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DUI NEWS

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"Standing Orders" Prevent Prejudice to the People

Defense Counsel Can Be Held in Contempt

By David Sherman

Has this ever happened to you? The defense accuses you of prosecutorial misconduct in the jury's presence. Or the defense objects and says: "That's a discovery violation; move for a mistrial." Or the defense improperly says in closing argument: "The defendant is not present today because he's in the hospital getting chemotherapy." Or the defense blatantly mentions something that was specifically excluded in pre-trial motions. You get the idea, I am sure.

In situations like these, the court should consider citing the defense counsel with contempt for displaying such an indifferent disregard of duty to obey pre-trial court rulings. Defense lawyers are arguably violating the Business and Professions Code by failing to respectfully follow court rulings and black letter rules of criminal procedure.

In every trial, I consider filing a "Motion to Protect Due Process of the People." The purpose of this motion is to put the court on notice that after the court has made specific rulings pre-trial and during trial, the People will urge the court to consider a finding of contempt if the letter or spirit of those rulings have been violated by defense counsel. This is especially important when dealing with a defense attorney known for "slash and burn" behavior and/or a judge who has a reputation for letting things slide. How do you hold their feet to the fire and ensure the People get a fair trial? Contempt and monetary penalties may be the answer.

Do you see the genius of this approach? Hit them where it hurts—in the pocketbook. Usually, when defense lawyers are repeatedly admonished for pushing the envelope, they get away with it by saying something like, "Sorry Judge, I guess I got carried away with how passionately I believe in my client's innocence." But imagine if every time they violate a direct ruling or engage in obvious inflammatory behavior, they are personally fined $500. The mere threat has been successful here in Santa Cruz County. The motion can serve as deterrence to constrain unfair practices. Thus the court should be urged to prophylactically promulgate "standing orders" to constrain unfair practice.

There are many factual scenarios that can affect the fairness of the trial. The court should be urged to consider the following four particularly important standing orders to protect the People:

1. No allegations of prosecutorial misconduct should be made in front of the jury. If a defense lawyer really believes, in good faith, that the allegation must be made, the lawyer should say "I would like to lodge an objection to protect the record and go sidebar." All sidebar discussions should be recorded. **(continued Page 6)**

RECENT DECISIONS

Prosecutors with affirmations in this article:

Matt Hooper,
LaTasha Wasson
Marla Holloway
Brandon Heron
Kelly Lawrence
Kelly Jackson
Derek Smith
Edith Sellars
Lance Webb
Brooks Yelverton
Bill Reedy
Greg Eshbaugh

State v York, 2011 Tenn Crim App Lexis 577 **Physical Control**

A car crashed. The road was blocked in order to let a tow truck driver pull the car from a ditch. When traffic backed up Fayette County Deputy Chris Rockholt went up to the defendant's car to explain the delay. He found an impaired driver. Another deputy, Dale Phillips, investigated. He conducted standardized tests and observed the defendant. His conclusion was that the defendant was intoxicated. The Court affirmed the conviction for DUI 4th offense stating the defendant was in physical control and that a DUI conviction can be based solely on an officer's testimony.

State v Reid, 2011 Tenn Crim App Lexis 572 **Oxycodone Driver**

Convictions for DUI 3rd offense and simple possession of Oxycodone were affirmed. Reid was passed out behind the wheel in a gas station. She kept nodding off during the investigation. When she was asked to empty her pockets, she attempted to hide half a blue pill. It was placed in an evidence bag. She complained of pain from handcuffs and they were moved, so that the cuffs were in front of her. The partition between seats was open to permit conversation. When the officer transported her to the hospital for a blood test, she slid through the partition and attempted to eat the bag and pill. She scuffled with the officer. She then refused testing. An interesting side note, the Court entered a judgment dismissing the implied consent charge. The Appellate Court noted that it was clear she had refused testing and reinstated the violation.

State v Pack, 2011 Tenn Crim App Lexis 580 **Reasonable Suspicion: Urination**

The defendant decided to relieve his bladder after turning onto a city street in Tullahoma. An officer was parked on the same street. The officer carefully approached the defendant avoiding the large puddle during the zipping phase of the crime and found an intoxicated, but relieved DUI 3rd offender. The defendant pled guilty, but reserved the issue of whether the officer had reasonable suspicion to approach him after he had exposed himself and relieved himself in public. He lost. It seems a bit incredible that someone had to write a brief about this topic!

State v Gettner, 2011 Tenn Crim App Lexis 655 **One for the Ages**

This case is noteworthy only because the DUI offender and violator of the habitual motor vehicle offender law committed his crimes and presented himself for sentencing when he was 92 years old. The Court had tried everything to keep the guy out of jail including putting his car on blocks. He drove another car. His appeal from his denial of a request for alternative sentencing failed.

State v Patterson, 2011 Tenn Crim App Lexis 657 **Credible officer, poor video**

The video of the traffic stop was poor quality, but did not contradict the testimony of an officer found to be credible by the Court. The testimony of the officer indicated the defendant was swerving over lane lines and did not maintain his lane of travel. The Court distinguished the case from State v. Binnette 33 SW3d 215 (Tenn 2000) in which the arresting officer did not testify and State v. Garcia 123 SW 3d 335 (Tenn 2003) in which the Supreme Court held that the evidence preponderated against the trial court's conclusion that the totality of the circumstances established reasonable suspicion for the stop.

RECENT DECISIONS

State v Brown, 2011 Tenn Crim App Lexis 703 **Appeal Does Not Stay License Revocation**

This defendant was convicted of DUI and his license was ordered to be revoked. He appealed and the Clerk gave him his license back. Later he drove and was charged with driving on a revoked, suspended or cancelled license. He was convicted and the conviction has been reversed. Since the Clerk mistakenly returned his license, it was not sent to the Department of Safety and was not revoked by the department.

"Revocation of driver license" means the termination by formal action of the Department of Safety of a person's driver license or privilege to operate a motor vehicle on the public highways, which termination shall not be subject to renewal or restoration except that an application for a new license may be presented and acted upon by the department after the expiration of at least one (1) year after the date of revocation.

"Suspension of driver license" means the temporary withdrawal by formal action of the department of a person's driver license or privilege to operate a motor vehicle on the public highways, which temporary withdrawal shall be for a period specifically designated by the department, not to exceed six (6) months for any first offense, except as provided otherwise under law.

This court has previously stated that a conviction is a "final conviction" for purposes of revoking a license even when an appeal of the conviction is pending. State v. Loden, 920 S.W.2d 261, 264-65 (Tenn. Crim. App. 1995); cf. State v. Sneed, 8 S.W.3d 299, 301-02 (Tenn. Crim. App. 1999) (regarding what constitutes a "final conviction" for purposes of determining whether a defendant is a habitual motor vehicle offender). The reasoning is that "to allow an individual convicted of and presumed guilty of driving while intoxicated to continue to operate a motor vehicle pending appeal would be inconsistent with the legislature's statement of public policy." Loden, 920 S.W.2d at 264. Furthermore, the reason for the Department of Safety's revocation of a driver's license "is not to punish the driver but is to protect the general public by removing a potential menace from the highways." Goats v. State, 211 Tenn. 249, 364 S.W.2d 889, 891 (Tenn. 1963). The revocation "is not a trial or conviction for a criminal act."

"With these considerations in mind, we conclude that a conviction becomes final for purposes of section 55-50-501 and 55-50-503 when the trial court enters the judgment. At that time, the trial court should require the defendant to surrender his or her license to the court. The trial court should then forward the license along with a copy of the judgment to the Department of Safety as required by section 55-50-503. In this case, however, the trial court never forwarded the Defendant's license and a copy of his conviction to the Department of Safety. In fact, the court clerk eventually returned the license to the Defendant."

A conviction becomes final for purposes of section 55-50-501 and 55-50-503 when the trial court enters the judgment. At that time, the trial court should require the defendant to surrender his or her license to the court. The trial court should then forward the license along with a copy of the judgment to the Department of Safety as required by section 55-50-503.

State v Patrick, 2011 Tenn Crim App Lexis 590 **Knowledge of License Suspension Supports Stop**

Patrick's license was suspended and an officer knew it. The officer had received information that Patrick would be driving in a particular car with drugs. The officer checked the status of his license and it had been suspended several years before and had never been reinstated. With that knowledge the officer watched for and saw the defendant, tried to pull him over and had to chase him for a while. Patrick argued the stop should have been suppressed without success.

State v Ownby, 2011 Tenn Crim App Lexis 721 **Possible Excuses Don't Excuse DUI**

Ownby ran a red light, had the odor and bloodshot eyes. He did not do well on field sobriety tests. During cross examination the well trained deputy with four years experience admitted that things other than intoxication could cause a person to have bloodshot eyes, poor balance and run a red light. No evidence contradicted the fact that the driver was impaired. Mere possibilities did not support the defendant's appeal.

TRAFFIC CAMERAS

The Tennessee General Assembly spent a lot of time debating the use of traffic cameras in the last session. After all the debating was done Public Chapter 425 passed. The new chapter requires cities to conduct a traffic engineering study certified by a licensed engineer specializing in traffic engineering. Vendors may not participate or even suggest an engineer to the city. The new chapter restricts when a city can issue a ticket for turning right on red or left onto a one way road. Evidence must clearly show the front tire of the vehicle before the stop line while the light is red and then show the rear tire past the stop line while the signal is still red. There must also be a clearly marked sign indicating that no turn is permitted on red.

With respect to speed cameras the act prohibits the use of a camera within one mile of a reduction in the speed limit of ten miles per hour or more. Warning signs are required 500 to 1,000 feet before the camera.. Tickets for camera violations must be reviewed by a POST certified operator and be sent out within 30 days. The ticket must include the amount of the fine, which is up to $50 and state any additional fees or costs from the failure to pay or from being found guilty after contesting the violation.

Recently Dayton, Ohio, activated four speed cameras. For several months only warning citations were delivered to vehicle owners. Real citations began the first of August. They resulted in 3,500 violations in 17 days. Dayton police call it a rampant problem. One driver was seen speeding on the same street twice in 10 minutes. Speed is a contributing factor in about one third of all traffic fatalities nationally. Camera opponents point out that tickets from cameras greatly increase city revenues. For that reason they think the cameras have no purpose except the growth of revenue. They view the cameras as a tax on drivers, despite the fact that those who pay are those who violate traffic laws.

The issue of red light cameras is so hot that the new law resulted in an Attorneys General opinion a month after it became the law. Attorney General Cooper found that changing the definition of a valid traffic citation is well within the state's legitimate powers. Cooper cited 19th century precedent from the Tennessee Supreme Court recognizing the principle that changes in the rules of evidence do not impair contracts. Cooper noted that motor vehicle use is highly regulated, and camera vendors should expect those rules to change frequently.

"Chapter 425 does not favor one vendor over another, nor does it favor local governments at the expense of the vendors (since both parties might lose income under a revenue-sharing agreement)," Cooper wrote. "Rather, Chapter 425 would appear to favor motorists who are charged with misconduct. It enhances their ability to confront a live witness, instead of photographic evidence, at any contested hearing on the matter."

What does that confrontation look like? The POST certified officer looks at the video and comes to a conclusion. The driver looks at a video and comes to a conclusion. The Judge looks at a video and comes to a conclusion, which actually matters. It sounds a little bit like de novo review of DUI traffic stops, which we have lived with since Justice Barker wrote State v Binette, 33 SW3d 215 Tenn 2000. If a Judge can look at a video of a traffic stop and determine whether a person was seized after reasonable suspicion that a crime had occurred or was occurring, can a Judge look at a red light video to determine if a person ran the red light? Can a Judge look at a video of a fast car and determine if the car was speeding? It will be interesting to see how such cases are analyzed in the next few years. In the meantime, can't we all just slow down and stop for red lights and fix the problem.

RED LIGHT CAMERAS WIN POLL APPROVAL

A New Study released by the Insurance Institute for Highway Safety confirms that two thirds of drivers in big cities with an established red light camera system favor the camera program.

Among drivers in the 14 cities with red light camera programs, two-thirds favor the use of cameras for red light enforcement, and 42 percent strongly favor it. The chief reasons for opposing cameras were the perceptions that cameras make mistakes and that the motivation for installing them is revenue, not safety. Forty-one percent of drivers favor using cameras to enforce right-turn-on-red violations. Nearly 9 in 10 drivers were aware of the camera enforcement programs in their cities, and 59 percent of these drivers believe the cameras have made intersections safer. Almost half know someone who received a red light camera citation and 17 percent had received at least one ticket themselves.

THE HIPPA MYTH (cont'd)

(CRASH PAGE CONTINUED FROM PAGE 12)

The law was originally created in good faith to prevent uncontrolled use and publication of a patient's medical information. It was never meant to obstruct or prevent legitimate police or prosecutor investigations. The preamble states that disclosure is authorized if the request is in compliance with the law.
45 CFR 164.512(f) lists six of the basic exceptions to the non-disclosure rule. The exceptions are:

1. Disclosure pursuant to process and as otherwise required by law. (examples: Search warrant, subpoena)
2. Disclosure limited information for identification and location purposes for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person,
3. Victims of a crime.
4. Decedents, if the entity has a suspicion that such death may have resulted from criminal conduct.
5. Crime on premises if the entity believes in good faith constitutes evidence of criminal conduct that occurred on the premises of the entity.
6. Reporting crime in emergencies if such disclosure appears necessary to alert law enforcement to:
   (A) The commission and nature of a crime;
   (B) The location of such crime or of the victim(s) of such crime; and
   (C) The identity, description, and location of the perpetrator of such crime.

To accomplish this an administrative request can be made pursuant to 45 CFR 164.512(f)(1)(ii) (C(1)-(3)) for information relevant and material to a legitimate law enforcement inquiry. This is commonly referred to as a HIPAA letter. It would generally come from a prosecutor directing release of medical records pertaining to treatment of a particular individual and to allow the interviews of staff members by law enforcement agents. The language of this letter must be very specific to comply with HIPAA. A suggested form for such a letter will be provided at my HIPAA DUI breakout lecture at the October Conference in Nashville.

Read the law. HIPAA is a lot better for us than you may think.

DID YOU KNOW ABOUT TCA 57-3-406 (c)

No retailer shall sell any alcoholic beverages to any person who is visibly intoxicated, nor shall any retailer selling alcoholic beverages sell to any person accompanied by a person who is visibly intoxicated.

A Taylor Tip

Susan Taylor, an ADA in Memphis, passed along a suggestion for all. Whenever she has a DUI offender with a child passenger, she requires as the part of any resolution of the case that the parent attend parenting class. It may seem very basic that a parent should know better than to endanger a child by driving impaired, but apparently some need a class.

Standing Orders (cont'd)

"Standing Orders"
(continued from page 1)

2. Likewise, no allegations of discovery violation should be made in front of the jury. If a lawyer really believes, in good faith, that the allegation must be made, the lawyer should say "I would like to lodge an objection to protect the record and go sidebar." All sidebar discussions should be recorded.
3. No inflammatory speaking objections.
4. No conduct whatsoever that will unfairly inflame the passions of the jury and prejudice either side.

ARGUMENT #1: The People's right to due process and a fair trial is as important as the defendant's right to due process.

The People's rights are often violated when defense counsel pursues a win-at-all-cost strategy, including using inflammatory tactics. During trial, the court is too often placed in the difficult position of having to decide how to remedy the effect of improper defense conduct without also risking prejudice to the defendant. You cannot compromise the defendant's right to a fair trial because his or her lawyer violates the spirit and letter of the rules. All too often, any remedy is inadequate because it is well recognized that you cannot un-ring the bell. The jury has already heard the improper material. Plus, if the People are forced to make many objections in front of the jury, it can be perceived by the jury as obstruction or as an effort to preclude the introduction of evidence helpful to the defendant. If the court comments on the transgression, it brings more attention to the matter. The improper behavior should not take place in the first place. Thus, you should advise the court beforehand that, if necessary and in response to some obviously improper behavior by defense counsel, the People will request:

1. A hearing on the record outside the presence of the jury.
2. At that hearing, the court should consider a finding that the defense attorney acted contemptuously to impair the respect due to the court's authority or has committed willful disobedience of court orders.
3. The court should sanction the offending lawyer personally with either a fine or imprisonment in the county jail, pursuant to Penal Code section 166(a)(1), (2), (4), & (b)(1); and Business and Professions Code section 6068(a) & (b).
4. Alternatively, the court should consider reprimanding the offending lawyer in front of the jury and immediately explaining to the jury why it should ignore what has occurred and, if necessary, advise the jury that the People have not acted improperly.

Of course, not every improper act should be characterized as "willful" or "purposeful" misconduct. For the purpose of this motion, willful or purposeful misconduct occurs when an attorney demonstrates a pattern of unfair practices such as unduly arguing the facts and law in voir dire; excessive argument in opening statement and stating facts for which there will be no evidence; arguments that amount to jury nullification; excessive speaking objections; groundless accusations of prosecutorial misconduct; ignoring motion in limine rulings without going sidebar; etc.

However, be careful. As the saying goes, what's good for the goose is good for the gander. If you are willing to attack defense practice, you will inevitably invite attacks on your own practice. Be prepared to be perfect yourself. Explain to the court that you are not trying to invite a trial of charge and countercharge, bitter combat, and name-calling. You just want everyone to be on notice that you have a duty to protect the rights and interests of your client—and you will do so.

ARGUMENT #2: The court can cite the defense with contempt if it displays an indifferent disregard of its duty to obey pre-trial court rulings.

- The People of the State of California have the right to due process of law and to a speedy and public trial. (California Constitution, art. 1, § 29.)
- The court shall have the power to compel obedience to its judgments, orders, and process. (Code Civ. Proc. § 128(4).)
- The court shall exercise reasonable control over the interrogation of witnesses for the ascertainment of truth. (Evid. Code § 765.)

Standing Orders (cont'd)

- "Contempt" is defined in part as disorderly, contemptuous, or insolent behavior directly tending to impair respect due to its authority. (Penal Code § 166(a)(1).)
- Contempt is also defined in part as "willful disobedience" of any order, including orders pending trial. (Penal Code § 166(a)(4).)
- "Willful" as pertaining to contempt should not be construed as "meaning only a deliberate intention to dis regard a court order, but rather encompassing an indifferent disregard of the duty to obey it promptly." (*In re Burns* (1958) 161 Cal.App.2d 137, 142.)

Argument #3: Defense lawyers are violating the Business and Professions Code by failing to respectfully follow court rulings.

Business and Professions Code section 6068 states, in part (emphasis added):

It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state.

(b) To **maintain the respect due to the courts** of justice and judicial officers.

Cases have analyzed the duty of respect to the court in Business and Professions Code section 6068(b). In 2003, the appellate court in *People v. Pigage,* [(2003) 112 Cal.App.4th 1359, 1374; see also *Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 126], mandated that attorneys must respectfully follow court rulings, whether they believe those rulings are correct or incorrect. In the 1999 case of *People v. Chong*, [(1999) 76 Cal.App.4th 232,243], the court found that even if an attorney is incensed at an adverse ruling, he or she must not willfully disobey it and must maintain an attitude of respect to the court.2 An attorney is an officer of the court, so when he or she violates his or her obligations, a judge may protect the court's integrity and reprimand the attorney, (*Id.* at 243). Because trials are often fastpaced, a judge may reprimand an attorney in front of the jury because it is often not feasible to excuse the jury first, (*Id.* at 244).

The *Chong* court cited Business and Professions Code section 6068 for the proposition that "an attorney must not willfully disobey a court's order and must maintain a respectful attitude toward the court", (*Id.* at 243). Other California courts found that judges are entitled to receive courteous treatment from lawyers, in the same fashion as lawyers are entitled to receive courteous treatment from judges, (*In re Grossman* (1972) 24 Cal.App.3d 624, 629) and even the most zealous of attorneys, as an officer of the court, has "a paramount obligation to the due and orderly administration of justice", (Chula v. Superior Court of Orange County (1952) 109 Cal.App.2d 24, 39).

The duties under section 6068 should not be taken lightly. Business and Professions Code section 6103 explains that a violation of a lawyer's duties as an attorney may constitute cause for suspension or disbarment.

Conclusion

The court has the inherent power to control the courtroom and the presentation of evidence to a jury. If a prosecutor makes a mistake, the remedy is frequently one that hurts the People's case (continuance, precluding witnesses or evidence, admonishing the lawyer before the jury, drafting special jury instructions, commenting on the prosecution's failings, etc.). The court can also declare a mistrial.

However, courts sometimes loathe doing anything to hurt a defendant's case when a defense lawyer makes mistakes because such action can hurt the defendant, not the defense lawyer. The People cannot ask for a mistrial because a jury has been empanelled and jeopardy has attached. Thus, no matter how seriously and egregiously a defense attorney has violated the letter and spirit of the law, the People are stuck with a tainted jury that cannot be expected to disregard everything that has made the trial unfair.

You should respectfully request that pre-trial motions be carefully litigated, resulting in clear specific orders of what is, and what is not, acceptable during trial. If defense lawyers violate the express orders of the court, the court should consider holding the offending party in criminal contempt, pursuant to Penal Code section 166, and imposing fines or jail time to punish the contempt and deter others from playing fast and loose with the rules in future litigation.

STANDING ORDERS

David Sherman, an attorney for 30 years, is an assistant district attorney in Santa Cruz County, formerly prosecuting in Tucson and San Diego. He has been a teacher for 20 years, having taught at many area law schools, CDAA, APRI, and the National Advocacy Center specializing in trial skills and "train the trainers," and he was the technical advisor for the CDAA New Prosecutor Seminar for four years.

Are You a Dangerous Driver?

In 1996, near Washington, D.C., two 26-year-old drivers began dueling in their cars as they drove up the George Washington Parkway. Traveling at speeds of up to 80 miles per hour, the cars crossed the median of the parkway and hit two oncoming vehicles. Only one of the four drivers involved in the crash survived; he was sentenced to 10 years in prison for his role in the incident.

Aggressive drivers—those who operate a motor vehicle in a manner that endangers or is likely to endanger persons or property, according to the National Highway Traffic Safety Administration (NHTSA)—are becoming more common and more dangerous on our congested roadways. According to a NHTSA survey, more than 60 percent of drivers see unsafe driving by others, including speeding, as a major personal threat to themselves and their families. In fact, 1997 statistics compiled by NHTSA and the American Automobile Association show that almost 13,000 people have been injured or killed since 1990 in crashes caused by aggressive driving.

Clearly safety experts, law enforcement officials and the motoring public agree that something should be done to curb this threat on our highways. And in fact, traffic safety and enforcement organizations are renewing efforts to identify and penalize aggressive drivers—those who speed, tailgate, zip from lane to lane, flash headlights in frustration, and engage in other dangerous driving practices. Their options range from increasing fines to possibly suspending licenses for repeat violations. But before you point the finger at "the other guy," perhaps we would all do well to examine our own driving habits. Ask yourself, honestly:

- Do you routinely exceed the speed limit because you're in a hurry? Do you "try to beat" the red light for the same reason?
- Do you tailgate or flash your headlights when you're frustrated by the slower driver in front of you? Do you use your horn frequently to signal impatience?
- Do you switch lanes without first signaling your intention? Do you make sure you won't cut someone off in the process?
- Do you use your high beams routinely, and/or keep them on despite oncoming traffic?
- Do you let yourself get distracted while using your car phone, thus endangering and/or angering other motorists?
- Do you make eye contact with other drivers who are angry and trying to get your attention? Have you ever used an obscene gesture to communicate your displeasure with another driver?

Driving behaviors that are seen as "harmless" or permissible "just this once" can, at least, create unsafe situations and, at worst, lead to injury or death. Don't let highway congestion, a tight schedule or everyday stress turn you into an aggressive driver. Slow down, remain calm and keep your eye on the high road.

TRAINING NEWS

Congratulations to the 21 Tennessee officers who completed the 80 hour Advanced Crash Investigation Class June 6-17th in Nashville at the Tennessee Highway Patrol Training Academy. The class instructors were Kingsport Sgt Dale Farmer, an A.C.T.A.R. certified reconstructionist, and officers Rachel Gober and Brad Brandon of the Franklin Police Department. Topics included:

Speed estimates from kinetic energy~ skid marks~ scuffmarks and airborne situations
Vehicle dynamics and motion
Time~ distance~ and motion equations
Conservation of momentum calculations
Diagramming vehicle damage
Vehicle damage analysis explaining thrust~ center of mass~ overlap and collapse
Vehicle lamp examination
Tire damage evaluation
Advanced photography and video techniques
Vector sum analysis

Officers:	Departments:
Christopher Augustin	Metro Nashville PD
William Goodman	Dixon PD
David W. Burgess	Collegedale PD
Charles J. Travis	Sumner Co SO
Bryan Kirkpatrick	Brentwood PD
Chris Burgdorf	Brentwood PD
Kevin Coleman	Metro PD
Ryan Hartley	Metro PD
Thomas J. O'Brien	Metro PD
Leon Coleman II	Ft. Campbell PD
Mathew Elam	Ft. Campbell PD
Tony Wrinkle	Gallatin PD
Aaron Pickard	Sumner Co SO
Theodore Loftis JR.	Sumner Co SO
Jeffrey S. Brown	Metro PD
William Z. Waters	Metro PD
Erika Bowden	Metro PD
Barry Bunch	Blount Co. SO
Jared Patrick	Bristol PD
Paul S. Moore	THP
Jason Goslee	THP

To qualify for this course, each officer had to previously complete the At Scene Crash Reconstruction course.

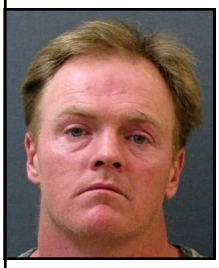
DID YOU KNOW ABOUT
TCA 57-4-203 (c)(1)

"It is unlawful for any licensee or other person to sell or furnish any alcoholic beverage to any person who is known to be insane or mentally defective, or to any person who is visibly intoxicated, or to any person who is known to habitually drink alcoholic beverages to excess, or to any person who is known to be an habitual user of narcotics or other habit-forming drugs."

A prosecutor may want to distribute to retailers a list of those who are known to habitually drink alcohol or habitually use drugs to excess as a service to retailers. This crime is a class A misdemeanor.

VEHICULAR HOMICIDE MURDERERS ROW

DUSTY McDONALD **Daughter killer gets 22 years**



On March 8, 2011, Alexis Thompson, 9 years old, missed the bus to take her home because she wanted to stay at school and attend a study session. Dusty McDonald married Alexis's mother several years ago and is the only dad Alexis has ever known. He was hanging out at home drinking beer when she didn't get off the bus. He then went to the school extremely angry that she didn't come home as she was told. At least one teacher was so concerned about his demeanor and the fact she caught a smell alcohol on his breath when he signed Alexis out, that she called the local police department, but unfortunately Dusty was still allowed to leave because he did not appear intoxicated at that point. He was overheard telling Alexis, "There will be consequences for your actions." He then called his wife and told her that he found Alexis at school and was going to ride around and discuss why she missed the bus. She never saw her daughter alive again. It appears that Dusty continued to drink beer after he picked his daughter up at school and just after 5pm lost control of his vehicle on a small back country road, straightened out a curve and crashed into a tree. Alexis was trapped in the vehicle, bleeding and slowly dying. Instead of trying to pry her out of the wreckage or help her in any way, Dusty crawled out of the truck and ran away. He was seen by at least 3 different people running from the scene and was told to stop by at least one person who had a cell phone and was calling for help, but he continued to run. A deputy ran him down shortly thereafter as he crossed a driveway. The defendant's blood test later showed a BAC of .20. At the time of the crash, he was driving on a revoked license from a prior DUI in Oregon and has at least 2 other DUI convictions on his history. Thankfully, citizens nearby the crash, emergency responders and law enforcement were with Alexis as she died. It is of some comfort to her mother that she did not die alone.

On September 8th , Dusty McDonald plead guilty to Aggravated Vehicular Homicide and Leaving the Scene of a Collision in which a death occurred and DORL 5th. He received a 22 year sentence to serve @ 30% with a 22 year license revocation. Alexis's mother lost a daughter and a husband that day and this family will never recover. It is travesty that Dusty will ever be allowed parole, but it is likely he will be let out before Alexis would have been old enough to graduate High School.

There are no winners in a case like this, a thousand things that could have changed the outcome, but as a father and husband, I cannot fathom how anyone could have left that baby girl there to suffer and die and just run away. This case has left a scar on every person involved with it including the prosecutor. I am just proud that I was able to get some kind of justice for Alexis and her family. I hope they are now able to start the healing process. The family and I commend the Sumner County Sheriff's Office and the THP for a well prepared case with virtually no holes through which Dusty McDonald could escape. These are the consequences of Dusty McDonald's actions.

(submitted by A.D.A. William Lamberth)

10 Year Sentence

Tiffany Isaza was sentenced to 10 years in Bradley County for killing 24 year old Dustin Ledford. The defendant, Isaza, had a blood alcohol level of .24. She was travelling north in the southbound lanes of a four lane highway, when she crashed with her children in her car. She was not eligible for an aggravated vehicular homicide penalty, because she did not have a prior DUI conviction to go together with her outrageous BAC level. The mother of the victim in the case has pledged to continue to lobby the General Assembly to add this situation to eligibility for the aggravated vehicular homicide law, which is a class A penalty.

VEHICULAR HOMICIDE MURDERERS ROW

State v Washington, 2011 Tenn Crim App lexis 602 **Motorcyclist killed 25 years**
In May, 2004 George Washington had a .34 blood alcohol level when he turned left in front of a motorcycle killing Marquentis Kearney. An eyewitness indicated that Washington pulled his Cadillac into the turn lane and never stopped. He turned about a half a car length in front of the motorcycle. Washington had six prior DUI convictions and received the maximum sentence for aggravated vehicular homicide as a range one offender of 25 years. He is already eligible for parole. I have no idea how a homicide in 2004 could result in a 2011 appellate decision. That's unusual even for Memphis.

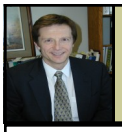
State v Johnson, 2011 Tenn Crim App Lexis 648 **Motorcyclist killed 10 years**
In September, 2008, James Johnson stopped at a red light. He pulled out against the light into the path of a motorcycle driven by Manuel Guzman. Guzman could not stop. He slammed into the 1994 Chevy truck being driven by Johnson and was immediately killed. Johnson had a blood alcohol content over .20. He pled guilty to vehicular homicide by intoxication and received a ten (10) year sentence. He then pled for probation. The defendant at the probation hearing proved he was a very sick man receiving radiation treatment for cancer five days a week. He had a least three prior DUI convictions, recognized that he had an alcohol problem and had done little to deal with it. The Court found that the case was horrible and that the defendant was not suitable for alternative sentencing.

State v Howard, 2011 Tenn Crim App Lexis 275 **On Bond Behavior Supports Sentence**
Defendant argued that the trial court erred by denying alternative sentencing under Tenn. Code Ann. § 40-35-103. The court of appeals disagreed. Relative to the trial court's denial of alternative sentencing, the presentence report reflected that defendant did not have any prior felony convictions. However, defendant was convicted of several misdemeanor offenses that occurred less than two weeks after defendant killed the victim as a result of his decision to drive while intoxicated and in excess of the speed limit. Defendant was ultimately convicted of possession of drugs, possession of marijuana, and driving while impaired. Defendant was also convicted of possession of marijuana in 2005 and criminal impersonation in 2006 and had abused alcohol and marijuana since age 12. Because the victim was killed as a result of defendant's impaired driving, confinement was warranted to avoid depreciating the seriousness of the offense. Additionally, given defendant's subsequent conviction for driving while impaired, defendant's behavior displayed a lack of potential for rehabilitation when the subsequent driving offense was committed less than two weeks after the vehicular homicide.

State v Boldus, 2011 Tenn Crim App Lexis 614 **Consecutive Sentences**
Defendant appealed judgments imposing consecutive sentences for vehicular homicide by recklessness and leaving the scene of an accident involving death. The appellate court found that defendant drove at a high rate of speed while excessively intoxicated with passengers in his car, engaged in an escalating pattern of dangerous driving behavior, consumed alcohol while underage, and admittedly drank and drove on other occasions. The appeal was denied.

KNOW THE LAW OF PAT DOWNS!

In July, the Court of Criminal Appeals reversed a drug conviction because they decided the officer involved in the case was not justified in conducting a pat down of the defendant. The case of **State v Mejia**, 2011 Tenn Crim App 583 confirms prior decisions concerning pat downs. The officer in the case was called to a scene where there was a large crowd. The defendant was in an argument over car keys with a female. The officer conducted a pat down **"for my safety and his, just so I didn't have to watch him and those people".** The Court ruled that the officer lacked reasonable suspicion that the appellant was armed and dangerous in order to justify the pat-down. The drugs found in the pocket of Samir Ramon Mejia were suppressed and he got away with his crime this time.



THE CRASH PAGE

By Jim Camp

CROSS EXAMINATION OF MEDICAL EXPERTS

Medical experts may pose a particular problem for many prosecutors who fear the science. In reality they shouldn't, because we usually have more resources at our disposal in this area than in any other.

As with any other expert research must be done. Qualifications must be examined and work history must be reviewed. The Physician's specialty must also be examined. Obtain a copy of the physician's curriculum vitae. Where did they go to school? What is their specialty? What specialties did they do their residencies and internships in and where? It must be determined if they are in fact qualified to testify regarding the issues in question in your case. Look carefully at the physician's memberships and accreditations. Membership in the State Medical Society is generally available to all physicians in otherwise good standing. Board Certification on the other hand is a peer review process that involves both written and oral testing. Having it can be a huge credibility builder. Lack of that certification can be used effectively on cross-examination particularly if your expert is Board Certified.

Take advantage of your local medical resources. Your own primary care physician is a good start. They can examine your expert's educational background and professional history and help you evaluate them. They can also help you understand the science. Your local hospital most likely has a medical library or computers with subscriptions to online medical reference sources. Talk to your physician again or the hospital CEO and see if you can use their resources for research. You will be surprised at what is out there and available to the general public.

Finally don't ignore the local high school and community college. Biology teachers can be a great aid in learning the science and in helping you do medical research as well as in the creation of exhibits for use during trial. They are usually more than happy to help and their energy and different perspective can be surprisingly helpful. As long as you do your homework regarding the specific medical issue in question you need not fear any expert witness. If you do your own due diligence they will in the end fear you.

THE HIPAA MYTH

Most prosecutors and law-enforcement officers eventually need health provider records in furtherance of a criminal investigation. This is particularly true in the DUI case. As a result we eventually run head on into the wall of the HIPAA myth. This myth permeates the halls of health care institutions nation wide. It is spread by health care providers who are usually trying to avoid sanctions for disclosing medical information without the patient's consent. One problem is most health care providers have never really read The Health Insurance Portability And Accountability Act. The other problem is few of us have read it either. We ask for records, not knowing what we are really entitled to under the law. They say no, not knowing what they can or cannot provide and we eventually accept their refusal and walk away frustrated while looking for other avenues to obtain the same information.

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