No. 04-92580-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS, PLAINTIFF-APPELLEE,

v.

BILLY D. ANDERSON, DEFENDANT-APPELLANT

APPELLANT'S RESPONSE TO APPELLEE'S PETITION FOR REVIEW

PETITION FOR REVIEW FROM THE COURT OF APPEALS OF THE STATE OF KANSAS
MEMORANDUM OPINION NO. 92,580
DISTRICT COURT CASE NO. 03-CR-1629
DISTRICT COURT OF SEDGWICK COUNTY
HONORABLE DAVID W. KENNEDY, JUDGE

ARIAGNO, KERNS, MANK & WHITE L.L.C.
Philip R. White **KS No. 15867**
212 N. Market, Suite 200
Wichita, Kansas 67202
Telephone: (316) 265-5511
Telecopier: (316) 265-4433
ATTORNEY FOR APPELLANT
BILLY D. ANDERSON

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OBJECTION TO PRAYER FOR REVIEW

COMES NOW Defendant-Appellant Billy D. Anderson ("Anderson"), by and through counsel, Philip R. White, and hereby objects, pursuant to K.S.A. 20-3018(b) and Kan. S.Ct. R. 8.03, to the Petition for Review filed by Plaintiff-Appellee State of Kansas ("State") urging this Court to review and reverse the Kansas Court of Appeals' decision in *State v. Anderson*, __ Kan.App.2d ___, ___ P.3d ___ (No. 92,580, September 16, 2005), reversing his conviction of the offenses of possession of methylenedioxymethamphetamine ("MDMA"), in violation of K.S.A. 65-4163(a), a severity level 3 non person drug felony, and no tax stamp, in violation of K.S.A. 79-5204, a severity level 10 non person felony.

RELEVANT DATES

The Court of Appeals issued its decision on September 16, 2005. The State filed its Petition for Review with the Clerk of the Appellate Courts on October 17, 2005. By operation of K.S.A. 60-206(a) and Kan. S.Ct. R. 8.03(c)(1), Anderson believes this Response is timely if filed on or before October 31, 2005.

ISSUE PRESENTED

Whether the State filed its Petition for Review in good faith.

ARGUMENT

Ultimately, Anderson was arrested without either legal or factual justification, and the State's Petition for Review must be denied.

Any party aggrieved by a decision of the Court of Appeals may petition the Supreme Court for discretionary review. Kan. S.Ct. R. 8.03(a). Among the factors to be considered in determining whether review will be granted are: (1) the general importance of the question presented; (2) the existence of a conflict between the decision sought to be reviewed and a prior decision of the supreme court, or of another panel of the court of appeals; (3) the need for exercising the Supreme Court's supervisory authority; and (4) the final or interlocutory character of the judgment, order or ruling sought to be reviewed. K.S.A. 20-3018(b). The State fails to discuss and apply these factors in its quest to obtain discretionary review.

1. The State knows that Anderson was never prohibited from associating with gang members and, therefore, did not file its Petition for Review in good faith.

Consistently Anderson has complained that the State failed to introduce – nor did the trial court require the prosecution to introduce – any evidence that a prohibition from associating with gang members was in fact a special condition of Anderson's parole.[1] The Court of Appeals agreed, commenting:

> Moreover, as Anderson points out in his brief, there was no evidence presented at the hearing to establish that Anderson had violated a special condition of his parole by associating with gang members. Padron indicated that he had never been informed by a parole officer that Anderson was

[1]The State also failed to establish how Anderson and his passenger were entered into SPIDER as "documented gang members" – including information necessary to determine how the database is compiled, by whom it is compiled, or any other indicia of its contours or reliability, including its breadth or depth. *See State v. Steen*, 28 Kan.App.2d 214, 13 P.3d 922 (2000).

> prohibited from associating or being in contact with gang members as a condition of his parole. Padron further indicated that based upon his experience and training, parolees who were gang members should not be around other gang members. Nevertheless, the State never introduced any evidence establishing that as a special condition of *his* parole, Anderson was prohibited from associating with gang members. As stated earlier, the State has the burden of showing the lawfulness of the search and seizure. Without such information, we are unable to conclude that Anderson did in fact violate a special condition of his parole and that the later arrest and detain order was properly issued.

Anderson, Slip. Op. at 37-38.

After oral argument before the Court of Appeals, Anderson's attorney became aware of the existence of several Kansas Parole Board Certificates of Release issued prior to July 30, 2003, the date Anderson was arrested for violating a special condition to which, as it turns out, he was *never* subject. To bring them to the attention of the Court of Appeals, on August 23, 2005, Anderson attempted to make these documents part of the Record on Appeal, arguing that these Release Certificates constitute exculpatory evidence[2] which, independent of any court order, the State had a positive duty to disclose. *State v. Hill*, 211 Kan. 287, 292, 507 P.2d 342, 348 (1973); *see also* Model Rule of Professional Conduct 3.8, Special Responsibilities of a Prosecutor. Reversal of a conviction is justified if the evidence withheld is clearly and unquestionably exculpatory and the withholding of the evidence is clearly prejudicial to the defendant, particularly where the prosecution deliberately acts in bad faith to obstruct the defense or *intentionally fails to disclose evidence whose highly probative value to the defense could not have escaped the prosecutor's attention*. *Hill, id.*; *State v. Kelly*, 216 Kan. 31, 33, 531 P.2d 60, 62-63 (1975). The Court of Appeals denied

[2]Evidence is exculpatory if it tends to disprove a fact in issue which is material to guilt or punishment or if it bears upon the credibility of a key witness on an important issue in the case. *State v. Kelly*, 216 Kan. 31, 36, 531 P.2d 60, 65 (1975).

Anderson's request, but not before Chief Sedgwick County Appellate Attorney David Lowden filed a response on behalf of the State.

True and correct copies of these virtually-identical Release Certificates, as obtained from the Kansas Department of Corrections, are attached hereto as Appendices "A", "B" and "C" and are incorporated herein by this reference. Their boilerplate provisions contain no reference regarding association with gang members. Appendix "A" governed Anderson's conduct from and after April 24, 2002, and contains the following special conditions:

> I agree to enter and successfully complete structured living as directed by my parole officer.
>
> I agree to abide by any conditions imposed by prior release certificates for my current offense(s).

Appendix "B" governed Anderson's conduct from and after July 11, 2001, and contains the following special conditions:

> I agree to enter and successfully complete structured living.
>
> I agree to comply with any additional conditions as established by my parole officer and any conditions imposed by prior release certificates for my current offense or offenses.
>
> I agree to participate in a substance abuse evaluation and comply with all treatment/aftercare recommendations as directed by my parole officer.

Appendix "C" governed Anderson's conduct from and after April 20, 2000. No special conditions were imposed upon Anderson at that time.

When a statement in an arrest affidavit is false, it matters little whether it was made knowingly and intentionally or, instead, with reckless disregard for the truth. *See McCormick v. Board of County Com'rs of Shawnee County*, 28 Kan.App.2d 744, 750, 24

P.3d 739, 745, *aff'd in part, rev'd in part* 272 Kan. 627, 35 P.3d 815 (2001) (citing *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)). KDOC Special Enforcement Officer Richard Sackhoff lied when he signed the "Order to Arrest and Detain" stating that Anderson had violated a special condition of supervision by being in contact with another gang member when that was not in fact the case. Yet Sackhoff affirmed the accuracy of this statement in sworn testimony before the trial court:

> DEFENSE COUNSEL: Would you have any reason to believe that the contents of that document would be inaccurate?
>
> SACKHOFF: No.

(R. II, 7-8.) This testimony, given in a hearing on a felony charge when Sackhoff apparently never verified Anderson's conditions of parole, constitutes perjury pursuant to K.S.A. 21-3805. On at least three occasions, the trial court remarked that there was probable cause to believe that Anderson was in violation of his parole (R. II, 130, 132-33), seemingly satisfying the materiality requirement as a matter of law. *See State v. Rollins*, 264 Kan. 466, 475, 957 P.2d 438, 444 (1998). Further, neither Wichita Police Officer Eddy Padron nor Assistant Sedgwick County District Attorney Jennifer Hudson acknowledged to the trial court that he or she had never bothered to determine whether in actuality Anderson was subject to the alleged special condition.

On any pleading, an attorney's signature constitutes a certificate that to the best of his knowledge, it is not being presented for any improper purpose, such as to cause unnecessary delay; that the legal contentions asserted are warranted by existing law, a non-frivolous argument for the extension, modification or reversal thereof, or the establishment of new law; *and that the factual contentions have evidentiary support*. K.S.A. 60-211(b). Lowden,

however, has had personal knowledge since late August 2005 that the justification for Anderson's arrest – violation of a certain special condition of parole – had *absolutely no basis in fact*. The State's Petition for Review, filed on the very last day permissible for it to do so, only delays unnecessarily Anderson's release from incarceration in this case and further perpetuates the fraud on the Court created by Sackhoff in violation of Anderson's Constitutional rights. Accordingly, it must be denied.

2. The Court of Appeals correctly determined that strict construction of K.S.A. 75-5217(a) requires a police officer to be in physical possession of a written arrest and detain order before taking a suspected parole violator into custody, and the State lacks the necessary factual support to argue otherwise.

K.S.A. 75-5217(a) implements the holding of the United States Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972), that even though revocation deprives a parolee only of conditional liberty properly dependent on observance of special parole restrictions, not of the absolute liberty to which every citizen is entitled, certain specified minimal due process requirements must be observed:

> [T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege." By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.

Morrissey, 408 U.S. at 482, 92 S.Ct. at 2601. For that reason, K.S.A. 75-5217(a) "*requires* serving the parolee *at the time of arrest* with *written notice* that states the parole violation charges." *Hearst v. State*, 30 Kan.App.2d 1052, 1055, 54 P.3d 518 (2002) (emphasis added). Seemingly, through use of the word "notice," the *Hearst* court chose to *not* to distinguish

between an arrest warrant that might be issued by the Secretary of Corrections and a written arrest and detain order that might be given by a parole officer. Instead, both the court and the Kansas Legislature used the key word "written" signifying the existence of an actual, physical document that must be "given," that is, put from one hand into another's possession before he is authorized with the power to arrest. Further, because violating the conditions of one's parole is not classified as a criminal offense under the Kansas Criminal Code, K.S.A. 21-3101 *et seq.*, a parole violation is not a felony or a misdemeanor, but a civil infraction. *State v. Sullivan*, 17 Kan.App.2d 771, 773, 844 P.2d 741, 743 (1993). Thus, the Court of Appeals correctly concluded that the officers had no authority to arrest Anderson under K.S.A. 75-5217(a) without physical possession of a written arrest and detain order and otherwise lacked probable cause to believe that Anderson had committed a criminal offense justifying a warrantless arrest – which we know now lacked *any* basis in fact. *See Anderson*, Slip. Op. at Syl. ¶ 11.

The State, however, argues that this Court should follow "well-known rules of statutory construction" and the "plain reading" of K.S.A. 75-5217(a) while simultaneously ignoring the word "written." Petition for Review ("Pet. Rev.") at 13-14. It renews its focus on the word "given," thankfully abandoning the analogy the Court of Appeals deemed so "strained." *Anderson*, Slip. Op. at 33. The State also maintains its argument that Anderson enjoyed only "conditional liberty" and urges application of the *Griffin v. Wisconsin*[3] "special needs" doctrine, relying upon *United States v. Delay*, No. 03-40055-01-SAC (D. Kan.

[3] *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987)

2003),[4] regarding the execution of a *previously issued and existing* arrest and detain order, a situation clearly not present here. *Griffin* upheld the constitutionality of a state regulation authorizing probation officers to search a probationer's home without a warrant with only "reasonable grounds" to believe contraband is present; no such similar regulation is at issue here, and to date, this Court has applied *Griffin*'s "special needs" doctrine only to the collection and cataloging of DNA information pursuant to K.S.A. 21-2511. *State v. Martinez*, 276 Kan. 527, 78 P.3d 769 (2003).[5]

3. The State's argument that Anderson's decision to flee police custody was an intervening circumstance to any alleged illegal seizure is absurd and ignores the point that Anderson ran only after officers attempted to arrest him without either legal or factual justification.

The Court of Appeals disposed of the State's argument as follows:

> We do not endorse the State's attempt to bootstrap Anderson's flight from the officers and his action of discarding the drugs into the factors giving the officers probable cause to believe that Anderson was involved in drug activity. As noted in 2 LaFave, Search and Seizure § 3.2(d) (4th ed. 2005), when a warrantless arrest is made, "the information to be considered is the 'totality of facts' available to the officer *at the time of the arrest or search*." (Emphasis added.) Here, Anderson did not flee the scene and discard the drugs until after the officers had attempted to arrest him. Therefore, these factors are not relevant in determining whether the officers had probable cause to arrest Anderson.

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[4]The State has failed again to attach a copy of this unpublished opinion, contrary to the applicable Supreme Court rule. *See* Kan. S.Ct. R. 7.04(f)(2). Moreover, a federal court's construction of a Kansas statute is not binding on Kansas courts. *Central Kansas Power Co. v. State Corp. Commission*, 181 Kan. 817, 830, 316 P.2d 277, 287 (1957).

[5]Previously, this Court found it unnecessary to consider the "special needs" doctrine in deciding the constitutionality of K.S.A. 21-2511. *State v. Maass*, 275 Kan. 328, 64 P.3d 382 (2003).

Anderson, Slip. Op. at 25-26. This holding conforms with long-settled constitutional principles:

> Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed.

Byars v. United States, 273 U.S. 28, 29-30, 47 S.Ct. 248, 248-249, 71 L.Ed. 520 (1927).

The State's alternative argument – that the officers had "a right and duty to arrest" Anderson upon seeing him commit another crime, *i.e.*, resist arrest or obstruct legal process or official duty – is equally preposterous.[6] "Official duty" under K.S.A. 21-3808 is defined in terms of the officer's authority, knowledge, and intent in approaching the defendant, and not the defendant's status. *State v. Hudson*, 261 Kan. 535, 538-39, 931 P.2d 679, 682 (1997) (classification of offense as felony or misdemeanor). The State has cited no case upholding a conviction for obstruction of official duty where, as here, law enforcement had no legal or factual justification to arrest a defendant. Cases holding that a person may not resist arrest by a law enforcement officer, even he believes the arrest is unlawful, refer to the person's perception of his guilt or innocence, not the officer's authority, and are inapplicable. *See State v. Logan*, 8 Kan.App.2d 232, 235, 654 P.2d 492, 495 (1982), *rev. denied* 232 Kan. 876 (1983) (citing *State v. Merrifield*, 180 Kan. 267, 303 P.2d 155 (1956)).[7]

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[6]Anderson used no force, making any discussion of K.S.A. 21-3217 inapplicable.

[7]"When upon thy frame the law — places its majestic paw — tho' in innocence, or guilt — thou art then required to wilt." *State v. Merrifield*, 180 Kan. 267, 271, 303 P.2d 155, 158 (1956) (quoting *State v. Lewis*, 19 Kan. 260, 266 (1877)).

4. The State cannot reorder the facts to fit the outcome it desires and create probable cause for arrest where none, in fact, existed.

The State argues that certain conclusions of the Court of Appeals that the officers' reasonable suspicions that Anderson was involved in drug activity should have lessened after drugs and a large amount of cash were found on Anderson's passenger and a drug dog alerted on Anderson's truck, although a search yielded nothing of evidentiary value, "are contrary to the facts, as recognized, accepted and set forth by the Court in its written opinion." Pet. Rev. at 4-5. It then cites *United States v. Anchondo*, 156 F.3d 1043 (10th Cir. 1998), for the proposition that probable cause to arrest Anderson existed upon the canine alert, even though a search of the truck was fruitless.

In *Anchondo*, the issue was whether the canine alert supplied justification for a pat-down search of the defendant *when none yet had been conducted*. Here, in contrast, and as the Court of Appeals correctly noted, Padron searched Anderson's person *before* the items were found on the passenger, the drug dog sniffed the truck and the subsequent search was unsuccessful. *See Anderson*, Slip. Op. at 11-12. Further, these officers made no attempt to search Anderson again, but instead pursued the goal of arresting Anderson for violating his parole, an objective not legally or factually tenable. Given this chronology, the Court of Appeals correctly applied certain controlling precedents to determine that further detention of Anderson was impermissible. *See United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 109 S. Ct. 1581 (1989); *Ybarra v. Illinois*, 444 U.S. 85, 91, 62 L. Ed. 2d 238, 100 S. Ct. 338 (1979); *Sibron v. New York*, 392 U.S. 40, 62-63, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (1968); *United States v. Di Re*, 332 U.S. 581, 92 L. Ed. 210, 68 S. Ct. 222 (1948).

CONCLUSION

The conditional liberty of a probationer or parolee, like the more complete liberty of others, cannot constitutionally be infringed without probable cause. *State v. Malbrough*, 5 Kan.App.2d 295, 296, 615 P.2d 165, 167 (1980). It does not, as the State advocates, provide law enforcement with *carte blanche* to ignore that liberty to obtain evidence of further crimes. Without actual, physical possession of such a written order – because none was in existence – or probable cause to believe that Anderson had committed a criminal offense justifying a warrantless arrest – which we know now also lacked *any* basis in fact – officers had no power to arrest, much less detain Anderson, and he should have been free to go. Appellee's Petition for Review must be denied.

Respectfully submitted,

ARIAGNO, KERNS, MANK & WHITE L.L.C.

Philip R. White KS No. 15867
212 N. Market, Suite 200
Wichita, Kansas 67202
Telephone: (316) 265-5511
Telecopier: (316) 265-4433
ATTORNEY FOR APPELLANT
BILLY D. ANDERSON

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this ____ day of October, 2005, a true and correct copy of the above and foregoing was mailed, by U.S. Mail, postage pre-paid, to: David Lowden, Chief Attorney, Appellate Division, Sedgwick County District Attorney, 535 N. Main, Wichita, KS 67203; with a courtesy copy to: Phill Kline, Attorney General, 120 S.W. 10th Ave., Topeka, KS 66612-1597.

ATTORNEY FOR APPELLANT

APPENDIX:
Kansas Parole Board Certificate of Release for Billy Anderson dated April 24, 2002

APPENDIX:
Kansas Parole Board Certificate of Release for Billy Anderson dated July 11, 2001

APPENDIX:
Kansas Parole Board Certificate of Release for Billy Anderson dated April 20, 2000