S.A. 8-1001(b) in no way affects the requirement that an arrest be constitutionally legal at the time of the arrest. Since the arrest was an unconstitutional seizure without probable cause, even if K.S.A. 8-1001(b) statutory changes are relevant and properly before this court, they are relevant only to statutory interpretations which are inferior to constitutional requirements. Defendant's arguments for relief based on K.S.A. 8-1001(b) are deficient.

d. Analysis of the facts.

Shepack was driving slower than the posted speed limit. Shepack admits that he weaved and that the stop of his vehicle by Trooper Taylor was proper based upon that driving. There was no accident. Shepack properly parked his vehicle on the shoulder in response to the trooper's signal to stop.

Defendant's argument that this manner of driving was sufficient to establish probable cause to arrest for DUI is without merit. This analysis would mandate that every driver driving a vehicle left of center would be legally arrested for DUI. This defies common sense. Why would the legislature establish a separate infraction of left of center if those same actions constitute the basis for a DUI arrest? Driving left of center constitutes a basis for a stop, which requires a lesser burden of proof than probable cause for arrest for DUI, as articulated in the preceding section. Furthermore, driving outside the lane may result from other causes than DUI, such as fatigue, health problems, answering a phone or changing a radio station. Driving outside a lane, while remaining on the highway and not suddenly stopping, should not result in a per se DUI arrest justification as alleged by Defendant.

Shepack properly exited his vehicle, exiting cautiously so that he would not hit the trooper with the door. When exiting his truck, the toll ticket fell to the ground, whereupon Shepack had no difficulty bending over and picking up the toll ticket. Shepack had no difficulty standing or walking. He did not lean on his vehicle. His speech was not slurred and he had no difficulty communicating.

There were no open containers of alcohol. There were only closed containers in the bed of the truck. Shepack did not dispute that his eyes were blood shot, watery, glazed and droopy, explaining that the condition of his eyes was caused by fatigue at the end of a long day. The trooper acknowledged that this eye condition could be caused by many things

other than alcohol consumption.

Upon exiting the truck, Shepack was asked to go to the rear of the truck. He was then asked to remove his hands from his pockets, with Shepack complying. Shepack then asked what the trooper wanted him to do, at which point the trooper grabbed Shepack's upper arm and led him to the back of the truck. Shepack did not believe he was given enough time to respond to the officer's request. At this time, it was Shepack's perception that the officer had made a decision to arrest him.

At the back of the truck, Shepack was then immediately handcuffed and placed under arrest. Less than two minutes had elapsed between the time the trooper arrived at Shepack's door until Trooper Taylor arrested and handcuffed Shepack. Taylor testified that he did not intend to release Shepack from the DUI arrest when he handcuffed him. The trooper testified that the basis for the arrest was DUI, not any other charge of resisting, failure to follow a lawful order or interference. Shepack did not intend to resist.

Taylor completed a DC-27 form, wherein on line 7, the trooper did not mark the potential clues of having alcoholic beverage containers, failing field sobriety tests, slurred speech, difficulty in communicating, admission of consumption, odor, or failing a preliminary breath test (PBT). Taylor later testified that he did smell an odor in spite of the inconsistent omission on the DC-27 form.

Prior to the arrest and handcuffing of Shepack for DUI, there was no admission of consumption. No field sobriety tests were identified by name or requested. The PBT was

not requested. Discrepancies of Shepack's description of his route of traffic were unknown to the trooper. Shepack had not admitted to drinking pre-arrest. These events occurred after the arrest, therefore they could not form a factual basis for arrest.

Based on these facts, there was no probable cause to arrest Shepack for DUI or any other crime. The district court was correct in its ruling. The judgment of the district court should be affirmed.

II. The issue of reasonable grounds to believe Shepack was under the influence is not properly before the Court of Appeals because this issue was not determined by the district court.

a. Standard of Review.

The Kansas Supreme Court defined the standard of review in Flores Rentals, L.L.C. v. Flores, 283 Kan. 476, 153 P.3d 523 (2007) as follows:

> "Whether jurisdiction exists is a question of law over which this court has unlimited review. Mid-Continent Specialists, Inc. v. Capital Homes, 279 Kan. 178, 185, 106 P.3d 483 (2005). Exercising this review, an appellate court has a duty to dismiss an appeal when the record discloses a lack of jurisdiction. Max Rieke & Bros., Inc. v. Van Deurzen & Assocs., 34 Kan.App.2d 340, 342-43, 118 P.3d 704 (2005)." 283 Kan. at 480.

b. The issue was raised below but not ruled on by the district court.

The issue of reasonable grounds to believe Shepack was under the influence was continuously raised by the parties, including in the petition, R. 13, Trial Memoranda of Plaintiff R. 1 at 63-65, and continuously at the trial, including R. 2 at 9-16, 97-98, 108-116, 189-91, R. 3, Plaintiff's exhibit 4, R. 4, Plaintiff's exhibit 2, line 7. The district court chose,

however, not to rule on the issue of reasonable grounds, ruling only on the issue of whether the arrest was lawful. R. 1 at 187.

c. Analysis.

In Flores Rentals, L.L.C. v. Flores, supra, the Court further ruled that:

> "Appellate jurisdiction is defined by statute; the right to appeal is neither a vested nor constitutional right. The only reference in the Kansas Constitution to appellate jurisdiction iterates this principle, stating the Kansas Supreme Court shall have "such appellate
> jurisdiction as may be provided by law." Kansas Constitution, Article 3, § 3. The Constitution is silent regarding the Court of Appeals, which is not a constitutional court but rather was statutorily created. In creating the Court of Appeals, the legislature limited its jurisdiction, defining the circumstances under which there is jurisdiction to hear an appeal. As a result, Kansas appellate courts may exercise jurisdiction only under circumstances allowed by statute; the appellate courts do not have discretionary power to entertain appeals from all district court orders. See Meddles v. Western Power Div. of Central Tel. & Utilities Corp., 219 Kan. 331, 333, 548 P.2d 476 (1976); Henderson v. Hassur, 1 Kan.App.2d 103, 105-06, 562 P.2d 108 (1977)." 283 Kan. at 480-81

The appeal in a civil case is entirely statutory, with the appellate court having no authority to create an exception to statutory requirements. Wiechman v. Huddleston, 304 Kan. 80, 370 P.3d 1194 (2016). K.S.A. 60-2102 defines the jurisdiction of the Court of Appeals. This statute does not grant jurisdiction to hear an issue not determined by the district court when issue was not ruled on because another issue was dispositive.

The district court ruled on the issue of the arrest only, stating that "Only one argument will be discussed here because it is dispositive of the appeal." R. 1 at 187. Determinations of issues may be unnecessary in consideration of other findings of the court. Schaefer & Associations v. Schrimer, 3 Kan. App.2d 114, 117, 590 P.2d 1087

(1979). Since the legality of the arrest was the only issue that was decided by the district court and since this issue was dispositive, the district court did not rule on whether there were reasonable grounds to believe that Shepack was under the influence of alcohol or drugs. The Court of Appeals should not follow the lead of Defendant in determining an issue not ruled on by the district court. The Court of Appeals lacks jurisdiction to determine an issue not determined by the district court.

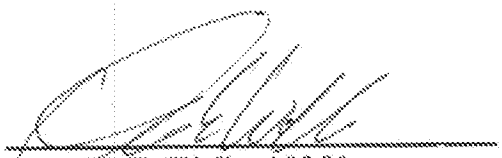
Statutorily, the reasonable grounds issue is separately defined in K.S.A. 8-1002(a)(1)(A) in an alleged refusal case, whereas the legality of the arrest is separately defined in K.S.A. 8-1002(a)(1)(B). The issue of reasonable grounds is also separately preserved in K.S.A. 8-1020(h)(1)(A), whereas the issue of arrest is separately preserved in K.S.A. 8-1020(h)(1)(B). Because these are separate allegations and issues of a legal arrest and reasonable grounds, the Court of Appeals should not review the issue of reasonable grounds that was not ruled on be the district court.

Having said this, in an abundance of caution in case this court decides to rule on this issue, the factual and legal analysis described in issue 1 in the Brief of Appellee is incorporated herein in support of Plaintiff's argument that the grounds were not reasonable to believe that Shepack was under the influence.

Conclusion.

Based upon these facts known to Taylor, there was no probable cause to arrest for DUI. There was no legal or factual basis to arrest for resisting, interference, or failure to

follow a lawful order. After weighting the evidence, determining the credibility of witnesses, observing the demeanor and presentation of witnesses, and determining the evidence, the district court ruled that the arrest of Shepack was not based upon probable cause. Having made this ruling, the Court determined that it was unnecessary to rule on any other issues. The ruling of the district court should be affirmed.



Douglas E. Wells, 10281

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above document was filed electronically on the date stamp, providing notice to the following:

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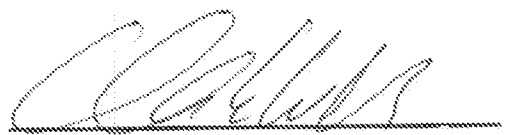
Legal Service Division – 2nd Floor
Docking State Office Building
Topeka, Kansas 66601-1588
Don.Cooper@ks.gov



Douglas E. Wells, 10281