No. 12-109118-A

IN THE
COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee - Cross-Appellant

vs.

SANTINE WHITE
Defendant-Appellant - Cross-Appellee

REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-APPELLEE

Appeal from the District Court of Geary County, Kansas
The Honorable Steven Hornbaker, Judge
District Court Case No. 10 CR 345

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TABLE OF CONTENTS

PAGE(S)

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REPLY BRIEF OF APPELLANT

The Defendant-Appellant, Santine White, by and through his attorney, Douglas L. Adams, submits this reply in response to Appellee's Brief received by the Court on October 30, 2013.

I. The search of the Dodge Ram violated the Fourth Amendment; consequently, the introduction into evidence of the illegally seized contraband constitutes prejudicial error and requires the reversal of Defendant's conviction.

A. When law enforcement re-initiated contact with Defendant it was not a consensual encounter.

The State argues that Defendant never testified that his consent was coerced or that he didn't feel free to leave the scene. Accordingly, the State assumes from a lack of testimony from Defendant at the suppression hearing that there is "no evidence" Defendant's consent was involuntary or coerced. (State's Brief, pp. 7-8).

This argument is flawed for at least two reasons. First, the test in determining whether an encounter between law enforcement and a citizen is consensual is based on the totality of the

circumstances and focuses on whether a "a reasonable person would feel free to leave" and end the encounter. State v. McGinnis, 290 Kan. 547, 552, 233 P.3d 246 (2010). The test is not subjective as to whether Defendant felt free to leave. Rather, it is whether a reasonable person in his position would feel free to leave based upon all of the circumstances existing at the time of the encounter. Thus, a lack of testimony from Defendant at the suppression hearing has little, if any, bearing on this determination.

In addition, the State overlooks the fact that it bears the burden to demonstrate that a challenged seizure is lawful. McGinnis, 290 Kan. at 551. This Court does not re-weigh the evidence or assess the credibility of witnesses in reviewing a suppression issue. State v. McMullen, 290 Kan. 1, 4, 221 P.3d 92 (2009). The State is attempting to shift its burden to Defendant by requiring him to testify that he didn't feel free to leave. Such testimony has never been required by the law and reverses the State's burden of proof under the totality of the circumstances test set forth in McGinnis.

As stated previously in Defendant's opening brief, a reasonable person under the totality of the circumstances in this case would not have felt free to leave the scene and end the encounter. Three uniformed law enforcement officers confronted Defendant within minutes of effecting a traffic stop. Officer Fisher was in a marked patrol vehicle. Defendant was informed that law enforcement saw a loaded gun in the glove box and wanted to search the vehicle. When the keys to the vehicle were found by law enforcement, they were not returned to him.

Further, Defendant was escorted by two law enforcement down the street, and then was ordered to return with the officers when his keys were found. He was likewise detained at the scene while a drug dog was called to perform an open air sniff around the vehicle. Clearly, Defendant's freedom of movement and ability to leave were severely limited by law enforcement. Officer Peirano

specifically testified that Defendant "was being detained" just prior to and during the search of the vehicle. (R. V, 47). No reasonable person under these circumstances would feel free to leave the scene and terminate the encounter. Defendant was seized under the Fourth Amendment.

At the time of Defendant's seizure, law enforcement had no reasonable suspicion that Defendant was involved in illegal activity. Peirano "thought" he saw a pistol grip or a magazine clip in the glove box. (R. II, 147). He wasn't even sure whether there was a violation of the local ordinance. (R. IV, 62). In fact, the ordinance was violated *only* if a *loaded* weapon is carried in a motor vehicle. (R. I, 36). Peirano couldn't tell for sure whether he saw a pistol grip or a magazine much less be able to tell if there was a loaded weapon in the glove box. In reality, all Peirano had was a hunch, and a hunch does not equate to reasonable suspicion. State v. DeMarco, 263 Kan. 727, 735, 952 P.2d 1276 (1998). As law enforcement did not have reasonable suspicion that Defendant had committed a violation of the local ordinance, their seizure violated the Fourth Amendment and requires the suppression of any evidence uncovered as a result of the ensuing search of the vehicle.

B. Law enforcement did not have probable cause to search Defendant's vehicle for a firearm.

The State argues that law enforcement had probable cause to search the vehicle because Peirano believed he saw a loaded gun in the glove box, and a month before Defendant had been stopped with his brother, who was in possession of a 9mm pistol and drugs. The State relies on State v. Doile, 244 Kan. 493, 769 P.2d 666 (1989), State v. Moretz, 214 Kan. 370, 520 P.2d 1260 (1974), and the unpublished federal district court decision in United States v. Alvarado, 1994 WL 31466 (D. Kan.). (State's Brief, pp. 8-9).

The State mischaracterizes the record in this case. First, Peirano never testified that he

thought he saw a loaded weapon in the glove box. As set forth previously herein, he was unsure about what he saw in the glove box, and was unsure whether there had even been a violation of the ordinance. Second, it was Defendant's brother who had been arrested with the pistol and drugs. Defendant was not arrested or charged in that incident. (R. IV, 11-12).

None of the cases relied upon by the State are on point or controlling in the instant case. In Doile, the police officer observed a marijuana cigarette on the dashboard of the defendant's vehicle, and the Court held there was probable cause to believe contraband was in the defendant's possession. 244 Kan. at 499-500. In Moretz, the police officer observed in plain view tools in the defendant's car that he subsequently learned had been stolen. The tools were still in the defendant's car the following day in plain view, and the Court held the officer had probable cause to search the car. 214 Kan. at 371.

In Alvarado, the defendant was stopped for speeding and improper lane change. When the officer approached the vehicle, he noted the "overwhelming" odor of air freshener coming from the vehicle, which the officer knew was commonly associated with masking the odor of narcotics. Further, upon running a license check, the officer found out the defendant was driving on a suspended license and had a history of weapons and narcotics charges. Finally, the officer observed, in plain view, a firearm in between the passenger and driver's seat. Under all of these circumstances, the federal district court concluded that the officers had probable cause to search the vehicle.

In the present case, unlike Doile, Moretz, and Alvarado, Peirano did not observe any contraband in plain view in the Dodge Ram. He saw what he thought was a pistol grip or magazine in the glove box. That alone did not give the officers probable cause to believe that the city gun ordinance had been violated because the ordinance would be violated only if there was a loaded

weapon in the vehicle. Peirano clearly testified he didn't know, based on his observations, whether there was a violation or not. He went back to the vehicle because there "could" have been a violation. (R. IV, 62). This is not even close to an officer observing a marijuana cigarette or stolen tools in plain view in the car. Doile and Moretz are factually distinguishable and not controlling.

In addition, unlike the situation in Alvarado, law enforcement did not cite Defendant for any traffic violations and never observed a loaded firearm in plain view in the vehicle. There was nothing indicating that the Dodge Ram contained illegal drugs. Finally, unlike the defendant in Alvarado, Defendant's license was not suspended and he had no prior history of weapons and narcotics charges.

The fact that Defendant had been in the company of his brother a month before, when his brother was arrested for having a pistol and drugs, did not provide probable cause to search the Dodge Ram on this occasion. In State v. Boykins, 34 Kan. App. 2d 144, 118 P.3d 1287 (2005), this Court held that a "person's mere propinquity to others independently suspected of criminal activity does not, without more, authorize a *Terry* stop unless the officer has reasonable suspicion directed specifically at that person." 34 Kan. App. 2d at 147. Boykins relied upon the Kansas Supreme Court's decision in State v. Morris, 276 Kan. 11, 25, 72 P.3d 570 (2003). In Morris, law enforcement stopped the defendant because they had seen him in the truck with an individual who had previously been the target of a search warrant for drugs. The Kansas Supreme Court held that this did not provide reasonable suspicion that the defendant was about to commit a crime at the time he was seized. *Id.*

As in both Boykins and Morris, the fact that Defendant had, a month before, been with his brother when his brother was arrested on gun and narcotics charges did not provide the officers with

even reasonable suspicion, much less probable cause, to search the Dodge Ram. The State's argument completely loses traction when considered in light of these decisions.

C. Law enforcement did not diligently pursue the search of the Dodge Ram.

The State takes issue with the fact that it took 30 minutes for a drug dog to arrive, and argues that the officers did not have to wait for a canine unit to arrive if they had the keys to Defendant's vehicle. (State's Brief, p. 9).

First, the State did not contest trial counsel's assertion that it took 30 minutes for the drug dog to arrive on the scene. There is certainly nothing in the record to contradict that fact. Once again, it is the State's burden to prove the validity of this search. As the State never contested this factual assertion below, they should be precluded from arguing there is no evidence to support it on appeal.

Further, the record indicates that Defendant's purported "consent" to search the vehicle was given and the keys to his vehicle were found *before* the drug dog was called to the scene. (R. V, 35; (R. II, 233). As recognized in the State's own brief, there would have been no point to wait for a canine unit to perform a free air sniff if law enforcement had "consent" to search and the keys to the vehicle. The sequence of events strongly suggests that Defendant never gave consent to search the vehicle. It also establishes that the officers did not diligently pursue their investigation of a purported firearm violation. Instead of immediately gaining access to the vehicle, they waited for a canine unit to arrive. This turned the investigation from an alleged firearms violation into an expedition for drugs. This exceeded the scope and duration of the investigative seizure and violated the Fourth Amendment.

D. Defendant's "consent" was not voluntary or knowing.

The State argues that Defendant's consent to search the vehicle was voluntary because he asked Peirano to accompany him down the street to call his wife, he was not restrained until after the cocaine was found, and he never voiced his objection to the search of the truck. (State's Brief, pp. 9-10).

The State fails to mention that Defendant was ordered to accompany the officers back to his vehicle when the keys were found, that Peirano testified Defendant "was being detained" just prior to and during the search of the vehicle, (R. V, 47), and Defendant's keys were never returned to him once they were found. Clearly, Defendant's movements were restricted and he was prevented from leaving the scene. Under those circumstances, his "consent" was a mere submission to authority and not a voluntary consent.

Contrary to the State's argument, the fact that Defendant did not "voice an objection" to the search is not evidence the consent was voluntary as argued in Defendant's opening brief. *See* State v. Kudron, 816 P.2d 567 (Ok. App. 1991); State v. Stitzel, 2 Kan.App.2d 86, 88-89, 575 P.2d 571 (1978). The State addresses neither of these cases in its brief.

Finally, contrary to the State's assertion in its brief, Defendant never argued that the failure to advise Defendant of his right to refuse to consent automatically made his consent to search involuntary. As noted in State v. Parker, 282 Kan. 584, 595, 147 P.3d 115 (2006), and as actually argued in Defendant's opening brief, the failure of law enforcement to advise Defendant of his right to refuse to consent is one factor this Court must consider under the totality of the circumstances. Given the other coercive factors mentioned previously, this factor weighs in favor of finding Defendant did not voluntarily consent to the search but merely submitted to lawful authority.

E. The officers exceeded the scope of any consent given in this case.

The State argues law enforcement did not exceed the scope of the consent to search because Godfrey told the jury he was looking for a loaded firearm and ammunition. According to the State, the 10th Circuit "has held that finding of loaded magazine and or ammunition is probable cause to continue searching a vehicle." (State's Brief, p. 11).

The State is missing the point on the scope of the search. While Godfrey may have told the jury he was searching for a loaded firearm and ammunition, Defendant's "consent" to search was limited to firearms. That the scope of the consent was limited to firearms was specifically testified to by both Peirano and Godfrey. (R. II, 232; II, 184).

Under the holding of United States v. Ross, 456 U.S. 798, 824, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), a case neither cited nor addressed by the State in its brief, the scope of a warrantless search of an automobile "is defined *by the object of the search and the places in which there is probable cause to believe that it may be found.*" (Emphasis added). The object of the search in this case was a loaded firearm. There was simply no probable cause to believe that a firearm, whether an AK-47 or a pistol, was contained in the small felt bag that Godfrey recovered from the console. The search of that bag exceeded the scope of Defendant's consent, if any, to search for firearms.

In addition, contrary to the State's assertion, Alvarado was not decided by the 10th Circuit; rather, it was an unpublished federal district court decision. Further, as set forth previously, Alvarado is factually distinguishable from the present case, and did not address the issue of the scope of an automobile search under Ross.

The State then cites United States v. Gains, 127 F.3d 1109 (10th Cir. 1997), another unpublished opinion, upholding the search of a Crown Royal bag for ammunition in which cocaine

was found. Relying on Gains, the State asserts that the presence of ammunition would be indicative of the presence of firearms, the ultimate goal of the search. (State's Brief, p. 11).

What the State fails to point out is that Gains involved the search of a residence pursuant to a search warrant for, among other things, firearms and ammunition. The Tenth Circuit went on to hold that the bag could have contained objects described in the search warrant, namely ammunition. Thus, the search of the Crown Royal bag was not unconstitutional. *Id.*

In the present case, the search of the Dodge Ram was not pursuant to a search warrant. It was pursuant to Defendant's purported "consent" to search for firearms. The bag Godfrey searched could not reasonably have contained a firearm. Gains is of no assistance to the State in this case both factually and legally. That decision, if it holds any precedential value at all, consistent with Ross, actually supports Defendant's argument that the search of the bag exceeded the scope of the consent to search, and thus violated the Fourth Amendment.

Accordingly, for all of the aforementioned reasons, the Defendant respectfully requests that this Court reverse his convictions and remand this case to the district court for a new trial.

Respectfully submitted,

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BRIEF OF CROSS-APPELLEE

Nature of the Case

The State of Kansas, Cross-Appellant, appeals the district court's imposition of a dispositional departure sentence to community corrections.

Statement of the Issues

Issue: The sentencing court based the departure sentence upon substantial and compelling reasons that were supported in the record.

Statement of the Facts

Defendant incorporates by reference the statement of facts contained in his initial brief filed in this matter. Prior to sentencing, Defendant filed a Motion for Sentencing Departure. He requested a dispositional departure based upon several factors, including: the lack of any prior criminal record demonstrated how aberrant Defendant's behavior was in this case; less than 30 feet separated Defendant from a severity level 3 offense and a border box; Defendant's imperfect Fourth

Amendment issue at the trial level; defendant's mental health history; Defendant's willingness to remain in drug/mental health treatment; extraordinary family and emotional support; and the combination of the all the circumstances in this case. (R. I, 183)

Attached to the departure motion were documents from the Department of Veterans Affairs Eastern Kansas Health Services indicating Defendant's diagnosis of PTSD and depression since 2001. (R. VI, 12-13, 16). Also attached was a certificate of appreciation from Defendant's brigade commander for Defendant's service in Bosnia. (R. VI, 13). There was also documentation indicating the medication Defendant was taking, and W-2 forms from Mid-Way Motors for 2010 and 2011. (R. VI, 12-13).

Defense counsel argued all of these factors at the sentencing hearing. (R. VI, 3-20). The record demonstrates that the district court considered all of the documents, the departure motion, and the statements of counsel. (R. VI, 53-54). The district court considered the seriousness of the offense of conviction and the public policy behind why a drug conviction within 1000 feet of a school typically required presumptive prison. (R. VI, 57-59). The court recognized, however, that it could depart from that public policy in the appropriate case, and subsequently found the afore-mentioned factors to be substantial and compelling reasons to impose a dispositional departure sentence in this case. The court imposed a controlling 49 month sentence, and granted Defendant probation for a period of 36 months to Community Corrections. (R. VI, 62-63). The Court told Defendant that it was putting him on a "short leash" and would not tolerate substantial violations of probation. (R. VI, 61). The court further ordered a drug and alcohol evaluation, and ordered offender registration for a period of 15 years. (R. VI, 65-71).

The State filed a notice of appeal from the sentencing court's imposition of a dispositional departure sentence. (R. I, 214). Additional facts will be addressed in the argument herein.

Arguments and Authorities

Issue: The sentencing court based the departure sentence upon substantial and compelling reasons that were supported in the record.

An appellate court's review of a departure sentence is limited to whether the findings of fact and reasons justifying departure are 1) supported by the evidence in the record, and 2) constitute substantial and compelling reasons for departure. State v. Favela, 259 Kan. 215, 224, 911 P.2d 792 (1996).

The substantial and compelling reasons justifying a departure in this case were clearly articulated by the Defendant's motion for departure, the arguments of defense counsel at the sentencing hearing, which the district court adopted, and the district court's own statements on the record.

1. Defendant's employability.

In State v. Crawford, 21 Kan.App.2d 859, 861, 908 P.2d 638 (1995), the defendant's impressive employment record was cited as a basis for imposing a departure sentence, and the Kansas Supreme Court held that this factor, in combination with others, constituted a substantial and compelling reason for imposing the departure sentence in that case. Likewise, in State v. Murphy, 270 Kan. 804, 806-07, 19 P.3d 80 (2001), the Kansas Supreme Court upheld the departure sentence in that case where it was established that the defendant was a good worker, and, when considered with other factors, sufficient to allow the imposition of a departure sentence. *See also* State v. Marquis, 2007 WL 4105355 (Kan.App.) at *7-8 (finding substantial competent evidence in the

record to support the district court finding that the defendant had availability and ability for employment in support of departure sentence).

In the present case, Defendant presented evidence that he has worked as a finance officer for car companies for nearly 10 years. He has a strong job history of professional, high-paying employment. Further, as soon as the legal proceedings were over, Defendant indicated that he may have an opportunity of being employed once more at Briggs Auto Group in Manhattan. (R. VI, 15). Defendant submitted his W-2 forms from 2010 and 2011 from Mid-Way Motors in support of this factor. (R. VI, 13). As in the above-referenced cases, Defendant's past work history and present ability to be employed, when considered with all the other factors present in this case, constitutes a substantial and compelling reason supporting a dispositional departure.

2. Defendant suffered depression and PTSD at the time of the offense.

K.S.A. 21-4716(b)(1)(C) provides as follows:

> The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants, drugs or alcohol does not fall within the purview of this factor.

In State v. Liskey, 2010 WL 4977156 (Kan.App.) at *3, this Court upheld a departure sentence based upon this statutory mitigating factor where the evidence established the defendant suffered from several personality disorders and chronic depression. The Liskey Court held that these mental impairments "could certainly compel a sentencing court to abandon the status quo and venture beyond the sentence that it would ordinarily impose." *Id.*

In the present case, the undisputed evidence establishes that Defendant had been diagnosed with depression and PTSD since his discharge from the military in 2001. (R. VI, 16). In fact, at the time of sentencing, he was still in counseling for these issues. As in Liskey, the presence of chronic

depression and PTSD would certainly qualify under this mitigating factor as mental impairments that affected Defendant's capacity for judgment at the time of the offense in the present case. As this is a statutory mitigating factor, it is, as a matter of law, a substantial and compelling reason to depart. State v. Rush, 24 Kan. App. 2d 113, 115, 942 P.2d 55 (1997). In addition, because this is a statutory mitigating factor, it should be given great deference by this Court. State v. Sampsel, 268 Kan. 264, 279, 997 P.2d 664 (2000).

3. Amenability to probation.

Although an individual defendant's amenability to rehabilitation is, standing alone, **not** a substantial and compelling reason to depart, the district court can properly consider such evidence in combination with other factors when determining whether to impose a departure sentence. For instance in Murphy, 270 Kan. at 806, the Kansas Supreme Court upheld a departure sentence where the defendant had been accepted at Labette Correctional Conservation Camp, and the camp was noted for its good results. Also, in State v. Ussery, 34 Kan.App.2d 250, 264, 116 P.3d 735 (2005), this Court upheld the departure sentence where, based on character witnesses for the defendant, the district court found he was amenable to rehabilitation. *See also* Marquis, 2007 WL 4105355 (Kan.App.) at *5-6 (upholding departure sentence based, in part, upon the steps the defendant took toward rehabilitation including attending AA and NA meetings, obtaining an evaluation indicating he was likely amendable to probation, and letters of support from family indicating the defendant would be amenable to probation).

In the present case, Defendant acknowledged the difficulty he had with alcohol and drugs. He was engaging in drug and alcohol counseling, and taking responsibility for his addictions. (R. VI, 17). Further, there were numerous family members and friends that testified on behalf of

Defendant at the sentencing hearing indicating he has a great support system in the community and would be amendable to probation. (R. VI, 30-45). When considered in the context of all the other factors presented at sentencing, Defendant's amenability to probation is a substantial and compelling reason justifying the departure sentence in this case.

4. Strong family support.

In Murphy, the Kansas Supreme Court "took judicial notice that Murphy had good family support," which was one factor, among others, the Supreme Court considered in upholding the departure sentence imposed in that case. 270 Kan. at 808. Likewise, in Marquis, 2007 WL 4105355 (Kan.App.) at *6, this Court held:

> Marquis has family support, which was evidenced by the support letters from family and the presence of Marquis' wife and grandmother in the courtroom. Therefore, there is substantial competent evidence on the record supporting this legally acceptable factor for purposes of Marquis' departure.

In the present case, defense counsel noted the strong support from family and friends that Defendant had. (R. VI, 20). This support was amply demonstrated by the numerous family and friends that appeared at sentencing in support of Defendant and specifically addressed the district court in requesting a dispositional departure. (R. VI, 30-45). The district court made a finding that Defendant had a great community of friends and they were very supportive of him. (R. VI, 56). Once again, this factor, when considered with the others in this case, supports the dispositional departure imposed herein.

5. Financial responsibility.

In Marquis, 2007 WL 4105355 (Kan.App.) at *4, this Court held that "family and financial obligations are legally acceptable, substantial and compelling factors that may be considered for

purposes of departure." The defendant in Marquis had a wife and child that he wished to support, and wanted to stay employed to support his family and pay off restitution. *Id.* In finding this factor supported the departure sentence imposed in that case, this Court held:

> In Crawford, the court considered that the defendant had three children to raise. 21 Kan.App.2d at 861. Though this was not the sole determining factor, the court noted: "... [W]e do not believe that any one of [the] factors, standing alone, would justify a downward departure. However, when considered in their totality, they are substantial and compelling." 21 Kan.App.2d at 861; see also Bolden, 35 Kan.App.2d at 580 (finding that the fact that defendant is raising dependent children is legitimate basis for departure sentence); Chrisco, 26 Kan.App.2d at 824–25 (recognizing that supporting a family may be proper departure factor in some cases);

2007 WL 4105355 (Kan.App.) at *4.

In the present case, Defendant's wife, Latisha White, appeared at sentencing on behalf of Defendant. She told the Court that she and Defendant had been together for 12 years and have three children. She asked the Court to allow Defendant to be at home where he could support her and his three children. Latisha confirmed the "great support system" Defendant had with his family and in the community. (R. VI, 34). Defendant's family and financial obligations, as in the above-referenced cases, and considered in their totality, constitute substantial and compelling reasons for a departure.

6. Lack of a criminal record and the circumstances of the instant offense.

In State v. Richardson, 20 Kan. App. 2d 932, 901 P.2d 1 (1995), this Court upheld a dispositional departure sentence to probation based upon the fact that the defendant's prior felonies were 14 years old and the defendant had not committed a felony of any type for the past 10 years. In finding this was a substantial and compelling reason to impose a departure, this Court held that the sentencing court relied upon factors which the sentencing grid did not take into account, such as

the time that had elapsed since the last felony committed. 20 Kan. App. 2d at 941.

In State v. Favela, 259 Kan. 215, 911 P.2d 792 (1996), the Kansas Supreme Court found that the fact that the defendant in that case had not previously committed any offense which would be deemed a felony was a substantial and compelling reason justifying departure. 259 Kan. at 236. Relying upon the holding in Richardson, the Favela Court held as follows:

> The sentencing court made comments on the record that the defendant's prior crimes simply consisted of stealing two packages of cigarettes and possession and transportation of alcoholic beverages. Further, the sentencing court stated that the defendant was just a kid crook and that this crime was out of character for the defendant. These comments show that the sentencing court relied on this factor in a way in which the defendant's criminal history score did not take into account. Thus, the fact that the defendant had not previously committed any offense which would be deemed a felony if he had been an adult was properly used as a substantial and compelling reason justifying departure in this case.

259 Kan. at 236.

In State v. Grady, 258 Kan. 72, 900 P.2d 227 (1995), the Kansas Supreme Court held as follows:

> We believe the legislature did not intend to prohibit a lack of criminal history as a downward dispositional departure factor in all cases. While generally criminal history is an improper departure factor because criminal history has already been used to set the presumptive sentence, we believe the legislature intended in the interest of justice that a trial court have discretion to impose a downward dispositional departure where a defendant has no prior criminal history and has a failed common-law or statutory defense that is not meritless.

258 Kan. at 87-88.

In the present case, it is undisputed that Defendant has no prior criminal record. (R. VI, 3). Further, defense counsel argued that, had Defendant been stopped 30 feet from where he was, this would have been a severity level 3 offense and Defendant would be in a border box. (R. VI, 18). Further, Defendant was stopped at 10 p.m. when school was not in session. There had been no

evidence connecting Defendant to the school in any way other than, by mere chance, he was stopped 970.3 feet from a school zone. (R. VI, 19). Counsel argued that the mitigating circumstances of the offense in combination with Defendant's lack of criminal history and the fact that the conviction in this case was an aberration supplied the court with substantial and compelling reasons for departure. (R. VI, 28).

The State countered this argument by stating that Defendant was within a school zone during the entire route he drove on the evening he was stopped by law enforcement. (R. VI, 25). As noted in Defendant's initial brief, however, this is an incorrect statement. The State presented no evidence the ball fields along this route were exclusively owned or leased by the school. Thus, contrary to the State's argument, 30 feet separated Defendant from a severity level 3 offense. These circumstances in combination with Defendant's complete lack of any criminal history served as substantial and compelling reasons to impose the dispositional departure sentence in this case.

The State asserts in its brief that the only reason the district court imposed a departure sentence in this case was because the Defendant was a "good family guy". The State further asserts that this is not a substantial and compelling reason given the statements law enforcement made at sentencing regarding Defendant's purported involvement with drugs, weapons and murder suspects. (State's Brief, pp. 19-20).

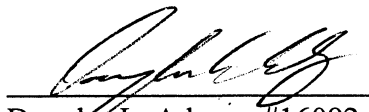
The record of sentencing belies the State's argument. Nothing in the record indicates that the court isolated its reasoning for granting the departure to the defendant being a "good family guy". The court considered the motion for departure, the supporting documentation, the statements of counsel, and the statements of the numerous individuals who appeared on Defendant's behalf at sentencing. As set forth previously, there were substantial and compelling reasons justifying a

departure and they were supported by sufficient evidence in the record, including the statements of defense counsel. See State v. Favela, 259 Kan. 215, 228-229, 911 P.2d 792 (1996) ("A reviewing court may be assured that a sentencing court's findings are not clearly erroneous or made up by the sentencing court, if the findings are based upon oral statements of a defense counsel which the sentencing court apparently regarded as reliable and trustworthy").

The district court addressed the issue of Defendant's association with the individuals mentioned by law enforcement at the sentencing hearing. Specifically, the court found that the people who had exerted some bad influence on Defendant were either in prison or facing long prison sentences. "They are gone," the court stated on the record. (R. VI, 60). This demonstrates, contrary to the State's assertion in its brief, that the district court did consider the statements of law enforcement at the sentencing hearing, and made findings establishing that the individuals who were a bad influence on Defendant had been removed from the scene.

The factors relied upon by the district court to justify the departure sentence were, either standing alone or in combination, substantial and compelling reasons. The entire record of sentencing supports this conclusion, including the statements of defense counsel, upon which the court relied, and upon the statements of the district court itself. Further, there is sufficient evidence supporting the factors relied upon by the district court in this case. Accordingly, this Court should affirm the dispositional departure sentence imposed in this case.

Respectfully submitted,



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APPENDIX

170 P.3d 443, 2007 WL 4105355 (Kan.App.)
(Table, Text in WESTLAW), Unpublished Disposition

(Cite as: 170 P.3d 443, 2007 WL 4105355 (Kan.App.))

Court of Appeals of Kansas.

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v.
Shane M. MARQUIS, Appellee.
No. 97,455.

Nov. 16, 2007.

Appeal from Butler District Court; Charles M. Hart, judge. Opinion filed November 16, 2007. Affirmed.

James R. Watts, assistant county attorney, and Phill Kline, attorney general, for appellant.
Monique K. Centeno, Lawrence W. Williamson, Jr., and Sean Shores, of Shores, Williamson and Ohaebosim, LLC, of Wichita, for appellee.

Before HILL, P.J., GREEN and MARQUARDT, JJ.

MEMORANDUM OPINION

PER CURIAM.

*1 Shane M. Marquis pled guilty to possession of marijuana with intent to sell and to felony possession of drug paraphernalia. These two offenses required a presumptive prison term.

The trial court concluded that there were substantial and compelling reasons for departing from the statutory mandate, however, and granted probation. On appeal, the State argues that the factors the trial court used to justify the departure were not warranted. We disagree and affirm.

On March 27, 2006 Shane Marquis pled guilty to one count of possession of marijuana with intent to sell and one count of felony possession of drug paraphernalia. Marquis was also found in possession of an illegal weapon, brass knuckles, but was not charged for this crime. Marquis moved for **downward** dispositional **departure**, arguing that substantial and compelling factors were present warranting the granting of probation as opposed to prison. The district court granted his motion.

The district court specifically acknowledged Marquis' level C criminal history. Marquis' criminal history is primarily based on a 2002 juvenile adjudication for indecent liberties with a child. The case, described by the State during the departure hearing, involved an assault in which Marquis picked up a girl, put her on the ground, landed on top of her, and put his hands under her shirt without consent. The defense did not dispute this synopsis of the case. In addition, Marquis had various juvenile criminal offenses on his record.

During the departure hearing, Marquis submitted a copy of a drug and alcohol evaluation. This evaluation, signed by Kathryn S. Dean, of the Addiction Treatment Program of Southeast Kansas, verified Marquis' evaluation and his placement at level one (an emphasis on primary recovery counseling). The evaluation stated that Marquis was currently employed full-time, willing to attend rehabilitation, placed a high importance on rehabilitation, had a prior rehabilitation attempt that was incomplete, acknowledged cravings but asserted he was able to remain sober, and reported support at home but would benefit from a positive social support system. As pointed out by the State during the departure hearing, the evaluation did not confirm that Marquis was entering an actual treatment program, but that it was merely an evaluation. Marquis verified this in his testimony, when he stated, "[T]he evaluation, I went for that. But I haven't completely followed through on that yet."

Marquis submitted three letters from family members describing their continued support of him. Linda Dumler, Marquis' grandmother, stated that "He knows that he has done wrong, and is trying to make it right" and that "I would not like to see him in prison or behind bars again,

170 P.3d 443, 2007 WL 4105355 (Kan.App.)
(Table, Text in WESTLAW), Unpublished Disposition

(Cite as: 170 P.3d 443, 2007 WL 4105355 (Kan.App.))

because he is trying to do well and stay out of trouble." Marquis' mother, Annie Marquis, stated: "I personally do not believe that prison is a good answer for him, he is trying to change his life and all of his friends and family have noticed that." Marquis' wife, Ashley Renee Hudson, stated: "Over the last six months I have helped and watch [*sic*] the changes in Shane.... All the people he was friends with those individuals that influenced him in a negative manor [*sic*] disappeared. He stopped the use of any and all drugs or alcohol.... He has a life now and a son. He has responsibilities and a reason to be a better man."

***2** Defense counsel stated that Marquis was currently employed at the Best Western motel in Newton and acknowledged the presence of the manager, Marquis' grandmother, in the courtroom at that time. Counsel asserted that Marquis had taken steps to get a drug and alcohol evaluation, had been attending AA and NA meetings, and would be attending a treatment program. Counsel pointed out that Marquis is married, has a child, noted the presence of Marquis' wife in the courtroom, and stated that Marquis wants to financially and emotionally support his family and remain employed in order to pay off his restitution in another case. Marquis was prepared to make an $850 payment that day.

Marquis also testified on his own behalf. He stated that he is married, has a baby, and is trying to change his life. He testified that he obtained a drug and alcohol evaluation, although he had not yet followed through any further, and that he had been attending AA meetings and had been sober since his November arrest.

In granting departure, the district court stated on the record the following findings to support its decision: Marquis' responsibility of financial support for his family, Marquis' process of taking steps for rehabilitation which could be accomplished through community resources, support from Marquis' family regarding his ability to successfully complete probation, Marquis' availability and ability for employment, and Marquis' young age. The court stated that one of the "main factors" considered was Marquis' young age, indicating that Marquis had his life ahead of him and had the opportunity to either become a law-abiding citizen or be institutionalized in prison. Marquis was 21 years old at the time of the hearing. The court granted probation on the specific condition that if Marquis violated probation, he would serve his sentences consecutively as opposed to concurrently, resulting in an additional 12 months in prison.

Outside the normal conditions of probation, the court imposed special conditions that Marquis enroll in a drug and alcohol program and follow recommendations and that he gain or maintain employment.

*Was There Substantial and Competent Evidence to Support a **Downward** Dispositional **Departure**?*

Standard of Review

K.S.A. 21–4716(a) controls a **departure** from a presumptive prison sentence:

> "[T]he sentencing judge shall impose the presumptive sentence provided by the sentencing guidelines for crimes committed on or after July 1, 1993, unless the judge finds substantial and compelling reasons to impose a departure. If the sentencing judge departs from the presumptive sentence, the judge shall state on the record at the time of sentencing the substantial and compelling reasons for the departure."

On an appeal from departure, this court must determine whether the sentencing judge met the "substantial and compelling" standard. By enacting the appellate review language recommended by the Kansas Sentencing Commission, the Kansas Legislature intended the application of a two-step test: (1) an evidentiary test—whether the facts stated by the sentencing judge in justification of departure are supported by the record and (2) a legal test—whether the reasons stated on the record for departure are adequate to justify a sentence outside the presumptive sentence. *State v. Crawford*, 21 Kan.App.2d 859, 860, 908 P.2d 638 (1995). If an appellate court finds that either step has not been met, the sentencing court has erred in imposing a departure sentence. 21 Kan.App.2d at 860.

***3** A claim that sentencing guidelines departure factors are not supported by evidence in the record should

be reviewed to determine whether there is substantial evidence supporting the district court's findings or whether the court's findings are clearly erroneous. *State v. Zuck*, 21 Kan.App.2d 597, 599, 904 P.2d 1005 (1995) (citing *State v. Gideon*, 257 Kan. 591, Syl. ¶ 20, 894 P.2d 850 [1995]). "Substantial evidence is evidence possessing both relevance and substance and which provides a substantial basis of fact from which the issues can reasonably be determined. Specifically, substantial evidence refers to legal and relevant evidence that a reasonable person could accept as being adequate to support a conclusion." *State v. Walker*, 283 Kan. 587, 594–95, 153 P.3d 1257 (2007). Evidence on the record includes matters that were before the district court; this includes testamentary and documentary evidence. *Quesenbury v. Wichita Coca Cola Bottling Co., Inc.*, 229 Kan. 501, 505, 625 P.2d 1129 (1981).

Under the second step, whether the departure factors relied upon by the sentencing court constitute substantial and compelling reasons for departure is a question of law. *State v. Chrisco*, 26 Kan.App.2d 816, 819, 995 P.2d 401 (1999). This court has unlimited review of a sentencing court's reliance upon any given departure factor as a legally sufficient reason to depart from the presumptive sentence. *State v. Ussery*, 34 Kan.App.2d 250, 254, 116 P.3d 735 (2005). K.S.A.2006 Supp. 21–4716(c)(1) specifies a nonexclusive list of mitigating factors the judge may consider in determining whether substantial and compelling reasons for departure exist. The sentencing judge may consider nonstatutory factors when granting departure, but these factors are examined with greater scrutiny on appeal, must be supported by the record, and should be considered in light of the intent and purpose of the guidelines. *State v. Benoit*, 31 Kan.App.2d 591, 593, 97 P.3d 497 (2003) (citing *State v. Rodriguez*, 269 Kan. 633, 8 P.3d 712 [2000]).

In *State v. Favela*, 259 Kan. 215, 233, 911 P.2d 792 (1996), the court noted,

> "[T]he Kansas Legislature does not define what is a substantial and compelling reason for departure. However, the legislature did give some guidance in making the determination whether reasons justifying departure are substantial and compelling.... 'The judge shall consider and apply the enacted purposes and principles of sentencing guidelines to impose a sentence which is proportionate to the severity of the crime of conviction and the offender's criminal history.' "

Some purposes of the sentencing guidelines include preserving prison space for repeat or violent offenders; promoting uniform sanctions which are not based on socioeconomic factors, race, or geographic location; ensuring clarity in the penalties assessed; and creating a rational system to allow policymakers to allocate prison resources. 259 Kan. at 233; see *State v. Gonzales*, 255 Kan. 243, 249, 874 P.2d 612 (1994).

***4** An appellate court considers only those factors articulated by the sentencing court. *State v. Bolden*, 35 Kan.App.2d 576, 577, 132 P.3d 981 (2006) (citing *State v. Haney*, 34 Kan.App.2d 232, 235, 116 P.3d 747, *rev. denied* 280 Kan. 987 [2005]). The court's comments at the time of sentencing, not the written journal entry, govern the reasons for departure. *State v. Murphy*, 270 Kan. 804, 806, 19 P.3d 80 (2001). Each factor cited by the district court does not need to provide a substantial and compelling basis to depart so long as one or more factors constitute such a basis for departure. *Ussery*, 34 Kan.App.2d at 253 (citing *State v. Minor*, 268 Kan. 292, 311, 997 P.2d 648 [2000]); see also *State v. Ippert*, 268 Kan. 254, 261, 995 P.2d 858 (2000) ("As long as one or more of the factors relied upon is in fact substantial and compelling, the departure sentence will be affirmed.").

In granting the departure, the district court made the following findings to support departure: financial responsibility, steps towards rehabilitation, family support, availability and ability for employment, and age. This court must determine whether each factor is a substantial and compelling reasons for departure as a matter of law and, if so, whether the facts on the record support that factor.

Financial Responsibility

First, the district court cited financial responsibility as a factor in support of the grant of departure. Kansas cases

170 P.3d 443, 2007 WL 4105355 (Kan.App.)
(Table, Text in WESTLAW), Unpublished Disposition

(Cite as: 170 P.3d 443, 2007 WL 4105355 (Kan.App.))

indicate that financial responsibility to family is one of several factors that may be considered for purposes of departure. In *Crawford,* the court considered that the defendant had three children to raise. 21 Kan.App.2d at 861. Though this was not the sole determining factor, the court noted: "... [W]e do not believe that any one of [the] factors, standing alone, would justify a **downward departure**. However, when considered in their totality, they are substantial and compelling." 21 Kan.App.2d at 861; see also *Bolden,* 35 Kan.App.2d at 580 (finding that the fact that defendant is raising dependent children is legitimate basis for departure sentence); *Chrisco,* 26 Kan.App.2d at 824–25 (recognizing that supporting a family may be proper departure factor in some cases); *State v. Mendenhall,* No. 91,591, unpublished opinion filed March 18, 2005 (finding substantial and compelling reasons to grant **downward departure** because of defendant's age and his family); *State v. Green,* Nos. 87,979, 88,006, unpublished opinion filed January 16, 2004 (finding defendant's obligation to support his young child was valid departure factor which could be considered together with other factors).

Based on the above, family and financial obligations are legally acceptable, substantial and compelling factors that may be considered for purposes of departure. Furthermore, although the State does not challenge the evidentiary basis for the finding of financial responsibility, there is substantial competent evidence on the record to support this finding. First, Marquis has a wife and child that he wants to financially support. Furthermore, Marquis wants to stay employed so he can make the restitution payments owed in a previous case. These responsibilities were also reported in the letter written by Hudson.

Steps towards Rehabilitation

***5** Second, the district court found that Marquis was in the process of taking steps for rehabilitation which could be accomplished through community resources. The State does not challenge evidence of steps taken by Marquis towards rehabilitation, but only challenges whether they were sufficient or substantial. Nevertheless, the district court did not determine Marquis' steps to be substantial, but merely stated that Marquis was "in the process of taking steps." The sufficiency of Marquis' actions is a legal question.

In Kansas, rehabilitation is only one factor that may be considered when upholding departure. While a particular defendant's amenability to rehabilitation is not a substantial and compelling reason to depart from the presumptive guidelines sentence by itself, a sentencing court may properly consider such evidence in the totality of the circumstances if other factors warrant departure. *Ussery,* 34 Kan.App.2d at 263. See *Murphy,* 270 Kan. at 806 (upholding departure where defendant had been accepted in Labette Correctional Conservation Camp, noted as having reputation for "good results"); *Ussery,* 34 Kan.App.2d at 264 (upholding court's finding, based on character witnesses for Ussery, that Ussery was receptive to rehabilitation).

In the present case, Marquis was unable to show rehabilitation efforts beyond an evaluation and was not, at the time of sentencing, enrolled in an actual program. Marquis admitted in his testimony that he had not yet followed through with rehabilitation after his evaluation. Furthermore, Marquis admitted to having a prior failed attempt at rehabilitation. As the State points out, 3 months had passed since the evaluation yet Marquis had not yet enrolled in a program. On the other hand, Marquis obtained an initial evaluation where he stated rehabilitation was of "high importance," he was attending AA and NA meetings on his own initiative, and a special condition of probation required that Marquis begin a treatment program. Letters of support from Marquis' family suggested that he would benefit more from probation and that he was already making positive changes due to the rehabilitation he was conducting on his own. Additionally, the drug and alcohol evaluation prepared by the Addiction Treatment Program of Southeast Kansas ranked Marquis at a level one on a scale of one to four, indicating he is likely amendable to rehabilitation.

The State argues that in cases where rehabilitation was favorably cited, there was a "concrete treatment plan in place or the defendant was actively pursuing rehabilitation." For example, in *State v. Alaga,* No. 91,360, unpublished opinion filed December 3, 2004, the court disapproved the granting of a departure based on amendability for rehabilitation because there was no

170 P.3d 443, 2007 WL 4105355 (Kan.App.)
(Table, Text in WESTLAW), Unpublished Disposition

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concrete treatment plan in place and the defendant was not actively pursuing rehabilitation. Nevertheless, Alaga failed to seek any type of evaluation or assistance for his problems and had received no treatment of any form, merely explaining his goals to attend college and play baseball. This sharply contrasts with the present case. Although Marquis was not enrolled in a treatment program, his choice to attend AA and NA meetings and receive an evaluation can be characterized as a sincere attempt to change past bad behavior.

*6 Furthermore, in *Chrisco,* the court acknowledged the rehabilitation efforts of the defendant as a potential factor for departure despite that the efforts were fairly insubstantial. 26 Kan.App.2d at 824. The defendant there had only received a 2 1/2 -hour evaluation by a psychologist and had not begun treatment; in fact, the psychologist merely stated that he could begin treatment if the defendant was awarded probation. The court stated that the availability of a treatment plan carries with it the presumption that there is something to treat, for example drug addictions, and that a plan of treatment must include treatment for the behavior that caused the crime. 26 Kan.App.2d at 824. Similarly, Marquis only received an evaluation that suggested a potential plan for future treatment. Nevertheless, the evaluation and proposed treatment are directed at drug and alcohol use, clearly addressing the very crime for which Marquis was convicted. In addition, Marquis' attendance at AA and NA meetings are forms of rehabilitation that are similarly directed to the crime at hand.

Based on the above, rehabilitation is a legally acceptable, substantial and compelling factor that may be considered for purposes of departure. There is substantial evidence that Marquis made sufficient efforts at rehabilitation to warrant the district court including this factor in its analysis for departure. Furthermore, there is substantial and competent evidence on the record to support this finding.

Family Support

Third, the district court considered the support of Marquis' family when granting departure. In *Murphy,* the court "took judicial notice that Murphy had good family support," a factor among several the court considered in upholding departure. 270 Kan. at 808. Therefore, family support is a substantial and compelling factor that may be considered when combined with other supporting factors. Marquis has family support, which was evidenced by the support letters from family and the presence of Marquis' wife and grandmother in the courtroom. Therefore, there is substantial competent evidence on the record supporting this legally acceptable factor for purposes of Marquis' departure.

Availability and Ability for Employment

Fourth, the court found that Marquis has "employment available" to him and that he is "able to be employed"; notably, the judge did not explicitly state he found Marquis was employed. In *Crawford,* the court cited the defendant's impressive employment record when granting departure. 21 Kan.App.2d 861. The court upheld the departure based on the totality of the factors, stating: "[W]e do not believe that any one of [the] factors, standing alone, would justify a **downward departure**. However, when considered in their totality, they are substantial and compelling." 21 Kan.App.2d at 861; see also *Murphy,* 270 Kan. at 806–07 (upholding departure when defendant's employer reported he was a good worker and, when considered as a whole, several factors were collectively sufficient to allow departure); *Chrisco,* 26 Kan.App.2d at 819 (reversing grant of departure based on other reasons, even though employer testified to defendant's continued employment).

*7 The State suggests a lack of evidence regarding the fact that Marquis is employed. Nevertheless, the court only found that Marquis had employment available and was able to be employed. In analyzing the evidentiary portion of a departure factor, *Favela* found that the particular wording and intent of the judge governs. 259 Kan. at 230. Furthermore, defense counsel stated that Marquis was currently employed at Best Western. Our Supreme Court has said:

> "A reviewing court may be assured that a sentencing court's findings are not clearly erroneous or made up by the sentencing court if the findings are based upon oral statements of a defense counsel which the sentencing

170 P.3d 443, 2007 WL 4105355 (Kan.App.)
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court apparently regarded as reliable and trustworthy. Once the trial judge determines the credibility of the defense counsel's statements and decides to rely upon the statements, a reviewing court should not reweigh the credibility of the counsel's statements. See *Taylor v. State*, 252 Kan. 98, 104, 843 P.2d 682 (1992) (finding it is the duty of the trial court to pass on the credibility of the witnesses)." *Favela*, 259 Kan. at 228–29.

This court will not reweigh the credibility of defense counsel's statements. The district court apparently believed that Marquis was either employed or employable, a fact to which defense counsel testified.

The State further argued that the alleged employer was in the courtroom but failed to testify to Marquis' employment and wrote a letter on his behalf but failed to mention whether she employed Marquis. It is instructive to note that the alleged employer is the grandmother of the defendant, a person who has particular interest in Marquis' liberty. Nevertheless, the employer's presence in the room during this testimony arguably indicates an implicit verification of employment.

In contrast, the State provided no evidence that Marquis was *not* employed. The only evidence on the record supports employment. An appellate court must accept as true the evidence and all inferences to be drawn therefrom which support or tend to support the findings of the factfinder and must disregard any conflicting evidence or other inferences. *Jones v. Kansas State University*, 279 Kan. 128, Syl. ¶ 5, 106 P.3d 10 (2005). As the *Ussery* court stated:

"While there is nothing within this record to support the sentencing court's findings, neither is there contrary evidence. The sentencing court specifically stated that it had considered the trial evidence and statements made during the sentencing hearing, along with the pleadings, motions, and letters filed in the case, before ruling on Ussery's departure motion." 34 Kan.App.2d at 254.

The State cites *Murphy*, arguing that the employer there testified to the defendant's employment. Nevertheless, the *Murphy* court merely stated that the defendant's employer "reported he was a good worker." 270 Kan. at 806. Also, the court in *Murphy* was not dealing with the evidentiary issue of whether the defendant was actually employed but with a legal question—the fact that the employer testified to the employment was merely mentioned in passing. 270 Kan. at 806–07; see also *Crawford*, 21 Kan.App.2d at 860–61 (nothing indicates actual employment record was necessary to determine employment, and appeal was a legal challenge).

***8** Based on the above, employment is a factor that must be considered only as part of the overall analysis when determining whether departure is warranted. The key difference between the above cases and the present is the lack of evidence that Marquis has a good employment record of any lasting period of time and the potential for bias because of the relationship between him and his employer. There was no direct testimony by the employer regarding Marquis' actual employment or whether he was a good worker. Furthermore, there was no testimony guaranteeing Marquis would continue employment.

Despite these distinctions, the record reflects that Marquis is employed. Defense counsel stated that Marquis wanted to stay employed in order to support his family and pay his restitution, $850 of which he had available at that time, suggesting Marquis had been working. Furthermore, a special condition of probation was that Marquis gain or maintain employment. In addition, Marquis' grandmother, who displayed a strong desire to keep her grandson out of jail and on the right path, would have a strong incentive to keep him employed at her business, indicating a strong possibility for continued employment in the future. Given the above, there is substantial competent evidence in the record to support the district court finding that Marquis had availability and ability for employment.

Age

Fifth, the district court stated that Marquis' young age was one of the main factors considered when granting departure. Again, Kansas allows the court to consider age, when combined with other factors, in determining whether departure is appropriate. See *Murphy*, 270 Kan. at 807 (defendant's age of 19 considered as part of the entire

package); *Favela*, 259 Kan. at 235 ("The fact the defendant was only 17 years old at the time of the offense is not a substantial and compelling reason justifying departure as a matter of law, but it may be considered as part of the entire package."); *Haney*, 34 Kan.App.2d at 241–42 ("The legislature and the courts have considered the relative immaturity of an offender in providing for mitigation."); *Crawford*, 21 Kan.App.2d at 861 (upholding departure where defendant's old age was considered); *State v. Chapman*, No. 95,687, unpublished opinion filed May 23, 2007, slip op. at 2 (upholding departure where judge considered 19–year–old defendant's age); *Mendenhall*, slip op. at 3 (finding substantial and compelling reasons for departure because of the defendant's age and his family).

Age is a legally acceptable, substantial and compelling factor that may be considered for purposes of departure. This factor, when combined with other factors, was appropriately considered by the district court in its analysis for departure. The presentence investigation report listed Marquis as age 19, but the judge verified on the record through testimony that Marquis was actually age 21. Therefore, this information, contained in the record, constitutes substantial and competent evidence to support the court's reliance on Marquis' age.

***9** The State, however, argues that there are several reasons warranting the denial of departure. The State first points to Marquis' criminal history, which includes a person felony of indecent liberties with a child. Kansas has upheld departure when the defendant has a criminal history. See *State v. Crawford*, 21 Kan.App.2d 859 at 859–60, 908 P.2d 638 (1995) (upheld departure where defendant had a level G criminal history). Furthermore, a defendant's criminal history cannot be used to justify an upward departure when the sentencing guidelines have already taken the criminal history into account in determining the presumptive sentence. *State v. Benoit*, 31 Kan.App.2d 591, 595, 97 P.3d 497 (2003) (citing *State v. Hawes*, 22 Kan.App.2d 837, Syl. ¶ 4, 923 P.2d 1064 [1996]). Although a defendant's criminal history should be considered when granting **downward departure**, it should only be a part of the overall analysis.

The State next points to the nature of Marquis' crime of possession with intent to sell as opposed to mere possession, arguing that he is a " 'drug dealer" ' and that his crime differs from the " 'typical" ' and common. Nevertheless, this argument seems somewhat arbitrary. In *State v. Murphy*, 270 Kan. 804, 19 P.3d 80 (2001), where departure was granted, the defendant's crimes were aggravated robbery and kidnapping. Furthermore, the incident that led to Murphy's conviction also involved a felony murder. Although part of the decision to allow departure was due to Murphy's lack of a criminal record, it does not seem that this makes Murphy's crime any less distasteful or serious than the crimes committed by Marquis.

In fact, the *Murphy* court stated that it was not relying solely on Murphy's lack of criminal record when awarding departure. More important, in addressing the same type of argument being made in the present case, the court pointed out: "[T]he kidnapping and robbing were the crimes for which Murphy was charged and pled guilty. These facts cannot be considered 'aggravating' factors that cancel out the mitigating factors discussed above" when determining departure. 270 Kan. at 808. In essence, the underlying facts forming the basis for which the defendant was convicted cannot again be used against him in analyzing whether departure was appropriate. Therefore, since Marquis was already charged with intent to sell, those facts cannot be further used against him in the **departure** analysis. See also *State v. Mendenhall*, No. 91,591, unpublished opinion filed March 18, 2005 (upholding **downward** durational **departure** where defendant was charged with possession of methamphetamine with intent to sell within **1,000 feet** of a **school**).

The State points out that Marquis was carrying an illegal weapon, brass knuckles, at the time of the crime. Nevertheless, in *Murphy*, the defendant was similarly armed with a weapon while he held victims at gunpoint and stole their valuables. In dismissing this point, the court noted that the record made no indication that Murphy did anything with the weapon to escalate violence other than that he was carrying it. 270 Kan. at 808; see also *State v. Favela*, 259 Kan. 215, 217, 229–32, 911 P.2d 792 (1996) (upholding **downward departure** where defendant used gun during crime but never pointed it at any person).

Similarly, here Marquis was not charged with possession of an illegal weapon, and the record in no way indicates that the weapon had any involvement in the case.

***10** The State points out that Marquis failed to further his treatment on two grounds: because he had received only an evaluation 7 months after his initial appearance and because he had not entered any treatment program at the time of sentencing. Nevertheless, as reflected in *State v. Chrisco*, 26 Kan.App.2d 816, 824, 995 P.2d 401 (1999), a defendant's act of obtaining an evaluation, although he has not yet begun treatment, is sufficient to allow the court to consider this factor as part of its departure analysis.

Conclusion

As stated previously, "[a]s long as one or more of the factors relied upon is in fact substantial and compelling, the departure sentence will be affirmed." *State v. Ippert*, 268 Kan. 252, 261, 995 P.2d 858 (2000). The district court considered five factors when deciding to grant departure to Marquis. All five factors are factually supported by the record and are independently legally sufficient to meet the substantial and compelling standard. Nevertheless, even if one or more of these factors were found to be insufficient, the decision would still stand as long as the remaining factors were appropriately considered.

> "Reasons which may in one case justify departure may not in all cases justify a departure. Rather, the inquiry must evaluate the crime and the departure factors as a whole to determine whether departure in a particular case is justified. It is a question of what weight to give each reason stated and what weight to give the reasons as a whole in light of the offense of conviction and the defendant's criminal history. The inquiry also considers the purposes and principles of the KSGA." *State v. Grady*, 258 Kan. 72, 83, 900 P.2d 227 (1995).

In this case, several factors support the granting of departure to Marquis. Marquis was only 21 years of age and had a wife and young child to support. Although he had a criminal record, including a juvenile adjudication of indecent liberties with a child, he would have been only 17 years of age when that crime was committed. In addition, Marquis was attending AA and NA meetings on his own initiative and had obtained a drug and alcohol evaluation. Marquis' family supported his rehabilitation efforts, noting changes in his behavior and disassociation with drugs and people who had encouraged his negative habits. Marquis maintained that he was employed at his grandmother's business and suggested that this would continue due to his desire to meet his family expenses and pay for legal restitution.

Two purposes of the sentencing guidelines are protection of public safety and reservation of prison space for the most violent offenders. *Murphy*, 270 Kan. at 808. The evidence showed that Marquis was not a continuing threat to society, but rather that he was making valid attempts at reforming his life in a manner that could be done outside the walls of prison.

As a whole, the factors in favor of departure weigh against those opposing departure. Therefore, the trial court had substantial and compelling reasons justifying departure in this case.

***11** Affirmed.

Kan.App.,2007.

State v. Marquis
170 P.3d 443, 2007 WL 4105355 (Kan.App.)
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242 P.3d 1281, 2010 WL 4977156 (Kan.App.)
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Court of Appeals of Kansas.

STATE of Kansas, Appellant,
v.
Jennifer D. LISKEY, Appellee.
No. 103,145.

Nov. 19, 2010.

West KeySummary**Sentencing and Punishment 350H ⚖857**

350H Sentencing and Punishment

350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk853 Offense-Related Factors
350Hk857 k. Provocation, Participation or Condonation by Victim. Most Cited Cases

Sentencing and Punishment 350H ⚖862

350H Sentencing and Punishment

350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)3 Downward Departures
350Hk859 Offender-Related Factors
350Hk862 k. Mental Illness or Reduced Capacity. Most Cited Cases

Sufficient grounds existed to support a downward departure for a defendant's sentence of aggravated indecent liberties with a child. The evidence that the defendant suffered from mental impairments that affected her capacity for judgment constituted a substantial and compelling reason for departure. The victim's active participation in the conduct also constituted a substantial and compelling reason for departure because the victim initiated the sexual relationship with the defendant and actively pursued the defendant when she moved to another state purportedly to end the relationship. K.S.A. 21–4716(c)(1).

Appeal from Shawnee District Court; Jan W. Leuenberger, Judge.

Chadwick J. Taylor, district attorney, Jason E. Geier, assistant district attorney, and Steve Six, attorney general, for appellant.

Randall L. Hodgkinson and Patrick Dunn, of Kansas Appellate Defender Office, for appellee.

Before MALONE, P.J., CAPLINGER and LEBEN, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** The State appeals the district court's imposition of a dispositional and durational departure sentence for Jennifer D. Liskey, who pled no contest to two counts of aggravated indecent liberties with a child and one count of criminal sodomy. The district court cited 11 reasons for granting the departure sentence. The State claims that all 11 reasons relied upon by the district court were insufficient grounds for granting a departure sentence. The State further claims the district court abused its discretion in the extent of the downward departure. Based on our standard of review, we conclude that two of the reasons cited by the district court for the departure sentence were supported by substantial competent evidence and constituted substantial and compelling reasons for a departure. Accordingly the judgment of the district court is affirmed.

In May 2005, M.B. was 13 years old and had just completed seventh grade. Liskey, who was 35 years old, was employed as the paraprofessional for the gifted program in which M.B. was a student. Liskey and M.B. first kissed in May 2005, and Liskey began performing oral sex on M.B. around July 30, 2006, when M.B. was 14

242 P.3d 1281, 2010 WL 4977156 (Kan.App.)
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years old. On approximately July 30, 2007, when M.B. was 15 years old, he and Liskey began to have sexual intercourse. The sexual acts continued until November 2008, when M.B. disclosed the relationship to his mother because he was concerned that Liskey was suicidal. On November 10, 2008, Detective Heather Stults–Lindsay of the Topeka Police Department interviewed M.B. and Liskey separately.

On November 14, 2008, the State filed a complaint charging Liskey with one count of aggravated indecent liberties with a child. On December 29, 2008, the State amended the complaint, charging Liskey with three counts of aggravated indecent liberties with a child and one count of aggravated criminal sodomy. Ultimately, Liskey pled no contest to two counts of aggravated indecent liberties with a child and one count of criminal sodomy. The district court committed Liskey to Larned State Security Hospital for a presentence mental examination and evaluation pursuant to K.S.A. 22–3429.

On March 23, 2009, Liskey filed a motion for dispositional departure based on six factors: (1) M.B. was the aggressor and participated in the conduct; (2) the degree of harm or loss caused by the crime is significantly less than typical; (3) Liskey has no criminal history; (4) Liskey has family support; (5) Liskey's waiver of her preliminary hearing and trial rights resulted in judicial economy and also preserved the privacy of M.B. and his family; and (6) Liskey is ready to follow court orders and is amenable to probation. On August 26, 2009, Liskey filed an amended motion for departure, adding a request for durational departure based on the same factors. The next day, the district court filed a *sua sponte* motion for dispositional and/or durational departure.

The sentencing hearing commenced on September 4, 2009. M.B.'s father spoke at the hearing and requested that the court sentence Liskey to prison. M.B.'s mother and aunt both requested the maximum possible sentence and lifetime postrelease supervision. The State read into the record a letter written by M.B. in which he asked that Liskey receive at least 3 years in prison. Liskey's sister addressed the court and asked for mercy for Liskey. Liskey also spoke and admitted that the relationship was her fault and that she was sorry for her actions.

***2** The State recommended 61 months' imprisonment and a postrelease term of 36 months for Count I. For Counts II and III, the State recommended 61 months' imprisonment for each count and lifetime postrelease supervision. The State recommended that the sentences run concurrently and asked the district court to deny Liskey's motion for dispositional and durational departure.

On September 9, 2009, the district court granted Liskey's departure motion and sentenced her to 30 months' imprisonment on Count I, with a postrelease period of 36 months. On Counts II and III, the district court sentenced Liskey to 30 months' imprisonment, with lifetime postrelease supervision for each count. The district court ordered the sentences to run concurrently. The district court suspended the sentence and placed Liskey on 36 months' intensive supervised probation. The district court cited 11 reasons for granting the departure sentence and found that the reasons for departure were substantial and compelling "as set forth in the record both individually and when taken together." In conjunction with the hearing, the district court filed a 48–page memorandum decision and order setting forth the reasons for granting the departure sentence. The State timely appealed.

Appellate review of a departure sentence employs a mixed standard of review and is limited to whether the district court's findings of fact and reasons justifying a departure (1) are supported by substantial competent evidence in the record and (2) constitute substantial and compelling reasons for a departure. K.S.A. 21–4721(d); *State v. Blackmon*, 285 Kan. 719, 724, 176 P.3d 160 (2008). A sentencing court is not required to provide separate and distinct reasons for downward durational and dispositional departures when both are imposed in a single case. See *State v. Minor*, 268 Kan. 292, 306, 997 P.2d 648 (2000), citing *State v. Favela*, 259 Kan. 215, 221, 911 P.2d 792 (1996). Finally, each factor cited by the district court does not need to provide a substantial and compelling basis to depart so long as one or more constitutes such a basis for departure. *Blackmon*, 285 Kan. at 725, 176 P.3d 160.

242 P.3d 1281, 2010 WL 4977156 (Kan.App.)
(Table, Text in WESTLAW), Unpublished Disposition

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K.S.A. 21–4716(c)(1) provides a nonexclusive list of mitigating factors that may be considered to determine whether there are substantial and compelling reasons for a departure. The Kansas Supreme Court has held that statutory factors for departure should not be reviewed with greater deference than nonstatutory factors, and factors not enumerated in the statute are not subject to stricter scrutiny than those that are listed. *State v. Martin*, 285 Kan. 735, 747, 175 P.3d 832 (2008). The only additional consideration when reviewing nonstatutory factors is that the factors should be consistent with the principles underlying the Kansas Sentencing Guidelines Act (KSGA). *Blackmon*, 285 Kan. at 725, 176 P.3d 160.

Here, the district court outlined the following factors as justifying departure: (1) Liskey accepted responsibility by waiving preliminary hearing and entering a plea; (2) Liskey will be punished for the rest of her life through the stigma attached to being a sex offender; (3) Liskey had no previous criminal history; (4) on several occasions, Liskey tried unsuccessfully to end the relationship and her inability to do so or to cope with her or M.B.'s sexual urges was due to a personality disorder and emotional immaturity; (5) due to her mental impairment, Liskey lacked substantial capacity for judgment; (6) there is a lack of evidence of the form and extent of harm to M.B. from the offense; (7) M.B. was a participant in the conduct; (8) M.B., in his police interview, stated he did not want Liskey to go to prison, did not want her on lifetime supervision, and believed she would benefit from counseling; (9) Liskey has family support; (10) Liskey is not a present danger to society; and (11) the relationship between Liskey and M.B. was neither established nor promoted for the purpose of victimizing M.B.

***3** The State argues that all 11 factors relied upon by the district court in order to justify the departure sentence are either unsupported by evidence, not substantial and compelling, or both. Liskey asserts that every factor was supported by evidence in the record and was a substantial and compelling reason for departure. In this opinion, we will address only two of the factors relied upon by the district court for the departure sentence. As stated, if any of the factors articulated by the district court would justify the departure, the decision will be upheld on appeal. *Blackmon*, 285 Kan. at 725, 176 P.3d 160.

DUE TO LISKEY'S MENTAL IMPAIRMENT, SHE LACKED SUBSTANTIAL CAPACITY FOR JUDGMENT

In granting the departure sentence, the district court relied on the fact that Liskey's mental impairment prevented her from having substantial capacity for judgment. This reason parallels the statutory factor that "[t]he offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed." K.S.A. 21–4716(c)(1)(C).

The State concedes there was substantial competent evidence to support the finding; at least two doctors indicated Liskey suffered from mental impairments that affected her capacity for judgment. William L. Albott, Ph.D, diagnosed Liskey with an adjustment disorder and a personality disorder. Mitchell R. Flesher, Ph.D, diagnosed Liskey with dependent personality disorder and chronic depression. Therefore, the State only contends that this factor is not a substantial and compelling reason for a downward departure. Whether the facts relied upon by the sentencing court constitute substantial and compelling reasons for a departure is a question of law over which an appellate court has unlimited review. *State v. McKay*, 271 Kan. 725, 728, 26 P.3d 58 (2001).

The State argues that this factor is not applicable to "someone like Liskey, with above average intelligence, a college degree and a good career," but rather only to defendants whose lack of capacity for judgment stems from immaturity due to age. However, as Liskey points out, a plain reading of the statute makes no reference to this mitigating factor being limited to defendants in a specific age group. We have found only two published Kansas cases that specifically refer to this statutory factor, and neither case limits its application to defendants whose immaturity correlates to their physical age. *State v. Haney*, 34 Kan.App.2d 232, 239–41, 116 P.3d 747, *rev. denied* 280 Kan. 987 (2005); *State v. Ussery*, 34 Kan.App.2d 250, 257–58, 116 P.3d 735, *rev. denied* 280 Kan. 991 (2005).

To be substantial, the reason justifying a departure

must be real, not imagined, and of substance, not ephemeral. To be compelling, the reason must be one which forces the court, by the facts of the case, to abandon the status quo and to venture beyond the sentence that it would ordinarily impose. *Blackmon*, 285 Kan. at 724, 176 P.3d 160. Here, if the evidence establishes that Liskey suffered from mental impairments that affected her capacity for judgment, as the State concedes, this fact could certainly compel a sentencing court to abandon the status quo and venture beyond the sentence that it would ordinarily impose. Based on the record presented for our review, we conclude this factor rises to the level of a substantial and compelling reason for departure. Accordingly, the district court did not err in granting a departure sentence based on this factor.

M.B. WAS A PARTICIPANT IN THE CONDUCT

***4** Another reason given by the district court for granting the departure sentence was that M.B. was a participant in the conduct. This reason parallels the statutory factor that a departure may be granted when the "victim was an aggressor or participant in the criminal conduct associated with the crime of conviction." K.S.A. 21–4716(c)(1)(A). Here, the district court did not find that M.B. was an *aggressor* in the criminal conduct, but the district court found that M.B. was a *participant* in the conduct.

The first question is whether the finding that M.B. was a participant in the conduct was supported by substantial competent evidence in the record. The State argues that when the relationship began, M.B. was not a willing participant and at best M.B. willingly participated only after the relationship had substantially progressed. However, the State's argument is not supported by the record. In his interview with the police detective, M.B. stated that he initiated the kissing in May 2005. M.B. also told the detective that he had reassured Liskey when she expressed concern over the illegality of their relationship, that he had used the internet to research successful relationships between people with age differences, and that it was at his request that Liskey returned to Topeka after moving to New Mexico to escape the relationship.

In her police interview, Liskey stated that M.B. talked her into having sex in a car, that M.B. gave her a ring, and that they thought of themselves as husband and wife. In addition, the record includes Albott's psychological assessment of Liskey, in which he stated that "it would appear that [M.B.] was instrumental in initiating the process that ultimately led to sexual activities." Based on the record, we conclude there was substantial competent evidence to support the district court's finding that M.B. was a participant in the conduct.

We must next consider whether M.B.'s participation constitutes a substantial and compelling reason for departure. In *Minor*, 268 Kan. at 313, 997 P.2d 648, the Kansas Supreme Court upheld the district court's downward durational departure sentence in a conviction for aggravated criminal sodomy because of the victim's participation and actions leading to oral sex. The victim was 13 years old when the offense was committed. The defendant testified that the victim initiated the oral sex. This testimony was corroborated by the investigating officer, who testified that the victim was a willing and active participant, and by a friend of the victim, who testified that the victim stated she wanted to have intercourse with the defendant. The victim also corroborated that the oral sex was consensual. The Supreme Court concluded that the victim was an aggressor or participant in the criminal conduct and that this evidence supported the statutory ground for a departure sentence. 268 Kan. at 311, 997 P.2d 648.

State v. Sampsel, 268 Kan. 264, 997 P.2d 664 (2000), is similar to *Minor*. *In Sampsel*, the Kansas Supreme Court upheld the district court's downward durational departure sentence in a conviction for aggravated indecent liberties with a child because of the victim's participation and actions leading to intercourse. The victim, who was 13 years old when the offense was committed, stated that she wanted to have intercourse with the defendant, made advances toward him, and had consensual intercourse according to multiple witnesses. The Supreme Court concluded that the evidence supported the statutory ground that the victim was a participant in the criminal conduct. 268 Kan. at 281, 997 P.2d 664.

***5** Here, the facts are very similar to the facts of

242 P.3d 1281, 2010 WL 4977156 (Kan.App.)
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Minor and *Sampsel.* M.B. told a police officer that he initiated the relationship with Liskey in May 2005. M.B. also told a police officer that he actively pursued Liskey when she moved to another state purportedly to end the relationship. Based on the precedent of *Minor* and *Sampsel,* we conclude that M.B.'s participation in the conduct constituted a substantial and compelling reason for the departure sentence.

The State briefly argues that due to the more than 20–year–age difference between Liskey and M.B., M.B. was not capable of participating in the conduct. The State offers little to support this argument other than citing to cases in which the victims and perpetrators were closer in age than M.B. and Liskey. However, prior decisions such as *Minor* and *Sampsel* reveal no analytical emphasis on the proximity in age of the victim and the perpetrator when considering the victim's participation as a reason for a departure. Furthermore, in both *Minor* and *Sampsel,* the Kansas Supreme Court found the victim's participation in the criminal conduct justified the departure sentence even though the victim in each case was only 13 years old when the offenses were committed.

Here, there was substantial competent evidence of M.B.'s participation in the conduct and this factor constituted a substantial and compelling reason for departure. Accordingly, the district court did not err in granting a departure sentence based on this factor.

EXTENT OF DEPARTURE

Finally, the State claims the district court abused its discretion in the extent of the downward departure. A district court possesses broad discretion in determining the extent of a departure so long as the departure is consistent with the purposes and principles of the KSGA and the departure is proportionate to the severity of the crime committed and the offender's criminal history. When reviewing the extent of a downward durational departure sentence, the standard of review is abuse of discretion. *Favela,* 259 Kan. at 343–44, 912 P.2d 747. "Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. [Citation omitted.]" *State v. Gant,* 288 Kan. 76, 81–82, 201 P.3d 673 (2009).

Liskey's presumptive sentence for each count was 55–61 months' imprisonment. The district court sentenced Liskey to 30 months' imprisonment on each count to be served concurrently. The district court then suspended the sentence and placed Liskey on 36 months' intensive supervised probation.

The State argues that the extent of the downward departure in this case is excessive and an abuse of discretion. The State chiefly relies on the fact that the departure sentence was approximately half the presumptive sentence and the district court suspended the prison sentence and imposed 36 months' intensive supervised probation. The State also points out that much of the evidence relied on for the departure is contested, one of the crimes of conviction has been statutorily deemed a "sexually violent" crime and this was not an instance of an isolated occurrence; the crimes occurred over a period of 3 years.

***6** In *Minor,* the defendant's presumptive mid-range sentence was 256 months' imprisonment and the departure sentence imposed was 72 months. 268 Kan. at 302, 997 P.2d 648. This departure sentence was affirmed by the Kansas Supreme Court. 268 Kan. at 313, 997 P.2d 648. The departure sentence in *Minor* was over a 70% departure, much more than the approximately 50% departure the State complains of here. As for placing Liskey on probation, the principles upon which the sentencing guidelines are based, according to legislative history and interpretation by Kansas appellate courts, include reserving prison space for violent offenders, protecting public safety, and reducing prison overcrowding. *Favela,* 259 Kan. at 233–34, 911 P.2d 792. Here, the district court apparently decided that Liskey is not such a threat to public safety that she requires imprisonment. Based on the record, we conclude that reasonable persons could agree with the propriety of the departure sentence imposed by the district court. Accordingly, the district court did not abuse its discretion in the extent of the departure sentence.

Affirmed.

Kan.App.,2010.

State v. Liskey
242 P.3d 1281, 2010 WL 4977156 (Kan.App.)
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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing reply brief and brief of cross-appellee was made by mailing two copies, postage prepaid to Tony Cruz, Assistant County Geary Attorney, 801 N. Washington Street, Suite A, Junction City, KS 66441, and mailing one copy, postage prepaid, to the Attorney General, Kansas Judicial Center, Topeka, Kansas, 66612, on this 20th day of November, 2013.

Douglas L. Adams