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2018 LEGISLATIVE UPDATE

A number of new laws take effect in 2018, some of which relate to traffic safety issues in Tennessee. A pressing issue this year involved the BDAT and BAT fees collected by the courts and dispersed to TBI. In *State v. Decosimo,* 2018 Tenn. Crim. App. LEXIS 85, the CCA stated that these fees gave an "appearance of impropriety" on the part of TBI. HB1959 currently redistributes the BDAT and BAT fees to the State's general fund. This recently passed law, which removes the "appearance of bias" from TBI, became effective on May 21, 2018.

HB2450 started as an attempt to amend TCA 55-10-406 (implied consent). However, the bill was heavily amended and rewritten in the Senate. HB2450 as passed, amends TCA 55-10-408(b), which provides for certified labs, in addition to TBI, (For example: the Davidson County, Metro Lab) to accept evidentiary samples for testing. This law became effective on July 1, 2018.

SB0727 allows for providing electronic proof of vehicle registration, upon request by a law enforcement officer, amending TCA 55-4-137. Therefore, a motorist may now provide such proof by using their cell phone. This law became effective on July 1, 2018.

SB2253 amends TCA 55-10-419 and TCA 55-10-425. This law will allow a person that has been ordered to install an interlock device on their vehicle to toll the 365 day requirement if their vehicle becomes inoperable due to a crash. This law became partially effective on July 1, 2018 and the remainder shall become effective on January 1, 2019.

TCA 55-8-199 and TCA 55-8-207 were amended during the prior legislative session, but these amendments did not become effective until January 1, 2018. These statutes prohibit texting while driving a vehicle on a public road or Highway (TCA 55-8-199), and talking on a hand-held mobile telephone within a school zone (TCA 55-8-207). A question quickly arose as to whether a person could text or talk on their hand-held mobile telephones while in a school parking lot or in a school pick-up line. This prompted an Attorney General Opinion which addressed the subject. (AG Opinion No. 18-25)

The Attorney General stated that TCA 55-8-199 only applies to a "public road or highway." Therefore, a motorist can text or read a text in a school parking lot. A motorist can also text or read a text while in a school pick-up line only if the pick-up line is not on a public road or highway. Otherwise, texting is prohibited.

The Attorney General Opinion mentioned TCA 55-8-207, but refused to apply it to this analysis, since section TCA 55-8-207 applies to any "vehicle in motion" in "any marked school zone in this state." Using the Attorney General's analysis, it would appear all talking on a hand-held mobile telephone is prohibited within any marked school zone in this state, which includes all school pick-up lines.

RECENT DECISIONS

State v. Trevor Wallace, 2018 Tenn. Crim. App. LEXIS 388 (Houston County)

Mr. Wallace was indicted on one count of DUI, above .08% BAC. After the jury was sworn in, but before any testimony was heard, the defendant's attorney moved to dismiss the indictment for failure to state an offense. The indictment described the offense as, "...while having an alcohol concentration in his blood or breath of ten hundredths of eight-hundredths of one percent (.08%) or greater…" The trial court agreed and dismissed the case since the indictment only charged the one offense of DUI greater than .08% BAC and it included the additional language which effectively alleged less than the legal limit by including additional verbiage. The Court of Criminal Appeals disagreed and reversed the trial court's decision.

The CCA noted that the single count indictment described two modes of committing the offense of DUI, both of which were proscribed by TCA section 55-10-401. The indictment contained all of the elements of driving while under the influence of an intoxicant and it attempted to describe driving while having a BAC of greater than .08%. Therefore, the indictment was not subject to dismissal for failure to state an offense. Also, since the indictment merely contained a surplusage of words and there existed no evidence that the defendant was mislead by the indictment, any objection to the defect should have occurred before the trial and was thereby waived once the trial began. The CCA also ruled that double jeopardy did not attach since the defendant terminated the trial before any determination of guilt or innocence was presented.

State v. Michael James Amble, 2018 Tenn. Crim. App. LEXIS 320 (Loudon County)

The defendant was stopped for speeding and an officer detected an odor of alcohol. After performing poorly on the standardized field sobriety tests and showing multiple signs of impairment, Mr. Amble was arrested for DUI with priors and possession of a marijuana pipe. Mr. Amble was convicted of DUI 2nd, but he was acquitted of the paraphernalia charge. The vehicle owner claimed that the marijuana pipe was his. This charge was almost dismissed by the trial judge, upon a motion, since the marijuana pipe was not produced at trial.

Mr. Amble appealed the DUI conviction because condensation on the officer's patrol car blurred the video tape of the stop and made it very difficult to review. The defendant claimed that there was insufficient evidence to support the DUI charge, since the video was of such a poor quality. The Court of Criminal Appeals stated that although the video made it very difficult to observe the defendant's performance on the field sobriety tests, the video tape did, however, substantially corroborate the officer's testimony. The CCA also stated that' "Even without a video of the stop, the evidence was sufficient to support Defendant's conviction." Based upon what the officer observed, his training and experience, and the defendant's performance on the SFSTs. The CCA concluded that the defendant was not entitled to relief.

State v. James Larry Williams, 2018 Tenn. Crim. App. LEXIS 311 (Williamson County)

On March 13, 2017, the defendant was observed crossing the fog line once and the double yellow center line three times while traveling on a narrow residential road with no shoulders. Mr. Williams claimed that he was forced to weave in order to avoid mailboxes that were too close to the road and to avoid gravel from driveways. The officer stopped the defendant for violation of TCA 55-8-123(1) (Failure to maintain his lane of travel). During a motion to suppress evidence and after reviewing a video tape of the incident, the trial court ruled that the officer had probable cause to stop the defendant. The trial court noted that the defendant could be observed weaving within his lane throughout the video. Mr. Williams later plead guilty to DUI and he reserved a certified question for appeal.

Although the state attempted to argue, in their brief, that the Court of Criminal Appeals could also find probable cause based upon a violation of TCA 55-8-115 (Driving on the right side of the roadway), the CCA (Continued on page 3)

RECENT DECISIONS (Continued)

ruled that they were limited in their scope of review, to the certified question and the trial court's ruling. The CCA applied the Tennessee Supreme Court's analysis found in State v. Smith, 484 S.W.3d 393 (Tenn. 2016), which stated that a motorist must not leave their lane any more than is made necessary by the circumstances requiring the lane excursion. Id at 409. Upon a review of the record and the video tape, the trial court's ruling of probable cause to stop the defendant's vehicle was upheld. [Editor's note: When appropriate, TCA 55-8-115, (Driving on right side of the roadway), should be argued at the motion to suppress, the trial and also included in the certified question for appeal.]

State v. James Williams, 2018 Tenn. Crim. App. LEXIS 256 (Shelby County)

On September 20, 2015, the defendant was observed swerving in and out of lanes while travelling east bound on I-40. During this time, Mr. Williams was changing lanes without using a signal and he was straddling lanes, including the yellow roadway line. At one point, the officer stated that it appeared Mr. Williams was texting on his phone. The trial court denied a motion to suppress and a jury convicted Mr. Williams of DUI and reckless driving. Although the defendant appealed the motion to suppress, he did not include a transcript of the trial. Failure to prepare a proper record precludes appellate review. Therefore, the Court of Criminal Appeals concluded that the defendant waived review of his suppression issue.

State v. Jeffrey A. Jones, 2018 Tenn. Crim. App. LEXIS 230 (Williamson County)

A sheriff's deputy stopped the defendant for a broken headlight and later smelled an intoxicant. Upon exiting his vehicle, Mr. Jones was unsteady, used his hands for balance and had bloodshot, watery eyes. The deputy conducted "HGN" and he attempted to administer the "walk and turn," when Mr. Jones refused any further SFSTs. The deputy then filled out a pre-printed search warrant, including form words and paragraphs. The deputy then obtained the signature of a magistrate. The defendant brought a motion to suppress which attacked the form nature of the search warrant. After a hearing, the trial court judge denied the motion, finding that the deputy's testimony affirmed that the statements in the search warrant affidavit were true and that they established probable cause. The Court of Criminal Appeals ruled that the record supported the trial court's findings and conclusions. The ruling of the trial court was upheld.

State v. Joel W. Allen, 2018 Tenn. Crim. App. LEXIS 210 (Benton County)

On February 1, 2015, Mr. Allen was observed driving his red suburban. It was well known at the time, that Mr. Allen had been declared an habitual motor vehicle offender and that he had been observed driving regularly. On this day, Mr. Allen was driving "erratic and all over the road." The defendant performed poorly during standardized field sobriety tests and he admitted to drinking earlier that day. The deputy also found several burnt roaches in Mr. Allen's shirt pocket. Mr. Allen's wife was a passenger in the vehicle and she also appeared intoxicated. At trial, the defendant's wife claimed that she was suffering a medical emergency and the defendant was only driving because her blood sugar was really low. Unfortunately for Mr. Allen, she did not bring any medical evidence with her to the trial even though she knew she would be testifying.

Mr. Allen, on appeal, argued that the evidence was insufficient to convict him at his trail and that he received ineffective assistance of counsel. The Court of Criminal Appeals found that there was sufficient evidence to convict Mr. Allen, especially in light of the fact that a guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt. The CCA also ruled that Mr. Allen failed to show that his counsel rendered deficient performance or that Mr. Allen was prejudiced by any alleged deficiency.

Since the defendant was convicted of DUI 5th offense, possession of marijuana and operating a vehicle after being declared an habitual motor vehicle offender, the trial court sentenced Mr. Allen to serve an effective term of 12 years in the Tennessee Department of Corrections. The CCA affirmed his sentence.

DRUGGED DRIVING IS INCREASING

In May of 2018, the Governors Highway Safety Association (GHSA) published a report highlighting the increasing drugged driving problem in the United States and the impact that marijuana and opioids are having in leading this crisis.[1] For example, a 2015 national survey on drug use and health reported that marijuana use in the United States has increased from 14.5 million current (past month) users, aged 12 years and older in 2007, to 19.8 million in 2013. This increase makes marijuana the most common illicit drug used in America.[2] The increase in use of marijuana is expounded even greater when a state authorizes recreational use. In Colorado, in the three years (2013-2015) after the state legalized recreational marijuana compared to the three years prior (2010-2012): use by youth (age 12-17) increased by 12 percent; use by young adults (age 18-25) increased by 16 percent; and use by adults aged 26 and above increased by 71 percent.[3] The GHSA then looked at fatally-injured drivers, as reported in FARS. (Fatality Analysis Reporting System collected and administered by the National Highway Traffic Safety Administration) According to FARS in 2016, 41.1 percent of the drug-positive, fatally-injured drivers were positive for some form of marijuana and 75 percent of these drivers were positive for active marijuana, coded as Delta 9. In 2006, the marijuana-positive proportion was 34.5 percent.[4] What makes these numbers even more alarming is the knowledge that drug testing for fatally-injured drivers is not consistently administered, because testing protocols and cutoff values change from state to state.[5] In the state of Washington, a 2016 report by the AAA Foundation for Traffic Safety found that fatal crashes of drivers who recently used marijuana doubled after that state legalized it.[6]

Of course many impaired drivers are often found to be using more than one drug, or a combination of drugs and alcohol. In an April 2018 report, the Washington Traffic Safety Commission stated that among drivers in fatal crashes 2008-2016 that tested positive for alcohol or drugs, 44 percent tested positive for two or more substances (poly-drug drivers). The most common substance in poly-drug drivers is alcohol, followed by THC. Alcohol and THC combined, is the most common poly-drug combination.[7] Although research studies regarding marijuana use and crashes vary, all studies included in the Washington Traffic Safety Commission report agree that combining alcohol with THC will only further inflate the risk of a crash by a factor of between 1.84 and 6.44.[8] One recent research finding by Hartman et al., 2015(b), found that the presence of alcohol increases blood levels of both carboxy-THC and hydroxy-THC, the metabolites of THC.[9] Poly drug drivers have emerged as the most common type of impaired drivers involved in Washington fatal crashes in just the past five years.[10] Unfortunately, this is a common trend being observed all across the United States.

In addition to increased marijuana use, opioid use and abuse has also increased, which further contributes to the higher percentages of drugged driving cases that are currently being observed. On October 26, 2017, Acting Health and Human Services Secretary Hargan declared a nationwide public health emergency regarding the opioid crises. While overdose deaths from the abuse of prescription or illegal opioids have received the most attention, opioids also effect driving and can cause crashes.[11] In 2016, 1,064 drivers, or 19.7 percent of the drug-positive drivers, were positive for some opioid, which is slightly less than half as many as were positive for marijuana.[12] Many studies document that opioids can cause drowsiness and can impair cognitive function, both of which can have obvious effects on driving.[13] Unfortunately, many people that are prescribed opioids believe that it is still safe to drive. In a 2017 national survey of drivers, age 21 and above, 17 percent reported taking a prescription opioid in the past month. Of those who did, 64 percent said that they felt it was safe to drive.[14]

The Governors Highway Safety Association report also outlined specific strategies and recommendations that states could use to address this growing epidemic. One of the recommendations included additional drug identification training for law enforcement officers.[15] Two of these popular training programs include Advanced Roadside Impaired Driving Enforcement (ARIDE) and Drug Evaluation and Classification (DEC) training. ARIDE is a 16 hour course that provides basic information on drug impairment, including the signs and symptoms of impairment produced by marijuana and opioids.[16] The DEC program is an 80 hour course that trains officers to become Drug Recognition Experts (DRE).
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DRUGGED DRIVING IS INCREASING (Continued)

A DRE can identify the signs and symptoms of impairment and the specific category of drug causing the impairment. A DRE will perform a 90-minute 12-step evaluation including both behavioral test and a physical examination.[17] DREs usually are quite accurate in confirming a driver's drug impairment and identifying the type of drug responsible for the impairment[18], in particular impairment caused by marijuana.[19]

Another recommendation, encouraged obtaining chemical evidence during DUI investigations. A chemical test of a driver's blood, urine or saliva provides objective proof of the presence or absence of drugs in a driver's body.[20] Tennessee currently only uses blood analysis to determine the presence of drug impairment. More recommendations addressed education and changing public attitudes regarding driving after marijuana and opioid use. Unfortunately, the public in general does not understand that marijuana and opioids can impair driving and can cause crashes.[21] More education is needed and unless driver's understand the dangers of driving after using marijuana and opioids, other strategies will have limited effectiveness.[22]

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MAKING THE RECORD FOR APPEAL

Making the Record for Appeal—The Golden Rule

There seems to be a common thread running throughout the cases appealed to both the Tennessee Supreme Court and the United States Supreme Court. That common thread deals with the depth and completeness of the record, or should I say, the lack thereof. On May 14, 2018, the U.S. Supreme Court issued an opinion in *Byrd v. United States*[1] on an issue narrowed by the failure of the parties to make a full and complete record on all the issues surrounding the legality of a search. Due to this failure, the Court focused more on the issue of "standing".[2] This failure to make the record resulted in an order of remand to the trial court to develop the legality issue.[3] Later, on May 31, 2018, three cases were argued on the afternoon Tennessee Supreme Court docket. They were *State v. Decosimo,*[4] *State v. Williams,*[5] and *State v. Frazier.*[6] Although all three cases dealt with very different issues, all three were similar in the fact that the Justices asked questions which seemed to delve into topics not fully developed within the trial court record.

Sometimes lawyers get short or narrow sighted in their legal arguments and lose sight of the bigger picture. That seems to be the case in *Byrd v. United States*. In that case, the parties on both sides concentrated on the narrow issue of whether a person, who was not listed on a car rental agreement but was nonetheless in lawful possession or control of a rental car, had a reasonable expectation of privacy in the contents of the car. The proof in the trial court brought forth a plethora of facts that, if fully explored, would have justified the search of the car. The driver admitted that he had a marijuana cigarette in the car, which would give probable cause to search the car.[7] Also, there was another question regarding whether his possession of the car was "legal" or whether his intentional use of a third party to rent the car for the sole purpose of transporting heroin equated him with that of a "car thief" in unlawful possession of the car. Each of these two issues, had they been addressed at the trial court level, would have resolved the issue of whether the search was reasonable under the Fourth Amendment.

Within the three Tennessee cases were just recently argued in front of the Tennessee Supreme Court, it is difficult to pinpoint all of the issues left out of the record. However, in each of the Tennessee cases, counsel on each side addressed the record as best they could, but also said those dreaded words, "although this is not addressed in the record . . . I . . ." Such statements were a clear indication that the record was not complete for appellate analysis. Why? Everyone knows that on appeal, the record controls the outcome. At least one of these cases, if not all three, could have a significant impact on cases currently within the criminal pipeline.

The record in *Decosimo*, at first glance, appeared to be well-made from the trial court, but questions from the justices seemed to indicate some factual gaps. Those questions that exposed some factual support concerned the procedure used by the Tennessee Bureau of Investigation (TBI) for blood-alcohol testing relating to the use of testing instruments and the ability or lack thereof to manipulate the results obtained from those instruments. The focus of the trial record concerned the lack of evidence showing impropriety that the money received by the TBI from the BAT fee and it did not include the scientific process used to reach test results.[8]

The *Williams* case was quite different in that counsel for both sides acknowledge that part of the record was "missing".[9] The defendant argued that he was not given legally sufficient (actual) notice of the enhancing factors the State was seeking to use and that were ultimately used by the Court to enhance the sentence to that of a career offender.[10] The statute requires notice be given not less than 10 days before trial while case law provides the defendant with an opportunity to seek a continuance as a potential remedy if the notice is not timely filed.[11] In this case, the State filed the notice upon the completion of closing arguments, after jeopardy attached, and the defendant had no remedy available for this lack of compliance with the statute. The judge, however, had on two previous occasions, as he states in the record at sentencing, advised the defendant that he would be facing a sentence as a career offender.[12] The judge had knowledge of the defendant's history from a prior case that was pending at the time of indictment on the case at bar, but for which he had been acquitted at the time the second case went to trial.[13] The referenced colloquies themselves, however, were not provided in

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MAKING THE RECORD FOR APPEAL (Continued)

the record from the trial court and there were no facts present in the record to support that the agreed amendment to the indictment was the result of the late notice filed by the State. This left the Justices wondering about the colloquies' contents and subsequent request for a jury instruction on aggravated assault by the defendant.

A lack of record to support some of the State's argument before the Tennessee Supreme Court was also evident in the *Frazier* case. The State's primary focus was on Tennessee Code Annotated § 40-1-106, arguing that the statute gave statewide jurisdiction to issue search warrants to certain classes of magistrates, but limited it to geographical locations for others. In the argument, the State argued that District Attorney's relied on this statute and a 1985 Attorney General opinion for many years, but the State conceded that this information was from personal discussions and not proof in the record. The crux of defendant's argument was that Tennessee Code Annotated § 40-1-106 only defines who qualifies as a magistrate and jurisdiction is limited by Tennessee Code Annotated § 17-2-103 and § 16 -2-502. However, under the circumstances, this deficit in the record may not affect the outcome, because if the magistrate truly lacks jurisdiction to issue the search warrant, it is *void ab initio* and a good faith argument (not initially raised by the State) would not prevail.[14]

The lessons to be learned from these cases are: (1) look at both sides of the case, (2) anticipate defenses, (3) respond to defenses raised, (4) look for alternative arguments, and (5) present evidence at the trial level to address all. Failure to do one or more of these may result in at best, suppression of evidence or dismissal of a particular case, but at worst it may produce harmful future caselaw.

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1. *Byrd v. United States*, 200 L. Ed. 2d 805 (2018).
2. *Id. at* 818.
3. *Id.* at 819, "The Court leaves for remand two of the Government's arguments: that one who intentionally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief; and that probable cause justified the search in any event."
4. *State v. Decosimo*, 2018 Tenn. Crim. App. LEXIS 85 (Tenn. Crim. App. February 6, 2018), Application for Expedited Appeal Granted, 2018 Tenn. LEXIS 143 (Tenn. March 21, 2018), argued May 31, 2018, No. E2017-00696-SC-R11-CD.
5. *State v. Williams,* 2017 Tenn. Crim. App. LEXIS 843 (Tenn. Crim. App. September 13, 2017), Application for Appeal Granted, 2018 Tenn. LEXIS 17 (Tenn. Jan. 22, 2018), argued May 31, 2018, No. W2016-00946-SC-R11-CD.
6. *State v. Frazier,* 2017 Tenn. Crim. App. LEXIS 861 (Tenn. Crim. App. September 25, 2017), Application for Appeal Granted, 2018 Tenn. LEXIS 65 (Tenn. Crim. App. Feb. 14, 2018), No. M2016-02134-SC-R11-CD.
7. *Byrd* at 812.
8. *State v. Decosimo,* 2018 Tenn. Crim. App. LEXIS 85 (Tenn. Crim. App. February 6, 2018).
9. Counsel for the Appellant noted that the record did not contain the colloquies referenced by the judge during the sentencing hearing. It is important to note that the defendant permitted an amendment of the indictment in the request for the aggravated assault charge instruction. *See* endnote 1, *Williams* at *29. The defendant had been acquitted of the original indicted charges of aggravated rape. *Williams* at *14.
10. *Williams* at *21.
11. T.C.A. § 40-35-202(a). *See also, State v. Livingston*, 197 S.W.3d 710 (Tenn. 2016) (The notice must be written, express intent for sentencing beyond that of a standard offender and provide nature of prior offenses. If the notice is filed late, the defendant must show prejudice for the notice to ineffective.)
12. *Williams* at *25-26.
13. *Id.*
14. *See* T.C.A. § 40-6-108.

UPCOMING TRAINING

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

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.

Victim Issues - (TBA) December, 2018, Nashville, TN
The DUI training department will offer a one day training class focused on victim's issues involved in DUI cases. This training will coincide with the Mother Against Drunk Driver's "Night of Remembrance." During this event, MADD will recognize law enforcement officers and citizens for their great contributions to the enforcement and prevention of impaired driving in Tennessee.

Protecting Lives, Saving Futures Seminar (Franklin)

On May 23-24, 2018, Law Enforcement Officers and Prosecutors gathered in Franklin, TN to participate in a joint training seminar, covering all aspects of prosecuting impaired driving cases. One of the more popular sections of the seminar involved a wet lab exercise in which all students were able to observe Standardized Field Sobriety Tests being administered to volunteers that tested, at or above .08% BAC, on a breath test. Our next Protecting Lives, Saving Futures Seminar will take place in early 2019. Please look for future dates and locations for our comprehensive and informative Traffic Safety Seminars.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Impaired Driving Enforcement (ARIDE)
July 16-17, 2018, Nashville, TN
August 6-7, 2018, Waverly, TN

DUI Detection & Standardized Field Sobriety Testing
July 23-27, 2018, Sevierville, TN
July 30-August 1, 2018, Waverly, TN
September 17-19, 2018, Jonesborough, TN
October 15-17, 2018, McMinnville, TN

Drug Recognition Expert School (DRE)
August 20-30, 2018, Memphis, TN
(In-Service) September 5, 2018, Murfreesboro, TN

DUI TRACKER

DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from April 1, 2018, through June 28, 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 dispositions for the period from April 1, 2018, through June 28, 2018, since the last quarter were 1,249. This number is down from the previous quarter by 178. From looking at these numbers, we can see that the trend in DUI related dispositions in Tennessee has continued to fall this quarter, matching the lower disposition trends that we have been observing over the last year. The total number of guilty dispositions during this same period of April 1, 2018 through June 28, 2018 were 886. The total number of dismissed cases were 97. Across the State of Tennessee, this equates to 70.94% of all arrests for DUI made were actually convicted as charged. This percentage is slightly higher than the last quarter ending on March 31, 2018. Only 7.77% of the DUI cases during this current quarter were dismissed. Also, during this same period of time, only 206 of the total DUI cases disposed of were to different or lesser charges. Therefore, only 16.49% of the total cases were disposed of to another charge.

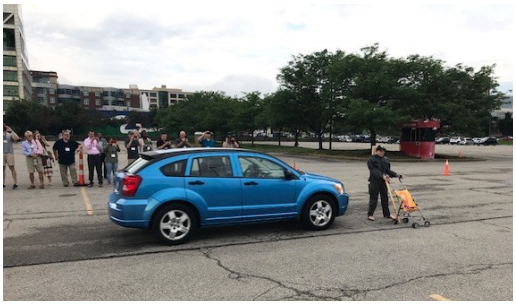
Fatal Crashes this last quarter

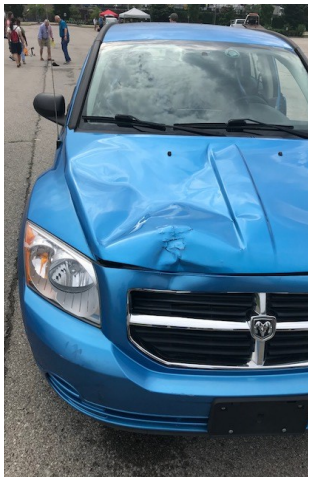
The following information was compiled from the Tennessee Integrated Traffic Analysis Network (TITAN) using an *ad hoc* search of the number of crashes involving fatalities that occurred on Tennessee's interstates, highways and roadways from April 1, 2018 through June 28, 2018. During this period, there were a total of 218 fatalities involving 203 crashes, which is an increase from the previous quarter. Out of the total of 218 fatalities, 37 fatalities involved the presence of alcohol, signifying that 16.97% of all fatalities this quarter had some involvement with alcohol. This percentage is slightly lower than the previous quarter. Further, there were a total of 21 fatalities involving the presence of drugs, signifying that 9.63% of all fatalities this quarter involved some form of drugs.

The year-to-date total number of fatalities on Tennessee roads and highways is 440. This is down by 44 from the 484 fatalities incurred last year at this same time. This is a significant decrease, from last year, in fatalities on our roads and a great trend towards our goal of reducing fatalities in Tennessee.

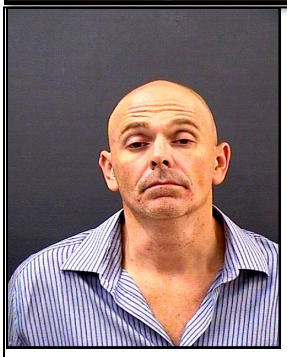
Lethal Weapon, Vehicular Homicide Seminar (Louisville, KY)

Last month, prosecutors and law enforcement officers travelled to Kentucky to participate in a joint training seminar covering all aspects of a vehicular homicide case. In June of 2019 this seminar will be offered in Pigeon Forge, Tennessee.





VEHICULAR HOMICIDE MURDERER'S ROW



State v. Chris Solomon, 83 CC1-2016-CR-832 (Sumner County)

On October 15, 2016, at around 1:30 pm, Chris Solomon was driving his silver Lexis 30 to 40 mph down a residential street when he struck two pedestrians, killing Bobby Pyles and severely injuring Dineen Cottrell. After striking the two, who were walking home from a nearby yard sale, the defendant continued to drive down the street until he eventually stopped and passed out. During a police interview, Mr. Solomon continued to fall asleep, even falling out of his chair at one point. The toxicology report indicated that the defendant had Xanax, Adderall and benzoylecgonine (an active metabolite of cocaine) in his system.

During a lengthy and emotional sentencing hearing, Judge, Dee David Gay, noted that Mr. Solomon had been to a drug and rehabilitation facility twice and had completed Sumner County's DUI court for repeat offenders. Judge Gay was "very discouraged" that the defendant had completed the DUI program and then killed a person and almost killed a second person. ADA Bryna Grant indicated that the defendant's criminal history included four DUI convictions since 2008, as well as convictions for theft, possession of marijuana false reporting and many probation violations. The State, along with the surviving witness, Dineen Cottrell, requested the maximum sentence of 33 years in TDOC. At the end of the hearing, Mr. Solomon was sentenced to serve the maximum sentence for each count and each count was run consecutive for a total sentence of 33 years in TDOC custody. He was also ordered to, "never, ever drive a vehicle again."

State v. Samuel Huffine, 2018 Tenn. Crim. App. LEXIS 247 (Sullivan County)

After a night of drinking with his wife, Mr. Huffine was driving them home, traveling westbound on Stone Drive in Kingsport, Tennessee. Stone Drive has three lanes of traffic in each direction with a turn lane in the center. At approximately 5:00 am, the defendant's Honda Accord drifted out of the westbound lanes and into the eastbound lanes of traffic, striking head-on a Kia Spectra being driven by Bobby Jarret in the center eastbound lane. Mr. Jarrett died from his injuries. A blood sample was taken from the defendant one hour after the crash and his BAC was .152%. It was also determined that Mr. Huffine was traveling 60 mph in a 45pmh zone.

Mr. Huffine plead guilty to 9 years, with the agreement that all counts would be served concurrently. Mr. Huffine requested a sentencing hearing to determine the manner of serving the 9 years. The trial court found applicable: enhancement factors (1) prior criminal behavior; (2) more than one victim involved; (10) no hesitation of committing the crime when high risk to human life; and (14) violation of a position of trust. The trial court sentenced the defendant to 9 years to serve in TDOC custody.

The Court of Criminal Appeals found that enhancement factors 1, 2 and 14 were incorrectly applied by the trial court. However, the CCA determined that the trial court correctly applied enhancement factor 10. Also, the CCA noted that the trial court correctly gave "great weight" to the probation factor, "confinement is necessary to avoid depreciating the seriousness of the offense." In sum, it was determined by the CCA that the record contained substantial evidence supporting the trial court's decision to deny probation. Therefore, since the CCA must afford a presumption of reasonableness to all in-range sentencing decisions, the sentence of the trial court was affirmed. (Continued on page 11)

VEHICULAR HOMICIDE MURDERER'S ROW

State v. Kevin Fleming, 2018 Tenn. Crim. App. LEXIS 218 (Campbell County)

Mr. Fleming was the driver of a pickup truck involved in a single vehicle crash, killing all three of his passengers. Mr. Fleming admitted to a trooper at the hospital that he had a couple of alcoholic drinks and that he had taken Hydrocodone earlier. The defendant agreed to give a blood sample, which was drawn 2 1/2 hours after the crash. The blood sample tested positive for alcohol (.07%), cocaine and Hydrocodone. After a jury trial, the defendant was convicted of DUI fourth offense and three counts of vehicular homicide. The trial judge sentenced Mr. Fleming to forty-two years TDOC. The sentence was later reduced to forty years when the DUI was merged with one of the vehicular homicide counts.

The Court of Criminal Appeals found that the use of some of the autopsy photographs of the victims, during the trial, were more prejudicial than probative. However, the overwhelming weight of evidence of the defendant's intoxication and guilt would have rendered the same verdict of guilt, even if the photographs had been excluded.

State v. Rebecca Robinson, 2018 Tenn. Crim. App. LEXIS 200 (Lawrence County)

On Sunday morning, December 7, 2014, Ms. Robinson and her three young daughters were in a vehicle crash involving a pickup being driven by Danny Pennington. Mr. Pennington died from his injuries sustained in the crash. A blood sample taken from Ms. Robinson indicated the presence of amphetamine (Adderall), alprazolam (Xanax), hydrocodone or dyhydrocodone (Loritab) and Lidocaine. It appears that none of the passengers were properly seat belted at the time of the crash. Speed and intoxication were determined to be factors involved in the crash. The defendant was convicted of vehicular homicide at trial and she was subsequently sentenced to eight years to serve.

Ms. Robinson appealed the fact that she was denied an alternative sentence and was ordered to serve her sentence of eight years in confinement at TDOC. The Court of Criminal Appeals determined that the record supported the findings of the trial court and the CCA upheld the trial court's sentence.

State v. Ramiro Ibarra, 2018 Tenn. Crim. App. LEXIS 96 (Warren County)

Mr. Ibarra was involved in a traffic crash after huffing canned air. As a result of the crash, a young girl was killed and three other people were injured. Mr. Ibarra plead guilty to one count of vehicular homicide and three counts of vehicular assault. The trial court sentenced the defendant to twelve years and ordered that he serve 364 days in confinement and the rest of his sentence on Community Corrections. After serving a little over a year on Community Corrections, Mr. Ibarra was transferred to probation. Eventually a petition to revoke the defendant's probation was filed for failing to report, failure to complete a drug and alcohol assessment, his admitted methamphetamine use and failure to pay court costs.

The trial court held a bail hearing at which testimony of the defendant's probation violations were discussed. After the bail hearing, Mr. Ibarra admitted the probation violations and the trial court sentenced Mr. Ibarra to serve the rest of his sentence in confinement at TDOC. The defendant appealed the ruling. The CCA stated, "Case law establishes that 'an accused, already on probation, is not entitled to a second grant of probation or another form of alternative sentencing.'" The trial court's judgment was affirmed.

SENTENCING ISSUES (STATE V. TRENT)

In *State v. Trent*, 533 S.W.3d 282, 292 (Tenn. 2017), Chief Justice Bivens stated , "[T]he imposition of a sentence on a criminal defendant is one of the most important decisions that trial courts are called upon to make because they invariably reduce a person's liberty, often eliminating it entirely." This quote and its lessons are valuable to both the trial courts and prosecutors alike. The *Trent* case centers around the trial court's denial of alternative sentencing and the reversal of this denial and imposition of probation in a vehicular homicide case by the Court of Criminal Appeals. The defendant had entered a plea of guilty to one count of vehicular homicide by intoxication with an agreement to be sentenced to eight years with the manner of service to be determined by the trial court at a sentencing hearing. The Tennessee Supreme Court found that a meaningful review of the record and the sentence of the trial court could not be conducted because the trial court "failed to make sufficient findings for the appellate courts to review the sentence" and the record was "inadequate to conduct an independent review of the sentence". *Id.* at 284. For this reason, the Court held that the record was "not sufficient" for the Court of Criminal Appeals to modify. The Supreme Court reversed and vacated the sentence imposed by the Court of Criminal Appeals, and remanded the case to the trial court for a new sentencing hearing. *Id.* at 296.

In addressing the record, the Supreme Court makes clear that the facts surrounding the defendant's actions on the date of the incident were recited from the affidavit completed by Trooper Bobby Brooks, of the Tennessee Highway Patrol, and by a stipulation of the parties at the time of the plea. The affidavit, which was intended only to provide enough facts for probable cause, described the crash as the defendant "crossed the center line on US Hwy 25E, striking the vehicle being driven by Karen Freeman . . ." *id.* at 286; and the facts further stipulated to by the parties were "that Kevin E. Trent, on or about May 3d, 2012, in Claiborne County, Tennessee did unlawfully, feloniously and recklessly, as the proximate result of Kevin E. Trent's intoxication, as set forth in 55-10-401, kill Karen Freeman by the operation of a motor vehicle in violation of 39-13-213." *Id.* at 284. Absent were the details of the crash, which could have included a wealth of information that could have been used in justifying the denial of an alternative sentence. (TCA 40-35-114(10)) For example, the following questions, though not exhaustive, could have been asked of the investigating witnesses: "Was a speed determined? How far into Ms. Freeman's lane did the defendant travel when he struck her vehicle head on? Did any other vehicles have to swerve to avoid Trent that day on the roadway? (other potential victims) What was Trent's demeanor, appearance, clues of impairment that afternoon, just after the crash? Did the defendant consent to a blood test or was a search warrant obtained?" (TCA 40-35-103(5)) Also, it is important to note that even though toxicology results were mentioned by parties, the TBI's lab report and expert testimony concerning the meaning of those results were noticeably absent from the record. These overlooked areas may also have supported the denial of alternative sentencing by the trial court. *Id.* at 293.

Although the burden of showing suitability for full probation is on the defendant, and not the State, pursuant to TCA section 40-35-303(b), it is incumbent upon the State to provide the court with sufficient facts to allow the trial court to properly analyze and weigh both enhancing and mitigating factors in conjunction with the general purposes of sentencing under T.C.A. section 40-35-102. In doing this, the State would assist trial courts to establish and weigh those applicable sentencing factors, on the record, and permit the presumption of reasonableness to attach to the trial court's decision to deny probation and impose a full sentence in the custody of TDOC.

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