TNDAGC

DUI NEWS

ISSUE 69
January 2020

PUBLISHERS:
Terry E. Wood, TSRP
Linda D. Walls, TSRP
LAYOUT AND DESIGN:
Pat Hayes

INSIDE THIS ISSUE:

TN DISTRICT ATTORNEYS GENERAL CONFERENCE,

Jerry Estes, Executive Director
226 Anne Dallas Dudley Blvd.,
Suite 800
Nashville, TN 37243

DUI Training Division
DUI Office: (615) 253-6734
DUI Fax: (615) 253-6735
e-mail: tewood@tndagc.org
Newsletters online at:
dui.tndagc.org/newsletters

Tennessee Highway Safety Office

312 Rosa L. Parks Ave.
William R. Snodgrass TN Tower
25th Floor
Nashville, TN 37243
Office: 615-741-2589

This material was developed through a project funded by the Tennessee Highway Safety Office and the National Highway Traffic Safety Administration.

RELIABLE BREATH TESTING IN TENNESSEE

On November 3, 2019, the New York Times published an article, "*These Machines Can Put You in Jail. Don't Trust Them.*" This article argued that alcohol breath tests are often unreliable and should not be trusted. Although the authors of the article gave a blanket distrust of all breath testing, the article only addressed a limited number of instruments and jurisdictions, all of which involved nefarious conduct on the part of others. The greatest complaint was due to a lack of calibration or an intentional miscalibration of the breath testing instruments. The majority of instruments and jurisdictions were not addressed. Tennessee's breath testing instruments were not referenced in the article, nor were they evaluated. This, of course, highlights a troubling issue with the article, with its almost exclusive use of criminal defense hired and sponsored resources. There exists, throughout the article, a complete absence of reporting regarding accurate instruments and/or properly run jurisdictions, which use extensive testing, calibrations and oversite policies and procedures. These policies and procedures result in verifiable and accurate breath testing results.

Breath testing in Tennessee is regulated by statute. *Tennessee Code Annotated* Section 38-6-103, authorizes the purchase of breath testing instruments for the purposes of measuring the alcohol content of a person's breath for use as evidence in the trial of cases; provided that prior to use, the instruments are tested and certified by the forensic services division of TBI, pursuant to subsection (g). TBI must continue to maintain and certify the instruments during their use. *TCA* 38-6-103(g) states that TBI, "shall establish, authorize, approve and certify techniques, methods, procedures and instruments … and teach and certify qualifying personnel in the operation of such instruments to meet the requirements of the law for admissibility of evidence." Most of these policies and procedures can be found on TBI's website.

Before an instrument is purchased for use in Tennessee, the instrument must first be tested and approved by the National Highway Traffic Safety Association (NHTSA) and listed on their Conforming Products List (CPL). TBI will then extensively test the instrument to see if it will pass the higher qualifications required to be used in Tennessee. TBI's testing includes extensive testing of the instrument's software/firmware prior to use. One of the instruments referred to in the NY Times article, the Intoxilyzer 8000, was evaluated by TBI and rejected, as it did not pass TBI's testing and standards. Tennessee currently uses the Intoximeter EC/IR II and the Alco-Sensor V XL for breath testing. Current TBI policies require each instrument to be tested for accuracy using Certified Reference Materials at BAC levels of 0.020, 0.050, 0.080, 0.100, and 0.200. (g/210L) TBI policies also require each instrument to be calibrated every ninety (90) days with Certified sample levels at 0.040, 0.080 and 0.200. If the instrument fails testing, it will be adjusted and retested. If the instrument fails again, it is returned to the manufacturer for repair. Upon return from repair, the instrument is again calibrated before use. (Continue on page 12)

RECENT DECISIONS

State v. Tony F. Boyle, 2019 Tenn. Crim. App. LEXIS 607

Responding to a dispatch call of an eighteen-wheel truck blocking an intersection after striking a fire hydrant, Officer Kenneth Shell of the Jackson Police Department observed Mr. Boyle sitting in his truck. The truck was "kind of caddy-corner between two streets … and water [was] everywhere from the fire hydrant." Mr. Boyle smelled of alcohol and he had trouble finding his driver's license. Officer Shell had to ask many times, while Mr. Boyle kept going between his wallet and some paperwork. Mr. Boyle stated that he was coming from a relatives house and he was trying to get back on the road for work.

A second officer, William Lewis, arrived on the scene and took over the DUI investigation. Officer Lewis also smelled the odor of alcohol and noticed that Mr. Boyle had slurred speech. Officer Lewis attempted to have Mr. Boyle perform SFSTs, but Mr. Boyle was having problems following instructions. Officer Lewis had to repeat SFST instructions several times. During the HGN test, Mr. Boyle would not follow the officer's finger with his eyes and he would turn his head from side to side, in opposition to the officer's instructions. Although Officer Lewis did not testify as to the results of the HGN test (He was not qualified as an expert), Officer Lewis was allowed to testify about the obvious signs of impairment regarding Mr. Boyle being unable to follow simple instructions during the HGN test.

Mr. Boyle became argumentative with the officer during the walk-and-turn test and he indicated impairment on every clue available to the walk-and-turn. Mr. Boyle was very argumentative during the one-leg stand and he could not perform as instructed. It was decided that Mr. Boyle was "very intoxicated" and he was arrested. Mr. Boyle refused Implied Consent after advisement and he refused to sign the form. Mr. Boyle claimed that he was very tired after driving 600 miles and that he did not drink alcohol or take illegal drugs that day. He also claimed that the officer threatened him and edited the body cam footage. Mr. Boyle was convicted.

The Court of Criminal Appeals determined that the evidence was sufficient to convict Mr. Boyle of DUI and stated, "While a refusal to submit to a breath or blood test for determining the alcohol content of a person's blood is not dispositive as to a person's guilt, it may properly be considered by a jury in determining whether the person is guilty of driving under the influence of alcohol or drugs. *State v. Smith*, 681 S.W.2d 569, 570 (Tenn. Crim. App. 1984)." (Of course, Tennessee Pattern Jury Instruction 38.04 can be used when a defendant is read the Implied Consent admonition and then refuses to submit to a breath or blood test, as such facts "further support an inference of Defendant's guilt.") The judgment of the trial court was affirmed.

State v. Henry Nicholas Brown, 2019 Tenn. Crim. App. LEXIS 675

While responding to several calls of a possibly impaired driver, with lights out on an attached towing dolly, Officer Jerry Singleton of the Kingston Police Department pulled over a vehicle matching the description. Mr. Brown was the only occupant. As Officer Singleton asked for Mr. Brown's driver's license and registration, Mr. Brown said he did not have them. He then put his vehicle in gear and stomped on the gas. The attached towing dolly struck Officer Singleton, breaking his left leg and leaving him laying in the middle of the highway. Officer Singleton required a hospital stay, physical therapy and counseling, with medical bills in excess of $28,000.00. Officer Singleton's "world went upside down."

Eventually, Mr. Brown entered guilty pleas to: Aggravated Assault, Evading Arrest and Reckless Endangerment. (Mr. Brown also entered guilty pleas to a set of similar cases from 2014 involving misdemeanor assault, resisting arrest and evading arrest.) After a sentencing hearing, Mr. Brown was sentenced to six years, four years and two years to be served consecutively, for an effective sentence of twelve years in TDOC. Mr. Brown had a history of evading and resisting arrest, all misdemeanors. Mr. Brown attempted to justify his conduct due to personal problems and being addicted to pain medication. He appealed the propriety of the consecutive sentencing. (Continued on page 3)

RECENT DECISIONS (Continued)

The standard of review on appeal is an abuse of discretion, with a presumption of reasonableness. The Court of Criminal Appeals stated, "So long as a trial court properly articulates reasons for ordering consecutive sentences, thereby providing a basis for meaningful appellate review, the sentences will be presumed reasonable and, absent an abuse of discretion, upheld on appeal." In this case, "[A]n extensive criminal history, standing alone, is enough to justify the imposition of consecutive sentencing. *State v. Nelson*, 275 S.W.3d 851, 870 (Tenn. Crim. App. 2008) (citing *State v. Adams*, 973 S.W.2d 224, 231 (Tenn. Crim. App. 1997)." The judgments of the trial court were affirmed.

State v. David Mitchell Bentley, 2019 Tenn. Crim. App. LEXIS 706

The *Bentley* case is similar to the *Brown* case above, but with a different conclusion. Mr. Bentley pled guilty to Reckless Aggravated Assault, and Leaving the Scene of an Accident Resulting in Injury. After a sentencing hearing, Mr. Bentley was ordered to serve 3 years consecutive to eleven months and twenty-nine days. However, the trial court failed to place any findings on the record with regard to applicable enhancement factors, the order of consecutive sentencing, and the denial of alternative sentencing. Accordingly, the Court of Criminal Appeals reversed the judgment of the trial court and remanded the case to the trial court for a new sentencing hearing.

On October 17, 2016, Mr. Bentley was driving to pick up his son from soccer when his vehicle struck a pedestrian, David Lloyd. After striking Mr. Lloyd, the defendant continued to drive away. Mr. Lloyd, who had poor vision before the incident, required intensive care treatment at Vanderbilt Hospital for one month and is now totally blind. Mr. Lloyd's life has been significantly impacted by this incident. Although Mr. Bentley claimed that he was not intoxicated that night, he does have a history of prior drug and alcohol issues, including a prior DUI and evading arrest. Mr. Bentley claims that he did not call police after he realized that he had hit someone because he was driving without a driver's license. In the earlier evading case, he stated that he ran because he was driving without a license. Some of Mr. Bentley's prior convictions include, DUI fourth offense, evading arrest, possession of drug paraphernalia, casual exchange, driving on a revoke license, resisting arrest, violating implied consent, contributing to the delinquency of a minor and driving while impaired.

The standard of review for sentencing issues imposed by the trial court is under an abuse of discretion, with a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012); *see also State v. Pollard,* 432 S.W.3d 851, 859 (Tenn. 2013) (applying the standard to consecutive sentencing); *State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012) (applying the standard to alternative sentencing). In this case, the trial court found that enhancement factors were applicable, but did not specify which factors applied to Mr. Bentley's felony sentence. "When the court imposes a sentence, it shall place on the record, either orally or in writing, what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, in order to ensure fair and consistent sentencing." *Tenn. Code Ann.* § 40-35-210(e). The CCA stated, "Likewise, the trial court failed to make any findings with regard to its imposition of consecutive sentencing pursuant to *Tennessee Code Annotated section* 40-35-115(b) or its denial of alternative sentencing. 'The record of the sentencing hearing is part of the record of the case and shall include specific findings of fact upon which application of the sentencing principles was based.' *Tenn. Code Ann*. § 40-35-209(c)." Given the complete lack of findings in this case, the CCA concluded that a new sentencing hearing was in order. Therefore, the judgment of the trial court was reversed and remanded to the trial court for a new sentencing hearing.

When faced with a sentencing hearing (or any hearing) and a record has not sufficiently been made, it is appropriate to ask the judge if he/she would state on the record, all the factors upon which the court is relying upon when coming to their conclusion. A quick recitation of this case, and any other prevailing law, may also be appropriate. A clear court record is required for a just result.

SFSTs DETECT DRUG IMPAIRMENT

Standardized field sobriety tests (SFSTs) have been developed to detect alcohol and drug impaired drivers since the late 1970s. In 1981, the National Highway Traffic Safety Administration (NHTSA) developed a training curriculum for the three-test battery (SFSTs) currently used today and they initiated training programs nationwide. NHTSA's *DWI Detection and Standardized Field Sobriety Testing, Participant Manual*, Session 1 page 13 (2018), affirms that one of the purposes of SFST training, is to teach the participant to "[K]now and recognize typical clues of alcohol and/or other drug impairment that may be seen during administration of the SFSTs." (Emphasis added) Detecting drug impairment by using SFSTs has always been a part of NHTSA's training program. The *Participant Manual* also states that SFSTs are psychophysical tests which are used to assess, "a subject's mental and physical impairment." *Id.* at Session 7, page 5 (2018). "These tests focus on the abilities needed for safe driving: balance, coordination, information processing, and so on." *Id.* SFSTs also test divided attention. The *Participant Manual* states:

> "**E. Divided Attention Tests: Concepts, Examples, Demonstration**
> Many of the most reliable and useful psychophysical tests employ the concept of divided attention: they require the subject to concentrate on more than one thing at a time (mental tasks and physical tasks). Driving is a complex divided attention task. In order to operate a vehicle safely, subjects must simultaneously control steering, acceleration and braking, react appropriately to a constantly changing environment, and perform many other tasks.
>
> Alcohol and many other drugs reduce a person's ability to divide attention. Impaired subjects often ignore the less critical tasks of driving in order to focus their impaired attention on the more critical tasks. For example, a subject may ignore a traffic signal and focus instead on speed control. Even when impaired, many people can handle a single, focused attention task fairly well. For example, a subject may be able to keep the vehicle well within the proper traffic lane as long as the road remains fairly straight. However, most people, when impaired, cannot satisfactorily divide their attention to handle multiple tasks at the same time.
>
> The concept of divided attention has been applied to psychophysical testing. Field sobriety tests that simulate the divided attention characteristics of driving have been developed and are being used by law enforcement agencies nationwide. The best of these tests exercise the same mental and physical capabilities a person needs to drive safely. A good, structured field sobriety test is simple and divides the subject's attention. Examples of divided attention tests include Walk and Turn (WAT) and One Leg Stand (OLS)." *Id.* at Session 7, page 13 (2018) (emphasis added)

"Simplicity is the key to divided attention field sobriety testing. It is not enough to select a test that just divides the subject's attention. The test also must be one that is reasonably simple for the average person to complete as instructed when sober. Tests that are difficult for a sober subject to perform have little or no evidentiary value." (Session 7, page 15 (2018) The average juror understands that SFSTs are simple tests that show impairment due to alcohol and/or drugs.

Tennessee Code Annotated Section 55-10-401(1) states: "Under the influence of any intoxicant, marijuana, controlled substance, controlled substance analogue, drug, … that impairs the driver's ability to safely operate a motor vehicle by depriving the driver of the clearness of mind and control of oneself that the driver would otherwise possess;" Divided attention tests (SFSTs) have been validated to successfully determine if the subject is illegally impaired of their clearness of mind and control of oneself. This applies to alcohol and other drugs. The *Tennessee Pattern Jury Instructions-Crim.* 38.01(a) states, "[a]ny mental or physical condition which is the result of taking [an intoxicant] [marijuana] [a narcotic drug] [a drug producing stimulating effects on the central nervous system] in any form and which deprives one of that clearness of mind and control of oneself which one would otherwise possess." The very thing that SFSTs detect. (Continued on page 5)

SFSTs DETECT DRUG IMPAIRMENT (Continued)

In the 1990s, validation studies were completed to determine the reliability of SFSTs. Although most of these validation studies focused on alcohol impairment, it was also determined that SFSTs are very useful when they are administered in the context of drug evaluations, and "the tests provide valid clues of drug impairment." See Marcelline Burns, Ph.D. & Sgt. Teresa Dioquino, *A Florida Validation Study of Standardized Field Sobriety Test (SFST) Battery.* (The validity of the tests when administered in the context of drug evaluations was examined in a retrospective analysis of the records) The Florida Validation Study also states that the "three tests (SFSTs) have been incorporated into Drug Influence Evaluations (DIEs) which are conducted by certified Drug Recognition Experts (DREs) whenever an individual is suspected of being drug impaired. As part of a DRE evaluation, the SFSTs provide important evidence of drug impairment and contribute to the DRE's three-part opinion: Is the individual impaired by a drug or drugs? If yes, is the impairment drug related? If yes, what category or categories of drug account for the impairment?" *Id.* SFSTs have also been incorporated into the Advanced Roadside Impaired Driver Enforcement (ARIDE) training for purposes of determining drug impairment. (Both mental and physical impairment).

SFSTs are simple tests designed to observe mental and physical impairment. "Evidence of intoxication includes the observations of a police officer during a defendant's performance of field sobriety tests. With the exception of the HGN test, field sobriety tests are not scientific tests requiring testimony of a qualified expert pursuant to Tennessee Rule of Evidence 702. *See State v. Murphy*, 953 S.W.2d 200, 202-03 (Tenn. 1997); *State v. Gilbert*, 751 S.W.2d 454, 459 (Tenn. Crim. App. 1988) (holding that "field sobriety tests are not 'scientific tests'; and the admissibility of the results is not to be governed by rules pertaining to the admission of scientific evidence."); *State v. Michael L. Hodges*, No. M2008-00776-CCA-R3-CD, 2009 Tenn. Crim. App. LEXIS 772, 2009 WL 2971073, at *4 (Tenn. Crim. App., at Nashville, Sept. 17, 2009), *perm. app. denied* (Tenn. Mar. 22, 2010)." State v. Childress, 2016 Tenn. Crim. App. LEXIS 948. Thus, police officers do not need to be qualified as expert witnesses in order to testify about their administration and interpretation of field sobriety tests. [*State v. Everett D. Robinson*, No. W1999-01348-CCA-R3-CD, 2000 Tenn. Crim. App. LEXIS 308, 2000 WL 364844, at *3 (Tenn. Crim. App. Apr. 7, 2000) (citing *State v. Christopher R. Hicks*, No. 03C01-9602-CC-00064, 1997 Tenn. Crim. App. LEXIS 480, 1997 WL 260069, at *1 n.1 (Tenn. Crim. App. May 13, 1997), *no perm. app. filed*), *no perm. app. filed*]. "State v. Gwinn, 2017 Tenn. Crim. App. LEXIS 313. Police officers can testify as to any impairment observed during the administration of SFSTs, regardless of what the impairing substance is, since the admissibility of the results are governed by *Tennessee Rules of Evidence* 701 (Opinion testimony by lay witness). Also, since SFSTs are not scientific tests, the officer is merely testifying regarding lay observations of impairment that he observed. If drugs other than alcohol did not impair, then observable signs of impairment would not be evident and an arrest would never be made. However, drugs do impair and there are observable signs of drug impairment. These observations are relevant, and they are not excludable as: a scientific test; as requiring an expert to testify about them; or as limited by the impairing substance being other than alcohol. Of course, alcohol is also a drug (a central nervous system depressant) and like other drugs, it causes both mental and physical impairment. Signs of alcohol impairment observed during SFSTs are the same signs of impairment observed by any other central nervous system depressant drug.

Many validation studies have recently been completed, which have confirmed that SFSTs are reliable to show drug impairment from all categories and classifications of drugs. *An examination of the validity of the standardized field sobriety test in detecting drug impairment using data from the Drug Evaluation and Classification program,* A. Porath-Waller, D. Beirness (2013) (They used 2,142 evaluations which included many different drugs). Also, a recent cannabis study, *Cannabis Effects on Driving Skills*, Rebecca Hartman and Marilyn A. Huestis (2013), determined that recent Marijuana use is associated with substantial driving impairment and that it can be observed by SFSTs. Many more studies used specific drugs such as amphetamines, etc. SFSTs are observable, reliable and relevant evidence that indicate drug impairment, which deprives the subject of the clearness of mind and control of oneself that is required to safely operate a motor vehicle. Any argument attacking SFST's ability to detect drug impairment is without legal and scientific merit.

OBTAINING SEARCH WARRANTS IN DUI CASES

Not that long ago, the law did not permit law enforcement officers to obtain a search warrant in driving under the influence cases (unless there was a serious injury or death).[1] If the defendant refused to provide a sample, that was the end of it.[2] The officer charged the defendant with DUI and a violation of the implied consent law and the prosecution moved forward without the blood evidence. Now, however, jurors want to see and expect to see a blood test result. I would like to believe that jurors have educated themselves on the law, but jurors expect test results because television dramas and the news media have conditioned them to expect scientific tests in all cases, not just driving under the influence cases. Combine this "CSI effect" with the increase in drug impaired driving, the "need" for blood evidence in addition to the officer testimony is now being demanded by the populace, though not actually required or demanded by the law.

So, just what does it take to obtain a search warrant for blood evidence? Well, first and foremost, probable cause is required. If there is probable cause to believe a person has committed the crime of driving under the influence as defined in T.C.A. §55-10-401, and that evidence of the offense may be found within the blood of the defendant, then a search warrant can be obtained. Probable cause is evaluated from the perspective of a reasonable officer at the time the officer made the decision and not in the hindsight of the courts. Probable cause exists when the "facts and circumstances within the knowledge of the officers, and of which they had reasonably trustworthy information, are sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense."[3]

The requirements for search warrants are found in two locations: Rule 41 of the Tennessee Rules of Criminal Procedure and Tennessee Code Annotated Sections 40-1-6-101, *et. seq.* Rule 41 details the more "technical" requirements for the issuance for search warrants while the "substantive" requirements are provided for in the code. Both the rule and the code require the establishment of probable cause in supporting affidavit(s).[4] Also, both require the affiant(s) make oath and affirmation regarding the facts contained within the affidavit(s) in support of the issuance of the search warrant before the search warrant is issued.[5] Rule 41 permits the issuance of a search warrant by electronic means, with examination of the affiant(s) and the administration of the oath by audio-visual means.[6]

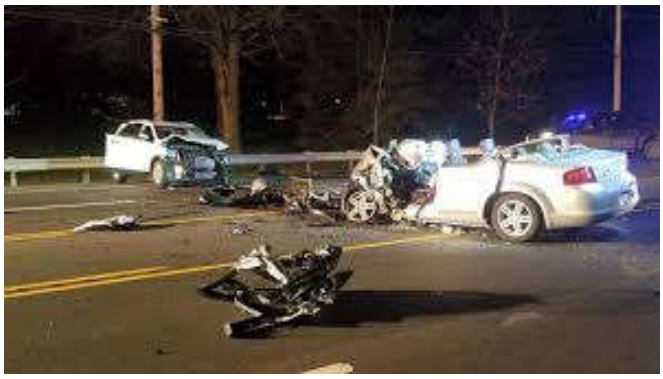
T.C.A. §40-6-103, requires that the search warrant name or describe the person to be searched. Therefore, it is important for the officer to provide identifying information to the magistrate. In all cases, particularly driving under the influence cases, the officer generally obtains certain identifying information. Generally, this information consists of the defendant's name, driver's license number, sex, race, date of birth, and social security number for his or her arrest report. This identifying information is routinely used to obtain the arrest warrant and is appropriate to use in obtaining a search warrant as well.

The form, issuance, and return of the search warrant is governed by T.C.A. §40-6-104 through 106, but the Tennessee Rules of Criminal Procedure provide much more guidance regarding this area. Rule 41 provides that only magistrates with jurisdiction where the property is located can issue a search warrant.[7] Since the "property" in driving under the influence cases is the blood of the defendant, the property is located where the defendant is to be found at the time of the search. The officer to whom the search warrant is provide to for execution must be present for the search and make the return to the issuing magistrate along with an inventory of the property seized. (This procedure helps to maintain the chain of evidence as well). After the warrant is returned, the magistrate is required to "transmit the executed original warrant with the officer's return and inventory to the clerk of the court having jurisdiction of the alleged offense in respect to which the search warrant was issued."

The search warrant for blood within the defendant in driving under the influence cases needs to be executed immediately, but Rule 41 requires the execution of a search warrant within five days of issuance. The five-day execution requirement is to ensure that the information is doesn't go stale. The only time the five-day execution requirement may be important, is in cases in which a defendant (Continued on page 7)

SEARCH WARRANTS IN DUI CASES (Continued)

is transported for treatment as the result of a crash, cannot be accessed for a direct blood draw for a variety of reasons, and the blood taken during the course of treatment would be the only source of evidence. In those cases, a search warrant may be obtained for the blood drawn in the course of medical treatment that is in the custody and control of the treating hospital. To obtain that evidence, the officer should contact the legal department of the hospital and the lab to request that the evidence be secured until a search warrant may be obtained and executed. Usually, a hospital holds blood for 24-72 hours after it is obtained. The search warrant would be directed and served upon the hospital. To ensure proper service, the best practice is to develop a relationship with each hospital lab and legal department to learn of specific procedures that facility requires to secure the blood for further testing. This relationship will make it easier to get the blood secured at the lab, obtain the search warrant and then execute the search warrant quickly.



---

1. "A search warrant is an order in writing in the name of the state, signed by a magistrate, directed to the sheriff, any constable, or any peace officer of the county, commanding the sheriff, constable or peace officer to search for personal property, and bring it before the magistrate." T.C.A. §40-6-101.

2. Before the enactment of 2009 Tennessee Public Acts Chapter 324, T.C.A. §55-10-406 (Implied Consent Law) provided that if a person refused to give consent to a test to determine the alcoholic or drug content of that person's blood, "the test or tests to which the person refused shall not be given . . ." except the law did not affect the admissibility of tests in the prosecution of aggravated assault or homicide by the use of aa motor vehicle if obtained by legal means (search warrant or exigent circumstances). *See* archived version of T.C.A. §55-10-406(a)(4)(A) and (d) (2008).

3. *State v. Reynolds*, 504 S.W.3d 283, 301 (Tenn. 2017) quoting *State v. Echols,* 382 S.W.3d 266 (Tenn. 2012).

4. Rule 41(b)(1), T.C.A. §40-6-103 reads, "A search warrant can only be issued on probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched." The affidavit must set forth **on its face** facts which establish probable cause before a search warrant may issue. Other information upon which the magistrate may have relied will not be subject to judicial review. *See generally, State v. Moon,* 841 S.W.2d 336 (Tenn. Crim. App. 1992).

5. Specifically, T.C.A. 40-6-104 states,

> The magistrate, before issuing the warrant, shall examine on oath the complainant and any witness the complainant may produce, and take their affidavits in writing, and cause them to be subscribed by the persons making the affidavits. The affidavits must set forth facts tending to establish the grounds of the application, or probable cause for believing the grounds exist.

6. Tenn. R. Crim. Proc. 41(b)(2).

7. T.C.A. § 40-1-106 grants Circuit and Chancery statewide jurisdiction to issue search warrants. Otherwise, judges only have jurisdiction in the geographic area in which they are appointed or elected.

UPCOMING TRAINING

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

Cops in Court - January 22, 2020, Chattanooga, 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.

Cops in Court - January 30, 2020, Oak Ridge, 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 12-13, 2020, Gatlinburg, 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.

20/20 Medical Foundation of Eye Movements & Impairment - March 12-13, 2020, 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.

Prosecuting the Drugged Driver Seminar - June 17-18, 2020, Jackson, TN
This course is designed to aid prosecutors in the prosecution of drug impaired drivers. It features all aspects of the investigation and prosecution of drug impaired driving cases. Included topics are the role of the Drug Recognition Expert (DRE) and the use of SFSTs to determine drug impairment, the role of toxicology, and methods for effectively and persuasively presenting this information at trial.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Impaired Driving Enforcement (ARIDE)
January 6-7, 2020, McMinnville, TN
March 2-3, 2020, Jasper, TN
March 23-24, 2020, Clarksville, TN
April 27-28, 2020, Clinton, TN

DUI Detection & Standardized Field Sobriety Testing
January 27-29, 2020, Sevierville, TN
March 23-27, 2020, Townsend, TN (ARIDE also)
April 20-24, 2020, Denmark, TN (SFST Instructor)
May 4-8, 2020, Hendersonville, TN (SFST Instructor)
June 1-3, 2020 Gallatin, TN

Drug Recognition Expert School (DRE)
January 27-February 6, 2020, Nashville, TN
February 17-27, 2020, Denmark, TN
April 6-16, 2020, Murfreesboro, TN
June 15-25, 2020 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, 2019, through December 27, 2019, 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, 2019, through December 27, 2019, since the last quarter were 1,193. This number is down from the previous quarter by 290. 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 last year. The total number of guilty dispositions during this same period of October 1, 2019 through December 27, 2019 were 880. The total number of dismissed cases were 78 and 59 more were nolle prossed. Across the State of Tennessee, this equates to 73.76% of all arrests for DUI made were actually convicted as charged. This percentage is slightly higher than the last quarter ending on September 30, 2019. Only 6.54% of the DUI cases during this current quarter were dismissed. Also, during this same period of time, only 159 of the total DUI cases disposed of were to different or lesser charges. Therefore, only 13.33% of the total cases were disposed of to another charge.

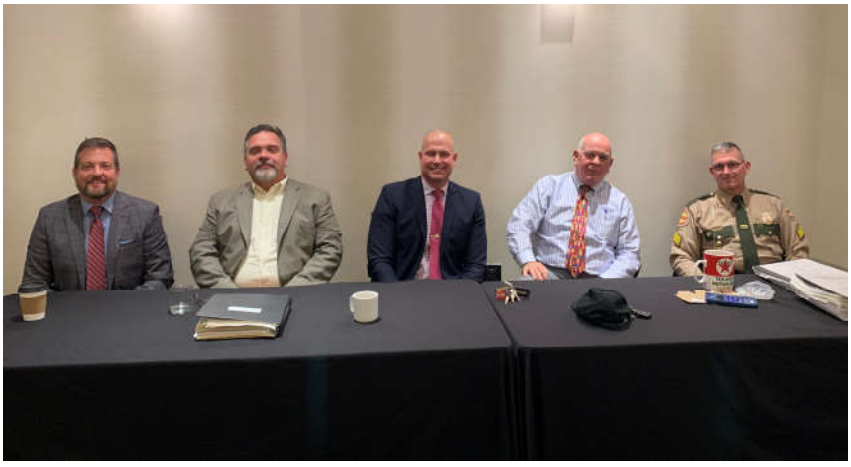
Fatal Crashes this last quarter

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, 2019 through December 27, 2019. During this period, there were a total of 268 fatalities, involving 247 crashes, which is a decrease from the previous quarter, but an increase over this same time last year. Out of the total of 268 fatalities, 40 fatalities involved the presence of alcohol, signifying that 14.93% of all fatalities this quarter had some involvement with alcohol. This percentage is lower than the previous quarter. Further, there were a total of 21 fatalities involving the presence of drugs, signifying that 7.84% of all fatalities this quarter involved some form of drugs.

The year-to-date total number of fatalities on Tennessee roads and highways is 1,075. This is up by 59 from the 1,016 fatalities incurred last year at this same time. For most of the year, we experienced a considerable increase from last year in the number of fatalities on our roads. Unfortunately this increase has been steady throughout the year, 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.

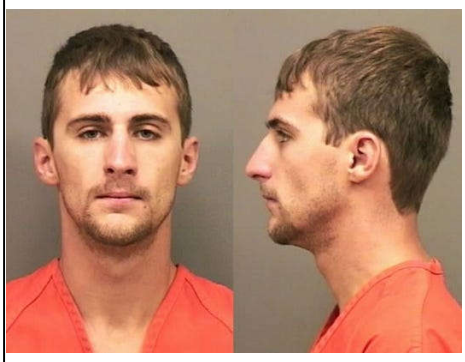
"Helping Victims of Trauma" Seminar

On December 13, 2019, the DUI Education Department held their annual Helping Victim's of Trauma Seminar at the Airport Marriott in Nashville, TN. Many prosecutors and victim witness coordinators were able to attend and hear from a number of great speakers, on the best practices to help victims (and their family members) to heal from the devastating consequences of impaired driving.



VEHICULAR HOMICIDE MURDERER'S ROW

State v. Douglas Wayne Jackson, 2019 Tenn. Crim. App. LEXIS 540



On June 29, 2013, Mr. Jackson, his brother and friends, went boating on the Cumberland River. While out on the river, Mr. Jackson pushed his brother, Aaron Santoyo, and Stephanie Burns into the water and then he sped away in the boat. Stephanie's fiancé was on the boat. He stated that Stephanie could not swim and he demanded that they return to get them. Mr. Jackson sped back to their location and while still at a high rate of speed, made a quick 90 degree maneuver. Mr. Santoyo was struck in the head by the boat and Ms. Burns was struck by the propeller, which caused deep gashes in Ms. Burns' hip, side and arms. Stephanie Burns died at the scene. Before rendering aid, witnesses reported that Mr. Jackson threw a chest of alcohol into the river. A blood sample indicated a 0.03 BAC and evidence of synthetic marijuana. Mr. Jackson pled guilty to Reckless Homicide as a Range II offender. After a sentencing hearing, he was sentence to five years imprisonment. Ten days later, Mr. Jackson filed a Rule 35 motion for sentence modification, after which the trial court imposed the same sentence.

The issues on appeal were whether the trial court misapplied enhancing and mitigating factors during sentencing and whether the Rule 35 motion should have been granted. The standard on review is an abuse of discretion with a presumption of reasonableness. The Court of Criminal Appeals stated that the misapplication of enhancement or mitigating factors does not invalidate the imposed sentence "unless the trial court wholly departed from the 1989 Act, as amended in 2005." *State v. Bise*, 380 S.W.3d 682, 706. However, the CCA determined that the trial court properly applied the enhancement and mitigating factors and then properly imposed the sentence in this case. Also, the CCA determined that the trial court properly interpreted the Rule 35 motion as another "bite" at sentencing and the judge thoughtfully considered all of Mr. Jackson's claims when the court denied the motion. The judgments of the trial court were affirmed.

State v. Johnny Morgan Dye, 2019 Tenn. Crim. App. LEXIS 652

Mr. Dye was convicted by a jury of vehicular homicide through intoxication and vehicular homicide through reckless conduct. The offenses were merged and Mr. Dye received an effective sentence of twelve years to serve in TDOC. On July 7, 2014, the defendant had been speeding (between 100 and 120 mph) and driving recklessly when his truck crossed into oncoming traffic, causing a head-on collision with a station wagon, killing Mr. Jacob Akers. Mr. Akers had just proposed to his fiancée four days earlier and he was preparing to attend medical school in the fall. Mr. Dye admitted to using heroin and many syringes were recovered from his vehicle. A blood sample indicated positive for amphetamine and hydrocodone, although the amounts could not be given a quantitative value due to the insufficient amount of the blood sample.

Mr. Dye appealed asserting that the evidence was insufficient to support the element of intoxication for vehicular homicide by intoxication. The standard of review is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Pope*, 427 S.W.3d 363, 368 (Tenn. 2013). The Court of Criminal Appeals stated,

(Continued on page 11)

VEHICULAR HOMICIDE MURDERER'S ROW

"Circumstantial evidence alone is sufficient to support a conviction, and the circumstantial evidence need not exclude every reasonable hypothesis except that of guilt." *State v. Wagner*, 382 S.W.3d 289, 297 (Tenn. 2012). Although Mr. Dye challenged the admission of certain evidence, the CCA stated, "[t]he sufficiency of the convicting evidence must be examined in the light of all the evidence presented to the jury, including that which may have been improperly admitted." *State v. Gilley*, 297 S.W.3d 739, 763 (Tenn. Crim. App. 2008). Specifically, Mr. Dye argued that the testimony was insufficient since the blood test only proved positive for drugs, but it could not quantify the drug amounts or prove their effect. However, the CCA stated that the recklessness of Mr. Dye's driving "demonstrated signs of impairment." Also, the CCA listed many cases in which a test was not given at all or an amount could not be quantified and yet impairment was found sufficient for conviction. *State v. Fleming*, 2018 WL 1433503 at *5-6, *26 (Tenn. Crim. App. Mar. 22, 2018) (No quantified amount of hydrocodone and cocaine); *State v. Moses*, 701 S.W. 2d 629, 631 (Tenn. Crim. App. 1985) (No testing); *State v. Wilson*, 2014 WL 3817074, at *14 (Tenn. Crim. App. Aug. 4, 2014) (No quantity for baths salts); *State v. Amble*, 2018 WL 1989632, at *4 (ten. Crim. App. Apr. 27, 2018) (No quantity); *State v. Carey*, 2015 WL 8482746, at *11 (ten. Crim. App. Dec. 10, 2015) (Insufficient breath test). The CCA found sufficient evidence to support the conviction and the judgements of the trial court were affirmed.

State v. William Blake Kobeck, 2019 Tenn. Crim. App. LEXIS 684

Mr. Kobeck pled guilty to vehicular homicide by recklessness, a Class C felony. He was sentenced to four years supervised probation, but he appealed when the trial court denied his application for judicial diversion. On May 9, 2017, Mr. Kobeck drove his Cadillac CTS across the centerline of Cherry Road, through a private yard and then airborne into a tree, killing his passenger, Reed Lowry. The THP determined that Mr. Kobeck's vehicle was travelling between 126 and 130 mile per hour during the time of the crash. (According to the vehicle's control module) The speed limit on Cherry Road is 40 miles per hour. Mr. Kobeck had two prior speeding tickets, but no other criminal history. Although many of the factors weighed in favor of granting judicial diversion, "the Court must hang its hat on … the deterrent value to others and the public interest as well." The trial court denied the defendant's application for judicial diversion.

The judicial standard on appeal is abuse of discretion, with a presumption of reasonableness. *State v. King*, 432 S.W.3d 316, 327 (Tenn. 2014). The Court of Criminal Appeals stated, "In determining whether to grant a defendant judicial diversion, the trial court must consider all of the following factors: (1) the defendant's amenability to correction, (2) the circumstances of the offense, (3) the defendant's criminal record, (4) the defendant's social history, (5) the status of the defendant's physical and mental health, (6) the deterrence value to the defendant and others, and (7) whether judicial diversion will serve the interest of the public as well as the defendant. *State v. Electroplating, Inc*., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998) (citing *State v. Parker,* 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996))."

The CCA determined that the trial court, in this case, did take into consideration all of the *Parker* and *Electroplating* factors and explained its reasoning for denying judicial diversion. Therefore, the trial court's ruling was entitled to a presumption of reasonableness. Since the trial court denied judicial diversion on the bases of the deterrence value to others and on the ruling of whether judicial diversion would serve the interest of the public, and since the trial court also determined that these factors outweighed the other factors considered by the court, the CCA determined that the trial court did not abuse its discretion by denying Mr. Kobeck's request for judicial diversion. Therefore, the judgment of the trial court was affirmed.

RELIABLE BREATH TESTING (Continued)

The majority of accuracy complaints within the NY Times article, involved inaccurate calibrations or even intentional miscalibrations of instruments in a few states. To prevent any possibility of miscalibrations in Tennessee, TBI has established policies and procedures that require the purchase and use of known and traceable standards which are certified by the National Institute of Standards and Technology (NIST). Once purchased, the standards are then run through a quality control check (QC) prior to being put into use. Documentation of the QC checks are kept by TBI in the Nashville lab. TBI requires an administrative review of all certificates of instrument accuracy. The in-depth reviews ensure that the certifications are proper and confirmed by their supporting paperwork. The reviewer shall not be the same person that certified the instrument. These policies prevent the possibility of transcription errors or miscalibrations. In addition to the above procedures, the EC/IR II instruments have internal self-calibrating mechanisms (every week) to ensure accuracy.

In *State v. Sensing*, 843 S.W.2d 412 (Tenn. 1992), the Tennessee Supreme Court detailed a short history of breath testing instruments used in Tennessee, from the "Drunkometer" used in 1953 and the "Borkenstein Breathalyzer" invented in 1954, to the "Intoximeter 3000" in use in 1988. The *Sensing* Court stated, "Since *Pruitt*, in 1965, there has been a vast advancement in scientific technology relative to blood alcohol testing as well as technical training in the operation of breath testing devices utilized for the detection of the blood alcohol level of persons suspected of intoxication." *Id.* at 414. Due to the reliability of the breath instrument and the extensive testing and calibrating conducted by TBI, the Supreme Court allowed testimony of the test without the requirement of an expert, if the requirements of *Sensing* were met. *Id.* at 418. Since *Sensing*, which was decided in 1992, there have been even greater advancements in scientific technology relative to breath testing. Modern breath testing instruments, such as the Intoximeter EC/IR II, are engineered to detect mouth alcohol and the instrument will not give a test result if mouth alcohol is present. Also, TBI has since improved their policies, such as the dual test requirement. By requiring a second test, the accuracy of the breath test can be confirmed, and any possible mouth alcohol or interfering substance can be excluded as an issue. Between the scientific advancement of the instruments and the updated policies of TBI, the twenty (20) minute waiting period, required by *Sensing,* is superfluous. However, all breath testing instruments in Tennessee are still programed for, and all TBI policies still require the twenty (20) minute waiting period as required by the *Sensing* ruling.

The NY Times article is important and should be commended for shedding light on corrupt practices within the legal community. The prosecution of all criminal cases should be based upon truth and justice, not the nefarious actions of participants that are expected to execute their duties responsibly, honorably and without perversion. However, to claim that all breath testing instruments cannot be trusted due to the irresponsible and dishonorable actions of some participants, is also irresponsible. Such a claim is not indicative of the professional, meticulous and quality work that is conducted nation-wide to provide reliable and unadulterated breath testing evidence. "[a] criminal prosecution is not that it shall win a case, but that justice shall be done ... It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Berger v. United States,* 295 U.S. 78 (1935). The extensive policies and procedures of TBI, along with the continual testing, calibrating and reviewing of all breath testing instruments, guarantees an accurate and trustworthy test result in Tennessee.

Tennessee District Attorneys General Conference

226 Anne Dallas Dudley Blvd., Suite 800 Nashville, TN 37243-0890
Website: http://dui.tndagc.org

Terry E. Wood (615) 253-6734
Linda D. Walls (615) 232-2944
Pat Hayes (615) 253-5684