BROWN-BAGGING WHILE DREAMING OF OUIJA BOARDS AND THE MAGIC 8 BALL

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Douglas County Bar Association
Brown-Bag Seminar

Here are five (5) fun topics of interest for practitioners in criminal law.

I DIVERSION APPLICATION

Kansas is a minority State, which allows a diversion of a prosecution where hearing the entire process, unless your client violates the terms of a diversion agreement, the client is never found guilty. In other states, we call this process a deferred prosecution.

In those other states, the client must first plead guilty or no-contest and then if they do what they are supposed to on diversion, at the end of a year the case is dismissed. During that interim period of time, they have a conviction on their record.

Completing the diversion application is something that should always be done with your client, because:

a) it gives you a chance to know something about your client; and, what his or her strengths and weaknesses are;

b) If there is an evaluation for alcohol, substance abuse, or other related matters, you can learn specifically about what the needs of the client are with respect to that subject, and you can determine whether or not they have been evaluated at a legitimate place. The last thing your client needs is to be evaluated by one of the "cottage" industry alcohol evaluation businesses, who rarely have the expertise or background to do a good job.

I recommend, in Lawrence, that these evaluations be done by either Professional Treatment Services, or if the client qualifies financially, by RADAC; and,

c) I always assist a client in completing the application so that the risk of being rejected is minimal and you can create this document in tandem, which makes the client recognize that you are actually doing something for them. The idea of letting the client fill out an application assumes for a moment that they understand the process and can communicate what is necessary, which is not always the case. In addition, letting the client fill out the application is the lazy man's way of doing it, and can in fact turn around to "bite you."

II SNEAKY SEARCH WARRANTS

As you probably all are aware, *Riley v. California*, a 2014 U.S. Supreme Court case found at 134 S.Ct. 2473 (2014) has held that cell phones can only be searched with a Search Warrant for that particular cell phone. That means that if your client is arrested on some unrelated charge, but the police believe that he or she is involved with drug trafficking, they must get a search warrant to download the contents of the cell phone.

The local Drug Enforcement Unit (DEU) has hit upon an idea of surveying all of the people who are arrested and whose cell phones are taken into evidence, and making a determination as to who should and should not have their cell phones searched.

They generally have been filing Affidavits that do not state probable cause, but contain a bunch if innuendos and conclusions, and then wait until a particular District Judge's month to review cell phone search warrants come up, i.e. those Judges who do not pay much attention to what is in the affidavit. Attached is such an Affidavit.

Once they get the search warrant, instead of making a return on the warrant to the person who owned the cell phone, they make the return in the evidence envelope where the cell phone was originally and the client never knows that the cell phone has been searched, unless the client requests the return of their personal property.

So, you have a client who was arrested on some other type of crime who may have been involved in some kind of drug trafficking, if their cell phone was taken as part of the property they had on them when they were arrested, you can bet that there might be a search warrant application in the future, and the best way to come at this is to file a Motion to have the cell phone returned, along with any other personal property that is not needed as evidence in your case. That will get you the information as to whether or not the search warrant has been issued, and you can proceed from there.

III <u>WHAT ARE THEY SAYING?</u>

Sometimes when the police download the cell phone traffic, they will come across conversations that they believe are in code and will attempt to claim that in their experience this type of code talk means that the client is engaged in using a communication device to facilitate a felony drug trafficking charge.

While at first blush this seems like a plausible theory, the problem is that in order for the officer's opinion that what's in your client's cell phone is in fact a code involving drugs, it seems to me they must be testifying as an expert witness.

K.S.A. 60-456 and 60-457 contains the definition of a lay witness, which is now clearly defined as someone who has not relied upon scientific, medical or other experience to give their opinion, and if the witness is an expert, you have a right to request the Court to perform a gate-keeping function to determine whether or not the opinion of the officer is reliable, which includes having them make an accurate translation; having them prove that they know how to translate the code in the message; and, having their training methods being tested for accuracy. In other words, the standards under *Daubert v. Merrill Dow Pharmaceuticals Inc.* 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) would apply.

IV DECEPTIVE SUBPOENAS

I am sure all of you have noticed that especially in domestic violence cases, the State has decided that instead of issuing subpoenas through the Clerk of the District Court, the District Attorney's Office will issue the subpoenas and serve them, and then make returns when they want to. The result is that if you look in the e-filing system or on full court, you will not see the subpoenas issued for the victim, which in some instances you will want to know if in fact the victim is not likely to testify.

While Judge Fairchild thinks that this practice is okay, he has not read the statute regarding issuing subpoenas. Our statutes provide that a facsimile signature and seal of the Clerk of the District Court can be placed on a subpoena and the subpoena is to be issued if, and only if, two (2) conditions are met, as follows: 1) the Court has to

issue an Administrative Order authorizing this facsimile subpoena process; and, 2) a copy of the facsimile stamp and signature of the Clerk of the District Court has to be provided to the Kansas Secretary of State with an Affidavit from the Clerk of the District Court saying that this is a true and accurate facsimile.

Judge Fairchild has admitted on the record that there is no such Administrative Order and the Clerk and the Secretary of State's Office indicates that no such facsimile Affidavit has been filed.

So, what does that mean?

Let's assume that you have a domestic battery case where the alleged victim indicates that she does not want to testify; that the police reports were not accurate; and, that she has attempted to contact the District Attorney's Office to prevent them from proceeding with the prosecution and they have refused to listen to her.

One of the things that the District Attorney's Office often threatens is to hold the witness/victim in contempt of court if she does not show up on the subpoena that was served upon her, or make her post a material witness bond.

But, if the subpoena that was served upon her is as a matter of law defective, neither of those remedies are available to the State. In other words, the State's claim of what they can do is nothing more than a bluff to coerce the witness to testify the way it wants.

V SOMETHING SMELLS IN THAT GARBAGE CAN

How many of us have seen affidavits for search warrants that claim that the police searched through the garbage can sitting in front of your client's residence, and in that garbage can they found "green leafy vegetation" and sometimes unknown film, which

they have field tested to determine what they were, and claimed the field tests found marijuana, and methamphetamine.

Then, the DEU Detectives scamper to a District Judge with an affidavit for a search warrant for your client's residence claiming as probable cause the results of their field tests. The question becomes, is the field test enough to warrant probable cause?

The answer is extremely complicated.

First of all, it is widely recognized that these field test kits are not scientifically accurate. I myself have witnessed a 20 year veteran of the narcotics unit from Overland Park, Kansas, take one of these NARK II test kits and test Folgers Dark Roast coffee mixed with Sage, and it reacts to indicate that this was marijuana. Even the manufacturer's information about the NARK II kits indicates that they are not scientifically accurate and that they have an error to them, depending upon how the kit is actually used by the person, and just the fact that it is not scientific.

This gets into the business of the officers making a statement as experts in the affidavit, which brings into question K.S.A 60-456; 60-457; and, what is likely to become the *Daubert* Rule.

As everybody should be aware, the current rule in Kansas is the so-called Frye test found in *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923), which says that an expert testimony can be admitted if their opinion is based upon a theory that is generally accepted in their particular profession.

That rule was promenaded 90 plus years ago, before the admit of Federal Rules of Evidence 701 and 702, and the modern version of K.S.A. 60-456 and 60-457, which now mirror the Federal Rules of Evidence.

Essentially the change is that when challenged, an expert's theory has to convince the judge that the theory is reliable, and if it is not reliable then the Court has an obligation to disallow the testimony of the expert. Our legal theory is that because the field sobriety tests are not scientifically accurate and not reliable, that the Court should not allow the opinion of the DEU officer who performed the test to be probable cause.

A brief word about the *City of Wichita v. Molitor*, _____ Kan. _____, 341 P.3d 1275 (2015).

This is the case that makes it very clear that when our Appellate Courts get an opportunity to apply the *Daubert* standards of reliability, they absolutely will.

The *City of Wichita v. Molitor* case involved a question of whether or not there was any use left by a police officer to determine probable cause by using one of the field sobriety tests commonly known as the HGN test.

The HGN test simply stated is an officer putting a source of light, either to the left or right of the suspect; having the suspect turn their eye towards the source of light at a particular angle; and if their eyeball flutters, that means that they have at least a .10 blood alcohol reading.

Just on its face, this theory seems like "tea-leaf reading", but because it was promoted by the National Highway Transportation Safety Administration, the Court accepted it as reasonable.

In 1996, Kansas declared that the HGN test results could not be used as evidence in Court, because of unreliability, but that it is okay for an officer to use it to form probable cause. The *Molitor* case took that way declaring, in one of the more classic statements of our Court, that the HGN test is about credible as a OUIJA Board and a Magic 8 Ball.

It is hard to say what courts will or will not say I s reliable, but is 65% accuracy or lower enough for probable cause?

State of KANSAS
County of DOUGLAS, ss:

Comes now Mike E. McAtee, Affiant, and makes this affidavit in support of the issuance of a search warrant to search the following described place; to wit;

1. The black cellular telephone, serial ed as item #6, case # currently in Law enforcement custody at 111 East 11th Street Lawrence, Douglas County, Kansas.

and there to seize anything which has been used in the commission of the crime(s); distribution and/or possession of controlled substance(s), use of a communication devise to facilitate narcotics trafficking, criminal threats and/or criminal use of a weapon which is contraband or which is property which constitutes or may be considered part of the evidence, fruits or instrumentalities of a crime, particularly the following described items; to-wit;

1. The electronically stored data contained within the cellular telephone; including but not limited to, call logs, text messages (SMS), instant message logs (MMS), photographs, video, emails and contact lists.

FURTHER, for the purpose of showing probable cause that a crime has been or is being committed and that the above described items exist and are located at the above described place, Affiant states the following facts which he has reasonable grounds to believe and does believe to be true; to-wit;

1. The Affiant is and has been a sworn Police Officer, Investigator and Detective with the Lawrence Kansas Police Department for over 23 years. Affiant has received specialized training, over 600 hours, in the investigation of street gang members, the crimes they commit, conspiracy investigations, violations of the Uniformed Controlled Substance Act and crimes of violence, such as; distribution and/or possession of controlled substance, use of a communication device to facilitate narcotics trafficking, criminal threats and/or criminal use of a weapon investigations. Affiant has been the lead investigator and assisted in numerous violations of the uniformed controlled substance act, violent crimes and weapons violations. This affidavit is based on the following facts, which are known to me as a result of my

personal participation in this investigation and from reports made to me by other law enforcement officers. Not all the facts are contained within this affidavit; the facts contained within the affidavit are used to establish probable cause that the crimes of distribution and/or possession of controlled substances, use of a communication device to facilitate narcotics trafficking, criminal use of a weapon and/or criminal threats investigation occurred and it is probable that evidence of the aforementioned crime(s) are located in the aforementioned place to be searched.

2. On Saturday, [redacted], Lawrence Police Officer [redacted] was dispatched to the [redacted] Lawrence, Douglas County, Kansas in regards to criminal threats investigation.

   a. Officer Baker located the victim/reporting party, [redacted], who reported she was leaving work from Home Depot and was attempting to turn onto West 31st Street in Lawrence, Douglas County, Kansas. [redacted] reported she saw a W/M, who was later identified; as [redacted], driving a [redacted] Chevrolet [redacted], blocking the road way. [redacted] advised after she motioned to [redacted] to back-up his vehicle [redacted] became upset and began yelling and screaming at her. [redacted] reported she began to drive away and was followed by [redacted]. After a few moments [redacted] and [redacted] were stopped in traffic [redacted] exited his vehicle and began yelling,

...? Horton reported she notice an unknown named female possibly video recording the incident with a cellular telephone. Mannell also observed the female's activities. ..... threatened to *blow her away* also. reported she observed and heard ..... hreaten the female with the cellular telephone then leave the area. advised she was scared by ctions and she called the police to report the incident.

b. Officer Baker contacted ... is who was identified as the female who used her cellular telephone to record the incident. ... s reported 's vehicle blocked the vehicle driven by ... advised she heard .....

... s reported when eturned to his vehicle he observed her holding her cellular telephone up. ... approached her and yelled, ...

... ? ... is reported she did not see a firearm but was frightened by 's words and actions.

3. Sergeant Shanks located in the block of ... and contacted ... ell acknowledged he was in the area of t and had an argument with the women but denied he threatened the women. advised one of the females (Horton)

extended her middle finger at him, which caused he to become agree. advised he also observed another female video recording his actions with her cellular telephone. acknowledged he was during the incident.

a. was placed under arrest and was searched incident to arrest. Officer located and seized a black cellular phone, and 's person.

b. Officers searched vehicle, located and seized two firearms and plastic bag containing green vegetation. Based upon Officers Heafey's and Ashley's training, knowledge and experience they believed the green vegetation to be marijuana.

4. Affiant knows through training and experience that cellular telephone(s) contain contact lists, call logs, images/photographs, videos text messages (SMS), emails, instant message logs (MMS) and that this electronic data remains on a cellular telephone even if deleted. Additionally, Affiant has learned through training and experience that persons will use cellular telephone's text message (SMS), instant message (MMS) and applications to plan and/or communicate about their past criminal activities. Persons will also maintain images/photographs, videos of themselves and/or associates, controlled substances and/or firearms and/or other evidentiary items on their cellular telephones for long periods