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MITCHELL V. WISCONSIN (EX. CIR. DEFINED)

In 2019, the United States Supreme Court, in *Mitchell v. Wisconsin,* 139 S. Ct. 2525 (2019), considered how the exigent circumstances exception applies when a suspected impaired driver is unconscious and unable to give a standard breath test. The condition of the suspect can also prevent an implied consent waiver or a voluntary consent. The *Mitchell* court stated:

> "When police have probable cause to believe a person has committed a drunk-driving offense and the driver's **unconsciousness or stupor** requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, **they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment.** Id. at 2539. (emphasis added)

In the *Mitchell* case, Mr. Mitchell was arrested for DUI, after a preliminary breath test had indicated a 0.24 BAC, and he had been observed driving a van to a park. The officer drove Mr. Mitchell to the police station to obtain an evidentiary breath test. However, Mr. Mitchell became too lethargic to give a breath test and he was then driven to a hospital for the officer to obtain a blood test. Upon arrival at the hospital, Mr. Mitchell had become unconscious and had to be wheeled into the hospital. Mr. Mitchell's blood was drawn upon the request of the officer. The BAC result was 0.22%.

The plurality's holding reiterated that in situations such as *Schmerber v. California,* 384 U.S. 602, 109 S.Ct. 1402 (1966) (a crash involving injuries) and in *Mitchell* (an unconscious suspect), the facts of these cases sat "much higher than *McNeely* (*Missouri v. McNeely,* 569 U.S. 141, 133 S. Ct. 1552 (2013), an average DUI stop) on the exigency spectrum," A defendant's condition often "heightened the urgency" of preforming the blood test. Id. at 2533.

Although the Tennessee Appellant Courts have not yet addressed the holding of the *Mitchell* court, since its decision in 2019, other states have. One such case is from Oregon, *State v. Stephens,* 311 Ore. App. 588, 493 P.3d 2, 2021 Ore. App. LEXIS 659 (Ore., May 19, 2021). This case involved the death of a bicyclist on a long straight stretch of highway. The defendant did not stop. The physical evidence of the crash was outside the fog line. The responding officer (Hargis) was able to identify and locate the defendant about 1 to 1 1/2 hours after the crash. A second officer arrived. The defendant showed signs of impairment. A tow truck was called to the location of the defendant's truck and all other officers were at the scene of the crash/victim. Officer Hargis drove the defendant to the hospital while the second officer stayed with the tow truck/vehicle. Officer Hargis requested a warrantless blood draw and the blood was drawn three hours after the crash. A second warrantless blood draw… (Continued on page 12.)

RECENT DECISIONS

State v. Marvin Maurice Deberry, 2022 Tenn. LEXIS 304 (MVHO serves full jail sentence)

The Tennessee Supreme Court has finally resolved whether the criminal savings statute applies to the Motor Vehicle Habitual Offender Act and whether the MVHO act was amended or repealed. The TSC held that a statute that **repeals** a criminal offense does not "provide for a lesser penalty" within the meaning of the criminal savings statute. Rather, a person who commits an offense that is later repealed should be convicted *and sentenced* under the law in effect when the offense was committed unless the legislature provides otherwise. Since the Motor Vehicle Habitual Offender act was determined to be repealed and not amended, the criminal savings statute does not apply and any defendant that violated the MVHO before it was repealed, must be sentenced under the provisions of the MVHO act.

In 2018, Mr. Deberry was stopped for a malfunctioning brake light. He was later indicted for multiple traffic related offenses, including driving after being declared an MVHO, per T.C.A. §55-10-616(a). On May 15, 2019, Mr. Deberry was convicted on all counts. However, two weeks earlier, on May 2, 2019, the Tennessee legislature passed the MVHO Repeal Act. (Act of May 24, 2019, ch. 486, §3, 2019 Tenn. Pub. Acts 1496). The Governor signed that legislation into law on May 24, 2019 and it went into effect on July 1, 2019, about six weeks after Mr. Deberry was convicted. The MVHO Repeal Act basically repealed the MVHO statute, including the offense of driving after being declared an MVHO, and replaced it with a provision explaining how an MVHO can seek reinstatement of a driver's license that was revoked or restricted solely because of the person's MVHO status.

Mr. Deberry was sentenced on July 8, 2019, one week after the MVHO Repeal Act went into effect. Mr. Deberry argued that the legislature just "recently repealed" the MVHO Act, therefore, his punishment should be in accordance with the MVHO Repeal Act because it "essentially gets rid of the penalty" and thus constitutes a "lessor penalty" within the meaning of the criminal savings statute. The trial court disagreed and sentenced Mr. Deberry to a five-year sentence of split confinement, along with the recommended jury finding of a $1,500.00 fine. Mr. Deberry then filed a "Motion for New Trial, Verdict of Acquittal, or Modification of Sentence. He argued that "no penalty is a lessor penalty." He was not arguing that the conviction be set aside, only the sentence. This time, the trial court agreed with Mr. Deberry and amended the judgment to reflect a MVHO conviction, but no penalty.

The State appealed the sentence to the Court of Criminal Appeals, which turned to the legislative history and, based upon the statements of two lawmakers, stated, the "legislative history overwhelmingly demonstrates the desire of the Legislature to provide relief to those who would otherwise be subject to greater penalties under the MVHO [Act}." Therefore, the CCA upheld the trial court's application of the criminal savings statute and the "lessor penalty" of no penalty. The TSC granted the State's application for permission to appeal.

Since this case was determined, based upon the interpretation of statutes, the TSC reviewed the decision, de novo with no presumption of correctness. *State v. Tolle,*591 S.W.3d 539, 543-546 (Tenn. 2019). The TSC determined that the MVHO Repeal Act, which eliminates an offense altogether, rather than reducing the punishment for that offense, did not "provide for a lessor penalty." Since a penalty is a punishment, a provision that repeals the offense and provides for no punishment is not a lessor penalty. No one would understand a "lesser evil" to include a choice that is "not evil at all." The criminal savings statute unambiguously preserves the State's ability to prosecute crimes committed before the repeal of the criminal offense. T.C.A. § 39-11-112.

Mr. Deberry's last argument was that since reinstatement fees for a driver's license were not repealed, they constitute a lessor penalty. However, those fees existed before and are unrelated to the MVHO Repeal Act. Therefore, the TSC reversed the judgment of the CCA, vacated the trial court's amended judgment and reinstated the trial court's original judgment of split-confinement and a fine. (Continued on page 3)

RECENT DECISIONS (Continued)

State v. Tyler Ward Enix, 2022 Tenn. LEXIS 345 (Standard of review for prosecutorial misconduct)

The Tennessee Supreme Court clarified the appropriate standard of review for claims of prosecutorial misconduct during closing argument when a defendant fails to contemporaneously object, but later raises the claim in a motion for a new trial. Although this case did not involve a traffic safety issue, it did address a common issue in many DUI/VH/AVA trial cases, i.e., claims of prosecutorial misconduct. Mr. Enix alleged that four instances of prosecutorial misconduct occurred during closing arguments at his trial.

As a result of the October 2015 homicide of Kimberly Enix, Mr. Enix was indicted with counts of first-degree murder, felony murder, especially aggravated robbery, especially aggravated kidnapping, and carjacking. (The victim was the defendant's ex-wife). Kimberly Enix had been found in her apartment with forty-seven stab wounds. Mr. Enix's DNA was found in the apartment and on the victim. Also, Mr. Enix took the victim's car and used her ATM card. Mr. Enix was found in Ohio, with the victim's car. Mr. Enix's defense, at trial, was that the crime occurred during a state of passion, without any intent for premeditation. The jury convicted Mr. Enix of first-degree murder and especially aggravated robbery.

Mr. Enix alleges prosecutorial misconduct occurred on four occasions, which were not contemporaneously objected to by the defense. Mr. Enix filed a motion for a new trial and he alleged reversable error. The trial court denied the motion for new trial and the issues were appealed to the Court of Criminal Appeals. The CCA reviewed the claims under the plain error doctrine and affirmed the trial court's judgments. Mr. Enix appeal to the Tennessee Supreme Court and argued that this Court should employ plenary review. The TSC held that plain error, as used by the CCA, was the appropriate standard to use in this situation.

Prior to 2017, a long line of cases held that failure to object to a prosecutor's statements during closing arguments results in a waiver on appeal. *See State v. Sutton,* 562 S.W.2d 820, 825 (Tenn. 1978); *State v. Dellinger,* 79 S.W.3d 458, 495 (Tenn. 2002); *State v. Austin, 8*7 S.W.3d 447, 449 (Tenn. 2002); *abrogated on other grounds by State v. Miller,* 638 S.W.3d 136, 150 (Tenn. 2021). However, Mr. Enix argued that the TSC changed the rule to "plenary review," if the issue was included in the motion for new trial, in their decision in *State v. Hawkins,* 519 S.W.3d 1, 48 (Tenn. 2017). The TSC distinguished *Hawkins* from the case on appeal, since in *Hawkins,* the objecting issues had been prohibited during a pretrial ruling and discussed at earlier hearings. Also, the TSC emphasized the fact that *Hawkins* in no way attempted to overrule the long-standing Tennessee case law. Therefore, The TSC held that plain review is the appropriate standard of review.

The TSC has consistently recognized that "closing argument is a valuable privilege that should not be unduly restricted." *State v. Reid,* 164 S.W.3d 286, 320 (Tenn. 2005). "[P]rosecutors, no less than defense counsel, may use colorful and forceful language in their closing arguments, as long as they do not stray from the evidence and the reasonable inferences to be drawn from the evidence or make derogatory remarks or appeal to the jurors' prejudices. *State v. Banks, 2*71 S.W.3d 90, 130 (Tenn. 2008). "A criminal conviction should not be lightly overturned solely on the basis of the prosecutor's closing argument." *Id.* Rather, "[a]n improper closing argument will not constitute reversable error unless it is so inflammatory or improper that i[t] affected the outcome of the trial to the defendant's prejudice." *Id.*

In order to obtain relief under the plain error review, the defendant bears the burden of persuading the appellate court that all five of the following prerequisites are satisfied; (1) the record clearly establishes what occurred in the trial court; (2) a clear and unequivocal rule of law was breached; (3) a substantial right of the accused was adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is necessary to do substantial justice. *State v. Dotson*, 450 S.W.3d 1, 49 (Tenn. 2014).

Mr. Enix failed to show any affect on the outcome of the trial. The judgments of the CCA were affirmed.

GETTING COOPERATION WITH DRE EVALUATIONS

One of the greatest challenges to the Drug Recognition Expert program is getting cooperation from someone who has been arrested or is suspected of DUID. I have sought out several opinions on this and will now share some of theirs as well as my own.

This cooperation does not start when the suspect comes into contact with the DRE, but as a result of how they are treated by the arresting law enforcement officer. When an officer understands that cooperation is a choice and treats the driver with respect, he/she will probably encounter more cooperation. There are basic social needs that everyone has. When we remember this, we gain so much more ground in our profession.

We will begin with learning to listen. We have two ears and one mouth. It is vital as law enforcement that we learn to use them in that order. When we arrest someone, it takes away their freedom and we become the bad guy really fast. That will intensify, if we become commanding and argumentative. A bad impression of law enforcement is impossible to overcome in the amount of time it takes to get from the arrest, to the time they come in contact with the DRE officer.

When I am asked to do a DRE evaluation, I normally do not want the arresting officer close by. I always show empathy to the suspect by saying things such as, "I know this is not the way you planned your day." This is also a great time to offer a drink or a restroom break opportunity. I always ask about where they are from, how long they have been here, what they do for a living, and if they have family close by. The purpose for these questions is to show the suspect that I care about them as a person. Rarely do I ever get into the evaluation until I establish a rapport. Joe Abrusci, the East Region Coordinator for IACP says: "Too many times I have seen DREs talk to people as though they are below them. Simple respect and finding common ground can be very helpful in opening communications versus shutting them down."

While we use the term "rapport" loosely. Websters dictionary defines it as follows: "a relationship, characterized by agreement, mutual understanding, or empathy, that makes communication possible or easy." This only happens when the suspect feels that they are valued by the law enforcement officer and that you really are concerned and understand their situation. It never gives an impression of guilt or innocence, but one of empathy and respect.

When possible, a DRE should never go to a DRE evaluation in uniform. Unforms carry with them a commanding presence. I know of evaluations involving fatalities and serious bodily injury that have been aborted or declined simply because a person in uniform enters the evaluation and speaks of details about the case. Regardless of what the excuse might be, this action can very easily cause the suspect to lose all rapport that the DRE has worked hard to build. They know they have been arrested, that they are in trouble, and that they may be going to jail. The evaluation can be the main factor in an appropriate conviction or sentence.

One of the most critical parts of the evaluation is giving *Miranda* warnings. The Law Enforcement Officer needs to make all attempts to make this a form of communication and not something they read off a sheet of paper. While the details are important, the delivery can be the difference between getting the evaluation and not getting it. I always present it as something that is necessary in order to see what is really going on with their current situation. This is where we really have to drop the "dragnet mentality" of "just the facts".

DREs are not only trained to see drug influence, but also circumstances where medical issues could be the reason for the impairment. This is important to tell the suspect, because many do have medical issues, which sometimes lead to the use and abuse of drugs. It is important that as we advise them of this and that we let them know, if it is drug impairment, they will get a fair shake and their cooperation is vital for this to happen.

By Tony Burnett, State DRE Coordinator for Tennessee. 

VEHICULAR HOMICIDE CHILD MAINTENANCE

On May 25, 2022, Governor Bill Lee signed House Bill 1834 into law, which became effective on that date. The law became Public Chapter 1056 and is known as "Ethan's, Hailey's, and Bentley's Law." This law forms a new section added to Title 39, Chapter 13, Part 2. Section (a) states:

> "Notwithstanding any law to the contrary, if a defendant is **convicted** of a violation of § 39-13-213 (a)(2) or § 39-13-218 and the deceased victim of the offense was the parent of a minor child, then the sentencing court shall order the defendant to pay restitution in the form of child maintenance to each of the victim's children until each child reaches eighteen (18) years of age and has graduated from high school, or the class of which the child is a member when the child reached eighteen (18) years of age has graduated from high school." (emphasis added)

So basically, if a defendant is convicted of Vehicular Homicide by Intoxication or Aggravated Vehicular Homicide and the victim of the offense was the parent of a minor child, then the defendant shall be ordered to pay restitution in the form of child maintenance payments. Due to the language regarding convictions and not offenses, a common question is if this new law applies to offenses that occurred before 5/25/22, but the conviction date, by plea or trial court verdict, occurs after 5/25/22? Section 3 of the Public Chapter states that "this act takes effect upon becoming a law, the public welfare requiring it, and **applies to offenses committed on or after that date."** (emphasis added) Therefore, this law applies to all qualified offenses after 5/25/22.

If the defendant is incarcerated and unable to pay the required maintenance, then the defendant must have up to one (1) year after the release from incarceration to begin payments. The defendant's obligation to make payments continues until the entire arrearage is paid. (Public Chapter 988 made the offenses of Vehicular Homicide by Intoxication and Aggravated Vehicular Homicide non-release eligible, to be served at 100%, with no reduction credits allowed.)

Civil actions and judgments against the defendant will offset or substitute for the child maintenance order. Similar laws like this have recently passed in other states. This bill had many co-sponsors and bipartisan support.

DUI Prosecutor Academy

On July 26-28, 2022, the Traffic Safety Resource Prosecutors presented our DUI Prosecutor Academy in Franklin, TN. Many prosecutors participated in this three day seminar, which emphasized all aspects of a DUI case from initial charging procedures to closing arguments in a jury trial. Upcoming trainings and classes presented by the TSRPs can be found on page 8 of this newsletter.

THE NEED FOR DETERRENCE PREVENTS DIVERSION

It is no secret that the dangers created when individuals evade arrest have prompted legislative changes for the past few years. In 2020, the Tennessee General Assembly enacted Public Chapter 584 which provided restitution for reckless damage to governmental property. Then in 2021, in reaction to the death of Master Patrol Officer Spencer Bristol of Hendersonville Police Department, the General Assembly again made changes to the evading arrest statute, Tennessee Code Annotated Section 39-16-603. Public Chapter 278, also known as the Spencer Bristol Act, provided for mandatory incarceration time for evading arrest in a motor vehicle and in instances involving the serious bodily injury or death of a law enforcement officer whether the evading arrest was with a motor vehicle or on foot.[1] Understanding the dangers of such behavior, the trial court in *State v. Garet Myers*, 2022 Tenn. Crim. App. LEXIS 348, No. E2021-00841-CCA-R3-CD, Knox County (Jul. 22, 2022), denied judicial diversion to a defendant convicted of evading arrest in a motor vehicle, reckless endangerment, speeding, and driving without a license for the type or class of vehicle operated. In its decision, the trial court stated, in conjunction with other factors, that "denial of diversion was necessary for deterrence both of the public and of the defendant, who had engaged in the dangerous behavior without any real cause."[2]

After meeting on social media, Ms. Shyanne Golden and Mr. Garet Myers planned to meet and go on a dinner date on April 5, 2019, but instead both went on a motorcycle ride that resulted in criminal charges for Mr. Myers (Myers) and knee injuries for Ms. Golden (Golden). The apartment complex where their journey began was also the home of Officer Joshua Byrd of the Rogersville Police Department. Observing the defendant drive through the complex, Officer Byrd noticed that the defendant failed to come to a complete stop at two stop signs before entering the highway. It was at that point that Officer Byrd followed in behind the motorcycle and the motorcycle was found to be exceeding the speed limit. To stop the motorcycle, Officer Byrd turned on is blue lights and siren, but the motorcycle continued and even reached speeds more than 100 miles per hour.[3] Golden protested the excessive speed of Myers and slapped the back of Myers to get him to stop to no avail. It was only after running off the road, into a ditch, going airborne, throwing Golden, and striking a stop sign did the motorcycle finally come to a compete stop and Myers was apprehended.

(Continued on page 7)

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1. T.C.A. 39-16-603 now reads: (a) (1) Except as provided in subsection (b), it is unlawful for any person to intentionally conceal themselves or flee by any means of locomotion from anyone the person knows to be a law enforcement officer if the person: (A) Knows the officer is attempting to arrest the person; or (B) Has been arrested. (2) It is a defense to prosecution under this subsection (a) that the attempted arrest was unlawful. (3) [Deleted by 2021 amendment.] (b) (1) It is unlawful for any person, while operating a motor vehicle on any street, road, alley or highway in this state, to intentionally flee or attempt to elude any law enforcement officer, after having received any signal from the officer to bring the vehicle to a stop. (2) It is a defense to prosecution under this subsection (b) that the attempted arrest was unlawful. (3) [Deleted by 2021 amendment.] (4) In addition to the penalty prescribed in subsection (d), the court shall order the suspension of the driver license of the person for a period of not less than six (6) months nor more than two (2) years. If the license is already suspended, at the time the order is issued, the suspension shall begin on the date the existing suspension ends. The court shall also confiscate the license being suspended and forward it to the department of safety along with a report of the license suspension. If the court is unable to take physical possession of the license, the court shall nevertheless forward the report to the department. The report shall include the complete name, address, birth date, eye color, sex, and driver license number, if known, of the person whose license has been suspended, and shall indicate the first and last day of the suspension period. If the person is the holder of a license from another state, the court shall not confiscate the license but shall notify the department, which shall notify the appropriate licensing officials in the other state. The court shall, however, suspend the person's nonresident driving privileges for the appropriate length of time. (c) In addition to the penalties prescribed in this section, the court shall order a person who commits evading arrest and, in doing so, recklessly damages government property, including, but not limited to, a law enforcement officer's uniform or motor vehicle, to pay restitution to the appropriate government agency for the value of any property damaged. (d) (1) A violation of subsection (a) is a Class A misdemeanor. (2) (A) A violation of subsection (b) is a Class E felony and shall be punished by confinement for not less than thirty (30) days. (B) If the flight or attempt to elude creates a risk of death or injury to innocent bystanders, pursuing law enforcement officers, or other third parties, a violation of subsection (b) is a Class D felony and shall be punished by confinement for not less than sixty (60) days. (3) A violation of subsection (a) or (b) that results in serious bodily injury to a law enforcement officer is a Class C felony. (4) A violation of subsection (a) or (b) that results in the death of a law enforcement officer is a Class A felony.
2. *Myers* at *31.
3. According to Officer Byrd's estimates, the motorcycle was traveling at approximately 130 miles per hour in 55 mile per hour zone. According to the defendant, he was moving with traffic initially at 60 to 65 miles per hour but sped up. According to the testimony of the Golden, at one point she looked at the speedometer and the defendant was traveling at 115 miles per hour.

DETERRENCE (Continued)

The defendant was ultimately tried and convicted of felony evading arrest in a motor vehicle, reckless endangerment (lesser include offense of reckless aggravated assault for which he was charged), speeding, and driving without a license for the type or class of vehicle operated.

A sentencing hearing was conducted in which the State offered the defendant's prior speeding convictions and subsequent charge for speeding and seatbelt violation into evidence. The defendant put forth the arguments that the victim did not wish to prosecute and that his fleeing was "provoked" by the officer who chased him, which were rejected. The court did note that the defendant's stable employment, subsequent marriage and fatherhood were favorable but not mitigating circumstances. Before sentencing the defendant to a two-year effective sentence on the charges and revoking the defendant's license for one year, the court found that the defendant had no hesitation about committing a crime where the risk to human life was high, citing an enhancement factor under T.C.A. § 40-35-114(10) and T.C.A. § 39-16-603 required a mandatory period of thirty-days of confinement and a minimum six (6) months license suspension. Although the court found that the defendant was amenable to correction and that his criminal history, social history, physical and mental state weighed in favor of diversion, the circumstances of the offense as well as the need for deterrence weighed against diversion and denied the defendant's request for judicial diversion.

The defendant filed a motion for a new trial citing sufficiency of the evidence, denial of the special jury instruction request, and the exclusion of insurance settlement check as evidence. The court denied the defendant's motion and an appeal to the court of criminal appeals followed on those issues as well as the denial of judicial diversion.

After addressing each of the new trial motion issues and concluding that the trial court properly ruled, the court of criminal appeals (CCA) addressed the trial court's denial of judicial diversion. Like all sentencing issues, the CCA noted that the decision to deny judicial diversion is reviewed under the abuse of discretion standard.[4] Accordingly, the *Bise* deferential standard applies, but the trial court is required by case law to consider and weigh, within the record the following factors against one another:

> (a) the accused's amenability to correction, (b) the circumstances of the offense, (c) the accused's criminal record, (d) the accused's social history, (e) the accused's physical and mental health, and (f) the deterrence value to the accused as well as others. The trial court should also consider whether judicial diversion will serve the ends of justice—the interests of the public as well as the accused.[5]

Looking at the record, the CCA found that the trial court in fact followed this requirement. Finding that the trial court considered the required factors, apportioned weight to each whether in favor or against diversion and finding substantial evidence to support the trial court's decision, the CCA upheld the trial court's decision to deny judicial diversion. Specifically, the CCA found that while the "defendant certainly introduced proof that some of the diversionary factors weighed in his favor, the trial court properly considered all of the necessary factors and placed its weighing of the factors on the record" and did not abuse its discretion denying diversion.[6] Thus, the judgment of the trial court was affirmed.

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4. *See State v. King,* 432 S.W.3d 316, 324-325 (Tenn. 2014).

5. *Myers* at *29, citing *State v. Parker,* 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996).

6. *Myers* at *32.

UPCOMING TRAINING

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

Cops in Court - October 19, 2022, THP Training Center, Nashville, TN
This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trial presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation from 1 p.m. to 4 p.m.

TNDAGC Fall Conference - October 25-28, 2022, Murfreesboro, TN
The DUI training department will offer DUI training sessions on October 27, 2022, during the DA Fall Conference, Thursday breakout sessions. The classes will cover legislative updates and new challenges.

Cops in Court - November 3, 2022, Sumner County, Gallatin, TN
This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trial presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation from 1 p.m. to 4 p.m. If there is an agency or area that wants a Cops in Court class, please contact Cheyenne Johnson, DUI Administrative Assistant (615) 253-5684.

Victim Issues and DUI Cases - December 2, 2022, Nashville, TN
The DUI training department will offer four hours of training focused on victim issues in DUI cases. This training will cover victim issues and DUI specific issues. This training will be provided for prosecutors and Victim-Witness Coordinators. (Space is limited)

Cops in Court - December 8, 2022, THP Training Center, Nashville, TN
This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trial presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation from 1 p.m. to 4 p.m.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Traffic Crash investigation
October 10-21, 2022, Cleveland, TN
January 16-27, 2023, Germantown, TN

Advanced Roadside Impaired driving Enforcement (ARIDE)
December 1-2, 2022, Jonesboro, TN

DUI Detection & Standardized Field Sobriety Testing
October 3-5, 2022, Mt. Pleasant, TN
January 23-27, 2023, Memphis, TN

Drug Recognition Expert School (DRE)
September 26 - October 6, 2022, Jackson, TN

DUI TRACKER

DUI Tracker this quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from July 1, 2022, through September 30, 2022, 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 July 1, 2022, through September 30, 2022, since the last quarter were 1,683. This number is down from the previous quarter by 166. From looking at these numbers, we can see that the trend in DUI related dispositions in Tennessee has decreased temporarily. We have had a busy quarter with the election of new District Attorneys and the formation of a new district, the 32nd Judicial District. In spite of these changes, our DUI prosecutors have continued to be vigilant in the prosecution of impaired driving cases in their districts. The total number of guilty dispositions during this same period of July 1, 2022 through September 30, 2022 were 1,260. The total number of dismissed cases were 113 and 47 were nolle prossed. Across the State of Tennessee, 74.87% of all arrests for DUI related charges were actually convicted as charged. This percentage is slightly higher than the last quarter ending on June 30, 2022. Only 9.5% of the DUI cases during this current quarter were dismissed or nolled. Also, during this same period of time, only 247 of the total DUI cases disposed of were to different or lesser charges. Therefore, only 14.68% of the total cases were disposed of to another charge. We must continue to contribute when and where we can within this process. The destruction of impaired driving is a constant peril.

Fatal Crashes this 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 July 1, 2022 through September 30, 2022. During this period, there were a total of 363 fatalities, involving 335 crashes, which is an increase from the previous quarter. Out of the total of 335 fatalities, 50 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 38 fatalities involving the presence of drugs, signifying that 11.34% of all fatalities this quarter involved some form of drugs.

The year-to-date total number of fatalities on Tennessee roads and highways is 974. This is down by 9 from the 983 fatalities incurred last year at this same time. For most of the year, we have experienced a considerable decrease from last year in the number of fatalities on our roadways. However, during the summer months, the fatality rate increased substantially. Currently, the number of Tennessee drivers on our roadways is higher than last year and the number of fatalities is slightly lower. Speed is an incredible catalyst in increasing the number of fatalities in our state and we have experienced an increase in vehicle speed since the Covid-19 shutdown. Combined with an impairing substance, speed has a synergistic effect on the fatality rates of involved crashes. With the increase of polydrug use, we are experiencing a greater danger of crashes and fatalities on our roads and highways. It is only with a united effort between law enforcement, prosecutors and other community leaders that will we be able to stem the tide of our rising fatality crashes. Please slow down, drive responsibly and arrive home safely.

VEHICULAR HOMICIDE MURDERER'S ROW

State v. Ebony Robinson, 2022 Tenn. Crim. App. LEXIS 404 (No probation for VH by Intox.)

This case clarifies that defendants are **not statutorily eligible for probation** when they are convicted of vehicular homicide by intoxication. On August 9, 2020, as Ms. Robinson was leaving an apartment on Buena Vista Pike in Nashville, she backed her vehicle at a high rate of speed, without looking and while on her cell phone. While in reverse, her vehicle struck two children, under ten years old, that were riding their bicycles. One child died at Vanderbilt Children's hospital that night and the other child survived, but with injuries. Ms. Robinson knew the deceased victim and claimed to be close.

Arriving officers smelled alcohol and asked Ms. Robinson if she had been drinking. She stated that she had a few and later said she had only had a sip. A cup containing tequila was located in the center console. Ms. Robinson performed poorly on field sobriety tasks and she was arrested for DUI, reckless aggravated assault, resisting arrest and other charges. A search warrant was obtained for a blood sample which indicated the presence of marijuana and her BAC was .08%.

Ms. Robinson plead guilty to Vehicular Homicide by Intoxication, Aggravated Assault, Resisting Arrest and Driving without a License. The sentencing court found three enhancement factors and no mitigating factors. Ms. Robinson was given a ten year sentence for Vehicular Homicide with all other counts running concurrent. Although the court initially noted that the defendant was ineligible for probation, it found the defendant eligible for alternative sentencing, claiming that there appeared to be a conflict in the statutes. Ms. Robinson's sentence was suspended and she was ordered to enter the Hope Center and periodic confinement after completion of a one year program. The State appealed.

The Court of Criminal Appeals determined that issues of statutory construction are reviewed de novo with no presumption of correctness. *Kampmeyer v. State*, 639 S.W. 3d 21, 23 (Tenn. 2022), and when construing a more recent statute in conjunction with pre-existing legislation, "we presume that the legislature has knowledge of its prior enactments and is fully aware of any judicial constructions of those enactments." *Davis v. State*, 313 S.W.3d 751, 762 (Tenn. 2010); *see also State v. Welch*, 595 S.W.3d 615, 626 (Tenn. 2020).

Although TCA § 39-13-213(a)(2) provides for probation after the initial mandatory minimum sentence, TCA § 40-35-303(a) states, "however, no defendant shall be eligible for probation under this chapter if convicted of a violation of §39-13-213(a)(2),". The mandatory minimum language was added to the vehicular homicide statute in 2015 and Vehicular Homicide by Intoxication was added to the list of probation ineligible offenses in 2017. The CCA in this case agreed with the ruling in *State v. Stephen Jacob McKinney*, 2022 Tenn. Crim. App. LEXIS 15, which stated that the practical affect of the 2017 amendment to the probation statute is that a defendant convicted of vehicular homicide by intoxication will never be eligible for release on probation. Therefore, the trial court in this case erred by granting Ms. Robinson probation followed by periodic confinement. Ms. Robinson was ordered to fully serve her sentence in TDOC confinement.

KEEPING PERSPECTIVE IN CHALLENGING TIMES

Have you ever thought, "I wish I would have known all the things I know now when I was younger" or "I wish law school had taught me everything I needed to know to appreciate and apply the law in the real world"? If you have, know that you are not alone in your thoughts. I have thought these thoughts throughout my career, and I continue to think those very same things today.

Looking back, I see how wise my parents were. Neither my mother nor my father had a college education. In fact, my mother only attended school through the eighth grade and only completed and received her GED the year I graduated from Cumberland University in 1993. My father completed his high school education at Lebanon High School in 1958 before going into the United States Army serving in Germany during the "cold war". Neither of my parents were employed in the legal field, yet both understood one aspect of law, safety.

Like most people, my parents understood that although no one gets out of this world alive, safety and security are important while you are here. It was something they sought out in all aspects of life, including traveling on the roadways. To keep things safe on the roads, my parents made sure that all vehicles were properly maintained. Oil changes, tune-ups, tire pressure, tire tread, headlamp, and taillight checks were done on a regular basis. The goal was to get to and from work, the grocery, grandparent's homes, etc. in a vehicle that could get you there without issue. It wasn't about the money that it would take to fix problems, it was making sure that the likelihood of issues was minimized as much as possible.

My parents also taught my brother and I the rules of safe use of the roads as pedestrians, bicyclists, and motor vehicle operators. Although we lived in a rural area, my brother and I were taught to use sidewalks, if available, to walk from one location to another. However, if sidewalks were not available, like at home, we were to walk facing traffic. Afterall, we could see and react if we were walking toward possible danger rather than it comes from behind us, and people could see and react to us if they could see our faces.

Our main means of travel to our neighbor's house, which was about half of a mile down the road up a steep hill (not kidding) was by bike. For us to travel by bike, we had to ask permission to go, and we had to return during the daylight hours. No night riding for us. We were told to travel in the same direction as the cars go and to move over as close to the shoulder to allow cars to pass, use hand-signals for turns or stopping, and to be respectful of the traffic. We were reminded that any deviation from these rules would result in loss of the privilege and punishment. For those reasons, particularly the punishment, we followed those rules.

Before my brother or I reached the age for us to get our learner's permit, we were taught to drive on the farm. My brother learned to drive a five-speed manual transmission pick-up truck helping dad with cutting wood. I, on the other hand, learned to drive an automatic pick-up truck in the back lot driving my mom around like Miss Daisy because my dad made me nervous and wouldn't let me help with the wood cutting. Both of us learned how to adjust mirrors, secure seatbelts, watch for "road" hazards or obstructions, use signals, etc. all before taking our driver's test, which we both passed on the first try (despite a dog running out in front of me and having to slow and apply the brakes to avoid hitting the dog).

So, what does this long reflection on the past have to do with keeping perspective in challenging times? It is a reminder that safety and security are the goals for all of us working in traffic related fields. When a police officer stops someone for speeding, not having headlights on at night, or having a broken taillight, that vehicle operator's safety is the main concern for the stop with other road occupant safety a consideration as well. Roads are designed, constructed, and speed limits are set for the safe operation of motor vehicles. Lawmakers enact laws regarding operator licensing, operation of motor vehicles, use of roadways be pedestrians and bicyclists, etc. are there for the safety and security of all who use the roads. Prosecutors work to enforce the laws to promote safer operation in the future. Upon conviction for violation of those laws, judges impose sentences to deter and change behavior for safer operation.

In essence, like my parents, all of us who work in traffic related fields are doing our best to minimize issues in safety. All of us who use the roadways, whether as motor vehicle operators, pedestrians, or bicyclist, should also work to minimize issues by learning the proper rules of use and working to maintain our "vehicles" for safety and security. After all, we are all in this together and sometimes we need to keep it all in perspective.

MITCHELL, EX. CIR. DEFINED (Continued)

was obtained one hour later. Officer Hargis testified that it would take him one to two hours to obtain a search warrant and he was already concerned about the loss of the alcohol evidence, while still investigating the defendant and his truck. No other officers were able to help with the warrant, as everyone was occupied with the crash investigation. After the second blood draw, Officer Hargis did prepare a warrant, which took 2 and 1/2 hours to prepare, get signed and a blood draw obtained. The third blood draw was taken six hours after the crash.

Quoting the *Mitchell* case, the Oregon Court of Appeals determined that based upon a "totality of the circumstances," the heightened need for prompt blood testing and the more pressing needs of the officers, exigent circumstances did exist. The additional delay that the warrant application process would have caused, created an exigency of sufficient magnitude to justify the warrantless blood draw. *Id.*

In a similar case, the Supreme Court of Louisiana stated that a car crash was the extra factor that gave rise to urgent needs which justified a warrantless blood draw, based upon exigent circumstances. *See State v. Michael*, 340 So.3rd 804, 2020 La. LEXIS 1347 (La. 7/09/20). Quoting the *Mitchell* case, the LSC stated:

> "[e]xigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious, so *Schmerber, 384 U.S. at 770,* controls: With such suspects, too, a warrantless blood draw is lawful. … When police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the *Fourth Amendment*."

Id. at 808-09.

In the Mitchell case, the defendant drove his truck into a smaller vehicle, injuring two people, and then left the scene. He was found a few miles away. All parties were transported to the hospital. While at the hospital, a blood sample was drawn from the defendant and his BAC was 0.23%. There was an issue regarding consent, but the LSC determined that since exigent circumstances existed, due to the crash and the injuries involved, consent was not needed because "[t]ime had to be spent to bring the accused to a hospital and to investigate the scene of the accident, and the trooper could 'reasonably have believed that he was confronted with an emergency.'" *Id.*

Many other state Supreme Courts have also published similar decisions, defining exigent circumstances in light of the *Mitchell* decision. See, *State v. McGee,* 959 N.W.2d 432, 2021 Iowa Sup. LEXIS 61 ** (Iowa May 14, 2021); and *State v. Miller*, 312 Neb. 17 *, 978 N.W.2d 19 **, 2022 Neb. LEXIS 85 ***. When impaired driving cases involve crashes and injuries (*Schmerber)*, or a suspect that is unconscious or in a stupor (*Mitchell v. Wisconsin*), or other pressing needs that prevent an officer from applying for a search warrant, while evidence is dissipating, then exigent circumstances should be considered, within the exigency spectrum, as described by the United States Supreme Court in the *Mitchell* case.

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