TNDAGC

DUI NEWS

ISSUE 33

DECEMBER, 2010

PUBLISHER:
Tom Kimball, TSRP; ADA
LAYOUT AND DESIGN:
Sherri Harper

INSIDE THIS ISSUE:

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: tekimball@tndagc.org
Newsletters online at:
Www.tndagc.org/dui/htm

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/

This material was developed through a project funded by the Tennessee Department of Transportation, Governor's Highway Safety Office and the National Highway Traffic Safety Administration.

THE IMPLIED CONSENT LAW WILL BE EFFECTIVE IF PROSECUTORS DON'T CAVE!

In October the DUI defense lawyers involved with the Tennessee Association of Criminal Defense Lawyers spent a great deal of time at a conference designing methods to try and derail the changes to the Implied Consent law passed by the General Assembly. The change to permit the General Sessions Court to determine whether a defendant violated implied consent is effective January 1, 2011. It is necessary for all prosecutors in General Sessions Courts to be aware of the intent and effect of the new law and be prepared for the challenges which will be orchestrated by the gentleman and ladies who specialize in DUI defense.

In 41 States there is a mechanism to suspend a revoke a driver's license for refusal to test after a DUI arrest. In those States, the implied consent refusal is determined in an administrative procedure and the license suspension occurs at the time of arrest. The suspension can then be appealed to an Administrative Law Judge (ALJ). If the A.L.J. finds that the driver refused a test, the driver then appeals his case into the Court system.

In 2008, a bill to create an administrative system to suspend the driver's license of those who violate the implied consent law was proposed as part of the Governor's Legislative package. The sponsors were the chairmen of the Senate and House Judiciary Committee. The bill passed through the committees and was ready for consideration when the economic news became tragic in the State. Many State employees were doomed to lose employment. The administrative license revocation law had a very large fiscal note as numerous new administrative law Judges and others would have been funded to operate the system. The bill was withdrawn.

Tennessee had a gigantic hole in the system. Impaired drivers were permitted to keep a valid license until the DUI case was finished. The Judge who heard the DUI case would determine whether the driver had refused a test to determine the blood alcohol concentration. In Tennessee, a driver is charged and first faces the charge in General Sessions Court. The driver can opt to have his case sent to the Grand Jury for consideration and then face the charge in the Criminal Court. It is not uncommon for a DUI to be continued numerous times in the process for a variety of reasons. In major metropolitan areas it is not uncommon for a DUI case to linger for years.

During the long period of delay the driver could drink and drive and be arrested numerous times prior to a determination of whether the driver violated the implied consent law. Until a case was finished, the license of the driver was valid.

(Continued on page 4.)

RECENT DECISIONS

State v. Hale, 2010 Tenn. Crim. App. LEXIS 913 BREATH TEST OPERATOR

Defendant argued that because Deputy Randy Bruso of the Dickson County Sheriff's Department could not remember the exact dates he received his training as a breath test operator and because he had to take his eyes off the defendant while he placed the mouthpiece on the tube of the ECIR-2, the result of the breath test (.16) should have been suppressed. The Court disagreed and found that the State had met its burden through a preponderance of the evidence as required.

State v. Self, 2010 Tenn. Crim. App. LEXIS 931 PRESCRIPTION DRUG IMPAIRMENT

The defense argued that horrendous driving and indications of intoxication should have been forgiven, because the impairment was caused by prescription medications taken at therapeutic levels. The driving observed by a citizen and law enforcement was ridiculous. Self forced one car off the road and stopped only with a non-injury collision. Self had medications for depression, muscle relaxation and her heart meds in her system. The medications were all taken at therapeutic levels, but resulted in intoxication that should have kept her off the road. The defendant presented expert witnesses to attempt to excuse her decision to drive. The defense expert admitted that one of the medications included a warning against operating heavy machinery. The conviction and sentence of 11/29 suspended after 73 days for the second offense DUI was affirmed.

State v Woods, 2010 Tenn.Crim. App. Lexis 872 DUI FELON WANTED A DO-OVER PLEA

Defendant was convicted in Shelby County of felony DUI, violation of habitual traffic offender law, felony evading, reckless driving and two counts of aggravated assault. He pled guilty and received a six year sentence and then appealed claiming prosecutorial misconduct. He lost. He argued that he had no choice but to plead guilty, because he had been charged with two counts of attempted second degree murder. In May of 2006, Woods was charged with leading Memphis police on a 7-minute chase while intoxicated. He drove the wrong way on the Sycamore View ramp onto the Interstate. Woods forced motorcycle officer Russell Chaudoin into another car causing critical injuries. The chase ended when he crashed into a police car. While his case was pending he head butted and hit News Channel 3 reporter, Andy Wise, when Wise followed him to his car to see if he would drive away from Court. Officer Chaudoin had to retire from the force due to his injuries.

State v Whited, 2010 Tenn Crim App Lexis 981 KILLER LEAVES SCENE DUI 4TH

Keith Whited (pictured) shot and killed an old friend and drove from the scene with a .23 BAC and drugs in his system. He was convicted for DUI 4th offense and driving on a revoked license in addition to second degree murder. According to testimony and the result of the case, it sounded like Whited was what someone might call a mean drunk. He had a long history of fighting while drunk and always carried a loaded pistol without a carry permit.

State v McFarland, 2010 Tenn Crim App Lexis 1025 CITIZEN INFORMANT

Mount Juliet Officer Scott Fulton stopped the defendant after receiving information from a bank teller that a driver was intoxicated driving a silver Corvette. The officer corroborated the information and watched the car cross lane lines and make an improper turn. The conviction was affirmed.

RECENT DECISIONS

State v Moffitt, 2010 Tenn Crim App Lexis 1052 Citizen Informant Truck Driver

A trucker called in news of a driver using the center of the highway as his own lane. A Lexington officer found the vehicle and confirmed it was the same one. He watched and saw classic driving cues. Video evidence confirmed the officer's conclusions that SFST's were not performed well. The defendant had a .25 blood alcohol level. The defendant waited until after the blood sample was destroyed, before he requested an independent test. The Court found he had plenty of time to make the request (about 6 months) and denied relief.

State v Hewitt, 2010 Tenn Crim App Lexis 1005 Credible officer sees more than obstructed video

Knoxville officer Clayton Madison started watching the defendant's vehicle due to a Be On The Lookout (BOLO) call from his dispatcher. The defendant's car matched the description of the car in the BOLO description. He observed the car making driving errors and turned on his video. While following the car, he saw some things that were not captured or visible on the video. The video camera was obstructed by other cars, a date stamp and the winding nature of the road. The officer could see around curves. The camera only saw straight ahead. The defense argued that the officer described things that were not on camera. It's conclusion was that the officer must be a liar. The Court found the officer to be credible after watching and listening to him on the witness stand. The Court also noted the difference between a human, who can turn his head and a camera that is stationary and pointed in one direction. Hewitt, a DUI third offender, refused to perform SFST's, but took a blood test. His conviction was affirmed.

State v Robinson, 2010 Tenn Crim App Lexis 1088 7th offender gets 4 years

Terry Robinson was slumped over the wheel passed out when he was found by Jackson Police Officer George Smith at an intersection in the city. He refused to perform field sobriety tests or a blood test. He did tell officers he had been drinking since 3:00 a.m. and was discovered between 2:00 and 3:00 p.m. He was thick tongued and the officer testified he had "no doubt that he was drunk". At trial the defendant testified and denied impairment. After conviction he argued there was insufficient evidence to support the conviction and asked the Courts to ignore the "physical control" section of the law without success.

State v Billman, 2010 Tenn Crim App 977 Conviction Reversed

The defendant was properly stopped for a DUI and had a marijuana plant in his car. He filed a motion to suppress a statement concerning the plant. The simple possession charge was subsequently dismissed. When the jury was sent to deliberate after all the proof was entered a document that included his statement was sent to the jury room as an exhibit. The error was quickly discovered. A motion for mistrial was denied. The Court reversed the decision and sent the case back for a new trial.

State v Prater, 2010 Tenn Crim App 967 Implied consent violation

This defendant was found not guilty of DUI and then complained when his license was revoked due to his violation of implied consent. The trooper in the case read the implied consent form to the defendant, who refused testing. The implied consent violation was for reasons unknown sent to the jury for deliberation and the jury found the violator guilty. The Court notes the violation was a civil violation and affirmed.

THE IMPLIED CONSENT LAW

In the General Assembly in 2010, the lawmakers decided to permit the Judges of the General Sessions Court to determine whether the driver had refused testing. That decision permits the license revocation to occur much closer to the time of the offense. This determination has been found by the Courts to be quasi criminal in nature. The statute delineating the implied consent law is not a criminal statute, but a statute which confers an administrative penalty. See: State v. Pinchak, 277 S.W.3d 912 Tenn Crim App 2005. No jail time is involved in the violation. There is no availability for diversion. There is no right to a jury trial. There is no exclusionary rule for cases that are not criminal in nature. There is no "right to drive". ***There is no right to refuse.*** Refusal carries a penalty. The penalty is the suspension of the privilege to drive.

The new law is apparently offensive to the members of the specialized DUI defense bar. They have enjoyed being able to delay the license revocation decision for their clients for a very long time. They make a lot of money by delaying the decision and moving a case to the Criminal Court. Often times they charge a fee for representation in the Sessions Court and an additional fee for representation in Criminal Court. They have been able to persuade customers that the additional fees are worth it, because they can keep a valid license as long as the case is ongoing.

When the license revocation happens in Sessions Court, some drivers who recognize that they are guilty of the crime of DUI may decide to enter a guilty plea in Sessions Court rather than play the costly delay game. Delay in a case almost always benefits the defense, but it will no longer mean that the license determination delay will be an additional benefit. In no way does the new law affect the defendant's Constitutional right to a trial by jury in Criminal Court for the criminal offense of driving under the influence. Prosecutors must be prepared for attempts to destroy the effectiveness of the new law. This writer has heard that some defense lawyers plan to appeal the implied consent determination to the Circuit Courts, whether or not there is any real question to argue. This writer has heard that the goal of some defense lawyers is to try to attach such an appeal to the DUI case to delay determination of the implied consent until the DUI case is heard. This writer has also heard that some lawyers will file civil interrogatories and request depositions in the implied consent cases. It appears that some want to try to undermine the effectiveness of the law by making the life of the prosecutor as miserable as possible.

So what is a prosecutor to do when the wealthy, nattily dressed DUI defense specialist lawyer begins a line of attack that includes scary words like depositions, interrogatories and the Rules of Civil Procedure? The prosecutor can hide under the table, wring hands and wipe the sweat from the brow with the defense attorney's silk handkerchief or the prosecutor can do the same thing he/she does every day. Do the right thing for the right reason for the right people and fear not. Prepare, study and get ready for some fun.

Know the law! The threats of the DUI practitioner are not the same as the reality that lawyer faces if the lawyer tries to carry out the threat. If an implied consent violation is appealed; the appeal must be in writing TRCP 5.02 and must be perfected within 10 days and requires a bond or affidavit of indigency. See: TCA 27-5-103. There is no writ of certiorari available to extend the time. State v Smith, 278 Sw3d 275, Tenn Crim App 2008.

If the State wins, the State is entitled to costs. See TCA 27-5-10. Costs include time used to respond to interrogatories or depositions, which can be substantial if someone plays such a game. Any appeal must be heard during the term of Court in which the appeal was perfected. See: City Finance Co. v. Harris, 60 Tenn. App. 180. The attempt to delay the case to combine it with the DUI case should fail, unless the DUI case is heard almost immediately. There is no right to a jury trial in an action which is not fully criminal. See: State v Wood, 91 S.W.3d 769 (a criminal contempt decision). The appeal does not automatically stop the Department of Safety from revoking the license. The Appellant would be required to seek and win an injunction against the department, when the department acts upon the decision of the Sessions Court Judge.

Continued next page.

THE IMPLIED CONSENT LAW

The determination of the implied consent violation should not take much time or energy. The issues involved are whether the offender refused a test or tests and whether the offender was warned that refusal would result in license revocation. It is hard to imagine how a practitioner could develop dozens of interrogatory questions to get answers to the relevant questions. It is also hard to believe that a practitioner would take the time and money to proceed with a deposition of an officer to get answers to the relevant questions. However, if someone goes that route, remember it is a two way street. The defense witness is the same person who is facing criminal charges, but the implied consent is not one of them. The defense witness would be sworn in to answer questions you may have regarding his refusal. Such questions might include why he/she refused and whether he/she had made the decision to refuse after consuming alcohol or drugs. Answers might not be admissible in a criminal trial, but may come up again at a sentencing hearing, bond violation hearing or parole hearing. A licensed attorney is probably not going to put his client in such a risky position. Eventually the fact that the license is revoked in General Sessions Court will be so common that we forget that it was not that way before the decision of the 2010 General Assembly created this change in procedure. When all is said and done, there will probably be a lot more said than done.

There will be some short term challenges ahead. New challenges mean more work, more research and more commitment. The reward should be more than worth it. If only one driver who would have driven impaired and killed someone takes the revocation of the license seriously enough to stay home or arrange for a designated driver or cab, all the effort will pay off. If dozens of drivers take the suspension of the license seriously enough to stop drinking and driving, act responsibly and get their lives and relationships in order, the hard work will have paid off. Time will tell. Are you ready to face the challenges with courage and determination?

LAW ENFORCEMENT ALERT: BEYOND THE TRAFFIC STOP

Did your traffic enforcement stop result in the discovery of more than you expected? If so, we want to know.

If the car you stopped had a driver or passenger on a Most Wanted list, tell us.
If the car you stopped had half a ton of illegal drugs, let us know.
If the car you stopped included a kidnapper, send it in.

The Law Enforcement Challenge conducted by the International Association of Chiefs of Police will include a special award for a category called, "Beyond the Traffic Stop". We know this stuff happens fairly commonly, but you and your agency cannot get credit, if no one knows what has happened. In Tennessee, GHSO Law Enforcement Liaison Clint Shrum has put out the call for nominations in this category. The most famous criminal involved in such a situation was Timothy McVeigh, the Oklahoma City bomber. He was stopped by then Oklahoma Trooper Charlie Hanger, because he did not have a tag on an old yellow Mercury, which was his get away car.

All traffic stops are mysteries. An officer never knows as he/she approaches a vehicle whether the people in the vehicle are common citizens or heinous criminals intent on causing great harm. We want to highlight your stories in the DUI News and we will forward them to Clint on your behalf.

DRUG PER SE LAWS

Arizona:

A.R.S. § 28-1381.A1. Driving under the Influence

A. It is unlawful for a person to drive or be in actual physical control of a vehicle in this State under any of the following circumstances:
   1. While under the influence of intoxicating liquor, any drug, a vapor releasing substance containing a toxic substance or any combination of liquor, drugs or vapor releasing substances if the person is impaired to the slightest degree.
   2. If the person has an alcohol concentration of .08 or more within two hours of driving or being in actual physical control of the vehicle and the alcohol concentration results from alcohol consumed either be fore or while driving or being in actual physical control of the vehicle.
   3. While there is any drug defined in Section 13-3401 or its metabolite in the person's body.

B. It is not a defense to a charge of a violation of subsection A, paragraph 1 of this section that the person is or has been entitled to use the drug under the laws of this State.

C. A person who is convicted of a violation of this section is guilty of a class 1 misdemeanor.

D. A person using a drug prescribed by a medical practitioner licensed pursuant to title 32, chapter 7, 11, 13 or 17 is not guilty of violating subsection A, paragraph 3 of this section.

Iowa

Iowa Code § 321J.2. Operating while under the influence of alcohol or a drug or while having an alcohol concentration of .08 or more (OWI).

1. A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this State in any of the following conditions:

a. While under the influence of an alcoholic beverage or other drug or a combination of such substances.

b. While having an alcohol concentration of .08 or more.

c. While any amount of a controlled substance is present in the person, as measured in the person's blood or urine.

7a. This section does not apply to a person operating a motor vehicle while under the influence of a drug if the substance was prescribed for the person and was taken under the prescription and in accordance with the directions of a medical practitioner as defined in chapter 155A or if the substance was dispensed by a pharmacist without a prescription pursuant to the rules of the board of pharmacy examiners, if there is no evidence of the consumption of alcohol and the medical practitioner or pharmacist had not directed the person to refrain from operating a motor vehicle.

b. When charged with a violation of subsection 1, paragraph "c," a person may assert, as an affirmative defense, that the controlled substance present in the person's blood or urine was prescribed or dispensed for the person and was taken in accordance with the directions of a practitioner and the labeling directions of the pharmacy, as that person and place of business are defined in section 155A.3.

Wisconsin

Wis. Stat. § 346.63(1)(am). Operating with a restricted controlled substance.

(1) No person may drive or operate a motor vehicle while:

The person has a detectable amount of a restricted controlled substance in his or her blood.

Restricted controlled substances are defined as Schedule I controlled substances (cannabis metabolites are excluded), methamphetamine and cocaine (cocaine metabolites are included). A valid prescription for methamphetamine or one of its metabolic precursors, gamma-hydroxybutyric acid or delta-9-tetrahydrocannabinol can be an affirmative defense.

TCA 40-11-118 (a) DUI Bond for Multiple Offender

TCA 40-11-118 (a) became effective January 1, 2011. The addition to the bond law was intended by the Legislature to require the Court to examine in greater detail any danger to the community posed by a multiple DUI offender. The new law has caused an uproar among defense lawyers. Steve Oberman in his 2010 book *DUI: The Crime and Consequences in Tennessee* has declared the law unconstitutional. Fortunately, Mr. Oberman is not a Judge to my knowledge. He is however, a true gentleman.

Section (a) states that a Court make a determination of whether the defendant is a danger to the community prior to release. Danger to the community has been a factor for the Court in considering an appropriate bond listed at 40-11-118 (b) which states the Court shall consider "the defendant's prior criminal record and the likelihood that because of such record the defendant will pose a risk of danger to the community". Section (a) of the new law requires the Court to look specifically at prior Tennessee DUI convictions, which are prior criminal convictions. If prior Tennessee DUI convictions exist, the Court is encouraged to lessen the danger posed by the offender by use of certain monitoring devices or treatment. The Court could impose conditions of release prior to the passage of the law. See TCA 55-10-116. Such conditions included: (1) release of the defendant into the care of a qualified person or organization responsible for supervising the defendant and assisting the person in appearing in court; (2) imposing reasonable restrictions on the defendant's activities, movements, associations and residences and/or (3) any reasonable restriction designed to assure the defendant's appearance. .

For all practical purposes, section (a) does three things:

First : It requires a Court to **make a determination**. While the term "Court" is not defined in the new statute, it is defined in TCA chapter in which the new section is included. Nothing in the new section eliminates current provisions. TCA 40-11-105 states:

(1) When the defendant has been arrested or held to answer for any bailable offense, the defendant is entitled to be admitted to bail by the committing magistrate, by any judge of the circuit or criminal court, or by the clerk of any circuit or criminal court; provided, that if admitted to bail by the clerk of any circuit or criminal court, the defendant has a right to petition the judge of the circuit or criminal court if the defendant feels that the bail set is excessive, and shall be given notice of this fact by the clerk.

(2) The clerk of any circuit or criminal court may only admit the defendant to bail when the **judge is not present** in the court and the clerk reasonably believes that the judge will not be present within three (3) hours after the defendant has been committed to the county or city jail, following arrest.

It appears that the Legislature has established the mechanism and personnel who can act for the Judge. The new statute did not rewrite the existing laws, it added to the existing laws.

Second: It requires the Court to examine the prior record of the defendant for prior DUI convictions and determine whether the prior convictions cause the Court to believe the defendant is a danger to the community. A defendant with one nine year old conviction may not be seen as a danger. A person with three convictions in the last two years may be much more dangerous. The Court is called upon to use it's judgment to make a determination of dangerousness.

Third: It requires the Court to examine whether conditions need to be set for the defendant to reduce the likelihood that an offender determined to be dangerous will cause danger to the community.

Nothing in TCA 40-11-118 (a) is in conflict with the constitutional right to a bond for the accused driver. The section requires that some thought be put into conditions of bond, if conditions are necessary to protect the public. The Legislature has previously included the prior criminal record and danger to the public as considerations to be examined before bail is set. The Legislature has previously empowered the Courts to set bond conditions. The new law gives greater emphasis to protecting the public from a dangerous offender when bond is set.

Go to the next page to read about TCA 55-11-148 (b) Bond for driver on bond for DUI.

TCA 40-11-148 (b) Bond For the NEW DUI Offense

TCA 40-11-148 (b) became effective January 1, 2011. The addition to the bond law was intended by the Legislature to require the Court to examine in greater detail any danger to the community posed by an offender on bond for DUI, who commits the crime again while on bond. TCA 40-11-148 (b) deals with the situation in which a defendant has been released on bail and has been arrested for another DUI, vehicular assault or vehicular homicide. It states:

(b) If a defendant has been admitted to and released on bail for a violation of § 39-13-106, § 39-13-213(a)(2) or § 55-10-401 and commits any of those crimes after release, the defendant **shall be considered a danger** to the community. The defendant shall not be released with another bail **unless** the court first determines the defendant is no longer a danger to the community. The court may consider the use of monitoring devices to eliminate the danger posed including ignition interlock, transdermal monitoring, drug tests and in patient treatment.

It appears that Oberman concludes in his book that a Court cannot stop an offender on bond for a DUI, who commits a second DUI while on bond from committing a third offense. If the Courts and the Legislature had such a negative outlook, the law would mean that a Court could not set a bond for such an offender. The offender would necessarily be held without bail in violation of the Constitution.

Courts have examined and used mechanisms for protecting the public with bond conditions for years. The Honorable Douglass Myers, Judge of the Criminal Court for Hamilton County, would sometimes require an offender to attend five A.A. meetings a week and come to the jail to submit to a breath test on weekends as a conditions. He would set a fairly low financial consequence to a new offense, but would make certain the new bond conditions would protect the public. He did this before things like electronic monitoring and transdermal alcohol monitoring devices had been invented. He did so with great success.

The idea that no bond can be set for an offender who commits a DUI while on bond for another is not what the new laws mandate. In fact, a new bond has to be set for such an offender. It has to be set after the Court is able to conclude that the danger presumed to be real has been eliminated. This requires the Court to make substantial efforts to eliminate the danger. These efforts may include, but are not limited to conditions of bond included in the statutes. For instance, an offender is not a danger due to driving when the offender is in an in-patient treatment center. The offender can't drive impaired if he is not allowed to consume alcohol or drugs while on bond. Monitoring devices can be used to make sure the condition is met. The defendant cannot drive impaired if he has geographical restrictions like house arrest with electronic monitoring. The driver cannot drive impaired if his vehicle is impounded and he is not permitted to purchase, rent or borrow another vehicle while on bond or if he is limited to driving a vehicle with an ignition interlock devise. The defendant might go to extreme measures to violate the conditions of bond. He may cut off an ankle bracelet or steal a car to drive to a bar or force his wife to blow into an ignition interlock to start the car. Such actions would represent an extreme, intentional act to commit another violation. No one can stop someone from committing a crime, if the person is determined to do so. The Courts are not required by the new law to stop future intentional criminal acts. They are not vested with super powers or the ability to cause the earth's rotation to reverse itself.

Good Judges with the addition of two new laws will examine ways to try to protect the public from someone who has been arrested twice in a short period of time for DUI. The new laws do not limit the courts to the use of the mechanisms listed in the law. Judges become Judges to serve the community. They are intelligent, capable, experienced men and women. They will look at each and every defendant and situation and compose the best practical method to assure the defendant is permitted a bond for a new offense and assure that the defendant will not cause carnage after release. Judges do not become Judges because the job is an easy job. The Legislature presumed Judges can release defendants and protect the public at the same time. Call me an optimist, but I believe Judges will do the right thing with the new law and uphold the Constitution.

IGNITION INTERLOCK LAW

The Ignition Interlock law was a 16 page ACT of the 2010 General Assembly. It is important to know the details of this law and there are many. In addition to the basic law, there are many new crimes established for those who play games with the orders of the court. The provisions are found at TCA 55-10-412.

DISCRETIONARY INTERLOCKS

The Court has discretion to order an ignition interlock in any case in which the Court believes the interlock would be a proper condition of probation. The Court may also order the use of an ignition interlock in any case in which a driver requests a restricted license as a condition of the reward of the restricted license for any time up to one year. The Court may order the use of an ignition interlock as a condition of bond prior to conviction and would have discretion to give credit for the time a person used an interlock prior to conviction. The Court may also order the use of an interlock, if a driver wants to remove the geographic restrictions of a restricted driver's license.

MANDATORY INTERLOCKS

A mandatory ignition interlock will be ordered for all DUI 1st offenders with a B.A.C. of .15 or above and offenders who had a child passenger in the vehicle at the time of the arrest, who request a restricted license. A mandatory ignition interlock will be ordered for all second offenders for six months prior to the reinstatement of a valid driver's license for offenses which occurred after the effective date of the act.

NEW VIOLATIONS BY THE DRIVER

If a driver is ordered to drive a vehicle with an interlock and tries to get around the order, he/she will have created a whole new set of problems and the penalties will hurt. If he/she drives a car without an interlock, tampers with the devise or gets a friend to give a breath sample, the person will have committed a new class A misdemeanor with a minimum of 48 hours in jail and more if he/she is convicted additional times.

NEW VIOLATIONS FOR THE ENABLER

If a person provides a vehicle for a driver and knows the person is limited to using an ignition interlock equipped vehicle, that person will have committed a class A misdemeanor with the same penalties as the driver. Mom and Dad need to be careful about this. If their child comes home and wants to borrow a car after they know that the child has had an ignition interlock installed, Mom and Dad may join the child for a weekend in the pokey. That's probably not going to be quality family time. If a person gives a breath sample to help the impaired driver start the car, that person will also face the same penalties, which may cause the end of a friendship.

WHO PAYS FOR THE INTERLOCK

The violator will be ordered to pay for the devise. It won't be cheap. Usually the installment of an interlock costs between seventy and one hundred dollars. The monthly fee is approximately seventy dollars per month. An indigency fund has been established for those who cannot pay the full price. The indigent fund is used to compensate the provider of the interlock equipment. The fund is maintained by the State Treasurer.

BENEFITS AND PITFALLS

The 2010 General Assembly chose to pass an ignition interlock law aimed at high B.A.C. offenders. The logic behind the effort was to find the offenders, who were more likely to re-offend if an interlock was not installed. Statistics touted for many years by M.A.D.D. indicated that approximately one third of all DUI offenders re-offend within three years. A Tennessee Bureau of Investigation study indicated that 21% of offenders in a five year period were rearrested at least twice during those five years. The General Assembly aimed at those offenders. M.A.D.D. wanted and still wants an ignition interlock law that includes all first offenders. Since, Tennessee has an extremely liberal implied consent law, which prohibits the use of search warrants to obtain blood after a refusal, the M.A.D.D. position has at it's core an argument that we don't really know who the high B.A.C. offenders are. Many refuse testing. It will be interesting to see what happens next.

DUI WALL OF SHAME

THIRD FELONY

John E Mertz, 40, of Knoxville is serving time for his third felony DUI. He committed one in 2003 and another in 2006. His latest has him locked up in the Knox County Jail.

THIRD FELONY

Rondie Nicely, 32, of Powell is also serving his third felony DUI. He committed his first DUI 4th offense in Union County in 2005 and his next one in Knox County in 2007. Now he is serving another also in the Knox County jail.

FELON AND ROBBER

Darrin Ramsey, 41, of Knoxville, is serving his first felony DUI. However, he practiced with a sentence for robbery convictions from which he was recently released.

WILL SHE KILL NEXT?

Delisa Reynolds, 46, of Maryville, committed a vehicular assault and got a four year sentence in 2001. In 2003, she committed a felony DUI and was sentenced to two years in 2004. In 2009, she drove after being declared a habitual offender and got another year. Now she is serving for another DUI felony.

SIXTH WAS ON A LAWNMOWER

Martin McMurray drove his lawnmower on the wrong side of the highway on with a .15 BAC level. He was convicted of DUI 6th offense and for a violation of the habitual motor vehicle offender act in the Criminal Court in Sullivan County.

BOND JUMPER GETS 11 YEARS

John Lynch was facing trial for his 11th Tennessee DUI and for violation of the habitual traffic offender law. He skipped out on bond two years ago and was arrested in Key West for a DUI. After Florida finished with him, he was extradited, pled guilty to felony DUI and HMVO and had a trial and was found guilty for failure to appear. Now he gets to serve 11 years in a Tennessee prison.

FOURTH FELONY

William Duffer Jr. received a 4 year sentence for his 8th DUI, which was his fourth felony DUI. He was also a habitual traffic offender. His first felony DUI occurred in 2001.

EIGHTH OFFENDER

Scott Howard had four pages of prior offenses in his pre-sentence report. He served on probation and community corrections for most of them, but spent time incarcerated for felony DUI in 2004. Howard received two four year sentences in Crossville for DUI 8th and his violation of the habitual traffic offender law.

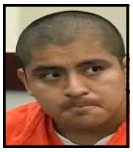
GOT SHAME?

Send us your multiple offender convictions for inclusion in this newsletter section.
Maybe, just maybe the point will be made that we need to find some creative solutions for these types of offenders before it is too late for one our fellow travelers on our highways.

VEHICULAR HOMICIDE MURDERERS ROW

James Allen Griffey, 35, received a 15 year sentence for aggravated vehicular homicide in Carter County. Griffey crashed into and killed an Ohio motorcyclist on U.S. Highway 321 near Fish Springs at about 2:45 p.m. on October 22, 2008. Griffey had a .06 percent blood alcohol level and he tested positive for four different drugs: diazepam, nordazepam, meprobamate and carisoprodol. Griffey had two previous DUI convictions. While awaiting trial, Griffey was arrested by the Elizabethton Police Department on July 24, 2010 on charges of evading arrest, simple possession of schedule III drugs and public intoxication. Griffey pleaded guilty to the charges.

Timothy Rush was so proud of the amount of alcohol he consumed at the Anchor High Marina in Hendersonville that he posted it on Facebook and invited his friends to join him. Then he drove with a .13 BAC level and killed Calvin Miller Jr., a mechanic returning a repaired car to it's owner. Rush pled guilty and received a 10 year sentence. His Facebook post was recovered by Sergeant Tim Clifford and Sgt. Wayne Nicholson of the Hendersonville Police Department.



Romon Neri, 23, an illegal immigrant living in Nashville, drove impaired and killed a legal immigrant from the island of Lalai, near Indonesia. Mr. Koirala, the father of five, was killed on Christmas Day in 2009. Neri was sentenced to serve eight years and will be deported when released.

Ricky Ray Redd, Jr., 37, was arrested in August on charges of vehicular homicide, vehicular assault and aggravated vehicular homicide. The charges are the result of a May 22nd crash in the City of Lawrenceburg. Mary Jo McDonald, 56, of Lawrenceburg, succumbed to injuries in July that she sustained in that crash. Redd pleaded to the charge of vehicular homicide and received a twelve year sentence to be served at 30 percent.

IanMcClellan, 31, of Centerville, pled guilty to aggravated vehicular homicide. McClellan will be sentenced by Judge Mark Fishburn January 18, 2011. McClellan killed Katie Kerr of White Bluff, when he crossed the centerline and crashed into her vehicle head on. McClellan faces 15-25.

Claude Merritt never learned in his sixty seven years that drinking alcohol and consuming diazepam could result in a deadly crash. He now has a forty year sentence for aggravated vehicular homicide. He killed an elderly lady in Bedford County, who was a passenger with her daughter in a vehicle driven by a sober gentleman. The two, who lived, also suffered injuries. Merritt had a .11 B.A.C. and diazepam (valium) in his system. He had at least three prior DUI convictions.

Tennessee District Attorneys General Conference

226 Capitol Blvd. Bldg., Suite 800 Nashville, TN 37243-0890
Website: http://dui.tndagc.org
Blog: http://tnduiguy.blogspot.com

Tom Kimball (615) 253-6734
Jim Camp (615) 232-2930
Sherri Harper 615) 253-6733

THE CRASH PAGE

Cross Examination of the Defense Expert Continued from Issue 32 **By Jim Camp**

Research the Witness' Background

You have to know your adversary. What is their employment history? Do they have a work history that adds or detracts from their professional competence and credibility? Are they truly qualified and competent to testify as an expert regarding the issue at hand? Take the time to adequately prepare and you will be amazed at what you can discover. Begin with a look at the expert witness file in the members only section of our TSRP website at http://dui.tndagc.org.

Move on to a Google search. Most expert witnesses have websites which usually contain at least a basic curriculum vitae. Some contain evidence of obvious bias in statements made concerning their ability in the field. They may even refer to specific cases that can be researched for prior testimony. Reference may also be made to lectures given that can lead to more evidence of bias and professional opinion. Also don't forget to search for the witness on Facebook and My Space.

Many times experts boast of certifications and memberships. Pay close attention here and do your research. Ask your expert about their validity. What is required to obtain such a status? Is a test required or the simple payment of dues? Do not allow these trumped up qualifications to go unchallenged either before or during trial.

Publications written by the witness can be another great source of information about them. Again, discuss these with your expert. Determine if any opinions expressed in these writings might contradict the defense expert's opinions in the case in chief. Be prepared to use the publication to impeach the witness if they do. Have that impeachment prepared ahead of time and make sure you read the articles in question. Also use your expert to determine if any publications contain opinions relied upon by the expert in your case. Does the defense expert routinely refer to their own publications as authority for those opinions?

Peer Review

"Peer Review" is a process where scientific articles are reviewed by other scientists and approved for publication in a scientific journal. If the defense expert routinely refers to their own publications as authority for their opinions, check to see if the articles have been subjected to a peer review process prior to publication or if the articles have simply been published in a DUI defense publication requiring no such peer review. The lack of peer review can be a great source of impeachment on cross.

Research the Science

You must try to learn as much as you can about the science involved in the expert opinion. You will never know as much as the expert but you can learn enough to understand the basis of their opinion which allows you to formulate effective questions on cross. That knowledge also helps you to defend yourself against an expert that is trying to pull the wool over your eyes. In the process terms of art need to be recognized, learned and understood. John Kwasnoski, the guru of crash reconstruction, often uses the word "accelerate" as an example of just such a term of art. When used by an expert in crash reconstruction it goes something like this: Defense Expert: "The vehicle maintained a speed of 35 mph as it accelerated through the turn."

Such a statement on the stand would lead most of us to sharpen our knives and prove to the jury on cross just how silly the expert's opinion truly is. After all, how can a vehicle maintain a particular speed as it *accelerates*? Professor Kwasnoski points out that the term of art "accelerate" can mean not only speeding up but also slowing down and changing direction. This example makes it easy to understand how the improper use of one term of art can result in the prosecutor shooting themselves in the foot.