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U.S. Supreme Court - Kansas v. Glover (2020)

The United States Supreme Court recently decided the legality of the often questioned police practice of detaining a vehicle after determining that the registered owner of the vehicle has a suspended or revoked driver's license. On April 28, 2016, Deputy Mehrer observed a pickup with a Kansas license plate. After running the plate, information indicated that Mr. Glover was the registered owner of the truck and his driver's license was revoked. Based solely on the information that the registered owner of the truck was revoked, Deputy Mehrer initiated a traffic stop. The deputy did not attempt to identify the driver of the truck before the stop. The driver of the truck was in fact Mr. Glover and he was later charged as a habitual violator. The Kansas District Court granted Mr. Glover's motion to suppress. The Court of Appeals reversed because "there were specific and articulable facts" that "gave rise to a reasonable suspicion." The Kansas Supreme Court reversed again stating that the deputy had "only a hunch" that Glover was behind the wheel. The U.S. Supreme Court granted certiorari.

"Although a mere 'hunch' does not create reasonable suspicion, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than necessary for probable cause." *Prado Navarette v. California,* 572 U. S. 393, 397 (2014) (quotation altered); *United States v. Sokolow,* 490 U. S. 1, 7 (1989). Courts "cannot reasonably demand scientific certainty . . . where none exists." *Illinois v. Wardlow*, 528 U. S. 119, 125 (2000). Rather, they must permit officers to make "commonsense judgments and inferences about human behavior." *Ibid.*; *see* also *Navarette, supra*, at 403 (noting that an officer "need not rule out the possibility of innocent conduct"). The U.S. Supreme Court concluded that since Deputy Mehrer saw the truck moving, identified it as belonging to Mr. Glover and had information that Mr. Glover had a revoked driver's license; Deputy Mehrer drew the commonsense inference that Glover was likely the driver of the vehicle, which provided more than reasonable suspicion to initiate the stop.

The fact that the registered owner of a vehicle is not always the driver of the vehicle does not negate the reasonableness of Deputy Mehrer's inference. Such is the case with all reasonable inferences. The reasonable suspicion inquiry "falls considerably short" of 51% accuracy, *See United States v. Arvizu*, 534 U. S. 266, 274 (2002), for, as we have explained, "[t]o be reasonable is not to be perfect," *Heien v. North Carolina*, 574 U. S. 54, 60 (2014). The Court noted that 75% of suspended or revoked driver's continue to drive. (Taken from a NTSHA survey)

This Court's precedents have repeatedly affirmed that "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Heien*, 574 U. S., at 60 (quoting *Riley v. California*, 573 U. S. 373, 381 (2014)). Under the totality of the circumstances of this case, Deputy Mehrer drew an entirely reasonable inference that Glover was driving while his license was revoked. Of course, if the deputy had possessed exculpatory evidence or different facts, (Continued on page 12)

Recent Decisions

State v. Donald Hyberger, 2020 Tenn. Crim. App. LEXIS 201

On May 31, 2018, Mr. Hyberger drove into oncoming traffic and caused a head-on collision. He admitted to previously drinking six vodka drinks prior to driving, smelled of alcohol and appeared "very dazed and confused about what had just happened." The officer read the implied consent law to Mr. Hyberger, "a couple of times." Once the officer was satisfied that Mr. Hyberger understood the waiver, the officer had him sign the waiver form and a blood sample was obtained. The blood result was 0.366 % BAC.

Mr Hyberger filed a motion to suppress, claiming that his consent was not voluntary and a warrant was not obtained. Although Mr. Hyberger and the officer gave contrary testimony at the suppression hearing, the trial court found Mr. Hyberger, "voluntarily consented to have his blood drawn after being read the implied consent law." Mr. Hyberger then entered a plea of guilty to DUI 3rd offense, reserving a certified question of law pursuant to Rule 37(b)(2). The Tennessee Court of Criminal Appeals found that the certified question was in violation of Rule 37(b)(2). Specifically, the certified question did not clearly identify the scope and limits of the legal issue reserved and the question was overbroad. (It included issues not passed upon by the trial judge) See *State v. Preston,* 759 S,W,2d 647, 650 (Tenn. 1988). Therefore, the appeal was dismissed.

State v. William J. Wagner AKA William Justin Wagner, 2020 Tenn. Crim. App. LEXIS 236

A Millington Police officer arrested Mr. Wagner for DUI 3rd offense at the gates of the Millington Naval Air Station. Mr. Wagner smelled of alcohol, his eyes were bloodshot and watery, his speech was slurred and open beer cans and a vodka bottle were found in his vehicle. His driver's license was restricted and he was driving outside of the listed restrictions. All SFSTs were refused. Mr. Wagner filed a motion to dismiss based upon a lack of jurisdiction, since he was currently on federal property when he was arrested. The State argued that DUI is a continuing offense and that circumstantial evidence existed to show that Mr. Wagner drove within the city limits of Millington to arrive at the gate where he was stopped. The trial court denied the motion to dismiss the indictment, based upon "concurrent jurisdiction, if not exclusive jurisdiction." Mr. Wagner entered a plea of guilty to DUI 3rd offense, reserving a certified question of law.

Although Mr. Wagner, the trial court and the State all consented to the reservation of the certified question and agreed that the issue was dispositive of the case, the CCA "is not bound by the determination and agreement of the trial court, a defendant, and the State that the certified question is dispositive of the case." *State v. Dailey,* 235 S.W.3d 131, 134-35 (Tenn. 2007). Instead, the CCA must make an independent determination. *Id.* At 135. The CCA determined that even if Mr. Wagner was arrested for DUI on federal property, since he commenced driving under the influence in Millington, the State had jurisdiction to prosecute him for DUI. Mr. Wagner's certified question was not dispositive of the case and his appeal was dismissed for lack of jurisdiction.

State v. Kendall Allison Clark, 2020 Tenn. Crim. App. LEXIS 273

This case involves a vehicle stop, based upon a 991 call. On July 7, 2016, a concerned citizen called 911 when he observed a truck parked in his sister-in-law's driveway. The driver was "either passed out or dead" and slumped over to the right. Five minutes later, the same caller called 911 again to report that the driver of the truck had awakened, "drove through a ditch" and was now driving down the roadway. An officer located the truck and detained the driver, Mr. Clark. At the time of the stop, the officer had not observed any "poor driving" or made any observations of Mr. Clark slumping over in his truck. After a motion to suppress was denied, Mr. Clark pled guilty to DUI, reserving a certified question on appeal.

Information provided by a known citizen informant "is presumed to be reliable" because a citizen informant has "gained … information through first-hand knowledge." *State v. Luke,* (Continued on page 3)

Recent Decisions (Continued)

995 S.W.2d 630, 636 (Tenn. Crim. App. 1998), *see State v. Cauley,* 863 S.W.2d 411, 417 (Tenn. 1993). A "report that a vehicle is being driven recklessly or erratically suggests that the driver may be under the influence of alcohol or drugs, fatigued, or in physical distress." *State v. Hanning,* 296 S.W.3d 44, 46 (Tenn. 2009). The CCA determined that since the same truck had been located, close in time, the officer had reasonable suspicion to believe that the truck had recently been driven through a ditch and the driver had recently been slumped over. Although the officer did not observe any bad conduct, a reliable report of erratic driving suggested that Mr. Clark could have been impaired. As a result, reasonable suspicion justified a warrantless detention of Mr. Clark. Also, the CCA found that the community caretaking exception additionally permitted the initial warrantless detention of Mr. Clark. *State v. McCormick,* 494 S.W. 3d 673, 680-83 (Tenn. 2016), *see also, State v. John D. Henry,* No. E2017-01989-CCA-R3-CD, 2018 WL 5279095 (Tenn. Crim. App. Oct. 23, 2018). The judgment of the trial court was affirmed.

State v. Chad Everette Henry, 2020 Tenn. Crim. App. LEXIS 326

On October 3, 2017, Mr. Henry entered a plea of guilty to voluntary manslaughter (as a Range I offender) and DUI. According to the indictments, on December 25, 2014, the defendant caused the victim "to exit a moving vehicle … by inflicting blunt force trauma upon [the victim]," causing her death. Mr. Henry agreed to a greater sentence, outside of Range I, pursuant to *State v. Hicks,* 945 S.W.2d 706 (Tenn. 1997). After a sentencing hearing, Mr. Henry was sentenced to 12 years to serve in TDOC for the voluntary manslaughter and 11,29 probation after service of 45 days for the DUI 2nd offense. Mr. Henry appealed being sentenced outside of Range I. A defendant may enter into a plea in which he agrees to be sentenced outside of his offender range classification, "so long as [the sentence] does not exceed the maximum punishment authorized by the plea offense." *Hoover v. State,* 215 S.W.3d 776, 780 (Tenn. 2007) (citing *Hicks,* 945 S.W.2d at 707). Since the sentence of 12 years was less than the maximum authorized (15 years), the judgments of the trial court were affirmed.

State v. James Robert Black, Jr., 2020 Tenn. Crim. App. LEXIS 368

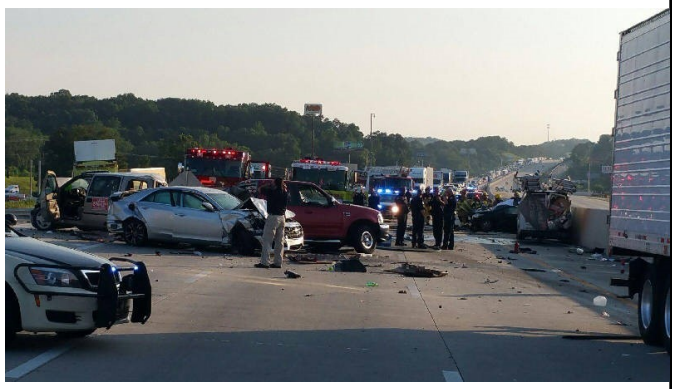
On August 5, 2017, a trooper testified that he observed a pickup truck's driver side wheels cross the center of the road. A video of the incident was played, but the trooper stated that it is fuzzy and hard to see the vehicle cross the center line. The trooper stated that the only reason for the stop was the traffic violation of crossing the center line. Mr. Black was charged with DUI 2nd offense, per se DUI and other traffic related violations. After a hearing on a motion to suppress, the trial court entered an order granting the motion to suppress without making findings of fact or credibility determinations upon which to based the court's decision.

The State filed an appeal and argued that the Court of Criminal Appeals, in light of the absence of findings, should review the video *de novo* and make it's own determination as to whether the vehicle crossed the center line, thereby providing probable cause to justify Mr. Black's detention. After oral argument, the CCA ordered the trial court to supplement the appellate record with findings of fact. The trial court stated that although the trooper is always a good, reliable witness, the trial court found that the trooper was not "adamant" in his testimony and "simply submitted all issues concerning the stop to the court." The CCA determined that the trial court made "an implicit finding of fact" that the trooper's testimony was not credible enough to find that Mr. Black's truck crossed the center line. Therefore, the CCA cannot simply review the videotape to make a *de novo* review. *See State v. Binette,* 33 S.W.3d 215, 217 (Tenn. 2000). The CCA quoted *State v. Brown,* 294 S.W. 3d 553 (2009) which states that even in light of a lack of specific findings by the trial court, an implicit finding by the trial court can be relied upon for the bases of a decision on a motion to suppress. *Id.* At 565.

Therefore, the CCA concluded that the decision to grant the motion to suppress was supported by the trial court's implicit finding that since the trooper was not "adamant" in his testimony, the trooper's testimony was not credible enough to support the fact that Mr. Black's vehicle crossed the center line.

DRE Testimony Allowed in Court - State v. Brewer (2020)

Benjamin Scott Brewer was convicted of six counts of vehicular homicide by intoxication, four counts of reckless aggravated assault, driving under the influence, violation of motor carrier regulations, and speeding as a result of his actions and the resulting crash on June 25, 2015, on Interstate 75 in Hamilton County, Tennessee.[1] In a 702 and 703 hearing, upon the motion of the defendant, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *McDaniel v. CSX Transportation*, Inc., 955 S.W.2d 257 (Tenn. 1997)[2], Chief Brian Hickman of the Collegedale Police Department testified about the training and experience he received in the drug evaluation and classification program. (DEC) The purpose of the hearing was for the court to determine whether Chief Hickman would be able to testify as a drug recognition expert, at trial, regarding the 12-step evaluation that he had conducted in this case. During his testimony, he explained the history and development of the 12-step process;[3] the studies and evaluations of the effectiveness of the process;[4] the standardization of the process so that it is administered the same way each time; the proficiency in the process that must be displayed in the certification process; and the requirements for continued certification.[5]



Based upon the information heard at the pretrial hearing, the trial court concluded that Rules 702 and 703 of the *Tennessee Rules of Evidence* governed the admissibility of scientific evidence, without specifically going through each of the *McDaniel* factors. Relying upon the information provided by Chief Hickman, the trial court found that any evidence he observed, from his DEC evaluation of the defendant, would substantially assist the jurors. Further, having held that the evidence was admissible, the trial court accurately pointed out that it would be up to the jury, the triers of fact, to determine what weight, if any, should be given to the evidence provided. Specifically, Judge Don Poole quoted *McDaniel* in his order, "The court . . . must assure itself that the opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation. ... Once the evidence is admitted, it will thereafter be tested with the crucible of vigorous cross-examination and countervailing proof. ... [T]he weight to be given to stated scientific theories, and the resolution of legitimate but competing scientific views, are matters appropriately entrusted to the trier of fact." *Id.*

Upon appeal, the Court of Criminal Appeals (CCA) found that the trial court had not abused its discretion in permitting the testimony of Chief Hickman as an expert. The CCA noted that although the trial court did not "explicitly name the *McDaniel* factors, the trial court aptly considered the development of the test and its reliability when determining whether to admit the testimony". Further, the CCA reiterated that a rigid application of the *McDaniel* factors is not required and referenced the six-page order issued by the trial court "as well reasoned and thorough" and a proper application of *Tennessee Rules of Evidence,* Rules 702 and 703. Although the admissibility of Chief Hickman's testimony was decided in a pretrial motion hearing, the basis for Chief Hickman's opinion that the defendant was impaired, was recited for the jury.[6] At least half of the testimony concerned his training, skill, knowledge, and experience as a drug recognition expert. The remainder of the testimony, after being tendered as an expert, was in regard to Chief Hickman's observations of the defendant during the drug evaluation and classification process and then the rendering of his opinion as to which of the seven categories of drugs the defendant appeared to be under the influence of, at the time of the evaluation. In this case, Chief Hickman opined that the defendant was under the influence of a stimulant and a depressant. The toxicology results (step 12) supported the finding that the defendant had a stimulant in his system. (amphetamine and methamphetamine) While the blood testing results did not show the presence of a depressant, Chief Hickman testified that this did not concern him given there are some drugs, including some central nervous system depressants, that the Tennessee Bureau of Investigation may not currently test for at present.[7]

(Continued on page 5)

DRE Testimony Allowed in Court (Continued)

During cross-examination, the defense first attacked the DEC program by asking Chief Hickman about not completing one of the steps, interviewing the arresting officer. (Step 2) In reply, Chief Hickman noted that the defendant was not in custody when he did the evaluation. He further explained that he did not want to have his evaluation influenced by others telling him about seeing things that would not go along with his evaluation. Next, the defense attacked the program's reliability as "not being perfect" and the studies relied upon concerning reliability of the procedures in predicting the presence of depressants and stimulants.[8] Then, the defense attacked the use of the 12-step procedure on individuals involved in crashes. Finally, the defense attacked the observations made by Chief Hickman, pointing to what the defendant did as instructed, and minimized what the defendant did not do as instructed. Just as anticipated by the trial court in its application of Rules 702 and 703, the defense was provided the opportunity to challenge the findings of Chief Hickman through vigorous cross-examination, as provided for and suggested in *McDaniel* and its progeny. Also, the jury was permitted to supply whatever weight it deemed appropriate in reaching its verdict. After all the evidence was presented, the jury ultimately found that the defendant was driving under the influence on that fateful day in June of 2015. The jury further concluded that six people were killed, and four others were seriously injured as a result of the defendant's actions and the trial court sentenced the defendant accordingly.[9]

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1. State v. Brewer, No. E2019-00355-CCA-R3-CD, 2020 Tenn. Crim. App. LEXIS 221 (April 6, 2020). The carnage of the crash scene extended for 453 feet. Six people died and four were seriously injured in the cash. Traffic had slowed for an active construction zone. The defendant was driving 78- 82 miles per hour when he failed to slow for the stopped traffic.

2. Order of the trial court, State v. Brewer, No. 295881, Criminal Court for Hamilton County, Tennessee, Division III.

3. The 12-steps of the DRE process are: (1) The breath (or blood) alcohol concentration test; (2) Interview of the Arresting Officer; (3) Preliminary Examination (includes first of three pulses); (4) Eye Examinations; (5) Divided Attention Tests; (6) Vital Signs Examination (includes second of three pulses); (7) Dark Room Evaluations of Pupil Size (includes examination of oral and nasal cavities); (8) Muscle Tone; (9) Examination of Injection Sites (includes third pulse); (10) Statements, Interrogation; (11) Opinion; and (12) Toxicology: obtaining a specimen and the subsequent analysis.

4. The program was developed in Los Angeles, CA by LAPD in conjunction with medical professionals. The effectiveness of the program was the subject of *Identifying Types of Drug Intoxication: Laboratory Evaluation of a Subject Examination Procedure*, May 1984 Final Report. George E. Bigelow, Ph.D. et al. Behavioral Pharmacology Research Unit, Department of Psychiatry and Behavioral Sciences. Funded by the U.S. Department of Transportation's NHTSA and the National Institute of Drug Abuse. (Commonly called the Johns Hopkins Study), NHTSA, Pub. No. DOT HS 806 753 (1985) and Field Evaluation of the Los Angeles Police Department Drug Detection Procedure. February, 1986, DOT HS 807 012, A NHTSA Technical Report, National Highway Traffic Safety Administration. Richard P. Compton. (Commonly referred to as the 173 Case Study), as well as various other studies.

5. Tennessee's DRE program coordinator is Tony Burnett. For more information about the certification process in Tennessee, see the Tennessee Highway Safety Office website, https://tntrafficsafety.org/dre-program.

6. For the purposes of this article the transcript from the trial testimony of Chief Hickman was obtained and reviewed. For brevity, all the information contained within this article regarding Chief Hickman's testimony, at the jury trial, comes from the transcript and not the opinion issued by the Court of Criminal Appeals on April 6, 2020.

7. There was evidence of a depressant found during testing, but the result was below the testing lab's cutoff level and could not be confirmed. Therefore, the evidence was not reflected on the toxicology report or mentioned in the trial testimony.

8. Many more studies have since been published regarding the reliability of the DEC program, i.e., "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) (Based on 2,142 DEC Evaluations)

9. The defendant received a 55-year effective sentence. The consecutive sentencing of the defendant was challenged upon appeal. The appellate court found that the application of the two consecutive sentencing factors by the trial court: (1) that the sentence was necessary to protect the public from further serious criminal conduct; and (2) that it reasonably related to the severity of the offenses committed; was not an abuse of discretion and the CCA affirmed the legality of the sentence imposed.

Can Driving with High Beams Justify a Stop?

In *State v. Walters*, No. W2019-00420-CCA-R3-CD, 2020 Tenn. Crim. App. LEXIS 364 (May 22, 2020)[1], Deputy Gross stopped the defendant, Jason Bradley Walters, for unlawfully turning on his high beam lights and obstructing the deputy's vision while driving. Deputy Gross was on duty on October 17, 2017, at approximately 12:15 a.m., and he was travelling southbound on Christmasville Road in Madison County. Another vehicle was travelling between 200 and 300 feet in front of Deputy Gross, and was also traveling southbound. Mr. Walters was traveling northbound and after he passed the first vehicle, Mr. Walters turned on his high beams, while he was approximately 150 to 200 feet in front of Deputy Gross. Deputy Gross "flicked" his high beams on and off several times to let the defendant know that his lights were too bright, but the defendant never dimmed his lights and the glare prevented Deputy Gross from looking straight ahead. Deputy Gross turned around and initiated a stop as the defendant pulled into his driveway at home. Mr. Walters testified that Deputy Gross had his high beams on and Mr. Walters flashed his high beams to let him know.

Mr. Walters was indicted by the Madison County Grand Jury with Driving Under the Influence, 2nd offense (two counts alleged on alternative theories), Driving on a Revoked Driver's License, due to a prior DUI Conviction, and Failure to Dim Headlights within 500 feet of an approaching vehicle, in violation of T.C.A. § 55-9-407. The defense filed a motion to suppress based upon an unconstitutional stop. Both sides argued the credibility of their witness. The trial court took the matter under advisement and later filed a written order granting the motion to suppress. Although the defense never argued that T.C.A. § 55-9-407 was not a crime, and neither side addressed the issue, the trial court granted the motion to suppress based upon T.C.A. § 55-9-407 not being a crime. Therefore, Deputy Gross did not have probable cause or a reasonable suspicion upon which to justify the traffic stop.

The Court of Criminal Appeals reversed the trial court's judgment granting defendant's motion to suppress evidence gained upon the stop of the defendant for violation of T.C.A. § 55-9-407, and remanded the case back for the trial court to make specific findings of fact and determinations regarding the credibility of the testimony presented at the hearing. (i.e., which witness was considered credible.) Further, the CCA provided that the trial court must issue a new order either granting the motion to suppress or denying the motion.

So, exactly what was the issue with the original order of the trial court? First, the trial court granted the motion to suppress stating that violation of Tennessee Code Annotated section 55-9-407 is not a crime. The defendant did not argue for this conclusion nor did the State rebut it. Instead, in support of the ruling to suppress the evidence, the trial court indicated that the section did not provide for a fine or other penalty, chapter 9 is titled equipment-lighting regulations, there was no "catch-all provision" providing that any offense without a prescribed penalty is a class C misdemeanor, and there was no indication that the legislature intend the violation to be a crime. Further, the trial court found that since a violation was not a crime, the officer could not have had probable cause or reasonable suspicion to believe that a crime was being committed.

According to Merriam-Webster, "regulation" is defined as " the act of regulating: the state of being regulated; authoritative rule dealing with details or procedure; a rule or order issued by an executive authority or regulatory agency of a government and having the force of law". Part 4 of Title 55, Chapter 9, sets forth the lighting regulations for motor and other vehicles. (Continued on page 7)

Driving with High Beams (Continued)

Tennessee Code Annotated section 55-10-301(a), provides that "any person violating any of the provisions of chapters 8 and 9 of this title and parts 1-5 of this chapter, where a penalty is not specifically prescribed, **commits a class C misdemeanor**." (emphasis added). Therefore, a violation of Tennessee Code Annotated section 55-9-407 is a class C misdemeanor and the trial court erred in its conclusion that it was not a crime. As such, the violation of the statute can be the basis of reasonable suspicion or probable cause to justify a stop.

In addition to making this error in characterization of the statute as non-criminal, the trial court failed to make specific findings of fact regarding what took place on the roadway on October 17, 2017, making remand a necessity. The court also did not address whether it credited the testimony of Deputy Gross regarding what had occurred or that of the defendant in its ruling. "Only the trial court's credibility determinations apply. We note that without credibility determinations, when a trial court merely states that 'witness #1 testified that …,' this is *not* a finding of fact—at most it is just part of a summary of the testimony." The posture of this case is unique by the situation of the trial court's ruling. For this reason, the CCA could not address the merits of the motion to suppress and a remand was required.

Since clear and concise findings of fact can be made without stating that one witness is totally credible and the other witness is not credible, the trial court is required to make these findings. The finder of fact (which is the trial court here) can find a witness credible in some testimony and not credible in other testimony. *State v. Odem.* 928 S.W.2d 18, 23 (Tenn. 1996). A lack of credibility does not solely mean that a witness has lied. A witness can be speaking entirely truthfully as to his or her perception of what is seen, heard, smelled, or felt, but other evidence of weather, noise, odors, distance, etc. may factor into the ultimate credibility determinations made by the finder of facts. The trial court could grant the motion to suppress or deny the motion based upon which findings of fact the trial court determines. Accordingly, the CCA reversed the trial court's judgment granting the motion to suppress, left intact the judgment dismissing the indictment at this time and remanded the case back to the trial court to make the appropriate findings of fact in accordance with this opinion. The trial court was ordered to make a ruling either granting the motion to suppress or denying the motion to suppress. If the trial court denies the motion, then the indictment must be reinstated.

Could this appeal have been averted? The answer is perhaps. Perhaps after the order was issued, the State could have attempted to file a motion requesting the court to reconsider its ruling and take judicial notice under Rule 202 of the Tennessee Rules of Evidence of Tennessee Code Annotated section 55-10-301(a). The CCA stated that it was "puzzling why the State failed to do the minimal amount of research required to support a meritorious motion for the trial court to reconsider its ruling prior to moving to dismiss the charges, especially since the ruling was based upon a legal theory not raised or addressed by either party." However, many prosecutors have been informed by various Judges that they do not recognize that a motion to reconsider is proper. From the position of hindsight, the trial court could have requested both parties to submit further arguments or to appear and address the issue of whether a violation of Tennessee Code Annotated section 55-9-407 is a crime before issuing its ruling. At any rate, *Walters* helps remind us that it is hard to respond to an argument that is not raised or argued, either by written motion or in open court. That is one reason why motions are required to "state with particularity the grounds on which it is made." *See* Tennessee Rules of Criminal Procedure Rule 47.

UPCOMING TRAINING

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

Prosecuting the Drugged Driver - August 10 -11, 2020, Nashville, TN (Airport Hilton)
This course will aid prosecutors in conducting a drugged driving trial. Subjects covered will include dealing with opening statements, direct examination, cross examination, closing arguments, prescription and illicit drug pharmacology, SFSTs, working with DREs, and handling common drugged driving defenses.

Cops in Court - September 10, 2020, Green 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 from Noon to 4 p.m.

Cops in Court - September 16, 2020, Jackson, 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 from Noon to 4 p.m.

Conference DUI Breakout - October 20, 2020, Chattanooga, TN
Every year our DUI breakout session provides approximately four hours of education and training covering current DUI topics and legal updates.

Victim Issues - (TBA) December, 2020, Nashville, TN
The DUI training department will offer a one day training class focused on victim issues involved in DUI cases. This training will coincide with the Mother Against Drunk Driver's "Night of Remembrance." During this event, MADD will recognize law enforcement officers and citizens for their great contributions to the enforcement and prevention of impaired driving in Tennessee.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Impaired Driving Enforcement (ARIDE)
September 7-8, 2020, Pulaski, TN

DUI Detection & Standardized Field Sobriety Testing
July 13-15, 2020, Mountain City, TN

Drug Recognition Expert School (DRE)
August 31 - September 10, 2020, Nashville, TN
September 21-October 1, 2020, Cookeville, TN
October 19 - October 29, 2020, Jonesborough, TN

Advance Traffic Crash Investigation
July 6-17, 2020, Nashville, TN
August 10 -21, 2020, Pigeon Forge, TN
October 5 - October 16, 2020, Cleveland, TN

DUI TRACKER

DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from April 1, 2020, through June 30, 2020, and reflect the DUI Tracker conviction report for all judicial districts in 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 April 1, 2020, through June 30, 2020, since the last quarter were 596. This number is substantially down from the previous quarter by 921. Due to the COVID-19 crisis, all DUI related dispositions in Tennessee have dropped this quarter, as many courts have been closed, only allow video appearances or have greatly reduced dockets. The total number of guilty dispositions during this same period of April 1, 2020 through June 30, 2020 were 400. The total number of dismissed cases were 47. Across the State of Tennessee, this equates to 67.11% of all arrests for DUI made were actually convicted as charged. This percentage is slightly lower than the last quarter ending on March 31, 2020. Only 7.89% of the DUI cases during this current quarter were dismissed. Also, during this same period of time, only 120 of the total DUI cases disposed of, were to different or lesser charges. Therefore, only 20.13% of the total cases were disposed of to a charge other than the original 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 April 1, 2020 through June 30, 2020. During this period, there were a total of 255 fatalities, involving 240 crashes, which is an increase from the previous quarter. Out of the total of 255 fatalities, 30 fatalities involved the presence of alcohol, signifying that 11.76% of all fatalities this quarter had some involvement with alcohol. This percentage is lower than the previous quarter. Further, there were a total of 19 fatalities involving the presence of drugs, signifying that 7.45% of all fatalities this quarter involved some form of drugs.

The year-to-date total number of fatalities on Tennessee roads and highways is 507. This is down by 18 from the 525 fatalities incurred last year at this same time. Although there is a decrease from last year, there has been a greatly reduced amount of traffic, due to COVID-19. Our number of traffic fatalities should be much less. With less traffic comes increased speeds. Speed and intoxication is a deadly combination. Drive safe!

Protecting Lives, Saving Futures Seminar

The DUI Training Department held a Protecting Lives, Saving Futures Seminar in Pigeon Forge, TN, in February, 2020. Over 30 participants were taught the technical and legal requirements needed to prosecute an alcohol or drug impaired driving case. Participants also attended a wet lab, observed HGN and learned how to better present this evidence to a jury. On August 10 - 11, 2020, the DUI Training Dept. will be presenting the Drugged Driver Seminar at the Hilton Nashville Airport. Sign up, registration is closing soon.

VEHICULAR HOMICIDE MURDERER'S ROW

State v. Kevin E. Trent, 2020 Tenn. Crim. App. LEXIS

It seems that some cases have issues that continue for years. This case relates to a 2012 traffic crash in which Mr. Trent's truck struck a vehicle being driven by Karen Freeman, who was significantly injured during the crash and ultimately died over a year later as a result of her injuries. Mr. Trent entered a plea of guilty to vehicular homicide by intoxication, a Class B felony, in which he stipulated that he drove while under the influence of oxycontin and alprazolam, he crossed into oncoming traffic, struck Karen Freeman's vehicle causing her death and his intoxication was the cause of the crash. He agreed to an eight-year sentence with the manner of service to be determined at a sentencing hearing. The trial court originally sentenced Mr. Trent on April 20, 2015, to eight years to serve in TDOC custody. Eight years after the crash, in 2020, his sentencing issues are still being discussed and resolved.

On appeal, the Court of Criminal Appeals reversed the judgment of the trial court after concluding that the record did not support the trial court's imposition of incarceration and denial of alternative sentencing on the basis that the offense was "especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree." (quoting *State v. Bottoms,* 87 S.W.3d 95, 103 (Tenn. Crim. App. 2011). The CCA ordered his sentence to be served, the remainder, on probation. The State appealed to the Tennessee Supreme Court, which determined that the trial court "did not undertake the proper analysis before imposing a sentence of incarceration" and expressed its concern that the trial court ordered incarceration based upon the elements of the offense. *See State v. Trent,* 533 S.W.3d 282, 295-96 (Tenn. 2017). The Supreme Court also determined that the record was too incomplete for the CCA to have formed an independent appellate review and to have ordered the defendant to serve the remainder of his sentence on probation. *Id.* at 296. Therefore, a new sentencing hearing was ordered and the case was remanded back to the trial court.

At the new sentencing hearing on November 21, 2018, a new presentence report was received as an exhibit. Mr. Trent had no prior convictions and was determined to be a low risk for recidivism. He was living with his father at the time of the investigation. Mr. Trent was disabled from a prior motorcycle accident in which both arms below his elbows and his left leg had been amputated. He was hit by an intoxicated driver in June of 2005. Mr. Trent claimed that he was able to drive without any adaptions or prothesis. Mr. Trent would cut lawns and he received Social Security disability benefits. The victim suffered severe head and hand injuries and was placed into a nursing home until she died over a year later. The victim suffered a brain injury, was not able to eat or speak and had limited movement abilities. A witness testified that she saw Mr. Trent earlier and that he had slurred speech and almost hit a "canopy pole" while driving. Mr. Trent had spent 16 months in TDOC custody before being released upon probation at the CCA's instruction. He had complied with all probation requests although there was testimony that probation terms were light and he never provided a drug test, since probation did not have a nurse to hold the specimen cup.

The trial court again sentenced Mr. Trent to eight years TDOC custody after determining that he was not a good candidate for alternative sentencing. The trial court reflected upon "the culture of medicated drivers" and stated that Mr. Trent has the same mindset, that he didn't think that he was impaired while driving on medication. He also had a lack of self-awareness on his drug use and "might do this again." The court stated, "I'm gonna make sure that what I do in this case does not unduly depreciate the seriousness of the offense." The trial court's written order reflected that the court applied a single (Continued on page 11)

VEHICULAR HOMICIDE MURDERER'S ROW

enhancement factor after determining that the personal injuries inflicted upon the victim were particularly great. *See* T.C.A. Section 40-35-114(6) (2018). No other mitigating or enhancing factors were addressed at the hearing or in the written order.

The standard of review for a sentence is an "abuse of discretion standard." *States v. Bise,* 380 S.W.3d 682, 708 (Tenn. 2012). The CCA listed all the factors that must be considered when sentencing a defendant to incarceration. *See* T.C.A. Section 40-35-103(1)(A)-(C) (2018); *see Trotter,* 201 S.W.3d at 654; *see also State v. Electroplating,* 99 S.W.2d 211, 229 (Tenn. Crim. App. 1998); *State v. Parker,* 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996) The CCA determined that the trial court did not consider or properly apply the above factors and that, although the trial court did articulate its reasons for ordering the defendant to serve his sentence, the evidence contained in the record does not support the court's determinations and conclusions. Therefore, the CCA reversed the judgments of the trial court and modified Mr. Trent's sentence to split confinement of time served with the remainder to be served upon probation. The case was remanded for appropriate conditions of probation to be determined by the trial court. It is required that not only must the court state all factors upon which it considered when sentencing a defendant to incarceration, but the factors must comply with T.C.A. Section 40-35-103(1)(A)-(C). **(For offenses that occur after January 1, 2017, any Vehicular Homicide by Intoxication, T.C.A. 39-13-213(a)(2), is not eligible for probation pursuant to T.C.A. 40-35-303(a).**

State v. Cindy Hinton, Cheatham County Circuit Court, Case #18762

On February 29, 2016 Ms. Hinton was driving her 1998 Crown Victoria on Eastbound Interstate 24, between Clarksville and Nashville, during morning, rush-hour traffic. The traffic would alternate from sections of increased speed and sections of stopped or slow moving vehicles. Ms. Hinton increased her speed while approaching a stopped section of traffic. Roadway evidence analyzed by THP's Critical Incident Response Team, witness statements and vehicle evidence, all indicated that Ms. Hinton did not apply her brakes before slamming into a 2015 Toyota Corolla, driven by 39 year old Brandi Vandiver a resident of Kentucky. Due to the speed of Ms. Hinton's vehicle and the lack of braking, the Crown Victoria's front bumper over-rode the rear bumper and tires of the Toyota Corolla, penetrating cleanly through the trunk and rear passenger compartment of the Corolla. Ms. Hinton's vehicle made contact with the Toyota Corolla's front seats, causing fatal injuries to Brandi Vandiver. Additional evidence from Ms. Hinton's vehicle included an open mascara brush and eye-lash curler on the driver's-side floorboard, and a mascara brush stain on the driver's-side airbag. A blood sample from Ms. Hinton, taken two hours after the crash, contained .12 ug/ml Adderall, 9 ng/ml Diazepam, 23 ng/ul of Nor-Diazepam, and 44 ng/ul of Alprazolam. Ms. Hinton did not have a prescription for the Diazepam.

On November 14, 2019, a Cheatham County jury found Ms. Hinton guilty of a Class B felony, Vehicular Homicide by Impairment (T.C.A. section 39-13-213) and a Class C felony, Vehicular Homicide by Reckless Conduct (T.C.A. section 39-13-213). A sentencing hearing was held on February 26, 2020. The State argued that a sentence of probation would depreciate the seriousness of the offense and that a sentence of incarceration was necessary for deterrence per T.C.A. section 40-35-103(1)(b). The State called DUI Coordinator, Marley Pfeffer, who testified that in the last five years, the 23rd Judicial District experienced twice as many Vehicular Homicide offenses as the prior five years. The State also argued enhancement factors 1, 6 and 10, pursuant to T.C.A. section 40-35-114. The trial court sentenced Ms. Hinton to 11 Years TDOC custody for the B felony, as a Range I offender and 5 years TDOC custody for the C felony, as a Range I offender. The two counts were merged for an effective sentence of 11 years in TDOC custody.

Kansas v. Glover (Continued)

Then the result would be different. For example, if the registered owner of the vehicle is in his mid-sixties but the deputy observes that the driver is in her mid-twenties, then the totality of the circumstances would not "raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *United States v. Cortez*, 449 U. S. 411, 418 (1981); *Ornelas v. United States*, 517 U. S. 690, 696 (1996) ("'[e]ach case is to be decided on its own facts and circumstances'" (quoting *Ker v. California,* 374 U. S. 23, 33 (1963))). Here, Deputy Mehrer possessed no exculpatory information—let alone sufficient information to rebut the reasonable inference that Glover was driving his own truck—and thus the stop was justified. Therefore, if an officer runs a vehicle's license plate and determines that the registered owner of the vehicle does not have a valid driver's license, then sufficient, specific and articulable, facts exist to form a reasonable suspicion that the registered owner of the vehicle is driving the vehicle, without a valid driver's license. THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. KAGAN, J., filed a concurring opinion, in which GINSBURG, J., joined. SOTOMAYOR, J., filed a dissenting opinion.

Brentwood Officer Killed by Impaired Driver

Brentwood Police Officer and five-year veteran of the force, Destin Legieza, 30, was killed while on patrol, on Thursday, June 18, 2020. This was the first Brentwood Officer to be killed in the line of duty, in the history of the department, according to the Brentwood Police Department. Officer Legieza was returning his vehicle to the police precinct at the end of his shift. He was travelling southbound on Franklin Road, in Brentwood, at approximately 5 a.m. Ashley Kroese, 24, was travelling northbound on Franklin Road when her vehicle crossed two lanes, drifting into the southbound lanes of travel and striking Officer Legieza's police vehicle, head light to head light. Ms. Kroese has since been charged with Vehicular Homicide involving intoxication. Her BAC was .166.

Destin Legieza has been described by Assistant Chief, Richard Hickey, as a "shining star in our department." Officer Legieza was involved in his community, Special Olympics and his church. He had followed his father and grandfather into law enforcement. His father Lt. Legieza works for the Franklin Police Department.

The loss of Officer Legieza is hitting the Brentwood community hard. Flowers sit outside a popular deli just feet away from where he was killed. "For us it's about them knowing we love them, support the community and we want to do whatever we can to rally behind them," said Hailey Hiett who owns Brentwood Market and Deli. His sudden death is also affecting those who didn't know him. A group of strangers pray near the scene of the crash and the pile of flowers and letters quickly gets bigger. Thousands of people attended his funeral and procession through the streets of Franklin and Brentwood. Destin Legieza's death is a tragic loss of all of Williamson County. He will be greatly missed.

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