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MANDATORY FORCED BLOOD LAW WILL RAISE NEW ISSUES

MANDATORY FORCED BLOOD

The Legislature visited the area of blood draws in vehicular crime cases and cleared up a problem area and created a few new issues. To clarify the law concerning mandatory blood draws in cases of vehicular homicide and assault, the Legislature passed a bill to add subsection (f) to TCA 55-10-406. The bill mandates that an officer shall have blood drawn if there is probable cause to believe a driver has been involved in an accident with injury or death and violated 55-10-401 (DUI), 39-13-106, (Vehicular Assault), 39-13-213 (a)(2) (Vehicular homicide by intoxication) or 39-13-218 (Aggravated Vehicular Homicide). The tests shall be conducted with or without consent and be admissible by either party.

CLARIFICATION

For years officers have been permitted to obtain blood evidence in cases in which death or serious bodily injury occurred and was caused by the offender. An entire body of case law endorsed the practice. State v. Jordan 7 S.W.3d 92 a 1999 decision of the Tennessee Supreme Court, approved the non- consensual blood draw in a vehicular homicide by intoxication case. However, the statute which permitted the blood draw, 55-10-406 (e) stated,

> Nothing in this section shall affect the admissibility in evidence, in criminal prosecutions for aggravated assault or homicide by the use of a motor vehicle only, of any chemical analysis of the alcoholic or drug content of the defendant's blood which has been obtained by a means lawful without regard to the provisions of this section.

Notice the section did not mention DUI, vehicular assault or aggravated vehicular homicide. Many DA's opted to charge aggravated assault instead of vehicular assault to avoid problems of admissibility due to the language of the section.

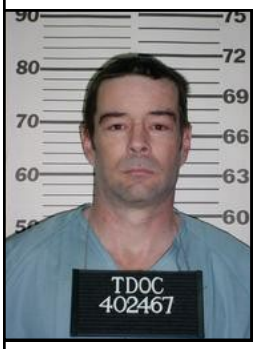
NEW ISSUES

In the old law non-consensual blood could be taken in cases of aggravated assault, which required serious bodily injury or intentional activity. This law eliminates aggravated assault and adds other sections. If there is an accident in which there is an injury to another person and the driver has committed a DUI, this statute mandates that blood shall be drawn with or without consent. Refusal is not an option. This seriously expands the number of cases in which non consensual blood draws are not only an option, but a requirement!

(Continued page 5)

RECENT DECISIONS

State v Williams 2009 Tenn Crim App Lexis 319 **EIGHT TIMES CONVICTED**



In Madison County, an eyewitness saw the defendant, Daniel Earl Williams, 42, drive from the road into his yard before swerving back out onto the road and parking in his driveway and he discovered the defendant passed out behind the wheel of the vehicle. When the police arrived, they found the defendant asleep behind the wheel with a can of beer in his hand. The defendant admitted to the police that he was drunk on the night of the incident. Williams was an 8th offender, sentenced to 2 years as a class E felon. Williams was eligible for release before his appeal was decided.

State v Coleman 2009 Tenn Crim App Lexis 277 **BLOW BABY BLOW**

In Nashville, Mr. Coleman failed to seal his lips around the breath tube and gave insufficient samples for the test. He had been driving at night without his headlights and was speeding when stopped. He pled guilty to driving on a revoked license and had a bench trial for his violation of implied consent. The defendant wanted the Sensing requirements for admission of a breath test to apply to his refusal. The Court did not buy it and found him guilty of the violation. The Court cited two previous cases in which the same argument failed: State v Hebert, 2004 Tenn Crim App Lexis 93 and State v Lazarro 2001 Tenn Crim App Lexis 277.

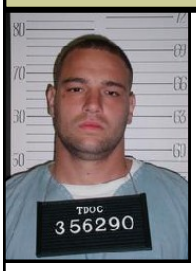
State v Landers 2009 Tenn Crim App Lexis 323 **REVERSED: NO NECCESSITTY INSTRUCTION**

Landers was driving 75 mph in a 55 zone. He was stopped. He showed all the classic signs of impairment and took a breath test with a .17 BAC result. He was convicted by a jury and appealed. He argued that it was necessary for him to drive and the Trial Judge refused to give a necessity instruction. The Court of Criminal Appeals reversed and remanded for a new trial. Landers was drinking at a bar and left as a passenger. The driver, Nathan Brantley, according to the defendant and Brantley got dizzy and felt nauseous. He could not pull over due to a construction zone, but eventually got over on the left side of I-65 and parked. The defendant took the wheel. He claimed he had been driving 15 to 30 seconds before being pulled over going 75 mph. He had a cell phone, which he did not use. He also had emergency flashers that were not used. The Trial Court refused to give a necessity instruction, because the Judge believed the defendant may have originally had justification to get the car off the road, but the defendant kept going past an off ramp and moved into the center lane on his way home. The reversal was based upon the defendant fairly raising a claim of necessity and the Court over stepping in coming to factual conclusions that should have been decided by a jury.

State v Plasket 2009 Tenn Crim App Lexis 340 **A.D.A. MAY SIGN INDICTMENT**

When the D.A. was suspended in Putnam County, an Assistant DA signed the indictments. The Defendant was convicted of DUI 6th offense and appealed claiming the signature of the Assistant DA did not satisfy TCA 40-13-103, which requires that an indictment be signed by a prosecutor. The Court affirmed the conviction based on the decision made concerning the same issue in State v. Taylor, 653 S.W.2d 757, 759-60 (Tenn. Crim. App. 1983)

RECENT DECISIONS



State v. Velazquez, 2009 Tenn Crim App Lexis 54

DRUG DEALER & DUI FELON SENTENCED

Michael Velazquez was disappointed in the Court's decision that he spend his seven year sentence in prison. He pled guilty to a felony DUI, evading arrest, possession of less than .5 grams with intent to sell and misdemeanor DUI. The service of his sentence was left to a sentencing hearing before Judge Kenneth Irvine in Knox County.

Velazquez failed a drug screen pending the sentencing hearing. He had worked at lawful jobs one and a half months in the last year, but made a majority of his income selling drugs. He had two prior felony convictions and at least thirteen misdemeanors. He had been released with suspended sentences on most of his priors and continued to re-offend. The Court found him to be less than a good candidate for rehabilitation and affirmed the denial of alternative sentencing.

State v Pearson, 2009 Tenn Crim App Lexis 275 **SUPPRESSION REVERSED**

Anthony D Pearson had a great day when his motion to suppress evidence was granted by Judge Gasaway in Montgomery County. Pearson was observed in a suspected drug deal when he gave a dealer money and received a small plastic baggy. The detectives conducting surveillance did not want to blow their cover, so they called ahead to patrol officers to stop the suspect's car. Pearson helped out by exceeding the 30 mph speed limit by 6 miles per hour and was stopped and searched due to his involvement in a drug transaction. Nothing was found in the search, but a drug dog alerted on the front floorboard on the driver's side of the car. Pearson was arrested due to the drug transaction. He was questioned by detectives and gave up the cocaine he had hidden in his sock. Judge Gasaway suppressed the cocaine effectively killing any chance for conviction and the State appealed. Judge Gasaway decided that the suspect was arrested for speeding and should have been cited and released. The Court of Criminal Appeals cited long standing precedent that subjective intent alone does not make otherwise lawful conduct illegal or unconstitutional. *See Whren v. United States*, 517 U.S. 806, 813 (1996) and that "information given by one officer to another is reasonably reliable information to provide probable cause." See, e.g., State v. Brown, 638 S.W.2d 436, 438 (Tenn. Crim. App. 1982). Finding probable cause to arrest based on the drug transaction, the suppression was reversed and the case remanded.

State v Zelek, 2009 Tenn Crim App 281 **CONSENSUAL ENCOUNTER AWKARDLY PARKED CAR**

Zelek parked his car in the street in Lebanon between 1:35 and 2:00 A.M. in a way that would block traffic. The street involved is a location where numerous drug and gun arrests occur. Zelek, the driver got out, looked at an approaching police car, went around the front of the car and into a house. A passenger got out, saw an approaching police car and got back in the Zelek car. Officer David Wilmore was on patrol when he saw the car parked "some distance" from the side of the road. He parked 20-25 feet behind the Zelek car, left his headlights on and his video camera running. He approached the car and spoke with the passenger, who had a boozy odor on his breath. After a back up officer arrived, Officer Wilmore went up to the house and after a short delay found an intoxicated defendant.

The defense cried foul and requested dismissal of the case. The defense was based on State v Williams 185 SW 3d at 316 in which our Supreme Court found that a person who is in a parked vehicle is seized when a police officer exhibits a show of authority by activating his blue lights. The Court rejected the argument finding the situation to be analogous to State v. Hawkins, 969 S.W.2d 936 (Tenn. Crim. App. 1997), where the Court found an officer had reasonable suspicion to investigate an "awkwardly parked" car and saw a powdered substance in plain view. The Court found that Officer Wilmore did not stop or seize the Zelek vehicle, but instead participated in a consensual encounter and developed reasonable suspicion to conduct an investigation that led to probable cause that Zelek had driven impaired.

RECENT DECISIONS

State v McCloud, 2009 Tenn Crim App Lexis 437 **OCCUPANT KINEMATICS PROVE DRIVING**

At trial, the defendant attempted to use the S.O.D.D.I. defense. "Some Other Dude Did It" is a common defense when a passenger has either left the scene or was a figment of a driver's imagination. If a driver crashes and is out of the vehicle when the police arrive, prosecutors and law enforcement officers can count on hearing the S.O.D.D.I. claim at trial. The problem with the defense is that physical evidence disproves fiction. McCloud suffered injuries to the left side of his body that matched the damage to the left, driver's side of the car. The passenger suffered injuries to the right side of his body that matched damage to the right, passenger, side of the car. Knox County Sheriff's Department Officer Tom Walker was recognized as an expert witness and testified: "Based on the injuries and the extent of the injuries on the two people that were in the car, it is my opinion that Mr. McCloud as the initial impact, as you will see by the pictures, if I am the driver and I come into – hit a telephone pole at high speed, my body is going to go to the left, because the body is in motion, is going to keep in motion until the wreck of an outside force. He came in contact with an unmovable object. The telephone pole and the door, causing his major injuries to his left side. Plus, the glass breaking right next to his head on the driver's side glass causing cuts only to the left side of his face.

When the car rotated 180 degrees, in my opinion, Mr. Harpe was a passenger, when they hit those trees behind him, it was not the same kind of impact. He's already lost speed, he's already lost momentum, it's not the same type of impact. He hits, of course, on his side so the body tends to go back this way. He comes in contact with the door on his side, causing injury to his right knee, which apparently in the hospital report he had an injury to his right knee. The glass breaks again right here next to his face causing the cuts and bruising to the right side of his face."

The conviction was affirmed and McCloud received a sentence of 11 months and 29 days for a second offense.

State v Moffatt 2009 Tenn Crim App 438 **ANOTHER PAT DOWN SEARCH CHALLENGE**

In the last issue of the DUI NEWS we included a brief synopsis of Arizona v. Johnson, 129 S.Ct. 781, 172 L.Ed.2d 694, written by my esteemed colleague Pete Grady of Iowa. Johnson, if you recall, was a passenger, who was seized when the driver was stopped. Johnson wore gang clothing, had served time for burglary and was known by the officer to be a gang member. The officer suspected Johnson was armed. He ordered him out of the car, patted him down and found a gun. The U.S. Supreme Court found that the officer had reasonable suspicion and a fear for personal safety and affirmed the pat down search.

In the same issue we included a discussion of the Brotherton decision by the Tennessee Court of Criminal Appeals. Brotherton was stopped and the officer noted the smell of marijuana. He asked the defendant to step out, patted him down and recovered five baggies of the wacky weed.

The pat down challenge of this month involves officers who suspected a gun was on board, but discovered cocaine in the search. Moffatt was a passenger. Neither he nor the driver were wearing seat belts. The car was pulled over. The driver acted very strange and kept looking to his left then to his right. He pulled his shirt down as if to cover something. When the officer asked him if he had a gun, he did not answer but stared straight ahead for about ten seconds. The officer signaled to the officer on the passenger side and mouthed the word gun. Both the driver and passenger were asked to step out of the car and were patted down. No gun was found, but Moffatt had a plastic bag with 6.8 grams of cocaine base, which he tried to stuff in his mouth. Judge Acree in Obion County suppressed the evidence. The State appealed. The Court of Criminal Appeals reversed and remanded finding that the preponderance of the evidence was against the conclusions of the Trial Court. Citing Arizona v. Johnson, the Court found that the officers had a reasonable basis to suspect the defendant was armed and had a legitimate reason to pat down the suspect.

(Continued from Page 1)

MANDATORY BLOOD DRAWS AND ADMISSIBILITY ISSUES

The Legislature made the results of mandatory non consensual blood draws admissible by the State or the Defendant. What happens if there is no blood taken due to unusual circumstances or an act of omission? Does this law, which mandates the blood draw create a right to a result for a defendant? Is there a responsibility on the part of the State to deliver a blood result in any DUI, vehicular assault, vehicular homicide by intoxication and aggravated vehicular homicide if the officer had probable cause to believe a driver committed any of those crimes and another person was injured or killed? What happens if no blood is taken? What happens if a hospital employee refuses to draw blood without the consent of the driver? What is a Court going to do when the defendant stands before the Judge and asks for his blood test result, which was mandated by the new Code section? Time will tell.

MANDATORY BLOOD DRAW AND DUI CASES

The difference between an assault case and aggravated assault case turns on the type of injury involved. An injury is defined in the jury instructions as a cut, abrasion, bruise, burn, or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty. The new subsection mandates a test if there is probable cause to believe that the driver in an accident caused an injury and committed a DUI, vehicular assault or vehicular homicide by intoxication. Here is the new subsection:
55-10-406:

(f) (1) If a law enforcement officer has probable cause to believe that the driver of a motor vehicle involved in an accident resulting in the injury or death of another has committed a violation of §§ 55-10-401, 39-13-213(a)(2) or 39-13-218, the officer shall cause the driver to be tested for the purpose of deter mining the alcohol or drug content of such driver's blood. Such test shall be performed in accordance with the procedure set forth in this section and shall be performed regardless of whether the driver does or does not consent to such test.

(2) The results of a test performed in accordance with this subsection may be offered as evidence by Either the state or the driver of the vehicle in any court or administrative hearing relating to such accident or offense subject to the Tennessee rules of evidence.

This act shall take effect July 1, 2009, the public welfare requiring it.

TRAINING ISSUE

There are many more police departments than there are prosecutors in the State. Please help get the word out. Failure to do so will have a negative impact on your cases. At best, you will not have a test result that you should have received. At worst, you may end up having to fight battles concerning discovery issues and missing evidence.

BLOOD REQUEST FORMS

At page eight and nine of this publication the reader will find two forms, which will be useful to law enforcement. These forms may be duplicated and used by any agency. Another form titled:

MEDICAL PROVIDER REFUSAL TO COMPLY WITH TCA 55-10-406 (F)
REQUEST FOR BLOOD WITHDRAWL

is available upon request. That form has a signature line for the hospital employee indicating he/she was made aware of the new law and refused to draw blood without the consent of the defendant. The use of the form will prove that a good faith effort to comply with the law was completed, but failed due to the actions of others.

TAIL LIGHT IS NOT BROKEN ENOUGH
IMPAIRED DRIVER WINS

The Court of Criminal Appeals in the Western District has added a new mystery to the law of traffic stops and seizures in Tennessee. We have been the land of the Blue Light Special for years after our Supreme Court decided that activation of blue lights was a seizure. Now the Court of Criminal Appeals in State v Brotherton, 2009 Tenn. Crim App 298, has added another light to the mystery. The new question for law enforcement is how broken does a tail light have to be before a stop is reasonable.

In Brotherton, the vehicle was stopped because of a busted tail light. The light had been patched with red tape, but the tape had weathered and the brake light in the tail light assembly was no longer red, but bright white. The Trial Court upheld the stop and focused on TCA 55-9-402 which states that every motor vehicle is to be equipped with two **red** tail lamps and two **red** stoplights in **good condition** and **operational**.

The Brotherton vehicle had all the lights, but one was not red. The Trial Court decided the broken light was not in "good condition". The repair tape covered more than 50% of the light, was weathered and the light was white. The Court of Criminal Appeals disagreed. The Court decided the tail light was operational and was not a safety issue. The Court decided that tail lights don't have to be in mint, factory condition and while a light covered largely in red tape is not the optimum situation, the Court gave credit to the impaired driver for trying to maintain his vehicle. The fact that the repair was old enough that the red tape was weathered and did not stop the bright white light from glaring was ignored.

Brotherton kept his weaving car in his lane, so the only reason for the stop that would satisfy our Supreme Court decisions was the statute, which requires working lights. After the stop Brotherton smelled of alcohol, admitted drinking 5-6 beers and had an open twelve pack in the right front floorboard. He was not wearing a seat belt. Brotherton pled guilty, but reserved the tail light issue for appeal.

TAIL LIGHT TEST TIME

Officers will now have to decide whether the broken tail light they observe is broken enough to satisfy probable cause for a violation of the tail light law. It seems appropriate that we in the legal profession should share their plight at least for a moment. Let's look at some tail lights and ask ourselves the question:

IS IT BROKEN ENOUGH?

Directions: Look at the eight broken tail lights below. Decide which tail lights are broken enough to satisfy the Brotherton Court. Ask yourself: 1). Has the Court in redefining good working order to mean "not a safety hazard" eliminated the violation as long as any light shines from the brake light? 2). Has the requirement that the stop lights be red been eliminated? 3). Does red now mean white and white now mean red? 4). Are the broken lights pictured below in good condition? 5). Would an insurance company prevail if it refused to pay for repairs for any of the lights below due to their good condition? Come to your own conclusions. Good luck to the officers, who try to enforce statutes that have such confusing language as "good condition".

STROKES & TIA

A stroke is the rapidly developing loss of brain function(s) due to disturbance in the blood supply to the brain. This can be due to ischemia (lack of blood supply) caused by thrombosis or embolism or due to a hemorrhage. As a result, the affected area of the brain is unable to function, leading to immobility to move one or more limbs on one side of the body, inability to understand or formulate speech, or inability to see one side of the visual field.

Warning Signs of Strokes:

Any numbness or weakness of the face, arm, or leg, especially on one side of the body
Sudden confusion, trouble speaking or understanding
Sudden trouble seeing in one or both eyes
Sudden trouble walking, dizziness, loss of balance or coordination
Sudden severe headaches with no known cause.

A transient ischemic attack (TIA) is a short-lived episode (less than 24 hours) of temporary impairment to the brain that is caused by a loss of blood supply. A TIA causes a loss of function in the area of the body that is controlled by the portion of the brain affected.

RESPONDING TO A STROKE SITUATION

If a law enforcement officer, prosecutor or Judge sees a person showing any of the symptoms of stroke, he/she should immediately get the person medical attention. The affected person should lie down flat to promote optimal blood flow to the brain. Three commands can be used to assess whether a person is having a stroke. They are:

1)Smile,
2) Raise both arms and
3) Speak a simple sentence.

The commands, known as the Cincinnati Pre-hospital Stroke Scale (CPSS), are used by the medical profession as a simple first step in the assessment process. If a person has trouble with any of the three commands, a call to 9-1-1 is in order.

Not everything that looks like a stroke is a stroke. Some things can mimic a stroke including an overdose of certain medications, a migraine headache, brain tumors and bleeding in the brain either spontaneously or from trauma.

IMMEDIATE RESPONSE IS CRITICAL

There is a need to rush to medical care because if the stroke symptoms do not resolve, there is a very narrow window of time to use alteplase (Activase, TPA), a clot busting drug, to reverse a stroke. Within three hours of the onset of stroke symptoms, the patient needs to get to the hospital, have the initial diagnosis made, have blood tests drawn, a CT scan done to insure that bleeding is not the cause of the stroke, a neurologist needs to be consulted, and the drug given. The earlier the patient is given TPA for stroke, the better the potential outcome and the lower the risk of complications.

As officers strive to protect and serve, their community caretaking duties include responding to dangerous medical situations. In the stressful environment of a Courtroom, Judges and lawyers may find a colleague, crime victim or bystander experiencing stroke symptoms. Awareness can result in a life saving response. Be aware. Learn more at: www.**stroke**association.org.

STATE OF TENNESSEE

REQUEST FOR BLOOD WITHDRAWAL (Non-Mandatory)

DATE: _____ TIME: ___:___ AM __ PM __

COUNTY:_____CITY : _____

_____
(*NAME OF HOSPITAL – CLINIC – LAB – ETC.)*

Tennessee Code Annotated 55-10-406 (a)(2) provides that a qualified individual who properly draws blood per a written request from a law enforcement officer shall not incur any civil or criminal liability.

The undersigned, a legally constituted law enforcement officer of the State of Tennessee, hereby requests

_____
(Name and title of physician, registered nurse, licensed practical nurse, clinical laboratory technician, licensed paramedic, licensed emergency medical technician, technologist, or nationally registered phlebotomist).

to obtain a blood sample to be used to determine the alcohol and/or drug content of the blood of _____.
(Name of suspect)

This request is in compliance with Tennessee Code Annotated 55-10-406 **so as to relieve the above individual withdrawing the blood from any criminal or civil liability for proper withdrawal of that blood.**

Officer: _____*NAME*
RANK *DEPARTMENT*

Original – to party drawing blood

Carbon – Officer

Note: This form should be presented to the qualified individual at the hospital, jail, fire department or ambulance. It does not replace the implied consent form, but will help the medical personnel know they are protected from frivolous law suits.

PRIOR OFFENSE BILL MAKES PROGRESS, STALLS

A bill that as introduced, permits arrest for DUI to toll the 10 and 20 year provision between convictions for purpose of determining a multiple offender passed the House, but was deferred in the Senate until January, 2010.

STATE OF TENNESSEE

REQUEST FOR MANDATORY BLOOD WITHDRAWAL

DATE: _____ TIME: ___:___ AM__ PM __

COUNTY: _____ CITY: _____

_____

(*NAME OF HOSPITAL – CLINIC – LAB – ETC.)*

Tennessee Code Annotated 55-10-406 (f)

(1) If a law enforcement officer has probable cause to believe that the driver of a motor vehicle involved in an accident resulting in the injury or death of another has committed a violation of §§ 55-10-401, 39-13-213(a)(2) or 39-13-218, the officer **shall** cause the driver to be tested for the purpose of determining the alcohol or drug content of such driver's blood. Such test shall be performed in accordance with the procedure set forth in this section and **shall be performed regardless of whether the driver does or does not consent to such test.**(Emphasis Added).

(2) The results of a test performed in accordance with this subsection may be offered as evidence by either the state or the driver of the vehicle in any court or administrative hearing relating to such accident or offense subject to the Tennessee rules of evidence.

EFFECTIVE DATE JULY 1, 2009

Tennessee Code Annotated 55-10-406 (f) as set forth above, makes it mandatory for a law enforcement officer to obtain a test for the purpose of determining the alcohol or drug content of a drivers blood under certain circumstances as set forth in that code section. The Legislature has made it clear that this test shall be performed regardless of whether the driver does or does not consent to such test. The Tennessee Court of Criminal Appeals in State v. Mason, 1996 TENN. Crim. App. LEXIS 163 has ruled that reasonable force can be used to obtain blood in certain circumstances. This includes restraint of a struggling individual. T.C.A. 55-10-406(a)(2) provides that a qualified individual who properly draws blood per such a written request shall not incur any civil or criminal liability.

Pursuant to the mandate of the above law T.C.A. 55-10-406 (f), the undersigned, a legally constituted law enforcement officer of the State of Tennessee, hereby requests

_____

(Name & title of physician, registered nurse, licensed practical nurse, clinical laboratory technician, licensed paramedic, licensed emergency medical technician, technologist, or nationally registered phlebotomist)

to obtain a blood sample to be used to determine the alcohol and/or drug content of the blood of

_____

(Name of suspect)

This request is in compliance with Tennessee Code Annotated 55-10-406 **so as to relieve the above individual withdrawing the blood from any criminal or civil liability for proper withdrawal of that blood.**

Officer: _____

NAME *RANK* *DEPARTMENT*

Original – to party drawing blood
Carbon - Officer

(Continued from page 12)

MANDATORY BLOOD DRAWS & THE ELECTED D.A.

the ones paying ultimately the heads of those agencies may also wish to be present during the meeting. As the discussions continue care must be taken to assure the hospital administration that every effort will be taken to minimize the inconvenience and lost lab hours to hospital staff as a result of the need to have them testify. That promise must be kept in order to avoid future breakdown of the negotiated agreement.

If an agreement cannot be reached alternatives must be explored. These include emergency medical services in your jurisdiction. Remember the immunity granted to hospitals under 55-10-406 (2) applies to paramedics and EMTs as well as well as RNs, LPNs lab techs and phlebotomists who draw blood at the ***written request*** of a law enforcement officer. Try to enlist the help of those ambulance services who are likely to be at the scene of these tragedies. Or in the alternative discuss with the local law enforcement agencies an on call system for those authorized under the statute to draw blood as described above. (Chattanooga uses this system). This allows for a cost effective alternative to the hospital's participation. But in order to ensure the application of immunity make sure the agencies in your jurisdiction make a WRITTEN REQUEST for the blood draw.
(I have drafted a new form for this purpose and will place a copy on the Conference website along with a modified implied consent form for use in mandatory blood draw cases).
The time to deal with these issues is NOW. Preparation is the key.

MORE NEW LAWS IN 2009

Public Chapter 201 Bans Texting while driving. Key provisions:
(b) No person while driving a motor vehicle on any public road or highway shall use a hand-held mobile telephone or a hand-held personal digital assistant to transmit or read a written message; provided, that a
driver does not transmit or read a written message for the purpose of this subsection (b) if such driver reads, selects or enters a telephone number or name in a hand-held mobile telephone or a personal digital assistant
for the purpose of making or receiving a telephone call.
(c) The provisions of this section shall only apply to a person driving a motor vehicle that is in motion at the time a written message from a mobile telephone or hand--held personal digital assistant is transmitted or read by such person.

Public Chapter 342 Driving on right half of the roadway
TCA 55-8-115 requires that all drivers remain on the right hand side of the roadway except for a few exceptions like passing another vehicle or when driving a wide load or to avoid a construction zone or an emergency vehicle. The new law makes the traffic violation a misdemeanor if as a result of the violation an accident occurs resulting in death or serious bodily injury.

Public Chapter 241 Escape from an officer
The escape law has been amended so that escape from an officer is now an escape like an escape from a jail.
Key provisions:
(b)(1) A person commits the offense of escape who is in the lawful custody of a law enforcement officer and knowingly escapes such custody.
(2) As used in this section, "lawful custody" means a person has been taken, seized or detained by a law enforcement officer either by handcuffing, restraining or any other method by which a reasonable person would believe places such person in custody and which otherwise deprives the person's freedom of action in a significant way.

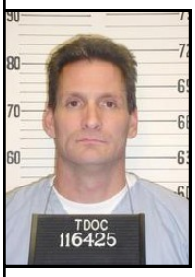
Public Chapter 370 Financial Responsibility in ALL Traffic Violations
The financial responsibility law now requires officers to request proof of insurance in all traffic violations, since the word "moving" has been struck from TCA 55-12-139 (b). This would include seat belt violations, red light camera violations or any other traffic violations set out in under chapters 8 and 10, parts 1-5, and chapter 50 of the TCA; any other local ordinance regulating traffic; or at the time of an accident for which notice is required under § 55-10-106.

VEHICULAR HOMICIDE MURDERERS ROW AND AN UNDERAGE PARTY HOST

State v Huffman, 2009 Tenn Crim App Lexis 352 **WHO KNEW THE JUDGE WAS LIKE GOD?**

Benjamin Huffman entered nolo contendere pleas to two counts of vehicular homicide based upon driver intoxication, a Class B felony, and pled guilty to one count of reckless aggravated assault, a Class D felony, one count of reckless endangerment, a Class E felony, and one count of driving on a revoked license, first offense, a Class B misdemeanor. The parties agreed to an eight-year sentence on one of the vehicular homicide convictions but left the defendant's sentence on the other vehicular homicide count to the discretion of the trial court. Following the hearing, the Court imposed a twelve year sentence for the second homicide and ordered the sentences to be served consecutively. Huffman, with a .15 BAC left the road, over corrected, slammed into a school bus and killed his two teenage passengers. Huffman was driving on a revoked license for DUI at the time. Huffman had many tattoos on his body, but the one that gets some attention is in the photo on the left. It reads, "Only God can judge me, not the f—-ing DA." Guess he forgot about the Judge.

State v Bradley, 2009 Tenn Crim App Lexis 428 **SLOW LEARNER**



Donald Bradley is another guy who just doesn't get it. Bradley committed a vehicular homicide in 1986 and went to prison for a year. He has not stopped committing crimes. His latest complaint was to appeal his six year consecutive prison sentence for felony evading, while driving on a revoked license after stealing a car at gunpoint. He was serving eight years on probation for felony evading at the time. Bradley had numerous prior felony and misdemeanor sentences. He had received probation even after killing another, robbing more and evading previously. He will now serve part of fourteen years.

Bradley priors

EVADING ARREST (FLIGHT)	12/17/2007
DUI, 4TH OFFENSE & SUBSEQUENT	02/07/2006
EVADING ARREST (RISK OF DEATH)	02/07/2006
EVADING ARREST (FLIGHT)	09/05/2002
RECKLESS AGGRAVATED ASSAULT	11/20/2001
ROBBERY	04/19/1990
AGGRAVATED ROBBERY	04/11/1990
AGGRAVATED ROBBERY	04/11/1990
VEHICULAR HOMICIDE	02/12/1987
BURGLARY - 1ST DEGREE	02/12/1987

State v Kiestler, 2009 Tenn Crim App Lexis 52
HOW NOT TO HOST A PARTY: SERVE THE KIDS BEER, POSE, WRITE ABOUT IT ON MY SPACE, GO TO JAIL

Brittany Kiestler, 27, was hosting a party. There was plenty of alcohol. The kids loved it. They loved it so much that the drinking teens and the defendant posed for some pictures holding their drinks up for the camera. The party was called a "drunkenfest" by a friend on My Space. The defendant wrote, " Of course I have some friends that are underage but cool as hell to me. . . . It seems nosy folks, you women at the courthouse, cough, cough, are making rude comments and trying to raise hell because I have a few pics with them drinking on there. . . . Every pickup with them . . . in it, their parents know what they are doing. . . . Y'all are not their parents, so you have no right trying to throw your two cents in. . . . When I have my parties, yes, there is drinking involved, but I don't pressure anyone into doing it. . .They can drink a Coke for all I care, just as long as they are having fun. . . . You can't say that your . . . kids haven't [done] the same." Brittany received a two year sentence.

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THE CRASH PAGE

By Jim Camp

MANDATORY BLOOD DRAWS & THE ELECTED D.A.

Picture if you will a crash scene. An impaired driver has been involved in a triple fatality accident killing the family of a prominent Tennessee politician. The driver is injured and is life-flighted to the emergency department at a major metropolitan hospital. One of the investigating officers responds to the hospital. Based upon his observations at the scene, statements of witnesses and the presence of an open beer can in the suspects car the officer has probable cause to believe the driver is impaired. The officer first requests blood using the implied consent form. The suspect refuses any test. The officer then makes a written request for blood pursuant to 55-10-406(f). Hilda the Head Nurse takes one look at the request and shakes her head violently. "Not without the patient's consent." you will be taking blood from my patient will be over my dead body." The officer leaves the hospital without the blood. The case is charged. The case is tried. Because the blood is not available for use by the defendant in his case the Court gives a missing evidence instruction. The jury, as a result returns a not-guilty verdict. The prominent politician turns his grief and anger towards the elected District Attorney who was unable to secure the conviction. As a result of his efforts the politician is successful in unseating the District Attorney. This my friends is a scenario that could occur as early as July 1, 2009. That is the date 55-10-406(f) goes into effect.

Our job is to prepare and by preparation prevent the combined injustice as described above. This scenario is not far fetched. Nor is it unique to our state. As a former 17 year elected District Attorney in Wisconsin, I was faced with similar problems. You see in Wisconsin forced blood is allowed in ALL DUI cases. As is the case here I and other prosecutors in Cheese head land were faced with the same problem some years ago. What happens when the hospital refuses to draw the blood? There are several options.

First: The elected D.A. must talk to the hospitals likely to be involved in blood draws for their respective jurisdictions. This will include not only area hospitals but also regional trauma centers such as Vanderbilt Hospital. A full and frank discussion must occur involving the CEO of those hospitals, the Emergency Department Director and the hospital attorney. Care should be taken to educate all of those involved ESPECIALLY the attorney. It has been my experience as both a medical malpractice defense lawyer and an elected D.A. that many attorneys advising hospitals have little or no knowledge of the law as it exists in the DUI or criminal world. We need to provide them with a copy of the applicable law ahead of any planned meeting so they can appear educated in the area when their client is present. Making the hospital attorney look foolish is not a good way to accomplish our objectives. During the course of these discussions we must remember the hospital CEO is thinking one thing "How much is this going to cost my hospital?" To answer this question we must address the first and most pressing issue: Who is going to pay for the blood draw? The quick and logical answer is the law enforcement agency requesting it.

In my old jurisdiction the hospital agreed to draw the blood free of charge. If the hospital won't agree to do it for free a fair and reasonable cost must be negotiated. The potential negotiating ceiling must also be addressed with the heads of the respective law enforcement agencies before hand. Since they will probably be

(Continued on Page 10)