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DUI NEWS

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KIMBALL'S SEAT BELT SURVEY
or
WHO'S LOOKING IN MY CAR TODAY?

Tom Kimball

Every October the Knights of Columbus conduct a Tootsie Roll drive to raise money for the mentally handicapped in their local communities. You have probably seen people wearing capes and holding cans at your Wal-Mart or grocery store. My perfect teenage daughter, Mary, helped this year with the drive. She and I stood outside a Food Lion grocery in Gallatin from 8 a.m. until noon and asked for donations, which will be used to support education programs for the mentally handicapped. I got bored. I decided to conduct my personal seat belt survey. Cars would pass about five feet from us as we stood on the sidewalk. I had an easy view into the cars. I decided to check to see if drivers were wearing seat belts. I have read the results of many seat belt surveys that were conducted by observers in lab coats at various intersections around Tennessee and the nation. Using surveys professional examiners claim to know what percentage of people are wearing seat belts. I saw this sign in Wilmington, Maine this summer and was impressed. I looked at one hundred drivers of passenger vehicles in 90 minutes. Of the one hundred, seventy nine (79) were buckled; twenty one (21) were not. They were lucky I was not a police officer with a ticket book.

Mary

I made a few other observations. Thirty eight percent (38%) of unbuckled drivers were smoking cigarettes as compared to five (5%) of those who buckled up. Only four of the unbuckled (19%) dropped a contribution into the tootsie roll can. Eighty percent of the buckled made a contribution for the mentally handicapped.

8 of 21 unbelted drivers were smoking.

Are there any conclusions that can be drawn for those behaviors? I don't know, but it seems to me that smoking is deadly as is unbuckled driving. Do people who don't wear seat belts have less concern for their lives? Do they have less concern for others? I think a psychologist could have a field day with this stuff. All I know is some people (21%) exhibit gross stupidity. Mary also pointed out a woman leaving the parking lot while applying makeup. She was driving, but had the rear view mirror turned so she could focus on her mascara. I hope she was wearing a seat belt. She will probably need it soon..

RECENT DECISION SUPREME COURT

STATE V FERRANTE, 2008 Tenn Crim App Lexis 783 **CLERK QUALIFICATION AND DELAY**

A deputy swore out an affidavit of complaint before an assistant court clerk. The State later agreed that the clerk was not capable of making a probable cause determination. After a year passed the defense asked that the case be dismissed as the affidavit was void ab initio and the statute of limitations for a misdemeanor had passed. The Trial Judge on appeal agreed and was affirmed by the Supreme Court.

Lesson #1: During this time when many officers are serving in the military, this could happen to you. If a case is continued for a long period of time, be certain of the qualifications and knowledge of the clerk or magistrate responsible for probable cause determinations.

Lesson #2: Watch out for delay tactics that may affect the statute of limitations. Make certain that the record is clear about which party is requesting delay. Do not agree to long delay in the process, unless circumstances like military service require it. Count on defense maneuvering based on this case. Know that the attorney in this case, Steve Oberman, teaches defense attorneys in this state and around the nation and is the author of *DUI: The Crime and Consequences in Tennessee.*

RECENT DECISIONS COURT OF CRIMINAL APPEALS

STATE V NELSON, 2008 Tenn Crim App Lexis 818 **NO GARDEN PARTY FOR DIRT BIKER**

Ricky Nelson lost control of his dirt bike on Big Springs Gap Road in Bledsoe County. An EMT, Mitchell Rice, made contact with him in a yard. Nelson indicated he had been injured and smelled of alcohol and slurred his words. Nelson admitted drinking and refused treatment, but was transported by ambulance to the hospital. Bledsoe County Sheriff's Sergeant Tony Moore heard Nelson tell another officer he had been drinking. He saw Nelson in the ambulance and noticed his bloodshot eyes. THP Trooper Bobby Clevinger spoke to Nelson at the hospital. Nelson admitted he was travelling from his brother's house and failed to negotiate a curve. He admitted two beers had been consumed and on the way to the jail kept asking the same question over and over. The trooper testified he was "highly confident" Nelson was intoxicated. Nelson was convicted and his sentences were consecutive for DUI (11/29) and driving on a revoked license (6 months). Nelson had a history including a felony DUI conviction in Florida, which justified consecutive sentencing.

STATE V SUMMERS, 2008 Tenn Crim App Lexis 807 **WHEN ALL ELSE FAILS: MIRANDA APPEARS**

The defendant argued that the request to perform field sobriety tests and a question about his driving violated Miranda. As in every Tennessee case which has included this issue, the Court disagreed. Specifically the Court referred to Berkemer v McCarthy, 104 S Ct 3150 and stated that: "brief roadside detention did not constitute 'custody' for the purpose of Miranda." The Court also stated: "The use of field sobriety tests following a Terry-type stop, to determine if the defendant is intoxicated, are not considered an interrogation."

STATE V GADDIS, 2008 Tenn. Crim. App. LEXIS 907 **THE BONDSMAN IN THE NEXT CELL**

In Polk County, there are two court systems, one being the Law Court of Ducktown and the other the Circuit Court of Polk County. Criminal cases arising from the civil districts within the jurisdiction of the Ducktown Law Court, which consists of the Third Civil District of Polk County, are tried in that court. The defendant, a bail bondsman, was driving in an alarming manner and was pulled over. He in the opinion of the arresting officer and the jury was intoxicated. A second officer on the scene described the defendant as "shitfaced". The conviction and 120 day sentence was affirmed. (See page 4 for more about this colorful case.)

RECENT DECISIONS COURT OF CRIMINAL APPEALS

STATE V LEDFORD, 2008 Tenn Crim App Lexis 841 **TRICKY (AND IMPROPER) DEFENSE TACTIC**

Defendant Ledford drove a big rig in a very dangerous manner. He crossed the centerline three times. At one point, defendant's tractor trailer crossed the right fog lane, and the truck's trailer straddled the dividing line between the two lanes so that no one could pass. His eyes were glassy, he had clues of impairment in field sobriety tests, his pupils were dilated and after arrest a meth pipe with residue was discovered behind the driver's seat. The defense attorney was able to suppress the lab result, which indicated the pipe had contained meth. Then the tricky part occurred. The same defense attorney later argued to the jury:
"They took a swab from this pipe, and you can rest assured that if there had been an illegal substance on that swab coming from that pipe, somebody would have told about it from right there, and they didn't. Now, you heard the testimony. He said, "I took the swab. I sent the swab -- the substance to the lab." That's what he said. If there had been an illegal substance on it, you would have heard somebody say it, and you didn't."
Neither the State nor defense counsel should make arguments regarding the absence of evidence excluded by the trial court. *State v. Jordan*, 116 S.W.3d 8, 19-20 (Tenn. Crim. App. 2003).
The prosecutor in the case took the bait and began her closing rebuttal argument be referring to a witness she was not allowed to present. After objection the Court denied a mistrial. The Appellate Court ruled that the improper argument by the prosecutor was not so egregious or specific as to render the trial fundamentally unfair.

STATE V DYER, 2008 Tenn. Crim. App. LEXIS 910 **CHAIN OF CUSTODY**

The facts of the case reveal that Officer Mara took the defendant to the hospital and witnessed what he believed to be a nurse or a nurse practitioner draw his blood and place it into the blood kit that Officer Mara provided. There is no indication that his belief was incorrect. Officer Mara testified that he placed the blood kit in the trunk of his car and transported it back to police headquarters where he placed it in an evidence bag and put it inside an evidence locker. The key to the evidence locker is possessed only by the evidence technician at the police department. Special Agent Crews testified that the blood sample was hand-delivered to the TBI by Mike Durham and received by the TBI evidence technicians. Special Agent Crews explained the TBI procedure for the receipt and processing of blood samples. The sample was sealed when it was received by Special Agent Crews, and he had "no reason to believe the blood sample wasn't in good condition." Somehow, the Trial Judge in Warren County thought this was insufficient proof despite numerous appellate decisions with similar facts that have held such proof is sufficient. Some Judges have been persuaded that if every person who has any contact with evidence is not called to testify a chain is not sufficient. Sometimes Judges and attorneys forget the purpose and standard for admission of evidence. The purpose of the chain of custody requirement is to "demonstrate that there has been no tampering, loss, substitution, or mistake with respect to the evidence." *State v. Braden*, 867 S.W.2d 750, 759 (Tenn. Crim. App. 1993). Reasonable assurance, rather than absolute assurance, is the prerequisite for admission. In this case the Trial Judge dismissed the case with prejudice after he ruled the chain was insufficient. The Court of Criminal Appeals reversed the decision and ruled that double jeopardy did not bar retrial.

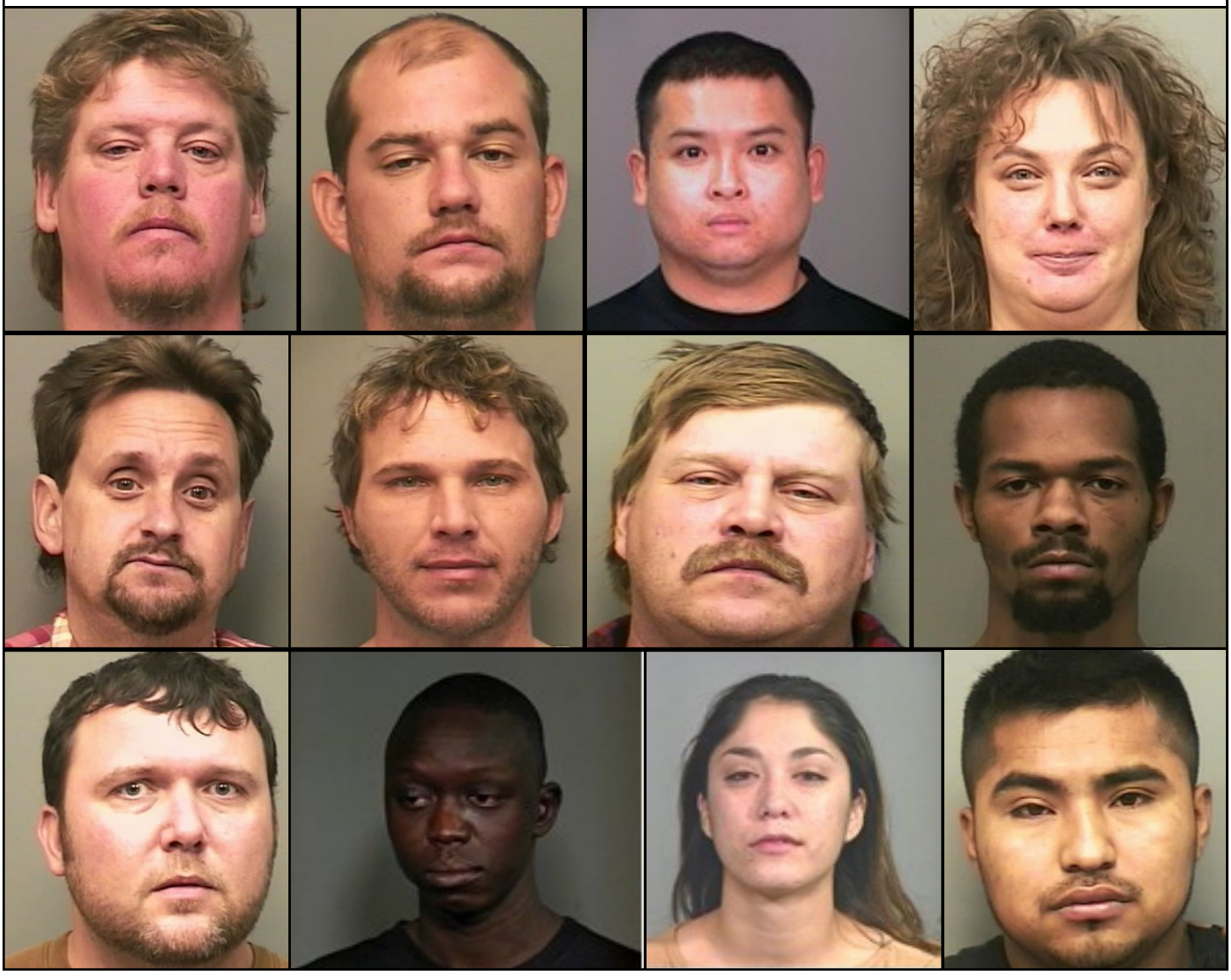
STATE V WINEMILLER, 2008 Tenn. Crim. App. LEXIS 918 **HIGH BEAM STOP**

The Defendant failed to lower his high beam lights for the approaching police car and another vehicle. This is a violation of TCA 55-9-407. The officer stopped the vehicle. He possessed probable cause that a crime was being committed. After the vehicle was stopped, the officer discovered an intoxicated operator. An officer may stop and search a vehicle if he has probable cause to believe a traffic violation has occurred. *Whren v. United States*, 517 U.S. 806, 814-17 (1996); *State v. Randolph*, 74 S.W.3d 330, 334 (Tenn. 2002); *State v. Vineyard*, 958 S.W.2d 730, 734-36 (Tenn. 1997). A second exception exists when specific and clear facts give an officer reasonable suspicion that an offense has been, or is about to be, committed. *Terry v. Ohio*, 392 U.S. 1 (1968). The probable cause determination in this case was upheld and more than satisfied the lesser, reasonable suspicion standard.

DID HE REALLY SAY "SH*T-FACED"? PAINTING THE PICTURE

In State v Gaddis, a November 20, 2008 opinion by Court of Criminal Appeals Judge David H. Welles the Trial Judge was chastised for failing to preserve the dignity and decorum of the Ducktown, Polk County Criminal Court. She failed to admonish an officer for using crude and vulgar language. The officer was asked: if he noticed "anything else about the Defendant's demeanor or appearance". The officer responded, "Well, an intoxicated person has a look about them….I call it 'shit-faced." The defendant's conviction was upheld. Mr. Gaddis, a bail bondsman, was sentenced to serve 120 days in jail in part due to a past DUI conviction in North Carolina.

As a service to our readers I thought it might be appropriate to depict this look. Mugshots were gathered from recent alcohol related arrests. The reader should understand that a mug shot is taken when the offender is jailed. The officer who arrests the offender usually has first contact with the offender one or two hours earlier. Here are some pictures that may depict what the officer was trying to describe. The DUI News would never suggest that an officer use crude or vulgar language to describe this look. Officers must be creative in their use of words, while still painting the picture for the jury. BAC levels for all of these offenders are not known as some refused the implied consent test. The known BAC's of these offenders are all above .15. At that level the offender has a 385 times greater likelihood than a sober person to be involved in a fatal crash. Many impaired drivers do not reach the level described by the officer.

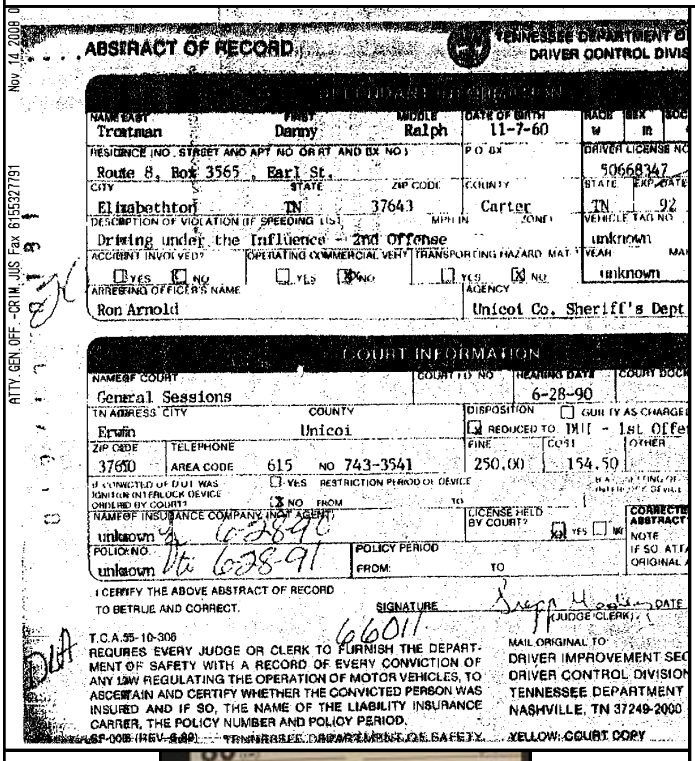


PROVING PRIOR CONVICTIONS

In **State v Troutman**, 2008 Tenn Crim App Lexis 899, Judge Ogle of the Court of Criminal Appeals, rejected the State's attempt to prove prior DUI convictions through the use of a driving abstract provided by the Department of Safety. A driving abstract is not the document specified in TCA 55-10-403(g), the certified computer printout of the driving record. The Troutman decision appears to indicate that a driving abstract, if certified, would be admissible pursuant to Rule 902 of the Tennessee Rules of Evidence. Currently ABSTRACTS are not certified. An abstract permits the prosecutor or officer to know that a certified driving history exists and must be requested. In response to the Troutman decision the Department of Safety is investigating the possibility of certifying driving abstracts. The beneficiary of the error in this case, Danny Ralph Troutman was a fourth offender, convicted as a first offender.

Many offices continue to order certified judgments in all multiple offender cases. Production of the certified judgment is a sure and safe method to avoid problems with the introduction of the evidence. The introduction of the certified driving history as set out in TCA 55-10-403 (g) is also a viable method. The statute requires delivery of the printout at the defendant's first appearance in court or at least 14 days prior to trial. The burden to challenge any convictions included in the driving history is then placed on the defendant and must be made in writing, setting forth the error alleged. If a written challenge is made the court may then require the production of a certified copy of the conviction for inspection before the Department of Safety printout is introduced.

Below on the left is a copy of a Driving Abstract. It is currently inadmissible as it is not sealed and thus not self authenticating. Below on the right is a certified copy of the driving history. It is admissible per the statute and Rule of Evidence 902. It is sealed and self authenticating.



ABSTRACT OF RECORD

TENNESSEE DEPARTMENT OF SAFETY
DRIVER CONTROL DIVISION

DEFENDANT INFORMATION

NAME (LAST)	FIRST	MIDDLE	DATE OF BIRTH	RACE	SEX
Troutman	Danny	Ralph	11-7-60	W	M

RESIDENCE (NO. STREET AND APT NO OR RT AND BX NO.): Route 8, Box 3565, Earl St.
P.O. BOX:
DRIVER LICENSE NO: 50668347
CITY: Elizabethton
STATE: TN
ZIP CODE: 37643
COUNTY: Carter
STATE: TN
EXP. DATE: 92
DESCRIPTION OF VIOLATION (IF SPEEDING LIST MPH IN ZONE):
Driving under the Influence - 2nd Offense
VEHICLE TAG NO: unknown
ACCIDENT INVOLVED? YES NO
OPERATING COMMERCIAL VEH? YES NO
TRANSPORTING HAZARD MAT.? YES NO
YEAR: unknown
ARRESTING OFFICER'S NAME: Ron Arnold
AGENCY: Unicoi Co. Sheriff's Dept

COURT INFORMATION

NAME OF COURT	COURT I.D. NO	HEARING DATE	COURT DOCK
General Sessions		6-28-90	

TN ADDRESS: CITY: Erwin; COUNTY: Unicoi
DISPOSITION: GUILTY AS CHARGED; REDUCED TO DUI - 1st Offe
ZIP CODE: 37650
TELEPHONE: AREA CODE 615 NO 743-3541
FINE: 250.00
COST: 154.50
OTHER:
IF CONVICTED OF DUI WAS IGNITION INTERLOCK DEVICE ORDERED BY COURT? YES NO
RESTRICTION PERIOD OF DEVICE: FROM TO
NAME OF INSURANCE COMPANY (NOT AGENT): unknown
POLICY NO: unknown
POLICY PERIOD: FROM: TO
LICENSE HELD BY COURT? YES NO
CORRECTED ABSTRACT: NOTE IF SO ATT ORIGINAL

I CERTIFY THE ABOVE ABSTRACT OF RECORD TO BE TRUE AND CORRECT.
SIGNATURE (JUDGE-CLERK) DATE

T.C.A. 55-10-306
REQUIRES EVERY JUDGE OR CLERK TO FURNISH THE DEPARTMENT OF SAFETY WITH A RECORD OF EVERY CONVICTION OF ANY LAW REGULATING THE OPERATION OF MOTOR VEHICLES, TO ASCERTAIN AND CERTIFY WHETHER THE CONVICTED PERSON WAS INSURED AND IF SO, THE NAME OF THE LIABILITY INSURANCE CARRIER, THE POLICY NUMBER AND POLICY PERIOD.

MAIL ORIGINAL TO:
DRIVER IMPROVEMENT SEC
DRIVER CONTROL DIVISION
TENNESSEE DEPARTMENT
NASHVILLE, TN 37249-2000

SF-0018 (REV. 6-89) TENNESSEE DEPARTMENT OF SAFETY YELLOW: COURT COPY

TROUTMAN

FROM :COCKE COUNTY DA FAX NO. :4236232012 Nov. 06 2008 01:41PM P

PAGE 1
OFFICIAL DRIVER RECORD

I HEREBY CERTIFY THIS TO BE A TRUE AND CORRECT COPY OF THE RECORD ON FILE WITH THIS DEPARTMENT.

KENNETH W. BIRDWELL
FINANCIAL RESPONSIBILITY

STATE OF TENNESSEE
DEPARTMENT OF SAFETY

TROUTMAN DANNY R
138 EARL AVENUE
ELIZABETHTON TN 37643

CURRENT DATE: 10/17/05
ID NAME: ADM
CONTROL NO.: 00521437

FOR GOVERNMENT USE ONLY

DR LIC NO: 50668347 BIRTH DATE: 11/07/60 LIC CLASS: DM** ENDRSE:
ISSUE DATE: 12/28/99 EXPIRATION DATE: 11/07/05
EYES: BL HAIR: BR SEX: M RACE: W HEIGHT: 5FT 09IN WEIGHT: 150
NON-CDL STATUS: VALID CDL STATUS: NONE
NON-CDL ELIGIBILITY DATE: 00/00/00 CDL ELIGIBILITY DATE: 00/00/00
REQUESTED INFORMATION:
RESTRICTIONS: NONE

CONTAINS ENTIRE RECORD FORMER STATE/LIC NO: / ** UNKNOWN **

EVENT DATE	ACTION DATE	ACTION CODE	LOCATION	DATE RECEIVED	SPEED MPH/ZN	CASE NUMBER	DOCUMENT CNTRL NUMBER
06/19/83	07/11/83	020	CARTER	08/23/83	0/00	R200683	32351010317
	DRI WHILE INTOX / REVOCATION/NOTICE SENT						
06/19/83	01/07/85	091	CARTER	01/08/85	0/00	R200683	32351010317
	REINSTATEMENT						
06/08/90	06/28/90	020	OBION	07/17/90	0/00	0200890	01971050181
	DRI WHILE INTOX / REVOCATION/NOTICE SENT						
06/08/90	04/26/94	091	OBION	04/26/94	0/00	0200890	01971050181
	REINSTATEMENT						
03/26/92	04/13/92	222	CARTER	09/15/92	0/00	2222692	22551020238
	DRI WHILE INTOX/2ND OFFENSE/REV/NOTICE SENT						
03/26/92	04/26/94	091	CARTER	04/26/94	0/00	2222692	22551020238
	REINSTATEMENT						
11/22/96	12/16/96	223	WASHINGTON	01/09/97	0/00	2232296	63651060092
	DRI WHILE INTOX/3RD OR MORE/REV/NOTICE SENT						
11/22/96	12/28/99	091	WASHINGTON	12/28/99	0/00	2232296	63651060092
	REINSTATEMENT						
01/06/02	00/00/00	001	NC	06/28/02	70/55	0010102	20933100276
	SPEEDING						
03/07/03	00/00/00	001	WASHINGTON	05/12/03	50/30	0010303	31071060309
	SPEEDING						

** LAST PAGE **

I hereby certify that I, Kenneth W. Birdwell, have been appointed by the Commissioner of the Tennessee Department of Safety as Keeper of the Official Driver Records and that this is a true and correct copy of the record on file with this Department.

Kenneth W. Birdwell
Kenneth W. Birdwell

Investigatory Traffic Stop Based On Anonymous Tip

Every month technical assistance calls are received after a prosecutor starts examining a traffic stop based on a call to 9-1-1 by an alarmed citizen. Such stops become more common every day as more citizens obtain cell phones and more citizens are affected by the tragic consequences of impaired driving. Prosecutors need to sit back and analyze the situation with certain principles in mind. While there is ample conflict about these situations in various State and Federal Courts, the Tennessee Courts have been fairly consistent for the last several decades.

Principle 1: **An anonymous tip can provide a basis for reasonable suspicion.**

The U.S. Supreme Court in Alabama v White, 496 U.S. 325; 110 S. Ct. 2412; 110 L. Ed. 2d 301; 1990 U.S. LEXIS 3053 reminded us to look at the totality of the circumstances. A caller indicated that Vanessa White would be leaving a certain apartment within an apartment complex at a particular time in a brown Plymouth station wagon with the right taillight lens broken, that she would be going to a certain motel, and that she would be in possession of about an ounce of cocaine inside a brown attaché case. An officer then observed the station wagon in front of the apartment complex and watched as Ms. White got in and drove toward the motel. The Court ruled the information was sufficiently corroborated to support the investigatory stop.

Principle 2: **Reasonable suspicion requires less certainty than probable cause.**

The reasonableness of seizures less intrusive than a full-scale arrest is judged by weighing the gravity of the public concern, the degree to which the seizure advances that concern, and the severity of the intrusion into individual privacy. Determining whether reasonable suspicion exists in a particular traffic stop is a fact-intensive and objective analysis. In determining whether reasonable suspicion exists, an important factor in the analysis is that reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. State v.Day, 263 S.W.3d 891 (Tenn 2008)

Principle 3: **Facts forming the basis for an officer's reasonable suspicion need not rest upon his personal knowledge or observation.**

In several Tennessee cases a citizen, sometimes anonymous, has provided information that led to an investigatory stop based on reasonable suspicion.

A caller alerted police that Terry Pulley was driving a yellow Ford L.T.D. in the Village Green Trailer Park, was armed with a shotgun, and was "supposed to shoot someone." State v Pulley, 863 S.W.2d 29; (Tenn. 1993).

A hotel desk clerk at the Holiday Inn called 9-1-1 indicating that a guy left in a White Chevy pick-up with a specific license plate number who had no business driving. An officer spotted the truck in a gas station parking lot. State v. Luke, 995 S.W. 2d 630, (Tenn.Crim.App. 1998)

An ambulance driver watched a yellow automobile weaving down the road and called 9-1-1 after it wiped out a mailbox. State v. Jensen, 2002 Tenn. Crim. App. LEXIS 990

An anonymous call reported that a person in an older model gold car with a white top was waving a gun around at a particular car wash. State v. Cox, 1998 Tenn. Crim. App. LEXIS 558

A citizen saw a gold jaguar run another car off the road while trying to pass in the oncoming traffic lane. The citizen called in the license plate number before the driver sped away. State v. Gibson, 2003 Tenn. Crim. App. LEXIS 777

Principle 4: **The type of anonymous call matters**:

A driver waved frantically and pointed to a defendant obviously intending to invite the officer's intervention. The Tennessee Supreme Court ruled that the actions of the citizen lacked any indication as to the nature of the citizen's concern and suppressed the stop for a lack of reasonable suspicion. State v. Day, 263 S.W.3d 891 (Tenn 2008)

A stop based on a silent 911 hang-up call and no corroborating evidence was suppressed. The call provided no tendency to identify a determinate person. United States v. Cohen, 481 F.3d 896

A call indicating possible misbehavior by a group of teens did not create reasonable suspicion to justify the seizure of a driver. An anonymous informant told police that six to eight teenagers had been looking in the windows of cars parked in a hotel parking lot, in an area where car burglaries had been committed. The informant did not actually see any criminal conduct. An officer saw the 24-year-old defendant driving a car with three passengers near the hotel. The officer did not see the defendant commit any offense, did not corroborate the anonymous tip**,** had no description of any car driven by the suspects, or in fact, any knowledge as to whether they were in a car. State v. Srisavath, 2001 Tenn. Crim. App. LEXIS 175

Prosecutors facing challenges to traffic stops based on citizen alerts should be aware that many defense arguments will contain cases that are old and moldy and misleading or cases from foreign jurisdictions, which advocate a radical change from Tennessee precedent. Don't fall for the junk. Take the time needed to know Tennessee law. If you are surprised in the courtroom and pushed to respond immediately, call your friendly Traffic Safety Resource Prosecutor.

A CHILD WILL LEAD THEM

Louisville, Kentucky - Landon Wilburn, 11, who used to shout at speeders to slow down as they drove through the Stone Lakes subdivision in Louisville, now has taken matters into his own hands. Dressed in a reflective vest, wearing a bicycle helmet and armed with an orange Hot Wheels brand radar gun, he points and records the actual speed of passing traffic. Landon also carries a flashlight with a built-in siren. "When I saw it happening, I got the biggest kick out of it," said resident George Ayers, 61. "People were locking up their brakes when they saw him." Many in the subdivision are frustrated that motorists tear through the neighborhood at 55 mph despite signs posting a 25 mph limit. Officials said the city will install speed humps in the neighborhood if 70 percent of residents agree and are willing to put up half the money. Associated Press - July 17, 2008.

A CHILD WILL LEAD THEM PART TWO

Albuquerque, New Mexico - "What is your emergency?" asked the 911 operator. The little boy replied, "My Mom is making me blow air into her interlock." The youngster was asked to help his mother break the law and blow into her ignition interlock device to start the car. Police responded to the call and charged 30-year-old Genevieve Sullivan with violating her probation for drunken driving. The 11-year-old walked a fine emotional line: He told operators he was afraid his mother would hear him and he'd get in trouble. But he was even more afraid of the consequences should his mother drive drunk. "He knew his mother was in trouble. He knew she needed help, and he knew he could provide that help" said psychologist Pat O'Gorman. ABC News - September 10, 2008.

DROWSY DRIVING KILLS

100,000 crashes each year are caused by fatigued drivers in the United States. 55% of drowsy driving crashes are caused by drivers less than 25 years old. Being awake for 18 hours is equal to a blood alcohol concentration (BAC) of 0.08%.

How can you tell if you are "driving while drowsy"?

* Difficulty focusing, frequent blinking, or heavy eyelids
* Daydreaming; wandering/disconnected thoughts
* Trouble remembering the last few miles driven; missing exits or traffic sign
* Yawning repeatedly or rubbing your eyes
* Trouble keeping your head up
* Drifting from your lane, tailgating, or hitting a shoulder rumble strip
* Feeling restless and irritable

Are You at Risk?

Before you drive, check to see if you are:

* Sleep-deprived or fatigued (6 hours of sleep or less triples your risk)
* Suffering from sleep loss (insomnia), poor quality sleep, or a sleep debt
* Driving long distances without proper rest breaks
* Driving through the night, mid afternoon or when you would normally be asleep
* Taking sedating medications (antidepressants, cold tablets, antihistamines)
* Working more than 60 hours a week (increases your risk by 40%)
* Working more than one job and your main job involves shift work
* Drinking even small amounts of alcohol
* Driving alone or on a long, rural, dark or boring road

ARE SLEEP DRIVERS CRIMINALLY LIABLE?

As with every case the determination of probable cause is fact specific. Evidence sometimes indicates criminal liability for reckless endangerment, criminally negligent homicide or other charges. Log books in commercial vehicles should indicate the amount of time a trucker took to rest. Other evidence should be collected including admissions, credit car receipts for gas and meals, pill and/or alcohol containers. The condition of the driver should also be recorded.

Adequate Sleep and Planning

Before hitting the road, drivers should:

* **Get a good night's sleep**. While this varies from individual to individual, sleep experts recommend between 7-9 hours of sleep per night for adults and 8 1/2 to 9 1/2 hours for teens.
* **Plan to drive long trips with a companion**. Passengers can help look for early warning signs of fatigue or switch drivers when needed. Passengers should stay awake to talk to the driver.
* **Schedule regular stops**, every 100 miles or two hours.
* **Avoid alcohol and medications** (over-the-counter and prescribed) that may impair performance. Alcohol interacts with fatigue, increasing its effects — just like drinking on an empty stomach.
* **Consult their physicians** or a local sleep disorders center for diagnosis and treatment if they suffer frequent daytime sleepiness, often have difficulty sleeping at night, and/or snore loudly every night.

How can you prevent drowsy driving?

Here are some suggestions:

* Take a 15 to 20-minute nap. More than 20 minutes can make you groggy for at least five minutes afterward.
* Consume the equivalent of two cups of coffee. Caffeine takes about 30 minutes to enter the blood stream and will not greatly affect those who regularly consume it. For best results, try taking caffeine and then a short nap to get the benefits of both.

For more information, go to the National Sleep Foundation's Web site**, "Drive Alert…Arrive Alive".**

TRAINING NEWS

TRAIN THE TRAINER TIME

Do you like teaching at the local academy?
Do you like teaching your fellow Prosecutors?
Do you want to teach at National courses?
Do you want to be a better teacher for your juries?
Attend Train the Trainer at the Chattanooga Marriott Feb 3-5, 2009. Sign up now by contacting Sherri at sjharper@tndagc.org. There are limited slots available for this outstanding course. Application deadline is January 8th!

COPS IN COURT

Do you want to host a Cops in Court session. These classes are being conducted at the request of District Attorneys and law enforcement regularly. In October, 2008 eight hour classes were offered to the Anderson County in-service classes three times, the Middleton Police Department, Somerville ARIDE (Advanced Field Sobriety Testing) class, The Tennessee Highway Patrol cadet class (16 hours), and a condensed session for the Nashville Metro Police cadet class. The course includes: Cross Examination, Report Writing, Professionalism and Mock Court. The focus of the course is to help the officer deliver the truth to the jury no matter what types of impediments are placed in the way. To schedule an eight hour POST approved session for 20-30 officers, contact Sherri at sjharper@tndagc.org or 615-253-6733.

LIFESAVERS CONFERENCE IN NASHVILLE

The National Lifesavers Conference will be conducted in Nashville at Opryland March 29-April 1, 2009. Lifesavers is the premier national conference involving traffic safety for States dedicated to reducing the tragic toll of deaths and injuries on our nation's roadways. Starting in the early 1980s, the Lifesavers Conference attendance has grown steadily, drawing over 2,000 participants in 2008. Each year, the Lifesavers Conference has become even more relevant and timely, providing a forum that delivers common -sense solutions to today's critical highway safety problems. To learn more and register go to:
www.lifesaversconference.org/

Pictured below: Report writing in Oliver Springs. 53 officers were trained on three Tuesdays in October.

DID YOU KNOW

In 2007, more than 50% of Tennessee traffic crashes occurred within 25 miles of the drivers home. Five percent of crashes involved out of state drivers. Five percent of driver's who crashed had been drinking alcohol. Slightly less than 1% had apparently fallen asleep at the wheel. Seventeen percent occurred on Friday as compared to 10% on Sunday. More crashes occurred between 3:00 pm and 6:00 pm than any other time. There were more crashes in October, 15,355, than any other month. The most common age for a crash was 25 to 29. Animals were involved in 5,969 crashes. There were 167,644 total crashes in 2007 and 1,110 resulted in a fatality. 51,475 resulted in injury. 118,567 resulted in property damage greater than $400 and 17,549 were hit and run crashes. Only 3,791 hit and run crashes were solved.
Source: TN Dept of Safety, Office of Records and Statistical Management, 08/25/2008.

REFUSAL TO TEST SUPPORTS CONVICTION FOR MAJIJUANA POSSESION

The Tennessee Supreme Court accepted the defendant's application to appeal to determine whether the evidence presented at trial was sufficient to establish the identification of marijuana. In State v White, 2008 Tenn. Lexis 856, Chief Justice Holder and a unanimous court dropped a bomb on the defense application.

James White was stopped leaving a bar without wearing a seat belt in Dyer County. White was a classic DUI offender with problems with small and large muscle control, slurred speech, the odor, admission to two beers and a bottle of homemade wine. After the arrest the deputy searched and found a partially smoked marijuana cigarette beside the gear shift. White was charged with DUI, violation of implied consent and simple possession of marijuana. White challenged the sufficiency of the proof concerning the simple possession of marijuana charge.

The Court framed the issue stating, "The sole issue as defined by the Court is whether there was sufficient evidence to support a conviction for the possession of a controlled substance." The Court noted that identification of marijuana by an officer has been affirmed in other circumstances.

"Previously, our Court of Criminal Appeals has held that officer testimony is sufficient to identify marijuana beyond a reasonable doubt when corroborated by field testing. See State v. Anderson, 644 S.W.2d 423, 424 (Tenn. Crim. App. 1982); State v. Hill, 638 S.W.2d 827, 830 (Tenn. Crim. App. 1982). In each of these cases, the officer's identification testimony was also accompanied by evidence that the defendant's arrest took place in the context of a drug deal. The Court of Criminal Appeals has also held that officer testimony is sufficient when corroborated by direct testimony in the form of a confession. See State v. Doelman, 620 S.W.2d 96, 98 (Tenn. Crim. App. 1981) (holding that the evidence was sufficient where several officers testified that the substance was marijuana and the defendants confessed that they were growing marijuana).

Finally, officer testimony has been held sufficient when accompanied by incriminating circumstantial evidence such as the defendant's implicit or explicit admission that the substance was marijuana and the discovery of drug paraphernalia commonly associated with marijuana use. See, e.g., State v. Primm, 1998 Tenn. Crim. App. LEXIS 1271, State v. Townsend, 1994 Tenn. Crim. App. LEXIS 433.

The testimony was not corroborated by the types of evidence the Court of Criminal Appeals has held to be sufficient. When all inferences were drawn in favor of the State, there was sufficient evidence to support a rational jury's finding that the substance was marijuana beyond a reasonable doubt.

This case was different. There was no field testing. There was no drug deal. There was no admission. There was no paraphernalia. There was a refusal to submit to a test and factors proving impairment.

The jury was permitted to infer that refusal to submit to the test supported a finding that he possessed marijuana. Factors considered also included the proof of impairment leaving the implication that some of the marijuana was affecting the defendant in combination with the alcohol he had consumed.

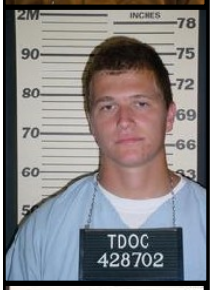
Refusal to submit to a test is common proof in a DUI case. Courts regularly instruct jurors that refusal to submit can be considered as proof of guilt. Good prosecutors start educating the jurors about the significance of refusal during the jury selection process and in argument. Now it appears that prosecutors have support for requesting a jury instruction and for arguing that refusal to submit to a test is proof of guilt for possession of drugs discovered in the subsequent search of a vehicle.

WHAT'S THAT SCREAM ABOUT?

In the recent decision, State v Lewis 2008 Tenn. Crim. App. LEXIS 956, the Court of Criminal Appeals upheld a unique reason for a traffic stop. Officers at a gas station heard a scream or yell coming from a car that was at least 50 yards away. The car drove onto a road and an officer stopped it. The officer testified that he was concerned that the yelling could have been due to someone being hurt or screaming for help. The Trial Judge upheld the stop approving because the officer "had to stop the vehicle to make sure something bad wasn't happening." The Court affirmed the stop, which resulted in the arrest and conviction of Benton Lewis for DUI. Let this be a lesson learned. Alcohol impairs some people's ability to use their indoor voices.

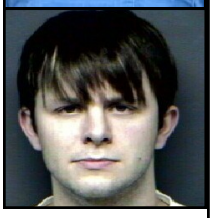
VEHICULAR HOMICIDE MURDERERS ROW

Derreck Parrott, 23, received an 8 year sentence in Cumberland County for vehicular homicide by intoxication. He also received three years for theft over $10,000 and two for burglary. He will be eligible for parole in October, 2010.

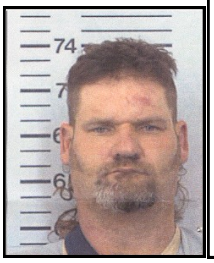


Sean David Anderson, 20, appealed his sentence for vehicular homicide after he pled guilty and had a sentencing hearing. The conviction and eleven (11) year sentence were affirmed in *STATE V ANDERSON,* 2008 Tenn. Crim. App. LEXIS 838. Anderson killed two passengers including his cousin when he was driving with a .29 BAC. He was driving in circles and raced through yards before he lost control, hit a pine tree and flipped his Jeep. The girls in the back seat were not wearing seat belts. Victim, Becky Anderson, was thrown thirty six feet into some hedges and lived a short time. Victim, Lauren Knieling was found near the front passenger tire. Two other passengers, who wore seat belts lived to testify.

Michelle Tuck, 24, of Knoxville, was sentenced to eight years in prison for the death of a motorcyclist in 2006. Tuck had a BAC of .23 when she killed Steven Eugene Goins, 37. Tuck also received a two year sentence for aggravated assault. She injured Joseph Bradley Israel, 25, in the three vehicle collision on Merchant's Drive at Clinton Highway. The prosecutor in the case was Bill Hood of the 6th Judicial District.



Keaton Guy, 20 of Anderson County appealed his sentence of four years for reckless vehicular homicide and a concurrent two years for vehicular assault. The victims were his passengers, 14 year old passenger, Annessa Homan, who was ejected and killed during his crash and a young adult friend, Carmen McGuff,, who was paralyzed for life. Guy wanted judicial diversion or alternative sentencing. He was driving 88 mph in a 45 mph zone on a curvy road, when he over corrected after striking a guard rail and rolled his truck several times. ADA Sandra Doneghy of the 7th Judicial District represented the State. Guy offended the family of the 14 year old victim when he had her picture tattooed to his chest. See State v. Guy, 2008 Tenn. Crim. App. LEXIS 954



WHERE DID YOU GO Stacey Jo?

Stacey Jo Carter, the recipient of a very favorable decision from the Tennessee Supreme Court, discussed in previous issues remains free. It seems that Stacey Jo, who ran from the crash scene as his cousin drowned, has run from the authorities and will probably not be found until he crashes again.

DEPRESSED? ABUSING SUBSTANCES? Don't Forget TLAP

The Tennessee Lawyers Assistance Program is a phone call away. If you, a family member or co-worker are suffering from substance abuse, depression or stress, call TLAP for help at 877 424 8527. Don't kill your career with a DUI or other destructive activities during the holiday season!

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THE CRASH PAGE

By Jim Camp

THE COMFORT ZONE

"This is way outside of my comfort zone". Those were the thoughts I was having when I was preparing for the presentation Tom Kimball and I made at the Annual D.A.'s Conference in October. Those of you who were courageous enough to stay for our session could see why. Actually, when Tom told me I was going to play Johnny Carson in front of the entire conference my response was a little more colorful. But since all things run down hill I diligently began my preparation. Sometimes we all need to focus and break out of that comfort zone. Looking back I am sure many of you are still probably wondering what we were trying to accomplish. The rest of you are hoping that visions of sugar plums dancing in your heads purge the unpleasant memories you have of that experience. But, I am here to tell you there was a method to our madness. A method that I hope was not lost amidst the awful jokes and campy (no pun intended) delivery. The object was to present the outstanding job done by several prosecutors. Prosecutors who's courage and hard work enabled them to not only charge and prosecute their cases to verdict, but to also obtain convictions when many of us would otherwise not have prosecuted them at all. Justice was done because they chose to step outside their "comfort zone".

One of those cases was *State v. Tamela Scott*. **David Puckett,** ADA in the 16th District, stepped outside of his comfort zone for the victims in the Scott case in Cannon County. Scott crossed over the centerline and struck the victim's van head on. Twelve-year-old Ben Leavy was killed. He was a passenger in the van struck by Scott. Ben's father Richard, his brother Shaun and step-mother Susan were seriously injured. At the scene more than four individuals had contact with the defendant Scott but none of them smelled alcohol. It was 1:52 in the afternoon. No one really suspected impairment. A trooper was in the ambulance with the defendant and the odor of alcohol was not present. The defendant showed no obvious signs of impairment. In fact no witness interviewed at the scene had any indication that the defendant was impaired. Medical blood and urine were taken at 4:50 PM almost three hours after the crash. The whole blood equivalent was .065. The urine sample was positive for cocaine metabolite and Citalopram as well as Ephedrine. Trooper Stan Hollandsworth interviewed the defendant at the hospital at which time she denied drinking alcohol or taking any illegal drugs, but admitted to taking anti-depressants. While talking to the defendant Hollandsworth could smell alcohol on the defendant and asked her again if she had anything to drink that day. The defendant finally admitted she had one beer before she left home. Defendant consented to a blood draw which was taken at 5:33 PM, nearly four hours after the crash. The result was .04. Four days later the defendant provided a written statement changing her story again and admitting that she drank two Bud Lights with lunch prior to the crash.

But David was still outside of our normal comfort zone. The blood test results were all under .08 and were taken a significant period of time after the crash. The witnesses at the scene as well as the ER physician said the defendant did not appear impaired. There were no field sobriety tests and the TBI toxicologist could not tell when the defendant had ingested the drugs she had in her system. At this point many prosecutors would have decided against prosecution. But David decided to step outside that comfort zone. He called TSRP Tom Kimball who got him in touch with Dr. Kenneth Ferslew a Professor and Director of the Toxicology Section at Eastern Tennessee State University. Dr. Ferslew performed a retrograde extrapolation using the tests taken. A retrograde extrapolation allows an expert to use a BAC test result along with other information to work backwards from the time of the test to determine the BAC level at the time of driving. Dr. Ferslew was therefore able to opine that the defendant's BAC was .102 at the time of the crash. He also testified that the combined use of the alcohol and drugs would produce an additive if not synergistic impairment of her psychomotor performance. He further opined that she was under the influence of alcohol and drugs at the time of the crash and they would have contributed to her miss operation of the vehicle. The Cannon County jury found the defendant guilty of vehicular homicide by intoxication and three counts of vehicular assault.

The moral of the story, of course is this: It is not just the "easy" cases we should be willing to charge and try but the not so easy ones. It is a Prosecutor's duty to seek justice in all cases., not just when it is easy to do so. In the *Scott* case, the person criminally responsible for this tragedy was convicted and punished. An injured and grieving family had closure. Because ADA David Puckett stepped outside of the comfort zone justice was done.