No. 14-111344-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellant

vs.

SHERRY L. HASKELL
Defendant-Appellee

BRIEF OF APPELLANT

Appeal from the District Court of Douglas County, Kansas
Honorable Sally Pokorny, District Court Judge
District Court Case No. 13 CR 720

Patrick J. Hurley, #17638
Assistant District Attorney
Office of the District Attorney
111 East 11th Street, Unit 100
Lawrence, Kansas 66044
Phone: (785) 841-0211
Fax: (785) 832-8202
Phurley@douglas-county.com

Attorney for Appellant

TABLE OF CONTENTS

No. 14-111344-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellant

vs.

SHERRY L. HASKELL
Defendant-Appellee

BRIEF OF APPELLANT

NATURE OF THE CASE

Sherry Haskell filed a motion to dismiss the State's criminal case which was granted by the district court. The district court misinterpreted K.S.A. 21-5608. The State appeals the district court's dismissal of its criminal case against the defendant.

STATEMENT OF ISSUE

I. The District Court erred when it dismissed the State's case.

STATEMENT OF FACTS

On June 8, 2013, the defendant allowed her daughter to have a party with her friends at the defendant's residence. (R. I, 4-7.) The daughter's friends were under the age of 21 years old and drinking alcoholic beverages. (R. I, 6-7.) The defendant admitted she was present, participated at the party and was drinking alcoholic beverages with the minors. (R. I, 6-7.) There was a bonfire, and two of the minors caught on fire because a gas can containing diesel that was near the fire exploded. (R. I, 6-7.) The

defendant refused to call 911, but eventually took the two minors to Lawrence Memorial Hospital to be treated for severe burns.

On July 22, 2013, the defendant was charged with unlawfully hosting minors consuming alcoholic liquor or cereal malt beverages. (R. I, 4-7.) The defendant filed a motion to dismiss claiming the minors were "social guests" as defined in tort law, which prevented her from being charged with a crime under K.S.A. 21-5608. (R. I, 20.) The district court dismissed the case on December 31, 2013, concluding the word "invitee" in K.S.A. 21-5608 means "business visitors" and the minors drinking alcoholic beverages were social guests, not "business visitors." (R. I, 67-68.) Pursuant to K.S.A. 60-259, the State filed a motion to reconsider on January 7, 2014, and the district court denied it on January 21, 2014. (R. I, 33-37, 69-70.) On January 22, 2014, the State timely objected and filed its notice of appeal. (R. I, 44, 55.)

Additional facts from the record will be set forth below as necessary.

ARGUMENTS AND AUTHORITIES

I. The District Court erred when it dismissed the State's case.

A. Standard of Review.

Statutory interpretation of the K.S.A. 21-5608 is a question of law, and the Court's review is unlimited and not bound by the district court's interpretation. See *State v. Hopkins*, 295 Kan. 579, 581, 285 P.3d 1021, 1023 (2012).

B. The District Court failed to follow the plain language of K.S.A. 21-5608.

The defendant alleged in her motion to dismiss that the word "invitee" in the statute means someone who pays to come onto another's property, which is a "business visitor." (R. I, 20-25.) The district court accepted the defendant's flawed argument and

dismissed the State's case. (R. I, 67-68.) The clear meaning and plain language of K.S.A. 21-5608 does not exclude the application of the statute to the defendant, because in Kansas, since 1994, the term "invitee" has not solely meant "business visitor." The term "business visitor" is nowhere to be found in the statute. See *State v. Urban*, 291 Kan. 214, 216, 239 P.3d 837, 839 (2010) ("An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *State v. Raschke,* 289 Kan. 911, 914, 219 P.3d 481 (2009). When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. Where there is no ambiguity, the court need not resort to statutory construction. Only if the statute's language or text is unclear or ambiguous (i.e. has a "common" meaning and a legal definition) does the court use canons of construction or legislative history or other background considerations to construe the legislature's intent. [Citation omitted.]")

The crime set forth in K.S.A. 21-5608 is anyone providing a venue for someone else's children to drink illegally, not just someone charging an admission fee for children to obtain or bring their own alcoholic beverages to drink on another's property to consume. K.S.A. 21-5608. Pursuant to K.S.A. 21-5608(a) & (c): *Unlawfully hosting minors consuming alcoholic liquor or cereal malt beverage* is:

> (a) Unlawfully hosting minors consuming alcoholic liquor or cereal malt beverage is recklessly permitting a person's residence or any land, building, structure or room owned, occupied or procured by such person to be used by an invitee of such person or an invitee of such person's child or ward, in a manner that results in the unlawful possession or consumption therein of alcoholic liquor or cereal malt beverages by a minor.

(c) As used in this section, terms mean the same as in K.S.A. 41-102, and amendments thereto.

K.S.A. 21-5608(a) and (c).

The ordinary meaning of "invitee" at least means both "business visitor" and "social guest," because it is simply someone invited by the parent or parent's child to some place. See also *GT, Kansas, L.L.C. v. Riley County Register of Deeds*, 271 Kan. 311, 316, 22 P.3d 600, 604 (2001) ("Ordinary words are to be given their ordinary meaning, and a statute should not be read as to add that which is not readily found therein or to read out what as a matter of ordinary English is in it.") Webster's Dictionary defined invitee as "an invited person." Webster's Unabridged New International Dictionary 1307 (2nd Ed. 1943) Therefore, the district court erroneously ruled the statute was inapplicable to the defendant. The language set forth in K.S.A. 21-5608 does not utilize the word "business visitor" or suggest the defendant cannot be charged with unlawfully hosting minors consuming alcoholic liquor or cereal malt beverages because she did not charge the minors money to attend or consume alcohol or cereal malt beverages. Interpreting K.S.A. 21-5608 to exclude the defendant from prosecution is inconsistent with the language in the statute and legislative intent.

C. The District Court erroneously defined the term "invitee" in K.S.A. 21-5608 to solely mean "business visitor" and not a "social guest."

The district court simply erred when it applied the erroneous definition of "invitee" as a "business visitor" to K.S.A. 21-5608. The district court found that: a) the term "invitee" as set forth in K.S.A. 21-5608 meant only a "business visitor" upon the defendant's residence, land building, room or structure owned or occupied by the defendant and rejected the plain language of the statute that invitee includes both

"business visitor" and "social guest;" and b) that minors who possessed and consumed alcohol during the alleged offense at the defendant's residence and upon her land, were not "business visitors" but rather were "social guests." (R. I, 67-70.)

The district court essentially found that K.S.A. 21-5608 applies only when an individual charges money for minors to drink alcoholic beverages on any property. (R. III, 7-10.) Based on the district court's decision to adopt the defendant's argument, it read into the statute language not readily found therein and applied the old context of the legal term "invitee" to exclude "social guests." (R. I, 67-70; II, 7-8.) The district court's conclusion K.S.A. 21-5608 *only* applies to "invitees," which it interpreted to be limited to "business visitors" is incorrect because the distinction between "business visitor" and "social guest" is no longer a valid point of law. *Jones v. Hansen*, 254 Kan. 499, 509, 867 P. 2d 303 (1994).

The distinction between "social guests" and "business visitor" was originally established to deal with premise liability in tort law. *Sideman v. Guttman*, 38 A.D.2d 420, 423, 330 N.Y.S.2d 263 (1972). The doctrine that social guests are to regarded as licensees was first formulated in 1856 in England. *Id.* The basis for the distinction focused on "social guests" taking the "premises as the possessor himself uses them and is not entitled to expect that precautions will be taken for his safety in a better manner than the possessor takes for his own safety or that of members of his family." *Id.* In 1994, the Kansas Supreme Court changed the need for the long standing distinction between "invitees" and "licensees" and held that "invitees" and "licensees" are to be treated the same under the reasonable care standard. *Jones v. Hansen*, 254 Kan. 499, 509, 867 P. 2d 303 (1994). The need for the distinction between the two terms disappeared in 1994, and

therefore, "social guests" are now considered "invitees" under *Jones*. *Id.* See also *Taylor v. Duke*, 713 N.E. 2d 877 (1999) ("An invitee entering the land of another may fall within one of three categories: public invitee, business visitor or social guest.") The defendant has confused the district court by using pre-1994 definitions of "invitee" and "business visitor," which are no longer applicable in tort law and should not be utilized to impose a similar useless and contrary meaning on K.S.A. 21-5608. The term "invitee" in K.S.A. 21-5608 is not used to set forth a particular duty of care and applying such a definition is error.

If the Court applies tort law correctly to this matter as suggested by the defendant "social guests" are also considered "invitees." See *Jones v. Hansen*, 254 Kan. at 509. The statute does not utilize the word "invitee" as a pre-1994 legal term for premise liability, it is utilized in a criminal statute that was enacted in 2010 after the word "invitee" was essentially expanded, but is otherwise not defined in the criminal statutes. The district court referenced *Odgen v. Zeman*, 3 Kan. App. 2d 718, 601 P.2d 17 (1979), to find K.S.A. 21-5608 applies only when an individual charges money for minors to drink alcoholic beverages on any property. (R. III, 7-10.) However, *Odgen* is not applicable because it is pre-1994 and it only deals with premise liability, not criminal law, and K.S.A. 21-5607 already establishes it is a crime to buy for or distribute any alcoholic liquor to a minor. K.S.A. 21-5607. In this context, the simple definition of "invitee" is someone invited by the parent or parent's child to some place or to correctly apply the standard in premise liability "invitee' means both "social guest" and "business visitor." See Webster's Unabridged New International Dictionary, 1307 (2nd Ed. 1943) ("Invitee an invited person") Defendant's effort to confuse the district court by utilizing

tort law definitions is misplaced. Tort definitions don't apply to criminal statutes. See *State v. Foster*, 298 Kan. 348, 357, 312 P.3d 364(2013) (refusing to use UCC definitions in the forgery statute). The district court failed to apply a common meaning of "invitee."

CONCLUSION

The defendant argued that this case should be dismissed based on faulty reasoning, a definition of "invitee" that is irrelevant/inapplicable/moot, while ignoring the plain language of the statute. There is no basis in fact or in law for the district court to have dismissed this case. The dismissal of the matter was an unreasonable interpretation of the statute by the district court. For the above-stated reasons, the State respectfully requests the Court to reverse the district court's dismissal of the case, the denial of its motion to reconsider, and all adverse findings and conclusions of law and reinstate the State's charge against the defendant.

Respectfully submitted,

Patrick Hurley, #17638
Assistant District Attorney
111 E. 11th Street, Lawrence, Kansas 66044
Phone: (785)841-0211/Fax: (785)832-8202
E-mail: phurley@douglas-county.com
CHARLES E. BRANSON
Douglas County District Attorney
DEREK SCHMIDT
Kansas Attorney General

Attorneys for Appellee

CERTIFICATE OF SERVICE

I, Patrick J. Hurley, Assistant District Attorney, hereby certify that two (2) copies of this Brief of Appellee were mailed to Adam Hall, Collister & Kampschroeder, Attorneys at Law, 3311 Clinton Parkway Court, Lawrence, Kansas 66047, Attorney for Appellant by U.S. mail, postage prepaid on the 14th day of April 2014; and delivered the original and sixteen (16) copies to Derek Schmidt, Attorney General, Criminal Litigation Division, 120 S.W. Tenth, 2nd Floor, Topeka, KS 66612, on the 14th day of April 2014 for approval and filing with the Clerk of the Appellate Courts.

Patrick J. Hurley, # 17638