



DUI NEWS

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THE TENNESSEE SUPREME COURT HAS RULED: A GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE

State v. Corrin Kathleen Reynolds 504 S.W.3d 283 (Tenn. 2016)

The Tennessee Supreme Court has finally adopted a good-faith exception to the exclusionary rule. Although the defendant's right to be free from warrantless searches and seizures was violated, the Tennessee Supreme Court none-the-less found that this case was appropriate to adopt a long-awaited good-faith exception to the exclusionary rule as defined under the United States Supreme Court case of *Davis v. Unites States*, 564 U.S. 229 (2011).

Factual Background

Just before 9 p.m. in Knox County on October 29, 2011, there was a single-vehicle crash resulting in the deaths of two of the four passengers in the car driven by Corrin K. Reynolds. She, like her surviving passenger, was injured and taken to the University of Tennessee Regional Medical Center.

Deputy Lee Strzelecki of the Knox County Sheriff's Office was dispatched to the University of Tennessee Medical Center to interview the survivors of the crash. Deputy Strzelecki was able to locate and then determine that Corrin Reynolds was the driver of the vehicle. Deputy Strzelecki stated that he could smell alcohol from the defendant during his conversation with her and he was able to perform the Horizontal Gaze Nystagmus (HGN), noting that the defendant exhibited all six clues of the test. The deputy then asked her if she would submit to a blood test and she responded "do whatever you have to do." *Reynolds*, 504 S.W.3d 283, 291. The deputy then requested that the UT Medical staff draw her blood. The deputy did not read to her the implied consent or obtain a search warrant, relying instead on what the deputy understood to be her verbal consent.

Because the deputy understood a statement that Corrin Reynolds had made to be her consent to the blood draw, and since the officer thought that she had consented, he did not obtain a search warrant or tell her of the consequences of a refusal or the implied consent. She was not placed under arrest at this time due in part to her medical injuries. Six months later, however, a Knox County Grand Jury returned a presentment for two counts of vehicular homicide, a count for vehicular assault, one for reckless endangerment, and one for driving under the influence.

In the intervening period, the defendant, Corrin K. Reynolds, through her counsel, filed a motion to suppress her blood results, because her blood was taken without her consent and without a warrant. The state argued that she had given actual consent. During the first motions hearing, the deputy testified to the statement made by the defendant, and his understanding that she had given consent. The deputy also testified that at that stage of his investigation, given that two fatalities had resulted in this crash the blood tests would have been mandatory.

(Continued Page 6)



RECENT DECISIONS

STATE v FUQUA, 2017 WL 946424

The defendant, Bobby Jay Fuqua, was indicted by a Robertson County Grand Jury for fourth-offense DUI, an E Felony, DUI per se (.08 or greater), driving on a suspended or revoked license, which was his second offense, open container law violation, violation of the implied consent law, and last but not least, indecent exposure. The defendant then filed a motion to suppress, arguing that the officer in this case, did not actually have reasonable suspicion to pull him over.

Unfortunately for the defendant, the trial court did not agree and denied the motion to suppress. However, a plea agreement was struck whereby the defendant would plead guilty to DUI fourth offense, declare himself a habitual motor vehicle offender but reserve a qualified question of law for appeal. The remaining counts of the indictment were dismissed. Under the Tennessee Rules of Criminal Procedure, specifically TRCP 37(b)(2)(A), our defendant reserved the question of whether or not the officer had any articulable reasonable suspicion to activate his blue lights and seize the defendant.

Why did the defendant think that this was a winning argument? Because the defendant was not actually driving. The uncontested facts in this case revolve around the defendant's location relative to his vehicle. The defendant was standing next to his vehicle urinating, when the officer first saw him. The officer circled around and pulled into the parking lot of a car wash where the defendant was still urinating. Upon approach, the officer asked him where the "liquid" flowing away from his car came from, to which the defendant responded that the liquid came from his bladder. The officer then asked him if he had had anything to drink and the defendant responded that he had one beer, which became two or three after a few more questions by the officer.

The Court of Criminal Appeals found in this case that: 1.) in Tennessee, the standard that courts look to for determining probable cause or an articulable reasonable suspicion is the totality of the circumstance and 2.) that the officer had articulated that he had reasonable suspicion that the defendant was urinating in public, which is why the officer came into the parking lot of a very public business.

Defendant loses this certified question on the law. Question denied!

STATE v. SAMPLES, 2016 WL 3452528

In this DUI case from the Bradley County Criminal Court, the defendant, James Dustin Samples, was sentenced to 11 months and 29 days, which was suspended to 7 days to serve, followed by supervised probation. As a part of his plea negotiations, the defendant had a certified question of law regarding the trial court's denial of his motion to suppress.

Trooper Philip Reagan with the Tennessee Highway Patrol was on duty on January 19, 2014, when he got a police dispatch alert regarding a vehicle that was observed by a caller, who had alerted police dispatchers, that the defendant's vehicle almost hit a concrete barrier near a construction zone. A description of the vehicle, including the tag number, and the general location was provided to the Trooper, who then located the vehicle passing him in the left lane approaching the 23rd mile marker. The Trooper then began following the vehicle and observed that the vehicle driven by the defendant made several abrupt lane changes, pass and change lanes directly in front of another vehicle that was pulling a trailer without signaling, pass into the shoulder of an exit, and crossing the fog line on the right of the interstate well before the end of the exit. The Trooper testified at the hearing to these personal observations of the defendant's driving.

The Court of Criminal Appeals upheld the trial court's denial of the motion to suppress, holding that: the Trooper had personally observed the poor driving of the defendant's vehicle and these observations constituted a constitutionally sound reasonable suspicion to pull the vehicle over pursuant to TCA §55-8-123 (1), which is a failure to maintain a lane.

RECENT DECISIONS

STATE vs GRIECO, 2017 WL 956345

Here we have yet another case where a defective affidavit of complaint has caused a good DUI case to be dismissed. In this case, the defendant, Louis Greico was arrested on August 24, 2013, for Driving Under the Influence. The officer swore out his affidavit of complaint before a notary public. Two days later, a Sullivan County General Sessions Judge found probable cause, based on the facts summarized by the officer. The officer stated in his affidavit of complaint that he observed the defendant driving across and into other lanes of travel. After noting this poor driving, the officer pulled the defendant over and conducted Standard Field

Sobriety Tests, noting the defendant's eyes were "glossy" and his speech was slurred. According to the officer's affidavit of complaint, the defendant did poorly on his SFSTs and was placed under arrest.

Procedurally, the next step occurred on October 6, 2014, the defendant waived his right to a preliminary hearing and agreed to have his case bound over to the Sullivan County Grand Jury, which returned an indictment for DUI on January 21, 2015. The defendant, through counsel, filed a motion to dismiss for failure to prosecute because the affidavit of complaint was void and the state had failed to commence prosecution. The defendant asserted that the officer had failed to make his oath in the complaint before a judicial officer with the authority to determine probable cause under Tennessee's Rules of Criminal Procedure. The trial court agreed and dismissed, but the state appealed.

The Court of Appeals agreed with the trial court that the charging instrument was invalid, because it was not properly sworn to before a judicial officer or magistrate with the authority to make a probable cause determination, which is a prerequisite, according to the court, for the arrest warrant to be valid. The bottom line in this case is this: just like the *Felicia Jones* and *Lisa Hayes* cases, that regardless of whether the state contends that the appearance of the defendant before a judge in general sessions court or waiver of the cause to the grand jury cures the defect, these remedies are still not valid substitutes for an arrest warrant, which must, by necessity, be issued pursuant to a valid affidavit of complaint, sworn to under oath to a magistrate or other authorized judicial officer pursuant to Rule 3 and 4 of the Tennessee Rules of Criminal Procedure.

This is another one of the cases in the same vein as the *Jones* case that makes it clear that the initial affidavit of complaint must be valid from the start.

STATE v. LAYHEW, 2017 WL 128706

This is an interesting case dealing with an issue that many prosecutors have had to deal with and that is the defendant who has multiple, pending offenses, especially DUIs, at the same time and whether they can be sentenced consecutively. In this case, the defendant, Jeffery Gordon Layhew, hit a bicyclist and then fled the scene without offering assistance to an injured party, or leaving his name and vehicle registration: a class A misdemeanor. While on bail for this offense, he then picked up two new DUI charges and was mandated to wear a SCRAM device on his ankle, which he cut off twice. After agreeing to let the trial judge sentence him, he pled guilty to two offenses: leaving the scene and DUI.

The trial judge in this case, after a sentencing hearing, ordered him to serve both sentences consecutively. However, the Tennessee Court of Criminal Appeals found that the trial court had not made any findings of any of the applicable factors that supported consecutive sentencing under T.C.A. § 40-35-115: Multiple Convictions. So, in the end, it was remanded to be re-sentenced with the trial court being required to enter a basis for the consecutive sentencing after re-hearing and the amount of restitution entered.

Fingerprint Sweat Testing: A Viable Option for Testing Drugged Drivers?

By: Stephen K. Talpins¹, Erin Holmes², and Kevin Sabet³

Introduction

Drug-impaired driving now rivals alcohol-impaired driving in both prevalence and impact. Approximately 43% of fatally injured drivers tested positive for the presence of drugs in 2015 (*see e.g.*, Hedlund, J., *Drug-Impaired Driving: A Guide for What States Can Do*, Governors Highway Safety Association, 2015). With traffic fatalities projected to rise yet again in 2016, it is imperative to identify new and promising ways to identify and remove drivers impaired by alcohol, drugs, or both from the nation's roadways. Traditional methods for testing suspected drug-impaired drivers (blood and urine testing) are relatively invasive, which creates issues for prosecution. Pursuant to *Missouri v. McNeely*, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), and *Birchfield v. North Dakota*, [136](#) S. Ct. 2160, 195 L.Ed.2d 560 (June 23, 2016) officers may only collect blood samples from DUI suspects pursuant to consent, a warrant, or exigent circumstances. There is a substantial possibility the courts will extend these rulings to urine testing as well. *See e.g. State v. Thompson*, 886 N.W.2d 224 (Minn. 2016). Further, these testing methods can be time-consuming and expensive. Further, only qualified individuals (e.g., medical personnel or law enforcement officers trained as phlebotomists) may draw blood samples, and only gender appropriate officers may collect urine samples from suspects. In an effort to address the shortcomings of these testing methods, some researchers and companies are developing new transdermal drug testing devices to screen DUI suspects for drug use. In this article, we address one of these emerging technologies: transdermal "fingerprinting."

Drug Detection in Sweat

The underlying theories and procedures for transdermal (sweat) testing are not new or novel and appear to be generally accepted. As the United Nations Office on Drugs and Crime (UNODC) aptly noted, "Researchers have known for more than a century that drugs are excreted in sweat." *Guidelines for Testing Drugs under International Control in Hair, Sweat and Oral Fluid* at 42 (UNODC 2014). Transdermal drug testing has been utilized in the community corrections field for some time as many probation officers rely on transdermal sweat patches to monitor probationers' drug use. *See e.g. U.S. v. Nading*, 2007 WL 1544424 (8th Cir. 2007); *Meyer*, 483 F.3d at 868; *U.S. v. Gatewood*, 370 F.3d 1055, 1060-62 (10th Cir.2004), *vacated on other grounds*, 543 U.S. 1109, 125 S.Ct. 1013, 160 L.Ed.2d 1036 (2005); *U.S. v. Drager*, 2013 WL 129364 (N.D. Iowa January 10, 2013); *U.S. v. Fenimore*, 2003 WL 23374632 (W.D.Mo. August 29, 2003)(not reported in F.Supp.2d); *U.S. v. Zubeck*, 248 F.Supp.2d 895, 898-99 (W.D.Mo. 2002); *U.S. v. Stumpf*, 54 F.Supp.2d 972, 974 (D.Nev. 1999).

"Fingerprint" Testing

Over the last 20 years, scientists have explored the feasibility of testing people for drugs by analyzing their fingerprints. More recently, they have adapted laboratory screening methods to field testing. There is a small but growing body of research demonstrating the viability of this "transdermal fingerprint" approach to drug testing. *See e.g. Kuwayama, K., et al, Effectiveness of saliva and fingerprints as alternative specimens to urine and blood in forensic drug testing*, 8 Drug Testing and Analysis 644 (2016); Muramoto, S., *Test Sample for the Spatially Resolved Quantification of Illicit Drugs on Fingerprints Using Imaging Mass Spectrometry*, 87 Analytical Chemistry 5444 (2015); Goucher, E., et al, *The detection and quantification of lorazepam and its 3-O-glucuronide in fingerprint deposits by LC-MS/MS*, 32 Journal of Separation Science 2266 (2009). Law enforcement officials and workplace supervisors are particularly interested in this approach "because the deposited fingerprints are quick and easy to collect, non-invasive, and can be linked directly to the person who deposited them." *See e.g. Goucher, E., et al., at 2266-2267 (2009).*

¹Board Member, Institute for Behavior and Health and former Miami-Dade County Assistant State Attorney.

²Director of Traffic Safety, Foundation for Advancing Alcohol Responsibility.

³Director, Drug Policy Institute at the University of Florida.

Fingerprint Sweat Testing: A Viable Option for Testing Drugged Drivers? (continued)

Professor Russell of the University of East Anglia (Norwich, England) is developing a technique he brands “Intelligent Fingerprinting” or “IFP.” The small, handheld collection device will allow law enforcement officers to obtain a person’s fingerprint and screen his or her sweat for amphetamines, cocaine, opiate Metabolites, and delta-9-tetrahydrocannabinol (THC) in under ten minutes. In order to obtain the sample, a suspect would press his or her finger into the portable cartridge for five seconds. That cartridge is then placed in a reader where a solution is released that dissolves the sweat. A reaction occurs when chemical reagents bind with drugs contained in the sample, indicating a positive result. The reader will then indicate whether the sample is positive or negative for the presence of each drug tested. A second sample can then be sent to a laboratory for confirmation and quantification. The United States distributor, SmarTox (www.smartox.com), advises that the device will be pilot tested in 2017 and available commercially shortly thereafter. The reader is expected to cost approximately \$3,500, and the cost per test should be between \$12 and \$14. As with most commercial products, the company is expected to offer volume discounts.

Window of Detection

At least one researcher found that the window of detection for transdermal testing generally is similar to that of urine testing. Thus, the window generally is longer than blood and oral fluid, but shorter than hair. *Guidelines for Testing Drugs under International Control in Hair, Sweat and Oral Fluid* at 42 (UNODC 2014), de Giovanni, N., *Sweat as an Alternative Biological Matrix*, Chapter 22, *Forensic Toxicology: Drug Use and Misuse* at 438 (Royal Society of Chemistry 2013). However, SmarTox advises that they believe the window of detection for IFP is more closely related to oral fluid testing, though they will not be certain until they conclude pharmacokinetic studies. Of course, the window of detection will vary according to drug type. From a roadside detection perspective, the shorter the window of detection, the easier it will be to link a suspect’s drug use with observed impairment.

Conclusion

Transdermal fingerprinting has the potential to be a useful method for drug screening purposes. As with any other method, the value of the results will depend on the particular device’s ease of use, quality (i.e., sensitivity, specificity, accuracy, and reliability), time required to obtain results, and cost. Transdermal fingerprinting is non-invasive. Accordingly, we would expect the courts to treat it like breath testing, obviating the need to obtain warrants to test DUI suspects. *See e.g. Birchfield, supra* (officers need not obtain warrants to conduct breath testing since the method is non-invasive).

IFP is intended to be used as a screening device and to establish probable cause for arrest. Accordingly, many courts will not scrutinize the results under *Frye* or *Daubert*. *See e.g. and United States v. Stepp*, 680 F.3d 651 (6th Cir. 2012); *United States v. Ozuna* 561 F.3d 728 (7th Cir. 2009), *cert. denied*, 130 S.Ct. 1685 (2010); and *United States v. Piroosko*, Case Number 5:12CR327 (N.D. Ohio October 10, 2013). Regardless, practitioners should be prepared to defend their reliability in court. As noted above, there is nothing new or novel about the concepts and theories underlying transdermal testing, which are generally accepted in the relevant scientific communities and courts. Accordingly, we assume that IFP results will survive judicial scrutiny once the technique is fully developed, but cannot comment further in the absence of device specific studies.

A GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE (cont'd)

On May 14, 2013, after a lengthy hearing, the trial court in Knox County denied the defendant's motion to suppress, citing the defendant's medical records that were admitted, the deputy's testimony and observations when he found the defendant on the hospital gurney, the officer's testimony of how she was conscious when the deputy found her and appeared alert, and the fact that she smelled of alcohol, the trial court denied her motion. It is also noted that the defendant's affidavit to the contrary was given little value, because the defendant had not testified at the hearing. Ultimately, the trial court found that she had given consent based on all the evidence presented, denying her motion.

A second hearing was held on August 30, 2013, because the defendant wanted to introduce additional medical proof. During this second hearing, Dr. John Robertson, Jr., testified concerning the defendant's ability to give consent, whether knowingly or not. Dr. Robertson testified that due to a number of factors, such as her hearing impairment, head injuries, and the pain medications that she had been given, the defendant could not have given her consent. Ultimately, Dr. Robertson testified that she could not have been capable of giving knowing consent due to her head injuries, the psychological trauma of the crash, and the medications for pain.

After considerations, the trial court entered an order on September 4, 2013, which granted the motion to suppress the evidence gathered from the warrantless blood draw. As to the reasons that the trial court gave for the order granting the suppression of the evidence, it noted a number of additional findings, but specifically the trial court held: 1.) as to the actual consent, the picture presented by the testimony at the second hearing gave the court a different impression because the court had earlier believed that there was an actual verbal exchange, with the defendant having answered numerous questions; and 2.) the non-verbal acknowledgments as to who was driving did not fill the court with confidence that the defendant actually understood when asked about giving blood. At this stage, the trial court did not find that she had given actual consent.

The state appealed through an interlocutory appeal to the Tennessee Court of Criminal Appeals. After consideration, the Court of Criminal Appeals for Tennessee affirmed the trial court's finding that she had not given actual consent; however, the Court of Criminal Appeals did find that the officer had probable cause to believe that the defendant was driving under the influence. This then became the basis for the implied consent statute to be triggered, which allowed the officer to draw the blood. Because the defendant never refused to submit to a blood test, the results were admissible. Alternatively, the Court of Criminal Appeals found that this case would be a case where Tennessee should adopt a good-faith exception and permit the results. The defendant appealed to the Tennessee Supreme Court.

The Tennessee Supreme Court began its analysis by establishing that both the trial court and the Court of Criminal Appeals found that the defendant did not give actual consent. The main consideration for the Tennessee Supreme Court turned to whether the good-faith exception should apply here and be adopted by Tennessee in the defendant's appeal.

The Tennessee Supreme Court held, just as the Court of Criminal Appeals did, that the Knox County deputy did, in fact, have probable cause to believe that the defendant had been drinking and driving at the time that she wrecked her car and killed two of her passengers. The Court also found that the defendant's Fourth Amendment of the federal Constitution and Article I, sub-section 7 of the Tennessee Constitution had been violated by the warrantless blood draw, but the Court found that this was an appropriate case to apply the good-faith exception to the exclusionary rule as defined under *Davis v. United States*, 564 U.S. 229 (2011).

The Tennessee Supreme Court further held, through its analysis of the case at bar, that the precedent, as set-forth under *Davis*, permitted the police and other law enforcement agencies, while operating under a good-faith and reasonable performance of their jobs, would not be penalized for their efforts if they obtain evidence in violation of the search and seizure protections. In so adopting this precedent, the Tennessee Supreme Court found that this position would adequately protect the citizens of the State of Tennessee.

Justice Lee dissented, holding that this was not an appropriate case for the adoption of the good-faith exception to the exclusionary rule. In her dissent, Justice Lee made it very clear that the Tennessee Constitution, specifically the protections against warrantless searches and seizures, was more protective than the Constitution of the United States.

DUI TRACKER REPORT

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from January 1, 2017, through March 9, 2017, and reflect the DUI Tracker Conviction Report for all districts in the State of Tennessee.

As can be noted, the total number of arrests for the year-to-date is 1,440, while the total number of guilty dispositions thus far is 911, meaning there is a statewide conviction rate of 63.3%. This means that across the state, 63.3% of all arrests for DUI made are convicted as charged.

The following information was taken from the 2006-2016 report on alcohol-related crashes in Tennessee, as promulgated by the Tennessee Department of Safety and Homeland Security. The total number of alcohol-related crashes in 2016 was 6,220

As this is the first newsletter of 2017, it is important to look back at the previous year to gain a perspective of what we need to focus on for this new year. As noted from the quarterly fatality report, 45.8% of all the fatalities on Tennessee's roadways are a result of drivers failing to maintain their lane of traffic. Drugs and alcohol are only one of the major problems on our highways.

YEAR TO DATE FATALITIES

As of April 5, 2017, there have been 235 fatalities on Tennessee's roads and highways. This is up by 4 from the 231 fatalities seen this time last year.

This information was compiled by the Tennessee Highway Patrol's Tennessee Integration Traffic Analysis Network (TITAN). You may view the fatalities update here: <https://tntrafficsafety.org>



Conard Transportation Inc., of La Vergne, Tennessee, created the Jeanne Mannes Safety Award to honor the memory of Ms. Mannes who was killed in a tragic 2013 crash involving a Conard driver. In presenting the first-ever award to driver Darren Isenberger (center) in recognition of his outstanding safety performance during the previous year, the company also invited the daughter of Ms. Mannes (at left of Isenberger), who spoke before a gathering of all 50 of the company's drivers. **Also invited were Danielle Smith, Transportation Specialist for the Commercial Passenger Safety Division** (third from left), **and Stephanie Mann, Tennessee Division Administrator** (fourth from right). Danielle was formerly a Safety Investigator in the Tennessee Division and conducted the FMCSA compliance investigation following the crash. Also in attendance were Sgt. Jimmy Jones and Trp. Kevin Ballew, Tennessee Highway Patrol (far right), who led the crash investigation and assisted in the indictment of the driver for reckless homicide. Tom Kimball, who as the Traffic Safety Resource Prosecutor for the Tennessee District Attorney Generals Conference (pictured behind the award winner), ensured prosecutors were knowledgeable in traffic safety laws, including commercial motor vehicle driver requirements, also attended the award ceremony. Mr. Kimball was recently named Director of the National Traffic Law Center. Photo provided by Stephanie Mann. Photo taken on January 7, 2017. Smyrna, Tennessee.

Ocular Data Systems' DAX Evidence Recorder and the Benefit of Video Evidence of Eye Signs in Impaired Driving Cases

James Camp, JD former elected District Attorney (WI), former Traffic Safety Resource Prosecutor (TN)
Dick Studdard, DRE Emeritus, LAPD (retired) DRE program founder

Jurys and Judges never have the opportunity to see evidentiary eye signs first hand. They never see horizontal gaze nystagmus, vertical gaze nystagmus, or rebound dilation of pupils. Until now.

With the help of drug recognition experts (DREs) and other leaders in the field of traffic safety, including the founder of the DRE program, Dick Studdard, DRE Emeritus and LAPD (retired), Ocular Data Systems, of Pasadena, California, has created the DAX evidence recorder, a small, light, robust, handheld instrument that allows drug recognition expert officers and DUI enforcing road officers to record the eye signs they observe during the administration of HGN, VGN and pupil response tests. These recordings can be taken anywhere eye sign tests can be administered: roadside, in the police station, jail, hospital or DRE examining room. The DAX uses a full spectrum night vision lens with macro focus for use in near total darkness. The DAX also provides audio recording.

The DAX is specially equipped to record HGN since it operates at 60 frames per second, 1080p, 1920x1080, and 16:9 aspect ratio format. It also has two switchable white LED lights and four IR (infra-red) LEDs for total darkness operation, perfect for DRE darkroom evaluations.

The DAX operates from four to six hours on a single charge and is fully recharged in only six hours using a Li-Polymer 13,000 mAH capacity battery with a car charger and AC (line) chargers included.

The memory is removable and replaceable, allowing 45 minutes' record time on the included 16 GB SD card. It also accepts secure digital SD cards up to 64 GB for even greater memory record time.

The officer can see the eye signs directly or through the 480x272 pixel, 4.3" color TFT-LCD display that can be turned off for darkroom evaluation. The DAX also has a switchable HDMI connection for an external monitor, allowing it to be used for live eye sign demonstrations of subjects viewable by the entire class in SFST, DRE and wet lab trainings.

The instrument weighs only 2.7 pounds and is 7" W x 8.9" H x 10" L (with the faceplate which is removable for saddlebag storage). A watertight, airtight and crush resistant Mil-Spec hard case is available. The DAX can be purchased for only \$4,999.99.

Conveying information to a jury is really about teaching and learning. When it comes to such an instructional process, we need to ask, "what works best?" If videos, photographs, or other visual evidence are available, they should be used to educate the jury. Research has shown that we learn and remember best through pictures, not through spoken words. (1) In fact, there will be six-times better recall of information that is simultaneously oral and visual. (2)

Nearly all of us have grown up watching television. Many learn what they know about the criminal justice system from series such as Law and Order, CSI, and NCIS. Most of us rely on television and the internet as our primary source of news and information. Some estimate that video evidence is involved in about 80 % of crimes (3) It is therefore no surprise that Jurors expect videos in the courtroom, even when they don't exist in the case. (3)

DAX video consequently strengthens the State's case. especially with regard to eye signs. We need to remember jurors are a blank slate. They know less about the SFSTs, the breath test, law enforcement techniques, and facts of the case than anyone in the courtroom. As a result, it is important to verbally explain all of the above with sufficient specificity but also to use visual aids to SHOW the jury what we want them to "learn". Viewing evidence makes it real and powerful. This increases memory retention as well as the strength of the evidence and the credibility of the officer. It also diffuses the usual defense arguments that the officer was mistaken when he/she thought they saw the eye signs described.

Judges usually never have the opportunity to observe eye sign evidence. Anti-HGN judicial bias exists in many jurisdictions, and Tennessee is no exception. DAX video assists in the reversal of this bias since it is difficult, if not impossible, to maintain such a belief once one sees the actual evidence up close.

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TRAINING OPPORTUNITIES

The TNDAGC DUI Training Section is pleased to announce the following classes:

20/20 Understanding the Physiology of Eye Movements & Impairment - April 25-26, 2017

This course is being offered for the third year at the Southern College of Optometry, Memphis, TN, and is primarily taught by four professors of Optometry. If you have missed the registration deadline of March 20, please mark your calendars for the same time next year. This class is open to prosecutors, Drug Recognition Experts (DRE) and any SFST Instructor.

Vehicular Homicide Trial Preparation Workshop-June 13-15, 2017-Pigeon Forge, TN

This workshop will allow prosecutors with a pending Vehicular Homicide or Vehicular Assault case to learn from experts about the science of crashes, while preparing the pending case for trial. Our featured speaker will be John Kwasnoski, Professor Emeritus of Forensic Physics at Western New England College, Springfield, MA, serving 31 years on their faculty. The registration deadline is May 1, 2017.

Protecting Lives, Saving Futures - July 25-26, 2017-Fall Creek Falls State Park

This joint prosecutor-law enforcement officer training is being funded by the Tennessee Highway Safety Office. Each prosecutor wishing to attend is required to recruit one to three officers to attend, as well. The program is aimed towards educating prosecutors in the area of prosecution of impaired driving and will use the team building approach with officers from the jurisdictions that each prosecutor serves. Course feedback is vital to the success of this class.

Cops in Court - As a reminder, the TNDAGC DUI Training Section also has several trainings that directly aid law enforcement, such as our "Cops in Court" training. Using the help of local ADAs and DAs, this training offers a realistic scenario of court room direct examination and cross-examination, an understanding of proper courtroom etiquette, the role of professionalism, and how to improve officers' report writing skill.

Please contact Sherri Harper, sjharper@tndagc.org, 615-253-6733 or Barry Williams, bawilliams@tndagc.org, 615-945-2040 for more information on any of these classes.

Tennessee Highway Safety Office Training Classes

The DUI Training Section also supports the ARIDE and DUI Detection and SFST programs through a partnership with the Law Enforcement Liaisons of Tennessee. Our office provides legal updates for officers, training in understanding the legal environment of Tennessee, and training to officers on report writing and testimony. Visit <http://tntrafficsafety.org/training-courses> to find a full list of classes offered near you. Below is a list of May and June classes only.

Advanced Roadside Impaired Driving Enforcement (ARIDE) Classes:

May 1-2, Newport Community Center
May 15-16, Shelbyville Police Department
June 26-27, Fort Campbell

DUI Detection & Standardized Field Sobriety Testing Classes:

May 15-17, Sevierville Police Department
May 22-24, Fayette County Sheriff's Office
June 12-14, Medina Police Department
June 19-21, Brentwood Police Department

VEHICULAR HOMICIDE MURDERERS ROW

State v Luthringer, 2017 WL 480706

Forty-Eight Year Sentence Upheld

This is an interesting case for several reasons, but we are going to focus on the sentence imposed by the trial court. The punishment that the defendant, Wesley Howard Luthringer, who was convicted of two counts of aggravated vehicular homicide, received after a jury trial in Bedford County was an effective sentence of 48 years. The trial court, after considering several factors, decided to impose two, 24 year sentences for the two counts of aggravated vehicular homicide, to be run consecutively, for a net sentence of 48 years as a Range I Standard Offender.

The factual background begins with the defendant and two friends who he met in a rehabilitation facility for drugs and alcohol after being involved in a single car crash. The crash cost two people their lives. The defendant, Wesley Howard Luthringer, who was later shown to be driving the vehicle. This was substantiated through the testimony of Trooper Barry Qualls, Jr., who observed the defendant being cut out of the vehicle in the driver's position. He was wearing his seatbelt. Also on February 24, 2014, Trooper Timothy Hearn, who was the Critical Incident Response Team (CIRT) member assigned to the case, testified that the vehicle had gone airborne and traveled 22 feet before hitting some trees. The defendant was shown at trial to have a BAC of .21% through the testimony of Ms. Melinda Quinn of the Tennessee Bureau of Investigation (TBI). The jury found the defendant guilty of two counts of vehicular homicide by intoxication. In counts one and two of the indictments, two counts of aggravated vehicular homicide by having a blood alcohol of .20% or greater, and two counts of aggravated vehicular homicide through having prior DUI related crimes on his record as shown through certified copies of his prior convictions. It is from these convictions that the defendant appeals.

The defendant in this case argues several different points, but the argument that we will be looking at is the contention that the trial court erred in the consecutive sentencing. The trial court in this case relied on several factors to come to this sentence. The pre-sentencing report in this case showed a defendant that had a severe problem with alcohol and drugs, as demonstrated by his numerous convictions for DUI, driving offenses, and drug-related offenses. All of these factors constituted strong indicators that the defendant could not be conformed to the morals of society and was such a present danger to society that incarceration was the most effective means by which the court could safeguard the public.

The analysis of the Court of Criminal Appeals found that the trial court was able to find within the record presented at trial as well as the presentencing report filed by Ms. Jenna Miller that the defendant had an extensive record with 16 prior convictions for alcohol (DUIs) and drug related offenses, but most importantly, the trial court had found, based on all of this information, that the defendant was a dangerous offender subject to being confined to protect the general public from any further criminal activity. Essentially, his prior record and inability to control his alcohol and drug problems rendered him a dangerous offender. The incarceration imposed was calculated to protect the public. The trial court also found that the severity of the crime was reasonably related to the punishment for the protection of society.

The Court of Criminal Appeals agreed that the trial court was properly able to find that the consecutive sentencing, because the defendant's extensive criminal history and the extreme disregard for the authority of the court and for the safety of the public. After weighing all of these factors, the Court of Criminal Appeals held that the trial court did not abuse its discretion, and the sentence was properly imposed on the defendant.

The Eyes: The Mirrors of the Soul- Horizontal Gaze Nystagmus (HGN) Explained

By Tony Burnett, DRE Instructor and State ARIDE Coordinator

Why are the eyes considered the mirror into the soul? Because they reflect the degree of impairment of the rest of the body. This is why the Horizontal Gaze Nystagmus (HGN) test is the most reliable of the Standardized Field Sobriety Tests. In this article, I am going to explain exactly why, based on my many years of training and experience in the field of Impaired Driver Detection and Enforcement.

The HGN Test begins with a stimulus, usually a finger, held between 12-15 inches from the subject's eyes to track any lack of smooth pursuit in the eyes as they follow the stimulus. Then it goes to distinct, sustained nystagmus at a maximum deviation and then the onset of nystagmus prior to 45 degrees. The order of this test is given to describe the level of impairment. Here is why: one cannot have distinct and sustained nystagmus and not have smooth pursuit. Neither can they have onset of nystagmus prior to 45 degrees without the other clues. The HGN is a scientific way of determining the brain's inability to communicate with the rest of the body, just as it is with the eye muscles. Absent certain extremely rare pathological disorders or diseases, this sobriety test is the most reliable means of determining impairment. So why can't law enforcement officers testify to this test?

The answer to this question was decided in the *Cora Murphy* case. The Tennessee Supreme Court determined that, because this sobriety test is different from other sobriety tests, and that "[i]n our view, the HGN test does differ fundamentally from other field sobriety tests because the witness must necessarily explain the underlying scientific basis of the test in order for the testimony to be meaningful to a jury." *State v. Cora Murphy*, 953 S.W.2d 200 at 202.

It differs because it is considered a scientific, technical, or some other specialized skill or knowledge based test, and the testimony, so it can be helpful to the jury, must be introduced by an expert witness. *See State v. Cora Murphy*, 953 S.W.2d 200 at 202-203. Having been qualified as an expert witness as a DRE in a DUI case, my perspective lends some insight to help bridge the gap between the prosecutors and explaining the test to the public.

Drugs and alcohol affect the brain in different ways, but there is tell-tale evidence reflected by the eyes. Miosis, or constricted pupils, occurs when opiate-based drugs are introduced into the human body. Just as opiates block pain, they also block the iris sphincter nerve, which affects both the iris sphincter and the iris striated muscle. Both control pupil size.

Mydriasis, or dilated pupils, occur with stimulants, hallucinogens, and sometimes with cannabis. These drug categories cause an increase in blood pressure and pulse rate due to the constrictions of blood vessels. As these vessels constrict, the pupil will grow larger. When pupil size is affected by these drugs, driving is affected due to the amount of light that is or is not allowed to enter the pupil. Miosis, or constricted pupils, can act like a blinder on a mule. It restricts the eyes' ability to have accurate peripheral vision. Peripheral vision is one of the more important aspects of driving any motor vehicle.

This information is becoming more and more needed as we see a dramatic increase, both nationally and statewide, in the use of prescription and illicit drug use. Because law enforcement and prosecutors have been primarily trained to arrest and prosecute impairment due to alcohol, we have somewhat been left behind. It is our goal to be current with what we are seeing in Tennessee and across the nation.

The Tennessee Highway Safety Office offers both the ARIDE and DRE programs to better educate officers to observe, identify, and articulate the signs of impairment related to drugs, alcohol or a combination of both in order to reduce the number of impaired driving incidents, serious injury, and fatal crashes.

For information on upcoming classes, go to <http://tntrafficsafety.org>.

Ocular Data Systems' DAX Evidence Recorder and the Benefit of Video Evidence of Eye Signs in Impaired Driving Cases (cont'd)

Prosecutors and Drug Recognition Experts (DREs) in the U.S. and Canada are using DAX video in court to help keep impaired drivers off the road. The Tennessee Department of Safety has purchased several DAX units for use in the field by DREs, as well as for use in training at the THP Training Center. Ocular Data Systems personnel, including Dick Studdard DRE Emeritus, will be providing instruction on the use of the DAX, as well as impaired driving eye signs to participating DRE and SFST instructors, District Attorney Generals, members of the Tennessee Wildlife Resource Agency, DREs and other Department of Safety Personnel. Following this training, the units will be assigned to those DRE-trained troopers in the next few weeks.

DAX video evidence strengthens the state's case by better educating and engaging the jury, increasing their mental retention, building the credibility of the arresting officer, and helping combat anti-HGN Judicial bias.

More information can be obtained on Ocular's website: www.OcularDataSystems.com or by calling (626) 201-4286

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Video Evidence. A Primer for Prosecutors. Bureau of Justice Assistance, U.S. Department of Justice. *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial*. Federal Judicial Center and National Institute for Trial Advocacy.



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