TNDAGC

DUI NEWS

ISSUE 31

JUNE 2010

PUBLISHER:
Tom Kimball, TSRP; ADA
LAYOUT AND DESIGN:
Sherri Harper

INSIDE THIS ISSUE:

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
Newsletters online at:
Www.tndagc.org/dui/htm

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.

TENNESSEE LEGISLATURE RESPONDS TO DUI

The Tennessee District Attorneys General Conference Legislative Committee proposed four pieces of DUI legislation this year. The General Assembly examined each thoroughly, amended some and passed them all. The goal of each piece of legislation was to make the roads of the State safer for all.

The principal problem that was addressed was delay in the system. All too often DUI cases would be delayed for a variety of reasons, which always weakens a case. Bad things happen when cases are delayed for extended times. The most graphic example for this author occurred in 2001 when two officers were killed in Hamilton County. Both officers had made dozens of good DUI arrests that would have resulted in convictions. Few, if any, would have been challenged in a trial. Defense attorneys had waived preliminary hearings and bound the cases over to the Grand Jury to delay the ultimate outcome. When each officer was murdered in the line of duty, the cases had to be dismissed.

You may ask why the cases were bound over, if there was not going to be a trial. If you ask that question, you are not familiar with the system in Tennessee. While the case is pending, the defendant was able to keep his license. It was not suspended until the DUI case was resolved. This fact added to the benefit of delay for the defense and gave many defendants motivation to delay the case by sending it on to the Grand Jury and criminal court.

In addition prior convictions could and often did fall off the record for purposes of determining if the offender was a multiple offender. This was the case, because the Courts had interpreted the law as ambiguous and decided in favor of the defendant that the legislature intended for us to count priors by the dates of conviction. All priors within ten years of the present conviction count. All priors dating back twenty years count, if one conviction was within the last ten. Since the dates related to the date of conviction the longer the case was delayed, the more likely a prior conviction might disappear. If a defendant had one prior nine years ago and seven more in the last twenty, he would be charged as a ninth offender. If the case was delayed a year and the nine year old disappeared, so did the others. This meant he could become a first offender again, if he could delay the day of reckoning.

A third delay problem occurs when an offender is out on bond and continues to drink and drive. In a celebrated case in Shelby County a woman had seven pending first offense DUI's. She was picking up more DUI's than Taylor Swift picks up Grammies. In several of the DUI's she wrecked. It was extremely fortunate she did not kill or die.

The Legislature has passed laws to deal with each of the delay issues. In addition the Legislature cured the problem that our DUI law did not prohibit driving impaired due to certain drugs and substances.

See the new laws on page 4 and 8.

RECENT DECISIONS

State v Tindell, 2010 Tenn Crim App Lexis 528 **COMMUNITY CARETAKING AND SOURCE CODE**

Attorney Jerry Summers of Chattanooga recognized his client was in trouble. Elizabeth Tindell had driven after spending a night out with friends. Her breath test revealed a .20 blood alcohol level. She had pulled into the driveway of a closed recycling center after 11 p.m. A deputy saw her pull over and concerned she might be in distress approached her car. He activated the cruiser's rear amber lights as well as the white "take-down" lights. The rear amber lights were not visible from the front of the cruiser, but the take-down lights were. Tindell was giggly. She was calling her husband, because she was too drunk to drive. She was arrested and charged with DUI. Summers pulled everything out of his bag of defenses. He challenged the "traffic stop". It was not a stop, but an officer responding to a person, who may be in distress. He pulled out the breath test source code challenge. Citing decisions in Minnesota and New Jersey, he requested the source code, the computer programming that instructs the breathalyzer device for the EC/IR II. After a hearing the Court noted the Tennessee Supreme Court's decision in **State v. Sensing**, 843 S.W.2d 412 (Tenn. 1992), concluded that a previous model device made by the same manufacturer was accurate; and that the evidence revealed studies that determined the accuracy of the particular device at issue in this case. Finally, he argued that the .20 BAC level was not a .20 due to margin of error in the testing instrument. Citing **State v. Danny Munson**, No. W2001-00151-CCA-R9-CD, 2001 WL 1768244, at *3 (Tenn. Crim. App. at Jackson, Dec. 31, 2001) the Court noted that the seven day sentence for a .20 BAC is a sentence enhancement, which requires proof by a preponderance of evidence not beyond a reasonable doubt.

The Defendant lost on all issues, but won one. Her DUI arrest occurred March 14, 2006. The Court of Criminal Appeals ruled against her June 22, 2010. Perhaps the delay alone was worth the time and money spent. Congratulations to Jay Woods, the ADA who handled the case and is now an Assistant U.S. Attorney in Chattanooga.

State v Albright, 2010 Tenn Crim App Lexis 426 **PRIOR CONVICTIONS**

Jason Albright was arrested in Marion County by deputy Jerry VanAllman July 21, 2007. The deputy was talking to people at a popular swimming hole when Albright drove up. As Albright got out of his car he appeared "unsteady". The deputy approached him and asked if he had been drinking to determine if he was under the influence. He was impaired with a .12 BAC. After the jury found him guilty, he waived a jury determination of whether he was a third offender. The Judge gave the defense lawyer permission to challenge the priors at the sentencing hearing.
The Court in an opinion by Judge Thomas revisits prior decisions and comes to some conclusions:

1) The identity of the offender in the prior conviction does not require extensive proof as was demanded by the defense. Citing State v Cottrell, 868 SW2nd 673 (Tenn Crim App 1992).
2) The prior judgment must be signed by a Judge. (Note: Shame on the East Ridge Municipal Judge, who would not sign judgments for years, unless the DA in the Court specifically requested he did so.)
3) Supplemental documentation, in this case, the citation, may be used to clarify the validity of a judgment.
4) The Defendant is foreclosed from attacking the prior Hamilton County conviction on the issue of whether it was voidable because he may have been un-counseled in the previous cases; such an attack would have to be mounted in a post-conviction proceeding. *McClintock*, 732 S.W.2d at 271-72.

Albright, accused of DUI 3rd offense was the beneficiary of shoddy work by the East Ridge Court in 2002 and ended with a DUI 2nd.

State v Asbury, 2010 Tenn Crim App Lexis 310 **MEDICAL RECORDS**

Asbury committed his 6th DUI and like most veteran offenders violated the implied consent law. When it was time for sobriety tests, the defendant layed on the ground and claimed he was having an anxiety attack. The effective rookie officer called for an ambulance. The defendant was transported to a local hospital. At the hospital blood was drawn for medical treatment purposes. At trial the result contained in the medical record was read by the custodian of records as a .26 BAC level. The defendant complained that the medical record violated his right to confrontation and was hearsay. Citing Melendez-Diaz and numerous Tennessee precedents, the Court affirmed the conviction and the admission of the hospital records.

RECENT DECISIONS

State v Heffel, 2010 Tenn Crim App Lexis 280 **MIRANDA**

The defendant was stopped for driving 56 mph in a 35 mph zone. He was asked to step out and walk to the back of the car. The speeding citation was explained to him. The officer smelled the odor typical of a drinker's breath and asked if he had been drinking. The defendant admitted to consuming Jack Daniel's 80 proof Tennessee whiskey distilled and bottled in Lynchburg. Prior to trial he moved to suppress the admission citing Miranda. The Trial Judge agreed. The State appealed.

Since, Berkemer v McCarty, 468 U.S. 420, 436-37 (1984) was released 26 years ago and followed in Tennessee by State v. Snapp, 696 S.W.2d 370 in 1985, the law has been clear that asking a modest number of questions and requesting the performance of sobriety tests at a location visible to passing motorists do not, by themselves, constitute treatment that can fairly be characterized as the functional equivalent of a formal arrest requiring Miranda warnings. The Court of Criminal Appeals reversed the decision of the Trial Judge and remanded the case for trial.

State v Richard, 2010 Tenn Crim App Lexis 313 **DETENTION PRIOR TO SFST'S**

Richard was clocked doing 45 mph in a 25 mph zone. He did not stop for blue lights until he had turned onto North Parkway in Memphis and pulled to the left side near the median in the middle of the street. The officer detected alcohol and asked the defendant to sit in the back of his patrol car, while he called a DUI officer to the scene. The defendant claimed that he was arrested without probable cause when he was placed in the patrol car to wait for the DUI officer to arrive and conduct the standardized field sobriety tests. The State argued he was arrested after the performance of the SFST's. The Court concluded that the temporary detention of the defendant was reasonable and the arrest occurred after the SFST's were concluded with probable cause.

State v Reed, 2010 Tenn Crim App Lexis 526 **CIRCUMSTANTIAL EVIDENCE HMVO DRIVING**

The Defendant was in a field all by his lonesome when Deputy Blaine Lewis of the Sevier County Sheriff's Department arrived at the crash site. The defendant had injured his left knee when he drove off the road, into a ditch and down a small embankment into the field. The defendant appeared to be under the influence and had previously been declared a habitual traffic offender. At trial the defendant attempted to raise a reasonable doubt as to whether he was the driver. The jury didn't buy it. The Court of Criminal Appeals affirmed the convictions. The defendant was treated at the hospital and the medical records reflected a .28 blood alcohol level.

State v Koons, 2010 Tenn Crim App Lexis 540 **GOT DRUNK AFTER WRECK DEFENSE FAILS**

Karen Koons in Lawrence County attempted to use the old favorite. She claimed she did all her drinking after she crashed her beloved pickup truck, due to the grief caused by seeing the truck in it's damaged condition. She claimed the wreck with the overturned truck happened about two hours prior to the arrival of the state trooper. At trial she claimed, and her sister testified, that she went to a friend's home and guzzled three beers, then took two more back to the wreck to drink, while she waited for a law enforcement officer to arrive.

At the scene she claimed she had two beers before the crash. She appeared to be very intoxicated. She could not perform field sobriety tests and she refused a blood test. Koons was convicted and found to be a second offense DUI violator. It is a bit ironic that the old favorite "two-beer" lie undermined the old favorite "got drunk after the crash" defense.

TEXAS TWO STEP

In Texas officers are trained to ask "WHAT ELSE" whenever a driver claims to have consumed two beers. Thirty three per cent (33%) of drivers admit to more consumption!

NEW LEGISLATION

Public Chapter 1080 COUNTING PRIOR OFFENSES

AN ACT to amend Tennessee Code Annotated, Title 55, Chapter 10, relative to driving offenses.

SECTION 1. Tennessee Code Annotated, Section 55-10-403, is amended by deleting subsection (a)(3) and substituting instead the following:

(3) For purposes of this section, a person who is convicted of a violation of § 55-10-401 shall not be considered a repeat or multiple offender and subject to the penalties prescribed in subsection (a), if ten (10) or more years have elapsed between the date of the present violation and the date of any immediately preceding violation of § 55-10-401 that resulted in a conviction for such offense. If, however, the date of a person's violation of § 55-10-401 is within ten (10) years of the date of the present violation, then the person shall be considered a multiple offender and is subject to the penalties imposed upon multiple offenders by the provisions of subsection (a). If a person is considered a multiple offender under this subdivision (a)(3), then every violation of § 55-10-401 that resulted in a conviction for such offense occurring within ten (10) years of the date of the immediately preceding violation shall be considered in determining the number of prior offenses. However, a violation occurring more than twenty (20) years from the date of the instant violation shall never be considered a prior offense for that purpose.

SECTION 2. This act shall take effect on July 1, 2010, the public welfare requiring it and shall only apply to an offender if at least one violation of § 55-10-401 occurs on or after such date.

Public Chapter 1015 DUI DEFINITION

AN ACT to amend Tennessee Code Annotated, Title 55, Chapter 10, relative to driving offenses.

SECTION 1. Tennessee Code Annotated 55-10-401 is amended by deleting the language and substituting instead the following:

§ 55-10-401.

It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises that is generally frequented by the public at large, while:

(1) Under the influence of any intoxicant, marijuana, controlled substance, drug, substance affecting the central nervous system or combination thereof that impairs the driver's ability to safely operate a motor vehicle by depriving the driver of the clearness of mind and control of himself which he would otherwise possess; or

(2) The alcohol concentration in the person's blood or breath is eight-hundredths of one percent (.08 %) or more.

SECTION 2. This act shall take effect January 1, 2011, the public welfare requiring it.

Public Chapter 867 BOND CONDITIONS

SECTION 1. Tennessee Code Annotated, Section 40-11-118(a), is amended by adding the following at the end of the existing language:

If the defendant has one or more prior convictions for § 55-10-401, § 39-13-106 or § 39-13-213(a)(2), the defendant shall not be released unless the court first determines he or she is not a danger to the community. The court may consider the use of monitoring devices to eliminate danger to the community including, but not limited to:

(1) Ignition Interlock devices;

(2) Transdermal monitoring devices or other alternative alcohol monitoring devices;

(3) Electronic monitoring with random alcohol or drug testing; or

(4) Pretrial residency in an in-patient alcohol or drug rehabilitation center.

SECTION 2. Tennessee Code Annotated, Section 40-11-148, is amended by designating the existing language as subsection (a) and by adding the following as a new subsection:

(b) If a defendant has been admitted to and released on bail for a violation of § 55-10-401, § 39- 13-106 or § 39-13-213 (a)(2) and commits any of those crimes after release, he or she shall be considered a danger to the community. He or she shall not be released with another bail unless the court first determines he or she is no longer a danger to the community. The court may consider the use of monitoring devices to eliminate the danger posed including but not limited to:

(Same List as above) Effective January 1, 2011

The Confrontation Clause and the Admissibility of Breath Test Evidence in DUI Prosecutions

Mark A. Fulks

The Confrontation Clause saga took another turn in *Melendez-Diaz v. Maryland* when the United States Supreme Court addressed the question of the admissibility of affidavits attesting the results of forensic testing in the absence of testimony from the affiant.

The facts of the case can be summarized in short order. Melendez-Diaz was found in possession of 19 small plastic bags that appeared to contain cocaine. The contraband was submitted to a state laboratory for analysis, and the analyst prepared three affidavits, called "certificates of analysis," explaining the composition, quality, and weight of the substance. The affidavits confirmed that the substance was cocaine. At trial, over the defendant's objection, the prosecution was allowed to admit the affidavits as prima facie evidence that the substance was cocaine.

In evaluating the admissibility of this evidence, the Supreme Court applied the test established in *Crawford v. Washington* to determine whether the affidavits fell into the "core class of testimonial statements" governed by the Confrontation Clause. That class was defined to include (1) ex parte in-court testimony or its functional equivalent, (2) extra-judicial statements contained in formalized testimonial materials, and (3) statements that were made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a trial. The first category includes affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, and similar pretrial statements the witness would reasonably expect to be used at trial. The second category similarly includes affidavits, depositions, prior testimony, and confessions.

Applying these principles to the "certificates of analysis" introduced as evidence against Melendez-Diaz, the Court noted that the "core class of testimonial statements" mentions affidavits twice. Additionally, the Court concluded that, because the affidavits were intended to serve as prima facie evidence of the contraband, they were also made under circumstances indicating that they would likely be used in a subsequent trial. The Court seems to have been particularly persuaded by the fact that the affidavits were "functionally identical to live, in court-testimony." Therefore, the analysts who prepared the affidavits were witnesses for the purposes of the Sixth Amendment.

In DUI prosecutions relying upon evidence of breath tests, two scenarios are readily apparent. There are two documents generated during the use of the EC/IR®II breath testing instrument, a printed test record (also called a test result card or receipt) and a calibration certificate. The printed test record generated by the EC/IR® II does not fall within any of the categories of testimonial statements identified in *Crawford* and applied in *Melendez-Diaz.* And it would not be admissible in the absence of the officer's testimony in any event. Our concern is with the calibration certificate. However, these certificates should be admissible over a defendant's Confrontation Clause objection because they are not testimonial in nature. The certificates are not generated in relation to a particular case. They do not provide prima facie evidence of intoxication and they are not the functional equivalent of live, in-court testimony. In footnote one, the Court explained that its holding did not require "that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or *accuracy of the testing device*, must appear in person as part of the prosecution's case." The Court continued to opine that "documents prepared in the regular course of equipment maintenance may well qualify as non-testimonial." Although the Court did not affirmatively hold that maintenance records, such as the calibration certificate, are indeed admissible, this footnote appears to be designed to provide guidance on this precise question. When seeking to introduce these certificates in accordance with *Melendez-Diaz*, it will be important to distinguish the evidentiary and testimonial nature of the "certificates of analysis" at issue in that case from the administrative and non-testimonial nature of the calibration certificates.

About the author: *Mark A. Fulks is Senior Counsel and an Appellate Team Leader in the Criminal Justice Division of the Attorney General's Office. He has previously published a number of articles on legal subjects, some of which have appeared in DUI News. He is also a frequent lecturer and has conducted seminars for, among others, the District Attorneys General Conference, the National District Attorneys Association, and the Tennessee Bar Association. Any opinions expressed in this article are his own and not necessarily those of his employer.*

HARDCORE DRUNK DRIVING COMMUNITY SUPERVISION

The Century Council & American Probation and Parole Association have joined to publish a guide concerning the best practices for dealing with hardcore drunk drivers. Hardcore Drunk Drivers are defined as DUI offenders with a blood alcohol content of.15 or more; repeat drunk drivers and drunk drivers resistant to change. This population is quite small, but terribly dangerous. It is estimated that drivers with a BAC of .15 account for about 1% of all drivers on weekend nights, but account for nearly 50% of all nighttime fatal crashes. (Simpson et.al. 1996)

About one third of all DUI offenders are repeat offenders. Over half of those tested had a BAC of .15 or more. In the U.S. in 2007, 25% of all drivers killed in motor vehicle crashes and 60% of all drivers involved in alcohol related crashes had a BAC of .15 or more. (FARS 2007). Drivers with a BAC of .15 or more are 385 times more likely to be involved in a single vehicle fatal crash than the average non drinking driver. (Zandor, 1991)

THEY WON'T STOP ON THEIR OWN!

Most hardcore drunk drivers are time bombs. They can't wait to drink and drive again. A study conducted recently included interviews with participants in DUI treatment courts. 86% reported that after their DUI arrest (average BAC of .20), they waited less that sixty minutes after they were released before they drank and drove again. Most of the study respondents believed they would be stopped (73%), arrested (95%), and convicted (97%). Many (80%) believed they might have changed if the had been treated more harshly after their first DUI arrest!

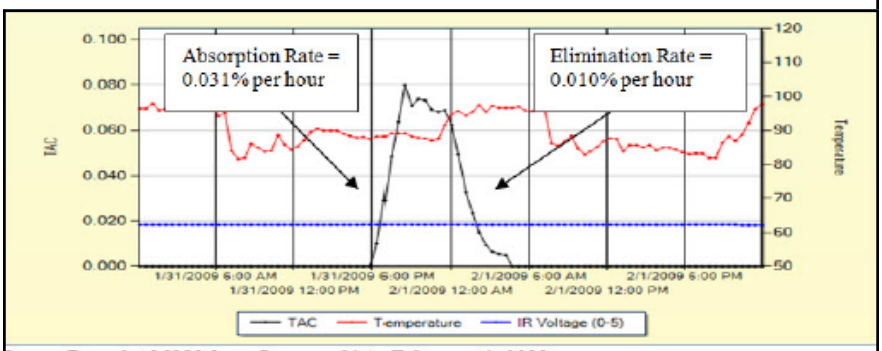
WHAT WORKS TO STOP THEM?

All indications are that jail, fines and license suspensions don't stop the hardcore offender from repeating DUI behavior. So what will stop them?

It takes a variety, according to the report, of strategies and interventions. The first recommendation is for **Pre Trial Community Supervision**. Pre-trial services support the judicial system by assisting with bail decisions, risk screening, information gathering and compilation and in some cases supervision of the released defendant. Pre-trial officers have access to driving records, criminal history and the arrest report. Intake interviews include information concerning education, employment, residency, mental health status and alcohol/substance abuse issues. This information is then synthesized and the pre-trial officer makes recommendations to the judge concerning release and supervision conditions. Vital to successful supervision is an alcohol/substance abuse assessment.

Pre-Trial Recommendations may include:

- Alcohol/drug abstinence
- Regular appointments with supervising officer; compliance with Court dates;
- Temporary restrictions on the driving privilege;
- A ban on attendance at certain types of establishments;
- Treatment gains;
- Monitoring with technology.
- Pre-Trial monitoring is not intended to presume guilt, but is intended to protect the defendant and the community from a dangerous situation.



Scram Bracelet 36983 from January 31 to February 1, 2009

HARDCORE DRUNK DRIVING COMMUNITY SUPERVISION

SUPERVISED PROBATION REQUIREMENTS

Once a hardcore drunk driver has been found guilty, supervision of probation must be realistic, relevant and research based to be successful.

Components of a Supervision plan:

- Supervision conditions must be specific;
- Conditions must be based on actuarial risk/needs assessment; treatment interventions must be based on needs assessment;
- Measurable goals;
- Defined timetables for goal completion;
- Individualized graduated responses (favorable or negative)
- Identification and explanation of technological interventions.
- Technology is a tool. It is not a replacement for supervision!

Technologies that may assist in supervision including:

- Electronic Monitoring:
- Continuous Transdermal Alcohol monitoring:
- Ignition Interlock Monitoring:
- Breath, blood or urine testing:
- Any combination of the above.

The Hardcore Drunk Driving Community Supervision Guide is available on our website in the Resources folder.

Pre-trial services must be deemed necessary by the court as a condition of granting a bond to an offender, who would otherwise be held in jail due to the danger he/she poses to the community. Tennessee's new Public Chapter 867, which goes into effect January 1, 2011, was drafted with the recommendations of the Century Council and American Probation and Parole Association in mind. The bill permits a Court to consider pre trial conditions when setting bond for multiple offenders. If the conditions set by the Court help to stop the offender from committing new alcohol/drug related crimes while on bond, the offender as well as the community benefits. The hardcore drunk driver won't stop without intervention. Without early intervention, he/she is likely to continue down a self destructive road.

Supervised Probation requirements fit neatly with DUI Treatment Court supervision. DUI Courts tends to be a long, rigorous program, generally lasting one to two years. The program with the type of structure including this type of supervision plan provides the participant small steps to accomplish. As those small steps continue, the person learns how to remain sober. These small steps allow the DUI court team to measure—somewhat objectively—how well the participant is progressing with treatment requirements. The goal is to eliminate recidivism one person at a time.

SEAT BELTS ARE NOT OPTIONAL

It isn't just a law with a pitiful fine. It is the math. So far in 2010, we know of 362 people who died in car crashes who were either wearing or not wearing a seatbelt. Two hundred nine (57%) were not wearing seatbelts. We also know that more than 80% of the population of Tennessee wear their seatbelts every time they ride in a car. A little less than 20% do not. Yet more than half our fatalities are not wearing the simple safety devise. It does not take a mathematician to figure out that's disproportionate and little insane!

More New Legislation

Public Chapter 1096 IMPLIED CONSENT

SECTION 1. Tennessee Code Annotated, Section 55-10-406(a)(4)(A) is amended by deleting from the second sentence the language "made at the same time and by the same court as the court disposing of the offense for which the driver was placed under arrest" and by substituting instead the language "made at the driver's first appearance or preliminary hearing in the general sessions court, but no later than the case being bound over to the grand jury, unless the refusal is a misdemeanor offense in which case the determination shall be made by the court which determines whether the driver committed the offense; however, upon the motion of the state, the determination may be made at the same time and by the same court as the court disposing of the offense for which the driver was placed under arrest".
SECTION 2. Tennessee Code Annotated, Section 55-10-406, is amended by adding the following new subsection:
(g) (1) The period of license suspension for a violation of subsection (a) of this section shall run consecutive to the period of license suspension imposed following a conviction for § 55-10-401 if:
(A) The general sessions court or trial court judge determines that the driver violated subsection (a) of this section; and
(B) The judge determining the violation of subsection (a) finds that the driver has a conviction or juvenile delinquency adjudication for a violation that occurred within five (5) years of the violation of subsection (a), for:
(i) Implied consent under § 55-10-406;
(ii) Underage driving while impaired under § 55-10-415;
(iii) The open container law under § 55-10-416; or
(iv) Reckless driving under § 55-10-205, if the charged offense was § 55-10-401.
(2) In all other instances in which the same course of conduct results in a driver license being suspended for a violation of subsection (a) and for a violation of § 55-10-401, the suspension period shall run concurrently.
SECTION 3. Tennessee Code Annotated, Section 55-10-406(a) is amended by adding the following new subdivision (7):
(7) If a person's driver license is suspended for a violation of subsection (a) prior to the time the offense for which the driver was arrested is disposed of, the court disposing of such offense may order the department of safety to reinstate the license if:
(i) The implied consent violation and the offense for which the driver was arrested result from the same incident; and
(ii) The offense for which the person was arrested is dismissed by the court upon a finding that the law enforcement officer lacked sufficient cause to make the initial stop of the driver's vehicle.
SECTION 4. Tennessee Code Annotated, Section 55-10-406, is amended by adding the following new subsection:
(g) If a driver's violation of subsection (a) of this section and § 55-10-401 occur as part of the same incident, the period of driver license suspension for the two (2) violations shall not exceed the period of suspension imposed by the court for the violation of § 55-10-401.
SECTION 5. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.
SECTION 6. This act shall take effect January 1, 2011, the public welfare requiring it.

Public Chapter 922 Salvia Divinorum and Synthetic Cannabinoids

SECTION 1. Tennessee Code Annotated, Section 39-17-438, is amended by deleting subsection (a) in its entirety and by substituting instead the following:
(a) It is an offense to knowingly produce, manufacture, distribute, possess or possess with intent to produce, manufacture, or distribute the active chemical ingredient in the hallucinogenic plant salvia divinorum or the synthetic cannabinoids JWH-018, JWH-073, HU-210 and HU-211; provided however, the provisions of this subsection concerning the synthetic cannabinoids JWH-018, JWH-073, HU-210 and HU-211 shall not apply to drugs or substances lawfully prescribed or to drugs or substances which have been approved by the federal Food and Drug Administration.
SECTION 2. This act shall take effect July 1, 2010, the public welfare requiring it.
Note: Other Important Legislation passed this term. View all relevant criminal laws on our website in the Resources folder.

VEHICULAR HOMICIDE DECISIONS

State v. England, 2010 Tenn. Crim. App. LEXIS 510 **48 YEARS IN PRISON**

Bobby England pled guilty to two aggravated vehicular homicides, which occurred on March 14, 2008. England was over the .20 BAC level which separates vehicular homicide from aggravated vehicular homicide. The two victims, Tony Lewis and Marty Elmore, were passengers in the England vehicle.

England opted for a sentencing hearing. At the sentencing hear it was revealed that the defendant was previously convicted of five separate driving under the influence (DUI) offenses, resisting arrest, assault and battery, destruction of private property, simple robbery, second degree burglary, and driving on a revoked license. The defendant's criminal history dated back to 1980. The defendant's social history indicated that he failed the seventh grade twice before dropping out of school. The defendant's early DUI convictions involved his inhalation of paint prior to driving. Mr. Williams acknowledged that individuals with a history of paint sniffing often suffered from "brain damage." Mr. Williams also stated that the defendant had violated parole on two occasions, although one violation was ultimately dismissed. Mr. Williams testified that the defendant reported that he was probably wanted in Florida for a probation or parole violation arising from a 2004 DUI conviction.

The Court ordered a sentence of 24 years for each conviction. The trial court considered the defendant's past failed attempts at rehabilitation as evidenced by parole or probation violations. The trial court also noted that the defendant was on supervised status when the present offenses were committed. The trial court placed great weight upon the defendant's history of criminal convictions, particularly the numerous DUI convictions. Based upon these findings and the defendant's admitted absence of mitigating factors, the trial court imposed sentences of twenty-four years for each conviction.

The trial court then imposed consecutive sentences based upon its findings that the defendant had an extensive history of criminal behavior, see Tenn. Code Ann. § 40-35-115(b)(2) and that the defendant is a dangerous offender, see Tenn. Code Ann. § 40-35-115(b)(4).

The defense argued that the passengers were complicit in riding with England and that the sentence should have been less, because they were complicit. The Trial and Appellate Court refused to create new law that would have placed a lesser value on the lives of passengers killed by an impaired driver than the lives of others. The Trial Judge referred to the argument as “a terrible idea”.

The Court of Criminal Appeals referred to the Supreme Court decision in State v. Carter, 254 S.W.3d 335 (Tenn. 2008) for the proposition that it defer to the decision of the trial court provided the trial court considered the sentencing principles and all relevant facts and circumstances.

Remember Stacy Jo Carter, featured in the “Where did you go Stacy Jo” column in several issues of the DUI NEWS? It’s that Carter, who gave us the State v Carter decision. Irony can be a beautiful thing.

State v Phillips, 2010 Tenn Crim App Lexis 290 **DRAG RACING RESPONSIBILITY**

David A. Phillips was drag racing in 2005 with Bradley Mullins. Mullins in a mustang slammed into and went under a Honda CRV while traveling 124 miles per hour. The Honda became a ball of flame. In the Honda Courtney Hensley perished. Phillips had previously tried to get other drivers to race with him in his Viper convertible. Prior to the fiery crash Phillips slowed down and drove up to the crash after it occurred. Phillips was convicted due to his responsibility for the conduct of another. He was sentenced to serve 6 years in prison. The denial of split confinement was affirmed in part, because he never acknowledged any responsibility for his actions. The trial was televised on Court TV. The case is reported at: State v Phillips , 2010 Tenn Crim App Lexis 290.

VEHICULAR HOMICIDE MURDERERS ROW

Bizzoco	Potter	Kelton	Galyean	Phillips P.9	England p.9

1) Dennis Bizzoco, 23, of Chattanooga was sentenced to eight years on March 9, 2009 in Hamilton County for vehicular homicide by intoxication. On June 14, 2006, he killed Jerry Martin when he lost control, crossed the center line and slammed into the Martin car after speeding around a roundabout. He injured Mr. Martin's passenger Mr. Joel King. Bizzoco's blood alcohol level was .17 and he had marihuana in his system. He also killed his friend, Michael Bodifer and injured Kera Bowman and Heather Brownfield. They were his passengers on the way to the Riverbend festival. Bizzoco in a presentence report indicated he started using drugs and alcohol at age 14. He would drink daily and smoke one to two joints per day. While out on bond Mr. Bizzoco was arrested and convicted in GA for Underage Consumption of Alcohol and was ordered to attend a rehab program.

2) Donna C. Potter received a 25 year sentence for Aggravated Vehicular Homicide in Davidson County. She had visited the methadone clinic and was impaired by the drug. She crossed the center line and crashed into an elderly couple killing both people. Too often methadone clinics trust their addicts to consume the drug as directed. Many don't.

3) Kimberly Kelton was convicted of vehicular homicide and received a 9 year sentence in Davidson County. She killed Perry Hamm on June 3, 2008 and was sentenced November 13, 2009. She had a .23 B.A.C. and fled the scene. She was on probation from Rutherford County for reckless endangerment at the time. While the case was pending, she picked up a new DUI. A motion to revoke her bond resulted in an order that she wear a continuous ransdermal alcohol monitoring device, until she was sentenced and incarcerated.

4) Rebecca Galyean is serving 11 years for vehicular homicide by intoxication and four concurrent years for two counts of vehicular assault. Galyean struck the vehicle which carried Larry and Dorothy Schrock and David Meese in Putnam County October 17, 2008. Mr. Meese was killed. The Schrock's were severely injured and stayed in intensive care for almost two months after the crash. Galyean admitted to drinking at two different bars and had a BAC of .16. Galyean was found guilty by a jury December 3, 2009.

5) On April 19, 2010, Autumn Williams pled guilty to two counts of vehicular homicide by intoxication 10 year sentence on each to run concurrently. The two victims were passengers of Williams' vehicle. John Baker was a husband and father to three minor children. Gary Evans was a father to a minor child. Around 5:20 pm. Williams ran off the right side of Tiprell Road in Claiborne County after losing control in a curve to the left. She slammed into a tree. At the scene blood was drawn with a .10BAC. She tested positive for trazodone and alprazolam.

6) In Chattanooga, Herineldo Cintron, 47, pled guilty and received a 15 year sentence. Years of delay resulted from the defendant claiming incompetence to stand trial. While out on bond Citron was accused of killing another person while beating him with the walker he used due to injuries sustained in the fatal wreck. The murder case is still pending. Cintron ran into and over a passenger on a motorcycle stopped at a light. He had a .21 BAC and cocaine in his system. He was speeding and driving like he owned the road.

TRAINING NEWS YOU CAN USE

The Advanced DUI Training course is over. Fifty five prosecutors attended and received some great information. We can't capture it all in an article but the handouts, power point presentations and some videos will be available in the "members only" section of the website soon. In the meantime, here are some valuable nuggets of information.

Drugs impair driving! Different drugs do so in different ways. Here are a couple examples.

Stimulants Effects on Driving:

Alter mood, judgment, perception
Alter reaction time, vision, attention and coordination
Differences in high vs. fatigue effects

Depressant Effects on Driving:

These drugs produce CNS depression, sedation and psychomotor impairment.

Alcohol's Medical/Biological Effects Impacting SFST Performance

Early Effects:
Reduced tension, relaxation
Reduced inhibitions
Sense of well-being
Decreased judgment
Mild euphoria
Combined effects give rise to false courage,
Reduced judgment regarding danger in a given situation
Misconception that EtOH is a stimulant; actually inhibits inhibitory centers.

Progressive effects with rising BAC:

Disruption of intellect/reasoning
Impairment of motor coordination
Loss of consciousness
Respiratory depression
Circulatory collapse
Death

Alcohol's effect on Vision

Visual impairment with lower acuity, peripheral vision, and distance judgment:
Pupillary dilatation with sluggish reaction to light and less resistance to glare:
Diplopia from inability to fuse vision from both eyes.

WHY SFST'S WORK:

Impairment of muscular coordination and judgment causes greater reaction time. Detected during instruction and performance phases.
Slurred speech due to less control of tongue muscles detected during oral responses.
Impaired reflexes detected throughout.
Loss of proprioception: the sensory nerve ending in muscles, tendons, and joints that provides a sense of the body's position by responding to stimuli from within the body is effected and is detected during the one leg stand.

Tennessee District Attorneys General Conference

226 Capitol Blvd. Bldg., Suite 800 Nashville, TN 37243-0890
Website: http://dui.tndagc.org
Blog: http://tnduiguy.blogspot.com

Tom Kimball (615) 253-6734
Jim Camp (615) 232-2930
Sherri Harper 615) 253-6733

THE CRASH PAGE

Qualify ALL of Your Witnesses...Tell their story By Jim Camp

Which of these statements is correct?

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

The answer: All of the above.

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

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

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

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

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

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

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

Qualify ALL of your witnesses. Tell their story.