**Case No. 109124**

---

**IN THE COURT OF APPEALS OF THE STATE OF KANSAS**

---

**STATE OF KANSAS,**

**Plaintiff / Appellee,**

**v.**

**RANDALL CAPONE,**

**Defendant / Appellant.**

---

**Appeal from the District Court of Johnson County**
**Honorable Thomas H. Bornholdt, District Judge**
**District Court Case No. 2011-CR-849**

---

# REPLY BRIEF OF THE APPELLANT

---


**JEREMIAH KIDWELL**
**Kansas Supreme Court No. 21540**
***Kidwell & Conkright***
**1111 Main Street**
**7th Floor, Harzfeld's Building**
**Kansas City, Missouri 64105**
**Telephone: (816) 474-3000**
**Facsimile: (816) 474-5533**
**jkidwell@kidwell-conkright.com**

**JONATHAN STERNBERG, Kan. #25902**
***Jonathan Sternberg, Attorney, P.C.***
**2345 Grand Boulevard, Suite 675**
**Kansas City, Missouri 64108**
**Telephone: (816) 753-0800**
**Facsimile: (877) 684-5717**
**jonathan@sternberg-law.com**

**COUNSEL FOR APPELLANT**
**RANDALL CAPONE**


**ORAL ARGUMENT REQUESTED**

## Table of Contents

## Reply as to Third Issue

In the third issue in his opening brief, Appellant Randall Capone explained how there was insufficient evidence to prove beyond a reasonable doubt the element of his charge of driving under the influence of alcohol (DUI) that he operated or attempted to operate a motor vehicle (Brief of the Appellant ("Aplt. Br.") 24-31).

As Mr. Capone explained, the law of Kansas is that inferences based on inferences are insufficient to sustain the State's burden of proof as to an element of a criminal offense (Aplt. Br. 28-29). In this case, the only evidence the State offered to prove Mr. Capone operated his truck was the testimony of two people who said they saw Mr. Capone from afar enter the driver's side of the truck and then saw the truck drive off but could not specifically say they saw him drive the truck (Record Volume VI, pp. 84-86, 100-01, 110; Aplt. Br. 27-28). As Mr. Capone showed, however, given his undisputedly extreme level of intoxication and the lack of any keys to operate the truck, turning the evidence of "Mr. Capone entered the truck and the truck drove off" into "Mr. Capone drove the truck" requires a series of inferences based on each other that lack independent proof, and thus are legally insufficient (Aplt. Br. 28-30).

As Mr. Capone further showed, for this reason, every reported Kansas opinion for dealing purely with the "operating" element of DUI involved the keys found either in the vehicle's ignition or on the defendant, with the defendant alone (Aplt. Br. 30-31). Conversely, in this case, the law of Kansas does not allow for the State's inferences based on inferences to constitute sufficient proof that Mr. Capone operated the truck (Aplt. Br. 30-31).

In its short, three-page response to Mr. Capone's third issue, the State ignores the inference-based-on-inference law and most of Mr. Capone's argument entirely (Brief of the Appellee ("Aple. Br.") 17-19). Instead, it argues that the jury rejected the testimony of Mr. Capone's witness, Brett Roberts, and thus there was sufficient evidence to prove beyond a reasonable doubt that Mr. Capone operated the truck (Aple. Br. 18-19). It argues "there was a plethora of circumstantial evidence to support [the] conclusion" that he drove the truck (Aple. Br. 17). It says this "plethora" was that the two witnesses testified they saw Mr. Capone enter the truck and then saw the truck drive off (Aple. Br. 17).

But Mr. Capone already explained in his opening brief how the law of Kansas is that "Mr. Capone entered the truck and the truck later drove off" does not automatically equal "Mr. Capone drove the truck" (Aplt. Br. 29-31). The State does not respond to this at all, nor does it respond to any of the law Mr. Capone cited.

As Mr. Capone already explained, *even disregarding Mr. Roberts' testimony*, as the State correctly asserts the jury was entitled to do and must have done, to infer from Mr. Capone entering the truck and the truck driving off that Mr. Capone, himself, actually drove the truck, it would require *all* the additional inferences that (1) Mr. Capone possessed the physical capacity to drive, (2) Mr. Capone possessed the instrumentalities necessary to drive (i.e. the keys to the truck), (3) Mr. Capone sat in the driver's seat, and (4) no one else drove the truck (Aplt. Br. 29-31). The State offered no direct evidence to support any of these additional inferences, and thus even if one or more of them were separately inferable from the evidence the State did introduce (i.e. the eyewitness testimony), the overall inference the State seeks to draw still constitutes an impermissible

inference based on inferences that the law of Kansas does not allow to be sufficient to prove the "operating" element beyond a reasonable doubt.

Indeed, the State's own evidence patently *disproved* at least two of these other, necessary inferences. Mr. Capone explained this in his opening brief (Aplt. Br. 25, 29-31), but the State does not respond to it. First, it was undisputed that Mr. Capone was *extremely* intoxicated. The bartender testified his level of intoxication caused her to refuse to serve him any more liquor (R. VI 84, 96-97). As soon as Mr. Capone entered the QuikTrip, the clerk observed him stumble about, eat out of a drip tray, fall into a rack, and finally lie on the floor in a pool of chili, as well as that he could barely walk and could not talk (R. VI 115-16, 128-29). Additionally, the arresting officer himself testified (and his dashcam and booking videos conclusively showed) Mr. Capone was unable to speak coherently or do anything but moan, could neither stand nor walk, had trouble even sitting up, and generally could do nothing but vomit or sleep (R. III 12; R. VI 128, 129, 139; R. IX Ex. 7, Ex. 10).

The undisputedly exceptional level of Mr. Capone's intoxication and its readily apparent physical effects on him belie the inference that he had the physical wherewithal to drive at all, which is necessary to reach the circumstantial conclusion the State advances in its brief that Mr. Capone drove the truck (Aplt. Br. 27). The State offered no evidence that Mr. Capone possessed the physical ability to drive. The only evidence it introduced was that of his tremendous intoxication, the only reasonable inference from which is that, if he did not have the ability to sit, stand, walk, or talk (or do anything but vomit or sleep), he certainly could not have had the ability not only to turn on his truck, but also (a) pull it out of a parking space in a packed strip mall lot without hitting any

other cars (R. VI 101), (b) drive down the parking lot lane and turn left at the L-shaped turn in the lot, the only way to get to the QuikTrip (R. VI 86, 88; R. VIII Ex. A) (c) turn left into the QuikTrip's lot (R. VIII Ex. A), and, finally, (d) park the truck perfectly in a parking spot in front of the QuikTrip (R. VI 128; R. IX Exs. 1-6).

Second, it was undisputed that no keys to the truck ever were found. This belies the inference that Mr. Capone possessed the instrumentalities necessary to start and operate the vehicle, which equally is required to reach the circumstantial inference the State advances in its brief that Mr. Capone drove the truck (Aple. Br. 28). The State, *sub silentio*, advances a separate circumstantial inference that Mr. Capone did have the keys but that they later disappeared, although the State offered no evidence for this. The only evidence at trial was that it was undisputed no keys ever were found. The keys were nowhere in the truck, on Mr. Capone, or at the QuikTrip (R. III 16; R. VI 140). The police never found them, be it on Mr. Capone's person during a search, in the QuikTrip store, in the QuikTrip parking lot, or anywhere else (R. III 16; R. VI 140).

In his opening brief, Mr. Capone showed that the presence of keys is crucial to establishing a circumstantial case of the "operating" element of DUI (Aplt. Br. 30-31). A person cannot drive a vehicle without first possessing its keys. As a result, in every previous reported Kansas case affirming a DUI conviction based on circumstantial evidence of the "operating" element, the keys were found either in the ignition or on the defendant, with the defendant alone (Aplt. Br. 30-31) (citing *State v. Stevens*, 285 Kan. 207, 316-17, 172 P.3d 570 (2007); *State v. Suter*, 296 Kan. 137, 290 P.3d 620, 629 (2012); *State v. Adame*, 45 Kan.App.2d 1124, 1128-29, 257 P.3d 1266 (2011); *State v.*

*Riedl*, 15 Kan.App.2d 326, 327, 807 P.2d 697 (1991); *State v. Sanchez*, 48 Kan.App.2d 608, 611-12, 296 P.3d 1133 (2013)).

The State addresses none of this in its brief. But it cannot escape the plain fact that the overall circumstantial inference it advances requires other circumstantial inferences in order to reach it, which the law of Kansas does not allow. To operate a vehicle, a person must: (1) enter the vehicle, (2) sit in the driver's seat, (3) possess the physical ability to drive, (4) possess the keys to the vehicle, (5) turn on the vehicle, and (6) the vehicle must move. In this case, the State proved via eyewitness testimony steps (1) and (6): that Mr. Capone entered the vehicle and the vehicle moved. That Mr. Capone *made* the vehicle move is a possible circumstantial inference from those two steps only if the other, intermediate steps also are established. As to steps (2) and (5), there is no evidence whatsoever, and they, too, only can be additional circumstantial inferences. As to steps (3) and (4), the undisputed evidence only was that Mr. Capone *did not* have the physical capability to drive and *did not* possess the keys to the vehicle.

Thus, even disregarding Mr. Roberts's testimony entirely, the State is left with proving its inference that Mr. Capone drove via other inferences that either the evidence did not directly establish or that the evidence disproved. The State's attempted circumstantial conclusion requires speculative inferences (that Mr. Capone drove the car) based on other speculative inferences (that Mr. Capone sat in the driver's seat, possessed the physical ability to drive, possessed the keys to the truck, and turned on the vehicle). \

But the law of Kansas maintains a strict "rule against basing an inference on an inference …." *State v. Cruz*, 15 Kan.App.2d 476, 491, 809 P.2d 1233 (1991) (citation omitted). It is "reversible error to allow the jury to speculate on unjustifiable inferences."

*Id.* at 490. Rather, "Guilt may never be based on inference alone. Presumptions and inferences may be drawn from facts established, but presumption may not rest upon presumption or inference on inference." *Id.* Mr. Capone explained all of this in his opening brief (Aplt. Br. 28-30), but the State does not address any of it at all.

Disregarding Brett Roberts's testimony entirely and wholly independent thereof, the State still simply did not meet its burden to prove beyond a reasonable doubt that Mr. Capone committed the "operating" element of DUI. The law of Kansas is that the eyewitness testimony merely that (1) Mr. Capone entered the truck and (2) the truck later moved, standing alone, is insufficient proof of this element.

The Court should reverse the trial court's judgment of conviction and sentence against Mr. Capone for the DUI charge.

## Reply as to First and Second Issues

### A. Introduction

As the State recognizes by addressing them together (Aple. Br. 4-15), the first and second issues in Mr. Capone's opening brief are related.

In the first issue, Mr. Capone explained how the trial court erred in finding probable cause to suspect him of felony DUI, because the version of K.S.A. § 8-1567 in effect at the time of his preliminary hearing limited the trial court's "look-back" period for prior DUI convictions only to those from *after* July 1, 2001, and the only evidence the State introduced at the preliminary hearing of Mr. Capone's prior offenses were offenses from *before* July 1, 2001 (Aplt. Br. 13-18). In the second issue, Mr. Capone explained how the trial court erred in sentencing him for DUI as a third-time felony, as the procedural prescriptions of the version of § 8-1567 in effect at the time of sentencing limited the trial court to finding prior DUI convictions from after July 1, 2001, and the only evidence of Mr. Capone's prior convictions introduced at the sentencing hearing also were from before July 1, 2001 (Aplt. Br. 19-23).

The State responds to the first issue by arguing Mr. Capone waived it by not moving to dismiss the case after his preliminary hearing (Aple. Br. 5). Thereafter, it responds to both issues by stating that the Legislature's change in § 8-1567, before any aspect of Mr. Capone's case began except the initial DUI charge was substantive, rather than procedural, and applies prospectively rather than retrospective (Aple. Br. 11-15).

The State's arguments are without merit. First, Mr. Capone timely moved for arrest of judgment as to the preliminary hearing, preserving the trial court's error, as the trial court itself expressly held. Second, while the State is correct that substantive

changes in laws apply prospectively and procedural changes apply retroactively, the change in § 8-1567 was manifestly procedural. It did not change the elements of DUI, its categorization, or its range of punishment. Rather, it merely changed the steps necessary for the trial court to find whether one is a first, second, third, fourth, or subsequent DUI offender for both preliminary hearing and sentencing purposes. The law of Kansas was that, especially as to Mr. Capone, this was a procedural change, not substantive.

**B. Mr. Capone's first issue is preserved for appellate review.**

Initially, the State briefly argues Mr. Capone waived his first issue by not moving to dismiss his case after the preliminary hearing (Aple. Br. 5) (citing *State v. Washington*, 293 Kan. 732, 734, 268 P.3d 475 (2012)). While the State is correct that, generally, the sufficiency of a preliminary examination should be challenged by a motion to dismiss thereafter, the law of Kansas is that a motion in arrest of judgment accomplishes the same end and equally preserves the error.

K.S.A. § 22-3502 provides, in relevant part, "The court on motion of a defendant shall arrest judgment … if the court was without jurisdiction of the crime charged." "[T]he granting of a motion for arrest of judgment does not operate as an acquittal of the charges made; it only places the defendant in the situation in which he was before the prosecution was begun," essentially dismissing the charges against him. *State v. Crozier*, 225 Kan. 120, 123, 587 P.2d 331 (1978).

This is the same outcome as that under K.S.A. § 22-2902(3) when evidence at a preliminary hearing is insufficient to show either that a crime has been committed or that the accused committed the crime. That is, the defendant is not acquitted, but rather is discharged from custody. *State v. Valladarez*, 288 Kan. 671, 677, 206 P.3d 879 (2009).

As the State points out (Aple. Br. 5), ordinarily, the "sufficiency of a preliminary examination may be challenged only by a motion to dismiss filed in the district court" after the examination. *Washington*, 293 Kan. at 734. But the lack of evidence sufficient to prove probable cause at a preliminary hearing also is jurisdictional: "Without" such a showing, "the trial court would lack the jurisdiction to try the defendant," but only would have "jurisdiction to conduct a preliminary hearing …" *State v. Seems*, 277 Kan. 303, 305, 84 P.3d 606 (2004).

For this reason – that the standards and outcomes are the same – the sufficiency of a preliminary examination also may be (and has been) challenged in a motion for arrest of judgment. *State v. Howland*, 153 Kan. 352, 355-56, 110 P.2d 801 (1941). And that is precisely what Mr. Capone did in this case. He filed a timely motion in arrest of judgment, reasserting his claims raised at the preliminary hearing that the trial court lacked jurisdiction to hear the felony claims against him because the only previous DUI convictions the State introduced at the preliminary hearing occurred before July 1, 2001 (R. VII 54). Indeed, as a result, the trial court itself expressly held in person at Mr. Capone's sentencing hearing that he had raised and preserved this issue for appeal (R. VII 10-11).

The State's suggestion that Mr. Capone the sufficiency of his preliminary hearing is without basis in fact or law. He timely raised and preserved it in his motion for arrest of judgment, which accomplished the same end as if he had filed a motion to dismiss. *Howland*, 153 Kan. at 355-56.

### C. As to Mr. Capone, the July 2011 change in § 8-1567 was procedural, not substantive, and the trial court erred in failing to apply it to this case both in binding Mr. Capone over and in sentencing him.

The remainder of the State's argument is that the Legislature's July 2011 change in § 8-1567 limiting the trial court's statutorily prescribed "look-back" period for prior DUI offenses to those that occurred after July 1, 2001, was a substantive change in the law, not procedural, and thus was only prospectively applicable, not retrospective (Aple. Br. 11-15).

The State is correct that the court's errors in binding Mr. Capone over and sentencing him required that the July 2011 change in § 8-1567 "appl[y] retroactively" to Mr. Capone's February 2011 DUI charge (Aple. Br. 6-7). The State also is correct that changes in "[l]aws are applied retroactively if the change does not prejudice the substantive rights of the parties as it is only a procedural or remedial rule," and a change "is procedural when it regulates the steps to be taken in determining whether a person violated a criminal statute," whereas it "is substantive when it contains rules which define what types of acts are punishable and then proscribes [*sic*] punishment for those acts" (Aple. Br. 11) (citing *State v. Sutherland*, 248 Kan. 96, 106, 804 P.2d 970 (1991); *State v. Sylva*, 248 Kan. 118, 119, 804 P.2d 967 (1991)).

As Mr. Capone explained in his opening brief, however, echoing those same standards, as to the circumstances of this case the change effected to § 8-1567 in July 2011 manifestly was procedural, not substantive, and this is especially true given the "rule of lenity" that criminal statutes always must be construed strictly in favor of the accused (Aplt. Br. 15-18, 21-23). This is because, demonstrably, the change in § 8-1567 did not change either the elements of DUI or its punishment range (Aplt. Br. 15-18, 21-

23). Instead, it merely changed the steps involved in determining whether the statute was violated and what the appropriate sentence should be (Aplt. Br. 15-18, 21-23). Whereas, previously, the trial court in binding over or sentencing a defendant could take into account any previous DUI conviction, after the July 2011 change its purview was limited only to those convictions from after July 1, 2011, as to both the evidence necessary at the preliminary hearing and what the trial court could look to in determining the sentence (Aplt. Br. 15-18, 21-23).

The changes obviously *did not* affect "the substantive rights of the parties" (Aple. Br. 11). The State does not even attempt to identify any substantive rights that were changed. Rather, the changes merely "regulat[ed] the steps to be taken in determining whether a person violated a criminal statute" (Aple. Br. 11). Unlike *State v. Williams*, 291 Kan. 554, 557, 244 P.3d 667 (2010), to which the State attempts to analogize this case (Aple. Br. 12), and in which the statute at issue expressly changed the actual punishment of the crimes at issue (from person to non-person felonies) with no regulation of any steps to be taken, here the elements *and* punishment range remain the same – only the steps in determining those elements and the punishment were changed.

For, in the preliminary hearing, while previously the State would have to show two any prior convictions to bind over a defendant, after July 2011 those convictions are limited, as in a change to a statute of limitations (Aplt. Br. 16-17). In the sentencing phase, the change merely affected the obviously procedural role of the trial court in "tak[ing] into account" only previous convictions "occurring on or after July 1, 2001" in "determining the sentence to be imposed for a first, second, third, fourth, or subsequent offender" under the section (Aplt. Br. 20) (quoting § 8-1567(j)(3)). In both instances, the

change "only affected the steps by which one is punished and," thus, "was procedural" (Aple. Br. 13).

Largely, the State does not address any of this. Instead, it argues Mr. "Capone might invite the court to adopt a rule that would only consider things that are elements of the crime or directly change sentencing penalties to be substantive, but things that affect those sentencing penalties to be procedural" (Aple. Br. 14). But he does not have to do so, as this already is the law of Kansas. For, as the State acknowledges, a change in a law "is substantive when it contains rules which define what types of acts are punishable and then pr[e]scribes punishment for those acts," while it is procedural when it "is procedural when it regulates the steps to be taken in determining whether a person violated a criminal statute" (Aple. Br. 11). The change at issue in this case merely affects *how* the trial court goes about determining probable cause at a DUI preliminary hearing or sentences a DUI offender. It does not affect *what* the two elements of DUI are or what the overall punishment range for it is. The State's attempt to play word games cannot overcome this.

Finally, the State briefly cites two "recent cases," *State v. Reese*, 48 Kan.App.2d 87, 91, 283 P.3d 233 (2012), and *State v. Messer*, 49 Kan.App.2d ___, Syl. ¶ 2, 307 P.3d 255 (2013) (Aple. Br. 14-15). Mr. Capone already distinguished *Reese* in detail (Aplt. Br. 16, 17-18), to which the State does not respond at all. Additionally, *Reese* still is pending the Supreme Court's decision on the petition for review filed in that case on September 4, 2012. *See* Docket in Case No. 106703 (Kan. App.). And *Messer* does not help the State, either. Similarly to *Reese* (but unlike in this case), the defendant in *Messer* already had been both charged and bound over *before* the July 2011 change in §

8-1567 took effect. 307 P.3d at 256. As well, the Court in *Messer* expressly noted that the six unpublished cases it cited (and to which the State refers (Aple. Br. 15)) all also are pending petitions for review to the Supreme Court. *Id.* at 260-61.[1]

The State's arguments are without merit. As to the circumstances of this case, the July 2011 change to the "look-back" provisions of § 8-1567 is procedural, not substantive. The trial court thus erred in failing to apply that change to the post-July 2011 preliminary hearing and sentencing in this case. This Court either should reverse the trial court's judgment of conviction and sentence against Mr. Capone for the DUI charge or should reverse the district court's sentence against Mr. Capone on the DUI charge and remand this case with instructions to resentence the DUI charge as a misdemeanor.

[1] Given the length of time the petition in *Reese* has been pending – over a year – and the surfeit of all these additional, subsequent petitions still pending, it seems likely that the Supreme Court is readying itself to grant review of this issue. This Court may want to wait to decide this case until the petitions in *Reese* and its progeny are decided or, alternatively, simply transfer this case to the Supreme Court under Rule 8.01(a).

## Conclusion

The Court should reverse the trial court's judgment of conviction and sentence against Mr. Capone for the DUI charge. Alternatively, the Court should reverse the district court's sentence against Mr. Capone on the DUI charge and should remand this case with instructions to resentence the DUI charge as a misdemeanor.

Respectfully submitted,

*Jonathan Sternberg, Attorney, P.C.*

by_____

Jonathan Sternberg, Kan. # 25902
2345 Grand Boulevard, Suite 675
Kansas City, Missouri 64108
Telephone: (816) 753-0800
Facsimile: (877) 684-5717
E-mail: jonathan@sternberg-law.com

KIDWELL & CONKRIGHT

by Jeremiah Kidwell
Kansas Supreme Court No. 21540
1111 Main Street
7th Floor, Harzfeld's Building
Kansas City, Missouri 64105
Telephone: (816) 474-3000
Facsimile: (816) 474-5533
E-mail: jkidwell@kidwell-conkright.com

COUNSEL FOR APPELLANT
RANDALL CAPONE

## Certificate of Service

I hereby certify that, on September 26, 2013, I mailed two true and accurate copies of this Reply Brief of the Appellant to each of the following:

Mr. Shawn E. Minihan,
Assistant District Attorney
Johnson County Courthouse
P.O. Box 728
Olathe, Kansas 66051-0728
Telephone: (913) 715-3124
Facsimile: (913) 715-3050

Counsel for Appellee
State of Kansas

The Hon. Derek Schmidt,
Kansas Attorney General
Memorial Hall, 2nd Floor
120 SW 10th Street
Topeka, Kansas 66612
Telephone: (785) 296-2215
Facsimile: (785) 296-6296

Counsel for Appellee
State of Kansas

_____

Attorney