

**REPORT OF THE JUDICIAL COUNCIL  
CRIMINAL LAW ADVISORY COMMITTEE  
ON K.S.A. 65-4142**

November 19, 2008

In June, 2008, Rep. Mike O'Neal, Chair of the House Judiciary Committee, requested that the Judicial Council study the suggestions contained in Shawnee County District Attorney Robert D. Hecht's letter dated 3-31-08 regarding K.S.A. 65-4142. D.A. Hecht had suggested that K.S.A. 65-4142 be amended in order to close the apparent gap in the law as set out by the recent Shawnee County District Court case, *State v. Jose Dominguez-Pena*, filed March 28, 2008. A copy of the letter from D.A. Hecht is attached. (See page 4)

**COMMITTEE MEMBERSHIP**

The members of the Committee taking part in this study are as follows:

1. **Stephen E. Robison, Chair**, Wichita; practicing attorney and member of the Judicial Council.
2. **James W. Clark**, Lawrence; attorney for the Health Care Stabilization Fund.
3. **Edward G. Collister**, Lawrence; practicing attorney.
4. **Jim D. Garner**, Coffeyville; Secretary, Kansas Department of Labor.
5. **Patrick M. Lewis**, Olathe; practicing attorney.
6. **Hon. Michael Malone**, Lawrence; District Judge in the 7<sup>th</sup> Judicial District.
7. **Steven L. Opat**, Junction City; Geary County Attorney.
8. **John M. Settle**, Larned; Pawnee County Attorney.
9. **Ann Swegle**, Wichita; Sedgwick County Deputy District Attorney.
10. **Loren L. Taylor**, Kansas City; Attorney and Police Trainer.
11. **Debra J. Wilson**, Topeka; Appellate Defender's Office.

**BACKGROUND**

In the *State v. Jose Dominguez-Pena* case, Mr. Dominguez-Pena was arrested after a drug dog alerted on his truck and officers subsequently found a large quantity of U.S. currency in a false compartment in the truck's trailer. The state charged Mr. Dominguez-Pena with possession of drug proceeds in violation of K.S.A. 65-4142. Mr. Dominguez-Pena filed a motion to dismiss the case arguing in essence that possessing drug proceeds was not illegal in Kansas unless the proceeds were derived from a violation of the Kansas Uniform Controlled Substance Act (UCSA). A copy of the Shawnee County District Court's memorandum decision and order on Mr. Dominguez-Pena's motion to dismiss is attached. (See page 6) K.S.A. 65-4142, in pertinent part, currently reads as follows:

**“Unlawful acts involving proceeds derived from violations of the uniform controlled substances act; penalties.** (a) It is unlawful for any person knowingly or intentionally to receive or acquire proceeds, or engage in transactions involving proceeds, known to be derived from any violation of the uniform controlled substances act, K.S.A. 65-4101 et seq. and amendments thereto. The provisions of this subsection do not apply to any transaction between an individual and that individual's counsel necessary to preserve that individual's right to representation, as guaranteed by section 10 of the bill of rights of the constitution of the state of Kansas and by the sixth amendment to the United States constitution. This exception does not create any presumption against or prohibition of the right of the state to seek and obtain forfeiture of any proceeds derived from a violation of the uniform controlled substances act and amendments thereto.

(b) It is unlawful for any person knowingly or intentionally to give, sell, transfer, trade, invest, conceal, transport or maintain an interest in or otherwise make available anything of value which that person knows is intended to be used for the purpose of committing or furthering the commission of any violation of the uniform controlled substances act and amendments thereto.

(c) It is unlawful for any person knowingly or intentionally to direct, plan, organize, initiate, finance, manage, supervise or facilitate the transportation or transfer of proceeds known to be derived from any violation of the uniform controlled substances act and amendments thereto.

(d) It is unlawful for any person knowingly or intentionally to conduct a financial transaction involving proceeds derived from a violation of the uniform controlled substances act and amendments thereto when the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the proceeds known to be derived from a violation of the uniform controlled substances act and amendments thereto or to avoid a transaction reporting requirement under state or federal law.” [Emphasis added]

The Court reviewed K.S.A. 65-4142 and acknowledged that there appears to be a gap in the law as a result of the statute requiring that the proceeds relate to a violation or an intended violation of the Kansas Uniform Controlled Substance Act. (See paragraph 2, page 13) The Court held that the State had failed to present sufficient evidence to establish probable cause to believe that Mr. Dominguez-Pena transported the alleged drug proceeds with either the intent to use it to commit a violation of the Kansas UCSA or with the knowledge that the money had been used to violate the Kansas UCSA. Therefore, Mr. Dominguez-Pena’s motion to dismiss was granted. (See page 14)

### **COMMITTEE’S CONCLUSION REGARDING K.S.A. 65-4142**

After review of the statute in question, the *State v. Jose Dominguez-Pena* case and considerable discussion on the issue, the Criminal Law Advisory Committee is in agreement with the District Court’s opinion and interpretation of K.S.A. 65-4142 and recommends the attached amendment to the statute. (See page 3)

65-4142

Chapter 65.--PUBLIC HEALTH

Article 41.--CONTROLLED SUBSTANCES

1       **65-4142. Unlawful acts involving proceeds derived from violations of the uniform**  
2 **controlled substances act; penalties.** (a) It is unlawful for any person knowingly or  
3 intentionally to receive or acquire proceeds, or engage in transactions involving proceeds,  
4 known to be derived from any violation of the uniform controlled substances act, K.S.A. 65-  
5 4101 *et seq.* and amendments thereto, *or any substantially similar offense from another*  
6 *jurisdiction.* The provisions of this subsection do not apply to any transaction between an  
7 individual and that individual's counsel necessary to preserve that individual's right to  
8 representation, as guaranteed by section 10 of the bill of rights of the constitution of the state  
9 of Kansas and by the sixth amendment to the United States constitution. This exception does  
10 not create any presumption against or prohibition of the right of the state to seek and obtain  
11 forfeiture of any proceeds derived from a violation of the uniform controlled substances act  
12 and amendments thereto.

13       (b) It is unlawful for any person knowingly or intentionally to give, sell, transfer, trade,  
14 invest, conceal, transport or maintain an interest in or otherwise make available anything of  
15 value which that person knows is intended to be used for the purpose of committing or  
16 furthering the commission of any violation of the uniform controlled substances act and  
17 amendments thereto, *or any substantially similar offense from another jurisdiction.*

18       (c) It is unlawful for any person knowingly or intentionally to direct, plan, organize,  
19 initiate, finance, manage, supervise or facilitate the transportation or transfer of proceeds  
20 known to be derived from any violation of the uniform controlled substances act and  
21 amendments thereto, *or any substantially similar offense from another jurisdiction.*

22       (d) It is unlawful for any person knowingly or intentionally to conduct a financial  
23 transaction involving proceeds derived from a violation of the uniform controlled substances  
24 act and amendments thereto, *or any substantially similar offense from another jurisdiction,*  
25 when the transaction is designed in whole or in part to conceal or disguise the nature, location,  
26 source, ownership or control of the proceeds known to be derived from a violation of the  
27 uniform controlled substances act and amendments thereto, *or any substantially similar*  
28 *offense from another jurisdiction,* or to avoid a transaction reporting requirement under state  
29 or federal law.

30       (e) (1) A person who violates this section, when the value of the proceeds is less than  
31 \$5,000, is guilty of a drug severity level 4 felony.

32       (2) A person who violates this section, when the value of the proceeds is at least  
33 \$5,000 but less than \$100,000, is guilty of a drug severity level 3 felony.

34       (3) A person who violates this section, when the value of the proceeds is at least  
35 \$100,000 but less than \$500,000, is guilty of a drug severity level 2 felony.

36       (4) A person who violates this section, when the value of the proceeds is \$500,000 or  
37 more, is guilty of a drug severity level 1 felony.

38       (f) This section shall be part of and supplemental to the uniform controlled substances  
39 act, K.S.A. 65-4101 *et seq.* and amendments thereto.

40       **History:** L. 1992, ch. 298, § 84; L. 1993, ch. 291, § 251; L. 1996, ch. 257, § 1; July 1.

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March 31, 2008

Mr. Stephen Morris, Senate President  
Mr. Derek Schmidt, Senate Majority Leader  
Mr. Anthony Hensley, Senate Minority Leader  
Mr. Melvin Neufeld, Speaker of the House  
Mr. Ray Merrick, House Majority Leader  
Mr. Dennis McKinney, House Minority Leader  
Mr. John Vratil, Chairperson, Senate Judiciary Committee  
Mr. Mike O'Neal, Chairperson, House Judiciary Committee

RE: K.S.A. 65-4142 - Possession or Transportation  
of Drug Money

Gentlemen:

It appears there is a gap in the Kansas Controlled Substance Act, which pertains to persons who receive, acquire, or possess proceeds known to be derived from or to be used for the acquisition of illegal drugs. It appears that the drug transaction - i.e. the manufacturing, purchasing, possessing, selling, or distributing of illegal drugs must occur in Kansas and the possession, using, facilitating, or transportation of money from the sale of illegal drugs ~~or to purchase illegal~~ drugs in or through Kansas is not a violation.

It seems that violation of the Uniformed Controlled Substance Act or the laws of another state as to the drugs themselves is not enough; rather it must violate the Kansas Act. In other words, there must be a drug crime in Kansas before we can prosecute for the possession, use, or transportation of money derived from the sale of illegal drugs or to purchase illegal drugs.

Why do we care?

We should care for Kansas is a known geographical area through which large quantities of drugs are transported from Mexico, California and Southwestern United States to Chicago,

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Philadelphia, New Jersey; New York and the Eastern Seaboard and back through which the proceeds of the sales are transported.

Kansas law officers are getting pretty good at detecting, stopping, and securing evidence of the foregoing and confiscating from \$100,000 to 5, 6, \$900,000 in cash, of obvious drug money.

However, as you can see from the attached court decision, we cannot prosecute and may well not be able to cause forfeiture of the money.

Such forfeited money can be a great benefit to Kansas Law Enforcement agencies budgets and a big help in improving their ability to finance improvements within their departments.

Please pass a clarifying amendment to the statutes to the effect that it was and is the intent of the legislature that a violation of the Kansas Controlled Substance Act, or any substantially similar act or provisions of federal law or the law of any other state is sufficient basis for proceeding under either K.S.A. 65-4142(a), (b) or (c) and that if there is a reasonable basis to believe that money or financial instruments are the proceeds of drug activity illegal anywhere or for acquisition of drugs, illegal anywhere, then same is subject to forfeiture. Please succeed in doing so this legislative session.

This can be significant in improving Kansas's safety, minimizing such activity in Kansas, and helping finance improvement in local law enforcement agencies.

Quickly, Kansas will become known as a "safe harbor" for such activity if the statute gap is not closed.

Thank you for your consideration.

Respectfully yours,

OFFICE OF THE DISTRICT ATTORNEY  
THIRD JUDICIAL DISTRICT

BY: 

Robert D. Hecht

District Attorney

RDH/kb

Encl.

FILED BY CLERK  
K.S. DISTRICT COURT  
THIRD JUDICIAL DIST.  
TOPEKA, KS.

2008 MAR 28 AM 8 53

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
DIVISION THIRTEEN

STATE OF KANSAS,

Plaintiff,

v.

JOSE DOMINGUEZ-PENA,

Defendant.

CASE NO. 07-CR-1635

MEMORANDUM DECISION AND ORDER

The above matter is before the Court on Jose Dominguez-Pena's motion to dismiss and the State's motion to amend the complaint. After careful consideration, the Court finds that the State has not presented evidence sufficient to establish probable cause to believe the Defendant has violated K.S.A. 65-4142; therefore, the Court grants the Defendant's motion to dismiss and denies the State's motion to amend the complaint.

FACTUAL BACKGROUND

1. On August 19, 2007, at approximately 3:56 p.m., the Defendant was pulled over by Officer Douglas Schreiner, a Rossville police officer, for speeding on Highway 24.
2. During the stop, the officer initially called for a back officer, called the

Defendant's driver's license number into dispatch, and issued the Defendant a traffic ticket.

3. After issuing the traffic ticket at approximately 4:38, the officer informed the Defendant he was free to go, but the officer then asked the Defendant for consent to search his trailer and requested that dispatch send a drug dog to the scene. The Defendant provided his consent, and the officer searched the trailer. Although the officer did not find anything illegal during the search, the officer further detained the Defendant for a Kansas Highway Patrol trooper to arrive to perform a motor carrier inspection.
4. At approximately 5:15 p.m., the drug dog arrived, and shortly thereafter, the trooper arrived to perform the motor carrier inspection.
5. The drug dog alerted on the Defendant's truck, and the officers searched the truck and trailer, which led to the discovery of a false compartment in the truck trailer that contained a large amount of United States currency. This discovery occurred at approximately 6:40 p.m. As a result of the currency discovered, the Defendant was arrested.
6. On August 23, 2007, the State charged the Defendant with possession of drug proceeds in violation of K.S.A. 65-4142(a), a severity level 1 drug felony. The complaint alleged that the Defendant "receive[d] or acquire[d] proceeds, or engage[d] in transactions involving proceeds, known to be derived from any violation of the uniform controlled substances act, K.S.A. 65-4101 *et seq.* and

amendments thereto, in an amount of \$500,000 or more.” The State also charged the Defendant with speeding in violation of K.S.A. 8-1558.

7. The Court held a preliminary hearing on December 10, 2007. The State presented evidence to suggest that the Defendant carried a load of drugs from Arizona to New York and that the Defendant was then on his way back to Arizona with the cash proceeds from the sale of those drugs when he was stopped in Kansas for speeding. Consistent with this theory, Officer Schreiner testified he did not have any reason to believe that the Defendant sold his alleged load of drugs and received the proceeds while in Kansas. At the conclusion of the evidence, the Defendant moved the Court to dismiss the felony charge based on a failure by the State to establish probable cause to believe the Defendant had violated K.S.A. 65-4142(a). The Court requested that the parties file briefs on the matter.
8. On December 18, 2007, the State filed a motion to amend the complaint. In its motion, the State acknowledged it did not present any evidence at the preliminary hearing to establish that the Defendant engaged in any transactions within the State of Kansas. The State requested permission to file an amended complaint charging possession of drug proceeds in violation of K.S.A. 65-4142(b), or in the alternative, possession of drug proceeds in violation of K.S.A. 65-4142(c).
9. The parties filed briefs as requested by the Court, and the matter is ready for ruling.

## CONCLUSIONS OF LAW

The Defendant contends the evidence presented at the preliminary hearing is insufficient to establish probable cause to believe he violated K.S.A. 65-4142. Therefore, the Defendant requests dismissal of the charge under K.S.A. 65-4142(a) and denial of the State's motion to amend the complaint to charge a violation of either K.S.A. 65-4142(b) or (c).

Under K.S.A. 22-2902(3), a defendant shall be bound over for trial on the charge “[i]f from the evidence it appears that a felony has been committed and there is probable cause to believe that a felony has been committed by the defendant.” The evidence need only prove probable cause, not guilt beyond a reasonable doubt. *State v. Romo-Uriarie*, 33 Kan. App. 2d 22, 26, 97 P.3d 1051, *rev. denied* 278 Kan. 851 (2004).

“Probable cause at a preliminary examination signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. [Citation omitted.] The trial court must draw inferences favorable to the prosecution from the evidence presented at the preliminary examination. [Citation omitted.] The magistrate should not be concerned with the fact that the possibility of conviction is remote or virtually nonexistent. [Citation omitted.] Where the evidence tends to disclose that the offense charged was committed and the defendant committed it, the question is one for the jury to decide, even though the evidence is weak. [Citation omitted.]” [Citation omitted.]” 33 Kan. App. 2d at 27.

Probable Cause to Support Charge under Subsection (a)

K.S.A. 65-4142(a) prohibits knowingly or intentionally receiving or acquiring proceeds, or engaging in transactions involving proceeds, "known to be derived from any violation of the uniform controlled substances act, K.S.A. 65-4101 *et seq.* and amendments thereto." A violation of K.S.A. 65-4142(a) requires that proceeds *first be derived by one other than the defendant* from a violation of the Kansas Uniform Controlled Substances Act (UCSA) and that the defendant receive or acquire the proceeds in a subsequent transaction. *State v. McGrew*, 29 Kan. App. 2d 1051, 1054, 36 P.3d 334 (2001), *aff'd* 51 P.3d 468 (Kan. 2002), *cert. denied* 537 U.S. 1058 (2002).

Here, the State concedes it presented no evidence that the Defendant engaged in a transaction involving the alleged drug proceeds while in Kansas. As a result, the State seeks to amend the complaint to charge the Defendant with a violation of subsection (b) of the statute, or in the alternative, with a violation of subsection (c) of the statute. The Court agrees the State did not present evidence sufficient to establish probable cause to believe the Defendant violated subsection (a) based on the rule announced in *McGrew*. Therefore, the charge against the Defendant under K.S.A. 65-4142(a) is dismissed.

Probable Cause to Support Charge under Subsections (b) or (c)

K.S.A. 65-4142(b) prohibits knowingly or intentionally transporting anything of value that the "person knows is intended to be used for the purpose of committing or furthering the commission of any violation of the uniform controlled substances act and amendments thereto." K.S.A. 65-4142(c) prohibits knowingly or intentionally directing,

planning, organizing, initiating, financing, managing, supervising, or facilitating "the transportation or transfer of proceeds known to be derived from any violation of the uniform controlled substances act and amendments thereto."

The rule from *McGrew* is not applicable in the context of K.S.A. 65-4142(b) and (c). A defendant who transports money he or she knows is intended to be used for the purpose of committing a violation of the Kansas UCSA has violated K.S.A. 65-4142(b). For example, a defendant violates subsection (b) of the statute by driving money to his drug source while intending to buy drugs. A defendant who transports proceeds known to be derived from a violation of the Kansas UCSA has violated K.S.A. 65-4142(c). For example, a defendant violates subsection (c) of the statute by selling drugs to a buyer and then transporting the proceeds to a third party. *Romo-Urriarie*, 33 Kan. App. 2d at 35.

The Defendant argues the language of K.S.A. 65-4142 creates a requirement that the alleged drug proceeds relate to a violation or an intended violation of the Kansas UCSA. The State argues the legislature could not have intended subsections (b) and (c) to require that the alleged drug proceeds relate to a violation or an intended violation of the Kansas UCSA because other provisions of the Kansas UCSA already proscribe possessing and selling drugs in Kansas. More precisely, the State asserts that because a defendant cannot be convicted of selling a controlled substance and the possession of proceeds, subsections (b) and (c) would be useless if the alleged drug proceeds must relate to a violation or an intended violation of the Kansas UCSA for a conviction under subsections (b) or (c).

The Court does not find the State's argument persuasive. K.S.A. 65-4142 plainly includes language referencing a violation of the Kansas UCSA. Under subsection (b), the money being transported must be intended for use in the commission of a violation of the Kansas UCSA; under subsection (c), the money being transported must have been derived from a violation of the Kansas UCSA.

Moreover, the conduct proscribed by K.S.A. 65-4142(b) is the transportation of money intended to be used in the future to commit a violation of the Kansas UCSA. This conduct is separate and apart from the possession or the selling of drugs that is proscribed by other sections of the Kansas UCSA. The conduct prohibited by K.S.A. 65-4142(c) is the transportation of money derived from a past violation of the Kansas UCSA. Here again, the transportation of the money is separate and apart from the drug transaction, and by transporting the money, the defendant has committed an additional crime separate from the crime committed during the drug sale that is prohibited by other sections of the Kansas UCSA. *Romo-Uriarie*, 33 Kan. App. 2d at 35. Therefore, requiring that the alleged drug proceeds relate to a violation or an intended violation of the Kansas UCSA does not render the subsections useless.

The State asserted at the preliminary hearing that *Romo-Uriarie* directly addressed the issue presently before the Court and found, based solely on a drug dog's alert, that probable cause existed to believe the Defendant had violated K.S.A. 65-4142. The Court has reviewed *Romo-Uriarie* at length and does not believe that our Court of Appeals considered the particular argument now in front of the Court. The *Romo-Uriarie* court

primarily considered whether the *McGrew* rule applied to subsections (b) and (c) of K.S.A. 65-4142. Because it does not appear the present argument was raised in *Romo-Urriarje*, the appellate court did not have the opportunity to address it in that case.

Based on the language of the statute, the Court determines K.S.A. 65-4142(b) and (c) require that a defendant either transported the alleged drug proceeds with the intent to use the money to commit a violation of the Kansas UCSA or with the knowledge that the money had been used to violate the Kansas UCSA. Without the proceeds originating from a violation of the Kansas UCSA or being intended to be used to violate the Kansas UCSA in the future, mere transportation of alleged drug proceeds does not violate current Kansas law.

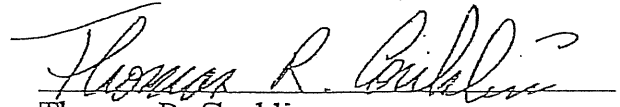
The Court acknowledges, as the Defendant notes, that there appears to be a gap in the law as a result of the statute requiring that the proceeds relate to a violation or an intended violation of the Kansas UCSA. Nonetheless, it is not the Court's place to close this gap; rather, it is the duty of the legislature to amend the statute if it sees fit. The Court has reviewed the Utah cases cited by the Defendant and notes that in those cases, the Utah Supreme Court similarly interpreted the forfeiture statute in effect at the time in Utah to require that the seized money had been used or had been intended to be used to violate the Utah Controlled Substances Act. *State v. One 1984 Oldsmobile and One Hundred Eighty-Nine Thousand Eight Hundred Seventy Dollars in United States Currency*, 892 P.2d 1042 (Utah 1995); *In re One Hundred Two Thousand Dollars in U.S. Currency*, 823 P.2d 468 (Utah 1992).

Here, the State failed to present evidence sufficient to establish probable cause to believe the Defendant transported the alleged drug proceeds either with the intent to use the money to commit a violation of the Kansas UCSA or with the knowledge that the money had been used to violate the Kansas UCSA. As a result, the State's motion to amend the complaint to charge a violation of K.S.A. 65-4142(b), or in the alternative, a violation of K.S.A. 65-4142(c) is denied.

### CONCLUSION

For the foregoing reasons, Dominguez-Pena's motion to dismiss is granted and the State's motion to amend the complaint is denied. This Memorandum Decision and Order shall serve as the journal entry of judgment. No further journal entry is required.

Dated this 27<sup>th</sup> day of March, 2008.

  
Thomas R. Conklin  
District Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing MEMORANDUM  
DECISION AND ORDER was mailed, hand delivered, or placed in a pick-up bin this  
\_\_\_\_ day of \_\_\_\_\_, 2008, to the following:

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