

PHYSICAL CONTROL, A NEW STANDARD

State v. Butler

The car has left the road. It may be wrapped around a telephone pole, a tree or in a ditch. Dude is sitting next to a tree with a vacant stare. This scene is repeated weekly if not daily around the state and nation. A new standard has been adopted by our Supreme Court concerning the required element that the vehicle can be operated.

In State v. Butler, 108 SW3d 845, Tenn. 2003 the court adopts the Smelter, 674 P.2d at 691 Wash App 1984 standard.

“The Smelter Court noted that under the reasonably capable of being rendered operable standard, the proper focus was not narrowly on the "mechanical condition of the car when it comes to rest, but upon the status of its occupant and the nature of the authority he or she exerted over the vehicle in arriving at the place from which, by virtue of its inoperability, it can no longer move.”

Our current pattern jury instruction: For a person to be in physical control of a motor vehicle, the person must be present, at or near a motor vehicle and must have the ability to determine whether or not such motor vehicle is moved and, if so, to where it is moved. It is not necessary that the motor of a motor vehicle be running or capable of starting for a person to be in physical control of such vehicle. A person may be in physical control of a motor vehicle without driving, starting or moving the motor vehicle.

Defining the instruction after Butler:

At or near = at least within 100 yards applies.
Capable of operation = focus not on the mechanical condition of the car when it comes to rest, but how the car got there.

The Butler scene:

Wal Mart parking lot and store.
Drunk is 100 yards from motorcycle.
Drunk is 50 feet from store entrance.

Justice Barker writes:

We conclude that the evidence was sufficient to support a conviction for driving under the influence based either on the theory that the **defendant was driving** the vehicle while intoxicated **or that he was in physical control** of the vehicle while intoxicated.

Tennessee District Attorneys General Conference

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

Tom Kimball, DUI Training Coordinator (615) 253-6734
Sherri McCloud, Administrative Assistant (615) 253-6733
DUI Fax Number (615) 253-6735

The Butler facts:

- Unknown customer approaches Deputy Owen and tells him about a drunk wandering in the parking lot.
- Deputy approaches drunk. Drunk has sparkplug and wrench in hand, tequila under jacket.
- Deputy escorts drunk into store and gives SFST's. Drunk does poorly. Drunk is transported to police station and blows a .19.
- Witness Janae Owen testifies drunk told deputy that he drove to store to get food. Motorcycle sputtered and stopped working at Wal Mart. He couldn't decide what to eat so he drank tequila to help his toothache pain. He could not find matching sparkplug in the book, so he went to bike and removed his to compare with plugs on shelf. Days later mechanic Henderson drained the flooded cylinder, replaced plug and started bike.

Butler was in physical control: His close proximity: **100 Yards**. He had the ability to move the bike. If he can remove the plug, he can insert the plug.

TNDAGC

DUI NEWS



Volume 1, Issue 4
September, 2003

PUBLISHER:

Tom Kimball, A.D.A.

LAYOUT AND DESIGN:

Sherri McCloud

INSIDE THIS ISSUE:

Case Law	2-3
Wall of Shame	4
Training Opportunities	5
DA pay and staffing	6
Vehicular Homicide	7
One Day in America	8
One year review	9
Belts, Booze and Speed	10
More cases	11
Physical Control	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: tkimball@tndagc.com
web: www.tndagc.com

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 BASIC TRAINING

September 23-25, 2003 the first DUI Basic Training seminar for prosecutors was conducted in Nashville. Speakers included NHTSA research analyst Dr. Marcellene Burns, Criminal Appeals Judge Thomas Woodall, and Memphis prosecutor Tom Henderson, and Michigan DUI Training Coordinator David Wallace. Sixty prosecutors learned about Sensing and breath tests, the validation studies of the standardized field sobriety tests for a .08 DUI, cross-examination and the visual trial. Participants came from Elizabethton in the east to Memphis in the west. For three days participants were able to learn from the best and compare notes with one another about what works in their jurisdictions.



DUI quiz. Pre-conference 53%. Post 91%

Pre-Test and Post-test

As Prosecutors entered the seminar they were given a list of 35 questions. Some are repeated in the borders of this newsletter. The average of correct responses was 53%. After the three day training the average correct response was 91%. It was an honor to be surrounded by prosecutors seeking information to help them convict the guilty and protect the citizens of this state.

Prosecutors were able to attend this conference because it was scheduled while the Sessions Court Judges were meeting for their conference. This caused courtrooms across the State to be closed long enough to permit a large group to assemble. Prosecutors were able to attend financially because of the generosity of the Governor's Highway Safety Office, the Department of Transportation, NHTSA and the US Department of Transportation. All funds came from federal sources. Ultimately prosecutors were able to attend because people pay Uncle Sam's taxes and Congress believes training prosecutors should be a priority.

GHSO TO FUND PILOT PROJECT PROSECUTORS

The same Governor's Highway Safety Office plans to fund about eight DUI prosecutors in separate Judicial Districts around the State. Plans have not been finalized. These eight projects will be the source of information permitting the GHSO to decide whether the employment of a specialized DUI prosecutor will result in increased convictions, better prosecutions and ultimately fewer injuries and fatalities on the roads. Four prosecutors were funded the past year.

What I hear, I forget.
What I see I remember.
What I do I understand.

Confucius 451 B. C

The following Prosecutors had DUI convictions affirmed by the Appellate Courts between June and September, 2003:

- Eleanor Cahill,**
Carroll County
- Camille McMullen,**
Shelby County
- Carl T. Huskins,**
Hamilton County
- Weakley E. Barnard,**
Marshall County
- Shaun A. Brown,**
Madison County
- Joseph Eugene Perrin and James Franklin Goodwin, Jr,**
Sullivan County
- Kristen K. Shea,**
Davidson County
- D. Roger Delp,**
Roane County
- Lee E. Dryer,**
Williamson County
- Paige Collins,**
Hamblen County
- Ryan Brown,**
Davidson County
- James Goodwin,**
Sullivan County
- Steven R. Hawkins,**
Sevier County

Thanks to all for your outstanding effort.

RECENT CASES



Child death by airbag conviction affirmed

State v. Jones, 2003 WL 22121660 Tenn. Crim. App. Sept. 2003

The Court of Criminal appeals has affirmed the Criminally Negligent Homicide conviction of Latrece Jones. She sat in the front passenger seat of a rental car with her two year old son on her lap. A fender bender resulted in the deployment of the airbag and the death of her son.

The State proved Jones knew the risks of air bag deployment through evidence from the hospital where nurses instruct parents of new-borns, from the warnings in the car, from experience with car seats and through a variety of public service messages circulated in print, radio and television.

State v. Orey, 2003 WL 21392877, Tenn. Crim App. June 2003

Officer Kim Barker of the Mckenzie Police Department stopped the defendant for speeding. He staggered out of his truck and took the finger count task and "got his numbers mixed up". He also refused the breath test. Another officer and a jailer testified as to their observations of the impaired defendant.

The defendant called five friends to support his story that the officers were seeing his normal physical tendencies. The judgement and sentence including service of 180 days for this third offense was affirmed.

Note: A breath test refusal often results in a strong argument.

Think of all the uses of a license to drive. Why would a person refuse to give a sample of their breath or blood in order to keep their license? All drivers consent to the test when they accept the license. By statute we let people refuse with a penalty. Refusal is the tool of the impaired.

State v. Bullion, 2003 WL 22018893 Tenn. Crim. App. August 2003

The trial court sentenced the appellant for violating the Motor Vehicle Habitual Offenders Act to four years incarceration and suspended her driver's license for ten years. For driving under the influence, the trial court sentenced the appellant to four years incarceration and imposed a three thousand dollar (\$3000) fine. The trial court ordered the appellant to serve the four year sentences consecutively, for an effective sentence of eight years incarceration.

Ms. Bullion claimed she had two beers. She did poorly on the SFST's and refused the breath test. Does this sound like every multiple impaired driver in Tennessee?

Judge Ogle writes: As noted by our supreme court, "[s]ociety demands protection from those who habitually drink and drive in complete disregard for the welfare of others and for the laws of this state." *State v. Troutman*, 979 S.W.2d 271, 272 (Tenn.1998)

More cases page 11

CASES CONCERNING SENTENCING:

DELBERT EUGENE OREY 2003 WL 21392877

DUI, third offense, and driving while license suspended, fifth offense, and was sentenced, respectively, to eleven months and twenty-nine days, with all but 180 days suspended, and six months, with all but forty-five days suspended, the sentences to be served concurrently.

DEREK PAUL WHYTSELL 2003 WL 21402024

For DUI 1st offense a \$500 fine, eleven months and twenty-nine days in the penal farm, which was suspended after service of forty-eight hours, fifty days of community service, revoked his license for a year, and required him to attend DUI school.

JOHN LEE BELLAMY 2003 WL 22052107

Pled guilty in the Sullivan County Criminal Court to reckless aggravated assault, a Class D felony; failure to appear, a Class E felony; driving under the influence, second offense, and leaving the scene of an accident, Class A misdemeanors; and driving on a revoked license, second offense, a Class B misdemeanor. The trial court sentenced him as a range I, standard offender to an effective sentence of four years, eight months, twenty-nine days. The defendant appeals the trial court's ordering him to serve his two-year, nine-month sentence for the reckless aggravated assault conviction and consecutive one-year sentence for the failure to appear conviction in confinement.

DARLENE RENEE BLACKHURST

2003 WL 21920251

Pled guilty to a second offense of driving under the influence of an intoxicant ("DUI"), leaving the scene of an accident involving injury, and three counts of reckless aggravated assault. Following a sentencing hearing, the trial court imposed an effective sentence of three years, eleven months and twenty-nine days.

JAY WESLEY MITTS 2003 WL 22174294

The Court improperly allowed the defendants 150 day DUI sentence to run concurrent to a violation for an unrelated charge. The 150 day sentence for fourth offense had to run day for day.

Compared to this day last year, there have been 76 fewer fatalities on Tennessee roads. The Booze it or Lose it campaign will be active in December. Good luck to all Lifesavers!

DEFENDANT'S LIES FROM THE WITNESS STAND SUPPORT INCREASED PENALTY

STEPHEN EUGENE DAVIS 2003 WL 21877664

The Court citing *State v. Chestnut*, 643 S.W.2d 343, 353 (Tenn. Crim. App. 1982) found that the lack of candor from the defendant was properly considered in sentencing. The Court also found that the defendant's prior employment in the 1970's as a police officer should not have been used to increase the penalty. The outcome: 15 days for first offense.

VIDEOTAPES

BRANDY D. FORREST 2003 WL 21909350

The videotape was relevant to illustrate the extent to which the defendant was impaired. The defendant maintained she had not consumed alcohol that evening and was not intoxicated at the time of the incident. However, the defendant's hysterical rantings as illustrated on the videotape arguably show otherwise. *See State v. Carl Martin*, No. W2002-00066-CCA-R3-CD, 2003 Tenn. Crim. App. LEXIS 12, at **23-24 (Tenn. Crim. App. Jan. 2, 2003, at Jackson) (holding the defendant's videotaped "profane and wicked rantings" were relevant and admissible in showing the defendant's impairment). The videotape is especially probative as it was the only physical evidence of the defendant's intoxication. The defendant refused to perform field sobriety tests and refused to take a breathalyzer test. The probative value of the videotape was not substantially outweighed by its danger of unfair prejudice. *See Tenn. R. Evid. 403*. Therefore, we conclude the trial court did not abuse its discretion in permitting the jury to view the videotape.

TRAFFIC STOPS

MARK HOWARD RUSSELL 2003 WL 21909348

Officer Delaney testified that he noticed a defective tail light, which is a traffic violation. *See Tenn. Code Ann. § 55-9-402 (1997)*.

ANSWERS TO QUIZ:

1. 18 clues
2. Metabolites of cocaine False
3. THC Duration True
4. Alcohol as liquid True
5. Alcohol as vapor True

MORE ARRESTED FOR DUI THAN ANY OTHER CRIME IN TENNESSEE 2002

DUI arrests:	27,654
Simple Assault:	23,417
Drug possession:	25,681
Public Drunkenness:	20,376
Bad Checks:	12,359
Shoplifting:	10,818
Aggravated Assault:	10,464

TENNESSEE EFFORTS RECOGNIZED NATIONWIDE

Tennessee recognized by Jeffrey W. Runge, MD, NHTSA Administrator in speech at the Annual Lifesavers Meeting, Chicago, II March 10, 2003.

Tennessee has reported that for two years in a row, they have reduced their number of roadway fatalities by more than 100 people each year. The State Highway Safety Office attributes these reductions to Tennessee's "Click It or Ticket" and to the "Booze it and Lose it" campaigns, and to the effective use of paid media.

High Risk Drivers Beware

US Senator Mike Dewine, Ohio has proposed legislation that would require states to pass a "High Risk Driver" law to continue to receive highway funds. Here's the definition from the Senate Bill 3056: An individual referred to in subparagraph (A) is an individual who--

- `(i) is convicted of a second or subsequent offense for driving while intoxicated or driving under the influence within a minimum of 5 consecutive years;
- `(ii) is convicted of a driving while intoxicated or driving under the influence with a blood alcohol concentration of 0.15 percent or greater;
- `(iii) is convicted of a driving-while-suspended offense if the suspension was the result of a conviction for driving under the influence; or
- `(iv) refuses a blood alcohol concentration test while under arrest or investigation for involvement in a fatal or serious injury crash.

**Belts, Booze, and Speed
Cost Nation 111 Billion in 2002**

Excerpts from Speech by **Jeffrey W. Runge, M.D.**, NHTSA Administrator, to 3rd National Intelligent Vehicle Meeting June 25, 2003.

Vehicle crashes are responsible for 95% of transportation related deaths and 99% of transportation related injuries. Unintentional injuries are the leading cause of death for Americans after the first year of life through age 34, and crashes are *the* leading cause of these deaths. They also represent a staggering loss – in terms of human lives lost and the estimated \$230 billion annual impact on the economy. Action – or inaction – largely contributes to these costs. Failure to wear a safety belt is responsible for \$20 billion, impaired driving contributes \$51 billion, and speed related crashes account for \$40 billion. 2002 the number of people killed by impaired driving collisions increased about 3% over the prior year.

Cost of Motor Vehicle Crashes - 2000



- Total annual cost - **\$230.6 billion**
- Highlights
 - Non use of belts - \$20 billion
 - Impaired driving - \$51 billion
 - Speeding - \$40 billion

RECENT CASES CONTINUED

Court of Criminal Appeals

State v. McCraney

2003 WL 21998487, Tenn.Crim.App., Aug. 22, 2003

Three weeks after the act of war in which our nation was attacked, the FBI asked Tennessee police departments to be on the lookout for rental cars from Florida. A Dyer county deputy saw a car with Florida plates and after calling in the tag number discovered the car was a rental. He followed the car and the driver "seemed like he may have been preoccupied with my presence." After several miles the officer stopped the car for following another too closely.

He gave a warning ticket. The driver denied drugs or guns and did not consent to a search. The deputies partner was a drug dog, who indicated drugs were aboard. Officer Barron asked the Defendant to exit the vehicle, and the Defendant told the officer that he had a blunt cigar stuffed with marijuana inside the vehicle. Officer Barron placed the Defendant in the officer's patrol car and searched the interior and the exterior of the car where the canine made a positive indication. The officer testified that, pursuant to the search, he found a marijuana cigar inside the vehicle, an aluminum foil-wrapped bag containing rock cocaine in the gasoline compartment, and, after returning to his patrol car, a bag of marijuana where the Defendant had been sitting inside of the patrol car.

The Court of Criminal Appeals affirmed the Trial Judges ruling suppressing the evidence. The Court, using the Odom standard, ruled that the facts did not preponderate against the Judges decision. The Trial Judge based his decision on cases like Daniel and Simpson.

NOTE: This does not change Tennessee law.
QUERY: Would this stop be valid if the individual in this car was a terrorist instead of a drug criminal? Would that fact corroborate the information provided?

State v. Gibson

2003 WL 22080792, Tenn.Crim.App., Sept. 9, 2003

Issues raised: The stop and the breath test result of .11 Sentencing of 90 days was not raised. The Pigeon Forge **stop** was affirmed based on a citizens tip that the defendant passed in a dangerous manner causing an oncoming vehicle to leave the roadway and the caller to slam on his brakes to avoid a collision. The citizen got the tag number and described the gold Jaguar. An officer then saw a gold Jaguar driving faster than other traffic and weaving in and out of traffic without using signals. He saw the tag number matched the call and stopped the defendant. The **breath test** involved twenty-two minutes of sitting 5-6 feet from the defendant and watching him, talking with him and checking to see if anything was in his mouth. The court analyzed the stop by looking at the reliability of the citizens informant information. They quote the Pulley decision, "When the informant reports an incident at or near the time of its occurrence, a court can often assume that the report is first hand, and hence reliable." State v. Pulley, 863 S.W.2d at 638. The court also notes that the "level of danger" that the tip reveals must be considered in determining the reasonableness of the stop.

TIMOTHY MCVEIGH'S STOP

Mr. McVeigh had been pulled over by an Oklahoma Highway Patrolman, Charles Hanger, on Interstate Highway 35 on the morning of April 19, 1995. McVeigh was driving a 1977 pale yellow Mercury Marquis, and was stopped by Trooper Hanger because the car McVeigh was driving displayed no license plate. McVeigh told Trooper Hanger that he was returning from Arkansas.

PRE-TEST QUESTION

- 1) There are a total of _____ clues from the SFST's if all three are properly given.
- 2) Metabolites of cocaine prove impairment
T _____ F _____
- 3) THC is detectable in the blood stream for only 15 minutes to an hour after smoking.
T _____ F _____

Answers on page 11

Recidivist Wall of Shame

Some Impaired drivers are exceptional. They continue the criminal behavior of driving under the influence until liver failure, heart disease or a fatal crash eventually stops them. They deserve special mention. Here are the first members of the Wall.

Wall nominee?

E-mail:
tkimball@tndagc.com

Bobbie Richard Seffield, 65, of Rockwood, Tennessee pled to DUI 11th offense on the day of trial in Putnam County. He had been convicted of DUI in various counties, including Putnam, Knox, Roane, Anderson, and Cumberland, 10 times over the previous 14 years.

Gerald Kieth Rogan, 45, of Kingsport, Tennessee was arrested Christmas Eve, 2002. He Pled to DUI 10th offense and violation of the Habitual Motor Vehicle Offender and received a sentence of 6 years as a Range II offender on July 21, 2003 in the Criminal Court for Sullivan County. He is now serving his sentence in the Tennessee Department of Corrections. His last three DUI's in 1999, 2000 and 2001 were in Virginia.

Valerie Arlene Bullion, 47, Rockwood, Tennessee, pled guilty and then challenged he 8 year sentence for 10th offense DUI, habitual motor offender, driving on revoked license and violation of implied consent. Her sentence was affirmed.

Terry L Jenkins, 43, Dickson, Tennessee, was convicted of DUI 9th offense and habitual traffic offender due to 8 driving on revoked convictions. He appealed and lost his challenge concerning his sentence in February 2001.

Randall P. Baker, 49, White Bluff, Tennessee, was convicted by a jury of DUI 2nd offense and driving on a revoked license in August, 2000. He was permitted to remain on bond to get his affairs in order. He did not return. His bench trial for failure to appear resulted in a sentence as a career offender, 6 years with 60% parole eligibility to run consecutive to his dui conviction in May, 2001. The sentencing report revealed he was convicted of DUI eighth offense in 1997, a case he appealed and lost. He had prior felonies for automobile burglary, petit larceny, second degree burglary, concealing stolen property, grand larceny, vehicular assault, and reckless endangerment.

Joe N. Galloway, 48, Hendersonville, struck and severely injured a lovely 79 year old Sumner County resident. As a felony DUI offender and habitual motor offender he is serving 8 years. His victim now uses a walker and cane to get around in a nursing home. She is no longer able to drive and is completely dependent on others to get around.

QUESTIONS

- 4) Alcohol after consumption exists as a liquid in the blood. T ___ F ___
- 5) Alcohol after consumption exists as a vapor (gas) in the air sacs of the lungs. T ___ F ___

Answers on page 11

DUI TRAINING 2002-2003 One Year of Impact

With the closing of the first fiscal year of the DUI Training Division a look back seems appropriate. Here are a few of the highlights of the first year of this program. Thanks to the people at G.H.S.O. for making this year A TREMENDOUS SUCCESS.

COPS IN COURT

In July over 200 officers participated in this training for report writing and testimony in court. Criminal Court and Sessions Court Judges and prosecutors were critiquers in court. The officer then watched a video of his testimony and received a one on one critique. One officer in his evaluation of the course summed it up well: "The testifying and feedback, although nerve racking, was to me the most beneficial aspect of the seminar. Seeing myself on video while testifying will help cut down on some of my bad habits. Another wrote, "Being able to be questioned and cross examined was great. I enjoyed getting feedback on how to improve." Numerous officers asked us to extend this seminar to a second day so they could get a before and after experience in the courtroom.

FACULTY BENEFITS FROM COPS IN COURT
"I had a trial this week and was able to prep my officer (who had never testified in front of a jury before) based on my experiences last week. The result? Victory!!" **Kristen Shea**, Nashville ADA

VEHICULAR HOMICIDE TRIAL WORKSHOP

The Vehicular Homicide Trial Workshop February 4-7, 2003 was our first venture into a trial practice training. Sixteen prosecutors from seven judicial districts brought pending vehicular homicide cases with them and received instruction and then practiced brainstorming, voir dire, opening statement, direct examination and closing argument.

Among the participants was ADA **Karen Cook** from Memphis. Her case, State v. Morgan, was recently resolved with a plea on the day of trial to a 22 year sentence. The faculty including six Tennessee prosecutors and three out of state prosecutors and two crash reconstructionists were deeply moved by the commitment of our participants. The victims and families of those killed by impaired drivers deserve the best representation.

Vehicular Homicide Faculty



PROTECTING LIVES



Protecting lives participant, Franklin officer **Tammy Crowe** walking the line for instructor, **Richard Holt**.

Protecting Lives, Saving Futures was conducted three times this fiscal year across the state: Greenville, Fall Creek Falls and Natchez Trace State Parks.

This seminar is designed to permit police officers and prosecutors to learn the role of the other and understand what it takes to convict those guilty of DUI. Twenty seven prosecutors and fifty five officers attended these trainings. Three different doctors joined prosecutors and officers as faculty. Many thanks to Dr. Kenneth Ferslew from ETSU for his help in each session.

We remember our friend, Gerald Warf from the Red Bank Police Department, who attended in March and has since passed away.

PARTICIPANTS IN TRAINING THIS YEAR:

Prosecutors: 183

Officers: 401

Judges: 10

Thanks to all for you efforts.

ONE DAY IN THE NEWS
24 hours of DUI in America September 3-4, 2003

The following stories appeared in the news on September 3 & 4, 2003. There is no significance to these dates. These stories do not include the police blotters of the nation. On any given day in this nation similar stories appear. Is it time to rededicate our efforts to stop DUI offenders from reoffending?

In Clinton, Illinois,
A man who was behind the wheel when a car went into a lake, killing three children strapped inside, has been charged with driving under the influence. Maurice Lagrone Jr., 28, is also charged with driving with a suspended license, DeWitt County State's Attorney Jerry Johnson said.
From the Associated Press September 4, 2003

In Casper, Wyoming September 4, 2003
Michael Cunningham was sentenced to between six and nine years in prison Wednesday for driving a boat while drunk on Alcova Reservoir last year that caused a crash that killed a Colorado woman by Judge Tom Sullins in 7th District Court on Wednesday.

Las Vegas KRN TV Sept 4, 2003
A judge in Las Vegas has sentenced a repeat drunken driver to a maximum of 49 years in prison after a deadly crash near Boulder City. Authorities say 52-year-old George Robinson crashed into a stopped car, killing a Florida couple. Robinson's blood-alcohol level was 0.24. The legal limit in Nevada is 0.10. Prosecutors say Robinson has been arrested at least seven times for driving under the influence of alcohol.

WMTW Portland, Maine September 4, 2003
The Maine Supreme Court upheld an eleven year sentence for Randall Horr. He was convicted for DUI 13th offense and being a habitual traffic offender.

WAVE TV, Louisville, Ky Sept 3, 2003
How can a Kentucky Parole officer can be arrested with a .29 BAC and counsel parolees concerning alcohol and drug problems. It appears that this is the parole officers 6th DUI arrest since 1992.

Birmingham, Alabama News Sept 3, 2003
Milton Sims, 46, has turned himself in to Bibb County authorities on a murder charge stemming from a DUI crash. He is charged with felony DUI and murder after striking a hitchhiker. Sims had been given a 10-year sentence that included three years' probation and 18 months in work release, court records show for felony DUI. He was on work-release due to health problems, but was being sought for failure to return to the jail on time. Sims has 10 prior DUI convictions.

Roanoke, Virginia Sept.3, 2003
In Roanoke a woman was killed and her husband charged with DUI after their Ford F-150 pickup ran off the right shoulder of the road, up an embankment and rolled back down landing on the roof. Other charges were under consideration.

TRAINING OPPORTUNITIES

CANCELLATION

Until further notice there will be no trainings in Tennessee. Plans for another Cops in Court in Jackson previously advertised in the last issue has been cancelled at the request of the GHSO.



Criminal Court of Appeals Judge Woodall accepted the challenge of explaining the multitude of Sensing cases at DUI Basic Training in September 2003.

COURSES AT THE N.A.C.

Prosecuting the Drugged Driver: January 20-23, 2004	
Trial Advocacy I	January 5-9 March 15-19, 2004 March 29-April 2, 2004
Trial Advocacy II	January 26-30, 2004
Trial Advocacy III (Persuasion)	March 15-19, 2004
Cross-Examination	February 17-20, 2004
Pre Trial Preparation	February 2-6, 2004

See www.ndaa.apri.org for the full training schedule.

PIERRE JACKSON GETS 52 YEARS

Pierre R. Jackson had three drunken driving convictions and had had no valid driver's license for more than a decade when he killed a couple on a motorcycle two years ago in an alcohol-related crash. He has been sentenced to 52 years to serve.

"It was almost like a time bomb waiting to blow up and it finally did," said Criminal Court Judge John Colton Jr. "This is the kind of defendant who should be taken off the street and separated from society." Memphis Commercial Appeal May 31, 2003.

**DEFENSE ATTORNEY REFUSES ALL REQUESTS
JURY CONVICTS-COURT AFFIRMS**

Former police officer and current Nashville defense attorney Gregory Dale Clayton can be found listed as a Tennessee DUI Defense Attorney with a simple yahoo search. His advise on the web: "If you are suspected of drunk driving (DUI) and refuse too (sic) take a blood, urine or breath test, you can be charged with violation of the State's implied consent law and your driver's license may be suspended. There is NO law in the State of Tennessee requiring you to take a field sobriety test. If you take a field sobriety test you are giving the police evidence that can be used against you in court. You don't have to answer any questions or take any kinds of tests that may incriminate you."

On April 12, 2000 Clayton took his own advise. After his conviction for DUI he appealed. His conviction was affirmed in State v. Clayton, 2003 WL 21516195, Tenn.Crim.App., Jul 03, 2003.

Some better advise? **Don't Drink and Drive!**

THE REVOLVING DOOR

I know no one wants to hear us gripe and I hate hearing it myself, but it was pointed out to me the other day that in a Nashville courtroom the only person making less money than the prosecutor was in jail. The bailiff, patrol officer, fireman in the arson case and court reporter were all being paid more than the only person that had an average law school debt of \$70,000. We wonder why one third of all prosecutors in the State have less than three years experience. Does anyone notice that this is wrong?

<u>Department</u>	<u>Position</u>	<u>Starting Salary</u>	<u>College Requirements</u>
Metro-Nashville P.D.	Trainee	\$ 30,084	None
	Officer I	\$ 33,435 (after graduation from academy)	
	Officer I	\$ 34,437	2 year degree
	Officer I	\$ 35,475	4 year degree
Davidson Co. S.O.	Trainee	\$ 31,921	60 semester hours
	Officer I	\$ 35,472 (6 mo. – 1 year)	
Metro Fire Dept.	Trainee Recruit	\$ 31,921	None
	Fire Fighter I	\$ 35,472	None
TBI	Special Agent I	\$ 33,072	4 year degree
	(after 2 nd year-flex)	\$ 37,020	4 year degree
Tennessee	Asst. District Attorney	\$31,044	Law Degree-7 years and Bar exam

STAFFING

Not only is the prosecutor’s salary less than anyone in the courtroom, more is required. Prosecutors are handling more cases every year. According to the TBI Crime Reports for 2001 and 2002, arrests increased again, but there were no more prosecutors to handle the increased case load. As more laws pass there are no more prosecutors. Will the new lottery laws effect DUI enforcement and prosecution? Every crime that must be prosecuted diminishes the amount of time a prosecutor has to prepare for litigation.

Here’s one example:

The Second Judicial District

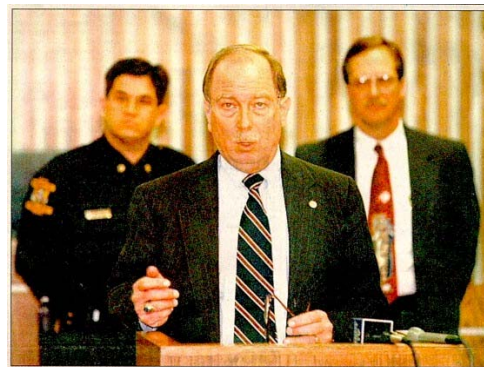
Sullivan Criminal Court Two Divisions	1,368 Cases
Bristol Sessions Court Two Divisions	5,399
Kingsport Sessions Court Two Divisions	<u>6,622</u>
Total cases	13,388

The Prosecutors:

- District Attorney Greeley Wells
- 10 Assistants for Criminal Court
- 3 Assistants for Sessions Court, who also handle Juvenile Court

Total cases per prosecutor = 956

Maximum number recommended by the American Prosecutor’s Research Institute = 250



District Attorney Greeley Wells

VEHICULAR HOMICIDE & ASSAULT CASELAW

Web Site:
This and the previous issues are available at www.tndagc.com/training/dui

State v. Perky, 2003 WL 21920255, August 12, 2003

The Defendant was unhappy with his 25 five year sentence for aggravated vehicular homicide. On appeal the Court noted that two enhancing factors applied. He had a criminal history and he had failed to live up to the rules when on probation. Perky had a .23 blood alcohol level when he “mangled” 16 year old, Joshua Cody Green when he attempted to pass another car and drove into the oncoming lane of traffic. Perky had two prior DUI’s and was on probation when he took the life of this teen.

In the opinion the Court points out that our legislature failed to include in the aggravated vehicular homicide statute any license revocation. Knoxville ADA Deborah Herron, displayed some innovative thought in requesting a \$50,000 fine, so that Perky could not get his license back until the fine was paid. The Court upheld the fine for other reasons.

Note: Aggravated Vehicular Homicide is classified as a non-violent crime, thus Perky will be eligible for parole at 30%. Currently an inmate gets 16 good day credits for every 30 days of a sentence. Thus Perky could, but hopefully won’t, be released in 3.75 years!

State v. Cofer, 2003 WL 21729450, July 25, 2003

This aggravated vehicular homicide conviction resulted in a 21 year sentence. ADA’s Freeland and Brown in the 25th Judicial District in Hardeman County had their work cut out for them.

There was:

- 1) an inexperienced but dedicated officer,
- 2) a reluctant eyewitness,
- 3) a blood alcohol test refusal and no forced blood,
- 4) a hospital serum blood conversion,
- 5) an impaired victim passenger;
- 6) chain of custody issue and a lack of witness interviews

The defendant offered as an “expert” the following: Mr. Province was licensed as a mechanic, had repaired cars for a number of years, had rebuilt wrecked cars, and had operated a tow truck. **He testified that he had also been involved in a number of car accidents.** The court properly refused.

Every vehicular homicide is a tragedy. Each is also a lesson. Every impaired driver arrested and convicted of DUI is without wheels while incarcerated. No impaired driver maims, mangles or mutilates while in custody. The only way to prevent these tragic cases is to proactively fight against the crime of DUI. Each conviction counts. There is no way to know who has benefited from the impaired driver’s custody. No law abiding citizen should ever be a victim of an impaired driver. We can’t stop the recidivist from driving when he is released. We can do our best to be certain that all persons guilty of this crime are convicted and removed from the streets for a time.