



# DUI NEWS

**PUBLISHER:**

Tom Kimball, TSRP; ADA

**LAYOUT AND DESIGN:**

Sherri Harper

**INSIDE THIS ISSUE:**

<i>Medical Conditions</i>	1
<i>Recent Decisions</i>	2-4
<i>Training</i>	5
<i>Medical Conditions</i>	6
<i>Webinar Series</i>	7
<i>DRE Testimony</i>	8-9
<i>Motorcycles</i>	10
<i>Veicular Homicide</i>	11
<i>Qualifying the Witness</i>	12

TN DISTRICT ATTORNEYS  
GENERAL CONFERENCE,  
William Whitesell, Interim  
Executive Director  
226 Capitol Blvd. Bldg. Ste 800  
Nashville, TN 37243  
DUI Training Division  
DUI Office: (615)253-6734  
DUI Fax: (615) 253-6735  
e-mail: tekimball@tndagc.org  
**Newsletters online at:**  
[dui.tndagc.org/newsletters](http://dui.tndagc.org/newsletters)

**Governor's Highway Safety Office**

James K. Polk Office Bldg  
505 Deaderick Street, Ste 1800  
Nashville, Tn. 37243  
Office: 615-741-2589  
web-site: [www.tntrafficsafety.org](http://www.tntrafficsafety.org)

*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.*

## DUI Enforcement, HGN, & Medical Eye Conditions

By Officer John Fessmire

Throughout your career as a law enforcement officer you'll encounter DUI offenders. Part of the standardized testing of these subjects involves the check for HGN, which is induced by intoxication by three of the seven defined drug categories: CNS depressants, dissociative anesthetics, and inhalants. Prosecuting officers will likely be called upon in court for testimony and, often, will hear the defense claim that a medical condition caused the officer to confuse symptoms of their client's respective condition for HGN. To help prepare for that contingency, let's explore commonly encountered medical conditions.

First, let's start with vision corrective lenses. At the start of HGN we ask the subject if they normally wear glasses or contacts and document the response. If they are currently wearing glasses, we have them remove them. Testing without the glasses does not produce HGN. As a side note, if you check the subject for a lack of convergence (LOC) without the glasses and observe an inability to converge, you should perform the test again with the glasses on. If the eyes are now able to converge with the glasses being worn, the test is negative.

With contacts, we do not have the subject remove them. HGN will not be produced by the wearing or not wearing of contacts. What you may see, in the case of contacts being worn, is a reduction in the cosmetic appearance of certain types of nystagmus.

Second, there are some ocular ("having to do with the eyes or vision") conditions that seem to be encountered more often than others, either on the road side during a shift or at a preliminary hearing when the conditions may be raised as a defense. The usual conditions encountered are astigmatism, cataracts, and/or glaucoma. Astigmatism (an irregular shape of the cornea), cataracts (clouding of the lens), and glaucoma (condition related to internal ocular pressure) do not cause nystagmus.

Occasionally, you may check for HGN in someone with strabismus, commonly referred to as "lazy eye". Strabismus does not cause nystagmus, but you may see a slight limitation in the movement of the affected eye. For the most part, the unaffected eye will lead or guide the affected eye. Even if strabismus is present in both eyes, it is not going to cause nystagmus.

There are other anomalies you may encounter at roadside, but these should all be fairly obvious and, if they're present, the subject will likely already be aware of the anomaly. Aniridia (lack of an iris), iris coloboma (incomplete closing of the iris), retinal coloboma (not visible for us, but will produce resting nystagmus), iridodialysis (detached iris), or even trauma from a previous injury will all be fairly obvious and warrant questioning and documentation, but those who are afflicted with these conditions will already be aware of them. More importantly, they will not cause nystagmus, though with trauma you may observe an asymmetric response from the eyes.

Scleritis or iritis will cause the eyes to appear quite bloodshot. Both conditions will cause the subject some level of pain, especially so with iritis. Confusing the bloodshot eyes in this case with intoxication is unlikely since neither scleritis nor iritis impact motor function, speech pattern, or induce chemical or alcoholic beverage odors.

Continued page 6



## RECENT DECISIONS

State v Brewer, W2014-01347-CCA-R3-CD

EVADING IS NOT CLASS D WITHOUT TRAFFIC

This defendant stole a vehicle and then refused to stop in the stolen vehicle once the blue lights and sirens were activated. The trial court sentenced him for the Class D evading crime. However, there was no testimony from any witness that there was any traffic on the road when he evaded. A risk of death to others is an essential element of the Class D felony. This is reminiscent of the reversal in *State v Williams*, 185 S.W.3d 311 (Tenn 2006), in which there was no testimony that any traffic was impeded to justify a seizure for impeding traffic.

State v Brown, 2015 WL 1951870, 2015 Lexis 312

55-10-406 (f) IS CONSTITUTIONAL

Another panel of the Court of Criminal Appeals has determined that the mandatory blood draw provision in TCA 55-10-406 is constitutional. It does not dispense of the search warrant requirement in non-consensual blood draws. The statute does not require an officer to obtain the blood sample without a warrant. This case is consistent with the Kennedy and Wells cases.

The Court determined there were no exigent circumstances in this case to justify a warrantless search. Prior to May 9, 2012, practitioners believed a search warrant was not permitted in DUI cases based on an opinion of the Attorney General. This case pre-dated the passage of the statute that permitted search warrants in DUI cases, which went into effect on May 9, 2012. Perhaps the exigent circumstance in this case was that no officer had ever received a search warrant for a blood sample in a DUI case as of the date of this crime, December 6, 2011. That's the way the cookie crumbles sometimes. The officer would have needed a crystal ball to comply with the changes in the law that would come six months after his arrest.

State v Crockett, 2015 WL 2393971, 2015 Lexis 370

CAMERAS DON'T SEE EVERYTHING

In Murfreesboro, the defendant had the misfortune of pulling into an intersection next to an observant officer, Chris Phillips. The officer saw that the driver had no seat belt. He watched four or five seconds and the driver made no move to put a seatbelt on. Officer Phillips turned to follow and noticed a rear taillight was covered with black tape. He pulled over the driver and two years later convictions for 3d offense, Driving on a Suspended license, Possession of a handgun by a convicted felon and theft over \$500 were affirmed. Judge Woodall noted that the stationary camera in the police car was mounted and depicted a stationary angle. It did not show what the officer saw as the officer and driver were in the intersection a few feet away. Judge Woodall spends some time complimenting the Trial Court's method of listing the Findings of Fact as a model for all.

State v Dotson, 2015 WL 1510776, 2015 Lexis 226

ADMISSIONS COLLABORATED

This defendant stole a car, crashed a car, tried to cover up his involvement and was convicted. No one saw him driving the car, so this case is informative about how to convict a driver, when he is discovered to be the driver days after his crash. Efforts by Trooper Chris Copeland, Franklin Officer Scott Savage, Franklin Detective Chad Pace, and Officer Megan Valentin resulted in the discovery of the bizarre night of Mr. Dotson. Detective Pace interviewed the Defendant the day after he had crashed. The defendant did not give the details of his evening to the Detective. He denied driving and stealing. A week later, Officer Valentin responded to a possible suicide call. The Defendant told her he was drunk on moonshine and vodka causing him to crash the car he had stolen from a repair lot. Evidence gathered from the car supported the admissions.

State v Dowdy, 2015 WL 2257275, 2015 Lexis 348

DUI DRIVER BRINGS HIS POT TO JAIL

In White County this Defendant was stopped after nearly running head on into an ambulance. He was intoxicated with alcohol and Xanax. In his vehicle he had oxycodone and xanax. At his sentencing hearing he would blame his intoxication to claim he had forgotten the bag of marijuana in his pants discovered during his booking. This defendant was on parole for a plethora of prior felonies. He was sentenced to serve 10 years.

**RECENT DECISIONS**



State v Zemp, 2015 WL 3612633, 2015 Lexis 455      18TH OFFENDER 8 YEARS  
 It takes a lot of gall to complain about any sentence, when a person has dedicated his life to violating the law. It appears that Charles Zemp has made it a goal to pass the record for DUI convictions. He was arrested on May 21, 2014 for his 18th DUI to go along with his six prior Habitual Motor Vehicle felonies. This was his sixth felony DUI to go along with twelve misdemeanor convictions. His sentence of eight years was appealed. His attorney, Assistant Public Defender David Gall argued that Zemp wasn't all that bad. He was "a very careful drunk driver" and that his record of criminal activity is not actually extensive because it

"consists almost entirely of motor vehicle offenses." The Court rejected those pleas for a minimum sentence and affirmed. I suspect this is one of those cases where the assigned public defender was stuck in a position where he had to come up with something to say and the history of Mr. Zemp left him in a bad position. Meanwhile, we'll watch for Mr. Zemp's release and his nearly inevitable 19th offense.

State v Johnson, 2015 WL 1810648, 2015 Lexis 281      STONE MAILBOX STOPPED DUI

Trooper Russell Peters responded to a crash in which a Ford Ranger pickup obliterated a stone mailbox in Trousdale County. The mailbox took a toll on the passenger side of the truck, making it inoperable. When the trooper responded, a deputy, eyewitness and the owners of the mailbox were present along with the defendant, who would claim that his absent girlfriend had driven and fled the scene. Johnson had four prior felony DUI convictions, was a habitual traffic offender and was driving on a revoked license. The Jury and Trial Court Judge were not persuaded by the "my girlfriend did it defense". He received a sentence of four years to serve including 315 days in confinement.

State v Mitchell, 2015 WL 2453095, 2015 Lexis 393  
 EXPLANATION OF MANDATORY BLOOD DRAW REQUIREMENT WAS NOT COERCIVE TO INVALIDATE IMPLIED CONSENT

This driver had a prior DUI conviction. When arrested for DUI again, he refused a blood test several times. Trooper Charles Achinger, described as constantly courteous, explained to the driver that the law required him to obtain a blood test with or without consent. He explained that refusal would result in another charge, violation of implied consent, which would result in a one year suspension of the privilege to drive. At the hospital the driver consented and signed a consent form. His Blood Alcohol level was .16. In the Court of Criminal Appeals he argued his consent was coerced and the blood alcohol test should have been suppressed. The Court rejected the argument. Baseless threats may render consent involuntary. Explaining a statute is not a baseless threat.

State v Parker, 2015 WL 3484411, 2015 Lexis 425      MVHO ORDER DOES NOT EXPIRE

The Defendant was convicted of driving after being declared a habitual motor vehicle offender and several other counts, including DUI 2nd offense. As a Range 3 offender, he was sentenced to serve ten years. He appealed and argued that his MVHO status should have automatically expired after ten years, despite his failure to petition the Court to restore his driving privilege. His argument was in direct contradiction to the Supreme Court ruling in State v Orr, 694 SW 2nd 297 (Tenn 1985). The Court in this case explained that provisions in the Rules of Civil Procedure limiting money judgments

**NEW LAWS EFFECTIVE July 1st**

A recording of our webinar and a short synopsis of new traffic safety laws is available on our website. Under the heading current news. Click on the words, "New Laws in 2015". The webinar is about 30 minutes long. There is also a short synopsis of the laws mentioned in the webinar. In addition to those laws the fine for a seat belt violation increased from \$10 to \$25.

## LAY EVIDENCE TESTIMONY

State v. Hurt, 2015 WL 1828299

In this decision, a robbery case, Judge Easter reviewed and stated the current law concerning testimony by a lay witness. It is included here to answer the question of why an officer can testify about impairment in a typical DUI case, even when the officer is not an expert witness. Judge Easter wrote,

“A witness’s lay opinion testimony is admissible only when the jury could not readily draw its own conclusions on the issue without the witness’s lay opinion or where the witness cannot effectively testify without stating the inference or opinion. *State v. Schiefelbein*, 230 S.W.3d 88, 130 (Tenn. Crim. App. 2007). The lay opinion testimony should be based on admissible facts which are in evidence. *State v. Boggs*, 932 S.W.2d 467, 474 (Tenn. Crim. App. 1996). While expert opinion is based on a process of reasoning which can be mastered only by specialists in the field, lay opinion should be based on a process of reasoning drawn from everyday life. *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992). A lay opinion should be within the range of knowledge or understanding of ordinary laymen. *Boggs*, 932 S.W.2d at 474. In other words, opinions permissible under Tennessee Rule of Evidence 701 must be based on the witness’s own observations, should require no expertise, and ought to be within the range of common experience. *State v. Samuel*, 243 S.W.3d 592, 603 (Tenn. Crim. App. 2007).

Common examples of lay witness testimony include: (1) testimony regarding the speed at which a car is traveling, *Kim v. Boucher*, 55 S.W.3d 551, 555-56 (Tenn. Ct. App. 2001); (2) testimony about whether a child was afraid, *Schiefelbein*, 230 S.W.3d at 130; (3) testimony about whether a person was physically impaired, *Boggs*, 932 S.W.2d at 474; (4) testimony about whether a person was intoxicated, *see Kirksey v. Overton Pub, Inc.*, 804 S.W.2d 68, 75 (Tenn. Ct. App. 1990); (5) testimony about whether an injury looked like a cigarette burn, *Brown*, 836 S.W.2d at 550; (6) testimony that an injury caused by digging a fingernail into the victim’s skin was recent, *Samuel*, 243 S.W.3d at 603; and (7) testimony that a door looked like it had been pried open and a footprint was similar to the defendant’s, *State v. Anthony Duran Hines*, No. M2007-00493-CCA-R3-CD, 2008 WL 2026113, at \*1-2 (Tenn. Crim. App. May 12, 2008), *perm. app. denied* (Tenn. Oct. 6, 2008). However, lay opinion testimony may be improper where the witness giving the lay opinion effectively usurps the function of the jury. *United States v. Grinage*, 390 F.3d 746, 750-51 (2d Cir. 2004) (holding that testimony interpreting both phone calls that the jury heard and calls the jury did not hear and making inferences highlighting similarities between the defendant’s calls and others made in furtherance of a conspiracy was not permissible lay opinion testimony under Federal Rule of Evidence 701). Additionally, we note that “[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” Tenn. R. Evid. 704.”

State v Adams 2015 WL 3826286

SURPRISE “EXPERT” WITNESS PROPERLY EXCLUDED

This driver was clocked doing 51 mph in a 40 mph zone and was stopped. He could not perform field sobriety tests in a manner consistent with sobriety. He was arrested and a blood test showed a B.A.C. level of .18. He received a trial and was convicted and sentenced to 11 months 29 days with all but 60 suspended.

His complaint was that his surprise expert witness and co-worker was not allowed to testify that Freon might have made the blood alcohol test inaccurate. His “expert” witness showed up on the day of trial. The defense never tried to comply with Rule 16(b) concerning reciprocal discovery. More importantly the “expert” could not qualify as an expert per Rule 702 and *McDaniel v CSX Transportation*, 955 SW2d 257. (Tenn.1997)

There was no sufficient indicia of reliability, no evidence or data to support the theory of the “expert”, no information as to whether his theory was accepted in the scientific community and no evidence that Freon was present in the blood sample. This effort struck out concerning all of the *McDaniel* and Rule 702 requirements.

## TRAINING UPDATE

It's been a busy quarter in the DUI Training Section. First, we were honored to put on a Cops in Court class with General Bryant Dunaway in Cookeville. Thirty-four officers attended over two days. The group posed for a Thumbs Down To Texting While Driving photo:



In April, we conducted the first 20/20, Understanding the Physiology of Eye Movements, class with the Southern College of Optometry in Memphis. This course included twenty officers and twenty prosecutors.



The following week the nations Traffic Safety Resource Prosecutors met in Oklahoma City to study progress in traffic safety training across the country.

We taught the 45 person THP Cadet course twice with Legal Aspects of Crash Investigations and Cops in Court. We taught at the 72 hour DRE class in Memphis and had four hours to teach about the law, report writing and testimony to the Nashville Metro Cadets.

We taught forty-eight prosecutors at the New Prosecutor Training Academy concerning DUI and cross examination as part of their week long training conducted by our Training Division.

The last week of May was our Crash Reconstruction for Prosecutors course conducted for thirty-two TN Prosecutors and a contingent of 19 visiting Kentucky prosecutors.

On June 25th, a webinar was conducted concerning new laws with a July 1 effective date. It was attended by 18 prosecutors and 30 law enforcement officers. It was an honor to share these courses with outstanding prosecutors and law enforcement officers who attended these classes. We fervently hope they all came away with some knowledge or skill they gained at these trainings.

Prosecutors, mark your calendars for our **TRIAL STRATEGIES** course November 17-19 at a location to be determined.

## DUI Enforcement, HGN, & Medical Eye Conditions

Additionally, we all are checking for equal pupil size before we begin checking for the 3 validated HGN clues in each eye. You very well may come into contact with someone whose pupil sizes are not equal to each other. Being familiar with the signs of a stroke or if your contact with a subject is the result of a significant vehicle crash, being aware of those things will help you get that person immediate medical attention in the event you suspect that the difference in pupil size is fresh.

Furthermore, on the topic of pupil size difference, there may be times you encounter this condition and you may not have a medical emergency occurring in your presence. Anisocoria, the name for this difference in pupil size, may be a naturally occurring anomaly. A third of people have a difference in pupil size of .5mm or less. Even fewer (less than 10%) people have a difference of 1mm or more.

Again, questioning the subject will help you determine what your next step should be. Most of the non-emergency causes of anisocoria will already be known to the subject you are testing. The difference in size may be natural, the subject may have just had an eye exam/procedure in which a singular eye was dilated, or you may have a legitimate medical emergency on your hands.

Now, let's look at diabetes and multiple sclerosis (MS) as they may be encountered in DUI enforcement and testimony. With diabetic episodes, much of the symptoms may very well mimic intoxication: slurred speech, bloodshot eyes (diabetic retinopathy), gait ataxia, and others. Being aware of extra signs (blood sugar test kit, glucose tablets, fruity odor (ketoacidosis)) will help you distinguish between a diabetic episode and intoxication.

Multiple sclerosis is a disease in which a person's immune system attacks the myelin sheathe that protects the nerves resulting in a wide array of symptoms and problems. This may cause a disruption in motor function and may manifest in weakness, poor coordination, fatigue, and many others, all of which could be confused for clues of intoxication. With MS, you must first understand that the order we check HGN clues in (lack of smooth pursuit > distinct and sustained nystagmus at maximum deviation > onset prior to 45 degrees) is designed to check for intoxication in increasing amounts. With MS, you may see onset prior to 45 degrees without there being any clues during the check for lack of smooth pursuit, or you may observe VGN without observing distinct and sustained nystagmus at maximum deviation.

While none of what has been mentioned here will induce HGN, some of them may produce resting nystagmus. Part of our eye check before beginning HGN is to check for resting nystagmus. Keep in mind that, resting nystagmus may only be seen in intoxication cases where the intoxicant is a dissociative anesthetic. If you see resting nystagmus you should be very keen to other observable facts, because you may be witnessing a medical issue or you may have someone high on a dissociative anesthetic, which has historically led to some of the most violent and brutal assaults on police officers.

We are in an age where scrutiny of the police is a rampant pastime and information/opinions are disseminated nationwide in a matter of minutes. As officers we not only have a duty to help people and protect the public, but we also have to ensure that we are doing things the right way. Continued training and understanding of our profession will help you fulfill your role. This article is the product of training and education provided to me by Doctors Karl Citek, Christopher Borgman, Wilson McGriff, & Richard Savoy through a course entitled *20/20: Understanding the Physiology of Eye Movements & Impairment* at the Southern College of Optometry.

With regards to DUI enforcement, this means that, in order to do the best possible job, you should be inquisitive about things that don't make sense. It's good investigative work. You should also document all indicators of intoxication and make mental notes of potential medical conditions. The totality of the circumstances will allow you to correctly make a decision on roadside with regards to arrest/don't arrest and it will allow you to build an ironclad DUI case to ensure the public is receiving the best product available from you as an entrusted peace officer and public servant.

### About the Author

John Fesmire is an officer with the LaVergne Police Department and is currently assigned to the Crime Suppression Unit there. Fesmire became the department's first Drug Recognition Expert in 2014 and has just recently completed "20/20" training to help educate and prepare him for expert witness qualification in court room testimony. Combining his almost 9 years of law enforcement with the ARIDE and DRE training received in that time, as well as his position as a field training officer, Fesmire also teaches other officers on the streets of LaVergne what to look for in possible intoxicated driver situations.

## WEBINAR SERIES

### WEBINAR SERIES

The National TSRP Webinar Series, Traffic Tuesdays, has the following outstanding webinars scheduled:

July 14, 2:00-3:30, Oral Fluid Testing in Impaired Driving Investigations

This webinar will discuss the use of oral fluid testing in impaired driving investigations. Oral fluid can be collected quickly and with minimal intrusion to the impaired driving suspect. It has the potential to be a viable sample for chemical testing in impaired driving cases.

Registration link:

<https://attendee.gotowebinar.com/register/6517167520043966465>

August 18, 2:00-3:00, The 7 Deadly Impaired Drivers

Driving sober is a virtue, yet impaired drivers continue to plague our nation's highways. National arrest statistics reveal more than 10,000 people died in alcohol impaired driving crashes in 2013 – one every 51 minutes. In 51 minutes, this webinar will explore lessons learned in the trenches from 7 real impaired driving prosecutions from the beginning of the investigation to the end of the courtroom trial. Wisdom will be imparted regarding the 7 deadly sins committed by impaired drivers and what we can do as law enforcement officers and prosecutors to better hold these offenders accountable. Please join us for an important hour worth of education and instruction concerning fallen humanity's tendency to drive impaired.

Registration link:

<https://attendee.gotowebinar.com/register/1845608695814275074>

September 8, 2:00-3:00, Turning the Sword into a Shield: Using the NHTSA Manual to Cross Examine the Defense Expert

If you've been prosecuting DWI cases for any length of time you have undoubtedly seen a defense attorney attack a police officer's administration of the standardized field sobriety tests. Sometimes defendants even hire former police officers or other self-appointed "experts" to analyze police reports and dash cam videos looking for any mistake in the SFSTs, no matter how slight. Cases can be lost when this type of testimony goes unchallenged. What officers and prosecutors don't always realize is that there is a lot of good stuff in the NHTSA manual that can be used to support the SFST testimony and, more importantly, to attack the defense expert's opinions about whether the tests were properly administered and how the results should be interpreted. Defendants like to use the NHTSA manual as a sword to cut holes in the state's case and avoid responsibility for their poor decisions and dangerous behavior. This webinar will show you how to use the manual as a shield to defend your officers and your impaired driving cases.

Registration link:

<https://attendee.gotowebinar.com/register/7888731310193084162>

Even if you cannot attend at the particular hour and day, REGISTER. If you register, a link will be sent to your mailbox with the recording of the webinar, which you can watch at your convenience.

### TRACKER REPORT

During this quarter, the DUI Tracker captured 2,331 DUI dispositions and 2940 new DUI cases Statewide, which accounts for about 40-50% of all quarterly dispositions. That's based on a typical annual average of about 23,000 dispositions per year or 5750 per quarter in Tennessee.

In this 3rd quarter of our fiscal year, the District with the most reported dispositions was the 16th District with 257 dispositions. The 16th includes Rutherford and Cannon Counties.

The district with the most new cases opened was also the 16th district with 324 new cases.

The district with the most guilty as charged dispositions was the 21st with 197, which also had the highest percentage of guilty as charged dispositions with at least 100 dispositions was the 21st (Williamson, Hickman, Lewis and Perry counties) with 83%

Overall 2331 dispositions were entered statewide with 1606 guilty as charged convictions for a rate of 68.9%

## A DRE MEETS THE WINEK CHART

Trooper Dwayne Stanford

Most people in society can tell when a person has had way too much alcohol to drink. People are pretty clear on the rules of drinking and driving. What about drugged driving? There are vast differences, but impairment is prevalent in both cases. The State of Tennessee has taken a proactive approach to combating the problem of impaired driving. The State has realized that drug impaired driving is an epidemic around the nation and especially Tennessee. Tennessee has a DRE program that is housed in the Tennessee Governor's Highway Safety Office. Currently, there are officers from cities, counties, and state agencies that hold the certification of Drug Recognition Expert. Current certified officers attend additional training as part of their continuing education requirement. Drug Recognition Experts attend in-service training where they often hear experts of optometry and toxicology. These officers are available to any Tennessee agency requesting their services. An agency can locate these officers through the Tennessee Governor's Highway Safety Office website. Additionally, officers may attend the Advanced Roadside Impaired Driving course, which will assist them in the identification of drug-impaired drivers. The trained officer will then have a better response and call a certified DRE for assistance.

"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 Drug Evaluation and Classification (DEC) Program is managed and coordinated by the International Association of Chiefs of Police (IACP) with support from the National Highway Traffic Safety Administration (NHTSA) of the U.S. Department of Transportation" ("Law enforcement &," 2012). The drug recognition expert program originated in the early 1970s in Los Angeles, California. The originating officers were making arrests only to find alcohol levels at or near zero. The officers suspected drugs as the variable present, but their familiarity with psychoactive effects was minimal. "In response, two LAPD sergeants collaborated with various medical doctors, research psychologists, and other medical professionals to develop a simple, standardized procedure for recognizing drug influence and impairment. Their efforts culminated in the development of a multi-step protocol and the first DRE program. The LAPD formally recognized the program in 1979" ("Law enforcement &," 2012).

Any law enforcement officer can apply to become a DRE. Many more are needed. Tennessee experienced 961 fatalities in 2014 ("Tennessee traffic fatalities," ). The fatality rate continues to fall, but none of those fatalities are acceptable. Officers should place emphasis on training.

While any officer can apply, not all will be accepted. There are high standards for any officer to become a DRE. An officer must attend the Advanced Roadside Impaired Driving Enforcement course and then be recommended by a certified DRE. Officers wishing to attend the DRE school must then apply and be accepted prior to attending. The first phase of the school consists of an academic setting. The academic phase comprises seventy-two hours. There are tests and quizzes administered during this phase, and the student must attain a minimum of eighty percent pass rate. The officer must be proficient in the administration of Standardized Field Sobriety Tests as well. At the conclusion of the academic phase, the officer must complete a certification phase.

The certification phase must be completed within six months of completing the academic portion. The certification phase may be the hardest component of the pursuit of attaining the DRE title. "These requirements include: conducting a minimum of 12 drug influence evaluations while under the supervision of a DRE instructor; identifying subjects under the influence of four of the seven drug categories; and attaining a 75% toxicological confirmation rate. In addition, the student must maintain a progress log, a rolling log, and submit their curriculum vitae. Finally, the student must pass a comprehensive final knowledge examination and obtain the written endorsement of two certified Drug recognition experts take their training and experience to the street. Their mission is to save lives.



## WINEK, THERAPEUTIC, TRUTH

Trooper Dwayne Stanford

It is not uncommon for the Drug Recognition Expert to arrest a driver and then be cross examined by a defense lawyer armed with a Winek chart and a conclusion that the drug was consumed at a therapeutic level.

The Winek Drug and Chemical Blood Data Chart indicates whether a therapeutic, toxic, and lethal level of drug is present in a person's blood. The chart is often used in criminal defense cases in Tennessee. On any given court day in Tennessee, one will see a defense attorney and even prosecutors utilizing the Winek Chart. The problem occurs when the officer cannot explain that therapeutic does not mean therapeutic for the purpose of driving a car and the elements of additive, overlapping, null, or antagonistic effects. To expand upon this thought, think of alcohol creating nystagmus. As officers conducting Standardized Field Sobriety Tests, we must realize that alcohol produces observable clues during the Horizontal Gaze Nystagmus Test. Inhalants also produce the same clues on the Horizontal Gaze Nystagmus test. The two, in combination, will

### What is the Winek Drug and Chemical Blood Data Chart?

produce clues during the horizontal gaze nystagmus test, which is an additive effect. But what if the offender consumes a narcotic analgesic and cannabis? Do they produce nystagmus in combination? They will not create nystagmus because neither category produces horizontal or gaze nystagmus. The example provided is an example of a null effect. An example of an antagonistic effect is a combination of narcotic analgesics and central nervous system stimulants and their effect on pupil size. Central nervous system stimulants dilate pupils, and narcotic analgesics constrict pupils. The result is unknown due to the antagonistic effect. An example of an overlapping effect is the combination of central nervous system depressants and central nervous system stimulants. We know that depressants cause horizontal gaze nystagmus. Stimulants do not cause nystagmus. The effect will overlap, and nystagmus will be present. Examples such as the ones provided can be further elaborated and described within a trial. But who has the training to create the recipe to make it clear to a jury? Officers are often questioned heavily on many variables related to the arrest. Defense attorneys will often claim that a therapeutic level of a drug was used if every other possible defense is exhausted. Defense attorneys often refer to the Winek Chart. "Winek defines a therapeutic blood level as that concentration of drug and/or its active metabolite(s) present in the blood (serum or plasma) following therapeutically effective dosage in humans" (Winek, Whaba & Blazer, 2001).

This is where the DRE shines in the criminal setting. The DRE is aware of the parameters of therapeutic levels and counters with a valid argument. What is the therapeutic level of Ambien or Zolpidem? A DRE would state the obvious in relation to Ambien. The therapeutic level of Ambien is sleep.

Think about that for a moment. Defense attorneys use this argument daily and fail to realize that they are admitting impairment. The therapeutic level of alprazolam creates nystagmus and other impairing qualities. "Nystagmus most commonly causes the eyes to look involuntarily from side to side in a rapid, swinging motion rather than staying fixed on an object or person" (Dubow, 2014). "Therapeutic for the purpose of reducing pain or anxiety does not mean therapeutic in the sense of driving a car" (Davis, 2010). What does society gain from having drug recognition experts? Successful case prosecution correlates to saving lives. In theory, offenders convicted of impaired driving offenses should not be on the road to re-offend after their conviction. In fact, data show that about two-thirds of those convicted do not re-offend. If the offender's case is dismissed due to a therapeutic level interjection, then they feel their behavior can continue without prosecution.

The element of training will help officers to respond to the frequent interjection of the Winek chart to permit the jury to make decisions based on truth instead of fiction. Everybody wins when the truth prevails, except for the person who tried to hide the truth.

(See page 10 for a description of the author)

### ABOUT OUR DRE AUTHOR

Sergeant Dwayne Stanford is a 14-year veteran of the Tennessee Highway Patrol who began his career working as a Communications Operator. He was commissioned as a trooper in 2007 and was assigned to Fayette County in the Memphis District. He was transferred in 2008 to Henderson County in the Jackson District. Sergeant Stanford was certified as a Drug Recognition Expert in 2010. He has assisted with many criminal investigations involving impaired driving, vehicular assaults, and vehicular homicides. He also served as a member of the Tennessee Highway Patrol Interdiction Plus Team until his promotion to Sergeant in 2014. He currently serves as the Hardin County Sergeant in the Jackson District, where he supervises DREs and serves as the Jackson District DRE Supervisor.

### MOTORCYCLE EFFORTS

In Tennessee so far this year 39 fatal crashes have involved motorcycles resulting in 41 fatalities and 27 additional injuries. Each red dot on the map shows the location of one of the fatal crashes.



Ongoing educational efforts are used by the Governor’s Highway Safety Office to help officers investigate crashes that involve motorcycles. 16 officers recently completed a 40 hour motorcycle crash investigation course at the Shelby County Sheriffs Department Training facility. The course included sessions on motorcycle laws, helmet inspections, motorcycle inspections, scene inspections, visual aspects of the motorcycle crash, location of evidence at the scene, numerous mathematical formulas to assist in obtaining motorcycle speeds, mathematic formulas to determine the proper lean angle of the motorcycle in order to properly negotiate curves, passing distance calculations, human factors, rider experience, interview techniques and various other topics to assist in the investigation. Congratulations officers.

#### NHTSA Motorcycle Fact Sheet Available

In 2013, there were 4,668 motorcyclists killed in motor vehicle traffic crashes—a decrease of 6 percent from the 4,986 motorcyclists killed in 2012. There were an estimated 88,000 motorcyclists injured during 2013, a 5-percent decrease from 93,000 motorcyclist injured in 2012. In 2013, two-wheeled motorcycles accounted for 93 percent of all motorcycles in fatal crashes. Get the Facts at: <http://www-nrd.nhtsa.dot.gov/Pubs/812148.pdf>



NHTSA estimates that helmets saved the lives of 1,617 motorcyclists in 2011. If all motorcyclists had worn helmets, an additional 703 lives could have been saved. The economic cost savings due to helmet use was approximately \$3.4 billion in 2011, and an additional \$1.4 billion could have been saved if all motorcyclists had worn helmets.

Read more about motorcycle safety at: [www.sharetheroadtn.com](http://www.sharetheroadtn.com)

## VEHICULAR HOMICIDE MURDERERS ROW

State v Messick 2015 WL 2128671, 2015 Lexis 333

DRIVER DESTROYS MULTIPLE LIVES

The factual background of this case is so distressing that it may cause a reader to sink to new levels of empathy depression. The driver in the case was one of those drivers everyone dreads seeing fly down the road. She was passing vehicles in and out of her lane, using the turn lane to pass vehicles. She was driving about 100 mph. Her sedan sounded like an 18 wheeler when it went by and shook the doors of other cars. Several people called 9-1-1 before the crash.

Inside the car the driver delivered her 15 year old daughter to a friend's house. The daughter was so alarmed by the driving, that she took over. Messick was smoking marijuana and drinking vodka straight from a bottle. After dropping off her daughter, Messick still had her 14 year old son in the vehicle. He pled with her to stop as he watched her drive with her speech so slurred he could not understand her. Messick started vomiting in the car, but would not stop despite the pleas of her child. The inevitable finally happened when Messick drove into a vehicle occupied by five people, Stanley George, 58, the driver, who breathed for the last time as Ruby George, 78, his mother watched. Mrs. George suffered 17 rib fractures as well as a punctured, collapsed lung. Passenger, Heather George, 17, suffered a fractured pelvis. Jordan Meeker, 18 suffered a separated pelvis. Layla George, 11, suffered a broken foot and other injuries to her lower leg and back.

The driver's son, Sean Cheney, suffered a broken collarbone. He was able to get out of the car and he cried as he lay on the ground about how he had tried to stop his drunken mother, but failed. He continued to cry and talk in the ambulance.

The devastation did not end for these victims or their loved ones. The wife of the deceased testified she and Stanley had been married thirty five years and had three children. The family was very close. Stanley's death resulted in emotional and financial losses. She and Stanley did everything together, because they enjoyed one another. After the crash she could not think straight, her short term memory suffered. She relied on post-it notes for everything.

After causing devastation to so many, the defendant felt the Court was unfair to not give her alternative sentencing or at least sentences that were not run consecutively to add up to sixteen years. She claimed she had accepted full responsibility and was reestablishing her relationship with her family. She lost her license as a nurse, but started beauty school. She claimed she had eliminated bad influences in her life. The record does not show whether she had stopped her 20 year habit of smoking marijuana, which started when she was eighteen. She did not appear from the record to suffer from the nightmares her victims still suffer.

The contrast between those who suffer as victims and those who want the Court to forgive their criminal conduct is disgustingly clear in the opinion written in this case by Judge Norma McGee Ogle. The victims, their parents, brothers and sisters will be haunted by the rear end crash on January 12, 2012 the rest of their lives. Messick will be assigned a job to do at the prison for a while, given classes and treatment and sympathy and have hearings to seek early release as a model prisoner. Eventually, she will be released and go back to work. The poor kids in the car of their deceased father will not get the opportunities to heal that she will get in a system that takes care of the criminal and forgets the many victims.



## Qualify ALL Your Witnesses...Tell Their Story

By Jim Camp

Which of these statements is correct?

- ◆ Expert witnesses have knowledge, education, degrees, awards, background, training and experience that enables them to speak with authority regarding certain topics.
- ◆ Traditionally non-expert witnesses have knowledge, education, degrees, awards, background, training and experience that enables them to speak with authority regarding certain topics.

The answer: All of the above.

Why do we so often neglect to tell the STORY of our non-expert witnesses? For some unknown reason we rush through basic questions about a witness's name, occupation, number of years in that occupation and other shallow, relatively innocuous questions just to get to the "good stuff". We want to treat witnesses, the likes of which we deal with everyday, as less qualified, less important, less critical in the scheme of the case. We spend very little time asking a lay witness about their past occupations, special skills, education, training, practical experience, community ties or involvement. We also ignore all of those qualities and more as it relates to law-enforcement witnesses. We tend to think that establishing the qualifications of these witnesses is just not as important or helpful as that of an Expert Witness. We rationalize this philosophy by telling ourselves that to belabor their qualifications will simply waste time and bore the jury. We think we don't need their story. The details of who they are or what they contribute. We are wrong.

How do we convince the jury that the State's version of the facts is the truth? By convincing the jury that our witnesses are more credible. That they are the ones who are more BELIEVABLE. What factors influence a juror's opinion of a witness's credibility? Well, the facts themselves are obviously important. But if it weren't for two sides of any given story we wouldn't find ourselves in court embroiled in a swearing contest. The image projected by the witness is important. Are they likable? Are they more knowledgeable? Are they more professional? Are they more capable? Are they more experienced? Are they better educated or otherwise trained? What do they bring to the table that makes it more likely that their version of the facts is the truth? What is their Story?

We therefore need to take advantage of the opportunity to win the jury's trust early. We need to convince them that our witness deserves to be believed. That they need to be trusted. We do this by allowing the jury to get to know them. We should WANT to take the time to introduce them to the jury. We need to take that time to build the jury's trust. We need to tell the witness's story. But to do this WE need to take the time to find out.

When was the last time you sat down and had a real chat with one of your patrol officers who bring you a large share of your cases? One of your "regulars"? The third shifters who's names appear most regularly on your DUI complaints? Do you really know anything about their civilian life, background, training or work experience? Whether they were a member of the armed services? What their specialty was? Whether they were ever decorated? If they had special security clearances or duties? Are they a training officer in their department and have they ever received any training additional to basic Cadet School? What is their story?

I recall discovering during direct examination that a witness had been in the Air Force, had Top Secret clearance and was responsible for programming nuclear missiles. I had no idea prior to our conversation on the witness stand. I had no idea, because I hadn't taken the time to ask. Did it have anything to do with a DUI case? Not in the least. But you should have seen the look on the faces of the jurors when they found out! They were visibly impressed. I had unwittingly doubled that officer's credibility quotient. I was lucky. I was able to tell HIS story. The point is, you don't have to be lucky. You just have to be conscious of the importance of truly qualifying a non-expert witness. And you have to act on that consciousness.

Take the time to prep your witnesses and become familiar with their background during your pre-trial session. If you can't find the time to prepare for trial in your busy schedule at least ask your witness to put together an informal resume. Include work history, education, military service and training. What are their hobbies, favorite pastimes and social activities? (I understand this may not apply to ALL of our lay witnesses). As it relates to law-enforcement officers be sure to ask them to list all of the DUI trainings they can remember participating in as well as other specialized schools. You might be surprised to find out just how much training they may be able to talk about.

So get to know your non-expert witnesses and spend some productive time during Direct using that information to introduce them to the jury. Let the jury get to know them as real people. As a real member of their community. As a real professional. As a believable witness worthy of their attention.

Qualify ALL of your witnesses. Tell their story.