



DUI NEWS

What's Your DUIOSOPHY

(Pronounced: deweyosopohy)

PUBLISHER:

Tom Kimball, A.D.A.

LAYOUT AND DESIGN:

Sherri McCloud

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TN DISTRICT ATTORNEYS
GENERAL CONFERENCE,
James W. Kirby, Exec. Director
226 Capitol Blvd. Bldg, Ste 800
Nashville, TN 37243
DUI Training Division
DUI Office: (615)253-6734
DUI Fax: (615) 253-6735
e-mail: tkimball@tndagc.com
web: www.tndagc.com

Governor's Highway Safety Office

James K. Polk Office Bldg
505 Deaderick Street, Ste 1800
Nashville, Tn. 37243
Office: 615-741-2589
web-site: www.tdot.state.tn.us/

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Victory! That's what an officer at a recent seminar called a DUI arrest. The explanation was simple. If the impaired driver is stopped before he clobbers a family, there is a victory.

Think about the impact of a drunk driver's collision with a tree. Even if alone, there are severe consequences for all of us. Who pays for his medical recovery? Are you tired of TennCare increases that result in pay decreases? Many recidivist impaired drivers are TennCare recipients. Who pays to raise the surviving children when the tree impact is fatal? Who helps the widow? Who provides moral guidance in the fatherless environment to aid the widow?

Go farther with these thoughts. Calculate the impact of the drunk crash into the unfortunate family. The impaired driver leaves orphans, widows and widowers behind. Often the injuries survived are life long. Sue Jones, the Conference victim witness coordinator told me this morning about a child in Sumner County with a colostomy bag and crutches which he still needs from a tragic crash six years ago on Christmas Eve. His parents and siblings were killed and he still struggles. The financial impact of that crash will remain for decades as will the effect of his injuries.

30%. That was the estimated first offense conviction rate given by A.D.A.'s from major metropolitan areas at a recent conference. The question was: How many persons charged with first offense DUI are convicted of first offense DUI? The guess was just a guess. The prosecutor's estimate was higher than that of the police officers.

What message does a "dewey" offender receive from a discarded DUI arrest? These offenders have plenty of enablers in their lives. Somebody makes the bond, somebody buys beer and somebody allows the drunk to drive. Who are the somebody's? Usually there is a mom, who doesn't believe her baby could do wrong. There are the friends, who are less responsible than the cast of CHEERS, that always walked away from the bar. Then there is us.

Most citizens who are convicted of a first offense DUI do not repeat the behavior. They learn a hard lesson. They serve 48 hours in an unpleasant atmosphere. They lose the privilege to drive for a year. They experience insurance premium increases. They learn that a DUI has a huge impact on life. A second offender learns those lessons and usually goes to a rehab for part of his sentence to be introduced to the principles of rehabilitation. If the second offender becomes a first due to an earlier dismissal, the rehab education is delayed.

Those who go on after a second will probably be back in your court numerous times. In prosecuting multiple offenders, I only dealt with third (cont. page 3)



DRIVING TIPS
AVOID REAR
IMPACT CRASHES

- 1) Don't tailgate.
Permit nine car lengths when driving 60 m.p.h.
- 2) Signal Early
- 3) Size up the whole scene 10-12 seconds down the road
- 4) Properly adjust headrest
- 5) Know how to use your anti-lock brakes.

Source:
National Highway Traffic Safety Administration

Lesser Included Offenses:

To see a list of cases the Appellate Courts have ruled to be lesser included offenses go to:
<http://www.tsc.state.tn.us/geninfo/Courts/lesserinc.pdf>

Thanks to the Administrative Office of the Courts for this useful information.

RECENT CASES



A unanimous Supreme Court in a decision by **Justice Burch** has changed the rules again. Prior to this decision a judgment was considered final if a defendant had pled guilty to a certain sentence and waived his right to appeal. The Court has decided that causing the defendant to stand by his decision is "an unnecessary trap". From now on a defendant can plead guilty and then attempt to withdraw that plea for up to thirty days. In practice will a coercive defendant plead the day of trial after victims have traveled to court only to withdraw his plea once the victims and witnesses have gone away? This case overrides the decision in *State v. Hall*, 983 S.W.2d 710 (Tenn. Crim.App. 1998). The decision is **State v. Greene, No. E2000-00616-SC-R11 entered May 1, 2003**

"We granted Harold L. Green's application pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure to determine the duration of the trial court's authority to entertain a motion to withdraw a guilty plea. On October 8, 1999, Green pleaded guilty to driving while under the influence of an intoxicant and was, thereafter, sentenced by the Criminal Court of Anderson County. On November 5, 1999, Green filed a motion to withdraw the previously entered guilty plea; the trial court granted the motion. The State appealed pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure. After granting the State's request for appeal, the Court of Criminal Appeals held that the trial court was without jurisdiction to consider the motion to withdraw the guilty plea. We find that the trial court's jurisdiction to hear and decide the motion to withdraw the guilty plea continued for thirty days after the plea was entered. Accordingly, we reinstate the judgment of the trial court and remand the cause for any further proceedings that may be appropriate."

AUTHOR'S NOTE: Good luck to General Ramsey and staff in attempting to retry this October, 1999 case. I hope your officer wrote a great report.

Supreme Court decides ramification for lost preliminary hearing tape: **State v. Graves 2003 WL 21212667 Tenn. May 27, 2003.** The failure to preserve an electronic recording or its equivalent of a preliminary hearing under Rule 5.1 (a) requires the dismissal of the indictment and a remand for a new preliminary hearing unless the State establishes (1) that all material and substantial evidence that was introduced at the preliminary hearing was made available to the defendant and (2) that the testimony made available to the defendant was subject to cross-examination.

2001-2003 SUPREME COURT DECISIONS CONCERNING DUI AND RELATED ISSUES

| Justice | Cases Decided | Favorable to State | Against State |
|----------|---------------|--------------------|---------------|
| Anderson | 7 | 3 | 4 |
| Barker | 7 | 3 | 4 |
| Birch | 7 | 3 | 4 |
| Drowota | 7 | 4 | 3 |
| Holder | 7 | 5 | 2 |

Cases reviewed: *State v. Greene* (above), *State v. Hicks*, 55 S.W.3d 515, *State v. McKnight*, 51 S.W.3d 559; *State v. Randolph*, 74 S.W.3d 330; *State v. Imfeld* 70 S.W.3d 698, *State v. Bell* 69 S.W.3d 171, *State v. Morrow* 75 S.W.3d 919, *State v. Yancey* 69 S.W.3d 553

ONE TOO MANY QUESTIONS

Q: DOCTOR, BEFORE YOU PERFORMED THE AUTOPSY, DID YOU CHECK FOR A PULSE?

A: NO.

Q: DID YOU CHECK FOR BLOOD PRESSURE?

A: NO.

Q: DID YOU CHECK FOR BREATHING?

A: NO.

Q: SO, THEN IT IS POSSIBLE THAT THE PATIENT WAS ALIVE WHEN YOU BEGAN THE AUTOPSY?

A: NO.

Q: HOW CAN YOU BE SO SURE, DOCTOR?

A: BECAUSE HIS BRAIN WAS SITTING ON MY DESK IN A JAR.

Q: BUT COULD THE PATIENT HAVE STILL BEEN ALIVE NEVERTHELESS?

A: IT IS POSSIBLE THAT HE COULD HAVE BEEN ALIVE AND PRACTICING LAW SOMEWHERE

ASSISTANT DISTRICT ATTORNEYS WITH AFFIRMED CONVICTIONS LISTED IN THIS ISSUE:

Georgia Felner
Williamson County

Greg Gilluly
Memphis

James Pope
Rhea County

Walt Freeland
Tipton County

Your author

RECENT CASES CONTINUED

Court of Criminal Appeals

State v. Greenwood, 2003 WL 1453201 Tenn. Crim. App 2/12/2003

Judge Riley holds that expert extrapolation is not necessary in the prosecution of DUI offenses. A blood withdrawal 55 minutes after the stop was reasonable to satisfy the .10 standard when test was .12.

State v. Quintanille, No. M2002-02440-CCA-R3-CD - Filed May 16, 2003

Judge Wade affirms driving with <.10 conviction after defendant with .12 is found walking less than one mile away from one car crash. Officer could have arrested for public intoxication. Case is distinguished from Folds and Sides.

State v. Daugherty, No. W2002-01141-CCA-R3-CD Filed May 16, 2003

Judge Riley affirms a DUI by physical control case from Memphis in which the drunk was passed out with the engine running. The jury rejected the "my car could not have been running because I had a faulty starter defense." Defendant sentenced to 180 days for a second offense.

State v. Whaley, No. E2002-01452-CCA-R3-CD Filed May 21, 2003

Judge Ogle affirms a Hamilton County conviction concerning physical control. The defendant moved to the driver seat and claimed to be the driver after her boyfriend was arrested (and later convicted) for a fourth offense DUI. At trial she claimed she did so to keep the car from being confiscated. The Court gave credence to the officer's testimony that the engine was running and the defendant was in the driver's seat. " All she had to do was drop it in drive and hit the gas, she was gone."

State v. DEGRAFENREID No. W2002-00681-CCA-R3-CD

Judge Welles affirms a Tipton County case. He writes: "In the present case, Deputy Cochran testified that he observed the Defendant's vehicle weaving within its lane of travel on Highway 59. In addition, the deputy stated that, at one point, the Defendant's pickup went off the road. The trial judge found the officer to be credible. It is our opinion that the deputy's testimony describes the type of pronounced, erratic driving that may form the basis for reasonable suspicion to justify a traffic stop."

DUIosophy continued from page 1

offenders and above. Rarely did the time beyond a second and third offense extend beyond five years. Rarer still was the DUI offender who stopped after two offenses.

So what does a 30% conviction rate for first offenders do? What message is sent? Do the 70% who are forgiven have any incentive to stop driving drunk? How long does the inconvenience of the arrest and court appearance deter behavior? Are we willing to accept a philosophy that is satisfied with this percentage?

I hope by now the reader is spinning some excuses like the following. 1) That is not the actual rate. 2) I know Johnny. We let him go last year and he has not been arrested since. 3) We are too busy to go to trial in DUI's. 4) Most DUI drivers don't kill. If your looking for justifications, you like me are not happy with a 30% number.

With the dawning of the .08 BAC standard and the elimination of the adult DWI, what deweyosophy will you proclaim? Shall we enable the drunk to keep on endangering our citizens, voters, taxpayers? Or shall we proclaim that no one will be permitted to continue driving drunk in our State. Will you claim Victory! The real victory includes convicting those who are guilty. The lasting Victory is that which stops the offender and protects our citizens.

NHTSA and the NCSA (National Center for Statistics and Analysis) Release 2002 Early Assessment of Vehicle Crashes

SOME FINDINGS:

The Estimated Number of Persons Killed in Motor Vehicle Traffic Crashes Increased to the Highest Level since 1990.

Alcohol-Related Fatalities Increased.

The Increase in Alcohol-Related Fatalities was concentrated in Occupants of Vans and SUVs and Riders of Motorcycles.

SUVs, Vans, and Motorcycles had a Larger Increase in Alcohol-Involved Drivers than other vehicles.

Fatalities for Children Ages 0–3 and Ages 4–7 Declined.

Fatalities for Occupants Ages 8–15 Increased.

Fatalities of Young Drivers (Ages 16 –20) Increased.

Most Passenger Vehicle Occupants Killed in Motor Vehicle Crashes Continue to be Unrestrained.

Fatalities of Older Motorcycle Riders (Ages 40 +) Increased, while Younger Rider Fatalities Declined.

See the complete early assessment at:

<http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/Rpts/2003/2002EARelease.pdf>

MADD CALLS FOR COMMITMENT TO WAR ON DRUNK DRIVING.

The number of alcohol related fatalities involving a .08 blood alcohol level increased from 14,933 in 2001 to 15,635 in 2002.

- MADD wants: Establishment of a National Traffic Safety Fund to support state and national traffic safety programs, enforcement, and data improvements
- Increased Accountability for Expenditure of Federal Funds
- Expanded Impaired Driving and Seat Belt Law Enforcement Mobilizations
- Enactment of a National Standard to Reduce Repeat DUI/DWI and Other Higher-Risk Driver Recidivism
- Enactment of a National Primary Seat Belt Enforcement Standard
- Enactment of a National Standard Banning Open Containers of alcoholic beverages in vehicles

TRAINING OPPORTUNITIES

DUI BASIC TRAINING September 23-25, Nashville

This course for Tennessee Prosecutors will address all those zany ideas that sometime catch fire with defense lawyers and end up in appellate courts. It will also involve methods used by experts and trial techniques.

Topics will include:

- STANDARDIZED FIELD SOBRIETY TESTS
- THE HGN EXPERT
- BLOOD ALCOHOL AND PHARMACOLOGY
- SUPPRESSION MOTIONS
- OPENING STATEMENT
- THE E.C.I.R. AND INTOXILYZER 5000
- LEGAL ISSUES IN BREATH TESTING
- DIRECT EXAMINATION
- CROSS EXAMINATION
- CLOSING ARGUMENT.

Registration Forms are on line at www.tndagc.com in the DUI Training Section or call Sherri at (615)253-6733 for an application.



COPS IN COURT, JACKSON

Officers learn courtroom presentation and report writing. What techniques will be used to try to confuse on cross examination?

Defense techniques like: Looping, Concession based cross, voice inflection, minimization, embellishment and closing the door to explanations will be discussed. Learn what the defense attorney is trying to do and how to respond with credibility and professionalism intact.

PROSECUTORS, CRIMINAL COURT JUDGES NEEDED FOR CRITIQUING OFFICER TESTIMONY.

PROTECTING LIVES SAVING FUTURES

This Course will be offered **August 19-21 at Natchez Trace State Park.**

This course was designed by the American Prosecutors Research Institute to create a team building approach between prosecutors and police officers to aid in the detection, apprehension and prosecution of impaired drivers. Prosecutors and police officers will participate in interactive training classes taught by a multi-disciplinary faculty.

Sessions include:

- VEHICLE IN MOTION
- REPORT WRITING
- PERSONAL CONTACT
- UNDERSTANDING SFST'S HGN
- PRE-ARREST SCREENING
- CHEMICAL TESTING
- DRUG RECOGNITION
- PRETRIAL PREPARATION
- MEETING DEFENSES
- MOCK TRIAL

Space is available for 10 prosecutors who may bring two officers from their jurisdiction.



Herb Tanner explaining how a yankee can survive in the South.

LESSONS FROM THE LAST PROTECTING LIVES, SAVING FUTURES SEMINAR:

In May prosecutors and officers gathered at the General Morgan Inn in Greenville, Tennessee. One Session called: **Strategies for Success** included a self evaluation in which prosecutors and officers were asked to guess what the conviction rate for DUI 1st offense was in their county.

Each prosecutor and officer in the major metropolitan areas represented believed that their conviction rates were about 40% lower than officers and prosecutors from rural areas. To improve, all agreed their must be better communication.

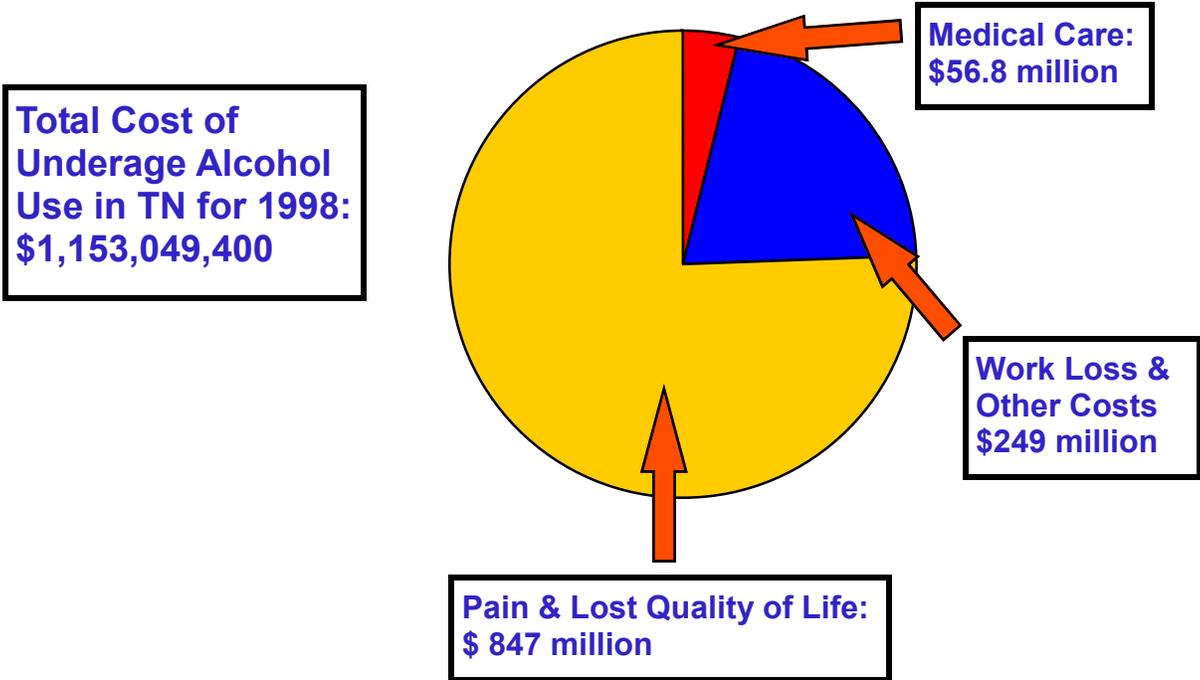
Officers need to know what prosecutors need in order to convict. Prosecutors must learn how the officers are trained and perform.

NHTSA fellow and Michigan prosecutor, Herb Tanner, put it well. "It's meat-cleaver justice, especially in Sessions Court, BUT IT'S STILL GOT TO BE JUSTICE"

Tanner also learned the difference in "y'all" and "all y'all in only three days in East Tennessee.

"Attaboy Herb."

Underage drinking is a \$1.15 billion dollar a year problem in TENNESSEE



YOUTHFUL OFFENDERS & DRUGGED DRIVING

According to the 2002 SADD/Liberty Mutual survey reporting results of more than 1,600 middle and high school students countrywide, driving after using marijuana is more prevalent than driving after drinking alcohol (48 percent of those who drink ‘regularly’).? “As if rampant pot smoking by teens weren’t problem enough, many of them believe that driving under the influence of marijuana poses little risk of impaired operation,” said Stephen Wallace, a psychologist and SADD’s national chairman and chief executive officer. “Marijuana use, even a little, negatively affects driving performance and is linked to tens of thousands of serious automobile crashes, injuries and deaths each year.

INTERESTED IN ATTENDING:

“Enforcing Underage Drinking Law Programs” 4th Annual National Leadership Conference? It is in Atlanta, Georgia, September 18-20, 2003.

Workshops include: **Judicial Partners**
 Workshops in this category will demonstrate how innovative approaches in addressing underage drinking and youth access to alcohol have been addressed by judicial partners to impact the social norms and laws affecting youth within their communities. Examples of strong support/collaboration with enforcement and other community members are encouraged. Judges, police officers, prosecutors and concerned individuals are welcome. **Deadline** to register is September 5, 2003. Register online at www.udetc.org. The cut-off date for hotel rooms is August 22, 2003.

VEHICULAR HOMICIDE & ASSAULT CASELAW

State v. Blakenship, 2003 WL 1892712 Tenn. Crim App. April 17, 2003

After the drunken defendant slammed into a college student pizza delivery girl he complained of the use of his medical blood result at trial. The defendant had refused to give blood for implied consent purposes. The Court notes that refusal under the implied consent statute is not applicable to procedures performed "pursuant to a medical rather than a law enforcement request" citing Goldston 29 SW 3d 537 (Tenn. Crim. App. 1999) and Ridge from 1982. The Court later notes that the medical record showing the defendant's serum blood level of .194 would have been admissible as a business record exception to the hearsay rule.

Other issues included observation of erratic driving earlier in a different county which was admitted as character evidence and sentencing.

Web Site:

This and the previous issue are available at www.tndagc.com.

"Never tell people how to do things. Tell them what to do and they will surprise you with their ingenuity."

"Untutored courage is useless in the face of educated bullets."

General George S. Patton Jr.

I don't make jokes. I just watch the government to report the facts.
Will Rogers

Using a polygraph in a vehicular homicide?

See Senate Bill 1088 for new rules.

Included:

B) OFFENSES: Under this bill, it would be a Class C misdemeanor to conclude a polygraph examination without giving the subject of the examination an opportunity to explain any deceptive reactions to questions that are evident on the charts, unless the examinee is represented by legal counsel and such counsel requests the results be given to counsel rather than to the examinee.

IN THE LEGISLATURE

SB 1757/HB 1820 by McNally/Newton would allow an immediate administrative license revocation for the arrested impaired driver's license's license to drive.

(Bill died in House and Senate Judiciary Committee.)

SB 1200/HB 1054 by Clabough/McCord permits motorcycles to run red light after coming to a complete stop and using due caution. Some light weight bikes don't cause the light to change. *(passed)*

SB 1697/HB 166 by Beavers would permit blood and breath test for impaired driver.

(Bill died in House and Senate Judiciary Committees.)

HB 190 by M. Turner would mandate 11/29 sentence for the impaired driver who is driving on a revoked license for a DUI. *(Died in House Judiciary Committee)*

SB 1070/HB 270 by Jackson/Shephard would allow a convicted DUI offender under age 24 or under to expunge (erase) up to two DUI convictions if he did so by age 27.

(Removed from calendar of Senate Judiciary Committee and House Ways and Means Committee)

SB 1717/HB 1213 by Bryson would have created a Class B misdemeanor for open alcohol containers in the passenger area of a vehicle. *Failed for the lack of a second in the House State and Local Government Committee.* Fiscal impact includes the loss of \$11 million currently supplied by the Federal government for Interstate Maintenance and the Surface Transportation Program.

SB 33/HB 61 by Clabough would have clarified that DUI by physical control is included as a qualifying offense for habitual motor offender status. Would remove Leaving the Scene with property damage as a qualifier. *(Died in House and Senate Judiciary Committees.)*

SB360/HB535 by Williams/Patton would increase DUI penalties. *(Died in Judiciary Committees)*

SB1302/HB1975 by Herron/McMillan would increase license suspensions for all DUI convictions. Would reduce penalty for fourth offense from felony with 150 days to standard class E felony.

(Died in Judiciary Committees)

SB 1871/HB1959 by Ramsey/Vaughn would create misdemeanor road rage crime.

(Recommended for passage in Senate Finance, Ways and Means Committee)

SB 1309/HB 1728 provides that all DUI convictions after July 1, 1982 be counted as prior offenses when computing multiple offender status. *(Removed from calendars of Judiciary committees)*

SB 345/HB 139 by Trail/Buck increases the fine for Driving Impaired with a child passenger from \$1,000 to \$1,500. *(Died in Senate Judiciary, House Ways and Means.)*

To read the bills in their entirety see: www.legislature.state.tn.us then go to link : LEGISLATION and type bill number in search box. Example type as HB270.

CRASH VICTIM'S FAMILY FIGHTS TO CHANGE LAW

Drugged Driving

By Lawrence Buser, buser@gomemphis.com
April 6, 2003

Mike Holliday was in a good mood that Friday evening 20 months ago when he dined with his wife, Donna, and another couple at Cafe St. Clair on Pickwick Lake 115 miles east of Memphis. The 54-year-old founder of the Holliday's Fashions women's clothing stores was looking forward to a Labor Day at the house where he, his wife and their three sons had spent many weekends. "He was happy and excited about being up there for the week," says close friend John Meeks, a Memphis businessman. "He had really just gotten the business and his life to a point where he was going to be able to slow down and enjoy life." But the weekend was soon to turn tragic.

As Holliday and his wife left the restaurant that is nestled in a picturesque harbor among hundreds of yachts, pontoons and ski boats, Meeks and his wife, Sandra, followed in their car. It was approaching 8:30 p.m. and now dark and raining. Less than a mile up the winding tan asphalt of Tenn. 57, Holliday hit the brakes of his white Isuzu Trooper. The unloaded trailer of an oncoming logging truck had crossed into his northbound lane as it rounded a downhill curve. "I saw the top of Mike's car explode and it had stopped and was actually coming back at me," recalls Meeks, who still has difficulty talking about that night. "With the lights and the glass and the rain it was like an evil, sort of horrible thing to witness. My brain just could not compute what was happening." Holliday was killed instantly. Donna Holliday, also 54, who was in the passenger seat, suffered serious head injuries, a broken pelvis, a broken collarbone and ligament damage to her neck and spine. The trailer rotated counterclockwise as it rode up and over the Trooper, coming to rest across both lanes of traffic. It separated from the Mack tractor, which spun off the road and into a depression between two private drives. Driver James D. Epperson, 45, of Tishomingo, Miss., was not seriously injured.

Tennessee Highway Patrol investigators concluded the crash occurred because the logging truck's trailer was in the wrong lane. Blood tests showed Epperson had marijuana ingredients in his blood. A records check showed he had been charged with 30 driving-related offenses since 1992, including driving while impaired, speeding, running a stop sign, expired tags and no mud flaps. In the crash that killed Mike Holliday, Epperson was charged with nothing. There was no criminal indictment, no traffic citation. Troopers who observed Epperson at the crash scene saw no sign of impairment. A state prosecutor said there was no sign of recklessness. Holliday's family was stunned. The sons pressed state prosecutors for some type of charge but got nowhere. "You have a situation where somebody's clearly in the wrong and he's killed somebody close to you," says Brad Holliday, 32, the oldest of the three sons. "But the authorities don't find it within their power or aren't willing to exercise their power to make sure justice is served."

Now they're trying to turn their personal tragedy and their frustration with the legal system into a tribute to their father's memory. The family is trying to get state lawmakers to establish a drugged-driving law that might make it easier to prosecute offenders. "We want to make it a little more clear-cut for them, to close the loopholes," says Holliday, whose brothers are Clay, 29, and Andrew, 25. "An injustice was done to my parents and to society as a whole when someone is allowed to escape a situation like this without punishment."

A charmed life

If Michael Edward Holliday seemed to lead a charmed life, it was largely his own doing. He was a star athlete, a military veteran and a former nondenominational seminarian. He also was an entrepreneur who started with a vacant building in Millington in the mid-'70s and built a \$25-million-a-year women's apparel business. "He wasn't a guy who had everything in life given to him," said Meeks. "What he had and what he accumulated he did it on his own." Holliday's Fashions now has 23 stores with 350 employees in five states. "In business he was something of a visionary," says Jules Wakschal of New York, a resident buyer for a number of clothing stores, including Holliday's for 23 years. "He had a terrific eye for fashion. I would tease him that he was going to be the biggest one-man business around because even with all his employees he drove the business with his ideas." Holliday made monthly trips to New York to meet with Wakschal, survey the fashion world and negotiate deals. Wakschal says Holliday treated associates and employees like family. "He was admired not only by his wife and his family," adds Wakschal, "but by everybody in the industry."

In August 2001, Holliday and friend Grant Fenner made an ambitious 110-mile circumnavigation by sea kayak of Isle Royale on Lake Superior near the Ontario/Minnesota border. High winds, high waves and angry thunderstorms were their constant companions for the week. Holliday thrived on it. From an entry in his journal

Drugged Driving cont'd.

dated Aug. 14: "I was surprised at how high the swells were so early. The wind was strong and it was already raining - the clouds seemed to make it impossible for God to see us in case we needed help - a real possibility today." Later that month, on Friday, Aug. 31, it was raining again as Holliday headed down a two-lane highway near Pickwick Lake in Hardin County.

Donna Holliday told of her loss in a recent E-mail:

"My sons have been a great source of strength for me. They lost so much, a father, a mentor, a friend. Mike was the kind of man that you called for advice or help with anything, or to share an adventure and always just for fun. "The boys also put their own lives on hold to help me recover physically and emotionally. Some days I see a light above the clouds and some days are very dark, but I know that God will bring me out of this nightmare. I pray that something good, something that might save another person's life will come out of our loss."

Alcohol proof easiest

In Tennessee, driving under the influence includes not only alcohol, but also any other intoxicant, narcotic or other drug, including prescription, that produces central nervous system effects. Proving the influence of alcohol is the easiest because there is a measurable limit - .10 now, .08 starting July 1 - at which a driver is presumed to be intoxicated. Most states, including Tennessee, have no comparable measurement to use when other drugs are involved. "A driver is much less likely to be prosecuted for impaired driving under the influence of illegal drugs than under the influence of a legal substance, alcohol," says Michael Walsh, PhD, of Bethesda, Md., a former director of the President's Drug Advisory Council. Sixteen states have some form of comparable measurement - called per se laws - for determining when a driver is in automatic violation of the DUI statute. Eight of those states have zero tolerance laws that ban the presence of any prohibited substance. "Typically in a state like Tennessee the prosecutor would have to prove that the guy was impaired because of the drug. That's a very high standard to link the impairment directly to the drug. It's hard to prove and that's why the per se law makes it easier," Walsh says.

In Nevada, 21-year-old Jessica Williams was sentenced to 18 to 48 years in prison after she was convicted of killing six teenagers in 2000 while driving with marijuana in her system that exceeded the amount allowed by state law. Defense lawyers say the drug limit does not necessarily mean a driver is impaired. In fact, jurors did not convict Williams for being impaired, but for having the prohibited substance in her blood. (The conviction was upheld on appeal in state and federal courts, but a trial judge last month granted Williams a new trial saying the law does not identify one of the marijuana byproducts as an illegal substance.) The 1999 Nevada law says a driver with 2 nanograms or more of marijuana's active ingredient, THC, per milliliter of blood is presumed to be impaired. Williams's blood was tested at 5.5 nanograms.

In the crash that killed Holliday, a blood sample taken two hours later from truck driver Epperson showed 32.3 nanograms of THC per milliliter of blood. "That would be 16 times the amount in our marijuana statute," says Gary Booker, director of the vehicular crimes unit of the Clark County District Attorney's Office in Las Vegas, where he prosecuted the Williams case. "It definitely would be a case we would prosecute. "Marijuana will be in your blood for only five, six or seven hours, so if it was in your blood we know for sure it was recently ingested." In a federal lawsuit the Hollidays have filed against Epperson and several other defendants, toxicologist Dr. David Stafford said in a report he believes the truck driver was under the influence of marijuana at the time of the fatal crash. Stafford, who was hired by the plaintiffs, said the THC level is consistent with marijuana use within four to five hours prior to when the blood sample was drawn. The effect, Stafford said, would be prolonged reaction time, euphoria, relaxation and impairment of the ability to operate a motor vehicle.

"I would vehemently disagree with that," says attorney Joe Lee Wyatt, who represents Epperson in the civil suit. "Obviously the highway patrol didn't think it." An expert he hired, physician Dr. Kevin Merigian, said there is no laboratory data to correlate the impairment Stafford cites with blood levels of marijuana THC. Further, Merigian questions the accuracy of the levels reported in Epperson's blood sample, levels which the doctor said would mean the truck driver would have been smoking marijuana while officers interviewed him after the crash. "The results in this case are suspicious," the doctor said in his report. Epperson declined to discuss the crash, citing the pending lawsuit.

Continued page 10

Drugged Driving cont'd.

Prosecutor John Overton of Savannah, Tenn., said he considered charges of vehicular homicide but had no evidence of reckless driving, intoxication or impairment.

The prosecutor eventually presented the case to a grand jury for review in March of last year, but he did not seek an indictment.

"All he (Epperson) does is hit the brakes and the trailer begins to come around," the prosecutor said. "That's awfully hard to say that the action in and of itself is willful and wanton disregard for the safety of persons and property by the fact that he stepped on the brake. It just wasn't there."

But with a crash that caused a violent death, some prosecutors say they would have had the driver indicted and let a trial jury decide whether a crime was committed.

"Why wouldn't you?" said Shelby County Prosecutor Bobby Carter, director of the narcotics prosecution unit. "There is criminally negligent vehicular homicide. Driving a log truck too fast in the dark and not keeping it under control? Maybe that would be criminal negligence. You don't need impairment."

Last November Walsh announced the results of a major state-by-state study of laws on driving under the influence of drugs (DUID). The study showed that there is no uniformity to laws and that while drunk drivers are prosecuted, there are millions of drugged drivers being overlooked.

Tennessee prosecutors, including Overton, say a DUID law defining specific limits, as with alcohol, would indeed make it easier to prosecute those drivers.

"James 'Wally' Kirby, executive director of the Tennessee District Attorneys General Conference in Nashville, said, "If someone brings it up, we'll certainly take a look at it, but it really hasn't come up at this point."

The Hollidays, who have contacted legislators and other state and federal officials, hope that will change.

"It's hard to think of anything good coming out of it," says Brad Holliday, "but I'd hate to see somebody go through the same types of frustration that we've been through."

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Drugged Driving Laws April 6, 2003

- Current law in most states, including Tennessee, makes it difficult to identify, prosecute or convict drugged drivers, according to a recent study funded by The Robert Wood Johnson Foundation's Substance Abuse Policy Research Program.
- Eight states have enacted zero-tolerance laws. Arizona, Georgia, Indiana, Illinois, Iowa, Minnesota, Rhode Island and Utah make the presence of any prohibited drug or substance in a driver's body while he/she is driving a DUI violation.
- Only Nevada has set specific percentages of prohibited drugs or substances other than alcohol as a violation of its DUI statute.
- Texas makes it illegal for chemically dependent persons who are a danger to themselves or for those who are addicted to a controlled substance to receive a driver's license.
- California, Colorado, Idaho, Kansas and West Virginia make it illegal for any drug addict or habitual user of drugs to drive a vehicle in their states.
- North Carolina and South Dakota make it illegal for any person under 21 to drive with any amount of a prohibited drug or substance in his/her body.

Source: "Driving Under the Influence of Drugs: Legislation in the United States," The Walsh Group, November 2002.

DRUG CZAR RELEASES MODEL STATE DRUGGED DRIVING POLICY

John Walters, Director of the White House's Office of National Drug Control Policy (ONDCP), has called for per se drugged driving impairment laws in the release of *Drugs and Driving: Model State Policy*. Dr. Jeffrey Runge, Administrator of the National Highway Traffic Safety Administration (NHTSA), joined Walters last November to launch this campaign to stop drugged driving.

"While the consequences of drunk driving have become well known over the past 20 years, drugged driving has received relatively limited attention," Director Walters said. ONDCP released a *Drugs and Driving: Model State Policy* that identifies several key elements of effective legislation against drugged driving:

- **Per Se Impairment Laws.** Drivers who have a mere presence of controlled substances and other impairing substances such as glue, paint and other inhalants in their blood should be considered per se impaired.
- **Treatment/Early Intervention.** Statutes should allow and encourage courts to provide the same treatment opportunities for drug-impaired drivers as for people convicted of possessing drugs.
- **Admissibility of test refusals.** All test refusals should be admissible as evidence.
- **DRE.** Every state should allow for training and testimony from law enforcement officers trained as Drug Recognition Experts.

Reflections from the DUI Training Guy:

After 9 months on the job it is apparent that there are good and bad things happening within the Judicial system in the area of DUI. Thus far I have had the opportunity to be involved in training about 200 officers and prosecutors. I have been with some of you for the best part of a week and others for hours. I am amazed at the dedication of prosecutors and officers from around our State. Your daily efforts are extraordinary. This includes your work ethic during training. Some of you get my weekly email updates. Thanks for the kind responses.

There are several areas in which we lag behind. We have a ridiculous problem with identifying and convicting the drug impaired driver. We have a problem with underage offenders. We continue to see more crashes involving impaired drivers.

There is hope. This was the first year that the Governor's Highway Safety Office, with funds from TDOT and NHTSA, gave us a few prosecutors to specialize in DUI and gave us funds for training. Before 2003 is over I anticipate 550 patrol officers will have attended "Cops in Court", where they will meet many of you and receive free training including report writing and testifying. For those who have volunteered to help critique, thank you. For those that wish to help, call me. More DA's have applied for DUI Prosecutors this coming year. We have learned much during this nine months. I believe we will see more help soon.

We will finally see the .08 BAC standard as of July 1. It will be interesting to see what happens to all those DWI reductions. This change will increase the workload of prosecutors. There will be a great gnashing of teeth from a defense bar begging for reckless driving or public intoxication reductions. Don't give in.

Click it or Ticket and Sobriety checkpoint weekend enforcements continue to result in fewer traffic fatalities. These enforcements combined with saturation patrols save lives.

Hopefully this year we will see an increased awareness of the need for viable laws to protect our citizens. Grant positions will come with strings attached so we must show we want to reduce the body counts on our roadways. Just as we would never compromise on the death penalty because we believe it saves lives, we must not compromise concerning our DUI laws. Those laws save lives as well.

I hope your summer is pleasant and safe. Be careful on the roads. You never know who you are sharing them with.

Tom Kimball



**Tennessee District Attorneys
General Conference**

226 Capitol Blvd. Bldg.,
Suite 800
Nashville, TN 37243-0890

Tom Kimball
(615) 253-6734
Sherri McCloud
(615) 253-6733

(615) 253-6735 Fax

Drawn like
a bug to a
bug-light.



Ever wonder why so many head on collisions involve drunk drivers with high blood alcohol levels? Dr. Karl Citek, OD, PhD tells us that: "In impaired drivers, peripheral vision is reduced, overall attention and awareness are depressed, and the individual is attracted to "novel stimuli" -- that works well in most situations, but it is especially dangerous late at night: the headlights coming around the curve or over the hill attract the highly intoxicated driver." Unfortunately, it is often the law-abiding citizen that pays the price.

NEVADA’S DRUGGED DRIVER PER SE LAW INCLUDES:

It is unlawful for any person who:

- (a) Is under the influence of a controlled substance;
- (b) Is under the combined influence of intoxicating liquor and a controlled substance; or
- (c) Inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle, to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access. The fact that any person charged with a violation of this subsection is or has been entitled to use that drug under the laws of this state is not a defense against any charge of violating this subsection.

It is unlawful for any person to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access with an amount of a prohibited substance in his blood or urine that is equal to or greater than:

| Prohibited substance | Urine Nanograms per milliliter | Blood Nanograms per milliliter |
|--------------------------------|--------------------------------|--------------------------------|
| (a) Amphetamine | 500 | 100 |
| (b) Cocaine | 150 | 50 |
| (c) Cocaine metabolite | 150 | 50 |
| (d) Heroin | 2,000 | 50 |
| (e) Heroin metabolite: | | |
| (1) Morphine | 2,000 | 50 |
| (2) 6-monoacetyl morphine | 10 | 10 |
| (f) Lysergic acid diethylamide | 25 | 10 |
| (g) Marihuana | 10 | 2 |
| (h) Marihuana metabolite | 15 | 5 |
| (i) Methamphetamine | 500 | 100 |
| (j) Phencyclidine | 25 | 10 |

News From the Sixth Circuit Court of Appeals

Two cases from Tennessee that all should be aware of:

- 1) In a per curiam opinion the Court in US v. Draper, 22 Fed Appx 413 affirmed the conviction and the District Court’s denial of the defendant’s motion to suppress. “The district court stated that, "I find the discussion and testimony by Officer Poteet convincing. He, in fact, observed a driver without a seatbelt on, and the Court does not accept the proposition that when an officer observes an illegal seatbelt or a violation of the seatbelt law that he should do nothing."
- 2) US v. Kingsley, 241 F.3d 828 C.A. 6th (Tenn) 2001, the Court found reasonable terms of probation including (A) random warrantless searches of his person and/or effects and (B) that he shall not at any time operate a motor vehicle. Kingsley had a 20 year history of criminal arrests, charges and convictions evidencing among other things, habitual alcoholic and/or narcotic intoxication, a pattern of reckless vehicular crimes and psychological abnormalities.

In 2002 during a twenty five day stretch of highly publicized checkpoints from May 20-June 15, 6913 drivers in Tennessee drove into a Ticket or Click It checkpoint without wearing a seat belt! 685 more drivers were arrested for DUI during the Click It or Ticket enforcements. See totals at <http://www.tdot.state.tn.us/ClickItorTicket/2002htm>.