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## STATE v. ROSEMARY L. DECOSIMO

The Criminal Court of Appeals has decided that an "appearance of impropriety" is formed from fees collected from TCA § 55-10-413(f), which violates a defendant's substantive due process under the 4th Amendment of the United States Constitution and Article I, Section 8 of the Tennessee Constitution. TCA § 55-10-413(f) assesses a \$250 fee for the testing of alcohol and drugs in the blood, breath, and/or urine, to those convicted of DUI, Vehicular Homicide, or Vehicular Assault, and deposits the fees into a fund available to the Tennessee Bureau of Investigation (TBI). Earlier this year, the CCA in *State v. Decosimo*, No. E2017-00696-CCA-R3-CD, 2018 Tenn. Crim. App. LEXIS 85\* (February 6, 2018) stated that, "[b]ecause the fee system at issue in this case calls into question the trustworthiness of the TBI forensic scientists' results, it violates the due process of the defendant."

Initially, Rosemary Decosimo was indicted in Hamilton County, Tennessee, for failing to yield, driving without a license, failure to maintain her lane of travel, DUI, and DUI per se in May of 2013. In January of 2014, she filed a motion to dismiss the indictment, or in the alternative, to suppress the evidence from her blood test. In her motion, she argued that TCA § 55-10-413 is unconstitutional because it creates a fee system in violation of her right to due process and a fair trial. Her motion was consolidated, with 20 other similarly situated defendants, for a hearing before a panel of three Hamilton Co. Criminal Court Judges sitting en blanc. Written stipulations were submitted by the parties, specifically relevant for analysis were (1) each of the defendants were charged with DUI, vehicular assault, and/or vehicular homicide; (2) each provided a breath or blood sample to law enforcement; (3) if the sample was blood, it was submitted to the TBI for testing; (4) in the case of breath, the sample was tested by a machine for the presence and concentration of ethyl alcohol and that the machine was calibrated, maintained and certified by the TBI; (5) agents with the TBI were often called to testify as witnesses regarding the testing process, equipment, testing results, and other relevant issues regarding blood or breath evidence with written reports often admitted into evidence; (6) if convicted, each person paid certain fees as part of the court costs, but, if the case was dismissed, the defendant was found not-guilty, or if there was a plea to a non-DUI related offense, no fee was collected; and (7) the fees were collected by the court clerk and paid to the TBI for use in operational costs as permitted by the statute. Evidence submitted at the trial court included the testimony of TBI Director Mark Gwyn before the Senate Judiciary Committee; a stipulated statement of Director Gwyn regarding the actual cost of testing, what was included in the cost, and what was not covered by the costs; documents from a case wherein TBI Agent Kyle Bayer failed to follow TBI protocol resulting in an error leading to the retesting of all samples tested by Agent Bayer; testimony of Raymond Fraley, defense attorney who had handled over 2000 DUI cases; and Lloyd Levitt, a defense attorney  
 (Continued on page 2)



## State v. Rosemary L. Decosimo (Continued)

who handled over 1000 DUI cases. Arguments were presented by both sides with the defense admitting that there existed “no overwhelming evidence that the TBI was biased or was trying to manipulate the blood test results” to receive the additional funding. The defendant argued, however, that actual bias did not have to be shown because T.C.A. § 38-6-103 (g) allows for the admissibility of the results in hearings which “enhances the appearance of impropriety”. Before the court ruled, the defense supplemented the record with a summary of Kyle Bayer’s blood alcohol tests, AIT Laboratory’s retest of the samples and TBI Assistant Director Robert Daniel Royse’s cover letter which indicated that in reviewing the samples it was found that the correct sample was originally analyzed by the TBI and that variations should be expected between any two scientific measurements because ethyl alcohol is a volatile compound and that the results can be impacted by such factors like sample age, volume of the sample available for retesting, sample condition, and the number of times the blood tube has been opened. In December of 2014, the court, en blanc denied the motion to dismiss or suppress the evidence, but granted the request for a jury instruction regarding the TBI’s pecuniary interest. In granting the request, the Court found that the statute created “a contingent-fee system”. The Court found that exclusion of the tests was not necessary because it is “impossible to calibrate” breath-test or blood-test machines to overstate a positive result and these tests are subject to “minimal” interpretation or opinion.

Application for interlocutory appeal was denied by the Court of Criminal Appeals and a motion to reconsider was denied by the trial court using a special judge. A plea submission hearing was held in March of 2017, where the defendant continued to reiterate her due process arguments. The trial court heard additional arguments but commented that the defendant had to show that the TBI had in fact manipulated the test results to obtain convictions, for the statute to be unconstitutional. The defendant subsequently entered a plea of nolo contendere, reserving the question of the constitutionality of T.C.A. § 55-10-413(f) for appeal.

The CCA started its analysis by looking at T.C.A. § 55-10-419 (2012) which imposed the \$250 fee at the time of Decosimo’s arrest, traced the evolution of the fee from 2005 to its current version in T.C.A. §55-10-413(f). The court emphasized that the fee was being placed into a fund “for exclusive use by the TBI”. The discussion by the CCA shifted to the case law upon which the defendant relied on to support her belief that the fee for BADT testing is unconstitutional, the *Tumey v. Ohio*, 273 U.S. 510 (1927), *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), and *Connally v. Georgia*, 429 U.S. 245 (1977) precedent. In a nutshell, these three cases conclude that if a judge or adjudicator has a pecuniary interest whether it is direct, personal, or assist him in some representative capacity for financial obligations, that it would cause the judge to forget the burden of proof required to convict the defendant, or tempt him to be partisan for financial benefit, and as such, it would violate the defendant’s due process. However, the CCA concluded that TBI forensic scientists did not perform functions equivalent to that of a judge. Therefore, the *Tumey* standard did not apply.

Yet the CCA was still not comfortable with the fact that TBI received a fee for each conviction and nothing if the defendant’s charges were dismissed (whether out right or by a “not guilty” verdict), so the Court looked at the role of the TBI forensic scientists as agents of the State in a law enforcement capacity. The Court found that they must be objective and independent experts. The CCA found that like a prosecutor, the forensic Scientist’s duty as a representative of the State, is to be impartial and that decisions in cases should be based upon the evidence without discrimination or bias. Even though prosecutors are not held to the *Tumey* standard, the CCA determined that the current fee system created a pecuniary interest in the continued employment, salaries, equipment and training like that of a contingency fee and called into question the validity or trustworthiness of the forensic scientists’ test results. Further, the CCA found that procedural safeguards such as thorough cross-examination of the forensic scientist at trial, jury instructions regarding credibility, and independent testing are not sufficient to remedy the due process violation.

The impact of the ruling sent shock waves throughout the State. The flood gates were open as TBI results were now subject to suppression in cases that were already pending or had previously been adjudicated. For (Continued on page 3)

## State v. Rosemary L. Decosimo (Continued)

this reason, the Attorney General's Office immediately appealed the CCA ruling. A motion requesting an expeditious review was filed with the appeal. The appeal points out that the CCA created a novel theory of substantive due process analysis by equating ethical guidelines to substantive due process. Moreover, the CCA also applied an incorrect "appearance of impropriety" standard, contrary to established precedent. In addition, T.C.A. § 55-10-413(f) affects several serious offenses wherein forensic alcohol and drug testing has been done and by finding the statute unconstitutional, the CCA has failed to consider the Tennessee Supreme Court's mandate that the analysis begins with "a strong presumption" that legislative acts passed are constitutional and that "reasonable doubt" about the constitutionality of a statute be resolved in favor of constitutionality. Particularly regarding a matter of first impression. Further the CCA's decision would affect many other statutes. Given the State's interest in highway safety and the enforcement of the highway safety laws, the *Decosimo* decision basically requires the State to use a forensic scientist other than TBI.

Currently, there exists a "legal limbo" in Tennessee Courts. Since *Decosimo* is not published and is not binding regarding the constitutionality of T.C.A. § 55-10-413(f). Several trial courts have heard *Decosimo* motions and have decided not to follow the *Decosimo* decision, while others have found the *Decosimo* decision persuasive and decided to follow the ruling. The Tennessee Supreme Court granted the State's application for permission to appeal on March 21, 2018. Arguments are set to be heard on May 31, 2018 in Nashville, TN.

## RECENT DECISIONS

### *State v. Randy Timothy Jones*, 2018 Tenn. Crim. App. LEXIS 183

This is another in a long line of "chain of custody" cases in which the defendant claims that the State did not establish the proper chain of custody. On March 21, 2016, Mr. Jones ran his truck off the side of the road, landing upside down. A THP trooper in Lawrence County responded to the scene and he observed Mr. Jones climbing out of his vehicle. Mr. Jones stated that he was okay and did not need an ambulance. During this conversation, Trooper Kilpatrick smelled an odor of alcohol "coming off of his breath." After performing poorly on standard field sobriety tests conducted by Trooper Pulley, Mr. Jones was arrested for DUI.

Mr. Jones consented to a blood sample, which Trooper Pulley observed. Trooper Pulley then deposited the blood sample into a TBI test kit and then drove to the Lawrence County jail where the defendant was booked. After leaving the jail, Trooper Pulley drove to his office where he filled out evidence forms which he signed and put into the test kit box, he then placed an evidence tracker on the box, he sealed the box and he deposited the box into a locked drop box at the THP department. Trooper Pulley testified that the box was then handled by evidence custodian, Trooper Jackie Vandergriff. Only the two Troopers and SA John Harrison of TBI testified. SA Harrison introduced the TBI electronic chain of custody which indicated that a tech opened the sealed box on March 30, 2016 and that there were no indications of tampering. It was kept in a refrigerated vault until it was transferred to a toxicologist on April 12, 2016 and then given to SA Harrison who tested the sample.

The defendant argued that the nine day gap and multiple people handling the sample was too much to consider the chain of custody established. The CCA again stated that the State is not required, "to call all witnesses who handled the item," and "when the facts and circumstances that surround tangible evidence reasonably establish the identity and integrity of the evidence, the trial court should admit the item into evidence." *State v. Cannon*, 254 S.W.3d 287, 296 (Tenn. 2008). The CCA also cited the recently decided case of *State v. Pascasio Martinez*, 2017 Tenn. Crim. App. LEXIS 977 (November 21, 2017), which was featured in our prior issue of the DUI Newsletter, Issue 61.

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## RECENT DECISIONS (Continued)

### ***State v. Benjamin Tate Brown, 2018 Tenn. Crim. App. LEXIS 119***

On January 13, 2016, Mr. Brown was arrested by Trooper Kenneth White for DUI, second offense, and for violation of the implied consent law, after being stopped for running a stop sign. Trooper White obtained a search warrant for a blood draw. Mr. Brown argued that the Trooper did not have “reasonable suspicion or probable cause, supported by specific and articulable facts, to believe that the Defendant had committed, was committing or was about to commit a crime when the stop was made.” The CCA stated that although Trooper White admitted that he had no recollection of the traffic stop independent from watching the video and reading his report, he did testify that after reviewing the video and reading his report, he remembered the case and he visually observed the Defendant’s vehicle fail to stop at a posted stop sign. (Due to the angle of the Trooper’s vehicle, the video does not capture the Defendant’s vehicle travelling through the stop sign.) The CCA stated that although the video does not show the Defendant run the stop sign, that fact alone, is “not a sufficient basis to discount the Trooper’s sworn testimony.” The judgment of the trial court was affirmed.

The CCA also affirmed T.C.A. section 55-1-405 which became effective on July 1, 2016, and established that, all prior convictions are eligible for purposes of enhancing punishment as a repeat or multiple offender if the prior offense occurred within ten (10) years of the current offense. Mr. Brown’s prior DUI offense date was June 4, 2006 with the current DUI offense date of January 13, 2016. A troubling set of circumstances for Mr. Brown.

### ***State v. Christopher Jones, 2018 Tenn. Crim. App. LEXIS 39***

Officers responded to a crash scene on Highway 394 , at approximately 6 pm, on September 28, 2014. The defendant, Mr. Jones had been driving his Suzuki motorcycle with a female passenger on the back when he crashed into a pickup. A marijuana joint and three Suboxone pills were found in the area near where Mr. Jones had been standing after the collision. Mr. Jones showed many signs of impairment and he was arrested. The defendant plead guilty to reckless aggravated assault, reckless endangerment DUI, simple possession of buprenorphine, simple possession of marijuana and failure to exercise due care. After a sentencing hearing, the defendant was sentenced to serve 2 years in TDOC custody.

The defendant argued to the court that he was eligible for and a favorable candidate for, a sentence of probation. However, the State successfully argued that pursuant to T.C.A. section 40-35-102(6)(A), the defendant’s prior criminal history and his prior lack of success on probation indicated that the defendant was not a favorable candidate for probation. Of course, it did not help that the defendant failed a drug screen while the case had been pending. The CCA affirmed the trial court’s sentence of 2 years TDOC.

### ***State v. Katherine Hart Collier, 2018 Tenn. Crim. App. LEXIS***

A Maury County Police Officer stopped Katherine Collier’s vehicle after observing it cross the center line of the road several times. The officer observed signs of impairment, including the odor of alcohol, and he requested Ms. Collier to perform standard field sobriety tests, which she performed poorly. During the initial contact, Ms. Collier asked the officer if he was “trying to frame her.” The officer replied that he knew she was the city manager and he was not trying to frame her.

After Ms. Collier refused a blood test, the officer obtained a search warrant and obtained a blood sample. Unfortunately the time listed for issuance on the original warrant and the time listed on the defendant’s copy of the warrant were different by two hours. The officer testified at the preliminary hearing that he had filled out each copy of the warrant after he printed the forms from a computer. The General Session’s Court ruled that the time discrepancies were clerical errors and that the officer’s testimony was credible.

(Continued on page 5)

## RECENT DECISIONS (Continued)

At a motion to suppress, The arresting officer testified that his preliminary hearing testimony was incorrect in that he made one original copy of the warrant and three photocopies of the warrant. The magistrate that signed the warrants testified that he signed the search warrant and all copies and that he wrote the date and time on each warrant. He could not explain all the time differences, but he did testify that the discrepancies were clerical errors. The magistrate stated that this was his first warrant issued without any assistance and that he realized at the preliminary hearing the importance of all the documents being identical. The trial court ruled that the time discrepancies on the warrant and copies were fatal to the warrant and the blood test results were thereby suppressed. The court further ruled that since the grand jury considered the blood test results, the indictment was dismissed in its entirety. The trial court noted that the discrepancies on the various copies of the warrant “were not the product of mere negligence or clerical errors.” Also, the court noted that the explanations of the officer and the magistrate were not credible since they could not explain how the discrepancies were the result of negligence or clerical error.

The Criminal Court of Appeals agreed that the search warrant and copies were not in compliance with Tennessee Rules of Criminal Procedure, Rule 41, which governs the issuance and execution of search warrants in that the warrant and all copies were not identical and they did not reflect on the face of the documents that the blood draw occurred before the search warrant was issued by the magistrate. “Our supreme court has concluded that a warrant must ‘explicitly show that it was issued then executed.’ *State v. Bodadilla*, 181 S.W.3d 641, 645.” The CCA chose not to apply a good faith mistake or technical violation standard since the trial court made a specific finding as to the credibility of the witnesses, the value of the evidence and how the witnesses could not explain how the discrepancies were the result of negligence or clerical error.

The CCA did find that the indictment should not have been dismissed in its entirety. “[a] grand jury can consider evidence obtained in violation of an accused's constitutional rights notwithstanding the fact that the evidence will be inadmissible at the ensuing trial.” *State v. Dixon*, 880 S.W.2d 696, 700 (Tenn. Crim. App. 1992) Therefore, the trial court was affirmed in part and overruled in part.

### ***State v. Jenna Sims*, 2018 Tenn. Crim. App. LEXIS 214**

On January 24, 2015, Jenna Sims was pulled over for driving ninety-four in a thirty-five mile-per-hour zone, on a wet roadway. Ms. Sims showed many signs of impairment and performed poorly on SFSTs. Her passenger stated that “he was scared and he told her to slow down after she had run two red lights prior to being stopped.” Various drug paraphernalia were also found in the vehicle. On February 23, 2015, Jenna Sims was again pulled over for speeding after fleeing from a domestic disturbance from which she wanted to avoid facing charges. She again displayed many indicators of impairment. Ms. Sims also had two prior convictions for DUI. On August 13, 2015, Ms. Sims plead guilty to her two DUI cases and she received an agreed-upon one year sentence consecutive to an eleven months and twenty-nine days sentence, which was suspended after 240 days jail. However, she was able to mitigate 110 days by attending an inpatient rehabilitation program.

Unfortunately, Ms. Sims left her rehabilitation program before the 110 days were finished and she failed to turn herself in to jail. She eventually plead guilty to a felony failure to appear. Surprisingly, Ms. Sims expected to be returned to probation and she was shocked to have her probation violated and then sentenced to serve in TDOC. In it’s thirteen page opinion, the Criminal Court of Appeals reiterated that to find an abuse of discretion in a probation revocation case, “it must be established that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred.” *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991) (citing) *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980)); *see also State v. Farrar*, 355 S.W.3d 582, 586 (Tenn. Crim. App. 2011) As in many cases, there were sufficient facts upon which the trial court could conclude that Ms. Sims was not an appropriate candidate for reinstatement to probation. It is important to protect the record by insuring the entire basis for the final decision is clearly stated.



## SHOULD TENNESSEE CONSIDER A 0.05% MINIMUM BAC?

### *Data Regarding a 0.05% BAC Limit*

Last year, the State of Utah passed and signed legislation which will lower Utah's presumption of impairment for Driving Under the Influence to a minimum blood alcohol percentage of 0.05%. This new legislation will take effect on December 30, 2018. "I think this has been studied for the last year. Most people are coming back with the idea that reducing to 0.05 is not a bad idea," stated Utah Governor Gary Herbert. "Most countries besides America use the 0.05 level or even lower."<sup>1</sup> This is especially true of the many European countries that have a minimum BAC percentage of 0.05 included within their per se DUI laws.<sup>2</sup>

The American Medical Association has been publishing articles since 1968 that have reported studies indicating, "Despite...limitations, all of the results of the tests, both real and simulated, have led to the conclusion that driving skills deteriorate with a relatively low blood-alcohol level, certainly less than the 0.05 percent w/v (50 mg/100ml)."<sup>3</sup> Every decade, the American Medical Association has cited articles such as the one published by the National Highway Traffic Safety Administration (NHTSA) in 1992 which states, "the weight of existing empirical evidence is sufficient to scientifically justify the setting of legal BAC limits at 0.05% or lower."<sup>4</sup>

In January of this year, The National Academies of Sciences, Engineering and Medicine prepared a report titled: Getting to Zero Alcohol-Impaired Driving Fatalities—A Comprehensive Approach to a persistent Problem.<sup>5</sup> It emphasized that in spite of decades of progress, alcohol-impaired driving remains the deadliest and costliest danger on U.S. roads today, yet it is entirely preventable. Due to this "persistent problem," a committee was formed in which they held five information gathering meetings and they came to the conclusion that a multi-pronged approach was needed. It was recommended that state governments should enact per se laws for alcohol-impaired driving at 0.05 percent blood alcohol concentration (BAC), accompanied by media campaigns and robust and visible enforcement efforts.<sup>6</sup> Other recommendations varied as to implementation and effect, such as increasing alcohol treatment and DUI courts, raising alcohol taxes, increasing enforcement of current alcohol sales and use laws, improving public transportation and improving ignition interlock laws.<sup>7</sup>

Part of our current environment, that was noted within the above report, includes the fact that per capita alcohol consumption and hazardous drinking trends are increasing.<sup>8</sup> To combat this problem along with other related alcohol-impaired driving issues, Tennesseans need to study the recommendations of the National Academies of Sciences, Engineering and Medicine committee, along with the recommendations of the American Medical Association and then implement any reasonable interventions that will prevent the devastating injuries and fatalities caused by alcohol-impaired driving.

1. Salt Lake Tribune, February 15, 2018.
2. <https://etsc.eu/blood-alcohol-content-bac-drink-driving-limits-across-europe/>.
3. American Medical Association, Committee on Medicolegal Problems. Alcohol and the impaired driver. A Manual on the Medicolegal Aspects of Chemical Tests for Intoxication. Chicago: American Medical Association; 1968.
4. United States Department of Transportation (USDOT). Driving Under the Influence; A Report to Congress on Alcohol Limits. National Highway Traffic Safety Administration; October 1992; D 1-3.
5. <http://www.nationalacademies.org/StopDWIdeaths>.
6. <http://www.nationalacademies.org/StopDWIdeaths>.
7. <http://www.nationalacademies.org/StopDWIdeaths>.
8. <http://www.nationalacademies.org/StopDWIdeaths>, Figure 2-3 Total per capita ethanol consumption, United States, 1935-2014. Source : Haughwout et al., 2016.

## THE COST OF DRIVING UNDER THE INFLUENCE

### *Chilling Facts and Considerations*

Despite the best efforts of law enforcement, prosecutors, traffic safety advocates, judges, legislators, and traffic safety professionals from across the country, more than 10,000 people still die on the roads of our nation as a whole, according to the National Highway Traffic Safety Administration (NHTSA).<sup>1</sup> In addition to this fact, nearly 29 people die every day in this country due to alcohol related crashes, which comes out to be one person every fifty minutes.<sup>2</sup>

Those of us who are actively involved with Traffic Safety in Tennessee are already familiar with some of the facts and information offered supra, but this information should specifically help as a reminder to the public and also as an illustration for the necessity of our constant vigilance.

Mothers Against Drunk Driving (MADD) statistics also tell us that the average drunk driver drives drunk at least 80 times before being caught for the first time.<sup>3</sup> Approximately 40% of all 10<sup>th</sup> graders drink alcohol.<sup>4</sup> It is unacceptable that 40% of our 10<sup>th</sup> graders across the nation, according to the study conducted by Miech, O'Malley, Bachman and Schulenberg, are or have consumed alcohol.

Consider further that the statistical number of people, who drive drunk each day, is around 300,000 people, leading to only around 2,800 actual arrests.<sup>5</sup> These statistics should be sobering news for all of us, especially given the facts listed above, which only serve to illustrate just how pervasive the problem actually is within our nation and the roadways and highways of Tennessee. Perhaps the most sobering stat is: during the average person's lifetime, one in three people will be involved in a drunk driving related crash.<sup>6</sup> The cost goes beyond the limits of the law, which still sees between 50 to 75% of all convicted drunk drivers continuing to drive, despite having a suspended drivers' license.<sup>7</sup> Even after all the efforts made by law enforcement agencies, these drivers continue to make it more difficult for the sober drivers who have a hard enough time driving on the best of days, with our congested roadways and highways.

Of course, no cost could be dearer to pay than that of a human life. Driving Under the Influence (DUI) is an absolutely preventable crime. Perhaps with the new trends in technology, such as driverless cars and the development of social media and phone apps, such as Lyft and Uber, this crime will eventually be brought to an end, but until that time comes, we will all still be required to remain vigilant.

1. <https://www.nhtsa.gov/risky-driving/drunk-driving>.
2. <https://www.nhtsa.gov/risky-driving/drunk-driving>.
3. MADD website: <http://www.madd.org/statistics>.
4. MADD website: <http://www.madd.org/statistics>; Miech, R. A., Johnston, L. D., O'Malley, P. M., Bachman, J. G., & Schulenberg, J. E. (2015). Monitoring the Future national survey results on drug use, 1975-2014: Volume I, Secondary school students. Ann Arbor: Institute for Social Research, The University of Michigan, pp. 599.
5. MADD website: <http://www.madd.org/statistics>; Arrest data: Federal Bureau of Investigation, "Crime in the United States: 2015" <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-29> Incidence data: Centers for Disease Control and Prevention. "Alcohol-Impaired Driving Among Adults — United States, 2012." Morbidity and Mortality Weekly Report. August 7, 2015 / 64(30);814-817. <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6430a2>.
6. MADD Website: <http://www.madd.org/statistics/> [https://www.caron.org/understanding-addiction/addiction-stats/drunk-driving-facts?gclid=EAlalQobChMI8fyXjoit2AIVi7bACh3GOQdiEAAYAiAAEgIpuFD\\_BwE&gclid=EAlalQobChMI8fyXjoit2AIVi7bACh3GOQdiEAAYAiAAEgIpuFD\\_BwE](https://www.caron.org/understanding-addiction/addiction-stats/drunk-driving-facts?gclid=EAlalQobChMI8fyXjoit2AIVi7bACh3GOQdiEAAYAiAAEgIpuFD_BwE&gclid=EAlalQobChMI8fyXjoit2AIVi7bACh3GOQdiEAAYAiAAEgIpuFD_BwE).
7. MADD Website: <http://www.madd.org/statistics/> [https://www.caron.org/understanding-addiction/addiction-stats/drunk-driving-facts?gclid=EAlalQobChMI8fyXjoit2AIVi7bACh3GOQdiEAAYAiAAEgIpuFD\\_BwE&gclid=EAlalQobChMI8fyXjoit2AIVi7bACh3GOQdiEAAYAiAAEgIpuFD\\_BwE](https://www.caron.org/understanding-addiction/addiction-stats/drunk-driving-facts?gclid=EAlalQobChMI8fyXjoit2AIVi7bACh3GOQdiEAAYAiAAEgIpuFD_BwE&gclid=EAlalQobChMI8fyXjoit2AIVi7bACh3GOQdiEAAYAiAAEgIpuFD_BwE).



## UPCOMING TRAINING

### THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

#### **20/20 Medical Foundation of Eye Movements & Impairment - April 24-25, 2018, Memphis TN**

This seminar will be located at the Southern College of Optometry in Memphis, Tennessee, and it will be taught by faculty members and professors of optometry. The legal and physiological aspects of eye movement and the detection of impairment will be covered. Registration is open to prosecutors, drug recognition officers, and SFST instructors. A mock court scenario involving a drug recognition expert will be included.

#### **Protecting Lives, Saving Futures - May 24-25, 2018, Franklin TN**

This joint prosecutor– law enforcement officer training is designed to allow everyone to learn from each other, inside of a classroom, rather than outside of a courtroom shortly before a trial. Topics covered include the detection, apprehension and prosecution of impaired drivers. Each prosecutor attending is required to recruit 1 to 3 law enforcement officers to attend the training together.

#### **Vehicular Homicide/ Crash Reconstruction - June 13-15, 2018, Kentucky**

This course is designed for the more experienced prosecutor and will be a joint effort with Kentucky. It features all aspects of the investigation and prosecution of vehicular homicide cases. Included topics are the role of the prosecutor at the scene of a fatality, working with hostile witnesses, working with victim family members and the effective use of visual aids at trial.

#### **Drugged Driver - August 8-9, 2018, Jackson TN**

This course will explore all aspects of the investigation and prosecution of drugged driving cases. Subjects covered will include dealing with experts on direct and cross examination, working with DREs, search warrants and common defenses.

#### **Conference DUI Breakout - October 23, 2018, Memphis TN**

Every year our DUI breakout session provides approximately four hours of education and training covering current DUI topics and legal updates.

### TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

#### **Advanced Roadside Impaired Driving Enforcement (ARIDE)**

April 2-3, 2018, Kingston TN  
 May 14-18, 2018, Sevierville TN  
 May 28-29, 2018, Knoxville TN  
 June 25-26, 2018, Manchester TN

#### **DUI Detection & Standardized Field Sobriety Testing**

April 16-18, 2018, Knoxville TN  
 April 18-20, 2018, Bolivar TN  
 April 23-27, 2018, Lafayette TN  
 April 30-May 2, 2018, Dresden TN  
 May 7-11, 2018, Chattanooga TN  
 May 21-23, 2018, McMinnville TN  
 June 25-29, 2018, Nashville TN



## DUI TRACKER

### DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from January 1, 2018, through March 29, 2018, and reflect the DUI Tracker conviction report for all judicial districts in the State of Tennessee. These numbers include the Circuit Courts, Criminal Courts, General Sessions Courts and Municipal Courts. The total number of arrests for the period from January 1, 2018, through March 29, 2018, since the last quarter were 1,427. This number is up from the previous quarter by 230. From looking at these numbers, we can see that the trend in DUI related arrests in Tennessee has shifted this quarter from the lower arrest trends that we have been observing over the last nine months. The total number of guilty dispositions during this same period of January 1, 2018 through March 29, 2018 were 945. The total number of dismissed cases were 102. Across the State of Tennessee, this equates to 66.2% of all arrests for DUI made were actually convicted as charged. This percentage is slightly lower than the last quarter ending on December 31, 2017. Only 7.16% of the DUI cases during this current quarter were dismissed. Also, during this same period of time, only 269 of the total DUI cases disposed of were to different or lesser charges. Therefore, only 18.85% of the total cases were disposed of to another charge.

### Fatal Crashes this last quarter

The following information was compiled from the Tennessee Integrated Traffic Analysis Network (TITAN) using an *ad hoc* search of the number of crashes involving fatalities that occurred on Tennessee's interstates, highways and roadways from January 1, 2018 through March 29, 2018. During this period, there were a total of 195 fatalities involving 182 crashes, which is a decrease from the previous quarter. Out of the total of 195 fatalities, 36 fatalities involved the presence of alcohol, meaning that 18.46% of all fatalities this quarter had some involvement with alcohol. This number is lower than the previous quarter. Further, there are a total of 19 fatalities involving the presence of drugs, which means that 9.75% of all fatalities this quarter involved some form of drugs.

The year-to-date total number of fatalities on Tennessee roads and highways is 195. This is down by 33 from the 227 fatalities incurred last year at this same time. This is a significant decrease in fatalities on our roads and a great trend towards our goal of reducing fatalities in Tennessee.

The DUI training department conducted two "Cops in Court" training classes, in Murfreesboro and Cleveland, this last quarter. These classes were an excellent opportunity for law enforcement officers to learn what is expected of them in the courtroom and how to be most effective when testifying. If officers within your district are interested, we can schedule a training class in your area soon!



## VEHICULAR HOMICIDE MURDERER'S ROW

### *State v. Nicholas Gordon, Humphreys County*

In the early morning hours of August 12, 2016, Nicholas Gordon was driving his Ford F-150 West bound on Highway 70 in Dickson and Humphreys Counties in Tennessee. Prior to the collision, by his own admission, he had been "doing something stupid" like being "out with friends... drinking or whatever." He was driving in large part on the wrong side of the road, in the East bound lane. He ran a driver off of the road, while she was on her way to work. After recovering her wits, she called 911 to report his driving, but it was too late. Three minutes after forcing the concerned citizen off of the highway, Mr. Gordon encountered an East bound Chevy pickup being driven by Dustin Edwards. Once again, Mr. Gordon was fully in the East bound lane. Mr. Edwards managed to slow his vehicle to 34 m.p.h. and to get as far to the right of a concrete bridge as space would allow. However, Mr. Gordon did not brake or make any other attempt to avoid the collision, striking Dustin Edwards's Chevy pickup at a full 56 m.p.h. Within minutes, Dustin Edwards was dead, and his two injured passengers Adam Dalme and Briana Burkins were transported by ambulance from the scene. Almost two hours after killing Dustin Edwards, Gordon's BAC was still at .214 %, according to a TBI blood test.

On the day of trial, after all suppression motions had been denied, Mr. Gordon plead open to Vehicular Homicide and two counts of Vehicular Assault as a Range I offender. On January 31, 2018, after a lengthy sentencing hearing, Judge Wallace sentenced Mr. Gordon to 12 years to serve in TDOC for killing Dustin Edwards, 3 years for injuring Adam Dalme and 2 years for injuring Briana Burkins. Judge Wallace ordered the 3 years for injuring Adam Dalme to run consecutive to the 12 years for killing Dustin Edwards and he ordered to final 2 years for injuring Briana Burkins to run concurrent for an effective sentence of 15 years in TDOC as a Range I offender.

### *State v. Michael Chesney, Campbell County*



On October 15, 2016, Michael Chesney, 27 was driving his 1998 Pontiac West bound on Jacksboro Pike near Krome Salon when his car veered off of the road to the right and hit a metal utility pole. The Pontiac then spun around, coming to rest over an embankment. The front passenger, Kristian Leach, had to be cut out of the vehicle. She was eventually flown to UT Medical Center where she died from her injuries. A rear passenger, Samuel Welch, was uninjured. Mr. Chesney was also uninjured and he refused any medical treatment. Statements from witnesses indicated that Mr. Chesney fell asleep behind the wheel.

The Lafollette Police Department along with the Campbell County Sheriff's Department, investigated the case. Mr. Chesney admitted to officers that he had been up the night before, "partying and drinking." He showed signs of impairment on all SFSTs. Mr. Chesney consented to both a breath and blood test. His breath analysis was negative for alcohol, but his blood analysis indicated a toxic level of Methamphetamine and a level of Amphetamine above the normal therapeutic level.

On November 27, 2017, Mr. Chesney plead guilty as charged to Vehicular Homicide for the death of his passenger Kristian Leach. Judge Sexton sentenced Mr. Chesney to 15 years to serve in TDOC as a Range II offender and loss of his driver's license for eight years. Mr. Chesney had two prior felonies, one in which he recently plead guilty to a conspiracy to commit robbery.

(Continued on page 11)

## VEHICULAR HOMICIDE MURDERER'S ROW

### ***State v. Ho Young Kang, Montgomery County***



Although sober rides were offered at a company party on October 23, 2016, Mr. Kang climbed into his pickup alone and drove away at approximately 1:20 in the early morning hours. While travelling approximately 77 mph in a 55 mph zone, Mr. Kang struck a vehicle being driven by 18 year old Samia Lucas. She was out with her friend, Joshua Lopez, celebrating his 18th birthday. They were both killed. During an emotional sentencing hearing, ADA Karen Willis stated how every DUI is preventable and that Kang had options that he ignored.

Judge Ayers sentence Mr. Kang to 10 years TDOC as a range I offender for each count of Vehicular Homicide, concurrent with each other and with his DUI count for a total of 10 years to serve in TDOC.

### ***State v. Thomas J. Privett, 2018 Tenn. Crim. App. LEXIS 48***

While under the influence of Methamphetamine, Mr. Privett was driving three friends in excess of 100 mph on highway 108 in Grundy County. After a collision, which resulted in the death of one of the passengers, Mr. Privett was charged with vehicular homicide, vehicular assault and DUI. Mr. Privett plead guilty to a ten year sentence to vehicular homicide and the trial court sentenced him to TDOC to serve. Although Mr. Privett argued for probation, the trial court disagreed and the CCA affirmed.

### ***State v. Randel Lee Burnett, II, 2018 Tenn. Crim. App. LEXIS 158***

On April 12, 2014, Randel Burnett, II was living with his girlfriend and her three sons. After drinking all day and into the night, Mr. Burnett felt a beer run was needed. The three boys, along with a young friend, wanted snacks at the store, so Mr. Burnett drove all of them to the store in his convertible Mini Cooper. On the way back, Mr. Burnett was driving over 100 mph in a 45 mph zone on highway 194 when he ran off of the road. All of the passengers were ejected after the vehicle flipped many times. No one in the vehicle was restrained. The 11 year old young friend, Brandon Anderson, was killed. Although he was originally charged with Felony Murder, Mr. Burnett agreed to plead guilty to vehicular homicide, aggravated child neglect and three counts of vehicular assault.

After the sentencing hearing, Judge McCraw sentenced Mr. Burnett to 12 years TDOC for the vehicular homicide concurrent to 12 years for the child neglect, but consecutive to three separate four-year sentences for vehicular assault, for an effective sentence of 24 years to serve in TDOC. Mr. Burnett appealed the use of the aggravating factors used by Judge McCraw to enhance his sentence. He claimed that the trial court erred by enhancing his sentences based upon the victims' vulnerability due to their ages, by finding him to have been on a judicially ordered release into the community and by finding that he had no hesitation about committing a crime when the risk to human life was high. Although the CCA agreed with Mr. Burnett that two of the three enhancement factors were misapplied, they did find that enhancement factor (13) was properly applied. The CCA found that Mr. Burnett was on a pretrial release or bail at the time of the vehicular homicide. The CCA again stated, "[a] trial court's weighing of various mitigating and enhancement factors [is] left to the trial court's sound discretion." *Citing State v. Carter*, 254 S.W.3d 335,343 (Tenn. 2008). In other words, "the trial court is free to select any sentence within the applicable range..." The sentence was affirmed.



## WELCOME TO OUR NEW TSRP



Linda D. Walls was born in Nashville, Tennessee and raised in the Vesta area of Lebanon, Wilson County, Tennessee. She attended and received an honors degree from Lebanon High School in 1989. Linda was given a scholarship to attend Cumberland University where she graduated Magna Cum Laude with an undergraduate degree in Social Sciences in 1993. After taking a year off from school and working in the corporate offices for Cracker Barrel in the merchandising department, Linda attended the University of Memphis Cecil C. Humphreys School of law where she received her JD in 1997. Linda worked for Southeast Tennessee Legal Services assisting victims of domestic violence for almost two years before moving to the Ninth Judicial District Attorney’s Office in May of 1999. Linda served as Assistant District Attorney in Kingston in all court levels until September of 2001 when District Attorney General Tommy Thompson offered her a job

in the Fifteenth Judicial District Attorney General’s Office. While in the Fifteenth, she worked in all court levels in the district. Her primary duties changed from time to time and in 2007, she was assigned to manage the docket for Division II cases which primarily consisted of driving under the influence and traffic prosecution. In 2014, she began working in both Division I and Division II on a variety of property crimes, but remained assigned to prosecute Vehicular Homicide cases. She worked for General Thompson until March 1, 2018, when she joined the Tennessee District Attorney Generals Conference as a Traffic Safety Resource Prosecutor.

The DUI Training Department presented our Protecting Lives, Saving Futures Seminar in Oak Ridge, TN on March 6-7, 2018. Law enforcement officers and prosecutors received interactive training on all aspects of alcohol and drug impaired driving cases. Pictured to the right is Dr. Chris Borgman of the Southern College of Optometry, explaining the medical background of the Horizontal Gaze Nystagmus. Our next Protecting Lives, Saving Futures Seminar will be presented in Franklin, TN at the Drury Hotel, on May 22-23, 2018. Please register early as availability will be limited. You can view the entire upcoming training schedule on page 8 of this newsletter.



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