



DUI NEWS

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

INSIDE THIS ISSUE:

<i>Whittling Away Binette</i>	2
<i>Recent Cases</i>	3-4
<i>New Laws</i>	5
<i>Wall of Shame</i>	6
<i>Crim Court Report</i>	7
<i>State v Gagne</i>	7
<i>V.H. Training</i>	8-9
<i>Murderer's Row</i>	10
<i>Cross Examination</i>	11-12
<i>Of Defense Expert</i>	11-12

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
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.

DUI TREATMENT COURTS THE TIME IS NOW

Three years ago Rutherford County received a grant from the Governors Highway Safety Office to fund a treatment court for multiple DUI offenders. The offenders have been transformed. Families have been reunited. Program participants have remained sober. Beliefs have changed. Responsibility has become the fundamental focus of lives instead of a tag line for beer commercials.

Services are provided in the court using the 10 Guiding Principles of DUI Courts. In 2009-10, the Rutherford County Court served 35 participants. Most had been convicted for 2nd or 3rd DUI offenses, some were 4th offenders. Seventeen entered the program during the fiscal year and fifteen graduated from the program typically in sixteen months.

RUTHERFORD County

Participants paid:	Attended:	Found:
Child support: \$5,828	4,852 AA/NA Meetings	Employment: all 15
Fines and Costs: \$8,257	2,883 counseling session	Negative drug screens: 96%
	213 Community service hours	

Williamson County began a DUI Treatment Court in August, 2010. It has included 8 participants and expects to conduct a graduation for some in September. Seven now have full time employment, one is disabled and a female participant, who was the first to join DUI Court, has been sober for 12 months. Several other participants have 6 and 10 months of sobriety. One participant, who is a small business owner, has had his best earnings in years since joining the DUI Court.

WILLIAMSON County

Participants paid:	Attended:	Found:
Fines and Costs: \$4,673	720 AA meetings	Employment 7 of 8
Child support: unknown	2 weekend retreats	Negative drug screens: 99.8%
	256 counseling sessions	

What would these multiple offenders have done without the treatment court? No one knows for sure, but the recidivism rate for multiple offenders is substantial. Some would have probably been in crashes. Some might be dead. Few, if any would have paid to change with time or money.

To learn about the 10 guiding principles of treatment courts, go to:
<http://www.dwicourts.org/learn/about-dwi-courts/-guiding-principles>
The time is ripe to expand treatment courts in Tennessee. Let's find a way.

WHITTLING AWAY BINETTE THE SUPREME COURT RECOGNIZES THE VIDEO IS NOT THE COMPLETE STORY

The Tennessee Blue-Light special may be going the way of the K-Mart Blue-Light special. It appears to be quietly moving toward the storage room. The Supreme Court has taken a broader approach to evidence and recognized that the video is not the only evidence in the case. The Court of Criminal Appeals appears to have gotten the message and the power of the precedent of the Binette line of cases appears to have recently diminished.

In State v Binette 33 SW3d 215 (Tenn 2000) the Supreme Court decided it could review videotapes with a de novo standard. In Binette, the only evidence offered in a suppression hearing was the videotape. The Court decided the driving in the video was insufficient and did not rise to a reasonable suspicion standard. The Supreme Court went further in State v Garcia, 123 SW3d 335 (Tenn 2003). In Garcia the Court decided there was insufficient evidence and that the video discredited the officer who did testify.

Recently our Supreme Court and Court of Criminal Appeals have recognized that the video does not always depict the whole story. First, the Court overturned the Court of Criminal Appeals in the case of State v Mitchell, 2011 Tenn Lexis 311. The CCA had reversed a disorderly conduct jury trial conviction for Mitchell based on two short videotapes. The Court of Criminal Appeals found that the events captured by the video cameras so conflicted with portions of the officers' testimony that a conviction for disorderly conduct was not warranted. The Supreme Court in an opinion by Justice Wade disagreed with the weight given the videotapes by the CCA. Justice Wade stated, "the Court of Criminal Appeals appears to have reweighed the evidence and concluded that the videotape was necessarily more reliable than the testimony of the witnesses testifying on behalf of the State."

The Mitchell decision was issued in March, 2011. About two weeks later the Supreme Court granted an appeal by the State and remanded another case to the CCA in light of the Mitchell decision. That case has now been decided by the CCA, which has reversed itself. The case concerned the probation violation of James Farrar.

In State v Farrar No. M2011-00838-CCA-RM-CD - Filed June 30, 2011, Judge Witt discusses the fact that the CCA had in its previous decision used the precedent of Garcia in reaching its decision. The Court following Mitchell the decided it was incorrect to do so. In the review Judge Witt pointed out differences between the video and the testimony of the officer. He stated, "The videotapes contradicted Officer Moore's testimony that the defendant admitted to drinking "several" beers; the tape revealed that the defendant said he had had two beers. The videotapes also contradicted the claim that the defendant swayed and was unsteady on his feet, and they do not support the claim that his speech was slurred. After pointing out what he believes to be contradictions, he still finds that the verdict against Mitchell should be affirmed. He does so in light of Mitchell and states, "Upon reviewing *Teddy Ray Mitchell* and the supreme court's scrutiny of the videotape evidence at issue in that case, we determine that the question of excessive drinking might entail discernible nuances or subtleties of behavior that, nevertheless, may be incapable of demonstration through the videotapes admitted in the present case. The question is not as stark as, for instance, whether a traffic light is green or red at a given moment. In other words, the videotape evidence at issue does not definitively rule out the possibility that the defendant, although not guilty of public intoxication, drank alcohol to excess." The Court then affirmed violation of probation although it rejected the public intoxication rationale for the decision.

In November, 2010 the Court of Criminal Appeals affirmed a conviction in State v Hewitt 2010 Tenn Crim App Lexis 1005. In that case the officer observed bad driving that was not captured by his video camera. Judge Ogle concluded that the officer had reasonable suspicion, because he observed things the video camera could not observe. That conclusion was based on the fact that cameras are pointed straight ahead and do not swivel in the same way as a human neck. An officer can look to his right or left. A camera cannot.

The Mitchell, Hewitt and Farrar cases all stand for the proposition that officers can see, smell, and hear things that a video or audio might miss. We know that a dashboard camera has its limitations. Rarely can we see whether a suspect has missed his heel to toe walk from a dash cam. They don't work that way. It is good to see that the courts have recognized that a camera does not tell the whole story.

DID YOU KNOW

The costs of deaths from motor vehicle crashes in Tennessee is 1.15 Billion Dollars per year.

Source: The Center for Disease Control



RECENT DECISIONS

State v Mackinnon, 2011 Tenn Crim App Lexis 228

CIVIL IMPLIED CONSENT REVERSED

In Sevier County, a Judge permitted a jury to decide whether there were reasonable grounds to believe the driver had violated the implied consent law. On appeal the Court of Criminal Appeals ruled that the Court must decide the civil implied consent violation. The Trial Court erred by sending the case to the jury for its determination. A jury does not have legal authority to decide civil implied consent violations.

**A jury does not have legal authority to decide
civil implied consent violations.**

State v Schoenthal, 2011 Tenn Crim App Lexis 294

STOP FOR LANE VIOLATION UPHELD

The defendant crossed the double yellow line and, for a brief period of time, was traveling on the wrong side of the road before drifting back into her lane. The defendant was stopped and found to be an impaired driver. She pled guilty and reserved for appeal the question of whether she was improperly stopped. The defendant was charged with a violation of TCA 55-8-123 in addition to DUI. The stop was upheld based on the requirement that drivers stay in their lane: “Whenever any roadway has been divided into two(2) or more clearly marked lanes for traffic...[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from that lane until the driver has first ascertained that the movement can be made with safety”.

State v Baucum, 2011 Tenn Crim App Lexis 301.

SEIZURE DEFENSE FAILS TO PERSUADE

In Dickson County officers Jeffery McLis and Tim Farris responded to a vehicle stopped in a roadway. As they approached they discovered the defendant passed out behind the wheel with the keys in the ignition. The defendant smelled of alcohol and urine. They observed an empty vodka bottle on the floorboard. When the defendant, a four time DUI offender woke, he was more than a little belligerent. The defense called the father of the defendant, who claimed the vodka bottle was his own, his son was having a seizure and that when he had seizures he urinated. The jury did not buy it. The conviction was affirmed.

State v Wilhoite, 2011 Tenn Crim App Lexis 289

REFUSAL TO TEST ADMISSIBLE

In Sevier County this DUI 3rd offender refused to perform field sobriety tests or a breath test. When refusing the breath test he volunteered that he could not pass due to drinking four beers. The defendant was originally arrested for driving on a revoked license and lack of insurance. He had struck three mailboxes and a tree. He argued that his refusals and admissions should have not been admitted, because they were self incriminating. The Court disagreed.

State v Polk, 2011 Tenn Crim App Lexis 279

NO MISTAKEN IDENTITY

This defendant in Madison County went to trial with a different kind of defense. She decided her arresting officer was not the officer testifying against her. Does that make this a case of mistaken identity in reverse? It did not work for her as the officer, the sober one at the scene, knew better. The defendant also indicated that a bar employee at “The Other Side” bar gave her directions. If so, shame on the employee. The only direction this patron needed was the direction to the phone to call a cab!

State v Robinson, 2011 Tenn Crim App Lexis 316

HMVO AND FTA RESULT IN 12

This habitual motor vehicle offender made two big mistakes. He drove and then he failed to appear for a court date. Since he was on bond for the HMVO, the FTA was consecutive. He was a career offender for both.

RECENT DECISIONS

State v Watson, 2011 Tenn Crim App Lexis 416

REASONABLE SUSPICION AFFIRMED

This defendant was observed by Officer Glen Stiles of the Polk County Sheriff's Department as he crossed the fog line twice and the yellow centerline once in about one half of a mile. The defendant was stopped and turned out to have a .15 BAC. The defense argued that the driving did not rise to a reasonable suspicion and lost the argument. There was no video in the case, so the defense was left with a problem. The court recognized that the officer was credible and truthful during the suppression hearing. On appeal it is very difficult to overcome the true testimony of a competent officer.

State v Clark, 2011 Tenn Crim App Lexis 293

INTOXICANT INCLUDES ALCOHOL

In Franklin County, ADA Steve Blount convicted this defendant in a jury trial. She had crossed the center line five times and could not complete any field sobriety tests. She was asked to take a breath test and failed in three attempts. A jury convicted her and she appealed. She took a novel approach on appeal. She argued that the word intoxicants in TCA 55-10-401 did not include alcohol. Prior case law and Mr. Webster's dictionary proved otherwise.

State v Bright, 2011 Tenn Crim App Lexis 377

4TH OFFENDER TESTIFIES IT WAS ALL MADE UP

Tellico Plains Officer Harvey Presley had been on the force two years after serving 22 years in the military. Carl Lee Bright worked part-time at a garage, when he wasn't in jail for DUI convictions. Officer Presley received a call from dispatch that a car had run someone off the road on Highway 360 and was now at Shorty's Market. Officer Presley saw the car pulling out; he followed and watched Bright cross into the oncoming lane of traffic on two different blind curves. He pulled him over and Bright smelled of alcohol and could not complete sobriety tests. Bright testified. When asked if Officer Presley was not simply mistaken but "making it all up," the Defendant said, "That's exactly right." Let's think this over. We now have a choice to believe a 22 year military veteran now serving his community in law enforcement or a guy driving dangerously, who can't walk a straight line. The 4th offender received a two year sentence.

State v Sanders, 2011 Tenn Crim App Lexis 410

"1ST" OFFENDER TO SERVE 120 DAYS

Randy Sanders was convicted for DUI after having gone ten years without a DUI conviction. He had three prior convictions, but all were more than 10 years old. When arrested, he was correctly charged as a DUI 1st. He pled guilty in Williamson County and then learned that DUI is not a game to play. The Court sentenced him to serve 120 days after finding that a lesser sentence for him would depreciate the nature of the offense. The Court also noted that measures less restrictive than confinement had previously failed to change this defendant and that his criminal history including three DUI convictions and driving on revoked convictions made a greater sentence necessary. The sentence was affirmed.

State v Myers, 2011 Tenn Crim App Lexis 406

WHEN ALL ELSE FAILS, IT IS CHAIN OF CUSTODY

In this horrendous vehicular assault and DUI case, a motorcyclist survived massive injuries sparing Myers from a vehicular homicide conviction. Myers, a 3rd offender, was not grateful for his gift. In fact he did all he could to try and discredit several lay witnesses who saw him cross the center line and strike Eric Shader so hard that he flew almost as high as the telephone pole. Mr. Schrader eventually graduated from a wheelchair to a walker and then he learned to walk again. He was in pain for years prior to trial. A blood test was conducted by a nurse at the Chattanooga Police Department blood room. The blood was delivered to TBI for analysis. The defense attempted to challenge the chain of custody. The case gives a thorough description of how things are done to protect the chain at the TBI lab.

State v Kirk, 2011 Tenn Crim App Lexis 265

DE NOVO APPEAL FROM GUILTY PLEA

In Blount County, the defendant pled blind to driving on a suspended sentence. He did not like his sentence and appealed. The Circuit Judge denied the appeal and remanded. The CCA reversed and ordered the Circuit Judge to enter and enforce a new independently determined judgment.

NEW LAWS EFFECTIVE JULY 1, 2011

The Tennessee General Assembly passed a multitude of new laws effecting the criminal justice system. Be aware that the following laws are in effect now.

Public Chapter 484 - Pre Trial Diversion is no longer an option concerning any felony case or any misdemeanor case, if the offender has a prior A or B misdemeanor conviction or has previously received pre-trial diversion. As has been the case for many years, P.T.D. is not available for DUI cases.

Public Chapter 252 - The Exclusionary Rule: Exceptions to exclusion of evidence have been established to put Tennessee law closer to federal law. The exceptions include good faith mistake or technical violation made by a law enforcement officer, court official or magistrate.

Public Chapter 274 - Synthetic Cannaboids: The list of banned synthetic cannaboids has been expanded to include items like bath salts.

Public Chapter 298 - Ignition Interlock: The law requiring interlocks for DUI offenders with a .15 BAC or above has been amended to clear up some confusion. A flow chart will be available at <http://dui.tndagc.org> soon.

Public Chapter 379 - License Revocation Time: A DUI 3rd offender shall now have his license revoked for 6 years. A DUI 4th or above offender shall have his license revoked 8 years.

Public Chapter 487 - DUI Bond Conditions: A Court no longer has to determine if a multiple offender is a danger to the community before placing conditions on the DUI bond. The Court is required to consider the conditions required by last year's law or other conditions. The Court is defined as anyone who currently sets bond per TCA 40-11-106.

Public Chapter 221 - Drug Users and Welfare: A person convicted of a felony drug crime is no longer eligible for welfare, unless they complete certain requirements including treatment.

Public Chapter 310 - Law Enforcement Access to Controlled Substance Databases: Expands the use of prescription drug databases for investigation of drug crimes by law enforcement.

Public Chapter 188 - Defendant right to Court Reporter: Defendant's now have a right to a court reporter in criminal cases. That, of course, means the taxpayer will be paying for court reporters for indigents now.

Public Chapter 290 - Post Conviction Petitions: Appeals from PCR denials must be filed within 30 days. The Court of Criminal Appeals shall not grant the application unless it appears the trial court has abused its discretion in denying the motion.

EVIDENTIAL BLOOD TESTING EXPANDED

Beginning January 1, 2012 all persons previously convicted of DUI, who are arrested for DUI will be required to undergo a chemical test on their blood to determine their blood alcohol content.

In addition all persons who are arrested for DUI with a child passenger will also undergo testing.

This testing will be conducted without or without consent. Public Chapter 307.

Wall of Shame

DUI Arrests



Casey Jo Gray



Bond violations

Casey Jo Gray, star of a channel 4 news story, made it to the Wall this month for her complete and total disregard for that thing called BOND. According to the March 21st story on the television news, Casey committed two DUI's a couple days apart and finally got held in jail with four pending DUI cases. Apparently there was never an effort to manage the danger she exhibited with anything like an ignition interlock or transdermal monitoring device.

6 DUI's 7 years

Joseph Borger, 41, received a 3 1/2 year sentence for his 6th offense DUI and another 3 1/2 year consecutive sentence for his violation of the habitual motor offender law in Marshall County. He is serving his 7 year sentence.

OUT OF STATE SHAME

Michael Lee Fowler, 49, of McKenzie, Tennessee did not do the state any favors when he crashed in Harrisburg, Illinois severely injuring a 12 and 15 year old. Fowler will now reside in an Illinois prison for eight years.



2009-2010 DUI Criminal Court Report

The Administrative Office of the Courts statistical Report for 2009-2010 indicates that some offices have more Criminal Court jury trials in DUI cases than others. One hundred seventy persons or 64% were convicted in 266 trials. Most jury trials occur when the attorney or defendant believes he/she has a good case. Defendants tend to plead guilty to the strongest cases. Many of the strongest cases are resolved in the General Sessions Courts. Those numbers are not included in this report. Below are listed the numbers and a city or town in the Judicial District for reference.

District: Location County Trials Dispositions

1	Johnson City	4	202
2	Kingsport	4	184
3	Greeneville	9	206
4	Sevierville	14	394
5	Maryville	3	71
6	Knoxville	18	863
7	Oak Ridge	0	75
8	Huntsville	7	142
9	Kingston	3	121
10	Cleveland	8	133
11	Chattanooga	9	637
12	Dayton	10	419
13	Cookeville	8	595
14	Manchester	8	71
15	Lebanon	2	239
16	Murfreesboro	0	352
17	Fayetteville	2	72
18	Gallatin	0	214
19	Clarksville	4	558
20	Nashville	19	1242
21	Franklin	15	309
22	Lawrenceburg	19	442
23	Charlotte	34	331
24	Huntingdon	2	66
25	Ripley	19	279
26	Jackson	5	222
27	Dresden	3	37
28	Trenton	3	114
29	Dyersburg	3	40
30	Memphis	18	1397
31	McMinnville	14	102

Districts with 100% convictions in jury trials include the 2nd, 8th, 9th, 13th, 17th, 27th, & 28th.

HGN Endorsed

The American Optometric Association has endorsed the use of horizontal gaze nystagmus testing by law enforcement officers. The test was studied by the AOA. It was found to be scientifically reliable and a valid tool to detect impairment. Read the AOA document at:
<http://dui.tndagc.org/resources/AOA%Resolution%20HGN.pdf>

BLOOD TEST DECISION

State v Gagne 2011 Tenn Crim App Lexis 386

To all the naysayers who doubt the constitutionality of the new evidential blood law, read this and weep! This sets out some of the case law concerning blood testing that was used to support arguments in favor of the legislation. A few points:

- 1) there is no right to refusal;
- 2) the failure to read the implied consent warning only effects the implied consent case, not the admission of the BAC in the DUI.
- 3) "If probable cause exists to believe that (a) the motorist has consumed an intoxicant; and (b) testing of the motorist's blood will reveal evidence of his or her intoxication, law enforcement need not obtain the voluntary consent of the motorist before collecting his or her blood sample. Humphreys, 70 S.W.3d at 761 (citing Schmerber, 384 U.S. at 768-72)."
- 4) The purpose of the implied consent law was to avoid violent confrontations with motorist. It in no way was established to benefit or give a right to an impaired driver.
- 5) "To carve out a rule of exclusion where the refusal provisions . . . have not been followed" is not the purpose of the Implied Consent statute. Hancock, 1999 WL 298219, *7."

The Tennessee Bureau of Investigation has compared crime rates over the last decade in a study recently released. DUI arrests during that period have declined 13%. Drug arrests, however have increased 45%. Crimes against persons increased 8%. Read some conclusions about the report at:

<http://www.tbi.state.tn.us/documents/TBICompilesStudyonTenYearCrimeTrendsInTennessee.pdf>

The full report is available at:

http://www.tbi.tn.gov/tn_crime_stats/documents/TenYearCrimeTrendsCompletesecured.pdf

VEHICULAR HOMICIDE TRAINING



Photos by ADA Jim Goodwin

It started with a crash. In the parking lot of Dick Clark’s American Bandstand theatre in Pigeon Forge, a head on collision left two cars sitting side by side. Fifty prosecutors from Tennessee and Kentucky examined the scene with fourteen crash reconstruction law enforcement officers. They had gathered for three days of training with no idea that it would begin with a loud scary crash in which South Carolina Trooper, Phillip Darnell would plow into a car while driving 29 miles per hour. Any passenger in the target car would have died.

Four hours were spent examining the remains of the crash. Prosecutors learned about tire mark evidence, point of impact determinations, airbag and steering modules, drag sleds and accelerometers, laser measurement tools and witness statements. Instructors for the on scene training were members of the THP C.I.R.T. teams including Director John Albertson, Lieutenant Mike McAllister and Sergeant Alan Brenneis.

After moving indoors the prosecutors learned from Physics Professor John Kwasnoski about pedestrian crashes, single vehicle crashes, intersection crashes, and in line collisions including rear end and head on crashes.

Joanne Michaels of the National Traffic Law Center teamed with TSRP’s Jim Camp and Bob Stokes of Kentucky to talk about the legal aspects of the technical investigation and recent developments in case law and new legislation. Tom Kimball discussed chain of custody issues and qualifications of expert witnesses. The prosecutors then spent a day working on direct and cross exams of experts. Idaho T.S.R.P. Jared Olson presented his theory of efficient and effective cross examination. The prosecutors then had to prepare for cross examination of defense experts. A defense expert was called to tell partial truths and he changed various formulas. The prosecutors worked to reveal the changes in order to clarify to a jury the truth. In the end prosecutors discovered that they had a better understanding how crashes occur and increased passion to convict the guilty in these horrific cases.



Special Thanks to our kamikaze driver from the South Carolina Highway Patrol, Phillip Darnell, who survive the 29 mph collision without a scratch. Thanks to THP for supplying forfeited vehicles for our

VEHICULAR HOMICIDE TRAINING

On his way home from the training a prosecutor discovered a fatal crash had occurred in his county. The following morning he went to examine the lead investigating officer. The prosecutor noticed a gouge mark in the road, that the officer had missed the night before. The gouge mark, if omitted from the diagram, would have led to a disaster for the officer on the witness stand and the possibility that a guilty part would have been acquitted. The gouge mark might have created a reasonable doubt, even though it was not vital in determining how the crash had occurred. The prosecutor called one of the instructors to thank him for saving the case and sparing a victim from more pain.

The prosecutors who took time to complete this intensive training all want the same thing, justice for all. Many of the lessons learned were lessons that will prevent injustices. The innocent will be freed and the guilty punished. That's what it is all about and it was well worth the effort.

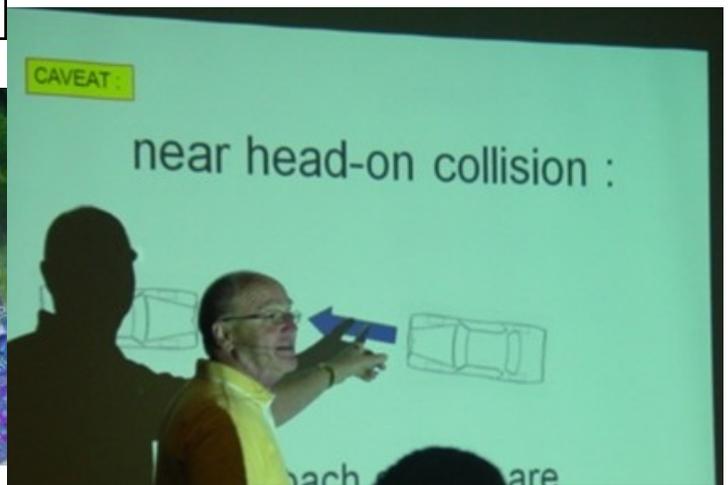


Trooper Jim Fillers explains how a drag sled is used to measure the co-efficient of friction for speed analysis.

THP Sergeant Andy Shelton discusses photography of the crash scene with prosecutors from Tennessee and Kentucky.



Sgt. Mark Kimsey of the Hamilton County Sheriff's Office shows prosecutors how to accurately measure dozens of points using a total station laser.



Professor John Kwasnoski made the physics interesting and real. He is not only a great teacher and witness, but he inspires learning.

VEHICULAR HOMICIDE MURDERERS ROW



7 years after leaving scene

Jeremy Lane received a seven year sentence for his vehicular homicide hit and run and bold faced lies. Lane struck a Unum Provident employee and mother of two, Susan Wood, and did not even slow down. He left the scene, stashed his broken 1995 Nissan 240 SX sports car and called 9-1-1 claiming he had been carjacked. Witnesses testified that Lane left the Chattanooga Billiards Club at about 7 a.m. and struck Mrs. Wood as she walked to work. Her orphaned children will never see, hear or touch her again.



10 years for Vehicular Homicide

Steven Miller was convicted of vehicular homicide by intoxication in Shelby County and received a 10 year sentence. Miller was speeding in Memphis in October, 2009. He was under the influence of three different pills, citalopram, trazodone and alprazolam. He ran the stop sign at 4th and Peabody Place near Beale Street. He cut down David Dembowski and kept going but was found in a parking lot nearby. His license to drive was revoked. While on bond Miller picked up new charges for possession of schedule 2 and 3 narcotics.



Killer was on Bond for DUI 2

Frank Cooper, 74, of Columbia is now serving 12 years for vehicular homicide by intoxication. Cooper killed Mack Odeneal, 57, on March 25, 2010. Cooper with a .19 BAC attempted to pass three vehicles through a construction zone marked for no passing. Cooper was out on bail for a DUI second offense when he killed. Larry Nickell represented the State. THP CIRT team director, Lt. Mike McAllister reconstructed the crash and testified in this tragic case. Judge Jim Hamilton called the death of Mr. Odeneal unnecessary and ridiculous.

State v Howard 2011 Tenn Crim App Lexis 275

Alternative Sentencing Denied

In Roane County, Bryan Howard killed Bradley Lively while driving under the influence and speeding. Two weeks later Howard was arrested again and later convicted for another DUI and possession of marijuana. After he pled guilty to vehicular homicide by intoxication, he complained about his sentence of eight years to serve. He wanted alternative sentencing. The Court of Criminal Appeals affirmed that alternative sentencing would depreciate the seriousness of the offense. The defendant's subsequent DUI displayed a lack of potential for rehabilitation.

NEVER A REPRIEVE FOR THE VICTIMS

David Dembowski, an electrician and fine gentleman was killed by the criminal, Steven Miller. David had a positive effect in his lifetime on hundreds of neighbors, friends and strangers. His mother wrote a five page letter to the Court. This is how it began: "There is a saying, "The measure of love is when you love without measure." That is a parent's love. How do I begin to put into words how the death of a child impacts your life? My mind is flooded with memories night and day. His father and I loved him before he was born and from the moment, they placed David in my arms I promised to protect and care for him. He was our first born with dark curly hair and hazel eyes with long curly eyelashes. People commented that he was too pretty to be a boy. He grew to be a handsome man and yet it wasn't just his looks-but his good heart that attracted people to him. I'm not sure his father and I realized how good he was to other people until after his death. People stood in line for over 3 hours at the funeral home to share in our grief and to share stories of things David had done for them. Things that David wouldn't have told you because he was a modest person."

CROSS EXAMINATION SERIES

continued

Impeachment Using An Article Authored by the Witness:

Prosecutor: “Dr. Fallon, on direct examination today you testified that a drag sled should not be used to determine the drag factor of the road surface at a crash scene.”

“You have authored an article titled ‘Accurately Determining Friction Coefficients In Automobile Crashes’ is that right?”

“That article was published in a publication of the American Trial Lawyer’s Association called the “Trial Lawyer”, correct?”

“The date of publication of the article ‘Accurately Determining Friction Coefficients in Automobile Crashes’ was January 10, 2010?”

“You were the sole author of that article is that right?”

“I show you what has been marked State’s Exhibit twelve for purposes of identification is that a copy of the article you authored?”

SHOW PERTINENT PART OF THE ARTICLE TO THE JURY VIA VIDEO PRESENTER, OR FOAM BOARD SO THEY CAN SEE, HEAR AND BETTER REMEMBER THE PERTINENT PART.

“Please refer to the first sentence of the first paragraph on page three of that article. At that place in the article you wrote ‘A drag sled is an accurate and reliable tool for determining the drag factor of roadway at the scene of a crash’. Did I read that portion of your article correctly?”

Upon receiving a verbal acknowledgement don’t ask any other question concerning this quote and move on. Saving once again any conclusions for Closing Argument.

Experts - Know Their Pattern

Use your pre-trial research to learn the testimonial tendencies of the defense expert. Read their trial transcripts to uncover the techniques they use while being cross examined. Structure your cross to use those tendencies and techniques against them. Set them up with questions you have seen in the transcripts. Questions they must answer the way you want them to. The way they have in the past. If they use particular techniques to avoid those answers be prepared with an appropriate counter.

Remember that body language is important during these exchanges. Control can be taken or relinquished at least in part based upon the way you stand, speak and address the witness. Remember to be the party in control of the encounter. That means standing solidly on both feet. Don’t lean. Square your shoulders and directly face the witness. Do not lean away. Look them in the eye and avoid reading your questions. Speak loudly and forcefully but don’t be offensive or abusive. Do assert your authority.

Countering Escape And Evasion Techniques

Professional expert witnesses are usually very talented and experienced testifiers. They are masters at cross-examination escape and evasion techniques. You in return must become just as adept at countering those techniques and hunting them down as they attempt to escape.

Experts often fail to answer questions directly. Many times they fail to answer the actual question asked at all. They run to escape and evade talking about everything BUT the answer to the cross-examiner’s question. They attempt to wear the prosecutor down hoping that you will tire of chasing them choosing instead to accept their answer and move on to another question. When faced with this form of escape and evasion remember the principle of *slow and steady wins the race*. This is a difficult concept to keep in mind especially when we think the judge and the jury are tiring of the chase. We must pursue them when they try to run. Keep bringing them back. Make them answer the question. We need to master the art of controlling the evasive witness.

Remember you are the Alpha in the confrontation. Take control and let them know it.

**Wife killer gets 18 for vehicular homicide and others**

Jamey Christy, 37, was charged with murder for killing his wife in 2007. He had his 11 year old child in his car when he chased his wife down the road on the way home from a wedding reception. She crashed after his car made contact with her SUV. A Montgomery County jury found him guilty of involuntary manslaughter, vehicular homicide, aggravated assault and reckless endangerment.



THE CRASH PAGE

CROSS examination of the DUI Defense Expert

Part 4 in the DUI NEWS Series By Jim Camp

Summaries of Transcripts

To effectively use hearing transcripts the you must first read and evaluate the document. Have a highlighter and either a notepad or computer. Caption your summary with the identifying features of the transcript such as the date of the proceeding and the name of the county and state where the deposition took place. Highlight the testimony you may plan to use to impeach the witness. While so doing pay special attention to the testimony preceding and following the statement you are most interested in. Remember we are the good guys. We want to be fair. Do not take any statement out of context. Doing so provides a good attorney or expert witness with an effective tool to make you look unfair and therefore not worthy of belief. Use the note pad or computer and reference the statement made as well as the page number and lines where it is contained. When finished review the sections selected and decide which ones will best be suited to be used as impeachment material. Avoid using statements that only marginally impeach. You want the jury to hear only strong impeachment evidence. Remember you can't and shouldn't use everything. Identify your purpose and be selective.

Once you have selected the excerpts you plan to use identify the order you wish to use them in and tab the pages where they are located in the same order. Use a format that you can easily identify and link to the summary you have created on your notepad or computer. Perhaps a number or a letter or combination of the two. Remember as you create your system that you want to avoid giving the witness a chance to recover. That means no paper shuffling and searching. Have command over the materials so you can be the party in control of the confrontation.

In Court

You must be familiar with the material that will be used to impeach. Effective impeachment doesn't just happen. It is expertly crafted. You must have a plan. Make sure you ask short non-complex questions that don't allow the witness a loophole to use to escape. Start to build the box you want to trap the witness in by establishing the opinion or assumption they testified to on direct. Get them to re-acknowledge it. Then get the witness to acknowledge the event, hearing, trial, interview, report or other document that you intend to use to impeach. Remember to ask leading questions. Provide a copy of the relevant parts of the document to opposing counsel as well as a copy of the same to the witness. If it is a transcript make sure you have attached a copy of the cover page identifying the proceeding, its location as well as the date and jurisdiction. If possible use either a video presenter, power point or keynote to show the jury the same portions of the transcript. This allows them to not only follow along but it also allows the jury to both hear and see the inconsistent statement. This has greater impact and makes it much more likely they will not forget the key important point. Read the portion of the transcript you have highlighted. Read slowly, clearly and loudly. You don't want the jury to miss this. To do this effectively you must PRACTICE. Most importantly, read it exactly as it is contained in the document. **DO NOT SUMMARIZE!** When you have finished ask the witness if you have read it correctly. Once the witness acknowledges either making the statement or the content of the transcript STOP. Ask no further questions regarding that point. Save any conclusions you wish to make for closing argument.

Impeachment Using a Transcript

Get witness to acknowledge the inconsistent statement made on direct then ask the following questions:

"Did you testify at a DUI trial in Soddy-Daisy, Tennessee on November 20, 2009?"

"You were called to testify on behalf of the defendant in that case is that correct?"

"You were sworn to tell the truth prior to being questioned correct?" "There was a court reporter present?"

"You were asked questions and gave answers in response to those questions is that right?"

"I show you what's been marked as State's Exhibit 8 for purpose of identification and the cover indicates that it is a portion of a transcript of your testimony in the case of State v. Mr. Tennessee in Soddy Daisy on November 20, 2009 correct?"

" On page 11, line 4 you were asked a question and responded as follows : *Read the applicable question and answer slowly and clearly.*

"Did I read that correctly?"

At this point be sure to avoid asking any other questions about that portion of the transcript. In particular do not ask why the statement is inconsistent with the witnesses statement in court in your case. Do not try to draw any conclusions through your questioning about the prior inconsistent statement. You can draw those conclusions during Closing Argument.

Continued page 11