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Revisiting Schmerber v California

Forty four years ago, the U.S. Supreme Court in a 5-4 decision written by Justice Brennan, affirmed the DUI conviction of Armondo Schmerber. He and a pal had been drinking at a bowling alley in California on November 12, 1964. They left and the driver skidded, crossed the road and struck a tree. Both Schmerber and his bowling buddy were transported to a hospital for treatment. An officer had noticed signs of "drunkenness" both at the scene of the crash and at the hospital. He told Schmerber he was entitled to counsel, could remain silent and that anything he said could be used against him. Schmerber contacted a lawyer, who advised him to refuse the breath test he had been offered. The officer directed a physician to take a blood sample from Schmerber, which verified his intoxication. The blood test was admitted over objection at trial. Schmerber appealed all the way to the U.S. Supreme Court.

Schmerber argued that the test violated his 4th and 5th Amendment rights. First he argued the compelled blood test violated his right to not incriminate himself. The Court disagreed. Justice Brennan wrote: "The privilege against self-incrimination is not available to an accused in a case such as this, where there is not even a shadow of compulsion to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature. Petitioner's limited claim, that he was denied his right to counsel by virtue of the withdrawal of blood over his objection on his counsel's advice, is rejected, since he acquired no right merely because counsel advised that he could assert one."

Schmerber then argued that the compelled blood test violated his right to be free of an unwarranted search and seizure. Justice Brennan wrote: "In view of the substantial interests in privacy involved, petitioner's right to be free of unreasonable searches and seizure applies to withdrawal of his blood, but under the facts in this case there was no violation of that right. There was probable cause for the arrest and the same facts as established probable cause justified the police in requiring petitioner to submit to a test of his blood-alcohol content. In view of the time required to bring petitioner to a hospital, the consequences of delay in making a blood test for alcohol, and the time needed to investigate the accident scene, there was no time to secure a warrant, and the clear indication that in fact evidence of intoxication would be found rendered the search an appropriate incident of petitioner's arrest."

The Court also noted that blood tests are a routine part of life. "The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer routine in becoming blood donors." Breithaupt v. Abram, 352 U.S., at 436. (cont. page 5)

RECENT DECISIONS
SUPREME COURT FIXES LIGHT LAW ISSUE

State v Brotherton, 2010 Tenn. Lexis 878 **Sullivan saw the Light**

The Supreme Court reversed the Court of Criminal Appeals holding that Trooper Michael Sullivan had reasonable suspicion to stop the vehicle that had a partially repaired tail light. The broken tail light had been covered with red repair tape, but the tape only covered a bit more than half the light. White light glared from the opening and became the basis for the investigative stop. The Court did not conclude that tail lights have to be kept in mint condition. A repair that did not permit the escape of glaring white light would not justify a stop. The Court reversed the Court of Criminal Appeals, which had reversed the Trial Court. In the decision Justice Koch wrote:

> The Court of Criminal Appeals erred by considering only whether the taillight on Mr. Brotherton's automobile was "in good condition and operational" for the purpose of Tenn. Code Ann. § 55-9-402(c). A showing of reasonable suspicion does not require an actual violation of the law because "*Terry* accepts the risk that officers may stop innocent people" to investigate further. *Illinois v. Wardlow*, 528 U.S. 119 at 126. Thus, the proper inquiry should have been whether Trooper Sullivan had an "articulable and reasonable suspicion" that Mr. Brotherton's taillight violated Tenn. Code Ann. § 55-9-402, not whether Mr. Brotherton's taillight, in fact, violated Tenn. Code Ann. § 55-9-402.

This case was tried in the Criminal Court by the late A.D.A. Steven Jackson. He would be pleased.

State v West, 2010 Tenn Crim App Lexis 575 **Prescription Drugs; Therapeutic Levels and Interaction**

Cookeville Officer Robert Cantwell saw the defendant swerve into the middle lane on three occasions before returning to her lane. Once the defendant stopped in a parking lot after he activated lights, she began to pull out as he walked up to the car. The defendant could not find her driver's license; did not follow instructions when asked to say the alphabet from C to X; could not follow instructions and complete the finger dexterity test as requested and in the Walk and Turn; did not follow instructions when she did not touch heel to toe, keep her arms at her side or take the proper number of steps. The defendant submitted to a blood test and had Lortab and Soma in her system at high therapeutic levels. After she was convicted by a jury, she appealed and complained the TBI Forensic Scientist, Dawn Sweeney, testified improperly. Agent Sweeney, an expert witness, spoke of the effects of the pain killer and depressant and told the jury that they had impairing effects. She indicated the drugs cause drowsiness, dizziness, disorientation, and can slow down a person's thought process and cause confusion even at therapeutic levels. Agent Sweeney said that the drugs would probably also affect a person's ability to follow instructions. After a cross examination challenge as to whether the drugs would have greater effects when taken together, Agent Sweeney testified that they would during re-direct examination. The Court rejected the defendant's appeal and stated, "The State was entitled to clarify on redirect examination that, although not a doctor or pharmacist, Agent Sweeney, as an expert in toxicology, could testify about the effects of drugs on an individual." See State v. Chearis, 995 S.W.2d 641, 645 (Tenn. Crim. App. 1999) (observing that one of the purposes of redirect examination is to clarify the testimony of a witness during cross-examination). Our supreme court has observed that an expert witness "may acquire the necessary expertise through formal education or life experiences." State v. Reid, 91 S.W.3d 247, 302 (Tenn. 2002) (citing Neil P. Cohen et al, Tennessee Law of Evidence § 7.02[4] at 7-21).

RECENT DECISIONS

State v Hunt, 2010 Tenn Crim App Lexis 652 **Reasonable Suspicion of Driving out of Lane**

Hunt was convicted of DUI second offense and challenged his traffic stop. Corporal Okert of the Goodlettsville Police Department indicated that "he noticed two vehicles traveling bumper-to-bumper" in the left-hand lane. His attention quickly focused on the car in the lead, the defendant's vehicle, because it was "having difficulty staying in the lane of traffic" and weaving out of its lane of traffic "a number of different times."
The defense challenged the stop in part because the Corporal did not charge the defendant with violations of Tennessee Code Annotated § 55-8-123(a) (2006), which the defendant contends requires an officer to assess whether a driver unreasonably veered outside his lane. The Court of Criminal Appeals affirmed the Trial Judge, who found that reasonable suspicion for DUI justified the stop and the Court goes on to conclude that the defendant's behavior also justified an investigatory stop based upon TCA § 55-8-123(a).

State v Wilson, 2010 Tenn Crim App Lexis 646 **Third Offender; Traffic Stop**

In Putnam County, Deputy Brandon Masters spotted the defendant travelling toward him and he had to take evasive action to avoid getting hit. The Deputy turned around and as he did so, he saw the defendant swerve across the center line and back into his lane. For the next mile and a half to two miles, the defendant swerved in his own lane. The defendant smelled of drinks, had slurred speech and red eyes. He admitted to drinking three beers and a mixed drink and told the deputy he had back trouble and a bad knee, when field tests were requested. He also admitted he performed construction work for a living. When tested, he could not say the alphabet, complete a finger dexterity test, walk a straight line and he refused a blood or breath test. A jury convicted the defendant, who was found to be a three time DUI loser. On appeal the defendant challenged the traffic stop. The Court of Criminal Appeals affirmed the conviction.

State v Thompson, 2010 Tenn Crim App Lexis 727 **Statute of Limitations Commencement of Proceedings**

Defendant Thompson won a statute of limitations argument in the Trial Court. The Trial Judge dismissed a DUI after determining the statute of limitations for the misdemeanor had expired. The Court of Criminal Appeals reversed the decision. The case had not been tried in the Criminal Court within a year after arrest. However, the defendant had bound his case over to the grand jury prior to the running of the statute, so the prosecution had been commenced despite problems with the affidavit of complaint.

State v Daqqaq, 2010 Tenn Crim App Lexis 733 **SODDI Defense Fails, 9 Months in Jail**

Defendant Nader Daqqaq used the old favorite defense of "my passenger was really the driver and the officers were either blind, stupid or dishonest." It did not work. The jury convicted and Daqqaq received a sentence including nine months in jail.

State v Adkins, 2010 Tenn Crim App Lexis 721 **Prior Convictions**

Defendant Adkins argued that his two prior convictions for DUI should not have been admitted and that the State did not prove that he drove and crashed his truck. The Court affirmed the Trial convictions.

State v Berry, E2009-02028-CCA-MR3-CD **200 Days for DUI 3rd**

Berry was passing a police cruiser headed the other direction on a two lane road, when he left the roadway and hit the curb. The officer did a u-turn and pulled him over. Berry showed mental and physical signs of impairment during field sobriety testing. Morristown officer David Hancock provided an excellent description of the performance and of the purpose of the tests. The defendant had a sentencing hearing that did not go well for him after the trial. The Court affirmed his 200 day jail sentence.

INHALANT ABUSE

Study reveals that an estimated 44,000 adolescents a day – many with underlying respiratory conditions – put their health and lives at risk by using inhalants.

Approximately 143,000 young people aged 12 to 17 used inhalants in the past year while dealing with a condition like pneumonia, bronchitis, asthma, or sinusitis, according to a new study sponsored by the Substance Abuse and Mental Health Services Administration (SAMHSA). The study determined that the rate of use was 4.4 percent among adolescents who had at least one of the aforementioned respiratory conditions, similar to the rate among adolescents overall (4.1 percent).

The use of inhalants can seriously impair the proper functioning of the respiratory system in otherwise healthy individuals resulting in unconsciousness, coma or death – so it may pose an even greater risk to those with serious underlying respiratory conditions. Under any circumstances, inhalant use, or "huffing" can cause severe permanent injury or death even after just one use. Inhalants take many forms, are easily accessible and can become very addictive.

"No one should engage in huffing. The consequences can be deadly," said SAMHSA Administrator Pamela S. Hyde, J.D. "The fact that adolescents with respiratory problems are just as likely to engage in huffing as adolescents in general underscores the continued need to educate parents, teachers, service providers and young people about what they can do to prevent this misuse of common everyday products."

The study also provides insight into the prevalence of adolescent inhalant use by various demographic factors. For example it shows that among the general population, American Indian or Alaskan Natives adolescents were more than twice as likely to engage in huffing than Black or African American adolescents (5.5 percent vs. 2.5 percent). In addition, the study examines other issues such as the types of inhalants most commonly used by adolescents with at least one of the selected respiratory conditions used in the survey (pneumonia, bronchitis, asthma, or sinusitis).

The report, *Adolescent Inhalant Use and Selected Respiratory Conditions* is based on data collected during 2006 to 2008 from a nationally representative sample of 67,850 persons aged 12 to 17 who participated in *SAMHSA's National Survey on Drug Use and Health*. The full report is online at: http://oas.samhsa.gov/2k10/175/175RespiratoryCond.cfm.

INHALANTS AND DRIVING IN TENNESSEE

Once every couple of months the Traffic Safety Resource Prosecutors receive frantic calls from a local District Attorney or Law Enforcement Officer after an inhalant caused crash killed a citizen. Usually, the inhalant-abusing, young driver passed out while huffing and driving. In the vehicle were cans of propellants like Dust-Off. The caller expresses concern about proving that the driver was impaired pursuant to our legal definition of impairment.

Routinely, we ask the caller to send the propellant containers to the T.B.I. lab with the blood sample. The lab is then able to test for the specific ingredients listed in the propellant. The toxicologist or forensic scientist can then testify as to what drug in the propellant caused a stimulating effect on the central nervous system. This was an overly complicated manner concerning proof of impairment. To fix the problem the 106th General Assembly in 2010 passed Public Chapter 1080 to redefine impairment to include "substances" that effect the central nervous system. The new law takes effect January 1, 2011.

Schmerber v California (cont'd)

(continued from page 1)

For forty-four years compelled blood testing after a determination of probable cause for the crime of DUI has been accepted law. Some States implemented implied consent laws after Schmerber to permit drivers to refuse a test and suffer a penalty. In Tennessee our refusal penalty has involved license suspension. In some other States refusal is a crime, which carries jail time. In others refusal has never been permitted. In some refusal is permitted, but trumped by a search warrant.

As Tennessee implements changes to the implied consent law, including mandatory testing in death and injury cases, it is important to know what the Schmerber case stood for and what if did not. The case and subsequent cases concerning mandatory blood draws are available at http://dui.tndagc.org.

The U.S. Supreme Court during the Schmerber case. Seated from left: Justice Tom C. Clark, Justice Hugo L. Black, Chief Justice Earl Warren, Justice William 0. Douglas, and Justice John M. Harlan. Standing are Justices Byron R. White, William J. Brennan, Jr., Potter Stewart, and Tennessean, Abe Fortas.

Honorable Edward L. Davenport for the People

The people of California were represented in the U.S. Supreme Court by Edward L Davenport. I discovered that his Honor, retired Judge Davenport, still goes to his law office in Van Nuys, California at the age of 83. He spent 15 years in the Los Angeles City Attorneys Office handling every type of criminal prosecution, prior to being appointed to the Bench by Governor Ronald Reagan. He served as Judge of the Los Angeles Municipal Court for 25 years. Schmerber was tried and convicted at the trial level after his blood test was introduced into evidence. His conviction was affirmed by the California Courts and appealed to the U.S. Supreme Court. The appeal was heard on a Monday morning. It was the first case on the docket and the first and only time Edward Davenport argued before the Supreme Court. He was 38 years of age at the time. Davenport remembers being quite confident in his position although he now wonders whether he should have been so confident. He prepared for argument by discussing the case with a representative of the California Attorneys General Office, who was experienced in Supreme Court argument.

Davenport was sworn in by the Court that Monday morning, but did not leave to complete registration with the other lawyers sworn in that day, because Chief Justice Warren announced the Court was ready to proceed in the case. Davenport began his argument and was immediately interrupted with questions from the bench. Davenport had a pretty good idea of which Justices would vote for or against the State prior to his argument. He was pretty sure Chief Justice Warren, Justice Douglass and Justice Fortas would be against him. He was correct. They were joined in their dissenting opinions by Justice Black.

Justice Brennan was apparently chosen to write the opinion, because he was the most liberal of the Justices who were in the majority. Justices Harlan, Stewart, White and Clark made up the majority. Justice Harlan wrote a concurring opinion that would have held that no 5th Amendment implications were involved in compelled blood tests without testimonial compulsion.

Davenport recalled his week in Washington D.C. at the Court. He watched attorney Richard Nixon argue a privacy case. It was apparent that Nixon was not a favorite of Chief Justice Warren. Judge Davenport also remembered how he enjoyed calling a friend, a 9th Circuit Judge, who had ruled in the opposite way in another case. He had the pleasure of letting his friend know that his previous ruling was no longer valid.

Ten minutes on the phone with Judge Davenport permitted me to touch judicial history. When I asked why the case with such a hot issue was tried and not settled, reduced or dismissed, he answered he had no choice. He believed it was the right thing to do. That's a message for all of us. Do the right thing every day. One of your decisions may become a part of history! Tom Kimball

NEWS FROM THE DRE CONFERENCE

Jeb Bird

Hundreds of drug recognition expert officers and a small group of prosecutors gathered in Pittsburg, Pennsylvania for the 16th Annual DRE Conference in July. Nationwide experts discussed various aspects of the problems associated with mixing drugs and driving. Among the speakers was Jeb Bird, who has worked as a clinician treating clients with addiction and mental health disorders for over 30 years. He noted:

1. Drug addiction is a brain disease that affects behavior.
2. Recovery from drug addiction requires effective treatment, followed by management of the problem over time.
3. Treatment must last long enough to produce stable behavioral change.
4. Assessment is the first step in treatment.
5. Tailoring services to fit the needs of the individual is an important part of effective drug abuse treatment for criminal justice populations.
6. Drug use during treatment should be carefully monitored.
7. Treatment should target factors that are associated with criminal behavior.
8. Criminal justice supervision should incorporate treatment planning for drug abusing offenders, and treatment providers should be aware of correctional supervision requirements.
9. Continuity of care is essential for drug abusers re-entering the community.
10. A balance of rewards and sanctions encourages pro-social behavior and treatment participation.
11. Offenders with co-occurring drug abuse and mental health problems often require an integrated treatment approach.
12. Medications are an important part of treatment for many drug abusing offenders.
13. Treatment planning for drug abusing offenders who reenter the community should include strategies to prevent and treat serious, chronic medical conditions, such as HIV/AIDS, hepatitis B and C, and tuberculosis.

Dr. Barry Logan

Dr. Logan, Director of Toxicological and Forensic Services for NMS Labs, spoke about the dangers of mixing depressants and stimulants. Logan noted the bar myth that one would cancel out the other. It is not uncommon to find a person who has consumed a lot of alcohol drinking an energy drink to try to keep going. Defense attorneys sometimes argue the myth of cancellation. Logan explained how the different drugs affected the nervous system in different ways with each causing their own negative effects on the ability to drive. Cocaine and amphetamines were the most common stimulants. Morphine, oxycodone, meperidine and hydrocodone were the most common depressants. High doses of stimulants caused motor agitation, restlessness, hyperflexia and excitability. Depressant effects include slowed pulse and breathing, slurred speech, drowsiness, lowered blood pressure, poor concentration, fatigue and confusion, as well as impaired coordination, memory and judgment. Combined effects result in the alert drunk misconception in which a person feels awake and alert, but judgment and reaction time are badly compromised. A driver with lousy reaction time and bad judgment is now on the road speeding through intersections or inches away from slower moving traffic. The stimulant and depressant will act in opposition to each other and produce unnatural reactions. This can cause an individual to act out of character. The combination also plays havoc on the heart. For the drug recognition expert the downside of amphetamines can be tricky to recognize as the amphetamine crash can cause many of the same symptoms as narcotic analgesics.

VEHICULAR ASSAULT DECISIONS

State v Eatherly, 2010 Tenn Crim App Lexis 579 **Seven Days to Serve**

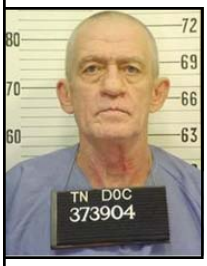
In Davidson County Sarah Eatherly slammed into a car with two young ladies who suffered substantial injuries including five severed tendons in one woman's arm. Eatherly had a .22 BAC while driving 100 miles per hour and talking on the phone. The 26 year old had consumed vodka at a party prior to the crash. During the sentencing hearing it was shown that Eatherly posted photos on MySpace showing alcohol abuse before and after the crash. (Picture on right). Her photos and descriptions indicated she was drinking excessive amounts and proud of it. The Judge sentenced her to two years suspended after 7 days. She appealed the denial of judicial diversion and lost.

State v Teaster, 2010 Tenn Crim App Lexis 802 **Four Years to Serve**

Teaster was driving in Greene County with a variety of prescription medications in her system. They included Soma and Valium. She was in a crash when she crossed into the opposing lane of traffic and ran head on into a van being driven by an 85 year old woman. The woman suffered numerous serious injuries including multiple fractures. Teaster was sentenced to serve four years in prison. Teaster argues the sentence was excessive and she should have received house arrest, alternative sentencing or less.

State v Pitts, 2010 Tenn Crim App Lexis 612 **Sixty Days to Serve**

The Defendant ran off the road while intoxicated, causing serious injuries to his passenger in a single vehicle crash. Pitts was speeding. His minimum speed when he left the road was 60 mph in a 45 mph zone. Pitts argued that his two year sentence suspended after 60 days in jail was excessive. It was not.



State v Chisholm, 2010 Tenn Crim App 76 **Four Years to Serve Consecutive to DUI 8th Offense**

Margaret Hicks suffered a fractured neck, fractured sternum, two broken ankles and knee injuries when George Chisholm turned from a side street and struck her head on. Her husband suffered a broken back, fractured left hand, and broken right hand. George Chisholm was on bond for his 8th DUI offense. During that offense his BAC was .21. He was also on unsupervised probation for weapons charges. When he drove into the Hicks vehicle head on his blood alcohol content was .22. Chisholm received a sentence of two years for his 8th DUI and four years for vehicular assault to be served consecutively. Chisholm argued that he should have received alternative sentencing due to his poor health. His health problems were associated with years of alcohol abuse. The trial court stated that the Defendant's actions caused many of his health problems and that the trial court was not willing "to allow the Defendant to stay loose and run the risk of killing someone."

6 years for Vehicular Assault in Sevier County

Randy Zlobec pled guilty on August 23rd, 2010 to 4 counts of vehicular assault and criminal impersonation in connection with a Labor day 2009 wreck. Four people were seriously injured. Zlobec received a 6 year sentence as a multiple offender with parole eligibility after 35% per cent of his sentence. Zlobec had pending heroin trafficking charges in South Carolina at the time of the crash. Zlobec had soma, amphetamine and methamphetamine in his blood at the time of the wreck and swam across the Little Pigeon River in an attempt to escape.

TENNESSEE ACTS OF 1881

By Tom Kimball

Every now and then it does us good to take a look back. After spending a great amount of time in the Tennessee General Assembly this past session, I was surprised to receive from my good wife a copy of the Acts of 1881, which she found at a yard sale. It is hard to imagine the General Assembly before computers, instant communication and booming microphones, but they made things work and rode horses home.

The Legislature in 1881 was concerned with many of the topics of today and some unique to their time. The separation of Church and State was different then. This was evident in several resolutions. For instance: *House Resolution XXI* stated that the "Superintendent of the Capitol be and hereby is instructed to permit the Nashville Commandery of the Knights Templar to meet in and have use of the Legislative Chamber on Easter Day of this year and also the year 1882 for religious celebrations."

The Legislature was sympathetic to the struggles of Ireland and passed resolutions condemning the treatment of the Irish people, who were fighting absentee landlordism "constitutionally and peacefully".

The Legislature was concerned with the mistreatment of "coloreds" even though the Acts failed to condemn the separation of races. As an example Public Chapter CLV (65) changed the practice of railroads, which would collect first class fare from "colored" passengers and compel the passengers to occupy second class cars "where smoking is allowed, and no restrictions enforced to prevent vulgar or obscene language." The Act required the railroads to accommodate the passengers in first class accommodations in separate cars or cars cut off by partition walls. Failure of the railroads to follow the law resulted in a $100 fine to be split between the person suing and the common school fund of the State.

Animal cruelty was addressed in Public Chapter CLXIX. Cruelty was named a misdemeanor and included dog and cock fighting, neglect and improper transportation. Societies for the prevention of cruelty to animals were given arrest powers. Fines and penalties went to the Societies.

Of course, the Legislature was concerned with additional crimes. Apparently mobs had been suppressed in Springfield and Winchester in 1880. That got some attention. Some prisoners had been removed from jails and killed. That resulted in a new crime for Sheriff's who failed to protect prisoners.

Sumner County was authorized to open a workhouse. People who failed to pay their fines and court costs were confined and forced to work off their payments at seventy-five cents for every nine hours of work per day.

The Legislature was concerned with unethical behavior of members. A joint committee with six members from the House and five members from the Senate was appointed to examine claims that members had taken bribes in exchange for votes.

The members agreed to visit the widow of President James K. Polk to pay their respects en mass on a day and time convenient to her.

The expenditures of the State were listed. Each Representative and Senator was listed with his mileage and per diem. For instance, Rep J.H. Agee travelled 630 miles and was compensated $100. He was also given $300 in per diems for 75 days of service. Things were a little cheaper back in 1881.

Taxes were charged like today's privilege taxes. Veterinarians paid $10 per year. Telegraph and telephone companies paid $250 per year. Theatres paid $500. Many different businesses were named, but all other professions paid $10. That would include the lawyers of the day. There was also established a state property tax. No income or sales tax appeared in the tax law of 1881.

Public Chapter XL punished providing alcohol to persons under the age of 21. The fine was $10-$200. The penalty included the loss of a liquor license for 12 months, unless the parent of the child consented to the purchase. A second violation resulted in a perpetual revocation of the liquor license.

Many of the topics of concern in 1881 are still topics of concern today. One thing is certain. We aren't as thrifty with our time and paper. Every law and resolution passed in 1881 and a list of all businesses with Corporate Charters were contained in one 383 page book. In 2010, the Appropriations Act alone was 133 pages. I wonder what would happen if for one year we had a 383 page cap of legislative action?

7 Excuses for Alcohol/Drug Abuse

In the Court system we hear every excuse imaginable for excessive drinking or drugging. The reality is that some people will keep drinking and/or drugging and driving until they win the battle with abuse, their liver fails or they die. Treatment and monitoring of offenders not only helps provide safety for the public, but often leads to major changes permitting the offender to have a life that no longer involves jail, crashed cars and broken relationships. First, the excuses have to be rejected.

#1 The Functional Alcoholic:

The Myth: He/she works, pays the bills and appears to be successful. He/she claims alcohol or drugs make that possible. Every day includes recovery from the night before.

The Truth: The reality is the career of the person is suffering. Clean and sober, the efforts of the person will lead to greater success and reward. The drugs and or alcohol limit success. They don't Empower success.

#2 - Social Well Being:

The Myth: Without alcohol or drugs the person believes he/she can't communicate or have a good time with the opposite sex.

The Truth: Alcohol does depress inhibitions, but it leaves people with a false image of the person. The character with a lampshade on his/her head may well be a thoughtful and considerate person acting the fool to get attention, but does the attention last beyond the night of the party?

#3 - I'm not hurting anyone.

The Myth: I can do what I want and when I want without causing harm to anyone.

The Truth: Everyone who cares is affected by the abuser of drugs or alcohol.. As the friends and family of the abuser helplessly watch the downward spiral to the bottom of the cesspool, each is damaged.

#4 - Everyone else drinks, why not me?

The Myth: Some people drink alcohol in moderation, socialize and act responsibly at closing time. Some people don't drink alcohol at all.

The Truth: Alcohol abusers don't have the same control and can't turn off cravings. A percentage of people can't drink any alcohol at all without drinking excessively.

#5 - My problems are too severe.

The Myth: Some think they can't handle their problems without alcohol or drugs. They claim that their problems are just too overwhelming.

The Truth: The truth is that their problems are greatly complicated by their addiction, because they sabotage their own lives and efforts at making any kind of real growth.

#6 - I can stop whenever I want:

The Myth: Denial is just a river in Egypt.

The Truth: When severe legal consequences, family problems and employment issues would make most people aware that they are going downhill in a hurry, the alcohol abuser finds a way to blame everyone else, so he/she can keep drinking.

#7 - I suffer from a medical problem and need my drugs/alcohol

The Myth: Abusers tend to over-medicate and wash down their pills with booze. If one pill helps the problem, two or three must help it two or three times as much.

The Truth: Generally speaking, properly medicating pain does not produce negative consequences! Abusing medication does. Medications are given in a dose to help minimize the medical condition. That doesn't mean a person can stop acting responsibly. Many medications have side effects that impair driving if taken as prescribed. The effects are more severe when the medications are abused.

VEHICULAR HOMICIDE MURDERERS ROW

15 years for Aggravated Vehicular Homicide in Monroe County

Eric Pedersen, 41, of Tellico Plains, TN has received a 15 year sentence. He killed his passenger, Angela Nichols, when he lost control of his pick up, went down an embankment and slammed into a tree. Peterson had a .20 blood alcohol level and one prior DUI conviction from Rio Rancho, New Mexico in 1990.

20 year sentence for Vehicular Homicide by Intoxication in Dyer County

Vincent Love Williams, 42, of Dyersburg received a 20 year sentence. He killed Jeffrey Richardson when he stole a truck, led police on a high speed chase and slammed into Mr. Richardson's vehicle at an intersection. Williams faced charges of first-degree murder, vehicular homicide as a result of intoxication, theft of property in excess of $1,000 and evading arrest in a motor vehicle. With the consent of Richardson's family, Williams pled guilty to the vehicular homicide charge and the rest of the charges were dropped. Richardson, who had a .07 B.A.C. and cocaine in his system, received the maximum penalty for vehicular homicide by intoxication for a multiple offender.

State v Mrozowski, 2010 Tenn Crim App Lexis 423 **8 years Vehicular Homicide**

The defendant left the road, crashed into cars at a car lot and killed Richard Scalf, who was standing in the car lot. Mrozowski had taken Dihydrocodeine and Dihydrocodeinone, which was prescribed to her. Mrozowski requested alternative sentencing and argued that because her case involved prescription medicines instead of alcohol, she should be treated less severely. The Court affirmed the denial of alternative sentencing due to her two prior DUI convictions in 1996 and 2000.

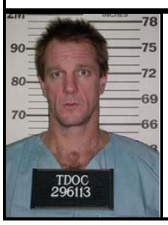
State v Pinkins, 2010 Tenn Crim App 478 **Child killed by driver with seizures. 6 months in workhouse**

Linda Pinkins testified she had seizures off and on for a decade. She took medications for diabetes and for her seizures. Sometimes she would black out for a few minutes. After an accident resulting in injuries in 1990. She was not allowed to drive for six months. She had "accidents" in 2003 and 2006. Pinkins, a school secretary in Memphis blacked out in 2008 and struck two cars. A seven year old child was killed and three people were injured. Her request for judicial diversion was denied due to her driving history and knowledge of the risks she took when driving and the nature of the crime.

CITIZEN INFORMANT PROVIDES BASIS FOR SEIZURE

State v Patterson, M2008-01988-CCA-R3-CD Sept 30, 2010

A fireman on his way to work saw the defendant driving dangerously. The driver crossed the center dividing line and nearly struck a van. The fireman called 9-1-1, flashed his lights, honked his horn and got the driver to pull over. The fireman was also an emergency medical technician. He went up to the car and asked the defendant if he was having medical problems. He smelled alcohol and spoke to the defendant several minutes. When the defendant realized he was not a law enforcement officer, he peeled out and nearly hit the fireman. Later, the defendant was found by the police sleeping in his driveway with the engine running. The defendant refused to get out of his car or unlock his door. He was pulled out after a slim-jim was used to open the door. The Court affirmed the seizure, arrest and conviction.



Bond jumper arrested in Florida

John Lynch is facing trial for his 11th Tennessee DUI and for violation of the habitual traffic offender law. He skipped out on bond two years ago and was arrested in Key West, Florida for yet another DUI. After extradition his bond was set at half a million dollars. Note to bond jumpers: if you are on the run, lay off the margaritas!

60,48 and 52 year Sentences for Vehicular Homicide

State v Craft, 2010 Tenn Crim App Lexis 710 **60 year sentence**

Terry Lynn Craft, 46, had a blood alcohol level of .15 when he drove like a madman at ridiculous speeds and crashed into and killed Gayla Hilliad and James Mullins. Craft was convicted and received two thirty year sentences to be served consecutively due to his long criminal history. Craft did not appeal his 60 year sentence. Instead he appealed whether there was sufficient evidence to support his convictions and whether a 9-1-1 call from a truck driver who witnessed the crash should have been heard by the jury. Craft lost on both issues.

In the trial Trooper Chris Lee testified as an expert in crash reconstruction and described his findings. He estimated that the victims' Explorer had been traveling at a minimum of sixty-six miles per hour at the time of impact. He could not say whether the Explorer had moved into the right lane shortly before the crash, but noted that it had been traveling completely straight at the time of impact. The defendant's Alero had been steering slightly to the left in a probable attempt at evasive action.

The Trooper also recovered the crash data recorder from the Alero. The data recorder, commonly referred to as a black box, recorded information for five seconds prior to the crash. During that time Craft was driving at 99 m.p.h., until he hit his brakes one second before impact and reduced his speed to 78 mph. The Alero had forced itself under the back of the Explorer, removing the Explorer's back tires from the road and depriving Mr. Mullins of control over the vehicle.

A truck driver, James Miller, saw the crash happen and called 9-1-1. He did not testify, but the dispatcher who received the call played it for the jury. The Trial and Appellate Court held that the call satisfied the excited utterance exception to the hearsay rule. The case also includes an excellent discussion concerning the actions of various medical professionals and the important roles they played in gathering evidence.

State v England, 2010 Tenn Crim App 510 **48 years for 2 passenger deaths**

Bobby England was sentenced to 48 years in prison for two aggravated vehicular homicides committed March 14, 2008. His consecutive sentences of 24 years were affirmed by the Court of Criminal Appeals. His history include 5 DUI convictions, two felony convictions, failed attempts at supervision and the fact that he was on probation when he committed the offense. England wanted a lesser penalty, because the two people killed were his passengers. The Court found nothing in the law that recognizes that passenger deaths should be of less importance than any other.

State v Jackson, 2010 Tenn Crim App 404 **52 year sentence affirmed**

Jackson received a new sentencing hearing after the Court of Criminal Appeals remanded the case due to the improper use of one sentencing enhancement factor. The Trial Court set the same sentence after the rehearing and was affirmed. The Defendant argued that the punishment for vehicular homicide should be the same as for DUI. He argued: "there exists a fundamental inequity when two people, both of whom are serial drunk drivers, whose licenses had been suspended or revoked, and who were violators over a long period of time, receive vastly different sentences based on circumstances beyond their control and unrelated to their moral culpability." The State responded that the defendant cannot reasonably argue that an unjustified disparity in sentencing exists when two different defendants are sentenced for entirely different criminal offenses.

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70% OF ALL CELL PHONE CALLS ARE CONDUCTED IN VEHICLES
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THE CRASH PAGE

By Jim Camp

Cross Examination of Expert Witnesses

As trial lawyers we often see ourselves as razor sharp cross-examiners. Many times this is not really the case. If we are new to the game we probably stumble in and out of trouble while raising our voice and trying to act intimidating. If we are experienced prosecutors we probably rely on our instincts and hope to get lucky. Well done cross examination requires preparation. When the subject of the cross examination has specialized knowledge that exceeds our understanding of the subject matter, preparation is even more significant. When the witness has well developed communication skills and has experienced hundreds of cross examinations, preparation is even more significant. In other words preparation is even more important when the witness is an expert.

Preparation is Key

What is our greatest adversary in the cross examination of experts? It is fear. Fear that we don't know enough to understand the expert's opinion. Fear that we will hurt our case. And maybe most of all, fear that we may look stupid in front of our jury and our peers. How do we bolster our courage? By detailed and thorough preparation. What we don't know can in fact hurt us but as the wise man said, "knowledge is power". The more we know the more well armed we are for the upcoming conflict.

Speaking With Your Own Experts

Your expert is truly your best resource. Because of their specialized knowledge and experience they will most likely be able to anticipate the defense witness' opinion and rationale. They probably have at least met the expert and may have observed him or her on the stand. They are probably familiar with the defense expert's opinion from prior cases. Your expert is probably well versed in the science at hand and is familiar with written authority. Any publications that have been written by the defense expert are probably in your expert's possession. If not they can obtain them and provide them to you along with a layman's breakdown of the science and rationale involved. They can provide texts and websites to assist in your knowledge and understanding. They usually love to teach and will be eager to explain the science, opinions and rationale and will answer any questions you might have. However in order to take the greatest advantage of this resource you must do something normally difficult for attorneys. You must discard your pride. You must honestly evaluate your knowledge or lack thereof and admit your limitations to your expert so they know just exactly how basic their explanation has to be. Don't be afraid to ask them to repeat or rephrase an explanation until you understand it. They know you don't know everything there is to know about the topic so don't pretend. Otherwise your pride will get you in big trouble. Be humble and don't be afraid to ask questions.

When the case goes to trial be sure to ask the court to allow your expert to sit in court during the direct and cross of the defense expert. This is especially important when you did not have the opportunity to discover or otherwise review the defense expert's opinion and report in the case. Your expert will be able to provide you with suggestions regarding additional areas of questioning. It will also help keep the defense honest knowing that your expert will catch opinions or other professional references that are overreaching or otherwise inaccurate.

Part 2 of this series will appear in the next issue of the DUI Newsletter.

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CONTACT YOUR TSRP!

If you are preparing for trial and receive notice that an expert will be called for the defense, contact one of your Traffic Safety Resource Prosecutors. They probably have transcripts, curriculum vitas, articles and web site materials related to the expert. If not, they will help you acquire the information you need to