No. 04-92580-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS, PLAINTIFF-APPELLEE,

v.

BILLY D. ANDERSON, DEFENDANT-APPELLANT

REPLY BRIEF OF APPELLANT BILLY D. ANDERSON

APPEAL FROM THE DISTRICT COURT OF SEDGWICK COUNTY
HONORABLE DAVID W. KENNEDY, JOHN J. KISNER, JR.,
AND JAMES D. FLEETWOOD, JUDGES
DISTRICT COURT CASE NO. 03-CR-1629

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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SUPPLEMENTAL STATEMENT OF FACTS

In its Appellee's Brief, the State of Kansas ("State") contends that "Officer Eddy Padron was already working on the case in another car and had attempted to contact an on-duty parole officer at 10:16 p.m." (Appellee's Brief at 4.) The inference that Padron had attempted at that time to contact a parole officer regarding *Defendant* is illogical – nearly twenty (20) minutes elapsed *before* Padron conducted a traffic stop of Defendant and ascertained his identity:

> DEFENSE COUNSEL: And can you and I agree that you stopped [Defendant] at 2234 hours, on July 30th of 2003.
>
> PADRON: Yes.

(R. II, 91.) Further, until SPIDER told him, Padron did not know that Defendant was under supervised release. (R. II, 47.) Officer Elmore did not know Defendant (R. II, 16), thus he could not have passed that information on to Padron who was "in the area but out of sight" (R. II, 60) until Elmore told him to stop Defendant's truck.

Moreover, the State's contention mischaracterizes the evidence presented to the trial court judge and conflicts with his finding that no attempt to contact a parole officer was made until after the drug dog came out and a search of the vehicle discovered no drugs inside:

> THE COURT: It was at that point that the officers began to contact a parole officer to get an arrest and detain order. And they obtained one. The exact timing of that, I'm not sure. Looks – ***from what I've got in front of me***, looks like that probably happened at about 2342 hours on the 30th.

(R. II, 130-31 (emphasis added).) What the trial court had in front of him were Padron's and Officer Naldoza's cell phone records, offered and admitted in the hearing, respectively, as Exhibits B and C. (R. I, 78-79; R. II, 89-91, 93-95, 124-25.) Defense counsel directed Padron's attention to the call he placed at 10:16 p.m. because it was the last call he made before the traffic stop. (R. I, 78; R. II, 89.) In fact, Padron placed this call to his home.[1] Padron placed no further calls until 11:41 p.m. – after Naldoza's phone calls were unsuccessful – when he either dialed a wrong number or got no answer. (R. I, 78; R. II, 94.) At 11:42 p.m., Padron called Sackhoff:

> DEFENSE COUNSEL: Can you and I agree that you did not place or attempt to place a phone call to any type of Kansas parole officer or the Parole Enforcement Unit prior to 2309 hours?
>
> PADRON: No. I think the only call I made to parole officer is the time that you got on the record there, your exhibit.
>
> DEFENSE COUNSEL: Yes.
>
> PADRON: That's the only phone call that I made in reference to trying to contact Mr. Sackhoff.

(R. II, 91.)

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[1]The fact that this call was *not* placed to a parole officer must have been patently obvious to the trial court because it frustrated defense counsel's ability to more fully use this exhibit in Padron's cross-examination:

> THE COURT: He's not gonna read anything. If you're wanting it read out loud, it's not gonna happen. I told you that earlier today.
>
> DEFENSE COUNSEL: I would tender these to the court.
>
> THE COURT: There you go.

(R. II, 90-91.)

Naldoza arrived at the traffic stop at 11:09 p.m. (R. II, 117.) Naldoza agreed that the decision to contact the Kansas Department of Corrections Parole Enforcement to try and obtain an arrest and detain order to violate Defendant's parole was made only after a search of the vehicle turned up nothing. (R. II, 123.) Naldoza tried to call Officer Warren Evans, then called SPIDER, then called two numbers and left two messages, to which he received no response. (R. II, 124.) Naldoza's cell phone records show these calls to have been placed between 11:24 p.m. and 11:31 p.m. (R. I, 79.)

The State's assertion that officers were "[a]rmed with the arrest and detain order" when they approached Defendant on July 30th to arrest him is equally misleading. (Appellee's Brief at 7.) The officers had not received any type of written order to arrest and detain from any parole officer at the time they attempted to arrest Defendant. (R. II, 95.) In fact, no written Order to Arrest and Detain was issued until July 31, 2003.[2] (R. I, 77.) Sackhoff left this document inside the front door of his home for some police officer to stop by and pick up. (R. II, 5.) The State failed to establish whether this Order was delivered with Defendant to the detaining institution as required by law.

[2]Note that the Order to Arrest and Detain technically provides that authority only to the Sedgwick County Sheriff. *Compare* K.S.A. 75-5217 with K.S.A. 22-3716 ("The warrant shall authorize all officers *named in the warrant* to return the defendant to the custody of the court or to any certified detention facility designated by the court.")

REBUTTAL ARGUMENT

Defendant's enjoyment of only "conditional liberty" did not provide law enforcement with the ability to continue to detain him until they obtained enough evidence against him for an arrest; the trial court erred in concluding otherwise, the evidence obtained from a search of Defendant should have been suppressed, and Defendant must be granted a new trial.

The State's argument that the officers' continued detention of Defendant was justified by his enjoyment of only "conditional liberty" is just the sort of "end-justifies-the-means" argument that courts traditionally abhor. Moreover, the State fails to cite any *Kansas* controlling precedent to support its position, and those opinions it does cite are distinguish-able in several respects.

In part, the State relies upon *United States v. Delay*, No. 03-40055-01-SAC (D. Kan. 2003). (Appellee's Brief at 12.) Although the State provided a citation – "2003 U.S. Dist. LEXIS 17978" – Defendant has been unable to find any official citation to the Federal Supplement – "F.Supp.2d" – indicating that, technically, this decision is unpublished. Unpublished memorandum opinions of any court or agency are not binding precedents, except under the doctrines of law of the case, res judicata and collateral estoppel, and are not favored for citation; when cited, they must be attached to any document, pleading, or brief that cites them. Kan. S.Ct. R. 7.04(f)(2). The State failed to do so. 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). Finally, the defendant in *Delay* contested the execution of a *previously issued and existing* arrest and detain order. In contrast, no such order existed when Defendant's illegal detention

began. *See also State v. Mansaw*, 32 Kan.App.2d 1011, 93 P.3d 737 (2004), *aff'd* ___ Kan. ___, ___ P.3d ___ (April 22, 2005).

The State also relies upon *Griffin v. Wisconsin*, 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987), upholding 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. (Appellee's Brief at 12-13.) No such similar regulation is at issue here, and to date, the Kansas Supreme 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).[3]

Despite the State's declaration to the contrary, K.S.A. 75-5217(a) is not a "codification" of "this notion of 'special needs' and 'conditional liberty.'" (Appellee's Brief at 13.) Instead, 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.

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

Morrissey, 408 U.S. at 482, 92 S.Ct. at 2601.

In compliance with *Morrissey*, 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. The trial court simply erred in concluding that oral authorization was sufficient:

> I don't have any problem with an oral and I don't think there's any problem in the law with an oral authorization, that it exists, once it exists for Mr. Sackhoff to give an oral authorization to the officers to arrest and detain.

(R. II, 131.)

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. The State's failure to introduce any evidence that the prohibition from associating or being in contact with gang members was in fact a special condition of Defendant's parole, coupled with its failure to establish how Defendant 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)) – means law enforcement knew nothing supporting even reasonable suspicion that Defendant might have been in violation of his parole. Just as the officer in *Steen* confirmed that he would have stopped any black male who may have happened to be driving or riding in the car in question, these officers admitted to a persistent, calculated and blatant pattern of pretextual stops with the sole goal of obtaining searches the vehicles and persons of customers of the East 21st Street Amoco Food Mart, particularly those wearing red, carrying a paper sack and driving a rented vehicle. (R. II, 11, 16, 24, 28, 30-32, 41, 61.) Without actual, physical possession of such a written order – because none was in existence – officers had no power to arrest, much less detain Defendant, and he should have been free to go.

CONCLUSION

For the foregoing reasons, the Court of Appeals must reverse and remand with instructions to the trial court to suppress the evidence obtained from an illegal search of Defendant's person and grant him a new trial.

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 May, 2005, five (5) true and correct copies of the above and foregoing were mailed, by U.S. Mail, postage pre-paid, to:

Charles L. Rutter
Assistant District Attorney
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:
United States v. Delay,
No. 03-40055-01-SAC
(D. Kan. 2003)