



# DUI NEWS

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*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.*

## GOODBYE DUI TREATMENT FURLOUGHS WE ARE GIONG TO MISS YOU

The Tennessee Supreme Court in the March 4, 2011, decision **State v. Cooper**, 2011 Tenn. Lexis 191, appears to have removed a sentencing option used to get DUI offenders into treatment for many years. To understand what has occurred, we have to examine the misdemeanor DUI sentencing scheme. The scheme mandates that all DUI misdemeanor offenders receive a sentence of 11 months 29 days. The scheme then sets a minimum possible period of incarceration depending on whether the offense is a first, second, or third offense. The balance of the sentence must be served on probation. A typical first offender receives a sentence of 11 months 29 days suspended after serving the minimum of 48 hours in jail.

The Court also sets a percentage of time the individuals must serve, if his/her probation is revoked. Typically the period of service is 75%, but not always. In Cooper, the third offender was sentenced to 11 months 29 days to be served at a 100% rate. The Court also permitted Cooper to receive a furlough after 90 days, if she applied for a furlough to attend treatment.

For treatment purposes a furlough would permit the Sheriff's Department to transfer the offender to a treatment facility, when a bed becomes available. The furlough is approved when the bed is ready. Without a furlough, the offender is released on probation and responsible for remaining sober and getting into the facility on her own. The time in jail usually serves as a time to dry out. If the offender refuses to apply for a furlough, she continues to serve her sentence. If she goes to the treatment and flunks out, she is returned to jail.

The Supreme Court ruled in Cooper that no furlough could be given to the defendant because the Court had ordered her to serve 100% of her sentence. The Court noted that 75% of the sentence is the maximum that can be served prior to eligibility for consideration for any rehabilitative program. TCA §40-35-302 (d).

In a footnote, the Supreme Court stated that the trial court might have accomplished the purposes of this particular sentence by imposing upon the defendant a sentence of 11/29 with 100% release eligibility, suspended after service of 90 days with the remainder to be served on probation, with a condition of probation that she attend and successfully complete an in-patient alcohol rehabilitation program. This footnote indicates that the sentence would have to be suspended and the offender released where she would have to manage her sobriety and her admission as probation conditions. Unfortunately many untreated offenders rush to the bar as soon as they are released as opposed to managing their sobriety. The furlough system increased the possibility of successful treatment outcomes. It is unfortunate that it is now going away. Goodbye treatment furloughs; we are going to miss you.



## RECENT DECISIONS

**State v Cooper**, 2011 Tenn. Lexis 191

Supreme Court Bans Treatment Furlough Practice

The Tennessee Supreme Court in the March 4, 2001, decision appears to have removed a sentencing option used to get DUI offenders into treatment for many years. The issue presented was whether the sentencing condition permitting an application for furlough after 90 days of a sentence to be served at 100 percent complied with the Tennessee Criminal Sentencing Reform Act of 1989. For treatment purposes a furlough permits the Sheriff's Department to transfer the offender to a treatment facility, when a bed becomes available. The furlough is approved when the bed is ready. Without a furlough, the offender is released on probation and responsible for remaining sober and getting into the facility on her own. The time in jail usually serves as a time to dry out. If the offender refuses to apply for a furlough, she continues to serve her sentence. If she goes to the treatment and flunks out, she is returned to the jail.

**State v Ralph**, 2010 Tenn Crim App Lexis 1090

12 year sentence



Defendant was convicted of DUI 5th offense, Driving as a Habitual Traffic Offender and Evading Arrest. He received a four year sentence for each. The sentences were consecutive. The case dated back to a stop September 1, 2006. The defendant decided it would be a good idea to speed away when Trooper Bruce Pryor approached his vehicle. He later decided it would be a good idea to run away and try to escape into the woods. The worst of his ideas was to drive after he had been declared a habitual traffic offender and to drive impaired. The defendant tried to use his previous 17 year prison sentence as a mitigating factor at sentencing, but failed to persuade the Court to grant leniency, because he had completed that sentence.

**State v Sweeton**, 2011 Tenn Crim App Lexis 43

3rd Conviction with 4th pending

This defendant drove through a Hamilton County tunnel straddling both lanes in May, 2006. He had a BAC of .16. His attorney managed to delay the inevitable by *five* years. The Defendant was convicted by a jury. His attorney appealed claiming discovery violations and that a prior conviction from Georgia, supported by ten pages of documentation should not have been used in his case. The appeal failed. On January 27th, 2011, the Chattanooga newspaper revealed that the defendant, an East Lake Special Education teacher, had been suspended from his teaching position after he was incarcerated for this conviction.

**State v Blair**, 2011 Tenn Crim App Lexis 142

No NHTSA manual cross examination

Defendant's DUI conviction was proper because the trial court did not improperly prevent defendant from using the National Highway Traffic Safety Administration manual to cross-examine a sergeant, who was testifying as a lay witness, regarding field sobriety tests conducted with defendant. Officers in Tennessee are not qualified as expert witnesses, unless they are Drug Recognition Experts. Using a learned treatise to cross examine a lay witness is prohibited. This case is consistent with prior decisions.

**State v Mooneyham**, 2011 Tenn Crim App Lexis 159

12 years Felony DUI & Evading



The defendant led law enforcement on a high speed chase and he then jumped off a bridge to try and escape. In addition to a twelve year sentence, he got wet. The defense tried to excuse the post jump observations as being the result of his fall and splashdown twenty five feet below. This driver risked his own and several other necks on December 7, 2008, in Bedford County, while driving like an idiot. You have to wonder how he describes his crime to his fellow inmates. I bet that water was a little chilly.



## Total Refusal DUI's

Experienced DUI offenders commonly refuse breath or blood tests in Tennessee. It is rare to see a third, fourth or fifth offender "consent" to a test of the blood alcohol levels. Many of the experienced DUI offenders also refuse to participate in field sobriety tests. For example, Terran T. Coleman, recently was convicted for his 15th DUI. When asked to perform the walk and turn test, he turned around and put his hands behind his back. Coleman received a three year sentence as a class E felon with prior felony convictions.

Cases in which a DUI defendant refuses to participate in field sobriety testing have become so common that the National Lifesavers Conference will have a break out session this year called: "*Old School DWI: How to Make a Case with a Suspect who Refuses Everything*." The Session will focus on the need for officer's to use all their observation skills and write thorough reports concerning observations. A March 8th, 2001 arrest in Nashville included a report that is an outstanding example, written by Officer Robert Short. "Defendant was involved in a traffic accident at the intersection of Andrew Jackson Pkwy and Weber Rd. The other party involved identified the defendant as the driver of the contact vehicle. The defendant advised that he was driving the vehicle. Defendant was found at fault in the accident. Upon arriving at the location I observed the defendant stumbling and unsteady on his feet. I asked the defendant what happened and he did not answer. I then asked the defendant if he had consumed any alcohol or drugs and he stated "no". I immediately noticed an obvious odor of alcoholic beverage coming from the defendant's breath, as well as red, blood shot, watery eyes. I told the defendant to have a seat in the back of my patrol car. The defendant took off his jacket and stood in place. I asked the defendant why he took off his jacket and he stated "to give to you." I reached out to take the jacket and the defendant put the jacket on. I told the defendant to go to my car and have a seat in the back seat and he then began to move towards my police vehicle. Defendant was very unsteady and stumbling as he walked approximately 15 feet to my police vehicle. The defendant then leaned up against my patrol vehicle with the palm of his hands at shoulder width and his legs spread with his head hanging towards his chest. I told the defendant to stand up and relax. He did not respond. I repeated the instruction to stand up 2 more times until he complied. I asked the defendant if he had his driver's license and he stated he left it at home. I asked him for consent to search his clothing prior to putting him into my police vehicle. He stated that he didn't have anything on him and to go ahead and search him. I located an open container of Captain Morgan's Tattoo Rum in the defendant's right front coat pocket. The defendant's vehicle was damaged beyond drivability and the defendant's 3 year old son, also named xxxx D.O.B. 07/28/2007, was in the back seat. I asked the child if he was O.K. or if he hurt anywhere and he replied that his shoulder hurt. NFD responded to the scene as did the child's mother, who cleared the child at the scene with and the mother signed the refusal of service for the responding medics. As I was at the vehicle to evaluate the possible injury of the child I noticed, in plain view, two empty Rum bottles identical to the bottle located in the defendant's pocket, and a compressed cluster of green leafy substance consistent with marijuana on top of the arm rest/center console area between the front seats. The defendant was asked to follow a stimuli and instructed how to do so for the purpose of observing Horizontal Gaze Nystagmus. The defendant refused to follow instruction and would not follow the stimuli as instructed. The defendant did follow the stimuli well enough to observe lack of smooth pursuit and distinct nystagmus at maximum deviation, prior to staring past the stimuli and avoiding the task. The defendant refused to submit to the Field Sobriety Tasks."

Field sobriety tests were designed as divided attention tests with mental and physical tasks. An officer observes a driver to determine if the driver can follow instructions. In the example the officer noted several times that the driver could not follow instructions. The field tests allow observation of physical tasks to evaluate whether the driver's physical abilities are impaired. In the above example the officer noted the various physical problems displayed by the driver. Observation of the refusing driver permits the same type of conclusions as the SFST's, if the officer observes and records observations well.

## WALL OF SHAME

### FIFTEENTH DUI



Terran T. Coleman, 45, received a sentence of three years as a class E felon with prior felonies for his 15th DUI. Coleman had prior DUI's as long ago as 1985 and has never stopped drinking and driving. He is also a convicted burglar, thief, escapee and aggravated assaulter and once was sent to prison for 7 years. When asked to perform the walk and turn he put his hands behind his back. The arresting Officer John Roberson that he knew he was headed back to prison.

### EIGHTEENTH DUI



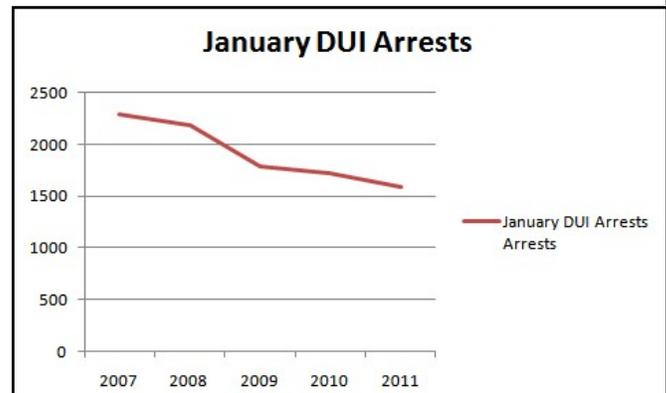
Dennis Michael Reagan topped Coleman. He was convicted of his 18th DUI. He went to prison for the first time as a habitual traffic offender (HTO) in 1989. He went back in 1992 for felony DUI and HTO. He went again in 2006 in April, got out and went back in November for another conviction. Reagan has had nine felony convictions. He refused all tests. He was sentenced to the maximum penalty for DUI offenses of 6 years with parole eligibility at 60%.



A first time entry to the “wall” is the Rutherford County School System. The system made it onto the “wall” by having four different teachers arrested for DUI in one year. This example of criminal behavior is not reflective of the attitudes of Tennessee or Rutherford County Teachers. The fact that four in one year managed to commit the crime and be apprehended would indicate that there is way too much partying going on with a group responsible for setting a good example for the children of Rutherford County.

### DID YOU KNOW?

During January, 2011, there were 1,592 DUI convictions posted to Tennessee driver's licenses. The posting of the conviction does not reflect when the arrest occurred. However, convictions posted were 31% lower than in 2007 and reflect a five year downward trend. These convictions are primarily from Tennessee, but include out of state convictions posted on Tennessee licenses as well.



## **The Magic in the Box Crash Data and the “Black Box”**

**Sergeant Andy Shelton, Sr. Tennessee Highway Patrol Critical Incident Response Team, Region 4 Supervisor**

### **What is the “Black Box”**

Most newer domestic and many import cars and light trucks have the ability to record and store some information about what the vehicle was doing immediately prior to and what happened to it during a crash. The systems that record this data are the Airbag Control Module (ACM), the Powertrain Control Module (PCM), and/or the Roll-Over Sensors (ROS) found in many modern cars. Commonly referred to by the misnomer, “The Black Box,” the ACM is typically where crash data is captured and stored in automotive systems. Depending on the vehicle manufacturer, the ACM may be referred to by several different nomenclatures, such as Sensing and Diagnostic Module (SDM – General Motors), Restraint Control Module (RCM - Ford), and others.

The improper description of “Black Box” should be avoided, as it may create a point of contention or attack by an opposing council or expert witness. The commonly accepted generic term of Airbag Control Module or ACM is preferable and may prevent confusion. Moreover, the ACM is not black; it is typically a cast aluminum module.

For the purposes of this article, ACM, PCM, and ROS will be referred to collectively as ACM.

### **What is in the Box?**

Most current air bag control systems use accelerometers inside the ACM to monitor if the vehicle is involved in a crash. Many systems have supplemental remote sensors, to assist in sensing frontal and side impacts. The accelerometer is the same device found in many newer cell phones which determine the orientation of the phone, detect shaking, and allow tilt and lean movements to control games and other applications.

The accelerometer in the ACM is designed to detect a change of speed (or velocity) over one thousand times a second. When the ACM detects a preset change in speed over a certain amount of time, also known as Delta-V, it will wake up and analyze the severity of the impact. If it predicts a severe enough Delta-V, it will deploy the airbags and other safety devices it deems necessary to protect the vehicle occupants.

While the primary purpose of the ACM is to deploy the airbags and perform diagnostics on the system, many have the ability to record data about the event, hence the Event Data Recorder. The EDR was originally added to some ACM’s as an engineering function. The crash pulse or Delta-V recorded by the EDR was helpful in determining the effectiveness of the ACM’s Deployment algorithm and was used to improve airbag systems and vehicle safety.

It is the EDR from which we now have the ability to retrieve some crash data. As technology has progressed, the information contained in some EDR’s has expanded to include pre-crash vehicle information such as vehicle speed, engine speed, brake pedal position, and more. Additionally, some vehicle PCM’s record vehicle and engine performance data which is recoverable.

### **Where does the Data Come From?**

It is when the ACM wakes up and analyzes the crash pulse that the EDR function begins. Most ACM’s do not continuously record real-time vehicle data, data rolls through a temporary buffer. Only after an event occurs that triggers the ACM to wake up, does any data become stored. However, some Powertrain Control Modules (PCM) do record real-time vehicle performance data in a continuous loop.

The data that is stored in the ACM comes from different sensors throughout the vehicle. Some of these sensors include, but are not limited to the Vehicle Speed Sensor, Throttle Position Sensor, Steering Angle Sensor, and many others. Most modules directly monitor the seatbelt status.

There are three types of Events that are recorded by the EDR, these are the Non-Deployment, Deployment, and Deployment Level Events. Typically a Non-Deployment event is not permanently written or Locked in the EDR memory. However, when a Deployment event is written to an EDR most ACM’s “Lock” the event into permanent memory. If a Deployment is commanded in a crash, but a Deployment has already occurred and been written to memory, the EDR may record a Deployment Level event or no data at all. Most ACM’s also write a Deployment Level Event permanently to memory if space and power is available.

If during a crash, power is lost to the system, there may not be sufficient power to write all or some of the buffered data to the EDR. This is one reason that not every crash involving Deployments and vehicles that have EDR’s produce usable crash data. There are numerous other reasons that crash data is not recorded or lost, some of these will be addressed later.

Continued next page

## **The Magic in the Box**

### **Crash Data and the “Black Box” (cont’d)**

#### **How do we Get the Data?**

Only properly trained technicians should attempt to collect crash data. Failure to follow the appropriate procedure with some ACM's can result in a loss or spoliation of some or all existing crash data.

The most common system used by both private and police crash reconstruction practitioners to retrieve crash data from ACM's is the Bosch Crash Data Retrieval (CDR) system. The process is called imaging the data (Some people refer to it as downloading, but imaging is the preferred term because the readout only makes a copy of the data like taking a picture, the original data is still preserved in the module. The CDR system has been developed in cooperation with the Original Equipment Manufacturers (OEM) in order to produce a clear, concise, and reproducible report.

The CDR system can be connected to a subject vehicle through the under-dash Diagnostic Link Connector (DLC) or directly to the module in the vehicle or removed from the vehicle and brought back to the work bench. Whenever possible, a technician should attempt to download data through the DLC first.

The report generated by the CDR is a translation of the data retrieved from the EDR. This report should be analyzed by a trained analyst for completeness, validity, and confirmation that it applies to the crash in question. Once this has been accomplished, the data can be used in conjunction with or to corroborate a mathematical crash reconstruction.

#### **Is the Data Good Evidence?**

The short answer is that there is no single answer to this question. A CDR report should be scrutinized by a trained analyst before its information is used in the investigation or prosecution of a case. There are some known things that can result in an ACM either not storing, or storing corrupted data. Additionally, there are several things that can cause some ACM's to lose some or all of the data they stored.

For obvious reasons, if an ACM is physically damaged during a crash it may not have stored or may lose all crash data. While not possible in every case, crushed, submerged, and burned modules have been successfully imaged and produced valid information. No assumptions should be made.

If during a crash an ACM experiences a voltage spike or loss, the memory writing process may be interrupted, corrupted, or never start. In this circumstance, many modules will indicate that the entire event was not stored. Others may display data from an old event that is partially overwritten by a new event and appears to violate the laws of physics. There are far too many scenarios to list them all in this format.

When a vehicle does store good data and the vehicle is mishandled by tow-truck operators, rescue personnel, or even law enforcement, some or all of the stored data may be lost or overwritten. In the event of a Non-Deployment, the data in some vehicles can be erased by cycling the ignition a number of times or overwritten by another impact. Ford Powertrain Control Modules can, at times, be overwritten by simply turning on or leaving the key in the on position. Additionally, as stated above, failure to follow the appropriate procedure with some ACM's or PCM's can result in a loss or spoliation of some or all existing crash data. Again, it is not possible to discuss all of the possible scenarios in this format.

In addition to the possible loss of data or the presence of corrupted data, it is possible that the data is present and valid, but does not immediately make sense in the context of the crash. For example, a CDR report may have multiple Non-Deployment events and speeds that vary wildly in a roll over crash. Another common situation in which the CDR report presents odd looking information that may be valid is when a vehicle side-slips prior to an impact. The CDR

With all of the above having been said, there are far more valid CDR reports than invalid.

report may show speeds that drop at unreasonable rates or are unrealistically low during some or all of the reported time. A trained analyst and reconstructionist may be able to use some or all of the information found in a report with this type of information. Every CDR report is different and should be taken on a case by case basis.

A CDR report can be interpreted and used in conjunction with crash scene evidence. The CDR report is often used as additional information in a reconstruction or a confirmation of the same. So, good data is good evidence and bad data is just that.

Continued next page.

## **The Magic in the Box**

### **Crash Data and the “Black Box”**

#### **Where and When should a Image be Attempted?**

While some deployment events lock data, it is not possible to know if the data is locked until after the readout. Due to the above described scenarios where ACM data can be corrupted, overwritten, or inadvertently lost, all crash data should be considered short lived evidence until proven otherwise by the readout. Responders to the scene can destroy crash data while attempting to move a crashed vehicle or recover personal items.

Officers should familiarize themselves with the supported vehicles and do everything possible to avoid data spoliation in vehicles that may have a supported EDR. At a minimum, the ignition keys should be removed from every vehicle and held until it can be determined if it is supported. Officers should ensure all ignitions are turned off immediately upon arrival at a crash scene. Whenever possible, the vehicle should be imaged prior to moving it from its final rest position. If an onsite image is not possible, it is preferred that the battery cables be disconnected, not cut.

#### **What Vehicles can be Imaged?**

Currently, most General Motors vehicles manufactured domestically since 2000 store pre-crash data, with some vehicles as early as 1994 having crash pulse data. Many Ford vehicles manufactured from 2001 store crash pulse data, with some as early as 2003 storing some pre-crash data in the PCM. Some Chrysler vehicles starting in the 2005 model year store pre-crash and crash pulse data. At present the only import vehicles that are supported by the CDR system are either domestic clones or share platforms with domestic vehicles.

Many import vehicle manufacturers are beginning to come online with recoverable data. Even if a late model vehicle is not currently listed as a supported vehicle, the data may be recoverable by asking the manufacturer for assistance. Do not make assumptions that that you can't get the data from it.

The NHTSA has issued a Rule that requires all vehicles equipped with an EDR have the ability to record and make recoverable a minimum standardized data set. This rule is effective September 1, 2012. However, it does not require that all vehicles have an EDR. Not all vehicles will have the ability to store and reproduce crash data even then. A list of currently supported vehicles can be found at <http://www.cdr-system.com/resources/coverage.html>

#### **What can I do with the Data?**

Crash reconstruction experts use evidence at the scene of a crash and physical evidence from crashed vehicles to attempt to determine pre-crash speeds, angles, and causative actions. The data obtained from a CDR report can verify the conclusions of the reconstructionist and even tell more of the story that the math can not reveal. The CDR report can tell what happened as the crash began.

The Ohio State Highway Patrol recently investigated a crash in which a Dodge Charger struck a Pontiac Montana in a “T-Bone” style collision. The Charger was traveling on a divided highway with a posted speed limit of 65 miles per hour. The Montana, driven by an elderly man crossed the highway from a side street at night. The passenger of the Montana was killed. A reconstruction indicated that the Charger was traveling at speeds between 65 and 78 miles per hour, with the Montana traveling at speeds between 16 and 20 miles per hour. The initial indication of the investigation was that the driver of the Montana pulled into the path of an oncoming vehicle, and was at fault in the crash. The CDR report showed that the Charger was traveling 124 miles per hour five seconds before impact. The final speed reported by the Charger was 78 miles per hour.

As you can see from this example, not only did the CDR report confirm the reconstruction, but also provided information that would not have otherwise been available. Due to the presence of ABS brakes, there was no roadway evidence of pre-crash braking on the part of the Charger. While the reconstruction was accurate, the pre-crash actions were unknown.

While every case should be taken individually, crash data and the CDR report can reveal information that can exonerate or indict a driver. For more information about crash data and the CDR system, please visit the CDR website at <http://www.cdr-system.com/>. Additionally, criminal cases within the State of Tennessee can be cited by the author if needed.

#### **Conclusion**

The presence of crash data can be used to confirm a reconstruction or it may reveal information that is otherwise unavailable. Whenever practical, crash data should be considered short lived evidence and retrieved before the vehicles are moved from a crash site. When a trained technician is not available to respond to a crash site, the at scene investigators should take care in handling crashed cars and a search warrant or written authorization be sought for a download at a later time.

## DRE CLASS COMPLETED IN JACKSON

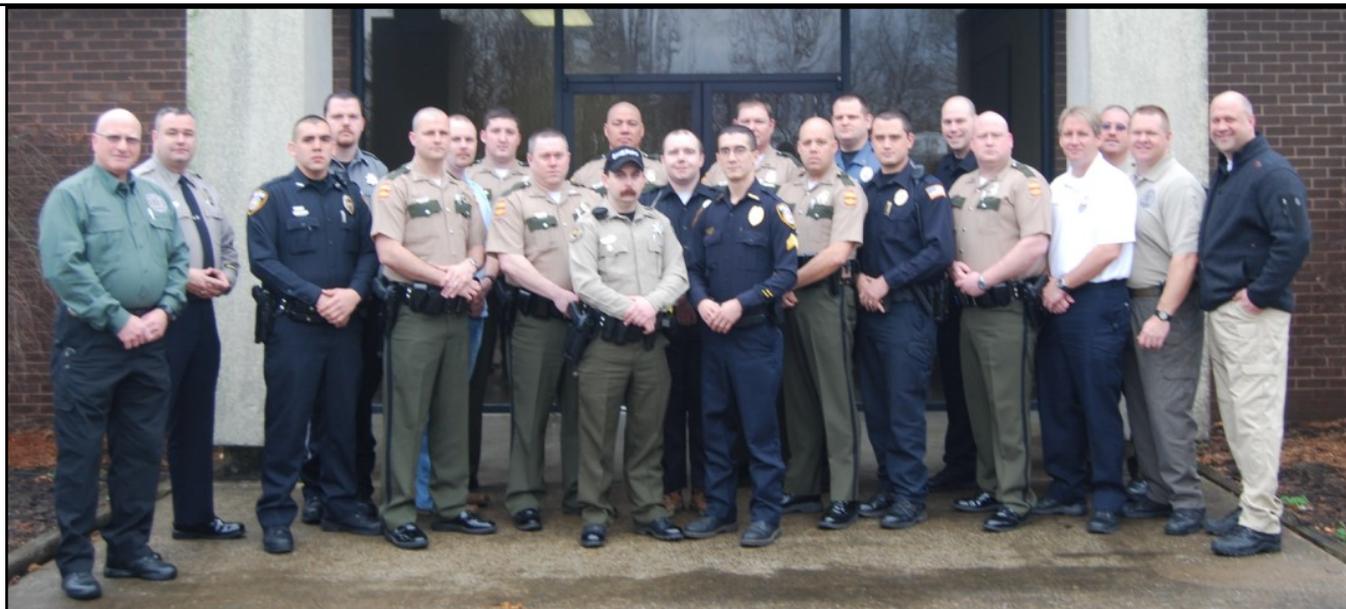
The 8th Drug Recognition Expert class in Tennessee has been completed. Officers spent 2 days in a pre-school and 7 more in the DRE school learning signs and symptoms of drug impairment. After completing and passing a six hour final exam, they will complete twelve evaluations in the presence of instructors and have each reviewed for accuracy before they receive certification from the International Association of Chiefs of Police.

Congratulations for work well done goes out to: Troopers Michael Cummins, Jason Mounts, Phillip Long, Vincent Meaker, Todd Yelverton, Mathew Sipes and Karl Cagle and Benton County Deputy Tim Moss, Gibson County Deputy Ryan Shanklin, Dickson Officer Scott Hull, Caryville Officer Benjamin Marlow, Franklin Officer Jon Angus, Savannah Officer Charles Childers, Brentwood Officer Stanley Boyd, Henderson County Deputy Landon Delaney, Ashland City Officers Mathew Sipes and Joseph Olivas and Germantown Officer Nicholas Louis.

A drug recognition expert or drug recognition evaluator (DRE) is a police officer trained to recognize impairment in drivers under the influence of drugs other than, or in addition to, alcohol. The International Association of Chiefs of Police (IACP) coordinates the International Drug Evaluation and Classification (DEC) Program with support from the National Highway Traffic Safety Administration (NHTSA) of the U.S. Department of Transportation.

The DRE categorization process is premised on long-standing, medically accepted facts. DREs classify drugs in one of seven categories: Central Nervous System (CNS) Depressants, CNS Stimulants, Hallucinogens, Phencyclidine (PCP) and its analogs, Narcotic Analgesics, Inhalants, and Cannabis. Drugs from each of these categories can affect a person's central nervous system and impair a person's normal faculties, including a person's ability to safely operate a motor vehicle. Many drivers use drugs from multiple categories when driving. The DRE works to recognize impairment from one or more categories when conducting a 13 step evaluation of the driver. DRE's are also trained to recognize medical impairment that may initially look like alcohol or drug impairment, but is not. Recognizing that a person is in need of medical attention is vital to the life saving work of our Law Enforcement Community.

DRE's have been qualified as expert witnesses in several Tennessee Courts, but none of the resulting convictions have been appealed. For that reason there are no Appellate decisions in Tennessee concerning the process. The recognition of DRE's as expert witnesses is common in many States and has been recognized in State Supreme Courts and Federal Courts. The DRE program in Tennessee began in 2006. Officers have a bi-annual continuing education requirement and keep up with new developments by completing refresher courses. DRE's are not only called to investigate car crashes and suspected drugged DUI offenders, but in other instances in which drug impairment is suspected.



DRE Faculty included: State Coordinator Richard Holt, Collegedale Chief Brian Hickman, GHSO Law Enforcement Liaison Clint Shrum, Franklin Officer Brent Rose, Anderson County Deputy Ray Faircloth, Alabama Highway Patrolman Jay Penton and for one brief hour, TSRP Tom Kimball.

## MURDERERS ROW

Jason Whiteside killed one of his passengers and injured two others when he decided to flee from law enforcement after running a red light. The police gave up their pursuit due to danger, but discovered a crash scene minutes later. Whiteside had outstanding warrants in Mississippi and was on bond for a crime in Georgia. Whiteside wanted probation after pleading guilty to the Class B vehicular homicide by intoxication charge, but was denied. Susan Taylor represented the people of the State.



Danny Ross is going back to the prison for 3 years. Ross was convicted of three counts of vehicular homicide by intoxication in 1993 and was released in 2004. Since he was released he has collected three more DUI convictions. He did not commit any DUI's in prison, so he came out with a 10 year DUI free period and went back to being a first offender. That is offensive, but statutorily required!

State v Bizzoco, 2011 Tenn Crim App Lexis 143.



Bizzoco got to celebrate for a couple minutes when he learned he won part of his appeal. He had been convicted of vehicular homicide, vehicular assault and DUI. The DUI conviction violated double jeopardy and had to merge into the vehicular homicide, so that part of his case was reversed. He killed two and injured four and now gets to serve 8 years with a 35% parole eligibility possibility.



David Lee Wilcox is now serving a five year sentence for vehicular homicide. He is currently in the Washington County jail. Wilcox received a verdict for reckless vehicular homicide by a jury in March 2011 for driving in December 2007. He ran over and killed David Hudson, as he tried to cross a street. Wilcox was speeding and there was testimony that he had no headlights on at the time. Wilcox had a .15 B.A.C. level. Wilcox's attorney Rick Spivey admitted to potential jurors his client was drunk that night. However, Spivey said the alcohol his client drank did not cause Hudson's death. The defense argued that a sober person could not have avoided the victim. Wilcox had a history of four prior DUI convictions, which, by rule, could not be shared with the jury.

## CRASH SCENE 101

Want to do something to make sure the guilty killers are convicted and the innocent cleared?

Attend Crash Scene 101. It is an 8 hour P.O.S.T. certified class for law enforcement featuring Professor John Kwasnoski to be held on June 16th at the Sevierville Civic Center. "Kwas" is an amazing teacher and author of "*From Crash To Courtroom*", an outstanding text for law enforcement and prosecutors.

### Training objectives for the course are:

- Recognize that initial observations at a crash scene are vital;
  - Recognize the need to observe and record information to determine who was the operator pre-crash;
  - Understand basic terminology used by crash reconstruction experts;
  - Learn certain principles of physics that will help them understand the kinematics of crashes;
  - Understand the necessity of photographic evidence in crash cases from various perspectives;
  - Prepare students to articulate findings in Court.
- Judges, Magistrates, Law Enforcement Officers, EMT's, firefighters, dispatchers and more are welcome!

Sign up at: <http://www.tntrafficsafety.org/GHSO/registration.asp>  
Or for questions contact Sherri Harper at 615-253-6733

# THE CRASH PAGE

## CROSS EXAMINATION OF THE DEFENSE EXPERT

### Part 3 in the DUI NEWS Series (beginning on page 12)

By Jim Camp

#### Motions in Limine

Expertise can be challenged by filing a Motion in Limine asking the court to either preclude or limit the witness' expert testimony by pointing out the holes in the witness' qualifications. Bringing this motion pre trial allows the court an opportunity to review and critically evaluate the witness' claimed expertise or lack thereof and allows the state the chance to discover the witness' opinion and assumptions early enough to adequately prepare for trial. The prosecutor needs to prepare for this motion. It is not a blind discovery expedition. A reasonable argument challenging the witness' qualifications to testify in your case should already be established. This is the foundation of your attack. You must come to the hearing armed and ready to effectively question the witness to establish your point. In addition you should file copies of any documents that lend credibility to your argument. These may include print outs of website pages, copies of transcripts of the witness' testimony as well as curriculum vitae provided by the witness in other cases. You must not ignore civil cases as a resource for this information since defense experts often testify in civil liability cases. These cases can contain a wealth of information due the more liberal discovery rules that apply. Even if the civil case does not go to trial discovery materials are available. These materials include depositions of the expert, answers to interrogatories including the expert's curriculum vitae, diagrams, reports and opinions.

#### Voir Dire of the Expert

If you have not filed a motion in limine to challenge the witness' qualifications you may achieve the same result during trial by requesting the opportunity to voir dire the witness. During an expert witness voir dire you have an opportunity to question the witness under oath. This is done prior to the start of direct exam questioning of the witness and outside the presence of the jury. You essentially cover the same ground you would cover during a motion in limine and use the same resources to prepare yourself for the questioning.

Defense Atty: "The defense calls Dr. Joseph Gonyo"

*The witness takes the stand.*

Defense Atty: "Please state your name and spell your last name for the record"

Witness: "Joseph Gonyo"

Prosecutor: "Your Honor the State requests the opportunity to voir dire the witness"

*The Jury is excused*

Prosecutor: "Mr. Gonyo you have been hired by the defense to testify in this case is that correct?"

Once the witness in question is called by the defense you ask the court for permission to voir dire the witness outside the presence of the jury. If any argument occurs on the issue it should also take place outside the jury's presence.

Under most state's trial procedure the defense really has no grounds to object to the witness voir dire.

#### Impeachment By Prior Inconsistent Written Statements

One effective method of cross examination is impeachment. Impeachment of an expert using prior inconsistent statements is difficult for many prosecutors. It's difficult because we don't often get the opportunity to see transcripts of prior testimony prior to cross. When we do, we are not familiar with the appropriate way to prepare those transcripts for impeachment purposes. Finally, we struggle with the appropriate impeachment methodology during the examination itself.

To properly use prior inconsistent written statements we must begin the process by identifying the document to be used to impeach the witness. It obviously should include statements made by the witness which have been reduced to writing preferably in transcript form or in the alternative as contained in a report or signed statement. These materials may include statements to an insurance carrier made by the defendant or other witness including a proposed expert, police interviews, signed statements, media interviews and transcripts of those interviews as well as the big daddy of them all, the transcript of prior testimony. Such transcripts can result from depositions given by the witness under oath as well as transcripts of hearing or trial testimony.



# THE CRASH PAGE

## CROSS EXAMINATION OF THE DEFENSE EXPERT

### Part 3 in the DUI NEWS Series

By Jim Camp

#### Reports, Personal Notes and Studies

Review with your expert all of the reports, personal notes, studies and articles previously authored by the expert that you can get your hands on. They may very well contain opinions or methodology at odds with her opinion in your case. Pay close attention to formulas, treatises, professional articles and other reference material referred to by the expert. Many times experts will pick material from these sources that assists them in rendering a particular opinion favorable to the defendant while ignoring other material from those same sources that is detrimental to their cause. Have your expert review these reference materials and have them prepare you to use those materials for impeachment purposes if possible.

You don't always have to reinvent the wheel. Fellow prosecutors and prosecutor associations are great sources for obtaining the materials referred to above. So are transcripts of the expert's testimony in other court and administrative proceedings. Contact other prosecutors in your state as well as your Traffic Safety Resource Prosecutor, the National Traffic Law Center and the National Association of Prosecutor Coordinators for help in this regard. Chances are either your Traffic Safety Resource Prosecutor or the National Traffic Law Center have banks of information on the expert you are preparing to face. Call them. They want to help.

#### Support for the Opinion

The prosecutor, with the help of his/her expert must determine what if any research supports the defense expert's opinion. Is the opinion based on science and sound principles or is it simply a conclusion based upon the expert's personal opinion? Many times experts in DUI cases, make assumptions that are nothing more than guesses or theories. Because they are so talented on the witness stand they are able to sound like the opinion results from a scientifically sound basis. Upon review however it becomes clear in many cases that the opinion is held by no one else in the scientific community and is not supported by research or scientific fact. It is up to the prosecutor to show the jury that the witness' opinion stands alone without sufficient foundation, that the opinion has not been widely accepted by the scientific community and has not been the subject of peer review.

At times the defense expert may make certain assumptions in order to arrive at their opinion. During cross it should be pointed out that if one assumption made by the expert is untrue or inaccurate then another assumption may be as well. If the opinion is based upon inaccurate assumptions then the inference left with the jury and argued AT CLOSING is that the opinion rendered by the expert must be inaccurate as well.

#### Challenging Expertise

Many times prosecutors have a problem dealing with such experts because they are intimidated. This intimidation flows from a lack of adequate knowledge of the subject matter at issue. Because of the intimidation factor it is typical for a prosecutor to passively accept the witness as an expert on the subject matter in question. This passive acceptance is a big mistake. An expert's qualifications must be examined thoroughly well in advance of trial to ensure they are in fact learned and/or experienced enough to be declared an expert in the field. If their qualifications and experience do not rise to the level of an expert we must challenge their being proffered as such.

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