



DUI NEWS

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HOW WAS YOUR 14?

2014 has come and gone. It was a busy year. I am glad to be alive for another one. In our beautiful Tennessee, thirty-three people are alive today who would have died on our highways if everything had stayed the same in 2014 as in 2013. There were 33 fewer deaths on our roadways for the year. Think about that for a minute. It might not seem like a big deal, but what if one of those 33 people was a person you love?

I thought a lot about life and death this year. In twelve months my spouse of 32 years had two major heart surgeries. Fortunately, she now has a new mitral valve and is recovering well. I spent many restless nights worrying about her and some worrying about how I would live, if she did not. On top of that, I had two children go through a significant treatments and a major surgery. I spent too much time dwelling on life and death issues. Too many people in our State did not have time to worry. They dealt with tragedy.

In 2014 thirty-three families were spared having to make funeral arrangements, having an officer knock on their door to give them horrific news, having to try to find motivation to go on with life after a tragic death in the family. Children still have parents, who could have been orphaned. Parents still have children, who could have suffered the loss no parent should suffer. This happened 33 times or almost three times a month in our State and no one who survived knows they could have been part of the death toll.

We lost 961 people on our roads in 2014. Isn’t that tragic? We celebrate the 3.4% reduction in fatalities, but strive for so much more.

Our leaders get it. Commissioner of Safety, Bill Gibbons stated, “Transportation Commissioner Schroer and I have a shared goal to make an impact on traffic fatalities in our State. Tennessee has experienced record low numbers in three of the past four years; and we hope to continue that trend in the future. We’ll continue to deploy our resources to help reduce fatal crashes in our State.”

THP Colonel Tracy Trott credits DUI enforcement and seat belt enforcement for the decline. State Troopers arrested nearly 2,000 more individuals for DUI than in 2013. There was an 18.6% drop in alcohol-related traffic fatalities. Trott noted that about 50% of those who died in traffic crashes were not wearing seat belts.

Kendell Poole, Director of the Governor’s Highway Safety Office, spoke in an interview in January and told us that 88% of people in Tennessee wear seat belts. The group that does not die at a much greater rate. Director Poole challenges us to do better in 2015. He believes we can attain another 7-10% drop in fatalities, if we all work together.

(continued page 11)



RECENT DECISIONS: Traffic Stops

State v. VanCamp, 2014 WL 7399671

9-1-1 CALL AS BASIS FOR TRAFFIC STOP

In this case the driver was stopped after a 9-1-1 call. The officer had reasonable suspicion to conduct a brief investigatory stop based on information received from a known citizen informant. A resident of Newport, delivering newspapers in the wee hours saw a car coming toward him in his lane. He pulled off the road and reported that a maroon-red, “bigger than average size” vehicle was traveling in the wrong lane. The vehicle made a left turn toward Newport and continued in the wrong lane. Less than two minutes after being notified by 9-1-1, Newport officer, Joshua Holt, spotted the car in the wrong lane on West Broadway. When information is received from a known citizen informant it is presumed reliable, especially when the motivation for contact with the police is to maintain safety for society or the person. See **State v Day**, 263 S.W.3d at 904.

State v Jones, 2014 WL 6662686

TRAFFIC STOP UPHELD...Silver BMW

Turhan Thomas, a deputy sheriff with the Sevier County Sheriff's Office, noticed a silver BMW “pull in a little fast” at E-Z Stop gas station on Chapman Highway at 3:00 a.m. and saw appellant get out of the car, look at the car's tires, and then reenter the car. Appellant then “squaled the tires a little bit” and pulled back out onto Chapman Highway at a “high rate of speed.” Deputy Thomas then entered his car and followed appellant. After cresting a hill, the officer saw appellant slow and stop his car in the left lane of a four-lane highway in a curve. Deputy Thomas sat in his car for approximately four to five seconds after appellant's car had stopped moving before activating his emergency lights. Appellant pulled onto the side of the roadway. The defense moved to suppress the stop, but failed to properly preserve their grounds to appeal after the plea of guilty.

State v Willis, 2014 WL 5429379

TRAFFIC STOP SUPPRESSED.....Toyota 4Runner SUV

At 3:30 A.M., Franklin Police Officer Tammy Lee Crowe was in a neighborhood due to a resident calling that a vehicle was racing around in a cul de sac on Sliders Knob Avenue. Officer Crowe knew there had been car burglaries in the neighborhood. When she arrived she found that a Toyota 4Runner sport utility vehicle (SUV) driving in a wooded area where there were no houses or roads. She had never seen a vehicle in that area on any previous occasion, so she found the vehicle's activity suspicious. She could not drive her vehicle up the steep terrain the SUV had attacked, so she focused her spotlight on the SUV and asked the two guys in the vehicle to come down to her car to talk. She identified the driver, who was under the influence. The Court determined that she did not have reasonable suspicion to stop the driver who was driving up a steep terrain at 3:30 A.M. There was no road for the vehicle and no houses on the property. It was 3:30 A.M., but the Court determined that the facts were weaker than in the **Moats** decision and since community caretaking is not applicable in Tennessee, there was no reasonable suspicion.

State v Davis Jr., 2014 WL 6883628

TRAFFIC STOP UPHELD

Knox County Sheriff's Department Officer William Massey received a BOLO (Be on the Lookout) call from his dispatcher. The call indicated a person left a domestic violence crime scene in a green BMW. The driver lived on Keller Bend Road in Knox County. Officer Massey went to the road, watched and waited. Twenty five minutes after the call he spotted a green BMW on Keller Bend. He watched the car cross the center line a couple of times before he activated his in-car camera. The camera recoded the driver cross the center line once. The traffic stop was upheld due to the violation of TCA 55-8-123, which requires a driver to stay in a single lane.

RECENT DECISIONS— Chemical tests

State v Reynolds, 2014 WL 5840567

BLOOD TEST PERMITTED —HUMPHREYS & WALKER

The Court reversed the trial court suppression of a blood test in this fatal crash case. The Court found the driver did not give actual consent for a blood draw due to her traumatic injuries and treatment. The Court found the Trial Court was incorrect when it suppressed the blood test, because the driver never refused a test and implied consent applied. This case followed the precedent set in State v. Humphreys, 70 S.W.3d 752, 761 (Tenn.Crim.App.2001) and followed in State v. Darryl Alan Walker, No. E2013-01914-CCA-R3-CD, 2014 WL 3888250, at *6 (Tenn. Crim App. Aug. 8, 2014) in which the court stated: “voluntary consent is unnecessary as consent has already been obtained by the act of driving the motor vehicle upon the public roads of this state”. After reading this decision a prosecutor could believe the issue is settled in cases in which there is a blood draw and the driver does not refuse a test. However, the prosecutor needs to read the next case to see that the Humphreys precedent is not always followed. The Reynolds, Walker Humphreys cases look at whether there was an actual refusal.

State v Gardner, 2014 WL 5840551

BLOOD SUPPRESSED—KENNEDY & WELLS LINE

Another Appellate Court has followed the Kennedy and Wells line of cases concerning interpretation of Missouri v McNeely 133 S. Ct. 1552 (2013). These cases appear to require exigent circumstances or actual consent to a test. In this case, the Court found that no exigent circumstances justified a blood draw without a search warrant as mandated by McNeely. This arrest and blood draw occurred on December 21, 2012, about six months after the Governor signed a law permitting search warrants in DUI cases. Prior to that law, officers and prosecutors were of the impression that search warrants in DUI cases were not permitted, based on the written opinion of the Attorney General. See Opinion No. 10-01.

The officer testified in the Gardner case that no system existed in Greenville, Tennessee, which would have permitted him to obtain a search warrant. The law in place statutorily required him to obtain a blood sample, which indicated a .18 blood alcohol level. He did not seek a search warrant. Hopefully, the system in all counties has adjusted to the law permitting search warrants for DUI cases and McNeely, so problems like this one will go away.

This case did not include an analysis of whether the implied consent law would have permitted this blood draw as in the case of State v Walker, 2014 WL 3888250. The Trial Court decided the driver did not consent, since his test was required. “We note that the trial court determined that the defendant did not consent to the blood draw and that the State consented to the “nonconsensual” language of the certified question.”

Implied consent occurs when a person drives in Tennessee. The Trial Judge analyzed this issue to determine if actual consent occurred. Actual consent is not the legal standard, but that argument was not raised in this case.

State v Puckett, 2014 WL 6491058

BREATH TEST SUPPRESSED

The driver contended that his breath test should have been suppressed due to McNeely and a lack of exigent circumstances to forego a search warrant. That defense failed. The driver consented to a breath test. Even when an issue is raised with an incorrect premise, the result can still sting. In this one the Court decided the officer did not pay enough attention to the driver during the twenty minute observation period. With regard to the *Sensing* violation, the trial court found that the State “met ... and really exceeded” its burden in proving that the officer properly conducted the twenty-minute observation period. The trial court stated that it could “view the Defendant the entire time” on the videotape and that “there was no way the Defendant put anything in his mouth.”

The Appellate Court overruled that finding. The Judge stated, “Our own review of the videotape, taken together with the officer's testimony that he did paperwork during the observation period, leads us to conclude that the evidence preponderates against the trial court's finding that the officer complied with the requisite twenty-minute observation period. Therefore, we hold that the trial court erred in admitting the breath-alcohol test results into evidence.”

What do they say at the football game? “After video review the call is reversed.” Of course, at the football game the referee is not looking at a video when he makes the call on the field.

The lesson for every officer is simple. Be careful to comply. You don't know who is deciding what is enough.

(more cases at page 9)

AN INTERVIEW WITH Matt Gilbert

By Tom Kimball

I learned a few months ago that ADA Matt Gilbert had been accepted to serve the Tennessee National Guard J.A.G. Corps. Matt has served as a DUI Prosecutor in Nashville for two years and has been a key part of a team led by Kyle Anderson. Matt will be training with the Guard until June. When he returns he will be reassigned in the Nashville office. We wish Matt the best in his military as well as civilian careers. Several months ago I started looking for a volunteer to talk and write about how a prosecutor examines a case to determine the best outcome for the case. Matt jumped in. It seems appropriate, then, that he serve as an example of how a prosecutor works from the time a case comes to his desk until it is resolved.

Tom: When you are preparing for a Settlement Date, how do you analyze your DUI cases ?

Matt: Every detail matters. I work in Davidson County. DUI cases are prosecuted by two teams of attorneys. A General Sessions team handles all cases in General Sessions. Cases that are not resolved in Sessions are then transferred to the DUI team to be prosecuted in Criminal Court. As a member of the Davidson County DUI Team, I am assigned cases after they leave Sessions Court. This means that when I am analyzing DUI cases, I first want to know how they got to my desk.

There are **five** common ways that prevent a case from General Sessions resolution.

- First: Weight of the Evidence - Sometimes the prosecutor and defense lawyer simply disagree about how the evidence should be weighed. What will jurors find most and least significant? DUI cases involve several different types of complex evidence, and often the state and the defense disagree.
- Second: Suppression Issues - The Defense lawyer may intend to file some type of suppression issue with regard to the stop or the admissibility of the breath or blood test.
- Third: Mitigating Factors- Many times a defendant may want to beg for leniency due to his employment situation. A prosecutor may have some reason to believe leniency is not appropriate, such as the facts of the case, the defendant's record, or because it is a defense lawyer who repetitively asks for leniency and demands it in every case.
- Fourth: Aggravating Factors - If a case involves a bad wreck with injuries or multiple DUI convictions, then those cases may need the attention to detail of Criminal Circuit Court and to be evaluated closely for other relevant Tennessee Code sections, such as Vehicular Assault.
- Fifth: Request for Jury Trial - Defendants are entitled to a trial by jury in all cases in Tennessee, and these cases are transferred to the criminal court DUI team. Every detail matters, including why the case went the procedural direction it did.

With that in mind, I try to determine what the negotiation impasse is and attack it directly. For example, if the defense is concerned with evidence weight, I try to show the strength of the best facts and all the facts as a whole. For another example, if the defense is concerned with aggravating factors, I try to show exactly why the offer must stand and why I think the Judge would sentence something even worse. I also try to break down the negotiation impasse by communicating heavily with the defense counsel. If I have time, I call, write letters, send e-mails, etc. I do this for every single court date if I can. I do this to show the defense that I care and that I have every detail of this case in mind. This is not just a case in a stack on my book shelf – this is an important case against an important person with an important officer in an important community. By over communicating and making kind concessions about secondary matters when necessary, I hope to build credibility with the defense to guide them to my proposal. After enough charm and detail, I hope they won't be able to help but see it my way.

Tom: HOW IS YOUR DECISION AFFECTED BY THE POLICE REPORT?

Matt: My opinion is that the police report serves three different roles in a criminal case.

- First: Negotiation - The police report is a negotiation tool. If a report is strongly and intelligently written, a defense attorney should understand that he or she is facing a police officer who will be a tough adversary in court increasing the chance that the defense will accept your settlement offer. However, if a report is poorly written, a defense attorney may feel that he or she can win the case simply by beating up on the officer on the stand, decreasing the chance the defense will accept your settlement offer.

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Matt's Case Analysis Thoughts

- Second: Officer Memory - Officers commonly make hundreds of arrests in their career. A poorly written report will mean the officer simply may not be able to remember the specifics of the case.
- Third: Cross Examination by Defense - An astute defense counsel will come to a hearing or trial prepared to point out any differences between the officer's testimony and the officer's report in cross examination. In some instances, a defense attorney may even try to have the report admitted into evidence to prove some point about inconsistencies. Because of this, it is prudent to come to court after a close review of these reports. An ounce of prevention is worth a pound of cure.

With these three things in mind, I think over and over and over again that strongly and intelligently written reports result in strong cases that are rarely challenged.

Tom: HOW IS YOUR DECISION AFFECTED BY THE VIDEO OR LACK OF VIDEO ?

Matt: If a case has a video, it is probably the most important piece of evidence. The Judge or Jury will likely place the most weight on this video. Because of this, if a video exists, I always start with the video, watch as much as I have time for, and just see what my impressions are. Just like before, every detail matters. If a case does not involve a video, then the case will be won or **lost the quality** of the police officer and the specifics of the breath/blood/refusal. Additionally, it is prudent in cases without a video to accommodate the "CSI Effect" - explaining to the judge or jury exactly why this evidence does not exist.

Tom: HOW IS YOUR DECISION AFFECTED BY THE DESCRIBED OR FILMED DRIVING BEHAVIOR?

Matt: The defendant's driving may contain details that show impairment, such as a wreck, inconsistent speed, swerving, or neglecting to use headlights in the dark. The presence or absence of each of these details matters. Judges and Juries may expect that an intoxicated person would show this on their driving in some way. There can be no speculation if it is on video. Video evidence of driving is very important for two reasons. First, it speaks to the constitutional validity for the stop. Second, it serves as very direct evidence for intoxication if very bad driving can be played to the trier of fact.

Tom: HOW IS YOUR DECISION AFFECTED BY THE PERSONAL CONTACT PHASE ?

Matt: When a police officer talks with the driver, he or she may notice items that suggest impairment, such as bloodshot/red/watery eyes, slurred speech, poor balance, odor of alcohol on person or breath, open containers of alcohol in the car, and admissions of drinking. If a subject is intoxicated, we would expect a trained police officer who is closely evaluating sobriety to see something about eyes, speech, balance, alcohol odors, or admissions that show intoxication. These details speak both to the constitutional validity of the seizure and to show evidence of intoxication. I find that this phase is easy to skip over. Sometimes this phase is the one that really helps tell the whole story.

Tom: HOW IS YOUR DECISION AFFECTED BY PERFORMANCE ON FIELD SOBRIETY TASKS ?

Matt: The National Highway Traffic Safety Administration has validated several field sobriety tasks. Police officers are typically looking for set "clues." However, every detail matters, even if it is not one of these predetermined clues.

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ABOUT MATT

First Lieutenant Matt Gilbert has been an Assistant District Attorney General in Nashville since 2013 and a member of the Vehicular Crimes Team since 2013. He graduated from Washington University Law School in 2012 and from Austin Peay State University in 2008.

“Every Case is an Important Case” MATT GILBERT

In my experience, Jurors who I have talked to after trials care a lot more about how these tasks are described, demonstrated, and evaluated **in court** than I expect. I think it is incumbent upon us to have the officer describe, then leave the witness stand and demonstrate perfect performance followed by the defendant’s performance, followed finally by critique from the witness stand. I find that Jurors are rarely convinced by me standing in front of them on a soapbox talking about tasks they have never heard of before. The officer needs to be able to hit a home run here if we are relying on this evidence.

Tom: HOW IS YOUR DECISION AFFECTED BY THE REPUTATION OF THE OFFICER?

Matt: Remember that every detail matters. Whether or not those details are recorded is 100% controlled by the officer. If the officer collects the details, we will have a great chance of painting a full picture in court. If the officer does not, then our chances of success are greatly reduced. The reputation of the officer will spread through the courthouse. Defense attorneys compare notes. Prosecutors compare notes. Judges have long memories. How everyone feels about the officer will be dependent on several things. It starts with the report.

Tom: HOW IS YOUR DECISION AFFECTED BY THE REPUTATION OF THE DEFENSE ATTORNEY?

Matt: In a negotiation, both the defense attorney and the defendant have to agree with the prosecutor for a guilty plea. All people are created differently. Customizing your negotiation to how that defense attorney sees the world should help produce great results. In a trial, the same philosophy applies to how you present your case in chief. If a defense attorney is known for specific types of arguments, then anticipatory rebuttals during the case in chief can significantly increase the strength of a case.

Tom: HOW IS YOUR DECISION AFFECTED BY THE PRIOR RECORD OF THE DEFENDANT?

Matt: DUI sentences depend greatly on prior convictions. Mastering the defendant’s record before the negotiation begins is imperative. Just like before, every detail matters – every date, fact, and sentence of prior cases should be taken into consideration. Obviously, the more concerning the criminal record, the more the carefully and aggressively the case should be prosecuted.

Tom: HOW IS YOUR DECISION AFFECTED BY THE REFUSAL TO TEST OR SUBMISSION TO TEST?

Matt: If a defendant submits to a breath or blood test, that becomes powerful evidence for either guilt or innocence. First, the evidence must be evaluated carefully for admissibility. If the evidence is admissible, then that score should be proudly announced to the finder of fact as soon as possible. If that score is low, then we should acidulously evaluate the other facts of the case to ensure we have a winning case – and to make sure we are not prosecuting an innocent person.

Refusal of test means it is time to think creatively. Have I said every detail matters? Here, we need to know the story and the reasons for refusal. Did the defendant refuse because the officer intimidated them, and the officer is not able to explain other reasons for the arrest? That sounds like a pretty big challenge to prosecute. Did the defendant refuse even though the officer was polite and collected a mountain of other evidence? That sounds like the defendant is intoxicated and may have been concerned with how high the BAC score may have been.

Tom: MATT, DO YOU HAVE ANY CLOSING THOUGHTS?

Matt: This is my last day at the Davidson County DA’s Office. I begin a military leave today for Army National Guard Training. I return in June of this year. I am excited to broaden my horizons in the Tennessee Army National Guard. I look forward to coming back to the Davidson County DA’s Office this summer.

I have been a prosecutor focusing on DUIs for two years now. This has been a great experience that I will take with me. Tom and Jim, thanks for being great TSRPs and helping me grow so much. I appreciate that more than you know.

WELCOME JUDGE BURNS

The State of Tennessee has retained a Judicial Outreach Liaison (J.O.L.) to help Judges, Judicial Commissioners and others stay current on traffic safety issues. Judge Leon C. Burns has accepted the position.

Judge Burns served continuously as a Criminal Court Judge for the Thirteenth Judicial District from 1976 until 2014, when he retired from the bench. He received his Doctor of Jurisprudence from the University of Tennessee in 1972. During his tenure on the Court, he also served on the Supreme Court Rules Commission, Sentencing Commission and Commission on Criminal Justice. He has previously been an adjunct professor of Criminal Justice at Tennessee Technological University in his home community of Cookeville.

The position of J.O.L. was first created through an agreement of the National Highway Traffic Safety Administration (NHTSA) and the American Bar Association. There are seven Regional J.O.L.'s who work in various parts of the nation. Tennessee joins Texas, Pennsylvania and Florida as states that have retained their own Judge to serve only in their own state.

To serve Judge Burns indicated knowledge of or willingness to learn about DWI Courts, Ignition Interlocks and other promising practices and share his knowledge with other judges. He will advise state highway safety officials about judicial issues that arise in impaired driving and other traffic cases. He will provide education and technical assistance to judges, other criminal justice officials and other political and opinion leaders regarding traffic safety issues. He will also attend meetings, conference, workshops, media events and other gatherings, focusing on impaired driving and other traffic safety issues to convey the perspective of Judges concerning such issues.

Holiday Impaired Driving (Enforcement: 12/12/14 - 1/1/15)

Do you ever wonder how the traffic safety campaigns affect traffic safety? Across Tennessee, agencies participated in extra patrols, checkpoints and other activities for the Christmas and New Year holidays. From the 367 agencies participating, 326 reported their results as of mid January. (Source GHSO website, <http://tntrafficsafety.org>.)

Sworn officers	13815	DWI Arrests - Alcohol Only	480
DUID Arrests - Drugs Only	90	DWI/DUID Arrests - Alcohol and Drugs	250
DRE DUI Arrests	15	DRE DUI Drug Arrests	18
Impaired driving arrests (DUI)	1159	Safety belt citations	2996
Child safety citations	355	Felony arrests	1968
Recovered stolen vehicles	115	Fugitives apprehended	1627
Suspended/Revoked licences	4578	Uninsured motorists	8925
Speeding	20507	Reckless driving	401
Drug arrests	1524	Individuals given DRE evaluations	29
Weapons seized	62	Other	3515
Press conferences held	16	TV news stories aired	22
Radio news stories aired	28	Print news stories run	76
Other news stories	11	Number of checkpoints	122
Number of vehicles passing through the checkpoints	11022	Number of vehicles detained	2423

TRAINING NEWS

20-20 Medical Foundations of Visual System Testing

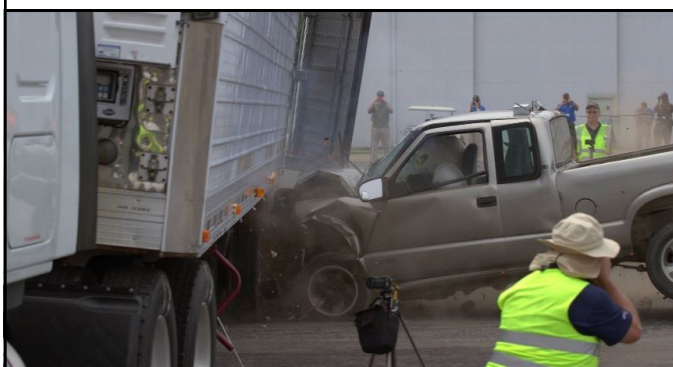
We are proud to announce a new class for prosecutors and selected officers. We have named it our 20-20 class. Formally it is called: **20-20 Medical Foundations of Visual System Testing**. This class is being offered with the cooperation of the Memphis, Tennessee, Southern College of Optometry April 28 and 29, 2015. The goal of the course is to help top level DUI officers develop expertise to qualify as expert witnesses concerning the Horizontal Gaze Nystagmus Test. Instruction will come from Optometry Professors. Upon completion of the optometry instruction, a time has been reserved for mock court training under the watchful eyes of the faculty to assure that the officer and prosecutor correctly communicate the knowledge they have gained. Only twenty officers and 20 prosecutors will be permitted to participate at this training seminar, which is the first of it's kind in Tennessee. Dates of future conferences will be announced in the near future.



LETHAL WEAPON: Vehicular Homicide Training for Prosecutors

Prosecutors from Tennessee and Kentucky will gather May 26-30 to learn about investigations of car crashes and the presentation of evidence in vehicular homicide cases. Professor John Kwasnoski, a long time Professor of Forensic Physics and nationally acclaimed instructor and author, will be the lead instructor for the prosecutors class. Kwasnoski is the author of *FROM CRASH TO COURTROOM*, a required text for every DA office.

This year the course will be run concurrently with Tennessee Traffic Crash and Safety Symposium. This will permit prosecutors to observe and study several crashes, performed for the Symposium. The focus this year at the Symposium is pedestrian crashes. Below are scenes from the 2014 Symposium focused on trucks.



RECENT DECISIONS

State v Cooper, 2014 WL 7178010

SEQUESTRATION OF WITNESSES

The trial court erred by allowing Officer Jones, the prosecuting officer, to testify as the State's second witness after his Sergeant testified about the same facts in violation of Tennessee Rule of Evidence 615. The State conceded the error, but argued it was harmless. The Court reversed after it was unable to conclude that the error was harmless.

State v Montgomery, 2014 WL 954929

INVESTIGATIVE DELAY RESULTS IN DISMISSAL

Deputies in Williamson County received a notification from the 9-1-1 operator that an unwanted person was at the house of her former boyfriend. The caller, the current girlfriend, indicated the defendant was driving a particular vehicle and might be intoxicated. The deputies headed in the direction of the house. On the way they spotted the car in a church parking lot. One deputy went to the house to investigate. The other went to the car. At the car, the deputy was careful to avoid being MOATED. He pulled to the side of the car and did not activate his lights. He went to the window to see if either of the two people in the car was the person named in the 9-1-1 call. The driver was that person. The deputy took the driver's license of both parties and went back to his car to communicate with the officer at the house. The officer in the parking lot noticed an odor consistent with someone who had been drinking alcohol coming from the car. The officer elected to wait until the officer at the house arrived to investigate further. He estimated in a hearing that the delay was 10-15 minutes. He explained he waited for the house investigating officer, because his purpose in being there was to check on the unwanted visitor call and determine if criminal trespassing had occurred. After the officer arrived from the house, that officer contacted the defendant and conducted a DUI investigation resulting in her arrest.

In a 2-1 decision the Court of Criminal Appeals upheld the suppression of evidence in the case. In an opinion by Judge McMullen with a dissent from Judge Bivens, the 2-1 majority decided the defendant's constitutional right to be free from seizure was violated by the delay in the DUI investigation. The driver was seized when the officer took her driver's license to investigate. He indicated to the people in the car that they needed to wait a few minutes for the officer who went to the house. Apparently, the deputy needed to investigate for probable cause of a DUI, before receiving the information from the witnesses at the house and a short delay to get that information to conclude the unwanted visitor investigation was in violation of the driver's rights in the DUI case.

This case is very fact specific. The Court notes that other Courts dealing with other types of delays have not reached a suppression conclusion. Two examples they cited are a delay to investigate, so an officer could direct traffic after a concert and a delay waiting for a specially trained DUI unit officer to arrive. Officers should be wary of delay. This case will be waved around to stand for a lot of things different from the facts of this case. The lesson in this one is if an officer smells alcohol, the officer should start investigating for DUI. That investigation begins with the discussion at the window. If this officer had asked some DUI questions, taken the license to check on it's status, returned to window and asked a few questions to see if the answers previously given were repeated or changed, this may have had a different result, even if he had not begun the HGN by the time the second officer arrived.

DRUGGED DRIVING KILLS

STATE v BURNETT, 2014 WL 4351420

DRUGGED DRIVER PASSES OUT AND KILLS

In a tragic case from East Tennessee, the effects of methadone and promethazine combined to make James Cody Burnett a killer. Burnett was 23 in 2009. He did not fire a gun or stab anyone. He drove a Mitsubishi cream colored Gallant in Knox County. At a stop light, he fell asleep. Several cars went around him at the light. He woke up and drove on, northbound on Highway 33. Just before the highway narrows to two lanes, there's a stop light. He stopped at that light. A witness who saw that he had fallen asleep at the stop light to the point where the traffic that had backed up behind him and began circling around him. After the third or fourth car that had circled around him, he woke up and continued to drive northbound on Maynardville Highway. He proceeded for about half a mile down the road and then appeared to fall asleep again. His car began to drift within his lane and then went into—at this point there's two lanes—the oncoming southbound traffic. The first car was able to avoid him. The second car did not have enough time to get out of his way. That car's driver was named Dawn Marie Reynolds. Ms. Reynolds was on her way to work, when Burnett crossed the center line and slammed into her driver's side. She died in the crash. Mrs. Reynolds, the mother of three beautiful children, was never able to complain about her treatment. Her mother, father and sister testified at the sentencing hearing. One of the children of Mrs. Reynolds had a birthday on the day she died.



The defendant's first substance was methadone, which he was using to treat a heroin addiction. The second substance was cough medicine. The third substance was promethazine, which was prescribed to his girlfriend to address her morning sickness. The State noted that the defendant was aware that the methadone could cause drowsiness. Further, he was aware that the use of methadone in combination with other narcotics or other sedatives could cause undesirable side effects.

Mr. Burnett was injured in his wreck and attempted to use his injuries and the fact that he had a fairly minor record to seek probation. In the end, probation and split confinement were denied. He was sentenced to serve eight years. The court noted he would be eligible for parole in less than three. Dissatisfied with that outcome, Burnett filed a motion for a reduction in his sentence. It was denied. He then appealed both the sentence and the denial of a reduction. Nearly five years after he took the life of Mrs. Reynolds his convictions were

DUI TRACKER UPDATE

Every day DUI cases are heard and completed in Tennessee. In districts that have a DUI prosecutor, the case dispositions are recorded and reported. This quarter, October 1—December 31, districts entered data into the Tracker. 25 Judicial Districts reported a total of 2,256 DUI Dispositions and 2,505 new cases opened.

- The district that recorded the most dispositions was the 22nd (General Brent Cooper, DUI Prosecutor Adam Davis) with 197 dispositions. The district opened 198 new cases.
- The district that recorded the most guilty as charged dispositions was also the 22nd with 148.
- The district with the most new cases opened was the 1st (General Tony Clark, DUI Prosecutor Joe Shults) with 226.
- Across the State 67.9% of offenders were found guilty as charged.

The limitation of TRACKER data is that it only gives a sample of the dispositions in the State. Some offices enter data from the Circuit Court, some enter data from Sessions Court. Some enter both. The TBI annual report on crime indicated there were 26,417 persons arrested for DUI in 2013. The Tracker includes data on about 8,000 cases per year.

HOW WAS YOUR 14? (continued from Page 1)

Wally Kirby, Director of the Tennessee District Attorneys General Conference, knows that it takes more than law enforcement to stop risky drivers. “We are proud of the Tennessee Highway Patrol, City police departments, Sheriff’s offices and all law enforcement agencies who stop and arrest drivers who are impaired by alcohol, drugs and other substances that impair driving. Listen, convictions for these crimes matter. The statistics tell us that about 75% of all persons convicted of 1st offense DUI never get convicted a second time. They learn a hard lesson. As law enforcement arrests more offenders, prosecutors end up with more cases in court. Our 31 elected District Attorneys spend a lot of energy making sure the guilty get convicted. We love to see reductions in fatalities and injuries caused by impaired driving. Life is precious. It should never be erased by a driver who would rather have a good time than act responsibly toward others. Life is too important to waste.”

2014 included some great moments. My eldest daughter got married to a great guy in Chattanooga. I received recognition and a national award called the Kevin Quinlan Award from the Foundation for Advancing Alcohol Responsibility on Capitol Hill. (pic on right). Jim Camp and I got to help train over 2,000 law enforcement officers and 175 prosecutors. I was honored to help train prosecutors in Idaho and New York City, participate in an international forum concerning ignition interlock devices in Washington D.C. and continue to be a part of the Traffic Injury Research Foundation concerning all sorts of traffic safety issues. With other Traffic Safety Resource Prosecutors, I toured recreational and medical marijuana shops in Denver and got to hear a lot of lies about how marijuana cures everything from the common cold to dementia and bone spurs. I even got to attend my first two baseball games in New York, a Mets win and a Yankee loss.



Let’s face it, there is a lot to live for every year. I hope 2015 is a special year for you. If you and I are lucky ones who survive for another year, we should thank our law enforcement officers and prosecutors and State leaders for making our roads a little safer.

COPS IN COURT

The DUI Training Division has been honored to train many law enforcement officers in this special training that helps officers survive in the courtroom. We stress integrity and professionalism and get to see the light bulb turn on for many officers. Last year, 195 officers participated in this class.

It could not be done without the many prosecutors who helped us conduct mock courts. Thank You:

Dan Alsobrooks, Kyle Anderson, Tim Beachum, Mike Bottoms, David Findlay, Glenn Funk, Matt Gilbert, Chandler Harris, Wayne Hyatt, Tracy Jenkins, Robert Nash, David Puckett, Meg Sagi, Jim Sledge, Caitlin Smith, Daniel Stephenson, Lacy Wilbur, Karen Willis, Lee Willoughby, Carlin Hess, Garrett Berman, Nathan Luna, Robin Martin, Rob McGuire, Tammy Meade, Kristen Menke, Sharon Reddick, Marcus Simmons, Rachel Sobrero, Steve Strain, Leandra Varney, Talmadge Woodall, Matt Floyd, Mark Gore, Joseph Johnson, Mathew McClung, Brent Pierce, David Pollard, David Puckett, Judicial Commissioner Tom Nelson and the various members of the Tennessee District Attorneys Conference who provided assistance and support: Sherri Harper, Mary Tom Hudgens, Alice Ferguson and Burney Durham.

We could not do it without you. We will need you again. Remember, it gets your name in the newsletter!



Let me Exhibit the Right Way to Exhibit

By Jim Camp

The following example relates to the introduction of a document prepared by a law enforcement witness.

1. Have the exhibit marked if you have not had them marked prior to the trial. Take the exhibit to the clerk and ask:
 “Ms./Mr. Clerk please mark this State’s Exhibit #1 for purposes of identification.” After it is marked accordingly the clerk will return it to you.
2. Show the exhibit to defense counsel. (A copy should have been provided to defense counsel previously). State for the record:
 “Your Honor may the record reflect that I am showing defense counsel the (document/item) which has been marked State’s Exhibit #1 for purposes of identification.”
 After defense counsel has had an opportunity to review the exhibit (this is much faster if you provide a copy to them ahead of time) take it back.
3. Ask the Court:
 “May I approach the witness?”
4. When the Judge grants permission to approach the witness, show the witness the exhibit and state:
 “Sgt. Lowrey, I’m handing you a document marked State’s Exhibit #1 for purposes of identification.”
 Allow the witness to review the exhibit.
5. After the Sgt. has had time to review the exhibit ask questions laying a foundation for the exhibit:
 “Can you identify this document?”
 Upon an affirmative response ask:
 “Would you tell the jury what it is please?”
 After the Sgt’s response ask:
 “Have you seen this document before?”
 When the Sgt. answers in the affirmative ask:
 “When was the first time you saw it?”
 After the response ask:
 “Where were you at that time?”
 Following the response ask:
 “Do you know who prepared this document?”
 Note: Remember that different types of exhibits will require different types of foundation questions under the Rules of Evidence, but the procedural framework is basically the same.
6. Move for admission of the exhibit into evidence by stating:
 “Your Honor I move that State’s exhibit #1 for identification be admitted in evidence.”
7. Once the Court admits the exhibit State:
 “Your Honor may I show State’s Exhibit #1 to the Jury?”

This procedure should be followed every time you intend to introduce an exhibit. While it may seem cumbersome, it is the correct and professional procedure for the task. It also avoids confusion on the record and will be important should there be an appeal. It also creates a bit of suspense on the part of the jury thereby making the exhibit much more powerful and meaningful once they get to see or hear it. Do it right the first time and every time. As they say, the devil is in the detail.

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