

ADMINISTRATIVE DRIVER'S LICENSE APPEALS

1. K.S.A. 8-1020

ANY LICENSEE SERVED WITH CERTIFICATION FROM OFFICER PURSUANT TO K.S.A. 8-1002 CAN WITHIN 14 DAYS MAIL OR FAX A WRITTEN REQUEST FOR A HEARING.

IF TIMELY REQUEST MADE AUTOMATIC STAY OF ANY SUSPENSION UNTIL 30 DAYS AFTER HEARING OFFICER'S DECISION

DIVISION SHALL SET HEARING "FORTHWITH"

See *Foster v. Kansas Dept. of Revenue*, 281 Kan. 368, 373-74, 130 P.3d 560 (2006) (addressing the Department's statutory duty to schedule administrative hearings "forthwith"). The Department should endeavor to make sure that driver's license suspension proceedings are handled in an expeditious manner.

HEARING IS BY PHONE UNLESS SPECIFICALLY REQUEST TO BE "IN PERSON"

\$50.00 ADMINISTRATIVE FEE NOW CHARGED WHETHER HEARING REQUESTED BY PHONE OR IN PERSON

DOES FEE HAVE TO BE PAID WITHIN THE 14 DAYS?

Pre-hearing discovery:

shall be limited to the following documents, which shall be provided to the licensee or the licensee's attorney no later than seven days prior to the date of hearing:

(1) The officer's certification and notice of suspension; (2) in the case of a breath or blood test failure, copies of documents indicating the result of any evidentiary breath or blood test administered at the request of a law enforcement officer; (3) in the case of a breath test failure, a copy of the affidavit showing certification of the officer and the instrument; and (4) in the case of a breath test failure, a copy of the Kansas department of health and environment testing protocol checklist.

(f) At or prior to the time the notice of hearing is sent, the division shall issue an order allowing the licensee or the licensee's attorney to review any video or audio

tape record made of the events upon which the administrative action is based. Such review shall take place at a reasonable time designated by the law enforcement agency and shall be made at the location where the video or audio tape is kept. The licensee may obtain a copy of any such video or audio tape upon request and upon payment of a reasonable fee to the law enforcement agency, not to exceed \$25 per tape.

Witnesses at hearing limited to:

Licensee

Any officer who certified the DC-27

One other witness who was present at issuance of certification affidavits from others can be submitted at time of hearing*

8-1020 (h)

(A) If officer certifies **refusal**, the scope of the hearing shall be limited to whether:

1. Reasonable grounds to believe the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or both, or had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system;
2. Person was in custody or arrested for an alcohol or drug related offense or was involved in a vehicle accident or collision resulting in property damage, personal injury or death;
3. Officer presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto; and
- (4) person refused to submit to and complete a test as requested by a law enforcement officer.

(B) If the officer certifies person **failed a breath test**, the scope of the hearing shall be limited to whether:

1. Officer had reasonable grounds to believe the person was operating a vehicle while under the influence of alcohol or drugs, or both, or had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system;
- (2) person was in custody or arrested for an alcohol or drug related offense or was involved in a vehicle accident or collision resulting in property damage, personal injury or death;
- (3) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto;
- (4) the testing equipment used was certified by the Kansas department of health and environment;

(5) the person who operated the testing equipment was certified by the Kansas department of health and environment;

(6) the testing procedures used substantially complied with the procedures set out by the Kansas department of health and environment;

3) If the officer certifies that the person **failed a blood test**, the scope of the hearing shall be limited to whether: (A) A law enforcement officer had reasonable grounds to believe the person was operating a vehicle while under the influence of alcohol or drugs, or both, or had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system; (B) the person was in custody or arrested for an alcohol or drug related offense or was involved in a vehicle accident or collision resulting in property damage, personal injury or death; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto; (D) the testing equipment used was reliable; (E) the person who operated the testing equipment was qualified; (F) the testing procedures used were reliable; (G) the test result determined that the person had an alcohol concentration of .08 or greater in such person's blood; and (H) the person was operating or attempting to operate a vehicle.

WHAT ABOUT A BLOOD TEST REFUSAL? WHAT ARE THE ISSUES?

i) At a hearing pursuant to this section, or upon court review of an order entered at such a hearing, an affidavit of the custodian of records at the Kansas department of health and environment stating that the breath testing device was certified and the operator of such device was certified on the date of the test shall be admissible into evidence in the same manner and with the same force and effect as if the certifying officer or employee of the Kansas department of health and environment had testified in person. A certified operator of a breath testing device shall be competent to testify regarding the proper procedures to be used in conducting the test.

WHAT ABOUT RECENT RULINGS ON CERTIFICATIONS FROM SUPREME CT.?

(k) At the hearing, licensee has the burden of proof by a preponderance of the evidence to show that the facts set out in the officer's certification are **false** or **insufficient** and that the order suspending or suspending and restricting the licensee's driving privileges should be dismissed.

(l) Evidence at the hearing shall be limited to the following: (1) The documents set out in subsection (e); (2) the testimony of the licensee; (3) the testimony of any certifying officer; (4) the testimony of any witness present at the time of the issuance of the certification and called by the licensee; (5) **any affidavits submitted from other witnesses**; (6) any documents submitted by the licensee to show the existence of a medical condition, as described in K.S.A. 8-1001, and amendments thereto; and (7) any video or audio tape record of the events upon which the administrative action is based.

AFTER HEARING OFFICER Shall enter an order affirming the order of suspension or suspension and restriction of driving privileges or **for good cause appearing** therefor, dismiss the administrative action.

o) The licensee may file a petition for review of the hearing order pursuant to **K.S.A. 8-259**, and amendments thereto. Upon filing a petition for review, the licensee shall serve the secretary of revenue with a copy of the petition and summons. **Upon receipt of a copy of the petition for review** by the secretary, the temporary license issued pursuant to subsection (b) shall be extended until the decision on the petition for review is final.

To the extent that this section and any other provision of law conflicts, this section shall prevail. **The petition for review shall be filed within 14 days after the effective date of the order.** Venue of the action for review is the county where the person was arrested or the accident occurred, or, if the hearing was not conducted by telephone conference call, the county where the administrative proceeding was held. The action for review shall be by trial de novo to the court and the **evidentiary restrictions of subsection (l) shall not apply to the trial de novo.** The court shall take testimony, examine the facts of the case and determine whether the petitioner is entitled to driving privileges or whether the petitioner's driving privileges are subject to suspension or suspension and restriction under the provisions of this act. If the court finds that the grounds for action by the agency have been met, the court shall affirm the agency action.

u) All notices affirming or canceling a suspension under this section, all notices of a hearing held under this section and all issuances of temporary driving privileges pursuant to this section shall be sent by first-class mail and a United States post office certificate of mailing shall be obtained therefor. All notices so mailed shall be **deemed received three days after mailing**, except that this provision shall not apply to any licensee where such application would **result in a manifest injustice.**

(v) The provisions of K.S.A. 60-206, and amendments thereto, regarding the computation of time shall be applicable in determining the time for requesting an administrative hearing as set out in subsection (a) and to the time for filing a petition for review pursuant to subsection (o) and K.S.A. 8-259, and amendments thereto.

60-206. (a) Computing time. The following provisions apply in computing any time period specified in this chapter, in any local rule or court order or in any statute or administrative rule or regulation that does not specify a method of computing time.

(1) Period stated in days or a longer unit. When the period is stated in days or a longer unit of time: (A) **Exclude the day of the event that triggers the period;** (B) count every day, **including intermediate Saturdays, Sundays and legal holidays;** and (C) include the last day of the period, but **if the last day is a Saturday, Sunday or legal holiday**, the period continues to run until the end of the next day that is not a Saturday, Sunday or legal holiday.

(2) Period stated in hours. When the period is stated in hours: (A) Begin counting immediately on the occurrence of the event that triggers the period; (B) count every hour, including hours during intermediate Saturdays, Sundays and legal holidays; and (C) if the period would end on a Saturday, Sunday or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday or legal holiday.

(3) Inaccessibility of the clerk's office. Unless the court orders otherwise, if the clerk's office is

inaccessible: (A) On the last day for filing under subsection (a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday or legal holiday; or (B) during the last hour for filing under subsection (a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday or legal holiday.

(4) "Last day" defined. Unless a different time is set by a statute, local rule or court order, the last day ends: (A) For electronic or telefacsimile filing, at midnight in the court's time zone; and (B) for filing by other means, when the clerk's office is scheduled to close.

(5) "Next day" defined. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) "Legal holiday" defined. "Legal holiday" means any day declared a holiday by the president of the United States, the congress of the United States or the legislature of this state, or any day observed as a holiday by order of the Kansas supreme court. A half holiday is considered as other days and not as a holiday.

(b) Extending time. (1) In general. When an act may or must be done within a specified time, the court may, for good cause, extend the time: (A) With or without motion or notice if the court acts, or if a request is **made, before the original time or its extension expires**; or (B) on **motion made after the time has expired** if the party failed to act because of **excusable neglect**. (2) Exceptions. A court must not extend the time to act under subsection (b) of K.S.A. 60-250, subsection (b) of K.S.A. 60-252, subsections (b), (e) and (f) of K.S.A. 60-259 and subsection (b) of K.S.A. 60-260, and amendments thereto. (c) Motions, notices of hearing and affidavits or declarations. (1) In general. A written motion and notice of the hearing must be served at least seven days before that time specified for the hearing with the following exceptions: (A) When the motion may be heard ex parte; (B) when these rules set a different time; or (C) when a court order, which a party may, for good cause, apply for ex parte, sets a different time. (2) Supporting affidavit or declaration. Any affidavit or declaration pursuant to K.S.A. 53-601, and amendments thereto, supporting a motion must be served with the motion. Except as otherwise provided in subsection (d) of K.S.A. 60-259, and amendments thereto, any opposing affidavit or declaration must be served at least one day before the hearing, unless the court permits service at another time. (d) Additional time after certain kinds of service by mail. When a party may or must act within a specified time after service and service is ~~by mail~~ made under subsections (b)(2)(C), (D), (E) or (F) of K.S. 60-205, and amendments thereto, three days are added after the period would otherwise expire under subsection (a).

CASE LAW

ALLEN v. KANSAS DEPT. OF REVENUE, 102,134 (Kan. 8-5-2011) 256 P.3d 845

Opinion filed: August 5, 2011.

Wonderly is easily distinguished. Unlike *Wonderly*, field sobriety testing was performed at the scene and the defendant failed one of the tests. Furthermore, the question before the Court of Appeals panel in *Wonderly* arose in an unusual set of circumstances, i.e., when a law enforcement officer transported the defendant back to the station for further testing. Additionally, **Court of Appeals panels have generally distinguished the opinion.** See *State v. Knopp*, No. 102,972, 2010 WL 3853225 (Kan. App. 2010) (unpublished opinion); *State v. Bottenberg*, No. 102,886, 2010 WL 3662825 (Kan. App. 2010) (unpublished opinion), *rev. denied* 291 Kan. ____ (2010); *State v. Bohnen*, No. 101,138, 2010 WL 173953 (Kan. App. 2010) (unpublished opinion). Generally, when a defendant admits to consuming alcohol, has bloodshot eyes, has committed traffic infractions, and makes a few albeit limited errors on field sobriety tests, Kansas courts have concluded that the officer had reasonable grounds to request a breath test. See *Smith*, 291 Kan. at 515, 518-19; *State v. Shaw*, 37 Kan. App. 2d 485, 154 P.3d 524, *rev. denied* 284 Kan. 950 (2007); *Campbell*, 25 Kan. App. 2d at 431-32; *Sullivan*, 15 Kan. App. 2d at 707-08; but see *State v. Pollman*, 41 Kan. App. 2d 20, 32, 204 P.3d 630 (2008) (no probable cause to arrest where there were no physical manifestations of intoxication and no indication of erratic driving).

While we find *Wonderly* to be of little assistance, this case shares several factual similarities with our recently decided *Smith* opinion. In *Smith*, the district court ruled that the arresting officer possessed reasonable grounds to believe Smith had been operating a motor vehicle while DUI, and we affirmed. *Smith*, 291 Kan. at 513, 515. The arresting officer in *Smith* recognized the following clues of intoxication

MARTIN v. KANSAS DEPT. OF REVENUE, 285 Kan. 625 (2008) 176 P.3d 938

PETITIONER STIPULATED DRIVER WAS UNDER THE INFLUENCE AT THE TIME

Martin attempts to persuade us that the issue of whether "reasonable grounds to believe" a driver was under the influence under K.S.A. 8-1020(h)(2)(A) is equivalent to the issue of whether "reasonable suspicion" existed to support the traffic stop. In other words, he asserts, the issue he wished to have decided in the administrative hearing was among those the statute permitted to be pursued there and then.

We are unmoved by this argument. "Reasonable grounds to believe" a driver is under the influence and "reasonable suspicion" sufficient under constitutional law are distinct legal concepts. The first demands consideration of the behavior of a driver before, during, and after he or she is behind the wheel. The relevant time period for determination of "reasonable suspicion," in contrast, ends at the moment the stop is effected. In addition, we observe that K.S.A. 8-1020(h)(2)(A) was enacted in 2001, long after the "reasonable suspicion" standard arose in United States Supreme Court constitutional analysis and long after we employed it in Kansas. See *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968); *State v. Boone*, 220 Kan. 758, 556 P.2d 864 (1976). Because we presume our legislature knows the law in existence at the time of an enactment, see *In re Tax Appeal of American Restaurant Operations*, 264 Kan. 518, 524, 957 P.2d 473 (1998), we consider it significant that it did not choose to mimic the "reasonable suspicion" language from cases when it drafted K.S.A. 8-1020(h)(2)(A). Instead, it

deliberately decided to enunciate a different standard.

In *Kempke*, the driver argued that due process was offended because he was not permitted to call the officer who administered the preliminary breath test as a witness at the administrative license suspension hearing. We disagreed, holding that suspension did not finally take place until after de novo appeal to district court and that the driver's ability to call the officer as a witness on appeal satisfied due process. 281 Kan. at 799-800. In *Cross*, we rebuffed an as-applied due process challenge to the statute limiting witnesses at administrative hearings on driver's license suspensions. 279 Kan. at 513.

In view of the fact that a driver's license is a privilege rather than a right, and in view of our approach in *Kempke*, we hold that the exclusion of Fourth Amendment and § 15 issues from Department decision in administrative suspension hearings under K.S.A. 8-1020(h)(2)(A)-(H) does not violate procedural due process.

GOOD IDEA TO RAISE AT ADMINISTRATIVE LEVEL CONSTITUTIONAL ISSUE BUT ADMINISTRATIVE HEARING OFFICER DOES NOT HAVE THE POWER TO DECIDE SUCH ISSUES.

We find this reasoning persuasive and consequently hold that an officer's mistake of law alone can render a traffic stop violative of the Fourth Amendment and § 15 of the Bill of Rights. Here, Wilson's misunderstanding and misapplication of the ordinance on brake lights took him outside the common sense and ordinary human experience that must be considered by us on a challenge to the existence of reasonable suspicion. Wilson thus lacked constitutional authority to stop Martin, and the district judge was correct to this point of the analysis. Officer thought all three brake lights had to be functioning law states only need two out of three.

In *Tornabene v. Bonine ex rel. Highway Dept.*, 203 Ariz. 326, 333, 54 P.3d 355 (2002), *rev. denied* May 28, 2003, Wendy Lyn Tornabene was stopped by police based on a tip from an anonymous caller. She failed field sobriety tests and refused or unreasonably delayed a breath test. At her administrative license suspension hearing, the administrative law judge ruled against her. She appealed, challenging the reasonableness of the initial traffic stop. The Superior Court vacated the ALJ's order of suspension, implicitly concluding that "reasonable grounds to believe that [a motorist] was driving . . . [w]hile under the influence of intoxicating liquor . . . require [d] a predicate finding that the investigatory stop that ultimately led to those grounds for belief was lawful." 203 Ariz. at 332.

On review, the Arizona Court of Appeals noted its obligation to "decide cases on nonconstitutional grounds if possible," and first addressed whether its statute required the hearing officer to determine whether Tornabene had been legally stopped. 203 Ariz. at 332. Like Kansas, Arizona limits the scope of an administrative license suspension hearing under its implied consent provisions. Such a hearing may decide

"only the issues of whether:'

1. A law enforcement officer had reasonable grounds to believe that the person was driving or was in actual physical control of a motor vehicle in this state either:

(a) While under the influence of intoxicating liquor or drugs.

the *Tornabene* court, "have superimposed on their license suspension statutes a requirement that the underlying stop be lawful, even when the statutes contained no such condition." *Tornabene*, 203 Ariz. at 334; see, e.g., *People v. Krueger*, 208 Ill. App. 3d 897, 906, 567 N.E.2d 717 (1991), cert. denied 503 U.S. 919 (1992) ("[W]e are unwilling to conclude that the legislature intended to authorize the suspension of drivers' licenses based on the fruits of illegal arrests"); *Olson v. Com'r of Public Safety*, 371 N.W.2d 552, 556 (Minn. 1985) (investigatory DUI stops that result in license revocation proceedings must comply with Fourth Amendment

see also *State v. Lussier*, 171 Vt. 19, 28, 757 A.2d 1017 (2000) (relying on Vermont Constitution; state constitution construed more liberally than Fourth Amendment); *Pooler v. MVD*, 306 Or. 47, 51, 755 P.2d 701 (1988) (en banc) (court refuses to "attribute to the legislature the intent to sanction unconstitutional procedures"; suspension of driver's license under implied consent statute must be based on valid arrest; otherwise, resulting evidence must be excluded); *Watford v. Bur. of Motor Vehicles*, 110 Ohio App. 3d 499, 502, 674 N.E.2d 776 (1996) ("a lawful arrest, including a constitutional stop," required before refusal to take test triggers license suspension).