



# DUI NEWS

**PUBLISHER:**

Tom Kimball, A.D.A.

**LAYOUT AND DESIGN:**

Sherri Harper

**INSIDE THIS ISSUE:**

<i>Traffic Deaths Fall</i>	2
<i>Recent Decisions</i>	3-4
<i>Murder's Row</i>	5
<i>CIRT Investigation</i>	6-7
<i>Mind Map</i>	8
<i>Biker Training</i>	9
<i>Questions for TSRP</i>	10
<i>Article</i>	11
<i>Nat'l Traffic Law Ctr</i>	12

TN DISTRICT ATTORNEYS  
GENERAL CONFERENCE,  
James W. Kirby, Exec. Director  
226 Capitol Blvd. Bldg, Ste 800  
Nashville, TN 37243  
DUI Training Division  
DUI Office: (615)253-6734  
DUI Fax: (615) 253-6735  
e-mail: tekimball@tndagc.org  
web: www.tndagc.org

**Governor's Highway Safety Office**

James K. Polk Office Bldg  
505 Deaderick Street, Ste 1800  
Nashville, Tn. 37243  
Office: 615-741-2589  
web-site: www.tdot.state.tn.us/

*This material was developed through a project funded by the Tennessee Department of Transportation, Governor's Highway Safety Office and the National Highway Traffic Safety Administration.*

## IS OUR SYSTEM HEALTHY?

A decade ago a well respected Tennessee Judge in a major metropolitan area became the poster child of the MADDVOCATE magazine. The people at MADD were unhappy with the particular Judge when he fussed at the prosecutor in Court that DUI cases were strangling his docket. He complained loudly that he could not possibly conduct trials for DUI when he had murders, rapes and robberies to contend with.

After the Judge was embarrassed by the article in the MADD magazine, he decided to clean up the DUI cases on his docket by dedicating a week a month to DUI trials. His Court became most active for a few months. Prosecutors and defense attorneys had their feet held to the fire. There were about ten trials in three months. There were over 100 pleas of guilty. After a few months the dockets were in control, continuances were rarely granted and the Judge had the most relaxed courtroom in the city.

### HOW ARE WE DOING NOW?

Every year the good people at the AOC calculate Trial Court statistics. At my special request they send me DUI disposition statistics. Between July 1, 2006 and June 30, 2007, there were 272 jury trials for DUI. There were almost 11,000 dispositions. About 2% of the cases went to a jury for a decision. Of those 61% resulted in convictions. Often times the cases that go to trial are the cases in which the defense attorney adamantly believes he has a decent shot at winning. Hopefully, the most important statistic is the one that shows the percentage of cases in which justice was accomplished. That one should be 100%. Some statistics jump off the page. For instance, there were 22 cases in the pre-trial or judicial diversion category. By law diversion is not permitted in DUI cases. Who are these 22 and how could that have happened?

There are 612 persons (about 5%) listed as guilty plea-lesser charge. There is no lesser included offense for DUI. What happened? Some prosecutors dismiss a weak DUI and amend the indictment by agreement to permit a plea to reckless driving. Such cases should be listed as dismissals for DUI purposes, because no case can legally be reduced to reckless driving.

### DISPOSTIONS BY PLEA

There were 8,758 cases which resulted in a guilty plea as charged or a dismissal/nolle prosequi. A nolle often occurs when the defendant pleads guilty to one count of DUI in a two count indictment. There were 4,441 cases which resulted in guilty as charged pleas.

Prosecutors in some cities indicate that the problem featured in the MADDVOCATE years ago has not gone away. They complain of backlogs and the reluctance of some Judges to hear DUI trials. They feel pressure from Judges, Defense Attorneys and fellow prosecutors to get rid of the DUI's. When they respond that DUI's kill, they are viewed as unreasonable zealots despite 512 alcohol related traffic deaths last year. Is our system healthy if justice is not the end result? Is our system healthy if the guilty are excused due to over burdened Judges and Prosecutors? If our system is sick, we must find a cure.

**CAN SESSIONS COURT AS A COURT OF RECORD PROVIDE A CURE?**

States surrounding us permit the use of jury trials in Sessions Court. Tennessee has never permitted the General Sessions Court to operate as a court of record. Historically, our State permitted citizens without law degrees to operate as Sessions Court Judges. That is no longer the case.

Currently our Sessions Court Judges can conduct bench trials, but the defendant is entitled to a do-over in Criminal Court with a de novo appeal, if he loses. We have been content for too long with a system in which the Sessions Court is treated as second class.

In the big blue commonwealth to our north every misdemeanor case is resolved in District Court, which is the equivalent of our Sessions Court. All appeals go directly to the Court of Appeals. Misdemeanors are not reviewed in a Grand Jury. In the commonwealth there are no misdemeanor cases lingering for years. Most are resolved in about three months.

In our State, especially in major metropolitan areas, it is not uncommon for a DUI first offense to go to trial two years after the crime occurred.

This is kind of sick. It needs to change. Memories of the events of the night of the crime are at best strained and at worst erased. The entire case for the State revolves around the written report.

We need more Judges and more juries to change the way our system works. It is time to examine what needs to be done to empower our Sessions Courts and treat them like they are capable of rendering just verdicts.

**TENNESSEE TRAFFIC DEATHS FALL, THANKS PARTLY TO POLICE GRANTS**

*Fatalities lowest number in 15 years; largest cities record biggest decreases; Governor's Highway Safety Office sees grant money to policing agencies as a key factor*

By KATE HOWARD  
Staff Writer

Traffic deaths in Tennessee dropped by about 9 percent last year, with the most sizable decreases in the state's biggest cities, according to preliminary totals.

The state recorded 1,287 traffic fatalities in 2006. All the reports for 2007 are not yet filed with the state but it appears likely the total will be 1,169 — 118 fewer deaths than the previous year, said Kendell Poole, director of the Governor's Highway Safety Office.

"This will be the lowest fatality number we've had in the state in 15 years," Poole said.

Metro had 66 traffic fatalities last year, a decrease of 25 percent from the previous year, according to Metro police. Poole said that the drops in Knox, Hamilton, Shelby and Davidson counties account for almost all of the decrease.

"We'd like to think the drops in urban areas are helped by grant money," Poole said. "We reached out to law enforcement last year as never before."

While it's too soon to be sure, Poole also expects to see a drop in alcohol-related fatalities. So far, fewer than 30 percent of last year's deaths involved alcohol, Poole said. Much of the grant money Poole mentioned went to policing agencies for DUI checkpoints and extra patrols.

"Results like that show that our efforts are working," said Laura Dial, executive director of Mothers Against Drunk Driving Tennessee.

**Tennessee is late**

Poole and Dial list their biggest legislative priority this year as pushing through a bill that would allow officers to immediately revoke the license of a person arrested on drunken driving charges. Gov. Phil Bredesen has said he will push the legislation.

"Tennessee is very late in the game with this law, since many states adopted it in the early 1990s," Dial said. "It sends a very powerful message to the public: you drive drunk, the police will take your license right there."

Dial is also pushing for legislation requiring that anyone convicted of driving under the influence use an ignition lock connected to a breath alcohol monitor that would prevent the car from starting if the device determined the driver is over the legal limit. That requirement would continue for six months to a year.

Reprinted from the Tennessean January 14, 2008

## RECENT DECISIONS

**State v Page**, 2008 Tenn. Crim. App. LEXIS 139

REASONABLE SUSPICION

The Court upheld the traffic stop of the defendant and described it. “The video shows the back of a black Corvette traveling on a straight two-lane road during daylight hours. In the beginning, the Corvette drives on the right side of its lane, and its right tires drive on or over the right white line of the lane several times. It travels toward the left side of the lane and weaves within its lane for a short period. About one minute into the video, the car’s left tires cross the double yellow line that separate the two lanes of traffic and stay over the double yellow line for a few seconds. Shortly thereafter, the car stops in front of the police cruiser.” The Court notes that this stop is distinguished from the Binnette, Puckett and Hannah cases cited by the defense.

**State v Fields**, 2008 Tenn. Crim. App. LEXIS 81

SERVICE OF HMVO PETITION

The defense argued and the State agreed that Fields was not properly served with a petition to declare him a habitual motor vehicle offender. Despite a lack of service a default judgment was taken and it was not served on Fields. Fields argues that a prior DUI conviction from 2005 could not be used against him as it was pending appeal at the time. The Court rejected that argument citing State v Sneed, 8 SW 3d 299.

**State v Adkins**, 2008 Tenn Crim App. Lexis 71

SUCCESSOR JUDGE

Adkins was convicted by a jury and then claimed that the Judge, elected after his trial, could not act as thirteenth juror. He claimed he was entitled to a new trial. Judge Dee Gay disagreed and was affirmed. The Court discussed successor Judges in great detail and determined in this case that witness credibility was not an overriding issue. “The defendant did not contest that he crossed the yellow line four times before Corporal Clifford stopped him, that he drank three beers, that his eyes were bloodshot and glassy, that his car smelled of alcohol, that he was also taking a prescription anti-depressant, or that he performed inadequately on the field sobriety tests. His testimony and that of his friend about his ear and knee problems were not in dispute. Corporal Clifford testified that the defendant reported these issues to him, and the videotape contains evidence of the defendant’s report of these alleged problems.”

**State v. McMahan**, 2008 Tenn. Crim. App. LEXIS 103

12 YEARS



This Sevier County habitual offender with ten prior DUI’s did it again. This time he was sentenced as a range two offender and given consecutive time for felony DUI, habitual motor offender violation, reckless endangerment and violation of implied consent.

Here’s his list of priors convictions: 10 DUIs, 7 driving revoked, 4 assault, 4 probation violation, 4 evading arrest, 3 disorderly conduct, 3 habitual traffic offender; 2 reckless driving, 2 theft, 2 failure to stop at accident scene, 1 destruction of property, 1 resisting arrest, 1 telephone harassment and 1 misdemeanor marijuana possession. McMahan was on probation when he drove drunk with a female friend and two children in his car and went off the side of the road.

**State v Jones**, 2008 Tenn Crim App. Lexis 210

VEHICULAR HOMICIDE



Roger Jones (pictured) ran a red light in Cocke County and slammed into a car driven by Amy Leatherwood. She was killed and sadly three children in the car were also injured. One of the year old twins suffered brain injuries.

Jones asked for alternative sentencing. He stated, “I am as sorry as I can be for the children also, thank God I didn’t kill anyone else. If I had the choice I wish it could have been me that died instead of the lady.” Jones admitted he had been out drinking the day of the crash and that he usually drank 12-18 beers a day. The Court denied his request as confinement was necessary to avoid depreciating the seriousness of the offense.



## RECENT DECISIONS

**State v Boddie**, 2007 Tenn Crim App Lexis 935

CHECKPOINT AND PUBLICITY

Sgt. Kevin Williams of the Highway Patrol testified about this sobriety checkpoint. It was obvious that the checkpoint was completed in compliance with the General Order with one possible exception. The Sergeant was not certain that the media had been notified. The defense argued that a lack of proof of publicity would cause the checkpoint to be unconstitutional per se. The court pointed out *State v Hicks*, 55 SW3d 515, holds that a court must evaluate the overall reasonableness of the checkpoint. A checkpoint is only unconstitutional per se if the field officers' discretion is not properly limited.

**State v Doyle**, 2008 Tenn Crim App Lexis 22

PHYSICAL CONTROL AT THE PILOT STATION

In Lenoir City, Trooper Daniel Rusky thought he was stopping at the Pilot Station for gas at 5:00 pm. Little did he know how his evening would change due to a need for fuel. Phillip Doyle drove into the parking lot with a different purpose. He did not need gas, but he was there to refuel. An off duty Lenoir City officer, Joe Foster, was at the Pilot working security. Trooper Rusky watched the defendant purchase two cans of beer. "A wave or wind of the smell of alcohol hit him". The trooper asked Foster to detain the defendant while he paid for gas, but Defendant Doyle decided to detain himself for twenty minutes in the men's room. When he reappeared the trooper greeted him and asked him to perform some tests. Doyle was argumentative, had bloodshot eyes, an unsteady gait and a ripe smell. Field sobriety tests were attempted and led to a conclusion that the defendant was extremely intoxicated. The court affirmed the conviction noting that officer Foster saw the defendant drive and that the defendant was in physical control.

**State v Glasgow**, 2008 Tenn Crim App Lexis 75

MYSTERY DRIVER & INCONSISTENT VERDICT

The intoxicated defendant was observed alone laying on the ground with his crashed ford escort in a ditch. A deputy arrived after receiving a 9-1-1 call. The deputy spoke with the injured defendant before he was taken to the hospital. The defendant claimed a female was driving. A Trooper arrived to investigate and later interviewed the defendant, who was a 4th offender with a revoked license. The defendant could or would not tell the trooper a name for the female. A year later the defendant's girlfriend claimed she was driving. The jury did not buy it and convicted the driver of DUI 4th. The parties stipulated that the defendant was driving on a revoked license. For reasons that are known only to the panel of twelve, the defendant was found not guilty of driving on a revoked license. Our courts do not demand consistent verdicts. The conviction was affirmed.

**State v Rauhuff**, 2008 Tenn Crim App Lexis 123

ATTACKING OFFICER COMPETENCE

Marvin Rauhuff had gone for a spin. Literally. He had lost control and did a 360 and stopped with two flat tires against a curb. One of Knoxville's finest, officer Travis Porter, arrived and Rauhuff revved his engine as if he was going to drive away. The 1986 Toyota with two flat passenger side tires did not cooperate. The officer opened the door and saw bloodshot eyes, smelled that distinct odor and watched as Rauhuff stumbled out of the truck. Field sobriety tests were too much for the defendant. The defendant examined the officer and testified in a way to try to convince the jury that he was not impaired, but had been knocked silly. For instance, the officer did not know or note how many times Rauhuff stepped off the line. The defendant claimed the parking lot on which he performed was gravel with broken pavement and there was no line to stand on. He claimed his odor probably came from seafood or butter. When asked why he did not tell the officer of any leg injury or being knocked silly, he replied, "I learned a long time ago you don't ask questions and tell stuff. You just reply." Rauhuff was convicted for DUI third offense.

*you don't ask questions and tell stuff. You just reply*

Melvin Rauhuff



## VEHICULAR HOMICIDE MURDERERS ROW

### Kills after release



McPheron

Jeremiah McPheron used to be known as a burglar and thief. Now he is in prison for 25 years for killing his friend and maiming a stranger. He had felony convictions for theft over \$1,000 in both Hickman and Dickson Counties. He also two aggravated burglaries convictions and one for a burglary that was not a home. One of the aggravated burglary convictions in July, 2006 was for six years. On March 25, 2007 he received another six year sentence for contraband in the jail in Hickman County. Unfortunately, he did not go to prison. Instead he was placed on community corrections and allowed to work construction. He and his friend, Perry Rogers were drunk in Williamson County. Rogers became too drunk to drive. McPheron took over with a .27 blood alcohol content. They collided with another vehicle on Franklin Road at Mack Hatcher and fled the scene at high speed. Shortly thereafter, the McPheron driven vehicle collided head-on with a vehicle driven by Ms. Carolyn Allen. Rogers was partially ejected from the vehicle and was pronounced dead at the hospital. Ms. Allen was treated several days at Vandy, and still suffers from injuries received. McPheron received 25 years on the Aggravated Vehicular Homicide charge and four years concurrent on the Vehicular Assault.

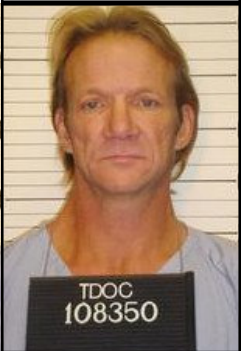
### The .30 killer



Faber

Michael Faber had a .30 BAC when he ran a red light and smashed into a family on Highway 13 in Montgomery County. The driver Opal Lee Lamison died on the scene. Nine year old, Michael Lamison Jr. died at Vanderbilt Hospital later. Seven year old Shane and fourteen year old cousin Ryan as well as husband and father, Michael suffered serious injuries. Faber had two prior convictions in 1996 and 2001.

### Can't handle parole



Adams

James Edward Adams Jr. is back in prison. In 1998 he was headed to Chattanooga to drink and party. He lost control on a downgrade on Highway 111 in Hamilton County, while intoxicated he slammed into another vehicle, killing Charles King, the passenger in the other vehicle, and severely injured the driver, Scott Hargrove. Adams had a 21 year old pregnant passenger, Cynthia Green. She and her unborn child were also killed. Adams was sentenced to 18 years in part due to his 10 previous DUI convictions. He was granted parole in May, 2006. He was arrested in August, September and October, 2007 for driving on a revoked license and domestic violence charges; serving 25 days in jail. His parole was revoked in November, but he gets another chance at a hearing June 1st.

### Kills friend



Michael Hight plead guilty in Sumner County to one count of vehicular homicide and received 9 years to serve in prison. Hight wrecked his SUV on October 2, 2007. His friend and neighbor Michael Harrison was killed instantly. Hight fled the scene on foot. Hight walked home and after conferring with his wife, called the Sheriff's office. They escorted him back to the scene, to the hospital and then to jail. The victim left behind a wife and a very young child whose lives have been ripped apart. Hight's blood alcohol content was a .13 with a low level of marijuana.

## Commercial Vehicle Crash Investigation

Sergeant Andy Shelton  
Tennessee Highway Patrol  
Critical Incident Response Team

Every day of the week a police officer may be dispatched to many types of calls for service. Among the more common of these calls is that of the traffic crash. Every experienced officer rolls up to the scene, cares for the injured, identifies the drivers, calls for the wreckers, and begins the pre-requisite paperwork. But, when there is a critical injury or fatality at the scene, there is a heightened level of urgency and importance. Is the scene a tragic crash or a crime? When a commercial vehicle is added to the equation, many officers are ill prepared to tackle the scene as a whole.

A commercial vehicle related crash can present a number of challenges that are not found at most crash scenes. The first of these can be the sheer scope and magnitude of the crash. A commercial vehicle can cause damage that is simply not found at any other type of scene, aside from train related incidents. This, combined with the size of the vehicles and potential load spillage, can often create traffic problems and logistical issues that are far greater than most traffic crashes. Additionally, it is not uncommon to see several hundred feet of skid marks leading into a commercial vehicle related crash, often causing the moderately experienced to jump to improper conclusions.

The second of the challenges at a commercial vehicle crash scene is that of the driver's paperwork. Even experienced commercial vehicle inspectors are often confounded with the information they find in the Drivers Record of Duty Status, commonly called a log book. When a commercial vehicle related injury or fatal crash occurs, the log book and all other paperwork in, on, and around the truck may be evidence that could transform a crash to a crime.

The last of the major commercial vehicle challenges to be addressed in this article is that of the vehicle itself. Most officers can recognize vehicle/equipment violations on a passenger car, but one can not look at a truck and tell if it had proper braking efficiency without specialized training. Additionally, the vast majority of citable passenger car equipment violations will not directly contribute to a crash. Many with a commercial vehicle will.

The first recommendation I would make to any crash investigator at a commercial vehicle scene is, "Take a breath. You can handle it."

Take a few minutes to look at the crash scene and try to determine things like direction of travel, vehicle lane usage, and traffic controls. Use the same basic skills you would use at any crash scene to determine if there is any visible sign of a traffic violation on the part of either driver. Once you have made your initial read of the scene, talk to drivers, passengers, and witnesses. Use your investigative skills to see if things exist that raise your suspicions. If there are, look deeper. Ask for assistance if you are not sure what to look for or where to look. If a commercial vehicle driver demonstrates signs that he or she is overly fatigued, or inversely is overly hyper definitely look deeper.

Keep in mind that commercial vehicle drivers are prohibited from consuming any alcohol for at least 8 hours prior to driving. If you smell an alcoholic beverage on a driver's breath, he or she is in violation of at least one federal code.

According to federal law, the operator of a commercial vehicle may not have a blood alcohol level of more than .04. That is one half of the national average limit for a passenger car driver. Any signs of alcohol or drug usage on the part of a commercial vehicle driver or presence in the vehicle should be taken seriously by the investigator.

The next step to take is to secure the truck. If you have a commercial vehicle involved crash, you are dealing with three things. The first is the truck. The second is the driver. And, the third is the business the truck and driver were conducting. Whenever a commercial vehicle has been involved in a crash, every piece of paper in the truck is potential evidence. If a driver is allowed to move in and out of his truck unobserved, some or all of this evidence may be lost.

We are talking about the dark science of the log book. I have been told by many officers that they "just don't know what to look for in a truck." A commercial vehicle is a highly regulated business on wheels. Therefore, the operator of a commercial vehicle is required to have and maintain certain paperwork at all times. This paperwork can show if a driver may be fatigued, or it may be evidence of habitual traffic violations, such as speeding. Paperwork often exists that can prove a driver knowingly violated the law and had done so for hours, days, or even weeks. Every gas or fast food receipt, hand written note, scale ticket, and traffic citation in the vehicle may be useful in your investigation.

These items can either verify or impeach the driver's logs. If you are unable to get the assistance of a commercial vehicle inspector at the scene of an injury or fatal crash, secure *all* of the paperwork in the vehicle for later analysis.

## Commercial Vehicle Crash Investigation

Once you have secured the truck's contents, you need to take certain steps to ensure that the cleanup of the crash scene does not destroy evidence on and within the workings of the truck. The air brake system on a truck is vastly different from that of the hydraulic braking system found in passenger cars. Commercial vehicle braking systems can oftentimes be analyzed after a crash to determine if they were in working order prior to the crash. However, the next step in your crash investigation process, the cleanup, may destroy any chance of performing that analysis.

One phrase you need to remember whenever you are talking to a wrecker driver at a commercial vehicle crash scene is, "Cage the brakes." This involves using a specialized bolt to back the brake shoes away from the drums, and then locking them in place. It will take a wrench and some muscle power to accomplish, and may take some persuasion to get it done.

If air, from either the truck's own system or the wrecker, is used to free the brakes in order to tow the truck, evidence will be lost. I have had to argue with a few wrecker drivers to get the brakes caged, especially on rainy nights when a vehicle is up to its axles in mud. Even so, it is imperative to maintain the condition of the braking system for later inspection. Once the caging bolts have been set, use evidence tape and wrap the chamber and the bolt until it can be inspected. The wrecker driver will enjoy showing you where they are so you can get as dirty as he did. Remember, do not allow air to be connected to a truck if you intend for it to be inspected at a later time.

Another truck item that can be useful in some commercial vehicle crash investigations is the engine management computer. This is often erroneously referred to as the "black box." If you have already secured the truck in order to protect the paperwork, you have done most of what is required to prevent data loss. You should also ask the tow company to disconnect the truck's battery cables. It is difficult to erase or corrupt the data in the engine management computers. However, repeated ignition key cycling or power spikes may cause some later difficulties.

As to the evidence of the crash, there may be none, or could be dozens of marks on the road in a tractor-trailer versus passenger car crash. These may look like traditional "skid marks," or may vary from "skip skids" to scrapes from vehicles sliding on their tops and/or sides. It is easy to become overwhelmed with the challenges of trying to decipher the myriad road marks generated by one of these crashes. Reconstructionists are taught to avoid trying to identify every tire mark, scratch, and gouge while they are standing in the road. A properly drawn, scale diagram is a necessity in many commercial vehicle crashes.

If you have reason to think that you are dealing with a crime, employ the talents of your department's crash reconstructionist to assist with the scene. If you do not have a crash reconstructionist in your department, seek the assistance of other departments. Do not hesitate to ask for help.

The logistical challenges created by the magnitude of the crash can be overcome with some creative thought. You may need to be prepared to call for more than one wrecker to handle the situation. The majority of tow companies that deal with commercial vehicles are more than capable of helping you with the logistics. Ask them for suggestions. (Not the guy that caged the brakes). Additionally, the drivers and/or company representatives can provide information for handling fuel spills and load cleanup.

Remember, when working the scene of a commercial vehicle crash or any other wreck, you are not alone. Even if you are the only officer on duty in a small town, members of other agencies can assist you. Every Trooper in the Tennessee Highway Patrol is certified in inspecting the Driver's Record of Duty Status and vehicle paperwork. Additionally, many Troopers are capable of inspecting commercial vehicle brake systems. If you need a second set of eyes at a crash scene, just ask.

The Tennessee Highway Patrol Critical Incident Response Team may be able to lend assistance if you encounter a major scene or suspect that you may have a crime and do not have a trained reconstructionist in your department.

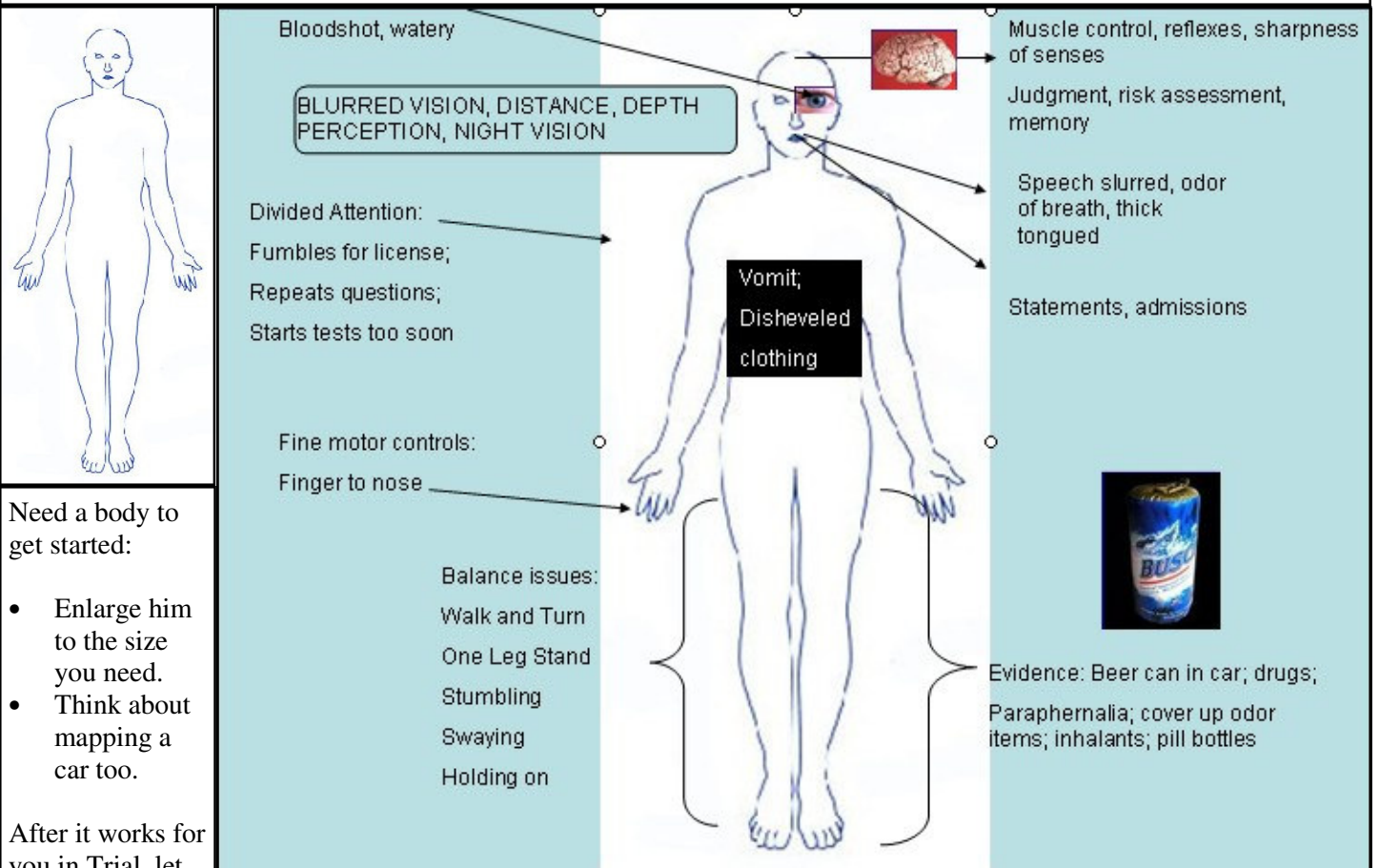
Do not forget to consult with your District Attorney General's office. If you suspect you are dealing with a crime, they should be brought on board as soon as possible. They will be able to offer suggestions as to how to proceed with your investigation, or additional items to examine.

With all of this having been said, not every commercial vehicle crash is a crime. In fact, the majority of commercial vehicle crashes I have investigated have not been the fault of the commercial vehicle or its operator. While there are many things to consider when approaching the challenges of investigating a commercial vehicle crash, do not enter into a scene with preconceptions as to the cause. Investigate.

# THE MIND MAP REVISITED

Several years ago, former Tennessee Prosecutor, John Bobo, wrote an article about mind mapping in *Between the Lines*, the newsletter of the National Traffic Law Center. John wrote about using a simple visual aid in closing argument to focus on the defendant's impairment. John wrote: "To mind-map a case with the jury, put a sketch of the defendant in the center of the board and spoke out all the evidence of impairment from trial."

This can be done simply using a poster board and the most remedial artistic skill. It can also be done using a computer with hyperlinks. The method is dependent on the prosecutor. A map of the defendant's impairment should overcome defenses that attempt to excuse part of the defendant's behavior. If the defense attempts to provide an excuse for every aspect of the impaired behavior, a jury applying common sense should conclude that they are being misled. Here's a sample of a map of impairment.

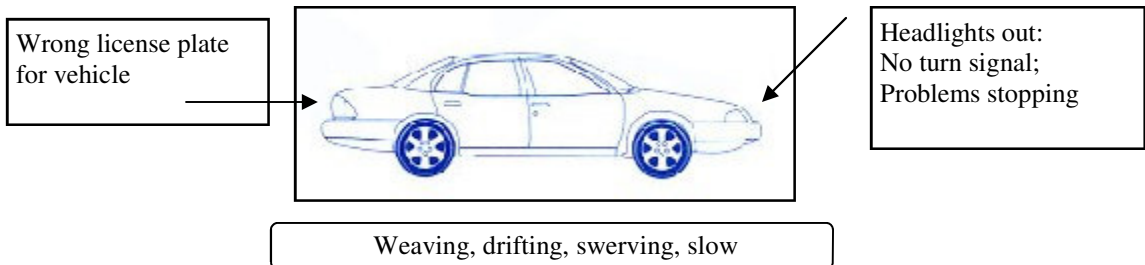


Need a body to get started:

- Enlarge him to the size you need.
- Think about mapping a car too.

After it works for you in Trial, let me know!

Contact Tom at tekimball@tndagc.org for a computer model.





## PROSECUTOR TRAINING

Two multiple day courses are on the horizon as we go to press.

**Prosecuting the Drugged Driver** is scheduled April 7-9 at TBI headquarters. It will include portions of the DRE pre-school for officers.

### CROSS EXAMINATION

**Cross Examination** is a four day course May 12-16 in a strategic planning workshop environment. The course will include instruction by Tom Henderson, John Tierney and Bob Deckle. Specific workshops will include case preparation, the use of approach point forms and control factors and techniques. Expert witness preparation will feature preparation for cross examination concerning toxicology issues.

The DUI Training Unit has been busy during the last several months delivering training in many different communities for various types of audiences. Every Tuesday Jim Camp teaches Fourth Amendment Training to the Tennessee Highway Patrol in service classes. This class features traffic stops, reasonable suspicion, probable cause and post arrest searches. Jim teaches about 45 officers per week.

The Training Unit also carries the Cops in Court class across the State. Tom Kimball has conducted the class for the Erin Police Department in-service training, Blount County Training Academy and the Advanced Standardized Field Sobriety Test class in Franklin. Two more classes are scheduled in April in Camden and Huntington. The unit intends to honor every request for this class as schedules permit.

Tom has also spoken to groups about traffic safety issues in Nashville and Memphis and provided information to many entities about pending legislation.

The Training Unit also supports Standardized Field Sobriety Test classes by teaching about the Legal Environment, Report Writing and Mock Court. The Governor's Highway Safety Office conducts ten SFST classes per year at various sites in addition to conducting SFST training at the Tennessee Law Enforcement Training Academy. The last TLETA class included 108 recruits.

## SAVE THE BIKERS

Fatal crashes in Tennessee continue to include a disproportionate number of motorcyclists. The popularity of motorcycles has increased as our population ages. Many people are driving their first bikes after they hit the age of fifty. So, how can the silver haired bike increase his/her chance of survival? It's all about training.

### MOTORCYCLE TRAINING PROGRAMS

The Tennessee Motorcycle Rider Education Program offers two intensive courses to prepare you for the challenges that the streets offer. One is for beginners, the other for more experienced riders. This allows students with similar skill levels to learn together.

The Basic Rider Course(BRC) is an entry level course designed for new riders. It incorporates classroom discussion and hands on practice. It is essential for safe riding. Motorcycles are provided.

The Experienced Rider Course (ERC) is for people who are already riding, but want to learn and practice more advanced skills.

Motorcycle Safety Foundation (MSF)-Certified Instructors/Coaches teach courses in a safe, off-street environment. These Instructors/Coaches are highly experienced riders with the patience, understanding and knowledge to help students develop the skills they need to become safe, responsible motorcyclists. Current riders and anyone thinking about riding (ages 14 and up) are encouraged to enroll in a Rider Training Course.

To find your local Rider Education program or to **SENTENCE** a biker to attend a course after an infraction, go to: <http://www.state.tn.us/safety/mrep.htm> or contact: John Milliken, Program Coordinator for the Department of Safety.

## QUESTIONS FOR THE TSRP

- Question:** A defendant wants a restricted Commercial Driver's License (CDL). Can he get one?
- Answer:** No!. There is no such thing. If the vehicle the person drives does not require a CDL, such as a florist delivery van, etc. the person can get a restricted Class D license with an F endorsement.
- Question:** The blood test in a vehicular homicide occurred two hours and three minutes after the arrest. Will it be suppressed?
- Answer:** It should not be suppressed. The 2 hour limit is found at 55-10-406(a). However, 55-10-406 (d) states: **(d)** Nothing in this section (55-10-406) shall affect the admissibility in evidence, in criminal prosecutions for aggravated assault or homicide by the use of a motor vehicle only, of any chemical analysis of the alcoholic or drug content of the defendant's blood which has been obtained by any means lawful without regard to the provisions of this section.
- Question:** Do you know of any cases that affirm the language "impairs to any extent" from Tennessee Pattern Jury Instruction 38.01?
- Answer:** See **State v. Curtis, 1992 Tenn. Crim. App. LEXIS 810**  
**State v. Tate, 2000 Tenn. Crim. App. LEXIS 473**  
**State v. Waddey, 1996 Tenn. Crim. App. LEXIS 399**
- Question:** The defendant has a restriction on his license requiring an ignition interlock. He is stopped for speeding and does not have one. What law has he violated?
- Answer:** The violation is a class A misdemeanor at 55-50-331(f). The offender should be charged with "operating a vehicle in violation of the imposed conditions."
- Question:** The Supreme Court decision in State v Hicks reversed a conviction in a case with a Driver's License checkpoint? My troopers still conduct Driver's License checkpoints. Can I prosecute these cases?
- Answer:** Yes. The checkpoint in Hicks was flawed. If the troopers are following the procedures set out in General Order 410-1, the checkpoint will not be flawed. To be constitutional the Court demands that we prove a substantial state interest in licensing, which is greater than the brief warrant-less intrusion into the lives of citizens. The Dept of Safety has the data that is needed to show a substantial State interest. It includes information about the number of licenses cancelled, suspended or revoked in a year, the number of unlicensed driver's in Tennessee and the number of fatal crashes involving unlicensed drivers as compared to licensed drivers. The Department can even tell you the percentage of drivers involved in pursuits who were unlicensed. Ultimately, the decision on whether we meet our burden is left to the Courts. The Ohio Supreme Court in a decision handed down several months before Hicks stated it this way:
- "Automobile licenses are issued periodically to evidence that the drivers holding them are sufficiently familiar with the rules of the road and are physically qualified to operate a motor vehicle. Persons who are too young or too old to drive pose a threat to the public safety. Persons who have had their licenses suspended for convictions of operating a motor vehicle while under the influence of alcohol often disregard their suspensions and drive anyway, endangering the public. In short, the state has a critical interest in protecting its citizens from drivers who either are not qualified to drive or have been forbidden to drive because of a record of driving offenses.  
 See Ohio v Orr 91 Ohio St. 3d 389, ; 2001 Ohio 50; 745 N.E.2d 1036.
- Question:** I see a bill has been filed to prevent us from reducing a DUI to reckless driving. Reckless driving is not a lesser included of DUI. We can't reduce DUI cases to reckless driving now. What's the point of the bill?
- Answer:** Some counties in Tennessee place a higher priority on convicting the guilty than others. I believe this bill reflects legislative frustration with DUI offenders who injure and kill.

The following article is designed for trial lawyers. The example is defense oriented, but applies to prosecutors as well.

## “Don't Polish a Diamond on the Stand”

by Elliott Wilcox

Don't gild the lily. When a witness gives you a favorable answer (regardless of whether its during direct examination or cross-examination), be wary of trying to improve upon it. Too many times, attorneys have tried to lock the witness down on a point that they've already won, only to have the witness improve upon the answer and cram it down the attorney's throat.

For example, let's say you represent a man accused of Trafficking in Heroin. The government is alleging that he was part of a conspiracy to sell 500 grams of heroin. Your client was a small part of the conspiracy, and only dealt with one person, a confidential informant. During direct examination, the prosecutor asks the informant, “Was Desmond Llewellyn Witherspoon present during the negotiations?” To everyone's surprise, the witness says, “I don't think so.” The prosecutor (an overworked young man with 6 months of experience) doesn't know what else to do, and so he sits down.

The wise defense attorney would say, “No questions” and shut up. But some cross-examiners would attempt to lock the witness's favorable answer down. The result is that they impeach valuable information:

**Q:** You told the prosecutor that you didn't think Desmond Llewellyn Witherspoon was present at the negotiations.

**A:** That's right, I don't think he was.

**Q:** So Desmond Llewellyn Witherspoon didn't have anything to do with the negotiations?

**A:** I don't think so.

**Q:** And Desmond Llewellyn Witherspoon didn't set up a deal to sell 500 grams of heroin, did he?

**A:** I don't think so.

**Q:** You keep saying, “I don't think so,” but could you clarify for us. [POINTING TOWARDS HIS CLIENT] He didn't have *anything* to do with the heroin negotiations, did he?

**A:** Oh, him? *Pookie?* Yeah, Pookie was the guy that set up the entire deal. He called me, negotiated the prices, raved about the quality of his product, told me he could get an unlimited supply of heroin because he'd killed some guys down in Colombia and had an entire border patrol on his payroll or something like that, so he had the entire region under a stranglehold and could export as much heroin as he wanted. Yeah, Pookie was the kingpin of the entire organization. But that name you keep mentioning, “Desmond Llewellyn Witherspoon?” I don't think I've ever even heard the name before. Your guy never told me his real name, everybody just called him “Pookie.”

Most often, attorneys encounter this problem during cross-examination. They'll cross a witness and unearth a diamond in their testimony. But then, they do the unthinkable, and try to polish it while the witness is still on the stand. The results, invariably, are disastrous.

**Q:** Did you hear anything?

**A:** Nope, not that I remember.

**Q:** Are you sure?

**A:** Yeah, pretty sure.

**Q:** [RUBBING HIS HANDS IN GLEE] *You didn't hear anything at all?*

**A:** Well, nothing except for [BAD FACT THAT SEEMED INNOCUOUS TO THE WITNESS]

When you uncover favorable testimony, consider switching to another line of questioning, or perhaps even quitting entirely and sitting down. It's okay to quit while you're ahead. To inquire further may ruin the presentation, or even elicit damaging information. If you keep going, you give the witness an opportunity to explain his answer. When you get a good answer, don't push the witness on the issue. Just take your good answer and go home.

Elliott Wilcox publishes ***Trial Tips Newsletter***, a free weekly e-zine for trial lawyers that reveals simple, powerful, and proven secrets to help you persuade jurors and win more trials, guaranteed. Sign up today for your free special report: “*How to Become the Best Trial Lawyer in Your Courthouse – The Top Ten Tips for Trial Lawyers*,” at [www.TrialTheater.com](http://www.TrialTheater.com)



**Tennessee District Attorneys  
General Conference**

226 Capitol Blvd. Bldg.,  
Suite 800  
Nashville, TN 37243-0890

Tom Kimball  
(615) 253-6734

Jim Camp  
(615) 945-2040

Sherri Harper  
(615) 253-6733

(615) 253-6735 Fax

**NATIONAL TRAFFIC LAW CENTER PUBLICATIONS**

The National Traffic Law Center (NTLC) is a division of the National District Attorneys Association and American Prosecutors Research Institute. It is directed by Joanne Michaels, for traffic prosecutor of the Syracuse, NY, DA's office and staffed by Mark Neil, former Traffic Safety Resource Prosecutor from West Virginia.

The NTLC has numerous resources available for prosecutors and law enforcement on it's website at [http://www.ndaa.org/apri/programs/traffic/ntlc\\_home.html](http://www.ndaa.org/apri/programs/traffic/ntlc_home.html). Monographs may be downloaded from the site in pdf format. Each monograph is approximately 50 pages. Several were made available through donations from the Anheuser Busch companies. The monographs include:

***Basic Trial Techniques for Prosecutors***

***Breath Testing for Prosecutors***

***The Drug Evaluation and Classification (DEC) Program***

***Prior Convictions in Impaired Driving Prosecutions***

***Drug Toxicology for Prosecutors***

***Overcoming Impaired Driving Defenses***

***Alcohol Toxicology for Prosecutors***

***Admissibility of Horizontal Gaze Nystagmus Evidence***

***Crash Reconstruction Basics for Prosecutors***

***Horizontal Gaze Nystagmus - The Science and the Law: A Resource Guide for Judges, Prosecutors and Law Enforcement***

**D  
O  
W  
N  
L  
O  
A  
D  
  
M  
O  
N  
O  
G  
R  
A  
P  
H  
S**

**DID YOU KNOW**

41%

Of motorcycle operators who died in single vehicle crashes in 2006 had a BAC of .08 or higher?

**SPEED AND ALCOHOL**

In 2006, 41% of drivers with a BAC of .08 or higher involved in fatal crashes were speeding, compared with only 15% of drivers with a BAC of .00 involved in fatal crashes.

**58% of Drivers in fatal crashes had a BAC of .15 or more.**

**Walk Like MADD!**

MADD Tennessee's 5K walk has a new name... MADD is changing the name of its signature fundraising walk, Strides for Change, to Walk Like MADD. Walk Like MADD conveys a stronger link to our mission to eliminate drunk driving as well as strengthening the brand of the walk and making the name more action-oriented and memorable.

**Save the Date!** MADD's annual walk will be held on **Saturday, June 21** at Centennial Park in Nashville.

Register today at <http://www.maddtn.org>.

For question contact Alexandria Honeycutt at 615-360-8055 or [alexandria.honeycutt@madd.org](mailto:alexandria.honeycutt@madd.org).

The highest percentage of drivers in fatal crashes who had BAC levels of .08 or higher was for drivers ages 21-24.



Let's **ELIMINATE** Drunk Driving

**10,947**  
DUI cases were concluded in the Criminal Courts in the last year.

**31,461**  
DUI convictions were posted to drivers records by the Department of Safety

**26,463**  
DUI arrests were reported to the TBI and included in the annual crime report.