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2018 UPDATE OF LEGAL MARIJUANA IN COLORADO

The Rocky Mountain High Intensity Drug Trafficking Area Strategic Intelligence Unit has published annual reports every year since 2013 tracking the impact of legalizing recreational marijuana in Colorado. Their latest report, issued in September 2018, provides data and information so that policy makers and citizens can make informed decisions on the issue of marijuana legalization.[1]

The report is divided into six sections covering marijuana's impact on Traffic Fatalities, Marijuana Use, Public Health, the Black Market, Societal Impact and the Marijuana Industry. Below is a summary of each section:

1. Traffic Fatalities - Since legalization in 2013, marijuana related traffic deaths increased 151% while all Colorado traffic deaths only increased 35%. During this same time period, deaths involving drivers who tested positive for marijuana more than doubled. (This equates to one person killed every 2 1/2 days compared to one person killed every 6 1/2 days.) The percentage of all traffic deaths that were marijuana related increased from 11.43% in 2013 to 21.3% in 2017.

2. Marijuana Use - Past month use, during the last three-year average, showed a 45% increase compared to the three-year average prior to recreational legalization. Use for the age group 12 years and older is ranked 3rd in the nation, which is 85% higher than the national average.

3. Public Health - The yearly rate of emergency department visits related to marijuana increased 52% after legalization. Marijuana-related hospitalizations increased 148% from 2012 to 2016.

4. Black Market - The number of highway seizures increased 39% from before legalization and the number of seizures in the U.S. mail system increased 1,042% during the same time period.

5. Societal Impact - Marijuana tax revenue represents approximately nine tenths of one percent of Colorado's FY 2017 budget. Since 2013, violent crime increased 18.6% and property crime increased 8.3%. 65% of local jurisdictions in Colorado have banned medical and recreational marijuana businesses.

6. Marijuana Industry - From 2014 through 2017, average annual adult use flower prices fell 62%. The average THC content of all tested flower in 2017 was 19.6% statewide compared to 17.4% in 2016, 16.6% in 2015 and 16.4% in 2014. The average potency of concentrated extract products increased steadily from 56.6% THC content by weight in 2014 to 68.6% at the end of 2017.

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1. The full report can be found at www.RMHIDTA.org.

RECENT DECISIONS

State v. Charlotte Lynn Frazier and Andrea Parks, 2018 Crim. Tenn. App. LEXIS 537

In this unanimous Tennessee Supreme Court decision, it was determined that absent interchange, designation, appointment or other lawful means, a circuit court judge in Tennessee lacks jurisdiction to issue a search warrant for property located outside of the judge's statutorily assigned judicial district. Also, the good-faith exception to the exclusionary rule does not apply in these circumstances. By applying this holding, the TSC concluded that the 23rd Judicial District Circuit Court Judge, herein, lacked jurisdiction to issue search warrants for residences in the 19th Judicial District. A search warrant issued for a search or seizure beyond the territorial jurisdiction of the magistrate's powers is treated as no warrant at all. (void ab initio)

State v. John Palladin Gibson, 2018 Crim. Tenn. App. LEXIS 754

On September 13, 2013, while responding to a call of an intoxicated man trying to use another person's credit card, Deputy Sulewski observed the defendant sitting in the driver's seat of a vehicle, while the engine was running and with its lights illuminated. Mr. Gibson presented many signs of impairment and he consented to a blood draw. Mr. Gibson's BAC was 0.08%. During the jury trial, only the Deputy and the TBI analyst testified regarding the chain of custody of the blood sample. Since there was no evidence offered regarding who handled the blood sample after the Deputy deposited it into the evidence locker and the procedures that were followed regarding the handling of the sample, the Court of Criminal Appeals ruled that an unbroken chain of custody was not established and a new trial was ordered for the DUI related counts. Although the State is not required to call every witness that handled the evidence, some evidence needs to be offered as to the policies and procedures followed to ensure the identity and integrity of the evidence being offered. The chain of custody can still be proven at the new trial.

State v. Gregory Eidson, 2018 Crim. Tenn. App. LEXIS 766

Mr. Eidson was convicted of DUI after a jury trial and was sentenced to 11/29, suspended after 10 days jail, consecutive to another sentence on a prior case. On August 9, 2015, Trooper Flatt responded to the scene of a crash. Mr. Eidson, the driver, claimed that his passenger got angry with him and grabbed the steering wheel, causing the car to go into a ditch. He admitted to drinking 12 beers before the crash. At trial, he claimed that he pounded many tall boys after the crash and hid the cans in the woods before the trooper arrived. Mr. Eidson filed his appeal pro se. He complained about many procedural, court and attorney deficiencies. Unfortunately, Mr. Eidson failed to properly prepare the record for appeal. He also failed to cite supporting case law or properly offer any supporting evidence for many of his arguments. Mr. Eidson's appeal was denied.

State v. Raymond Robert Crepack, 2018 Crim. Tenn. App. LEXIS 767

An anonymous caller, on January 11, 2015, complained about a reckless and possibly impaired driver. A description of the vehicle, tag number and description of the driver was given. The caller then stated that the driver pulled into the New Center Market. Deputy Yoakum found the vehicle at the market and he pulled into the next parking space. Mr. Crepack put the vehicle into reverse and started back when Deputy Yoakum asked him to stop. The Deputy saw an open beer container and he noticed signs of impairment. Mr. Crepack consented to a blood draw and his BAC was 0.17%. A Jury convicted Mr. Crepack of DUI 3rd offense. The Court of Criminal Appeals ruled that the anonymous caller was deemed reliable and the Deputy's actions were deemed reasonable, since the anonymous caller's information was made at or near the time of the occurrence, the caller claimed eyewitness knowledge of the alleged dangerous driving and the Deputy was able to verify a number of details of the caller's observations. Mr. Crepack also objected to his sentence of 11/29 to be served entirely in confinement and at 100%, day for day. Since the trial court noted that Mr. Crepack's extensive criminal history and his conduct supported the sentence, the CCA concluded that the trial court did not abuse its discretion in sentencing Mr. Crepack to serve.

RECENT DECISIONS (Continued)

State v. John D. Henry, 2018 Crim. Tenn. App. LEXIS 790

Two Knoxville officers were dispatched on September 20, 2014, to a liquor store regarding a male passed out in a vehicle. When the officers arrived, they spoke to the caller, observed the vehicle involved and they observed a male walk a short distance and then get into the driver's seat. As they approached the vehicle, the engine was running and one of the officers asked Mr. Henry to turn the engine off. Within 30 seconds, the officer observed open beer cans and he smelled an odor of alcohol coming from Mr. Henry. The trial court ruled and the Court of Criminal Appeals agreed that the officers possessed specific and articulable facts to conclude that a community caretaking function was appropriate in this case. The CCA also affirmed Mr. Henry's consent to give a blood sample after he consented, withdrew the consent and then consented again. Mr. Henry's BAC was 0.20%

State v. Kristen L. Van De Gejuchte, 2018 Crim. Tenn. App. LEXIS 834

On October 25, 2015, Ms. Van De Gejuchte was observed poorly attempting to park a jeep into a parking spot at a gated apartment complex. She then exited the jeep, fell down three times, vomited once and then entered a second vehicle and attempted to leave the apartment complex. A resident of the complex called his roommate, Officer Roach, after watching the above. Officer Roach was able to arrive in his police vehicle and stop Ms. Van De Gejuchte before she was able to leave the complex. She refused SFSTs and implied consent. A search warrant was obtained and a blood sample was taken. Ms. Van De Gejuchte's BAC was 0.21%. Ms. Van De Gejuchte claimed that since the apartment complex was not generally frequented by the public at large, the DUI statute was not violated. The Court of Criminal Appeals stated that the DUI statute is unambiguous and that a "apartment house complex" and "any other premises that is generally frequented by the public at large" are two separate and distinct locations, where DUI is prohibited. To take a phrase that is describing only one of the items and attempt to apply it to another separate and distinct item in the list, contorts the plain language of the statute. Also, the observations of the roommate were sufficient to establish a reasonable suspicion to stop Ms. Van De Gejuchte.

State v. Adam Lee Ipock, 2018 Crim. Tenn. App. LEXIS 854

On June 20, 2016, Adam Ipock was driving a friend's truck on Highway 154 when he crossed the centerline, by four or five feet and entered the opposing traffic lane, striking the pickup truck being driven by Mr. Cooper. Mr. Cooper suffered significant injuries, including many bone fractures and a collapsed lung. Shortly after the crash, Mr. Ipock threw a prescription bottle into the bushes nearby. A blood test revealed clonazepam, methadone and phentermine in Mr. Ipock's sytem. Only the Clonazepam was prescribed to him.

After a jury trial, Mr. Ipock was convicted of vehicular assault, DUI and possession of a Schedule II controlled substance. During the trial, the State inquired into and commented upon the underlying facts of Mr. Ipock's prior convictions for aggravated burglary and theft over $1,000. Although there was no objection made by the defense during the trial, Mr. Ipock did file two motions in limine regarding the use of his prior convictions. The trial court ruled that the prior convictions could be used to impeach Mr. Ipock. The Court of Criminal Appeals stated that although the ruling of the trial court allowing the use of the prior convictions was correct, the prosecutor, by inquiring into the underlying facts of those convictions, violated long-standing precedent and adversely affected a substantial right of the defendant. To the extent that any questioning was for the purpose of eliciting underlying facts of the former convictions, it was improper. *See e.g., State v. Blevins*, 968 S.W.2d 888, 894 (Tenn. Crim. App. 1997) The defendant's right to testify on his own behalf and to have his credibility judged pursuant to established rules of evidence was adversely affected. The CCA then stated that the error was not harmless since the defendant's credibility was of paramount importance to his defense that the crash was caused by his distraction. Mr. Ipock's convictions for vehicular assault and DUI were reversed and the case was remanded for a new trial. The conviction for simple possession was affirmed.

LEGAL SEARCH ISSUES

TO SEARCH OR NOT TO SEARCH? THAT IS THE QUESTION

Have you ever been so caught up in what label to place upon an action or lack of an action, that you miss seeing what is truly behind that label? This seems to be what we have trained ourselves and law enforcement to do. We are labeling actions to fit into categories for the sake of brevity of argument. What we have done, however, is stopped ourselves and law enforcement from exercising independent thought regarding facts and application of the law to those facts. The best example of this is labeling a search of a motor vehicle as an inventory search or search incident to arrest without looking at the justification behind the action in searching the car, truck, van, etc.

In 2009, the United States Supreme Court addressed the legality of the search of a car by police officers after the respondent was arrested for driving with a suspended license, handcuffed and locked in the patrol car in *Arizona v. Gant,* 566 U.S. 332 (2009). The Court held that the search incident-to-arrest exception to the Fourth Amendment's warrant requirement did not apply to the facts of the case. Once the respondent and the other arrestees were removed from the car and secured in separate patrol cars, none of the detainees could access the respondent's car and there was no reason to believe that evidence of the offense for which the respondent was arrested (driving while suspended) would have been found in the car. Therefore, there were no safety or evidentiary issues present given the facts and circumstances of this case to warrant a search incident-to-arrest exception to the warrant requirement. The Court held that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment or it is reasonable to believe the vehicle contains evidence of the offense of the arrest." *Gant* @ 501.

In reaction to the ruling in *Gant*, questions surfaced regarding other exceptions that may have permitted a lawful search of the vehicle under similar circumstances. Those questions inevitably lead to whether an inventory search would have been permissible under the facts. The response could not be definitive because there were insufficient facts to give an answer. The record was not clear, for example, regarding whether the car was towed, secured at the scene, or someone was contacted by the respondent to move the car and whether there was a policy in place. Why would the answers to those questions be important? Well, there is *Drinkard v. State,* 584 S.W.2d 650 (Tenn. 1979), which stands for the proposition that burden of proving the reasonableness of impoundment (towing) of a vehicle and resulting inventory search is upon the State. Under the facts of *Drinkard*, the Tennessee Supreme Court held that the totality of circumstances indicated that the evidence seized from the vehicle was the product of an unreasonable search in violation of the Fourth Amendment and Article I, Section 7, of the Tennessee Constitution. In *Drinkard*, the defendant was stopped on reasonable suspicion of impaired driving. The defendant was ultimately placed under arrest for driving under the influence, informed that his car would be towed, and an inventory search conducted according to police department policy. The defendant requested that his female passenger drive the car away rather than having it towed. The arresting officer did not permit this to take place because the female was not the owner or wife of the defendant even though she was not intoxicated and could have been able to drive, even with a cast on her leg.

Could the outcome of *Drinkard* or *Gant* been different under different facts? The answer is a resounding yes. Like everything else, prosecutors and law enforcement must analyze situations based on the totality of the circumstances. Had the *Gant* arrest been for driving under the influence, the defendant had signs of alcohol or drug impairment, and the car smelled of alcohol when the defendant was already outside or drug paraphernalia was observed, then the evidence of the crime, i.e. the alcohol or drug evidence could justify the search. Conversely, if there had been no one to take charge of the car in *Drinkard*, the car was in the roadway or on the side and needed to be secured or towed, and the defendant did not express a desire to have someone else recover it, an inventory of the car to document and secure the valuables for towing could justify the search. Specific and articulable facts need to be documented to verify the justification of the search and to help identify and explain all search related issues.

AVOIDABLE MISTAKES CONERNING PRIORS

Two recent court decisions emphasized avoidable mistakes made by prosecutors regarding their handling of prior convictions of the defendants that they were prosecuting. The first case, *State v. Jimmy Williams*, 558 S.W.3d 633 (Tenn. 2018), a unanimous Tennessee Supreme Court decision published October 12, 2018, involved giving proper notice of a defendant's prior convictions when the State is seeking an enhanced sentence. On July 27, 2008, Jimmy Williams sexually assaulted a woman in a field behind a Kroger grocery store in Memphis, TN. Charges were not brought until August 26, 2014 due to newly discovered information from an unrelated investigation. A jury trial commenced on February 2, 2016 and on February 4, 2016, at 1:39 p.m., the jury began deliberations. The State filed its notice of intent to seek enhanced punishment at 1:45 p.m. that same day. (Not 10 days prior to trial pursuant to TCA 40-35-202(a)) The defendant was sentenced as a career offender to fifteen years, after the trial court noted that, in a prior case, the court had discussed the defendant's offender classification with him and the State had filed a proper and timely notice, in that case.

The legal question, an issue of first impression, was, "[w]hether a notice to seek enhanced punishment filed in one case provided fair notice to the defendant that the trial court would sentence him as a career offender in a subsequent case?" *Id.* at 638. The Supreme Court stated, "If no pretrial notice is filed at all, the trial court must sentence the defendant as a standard, Range I offender. (Citations omitted) If notice is filed up to the first day of trial, a defendant must request a continuance to preserve his objection to the sentence enhancement. (Citations omitted) If proper notice is timely filed, but a superseding indictment charges additional offenses, then the State must file a new notice for the additional offenses. (Citations omitted)" *Id.* at 640. After equating Mr. Williams' case with cases involving the filing of a superseding indictment, the Supreme Court decided that the notice was insufficient. Mr. Williams' offender classification was then modified from career offender to standard offender, Range I.

The second case, *State v. Adam Lee Ipock*, 2018 Crim. Tenn. App. LEXIS 854, (Also discussed on page 3, under Recent Decisions) involved a vehicular assault and DUI trial in which the State properly introduced the defendant's prior felony convictions for impeachment purposes, after the defendant testified. Unfortunately, the State improperly delved into the specific facts regarding the prior convictions, both during cross examination of the defendant and during the State's closing arguments.

The Court of Criminal Appeals emphasized that Tennessee Rule of Evidence 609* governs the use of prior convictions to impeach the accused in a criminal trial. *Id*. at 25. The CCA stated, "It is well settled and oft repeated that the inquiry into an accused's prior convictions 'must be limited to the fact of a former conviction and of what crime, with the object only of affecting the credibility of the witness, not prejudicing the minds of the jury as to the guilt of the defendant witness of the crime for which he is on trial.' *Hendricks v. State*, 39 S.W.2d 580, 581 Tenn. 1931). Our Supreme court reiterated the rule in *State v. Morgan,* stating that '[i]f it is determined that the prior crime is within the admissible category, the inquiry in the presence of the jury,' is strictly limited to the fact of the conviction. *State v. Morgan,* 541 S.W.2d 385, 389 (Tenn. 1976) (citing *Hendricks*, 39 S.W.2d at 581)" *Id.* at 26. The CCA reiterated, "To the extent that the question was for the purpose of eliciting underlying facts of the former convictions, it was improper." Citing *State v. Blevins,* 968 S.W.2d 888, 894 (Tenn. Crim. App. 1997)". *Id.* at 29.

The CCA decided that by this conduct, a substantial right of the defendant, namely his right to testify on his own behalf and have his credibility judged pursuant to the established rules of evidence, was adversely affected. Therefore, the error could not be classified as harmless and the defendant's convictions for vehicular assault and DUI were reversed and then remanded to the trial court for a new trial.

When alleging or using a defendant's prior convictions, remember to consult the statutory rules and case law regarding their use, to prevent an avoidable mistake.

* Rule 609(a)(3) The State must give the accused reasonable notice of the impeaching conviction before trial.

RULE 35 : MOTIONS FOR MODIFICATION

Sentence Modification Under Rule 35; The different standard required for negotiated pleas as opposed to open pleas

As a prosecutor, I tried to cover all possible contingencies regarding sentencing when contemplating possible outcomes. One area that I never considered, but in retrospect I probably should have, was the possibility for the defendant to file a motion for sentence modification under Rule 35 of the Tennessee Rules of Criminal Procedure.[1] Honestly, I never covered the possibility for three reasons: (1) Rule 35 motions were rarely filed in the district I worked in, (2) when the Rule 35 motions were filed, the court usually denied the motion without a hearing[2] and (3) the defendants were usually moved quickly out of the county jail and into a Tennessee Department of Corrections facility.[3] Still, such motions are possible, and prosecutors need to be prepared to respond to those motions effectively.

Whether these Rule 35 motions are granted or denied, the right to appeal exists for each party. Case law in this area has developed over time. First, the standard of review on a Rule 35 motion is whether the court abused its discretion.[4] This standard of review contrasts direct appeals regarding the denial or granting of probation and length of sentence under T.C.A. §40-35-401(d) which provides for a de novo review of the record with a presumption of correctness.[5] In *State v. Patterson*, ___ S.W.3d ___ (Tenn. 2018), No. M2016-01716-SC-R11 -CD, 2018 Tenn. LEXIS 735 (Tenn. Dec. 10, 2018), the Tennessee Supreme Court granted an appeal to clarify what a defendant must prove on a motion for a reduction of sentence where the defendant entered a plea pursuant to Tennessee Rule of Criminal Procedure 11(c)(1)(B).[6]

In *Patterson*, the defendant had committed multiple burglaries of automobiles and a building in Putnam County, Tennessee. When he was apprehended, the defendant had some of the stolen items in his possession, he provided access to other stolen property, and he led the police to several places where he had committed his crimes. Further, he provided statements to the police implicating himself in those crimes. Ultimately, the defendant was indicted on forty-two offenses. Of those forty-two offenses, the defendant entered a plea of guilty to twenty of the forty-two offenses that he was charged with, (two C felonies: thefts over $10,000; two D felonies: theft over $1000; burglary of a non-habitation; burglary of a building other than a habitation; and sixteen E felonies: burglary of an automobile) without any agreement as to length or manner of service of sentences to be imposed (an open plea).

At the sentencing hearing, both parties agreed that the defendant would be classified as a Career Offender on the two Class D felonies and on the sixteen Class E felonies, but the classification on the two Class C felonies would be as a Range III Persistent Offender. The State argued two enhancement factors, specifically: (1) the defendant's previous history of criminal convictions or criminal behavior, and (2) the defendant's failure to comply with conditions of a sentence involving release into the community, to request enhancement of the Range III sentence beyond the minimum and the state requested consecutive sentences. In response to the State's arguments and to mitigate the sentences, the defendant provided three mitigating factors: (1) he had not threatened or caused any serious bodily injury, (2) he had provided information and assisted law enforcement, and (3) he had expressed remorse for his actions.[7]

The trial court sentenced the defendant to six-years on each of the sixteen Class E felonies; twelve-years for each of the two Class D felonies with a sixty percent release eligibility; and thirteen-years with a forty-five percent release eligibility. The court ordered that the sentences for each felony classification were to run consecutive for a total sentence of thirty-one years (thirteen, twelve, and six years). Seeking review of the sentence by way of appeal first, the defendant filed a notice of appeal under Tenn. R. App. P. 4(a) and then later filed a motion for a reduction of sentence under Rule 35 of the Tennessee Rules of Criminal Procedure in the trial court, within the 120-day time limit contained within the rule requesting that the court order his sentences to be run concurrent rather than consecutive and for any other relief, arguing that his thirty-one year sentence was "excessive in light of the facts present."

RULE 35 : MOTIONS FOR MODIFICATION (Continued)

The trial court held a hearing on the Rule 35 motion. Over the State's opposition and based only upon the request of the defendant, with no additional proof, the trial court granted the defendant's motion and reduced the sentence of the defendant. The State appealed the ruling. The Court of Criminal Appeals consolidated the direct appeal of the sentencing by the defendant and the Rule 35 appeal of the State. Finding that the trial court abused its discretion because the trial court failed to require the defendant to prove "a post-sentencing change in circumstances" and finding no merit to the arguments raised by the defendant on the direct appeal, the Court of Criminal Appeals reinstated the initial sentence of thirty-one years.

The Tennessee Supreme Court (TSC) granted the defendant's request to appeal the decision of the Court of Criminal Appeals. The TSC reversed the Court of Criminal Appeals decision and reinstated the trial court's judgment granting the defendant's Rule 35 motion. In doing so, the TSC reviewed prior decisions relating to Rule 35 motions and found that the standard announced in *State v. McDonald*, 893 S.W.2d 945 (Tenn. Crim. App. 1994) requiring a showing of a post-sentencing change or development that would merit a reduction of sentence in the interest of justice, only applied in cases where a specific agreement is reached regarding the sentence. Therefore, since the defendant in this case entered an open plea under Tennessee Rule of Criminal Procedure 11(c)(1)(B), the *McDonald* standard did not apply.

So, prosecutors be aware of offering an open plea when you are involved in plea negotiations. A Rule 35 motion is always a possibility and you need to be prepared to answer the motion effectively. By entering an open plea, the standard of proof for the Rule 35 motion is substantially less.

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1. Rule 35 reads "(a) **Timing of the Motion.** The trial court may reduce a sentence upon motion filed within 120 days after the date the sentence was imposed or probation is revoked. No extensions shall be allowed on the time limitation. No other actions toll the running of the time on limitation. (b) **Limits of Sentence Modification.** The court may reduce a sentence only to one the court could have originally imposed. (c) **Hearing Unnecessary.** The trial court may deny a motion for reduction of sentence under this rule without a hearing. (d) **Appeal.** The defendant may appeal the denial of a motion for reduction of sentence but shall not be entitled to release on bond unless already under bond. If the court modifies the sentence, the state may appeal as otherwise provided by law."

2. Rule 35 (c)

3. T.C.A. § 40-35-212, which provides in pertinent part, "(c) Unless the defendant receives a sentence in the department, the court shall retain full jurisdiction over the manner of the defendant's service. (d)(1) Notwithstanding subsection (c), the court shall retain full jurisdiction over a defendant sentenced to the department during the time the defendant is being housed in a local jail or workhouse awaiting transfer to the department. The jurisdiction shall continue until the defendant is actually transferred to the physical custody of the department."

4. *State v. Irick*, 861 S.W.2d 375 (Tenn. Crim. App. 1993).

5. T.C.A. § 40-35-401, reads "(a) The defendant in a criminal case may appeal from the length, range or manner of service of sentence imposed by the sentencing court. The defendant may also appeal the imposition of consecutive sentences. . . . (b) An appeal from a sentence may be on one (1) or more of the following grounds: (1) The sentence was not imposed in accordance with this chapter; (2) The sentence is excessive under the sentencing considerations set out in §§ 40-35-103 and 40-35-210; or (3) The sentence is inconsistent with the purposes of sentencing set out in §§ 40-35-102 and 40-35-103. . . . (d) When reviewing sentencing issues raised pursuant to subsection (a), including the granting or denial of probation or length of sentence, the appellate court shall conduct a de novo review on the record of the issues. The review shall be conducted with the presumption that the determinations made by the court from which the appeal is taken are correct."

6. Tenn. R. Crim. Pro. 11(c)(1) reads: "**In General.** The district attorney general and the defendant's attorney, or the defendant when acting pro se, may discuss and reach a plea agreement. The court shall not participate in the discussion. If the defendant pleads guilty or nolo contendere to a charged offense or a lesser or related offense, the plea agreement may specify that the district attorney general will: . . . (B) recommend, or agree not to oppose the defendant's request for a particular sentence, with the understanding that such recommendation or request is not binding on the court; or. . ."

7. The defendant provided a statement of allocution in the sentencing hearing in which he accepted "responsibility" and plead guilty "out of respect for the victims, taxpayers," and the court. Defendant requested leniency during his allocution.

UPCOMING TRAINING

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

Cops in Court - January 23, 2019, Mount Juliet, TN
This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trail presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation.

Protecting Lives, Saving Futures - February 11 - 12, 2019, Memphis, TN
This joint prosecutor/law enforcement officer training is designed to allow the participants to learn from each other, inside of a classroom, rather than outside of a courtroom shortly before trial. Topics covered include the detection, apprehension and prosecution of impaired drivers. Each prosecutor attending is required to recruit one to three law enforcement officers to attend the training together.

Cops in Court - March 15, 2019, Campbell County, TN
This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trail presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation.

20/20 Medical Foundation of Eye Movements & Impairment - April 23 - 25, 2019, Memphis, TN
This seminar will be located at the Sothern College of Optometry in Memphis, TN and it will be taught by Faculty members and professors of optometry. The legal and physiological aspects of eye movement and the detection of impairment will be covered. Registration is open to prosecutors, drug recognition officers and SFST instructors. A mock trial scenario involving a DRE officer will be included.

Lethal Weapon/Vehicular Homicide Seminar - June 11 - 14, 2019, Pigeon Forge, TN
This course will be a joint effort with prosecutors and law enforcement officers from Kentucky. It features all aspects of the investigation and prosecution of vehicular homicide cases. Included topics are the role of the prosecutor at the scene of a fatality, working with hostile witnesses, working with victim family members and the effective use of visual aids at trial.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Impaired Driving Enforcement (ARIDE)
January 7-8, 2019, Nashville, TN
February 25-26, 2019, Hohenwald, TN
March 18-19, 2019, Cleveland, TN
April 8-9, 2019, Collierville, TN
April 29-May 3, 2019, Jonesborough, TN (DUI/SFST also)

DUI Detection & Standardized Field Sobriety Testing
January 22-24, 2019, Crossville, TN
February 18-27, 2019, Hixson, TN (Instructor Class)
February 27-March 1, 2019, Dandrige, TN
March 4-6, 2019, Greenville, TN

Drug Recognition Expert School (DRE)
February 4-14, 2019, Nashville, TN

DUI TRACKER

DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from October 1, 2018, through December 28, 2018, and reflect the DUI Tracker conviction report for all judicial districts within the State of Tennessee. These numbers include the Circuit Courts, Criminal Courts, General Sessions Courts and Municipal Courts. The total number of dispositions for the period from October 1, 2018, through December 28, 2018, since the last quarter were 1,295. This number is down from the previous quarter by 27. From looking at these numbers, we can see that the trend in DUI related dispositions in Tennessee has slightly decreased, following the lower disposition trends that we have been observing throughout the last year. The total number of guilty dispositions during this same period of October 1, 2018 through December 28, 2018 were 969. The total number of dismissed cases were 89. Across the State of Tennessee, this equates to 74.83% of all arrests for DUI made were actually convicted as charged. This percentage is slightly higher than the last quarter ending on September 30, 2018. Only 6.87% of the DUI cases during this current quarter were dismissed. Also, during this same period of time, only 172 of the total DUI cases disposed of were to different or lesser charges. Therefore, only 13.28% of the total cases were disposed of to another charge.

Fatal Crashes this last quarter

The following information was compiled from the Tennessee Integrated Traffic Analysis Network (TITAN) using an *ad hoc* search of the number of crashes involving fatalities that occurred on Tennessee's interstates, highways and roadways, from October 1, 2018 through December 28, 2018. During this period, there were a total of 233 fatalities, involving 222 crashes, which is a decrease from the previous quarter, but an increase over this same time last year. Out of the total of 233 fatalities, 44 fatalities involved the presence of alcohol, signifying that 18.89% of all fatalities this quarter had some involvement with alcohol. This percentage is slightly higher than the previous quarter. Further, there were a total of 33 fatalities involving the presence of drugs, signifying that 14.16% of all fatalities this quarter involved some form of drugs.

The year-to-date total number of fatalities on Tennessee roads and highways is 1,040. This is up by 31 from the 1,009 fatalities incurred last year at this same time. For most of the year, we experienced a considerable decrease from last year in the number of fatalities on our roads. Unfortunately we have recently seen a sharp increase, outpacing last year's number of fatalities by an alarming amount. We must remain vigilant on our mission to lowering the number of fatalities that we experience every year.

COPS IN COURT SEMINAR

On October 3, 2018, we had another successful "Cops in Court" seminar held at the Hawkins County Justice Center. Blake Watson presented on "Report Writing" and "Direct and Cross Examination". Our next two "Cops in Court" seminars will be held in January 2019 in Henry and Wilson Counties.

VEHICULAR HOMICIDE MURDERER'S ROW

State v. Rubin P. Pena, 2018 Tenn. Crim. App. LEXIS 761

On July 20, 2013, Mr. Pena was driving his SUV westbound in the eastbound lanes of Interstate 24 when he struck a Ford Fiesta head on. Cynthia Joyner, a passenger in the Ford Fiesta, was killed and three others in the vehicle were injured. After the collision, Mr. Pena ran from the scene. A few months later, Mr. Pena called from Mexico, admitted that he was the driver of the SUV and stated that he wanted to turn himself in. Eventually, he turned himself in to authorities at the boarder between Texas and Mexico.

Almost a year after the crash, Mr. Pena was tried for vehicular homicide, three counts vehicular assault and leaving the scene of an accident resulting in death. Shanna Phillips testified at the trial that she was the driver of the Ford Fiesta and that she was driving east bound in the HOV lane of Interstate 24 when she was struck head on by a black SUV. Janet Sanchez, the longtime girlfriend of Mr. Pena testified that she saw Mr. Pena drinking beers earlier on the day of the crash and that he appeared intoxicated. Ms. Sanchez stated that Mr. Pena never came home that evening and she did not see him again until after he had surrendered to authorities at the boarder. The defendant was convicted of one count of vehicular homicide by reckless conduct, three counts of reckless aggravated assault and one count of leaving the scene of an accident resulting in death. He was found not guilty of vehicular homicide by intoxication. Mr. Pena was sentenced to six years for the vehicular homicide by reckless conduct and concurrent four-year sentences for each reckless aggravated assault conviction, consecutive to two years for leaving the scene of an accident resulting in death, for a total of eight years to serve in TDOC custody.

In finding that the evidence was sufficient to support the verdicts, the Court of Criminal Appeals stated that driving the wrong direction on an interstate is reckless conduct disregarding a substantial and unjustifiable risk. A witness testified to seeing Mr. Pena driving in the opposite direction on the interstate about one-half mile before the collision occurred. An accident reconstructionist testified that Mr. Pena's vehicle was accelerating at the time of the collision. Therefore, the evidence supported the jury's findings that the Mr. Pena acted recklessly by disregarding a substantial and unjustifiable risk and that he was aware of such risk. Also, the CCA stated that a person commits aggravated assault by reckless conduct when the reckless assault "involved the use or display of a deadly weapon," and this court has held that a vehicle may be used as a deadly weapon. *See State v. Tate*, 912 S.W.2d 785 (Tenn. Crim. App. 1995). Therefore, the evidence was also sufficient to support the convictions of reckless aggravated assault.

The CCA also upheld the defendant's sentence of six years, concurrent to three set of four years, but consecutive to two years, for a total of eight years to serve, finding that it was not excessive. Since challenges to the length of a sentence, within the appropriate sentence range, are viewed under an abuse of discretion standard and with a presumption of reasonableness pursuant to *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012), "[A] trial court's misapplication of an enhancement or mitigating factor does not invalidate the sentence imposed unless the trial court wholly departed from the 1989 Act, as amended in 2005." *Id.* At 706. So although the trial court in this case misapplied an enhancement factor, another enhancement factor was properly applied and the sentence was still determined to be reasonable. The error of the misapplied enhancement factor did not render Mr. Pena's sentence excessive. During the sentencing hearing, Mr. Pena made an allocution in which he claimed that he was not the driver, but a passenger in his own SUV. The real driver "Fabian" ran from the scene and only after another truck hit the SUV again did Mr. Pena leave the scene. Mr. Pena's version was not believable. The judgments of the trial court were affirmed by the CCA.

VEHICULAR HOMICIDE MURDERER'S ROW

State v. Laura L. Beasley, 2018 Tenn. Crim. App. LEXIS 765

Laura Beasley pled guilty to one count of vehicular homicide by intoxication and two counts of vehicular assault. Charges of DUI and child endangerment were merged into the vehicular homicide count. After a lengthy sentencing hearing, the trial court imposed sentences of ten years for the vehicular homicide and three years each for the two vehicular assault counts, all consecutive, for a total of sixteen years to serve in TDOC custody. On May 15, 2015, Ms. Beasley was driving a Chevrolet Cavalier with her two year old son in the backseat. As she travelled down Highway 52 in Portland Tennessee, Ms. Beasley steered her vehicle across the solid yellow centerline and hit, head-on, a Nissan Cube being driven by Samantha Williams. Riding in the backseat of Ms. Williams vehicle was her daughter, Adrianne Gentry, and Adrianne's boyfriend, Nicholas Townsend. All three victims had to be extricated from the Nissan Cube. Nicholas Townsend died at the hospital from his injuries. He was a Portland High school senior and was schedule to graduate the next day. Detective Williams, with the Portland Police Department and husband of Samantha Williams, was driving, with his other daughter, in a vehicle in front of his wife's vehicle. They were all on their way home from volunteering at a Special Olympics event. Det. Williams saw Ms. Beasley's vehicle speeding, in the opposite lane of travel, as it passed him.

In the presentence report, Ms. Beasley admitted that at thirty-one years old she had routinely consumed around 8 beers a day, several times a week. She began drinking alcohol since she was seventeen or eighteen years old. The crash occurred around 10:30 pm and Ms. Beasley admitted at the scene, to drinking one twenty-four ounce beer. Ms. Beasley failed SFSTs and she refused implied consent. After a search warrant was obtained, a blood sample was taken her Ms. Beasley's BAC was 0.119 %. At the sentencing hearing she admitted to drinking at least three, possibly four, twenty-four ounce beers.

Ms. Beasley appealed her sentence as excessive, that the trial court improperly ordered consecutive sentencing and the trial court improperly denied her alternative sentencing. The Court of Criminal Appeals stated, "The trial court is granted broad discretion to impose a sentence anywhere within the applicable range, regardless of the presence or absence of enhancement or mitigating factors, and 'sentences should be upheld so long as the statutory purposes and principles, along with any applicable enhancement and mitigating factors, have been properly addressed.'" *State v. Bise*, 380 S.W.3d 682, 706 (Tenn. 2012). Since the sentence was within the range and the trial court made specific findings, the CCA ruled that the sentence was not excessive.

With regard to consecutive sentencing, the CCA found the record supported the trial court's dangerous offender finding. "Her admission of drinking 3 to 4 twenty-four once beers within two and a half hours of putting her son in the car is simply stunning." The CCA went on to say that in any event, the trial court would have been justified in imposing consecutive sentencing based upon the defendant's extensive record of criminal activity, which includes criminal behavior, as well as convictions. (quoting *State v. Dickson*, 413 S.W.3d 735, 748-49 (Tenn. 2013)).

The CCA also found that under the revised Tennessee sentencing statutes, a defendant is no longer presumed to be a favorable candidate for alternative sentencing. (citing Tenn. Code Ann. Section 40-35-102(6)). "A defendant is not, however, automatically entitled to probation as a matter of law. The burden is upon the defendant to show that he is a suitable candidate for probation. *Id.* Section 40-35-303(b); *State v. Goode*, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997)" The judgments of the trial court were affirmed.

VICTIMS' RIGHTS: TWENTY YEARS LATER

In November of 1998, the voters in Tennessee overwhelmingly approved an amendment to the Tennessee Constitution that provides victims[1] of crime, certain rights. This amendment, Article I, Section 35, reads as follows:

> To preserve and protect the rights of victims of crime to justice and due process, victims shall be entitled to the following basic rights:
>
> 1. The right to confer with the prosecution.
> 2. The right to be free from intimidation, harassment and abuse throughout the criminal justice system.
> 3. The right to be present at all proceedings where the defendant has the right to be present.
> 4. The right to be heard, when relevant, at all critical stages of the criminal justice process as defined by the General Assembly.
> 5. The right to be informed of all proceedings, and of the release, transfer or escape of the accused or convicted person.
> 6. The right to a speedy trial or disposition and a prompt and final conclusion of the case after the conviction or sentence.
> 7. The right to restitution from the offender.
> 8. The right to be informed of each of the rights established for victims.
>
> The general assembly has the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section.

Since the passage of this amendment, the general assembly has clarified the role of prosecutors, law enforcement officers, judges, and victims in ensuring compliance with the spirit of the law.[2] Suffice it to say, the first three groups voluntarily joined in the judicial process, but a victim does not voluntarily request to join the judicial process and become a member of their group. A victim's membership is forced upon them by the unlawful acts of others. The first three groups understand their role and work within the judicial system daily. The victim's group does not. It is the responsibility of those who work with in the system to help the victim understand the judicial process and keep the victim informed of the what steps are necessary to promote a just and fair resolution of the case.[3]

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1. Victim is defined in Tennessee Code Annotated § 40-302 (a)(4)(A) as "(i) A natural person against whom a crime was committed; (ii) If the victim is a minor, then the parent or legal guardian of the minor; or (iii) If the victim is deceased or is physically or emotionally unable to exercise the victim's rights, then the following persons, or their designees, in the order of preference in which they are listed: (a) A family member; or (b) A person who resided with the victim; "Victim" does not include any person charged with or alleged to have committed the crime or who is charged with some form of criminal responsibility for commission of the crime.
2. Victims' Bill of Rights in Tennessee Code Annotated § 40-38-101, *et seq.*, Victim Impact Statement Act in Tennessee Code Annotated § 40-38-201, *et.* seq., and Constitutional Rights of Victims in Tennessee Code Annotated § 40-38-301, *et. seq.*
3. *See* Tennessee Code Annotated § 40-38-111 through § 40-38-114.

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