



**Tennessee District Attorneys
General Conference**

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Upon Further Review

What's a prosecutor to do?

1) Realize that all videotapes are subject to review much like a call in a football game.

2) Remember the Supreme Court doesn't always see things the way a police officer, trial judge, jury or Appellate panel sees them.



NFL Referees look at six angles of the play in question. The Court reviews one tape from a dark night in traffic taken from a moving police car. Witness testimony, the decision of the trial Court and the view of 12 jurors are overturned after further review in Garcia.

Supreme Court Video Replay

In State v. Binnette, 33 SW2d 2002, The Supreme Court set out a standard for review of videotaped traffic stops, when the suppression issue was based only on the videotape. In Binnette, the "considerable deference" given trial courts concerning the credibility of witnesses was not at issue. No officer testified. The findings of fact at the suppression hearing were based solely on the viewing of the video.

The Court has now ignored that oddity. In State v. Garcia, 2003 WL 22247450, Tenn.2003, the Court reviewed another video of a traffic stop. This one involved an officer who testified both at a suppression hearing and at trial. The defendant Gonzolo Moran Garcia was transporting 40 pounds of meth from San Diego to Georgia when a drug task force officer observed unusual driving. Officer Kohl testified, "that as she began to overtake the defendant's car, which was in the far right lane, she noticed that the defendant's car "was swerving in its lane of traffic." She then pulled in behind the defendant's vehicle in order to observe its actions. Officer Kohl stated that vehicle's erratic behavior continued: The vehicle would drive in its lane--it stayed in its lane of traffic; but, as the vehicle was going in its lane of traffic, it would swerve over to the right-hand marker, then it would swerve over to the left-lane marker. And I became concerned for his safety, as well as the safety of other motorists, and decided to stop the vehicle, at that point in time.

Despite the testimony of the officer and determinations of the trial court, the Supreme Court stated, "We have viewed the videotape and reviewed the testimony of Officer Kohl pertaining to the defendant's driving shortly before the traffic stop. Much like Binette, we find no evidence "of pronounced weaving or hard swerving" by Garcia. Binnette, 33 S.W.3d at 219. In fact, despite the testimony of Officer Kohl, we are unable to detect any weaving upon viewing the videotape." The Court goes on to note the lower courts found that all weaving was within the lane of travel.

The standard the Court refers to as "considerable deference" concerning witness credibility is from State v Odom, 928 S.W.2d 18.

Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence. So long as the greater weight of the evidence supports the trial court's findings, those findings shall be upheld. In other words, a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise.

The Court finds in accordance with the Odom standard that the trial courts finding of fact were not supported by a preponderance of the evidence. Justice Barker saw "no evidence" of weaving. Swerving from lane marker to lane maker is a "minor imperfection", not reasonable suspicion.



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BOND, DUI AND THE NEW ARREST

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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.

All too often a defendant with a pending DUI decides to keep drinking and driving. Sometimes the defendant gets caught. When this occurs do you have a system in place that permits the Prosecutor with the pending case to know about the new offense? You will find few defendants placing your citizens at risk like the DUI offender who continues to drive under the influence.

BE SYSTEMATIC Each Judicial District in Tennessee is an entity to itself. Whether you are in Memphis with its 17 Courts or the 13th with its seven counties there are some common denominators. The most common denominator is the jail intake list. Every new offender is on a list. Some of these are computer accessible, while others are listed in a book. New arrest warrants get delivered to the Sessions Court. New offenders are arraigned.

If the Prosecutor with the pending case is not informed of the new arrest, a hazardous situation that sometimes results in injury or death occurs. The binge continues unabated.

In Criminal Court most cases are entered into the CAIN computer Program. This permits cross references by name for offenders from county to county. There is no CAIN for Sessions and City Courts.

Finding out about the new offense requires extra effort from someone in the office. There has to be a system in place to allow the Criminal Court prosecutors to see who committed crimes last night. They then need the ability to compare their list of pending cases to the list of arrestees.

Communicate with the Sheriff's department by computer, fax or by taking a walk, get hold of the list.

FILE TO REVOKE AND/OR INCREASE THE BOND After the new arrest is discovered a motion to revoke brings the behavior to the attention of the Judge. TCA 40-11-118 requires as a minimum that the new case have at least twice the ordinary bond. The original case in which the bond condition of no new criminal behavior has been violated opens the door to numerous judicial responses. If your Judge believes the continued criminal behavior is dangerous, he/she may revoke the bond. See State v. Brown 2001 WL 1094940, State v. Stone, 880 S.W.2d 746, 748 (Tenn.Crim.App.1994), or place conditions including supervision and ankle bracelets on the defendant.

Some jurisdictions have proposed eliminating bond for repeat offenders, (See page 11) We need a proactive response from the prosecutor to stop the impaired driver on a binge. Too often has a victim's survivor asked the question, "why was he still on bond with two pending DUI's?"

The following assistant district attorneys have had convictions affirmed since the last issue in October:

- Michael A. Gallegos, 5th
- Frank Harvey, 9th
- Michael Randles (2), 17th
- Jennifer Tackett, 20th
- Scott McMurty, 20th
- Jim Sledge, 20th
- Carey J. Thompson, 23rd
- John Overturn, 24th
- Jerald Campbell, 28th
- Jerry Hunt, 30th
- Perry S. Hayes, 30th
- Kimkea Lashea Harris, 30th



District Attorney John Carney recently instructed officers from the 19th and 23rd Judicial Districts at Cops in Court, Clarksville. His talk about being an effective witness drew on his experiences as a TBI agent and Director prior to his tenure as District Attorney.

RECENT CASES



The following decisions concerning traffic issues have been reported since October, 2003

State v. Talley, 2003 WL 22718431, Tenn.Crim.App., Nov 17, 2003

This case from Gibson County is a fourth offense DUI felony conviction. The defense urged the Court to mandate that only standardized field sobriety tests be given. In this case there was a finger to nose and alphabet. It appears the defendant was too drunk to walk without holding on to something. The Court rejected the SFST or nothing argument citing State v. Lawrence, 849 S.W.2d 761, 763 (Tenn. 1993); Corder, 854 S.W.2d at 654 with a conclusion that proof comes in different types.

This argument is being made in various courts. Sometimes officers have to rely on field tests that have not been validated with numerous studies in the same way as the HGN, Walk and Turn and One Leg Stand. This Court rejects the defense attempt to limit what officers can do to determine probable cause to arrest and will consider the totality of the circumstances to prove guilt.

State v. Scott, 2003 WL 22326980, Tenn.Crim.App., Oct 09, 2003

The defendant had been transported to the hospital prior to the troopers arrival at the crash site. A citizen on the scene smelled an odor from an alcoholic beverage. The defendant returned to the car and removed bottles and took a drink. Five hours later in the emergency room he consented to a blood test. There was no alcohol. The parties stipulated that alcohol dissipates over time. The test was positive for methamphetamine, a stimulate and meprobamate, carisoprodol, and methadone, depressants.

The defendant complained about the chain of custody and claimed insufficient evidence to support conviction. The court found a proper chain established by the trooper and the labs record keeper and sufficient evidence based on alcohol and drug consumption.

State v. Orr 2003 WL 22970967, Tenn.Crim.App., Dec 13, 2003

This 62 year old driver was driving 5 mph in a 40 mph zone. He pulled into a Kentucky Fried Chicken drive thru, but never lowered his window to order the giblets. He claimed a bad back and fear of needles and refused all. He claimed the two beer lie, but had 2 bottles in the truck. He had a memory problem concerning priors. While this was pending he picked up three more DUI's in other counties. His 7 month sentence for DUI 3rd was affirmed.

CARNEY TIPS:

Credibility is everything; Don't answer a question you don't understand; Prepare for Court; Know your case; Watch the video; If counsel asks numerous questions at once, ask if you may answer them one at a time; Don't ever let an attorney put words in your mouth....They might not taste good.

Kilgore Seeks to Toughen DUI Laws

- DUI and Anti-Gang Legislation Two Components of Agenda for 2004 Session of the General Assembly -



Virginia Attorney General Jerry Kilgore

RICHMOND - During a speech at the 7th Annual Youth Awards presentation today, Attorney General Jerry Kilgore announced a proposal to toughen Virginia's DUI laws and further protect individuals in our communities. Kilgore's proposal would create a presumption against bond for a person arrested for drinking and driving who has a previous DUI on their record, and allow previous DUI offenses entered into the court record regardless of the number of years since the prior conviction occurred. Kilgore also discussed his anti-gang initiative to combat gang violence and encourage youth to not join a gang in the first place through the "Class Action" program. "Virginia's youth is Virginia's future. We should do all in our power to protect them from harm and negative influences," said Attorney General Kilgore. "As parents, we should be woven within their daily lives - sometimes asking questions, sometimes providing answers, and always willing to listen. As Attorney General, I have an obligation to keep our youth and communities safe - and will do all that I can to carry out this duty."

"Over the last decade, Virginia has worked to strengthen our DUI laws, but there is still more we can do to keep repeat offenders off the street and preventing the loss of innocent lives," said Attorney General Kilgore.

Specifically, the Attorney General will recommend to the General Assembly a law that creates a **presumption against bond for a person arrested for drinking and driving who has a previous DUI on their record**. Kilgore believes that a person with a history of drinking and driving has proven that they have no regard for the safety of others and they should not be allowed back on the streets if they are arrested for a second offense DUI or higher. Kilgore's proposal will also allow prosecutors to introduce any prior DUI as evidence no matter when it occurred and will recommend legislation that gives prosecutors this right. Under current Virginia law, prosecutors are only allowed to introduce prior DUIs that occurred within the last 10 years of the charged offense even for a person charged with second or third offense DUI

TENNESSEE LEAVING THE SCENE STATUS

This bill addressed a constant problem. Many recidivist impaired drivers leave the scene. Recently Joshua Sides (29) of State v. Sides, 2001 WL 523375, Tenn.Crim.App., May 16, 2001 was charged with vehicular homicide in Hamilton County. In the 2001 Sides opinion, his 2nd offense was reversed because he had left the scene and returned with his wife.

Since then Sides had pled guilty to another DUI, was permitted two weeks to check into the jail, allegedly struck and killed **Nicole Greco** (pictured) and then fled again.

THE BILL:

Permits police officer to arrest without warrant driver of motor vehicle who leaves scene of accident who is apprehended within 4 hours and who, upon apprehension, is found to be intoxicated. Amends TCA Section 40-7-103.



RESULT:

- 1) Passed House by vote of 86 to 1.
- 2) Failed in Senate Judiciary Committee by 3 to 3 vote.

Sponsors were:
Rep. Jerome Cochran, and
Senator Rusty Crowe.

Ms. Greco was a member of Bayside Baptist Church and a 2001 graduate of Central High School where she was a member of the Concert Choir.

She attended UTC and was majoring in early childhood education. She was a member of the National Honor Society and Phi Delta Kappa.

Revoked Drivers More likely to kill or be killed in traffic crashes

Tragically another fatal crash has occurred. Without watching the television news or reading the newspaper we can almost guess some of the facts involved.

- 1) If the driver had a valid license, he/she most likely had never had a suspended or cancelled license. Less than 4% of those killed in traffic accidents with a valid license have ever been suspended.
- 2) If the driver had a suspended or cancelled license, it is likely that the license had been suspended or revoked before. Only 48.4% of Tennessee drivers in a fatal wreck with a suspended license were on their first suspension.
- 3) If the fatality involved a driver with a revoked license, it is more likely the driver had previously been revoked. 35.9% of such drivers had one previous revocation. 11.7% had two previous revocations. 7.7% had three or more previous revocations. Only 44.7% of these drivers had not had their license revoked previously.

These numbers from the AAA Foundation for Traffic Safety only include revocation and suspensions for **three** years prior to the fatal wreck and are based on fatal wrecks from 1993-1999.

Why does this matter?

Remember **State v. Hicks**? In the Drivers License checkpoint case Justice Barker concluded: "First, the State has failed to demonstrate a sufficiently compelling state interest to justify suspicion less stops to check drivers' licenses."

Perhaps the fact that those with suspended or revoked licenses tend to die or kill at a much higher rate than those with valid licenses would demonstrate a compelling state interest in detecting and stopping those that continue to drive after suspension and revocation of their license.

NCSA National Center for Statistics and Analysis, 400 Seventh St., S.W., Washington, D.C.

TRAFFIC FACTS FROM 2003

Nationally, 1,561 people were killed in alcohol-related crashes between Thanksgiving and New Year's Eve last year.

Alcohol and a lack of seat belt usage claimed 2,464 lives between Thanksgiving and New Year's Eve last year.

Last year, 17,419 people were killed in crashes involving alcohol—an average of one every 30 minutes.

An estimated half a million people are injured in alcohol related crashes each year.

Alcohol-related crashes cost the public an estimated \$114.3 billion annually—this includes an estimated \$63.2 billion loss in quality of life due to these crashes.

Comments and suggestions are gratefully received. E-mail tkimball@tndagc.com

RECENT CASES CONTINUED

NHTSA Says Fight Against Drunk Driving Needs Renewal

12/11/2003

Dr. Jeffrey Runge, head of the National Highway Traffic Safety Administration (NHTSA), said renewed efforts are needed to reduce drunk driving, the Associated Press reported Dec. 3. "Since the early 1990s, we haven't made any progress," Runge said. According to Runge, the number of alcohol-related fatalities has remained constant from 2000 to 2002. Last year, there were 17,419 alcohol-related deaths. Of those, more than 15,000 were killed by drivers who had a blood-alcohol level higher than 0.08 percent. Runge said a bill under consideration in the U.S. Congress would allow the NHTSA to provide grants to states who establish specialized prosecutors or courts dedicated solely to drunk-driving cases. He is also urging doctors to inquire about drinking behavior during patient visits. "A doctor's advice is often all you need to catch them early," Runge said.

State v. Gassaway, 2003 WL 22703231, Tenn.Crim.App., Nov 13, 2003

Gassaway left the road after drifting, striking an embankment and going airborne. 125 feet later he was stuck between two trees. A Wildlife employee first responded and the defendant reeked of the smell of beer. After conviction for his second offense the defendant complained of insufficient evidence and an excessive sentence (11/29 suspended after 6 months). The Court in an opinion by Judge Glenn found the sentence to be proper due to the egregious nature of the crash and lack of truthfulness on the witness stand.

State v. Curry, 2003 WL 22888927, Tenn.Crim.App., Dec 08, 2003

May the court consider in a DUI first offense conviction the fact that four persons were killed in a crash even though the defendant was acquitted by a jury of all four counts of vehicular homicide. The Attorney General conceded that the sentencing court was wrong to do so.

The Court disagreed citing **State v. Winfield**, which specifically states that "a sentencing court may apply an enhancement factor based on facts underlying an offense for which the defendant has been acquitted, so long as the facts have been established in the record by a preponderance of the evidence." 23 S.W.3d 279, 283 (Tenn. 2000).

State v. Morgan Ray, 2003 WL 22888923, Tenn.Crim.App., Dec 08, 2003

The Court noted:

"The trial court found that the defendant has an extensive prior criminal record. The pre-sentence report indicates that the defendant has nine prior convictions for DUI, twelve for driving on a revoked license, seven for public intoxication, two for assault, two for leaving the scene of an accident, failure to comply with judicial penalty on a DUI conviction, disorderly conduct, resisting arrest, and joyriding. The defendant was declared a habitual motor offender in 1998. The defendant has four prior felony convictions including felony escape, attempt to commit burglary, and two for third degree burglary."

Naturally Ray complained the Court erred by denying alternative sentencing and sending him to prison for 9 years.

State v. Gailes, 2003 WL 22888879, Tenn.Crim.App., Dec 03, 2003

Gailes failed in an attempt to have the Court reexamine how priors are counted. This is not a dispositive issue. This is the second time a court has refused this "certified question of law". The court notes this issue has been addressed in other cases.

Recidivist Wall of Shame

Some Impaired drivers are exceptional. They continue the criminal behavior of driving under the influence until liver failure, heart disease or a fatal crash eventually stops them. They deserve special mention. Here are more members of the Wall.

John Morgan Gantt, 43, of Westmoreland, Tennessee is now spending 12 years in prison for three separate 8th offense DUIs in Sumner County. Gantt was arrested in Portland November 13, 2002 and blew a .18. He posted bond and was arrested again December 13, 2002 by Sumner deputy, Jeff Desenso. He admitted drinking 6-8 beers and taking Tylenol 3 with codeine. He refused a blood test. After posting bond he was again arrested April 17, 2003 in Portland and refused all tests. He pled guilty to all three and received consecutive 4 year sentences. His prior convictions were in 1985,1987,1988,1991,1992,1998 and 1999. He had prior felony convictions for habitual traffic offender, vehicular assault and aggravated assault.

Alphonso A. Gaudio, 46, of Delaware County, Pennsylvania was released from prison after his 10th DUI. The next day he slammed into a car, building and telephone pole while his blood alcohol level was .166
Source: Delco Times, PA.



Tulsa, Oklahoma attorney **James Rogers** was arrested for the fifth time for DUI. His four previous convictions included a five year probation he was serving when he had an accident and left the scene. Prosecutors say Rogers' case isn't unique; it's typical of a system that's looking for alternatives to tight budgets and crowded prisons.

Donna Hamby, of Lansing, Tennessee pled guilty to DUI 10th offense in Kingston 9/22/2003. She was also a Habitual Traffic Offender with 10 Driving on Revoked convictions. Hamby, 33, was indicted in May, 2002.

Billy Gene Watson, 52, pled guilty in September in Dyersburg, Tennessee to DUI 8th offense.

Charles Deason, 39, pled guilty in August, 2003 in Waverly to DUI 10th offense. He was also driving on revoked for the 6th time. His last felony DUI conviction was in Charlotte in 2000.

Prince Albert Hunter, 63, pled to DUI 9th offense and a violation of the Habitual Traffic Offender order in March, 2003 in Somerville.

James A Warren, 43, pled to DUI 9th offense and Driving on Revoked 5th offense in June, 2003 in Charlotte, Tennessee.

Ubaldo Trejo, 35, pled guilty to DUI 10th offense and violation of the Habitual Traffic Offender in Crossville in March, 2003.

Got a nominee for the wall? If in Tennessee, only send convictions for 8th offense or above to tkimball@tndagc.com

NHTSA UNVEILS STRATEGY TO REDUCE IMPAIRED DRIVING, SETS PRIORITIES FOR IMMEDIATE FUTURE

Citing the lack of substantial improvement in the number of alcohol-related fatalities since the mid-1990s, the National Highway Traffic Safety Administration (NHTSA) today released a high priority comprehensive departmental plan to significantly reduce impaired driving on the nation's roads in the coming years.

The report proposes a multi-disciplinary approach to address the complexities of the legal, social health and safety infrastructures involved in control of the impaired driving problem. The National Institutes for Alcohol Abuse and Alcoholism estimate the total cost of alcohol impairments, including medical consequences, crime, and accidental injury to be \$184.6 billion annually. The costs of alcohol-related motor vehicle fatalities account for 8.5 percent of this total.

The report also suggests generating vehicle-based solutions and improving the roadway environment. It identifies six critical countermeasures, all related to law enforcement and prosecution of DWI offenses, including specialized courts and strong alcoholic beverage control policy for minors. It offers five critical infrastructure initiatives for states to make their impaired driver control system more effective. Key among the countermeasures cited in the report to address impaired driving is high visibility traffic enforcement, enhanced support for DWI prosecution and adjudication, and medical screening of high-risk populations for alcohol use problems. These three priorities will be the department's focus on impaired driving prevention in the immediate future.

"We already know what works to stop impaired driving," said NHTSA Administrator Jeffrey W. Runge, M. D. "These strategies will save lives today, if we work together to implement them in every community." Dr. Runge announced the department's near-term impaired driving initiative at a news conference today in Washington, DC, to kick off the 17th annual Mothers Against Drunk Driving (MADD) *Tie One On For Safety* holiday ribbon campaign.

The report concludes, "NHTSA will continue to explore ways to achieve effective collaborative efforts with those who have the biggest stake in this issue - the citizens of this nation that absorb the cost of this problem in medical costs, lost productivity and human suffering from the loss of loved ones – the victims of impaired driving."

Today's report joins previous reports on safety belt use, vehicle compatibility and rollover mitigation. All are now available on the agency's World Wide Web site at <http://www.nhtsa.dot.gov/IPTReports.html>, and also on the U.S. Department of Transportation's docket management system at <http://dms.dot.gov/>. The docket numbers for each of the respective reports are Safety Belt Use, NHTSA-2003-14620; Vehicle Compatibility, NHTSA-2003-14623; Rollover Mitigation, NHTSA-2003-14622; and Impaired Driving, NHTSA-2003-14621.

Written comments may be submitted to the Docket Management System, U.S. Department of Transportation, PL 401, 400 Seventh Street, S.W., Washington, DC 20590-0001. Comments also may be submitted to the docket electronically at <http://dms.dot.gov/>. In every case, the comments should refer to the docket numbers.

Governors Highway Safety Office funds more DUI prosecutors

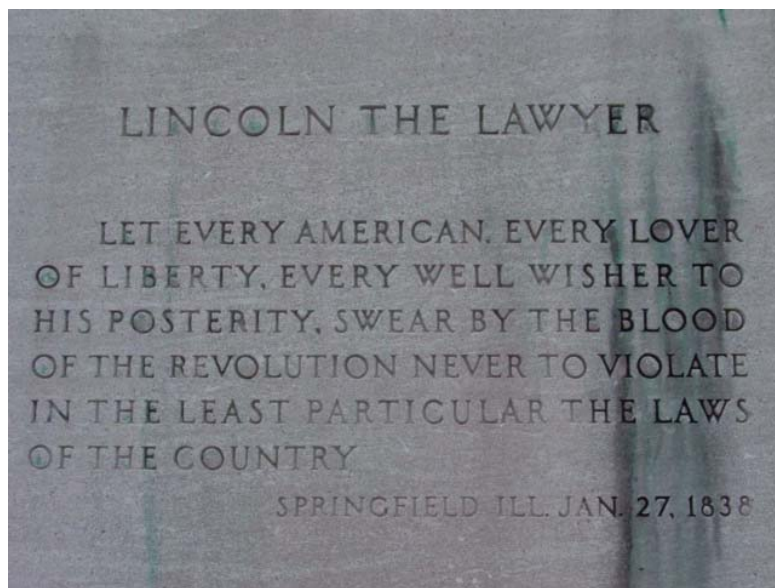
Through grants provided with National Highway Traffic Safety Administration (NHTSA) funds, the Governors Highway Safety Office (GHSO) has added to the rosters of five District Attorney offices new DUI prosecutors. These assistant District Attorneys have been retained by the District Attorneys in each of these offices to prosecute DUI, vehicular assault, vehicular homicide and habitual traffic offender cases. NHTSA has announced that special prosecutors is one of their top three priorities in the effort to reduce fatalities and injuries on the highways of our nation. See story on page 9. The five new assistants join ADAs, Georgia Felner, 21st, Thomas Tansel, 13th, and Howard Ellis, 8th District. There is a vacancy in the 1st District, Johnson City. Not pictured: Eddie Sellars, Sevierville 4th District, Howard and Georgia.



Kirby May (left) and Brooks Yelverton, Memphis, 30th District

Thomas Tansel, Cookeville 13th District

Billy Miller, Dickson 23rd District



On the Campus at Lincoln Memorial University, Harrogate, TN



Ricky Curtis at Cops in Court, Kingsport, 2nd District

TRAINING OPPORTUNITIES

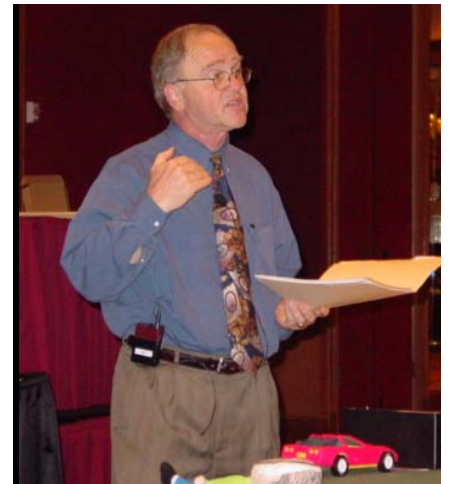
Training to be provided through the District Attorneys DUI Training Office is now available through the GHSO web site at: <http://www.tntrafficsafety.org>. Locations, dates, times and cities of training were chosen by the GHSO. To sign up for training consult with your District Attorney and then sign up online. Here are the dates and cities:

Columbia	February 9-13	Cookeville	June 14-18
Memphis	March 15-19	Knoxville	July 12-16
Jackson	April 19-23	Tri-Cities	August 16-20
Nashville	May 10-21	Chattanooga	Sept. 20-24

A catalog of information including course descriptions can be found at the web-site. **NOTE: travel expenses, lodging and per diems are not included per policy changes at the GHSO.**

POTENTIAL COURSES:

- Advanced DUI Training
- DUI Basic Training
- DUI Trial Advocacy
- Protecting Lives, Saving Futures
- PowerPoint Training for the Court Room
- GHSO Program Planning and Proposal Writing
- Cross Examination
- DUI Ethics and Professionalism
- Talking with Jurors



Professor John Kwasnoski teaching prosecutors about crash kinematics at the DUI day of training at the Annual Conference in Memphis October 21, 2003. Vehicular homicide is one of the most complex areas of law for prosecutors and one of the most important for safe communities. The victims of this crime deserve to have the best trained lawyer in the courtroom.

COPS IN COURT, Clarksville



Dec. 16, 2003 participants and faculty. This training sponsored by the Governors Highway Safety Office and the District Attorneys General Conference was designed to bring together Prosecutors and Officers from the 19th and 23rd Judicial Districts to enhance testimonial skills, report writing and knowledge of DUI case law. We try to build the police/prosecution team that can convict the guilty to protect the innocent. A total of 101 officers from 10 agencies received training from 20 prosecutors during three one day seminars, December 16th-18th. Thanks to Austin Peay State University for being a wonderful host.

Attorney General Opinion No. 03-152

November 25, 2003

Representative Mike McDonald of Portland, Sumner County, and a member of the Transportation committee requested an opinion concerning whether an officer may make a traffic stop if the officer has knowledge that the driver has a revoked or suspended license. The Attorney General citing *State v. Yeagan*, 958 S.W.2d 626, 627 (Tenn. 1997) affirmed that such a stop is based on reasonable suspicion.

SERVING MINORS ALCOHOL

Serving minors alcohol at a party is a lame brained idea. This lesson was learned the hard way by a host in *Biscan v. Brown*, 2003 WL 22955933, Tenn.Ct. App., Dec 15, 2003. Injuries to a 16 year old passenger in a car that was driven by a 17 year old impaired driver after leaving a party were permanent. The young lady suffered serious brain injuries resulting in a verdict of \$3,954,810. The party host was held accountable for 15% of the damages. Do the math and the party host is out more than half a million dollars.

Cases cont.

State v. Mellinger 2003 WL 22937749, Tenn.Crim.App., Dec 10, 2003

The jury found the 19 year old female driver guilty of DUI as a lesser included offense of vehicular assault. The defendant was sentenced to serve 273 days. Enhancement factors were properly applied. The factors:

- (1) The appellant has a previous history of criminal convictions or criminal behavior;
- (3) The offense involved more than one victim;
- (6) The personal injuries inflicted upon or the amount of damage to property sustained by the victim was particularly great;
- (10) The appellant had no hesitation about committing a crime when the risk to human life was high; and
- (16) The crime was committed under circumstances under which the potential for bodily injury to a victim was great.

State v. Norvell 2003 WL 22937747, Tenn.Crim.App., Dec 12, 2003

This defendant was convicted in Davidson County of third offense DUI and received a 140 day sentence. The description of the SFST's and breath test given by Officer Edwin Krenk are outstanding. Read this decision. It may be found at: <http://www.tsc.state.tn.us/OPINIONS/Tcca/PDF/034/norvell.pdf>

State v. Newsome 2003 WL 22999441, Tenn Crim App, Dec 23, 2003

Newsome was .27 when he straightened a curve and met a tree. His passenger flew out the door and suffered road rash. Newsome after being sentenced to 6 years in prison as a career felon challenged the testimony of his passenger. Road rash corroborated the passengers testimony. Newsome also wanted to challenge the use of his prior convictions due to a lack of enhancement advise at the time of his plea. The Court appears to be tired of such challenges. After citing *McClintock*, 732 S.W. 2d 268 and *Posey*, 99 SW3d 141, the court concludes with: "Because a challenge in the most recent D.U.I. proceeding of the validity of prior D.U.I. convictions is inappropriate we find this issue to be without merit."

State v. Chatman 2003 WL 22999438, Tenn.Crim.App., Dec 23, 2003

This defendant with a .14 BAC challenged the twenty minute observation period. What did he dislike about it? The officer twice in twenty minutes glanced at his watch! When *Sensing* 843 SW2d 412 (Tenn 1992) first arrived it carried 6 requirements. The fourth required that the motorist be observed for the requisite 20 minutes prior to the test, and during this period not have foreign matter in his mouth; not consume any alcoholic beverage; smoke or regurgitate. This court points out that this requirement is really two requirements. It does not matter that the defendant did not have anything interfere with the test, if there is not a good twenty minute observation. Glancing at the watch did not invalidate this observation period.

VEHICULAR HOMICIDE CASES

STATE V. HART

2003 WL 22532500

Tenn.Crim.App., Nov 07, 2003

In this vehicular homicide decision from Johnson City, Judge Wedemeyer affirmed the twenty three year conviction for aggravated vehicular homicide. The impaired defendant also was convicted of child endangerment due to driving with her six year old in the car while at a .17 blood alcohol level. Dr. David Stafford testified for the defendant and attempted to disparage the medical testing and record keeping of the Johnson City Medical Center without success. Assistant DA's Ken Baldwin and Tony Clark prosecuted the case. THP Trooper Dexter Lunceford testified concerning the reconstruction of the crash using computer diagrams drawn to scale. The head on collision occurred after the defendant drifted ten feet into the opposite lane of traffic. This is one of several cases that permits the introduction of medical records in vehicular homicide cases.

The Visual Detection of Impaired Motorists

An excellent explanation of driving behaviors typical of impaired driving is available from the National Highway Traffic Safety Administration. (NHTSA). This guide has been used to train officers since 1979. It was based on research and field studies involving hundreds of officers and over 12,000 traffic stops. Note that officers are trained to stop cars for weaving, swerving and drifting. Our Supreme Court tends to be skeptical of stops that are based on these clues of impaired driving. When instructing officers, be cautious and recognize their duty to protect lives. To leave an errant driver in operation of a car, because he is waiting for enough evidence to satisfy court decisions like *Binnette* and *Garcia* (see page 12) could result in tragedy. Here is the NHTSA description of weaving:

Problems in Maintaining Proper Lane Position

Maintaining proper lane position can be a difficult task for an impaired driver. For example, we have all seen vehicles weaving before. Weaving is when the vehicle alternately moves toward one side of the lane and then the other. The pattern of lateral movement can be fairly regular, as one steering correction is closely followed by another. In **extreme** cases, the vehicle's wheels even cross the lane lines before a correction is made. You might even observe a vehicle straddling a center or lane line. That is, the vehicle is moving straight ahead with either the right or left tires on the wrong side of the lane line or markers.

Weaving



To see the 24 clues go to:

<http://www.nhtsa.dot.gov/people/injury/alcohol/dwi/dwihtml/index.htm>

The NHTSA web-site also contains a wealth of information in the Traffic Safety area concerning DUI enforcement.