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DUI NEWS

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THE DUI RECIDIVISM ACT AND THE ROLE OF THE PROSECUTOR

Did anyone ever believe in 28 days of magic? At some time in our history Legislators decided to permit persons convicted of DUI 2nd offense to spend 28 days in a treatment facility instead of jail. The 28 day option sounded a lot like an alternative jail setting in the 1989 TCA. Court ordered participation in an in-patient drug or alcohol program was not to exceed 28 days. The person ordered to participate was to be confined and not be released until completion of treatment.

It is nearly impossible to discover why the number of 28 days was chosen. Neither this author nor his friends at the Department of Mental Health have found a single study indicating that 28 days of in-patient treatment is deemed effective to change the life of a DUI 2nd offender. I am certain that the in-patient treatment law was based on good intentions, if not good science.

Change is hard. President Eisenhower once said: "Neither a wise man nor a brave man lies down on the tracks of history to wait for the train of the future to run over him." The General Assembly in 2012-13 took on the task of rewriting our DUI laws expanding the role of treatment for DUI multiple offenders. In doing so, the General Assembly recognized that the type and manner of treatment should be left in the capable hands of experts. Lawyers are not the experts! Neither a prosecutor nor defense lawyer can develop an effective treatment plan for a DUI multiple offender. The days of agreeing to a 28 day treatment regimen as part of a plea negotiation are over.

The new law puts in place a mechanism in which the offender is convicted, goes to jail, undergoes an assessment and may then apply to engage in the treatment recommended by the mental health expert in lieu of some of his/her jail time. While a prosecutor might raise objections, the decision of whether to permit the offender to leave the jail and begin treatment is in the hands of the Judge based on the recommendations of the drug/alcohol assessment. The treatment decision occurs after the defendant has pled guilty and begun serving a sentence.

There is no course in law school that equips a lawyer to know what is best in treating the alcohol and or drug problem. At a September DUI for Prosecution Conference (page 9), Ellen Abbott, the Director of the Office of Criminal Justice Services for the Tennessee Department of Mental Health and Substance Abuse Services, reviewed how treatment services are determined for particular offenders.

The first step is **SCREENING**—a less extensive evaluation performed early in the process, possibly before a referral or shortly after. The screening focuses on the risk level for impaired driving and the extent of the problem. The second step is **ASSESSMENT**—this is an extensive evaluation conducted just before or upon entry into intervention and treatment. This guides decisions into the type and length of the intervention. There are several possible levels of intervention. Only two of the levels include in-patient treatment.

(Continued page 8)

RECENT DECISIONS

State v Hutchinson, 2014 WL 1423240 MURDER WARRANTLESS BLOOD TEST SUPPRESSION

In Knox County, a robber and murderer was convicted of facilitation charges. In an interesting twist, the Court found his blood test should have been suppressed, but the error was harmless. KPD Officer Joshua Shaffer received a call that a shooting was in progress near his location. He went to investigate. He found the defendant injured on the floor and a deceased victim in another room. Three witnesses were screaming. He stayed with the defendant while medical personnel treated him to preserve evidence. There was blood and tissue on the defendant's clothing. When they got to the hospital he requested a blood draw for drug and alcohol screening. The officer did not have reason to believe the defendant was intoxicated or drugged. The officer wanted the blood examined to see if it matched the blood at the scene. Forensic Toxicologist Melanie Carlisle testified there was cocaine in the blood. Based on the half life of cocaine, she noted it had been consumed within three hours. This is one of those in which a search warrant could have never been obtained in time to find the cocaine in the blood, but the Court seems to brush that aside.

State v Jones, 2014 WL 4101210 NO JUDICIAL DIVERSION FOR VEHICULAR ASSAULT

A case from Cheatham County Judge Wedemeyer with Judge Smith and Tipton explain why judicial diversion is not an option in a vehicular assault case. Since judicial diversion is not permitted for a DUI and DUI is a lesser included of vehicular assault, judicial diversion is not permitted for vehicular assault.

State v Cole, 2014 WL 3744427 THE COUSIN DROVE

The defendant argued at trial that his cousin was the driver. The SODDI defense failed.

State v Farley, 2014 WL 3744538 DRUGGED DRIVER GUILTY OF DUI 3RD OFFENSE

A Madison County jury convicted this driver of DUI, unlawful carrying of a weapon, violating the financial responsibility law, and violating the seatbelt law. The driver stumbled out of his vehicle, denied drinking and admitted taking some Oxycontin. Trooper Kevin Brown noticed really slurred speech, dry cotton mouth, thick tongue, would "brace hisself [sic] as he'd lean up against the vehicle and talk with me, just more or less in a stupor-type—just—I could tell he was under the influence." Dr. Tonya Horton testified about her forensic test of the blood which discovered the driver had 0.08 micrograms per milliliter of the opiate hydrocodone. She explained that the therapeutic range for that drug was 0.03 to 0.25 micrograms per milliliter. She stated that the primary effect of hydrocodone was pain relief and that the possible side effects included sedation, lethargy, poor muscle coordination, and confused thoughts. She added that these possible side effects could result in erratic driving, slurred speech, and loss of balance. More depressants were found in the blood after it was sent to the Nashville lab. Special Agent John Harrison testified that these drugs cause a loss of alertness and a reduction in focus, and he testified that, "in a driving situation, that would be an adverse effect because a person may not be as focused or attentive as they should be to operate the vehicle safely." He agreed that these drugs could cause a person to experience a loss of balance and slurred speech and could explain erratic driving. As to the combined effect of the four drugs found in the defendant's blood sample, Special Agent Harrison, testified that each of the drugs was a central nervous system depressant and when combined would have an additive effect.

State v Loudermilk, 2014 WL 3845041

A Shelby County jury convicted the defendant of DUI 4th offense. However, the oldest prior had a conviction date of November 30, 1992, but no testimony was entered as to the date of the offense. The offense for the latest conviction occurred May 6, 2011 and the State failed to prove that the violation date of the 1992 conviction occurred within 20 years of the current violation. Therefore, the Court remanded the case to be sentenced as a DUI 3rd offense. It is important for the practitioner to understand that under current law the Court looks at the violation dates. The violation for the current case triggers the 10 year window.

VIOLATIONS & CONVICTIONS

Violation	Conviction
May 6 2011	May 20, 2013
July 22, 2001	March 3, 2003
October 2, 1993	February 22, 1995

RECENT DECISIONS

State v Walker, 2014 WL 3888250 Mandatory Draws, Exigent Circumstances, Search Warrants

An August case of the Court of Criminal Appeals was the first to address a post McNeely challenge to a pre-McNeely blood draw. The defendant was convicted by a jury in Greene County. He appealed arguing that TCA 55-10-406(f) was unconstitutional and that the term "injury" in the statute is vague. The arrest was the result of a crash on November 20, 2011. In an opinion by Judge (now Justice) Bivens, exigency to justify a search without a warrant was upheld. It was described, "In the instant case, Trooper Rabun arrived on the scene after the defendant had been transported to the hospital. Trooper Rabun had to stay on the scene in order to interview Pierce and to aid the tow truck driver in removing the motorcycle from the ditch. He traveled to the hospital, and, although he was able to speak with the defendant when he arrived, his investigation further was delayed by the necessity of stitching up the wound that the defendant had sustained in the accident. By the time he was able to fully question the defendant, over two hours had passed since the time of the accident. Indeed, Trooper Rabun arrived at the scene of the accident around 6:00 p.m. and arrested the defendant at 8:05 p.m. Trooper Rabun also testified that he would have encountered considerable further delay in obtaining a search warrant and locating a magistrate to approve that warrant. These circumstances "ma[de] obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream ... support[ed] an exigency justifying a properly conducted warrantless blood test." *McNeely,* 133 S.Ct. at 1561. Therefore, the results of the blood alcohol analysis were admissible under the exigency exception to the warrant requirement, irrespective of the validity of the defendant's consent under the implied consent statute."

In this case Judge Bivens also noted that consent for a test is established when a person drives on our roadways. He wrote, " Because consent occurs at the point that a driver undertakes the privilege of operating a motor vehicle in the State of Tennessee, not at the point the implied consent form is read, the defendant's argument that his consent was rendered involuntary by the potentially coercive nature of the mandatory implied consent form read to him by Trooper Rabun is misplaced. Rather, at the time the implied consent form is read, "voluntary consent is unnecessary as consent has already been obtained by the act of driving the motor vehicle upon the public roads of this state." *Humphreys,* 70 S.W.3d at 752. Moreover, we note that, in *Humphreys,* this Court upheld the admissibility of a blood test under the implied consent statute when the officer did not read an implied consent form to the defendant and told the defendant that the law "requir[ed]" him to provide a sample. *See id.* at 759."

State v Kennedy, 2014 WL 4953586 Mandatory Draws, Exigent Circumstances, Search Warrants

In another opinion challenging a pre-McNeely blood draw issued October 3rd, Judge Witt, reversed a trial judge who had ruled 55-10-406(f) unconstitutional, but upheld the suppression of a blood test due to a lack of exigent circumstances to permit a warrantless search. Judge Witt agreed with the State that subsection (f) mandates that an officer obtain a test from multiple DUI offenders, but does not require any certain method to obtain the test. Obtaining a blood draw is constitutional if by consent, a search warrant or exigent circumstances that make obtaining a search warrant impractical. There was no search warrant in the instant case. The defendant was arrested on May 8, 2012. This pre-dated the McNeely decision by more than a year. The opinion does not mention it pre-dated the effective date of the law permitting search warrants in DUI cases by one day. Public Chapter 892 of 2012 went into effect the date it was signed by the Governor, which was May 9, 2012. Prior to the passage of the Public Chapter, the State did not request search warrants in DUI cases due to Attorney General Opinions that stated that the State was prohibited by the implied consent law from obtaining a search warrant. The Public Chapter was passed to make clear that the Court could issue search warrants in DUI cases and overcome the interpretation of the law in the Attorney General opinions.
The case goes into detail about why the officer could have gotten a search warrant. The local Sessions Court Magistrate, Marcia Hynes, testified that before April 26, 2013, no one in her office had issued a search warrant in a DUI case. April 26th was the date of the Missouri v McNeely decision. The Court analyzes the facts and concludes that an officer could have gotten a search warrant in 20 minutes to an hour on the night of the arrest, so the State failed to prove exigent circumstances.

State v Wells, 2014 WL 4977356 (go to page 10)

Marijuana Playing Larger Role in Fatal Crashes

Matt Schmitz and Chris Woodyard, Cars.com and USA TODAY

As more states are poised to legalize medicinal marijuana, it's looking like dope is playing a larger role as a cause of fatal traffic accidents.

Columbia University researchers performing a toxicology examination of nearly 24,000 driving fatalities concluded that marijuana contributed to 12% of traffic deaths in 2010, tripled from a decade earlier.

NHTSA studies have found drugged driving to be particularly prevalent among younger motorists. One in eight high school seniors responding to a 2010 survey admitted to driving after smoking marijuana. Nearly a quarter of drivers killed in drug-related car crashes were younger than 25. Likewise, nearly half of fatally injured drivers who tested positive for marijuana were younger than 25.

A National Highway Traffic Safety Administration study found that 4% of drivers were high during the day and more than 6% at night, and that nighttime figure more than doubled on weekends.

Colorado has seen a spike in driving fatalities in which marijuana alone was involved, according to Insurance.com. The trend started in 2009 — the year medical marijuana dispensaries were effectively legalized at the state level.

NHTSA and the National Institute on Drug Abuse are now in the final months of a three-year, half-million-dollar cooperative study to determine the impact of inhaled marijuana on driving performance. Tests observe participants who ingest a low dose of THC, the active ingredient in marijuana, a high dose and a placebo to assess the effects on performance, decision-making, motor control, risk-taking behavior and divided-attention tasks.

IGNITION INTERLOCK STUDY RESULTS TO BE REVEALED

The Traffic Injury Research Foundation (TIRF) will conduct a meeting at the Tennessee General Assembly October 21-22 to reveal their study of the use for ignition interlock devices in Tennessee. TIRF conducts reviews for various States and Canadian Provinces. They depict model programs that are in use and the strengths and weaknesses of programs in particular locations. The Traffic Injury Research Foundation (TIRF) develops and shares the knowledge that saves - preventing injuries and loss of life on the roads, reducing related social, health and insurance costs, and safeguarding productivity. They are the Canadian source for international research related to the human causes and effects of road crashes, providing objective and scientific information to support the development, implementation and evaluation of road safety programs, effective advocacy and consultation. If interested, please attend.

DO YOU KNOW WHAT YOUR DRE KNOWS?

Questions from quiz 5 of the DRE class Answers page 7

1) Which one of the following will cause the pupils of the eyes to constrict?

A. Cannabis
B. Dissociative Anesthetics
C. Hallucinogens
D. Narcotic Analgesics
E. CNS Depressants

2) Which one of the following will usually lower the blood pressure?

A. Dissociative Anesthetics
B. CNS Depressants
C. Hallucinogens
D. CNS Stimulants
E. Cannabis

3) The only artery that carries de-oxygenated blood is the:

A. Carotid
B. Brachial
C. Pulmonary
D. Radial
E. Coronal

PICKUP Trucks and Seat Belts

In the first six months of 2014 there have been 32 fatalities in which someone in a pickup truck was killed and was not restrained by a seat belt. In June 2014, a survey was completed concerning seat belt use. Observers stood at intersections around Tennessee and counted which drivers were wearing seat belts and which were not. Eighty eight percent of Tennessee drivers wore their seat belts. People driving anything other than a pick up truck wore their seat belts 90% of the time. Pick up truck drivers only wore them 79% of the time. In Roane and Warren County, they were worn less than 70% of the time.

It should not be surprising that a disproportionate number of unbelted fatalities include pick up trucks. Thirty two (14%) of our 226 unbelted fatalities in the first six months of the year involved pickup trucks. Below is a map showing where they happened. Every red dot represents a crash in which someone died in a pickup without wearing a seat belt. Seat belts save lives. Pass it on.

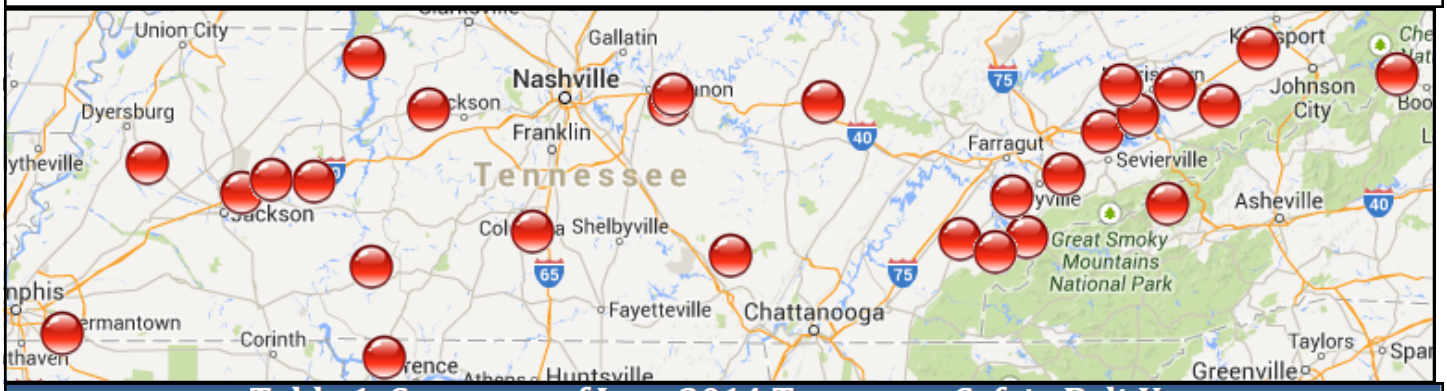


Table 1: Summary of June 2014 Tennessee Safety Belt Use
Final Statewide Observational Survey Results
July 10, 2014

		Adjusted Usage Rates					
County	No. of Sites	Passenger Cars	Vans	SUVs	Cars + Vans + SUVs	Pickup Trucks	All Vehicles
Davidson	15	89.67%	90.32%	88.83%	89.65%	82.90%	88.47%
Hamilton	15	90.81%	82.10%	90.33%	88.79%	71.59%	85.13%
Knox	15	94.79%	95.95%	94.31%	94.57%	75.37%	89.58%
Shelby	15	88.93%	93.66%	85.05%	88.09%	82.87%	87.17%
Blount	11	88.55%	94.53%	92.27%	90.13%	85.80%	89.34%
Dyer	11	87.79%	91.02%	82.87%	86.41%	81.56%	84.95%
Loudon	11	88.52%	92.19%	93.47%	90.65%	88.42%	89.76%
McMinn	11	91.74%	87.81%	92.61%	91.67%	73.50%	84.95%
Marion	11	90.26%	99.07%	93.09%	91.36%	78.94%	88.67%
Montgomery	11	91.10%	82.71%	95.89%	92.64%	76.41%	89.54%
Roane	11	88.44%	86.59%	89.84%	89.91%	67.95%	85.62%
Rutherford	11	91.34%	93.75%	92.77%	91.57%	78.07%	88.54%
Sevier	11	87.80%	91.60%	88.19%	88.51%	75.61%	86.21%
Tipton	10	92.92%	92.98%	89.06%	91.76%	85.07%	90.11%
Warren	10	87.02%	85.31%	91.77%	88.27%	69.75%	81.71%
Williamson	11	95.01%	94.27%	93.48%	94.46%	82.77%	92.39%
Statewide Totals	**190**	**90.29%**	**91.19%**	**90.35%**	**90.39%**	**79.06%**	**87.71%**

ARE YOU A.R.I.D.E. AWARE?

The Sevierville ARIDE course marked the 80th session of ARIDE instruction given across the state since 2007. This was a particularly important location for GHSO to conduct the training due to the volume of traffic and people that visit the area. This helps local law enforcement ensure the safety of Tennessee roadways while visiting the beautiful Smoky Mountains.

The ARIDE Course is designed to give law enforcement the tools to determine impairment of substances other than alcohol. Using the foundations of standardized field sobriety testing along with the modified Romberg balance test, the lack of convergence test and pupil sizes, law enforcement can determine not only impairment but in some cases what category of drugs cause the impairment. Additionally, ARIDE participants discover that every drug category affects the eyes either by pupil size changes or horizontal gaze nystagmus. The statement "the truth is in the eyes" become very real during this course. The ARIDE course does not qualify the participant as a Drug Recognition Expert however it does bridge the gap between SFST and DRE. The course is prerequisite to the DRE Course.

In 2011, the Governor's Highway Safety Office partnered with the Tennessee Highway Patrol to train 505 troopers in ARIDE. That same year there was a 39% increase in DUI arrests by state troopers. Local law enforcement is experiencing the same increase. Whether the participant plans on becoming a DRE or not there is no doubt the ARIDE course is helping law enforcement save lives.

Sheriff *Clint Shrum*, Grundy County

ARIDE OBSERVATIONS

Every quarter Jim Camp and Tom Kimball teach for an hour at ARIDE classes. On occasion Tom recruits local ADA's to fill the need. **Matt Hooper**, **Caleb Bayless, Ryan Desmond**, **Melissa Denny** and **Greg Eshbaugh** have all helped in the last year. ADA's are encouraged to attend and learn. ARIDE classes are constantly being added to the GHSO training schedule. The classes can be found at tntraficsafety.org. Go to the training drop down box to see the schedule. The next of these 16 hour classes is November 24-25 in Covington and December 15-16 in Sevierville. When an ADA attends, participate! Don't forgot your pen. The class will help the prosecutor better understand what the witness knows and will enhance courtroom skills for both.

DUI TRACKER UPDATE

Every day DUI cases are heard and completed in Tennessee. In districts that have a DUI prosecutor, the case dispositions are recorded and reported. This quarter, July 1-Sept 30, 24 districts entered data into the Tracker. A couple districts got behind as some personnel changed with elections and entered only a couple dispositions.

-The district that recorded the most dispositions was the 1st (Jonesborough) with 181 dispositions. The district opened 169 new cases.
-The district that recorded the most guilty as charged dispositions was the 21st (Franklin) with 132.
-The district with the most new cases opened was the 15th (Hartsville) with 202.
-Across the State the Tracker indicates that 1,992 cases were closed and 2,333 cases were opened.
-Overall 68.5% of offenders were found guilty as charged.

The limitation of TRACKER data is that it only gives a sample of the dispositions in the State. Some offices enter data from the Circuit Court, some enter data from Sessions Court. Some enter both. The TBI annual report on crime indicated there were 26,417 persons arrested for DUI in 2013. The Tracker includes data on about 8,000 cases per year.

DRUG RECOGNITION EXPERTS

Another DRE class has been completed! For nine days officers studied the effects of drugs on the human body. Upon completion each passed a rigorous five to six hour final examination. Three of the fifty questions from one of the review quizzes are on page 4. The intense training left every officer inspired to get back on the road. The common refrain from officers is that they now know they let impaired people drive away in the past, because they did not know how to identify people impaired by different types of drugs.

The officers will now test a dozen people, who have drug impairment under the supervision of their instructors. They must correctly identify several drug categories, before they receive their certification.

Those who competed the class were: David Alford, Rutherford County; David Arnold, Hamilton County; Travis Brown, Maryville Police; Jeff Brown, THP Cookeville; Patrick Dilday, Martin Police; Clark Evins, Dickson County; Daniel Gagnon, Montgomery County; Grady Garrett, Martin Police; Owen Grear, THP Memphis; Jacob Groce, THP Cookeville; Michael Heatherly, THP Knoxville; Scott Hudgens, Lavergne Police; Robert Johnson, THP Cookeville; Paul Montgomery, Dickson County; Bradley Nave, Nashville; Drew Naylor, THP Jackson; Terry Parker Jr., THP Chattanooga; Adam Patton, Hamilton County; Ashley Roach, THP Memphis; Shane Roberts, THP Nashville; Jeffrey Sharp, Union County; Donnie R Shipley, Maynardville; Ronnie Simmons, THP Cookeville; John Stith, Sumner County; William Toy, Mount Juliet; Dana Vann, THP Nashville.

Congratulations to the instructors of the DRE class for outstanding effort. It isn't always easy making toxicology and physiology interesting! One review included a Jeopar-DRE game. I gave the emcee, Clint Shrum, his first Oscar. He was quite deserving. It was the first time I ever saw him nearly choke on water.

Richard Holt - course manager
Clint Shrum - lead instructor
Paul Howard - Sequatchie Co.
Aaron Pickard- Sumner Co.
Scott Lewis- THP
Steve Sakarapanee - THP
Stanley Boyd - Brentwood
Jessie Loy– Metro Nashville
David Allen- Chattanooga

DRE QUIZ ANSWERS

1) Narcotic Analgesics cause constricted pupils.
2) CNS Depressants usually lower blood pressure.
3) The Pulmonary Artery is the only artery to carry deoxygenated blood.

LEVELS OF CARE FOR TREATMENT (continued from page 1)

Level .05 —Early Intervention
Level 1 — Outpatient Treatment
Level 2 — Intensive Outpatient
Level 3 — Residential / In-patient Treatment
Level 4 — Medically Managed Inpatient Treatment

Most DUI 2nd and 3rd offenders will be sent to level 2 intensive outpatient treatment. They will be involved in treatment for a long time. Some may be in treatment as long as two years. Treatment is not easy and takes a definite commitment from the offender. Such treatment includes 9-19 hours per week. It is intended for persons who do not need 24 hour care. The treatment is often provided around the offender's schedule, so the person can maintain employment. It includes the capacity to provide medical and psychiatric consultations, psychopharmacological consultation, medication management and crisis services. It provides essential education and treatment components while allowing the offender to apply newly acquired skills in real world environments. Participants can be moved up and down the level continuum, depending on success or failure. In-patient residential treatment is reserved for those who need it and cannot handle being out in the real world. They are managed more intensely and may be monitored medically. During a typical day the person will be in treatment classes or sessions about five hours.

An exception to the law's requirement that the treatment occur after the jail sentence begins is found at TCA 55-10-402 (h)(6) which permits jail credit for treatment that occurs after arrest prior to trial, if the person is ordered to treatment by the judge as a condition of probation. However, before commencing any court-ordered treatment program, the person must undergo a clinical substance abuse assessment. Without an assessment, the "treatment" was probably a joke.

For the most part the jail sentence serves two purposes. The first is punishment for the crime that endangers the public. The second is that the person have a time in which he/she does not consume alcohol or drugs prior to treatment beginning. The treatment professionals all agree that the offender must have this dry period for treatment to be effective. Without it, they must place the person in medically managed care and treatment cannot begin until the person has had a period to get clean.

The General Assembly decided to change the treatment option to reduce recidivism. The new process became effective July 1st. It is now in the works. Please remember treatment is not part of the plea negotiation. We are not qualified to pick the right treatment. Let's leave it to the professionals, as intended.

WHO CONDUCTS ASSESSMENTS?

Licensed alcohol/drug rehabilitation service providers are located all over the State. Those who conduct the screening and assessments are listed in two documents listed on our website in the "Resources" drop down menu . These are the current licensed providers. The list will change as licenses are added or removed. There are currently 95 licensed non residential providers in East Tennessee from Mountain City to Crossville including Sneedville. In Middle Tennessee, there are 125 non residential providers from Cookeville to Hohenwald. In the West, there are 89 more from Jackson to Dyersburg including Pinson.

There are many more facilities available in the largest metropolitan areas. For instance 39 of the 98 facilities in the west region are in Memphis. However, many smaller communities also have non residential services. Residential treatment facilities are much more limited. Memphis has 11 of 15 West Tennessee residential facilities. The other four are located in Jackson.

For many years the problem associated with treatment for DUI offenders was finding a bed! With the new law, the bed problem will be significantly decreased. Most of these offenders will not be going to bed. They will be going to work and attending treatment on weekends and evenings. Now the issue will be whether the offenders want to become patients trying to recover or whether they prefer to sit in the jail watching television counting the days until they can get on with lives that include dangerous drinking and driving behavior.

Our website with the list of providers in the Resources drop down menu is at: **http://dui.tndagc.org**

DUI TRAINING FOR PROSECUTORS

Terry Stevens ADA, 9th District

On September 16, 2014, over 40 Assistant District Attorneys General were welcomed to the ***DUI for Prosecution Conference*** sponsored by the Tennessee District Attorneys General Conference funded by the Governor's Highway Safety Office.

Steve Dillard, SFST Statewide Coordinator of the GHSO, began the instructional portion of the conference with an in depth explanation of Standardized Field Sobriety Tests, the proper administration of SFTS, and what clues law enforcement officers are trained to look for when conducting the SFTS's. Officer Dillard emphasized SFTS must be performed in a standardized manner. Law Enforcement Officers are instructed to conduct, in this order, the 'Horizontal Gaze Nystagmus' Test, the 'Walk and Turn Test', and the' One Leg Stand Test' during every suspected DUI stop. Officer Dillard also reminded the conference that 'everything is relevant' when looking at the 'totality of the circumstances' while conducting a Standardized Field Sobriety Test and in determining whether probable cause exists to perform an arrest of the suspect.

Richard Holt, Director of the Drug Recognition Expert program with the GHSO, was assisted by certified DRE's Paul Howard, Sequatchie County, and Aaron Pickard, Sumner County. They presented the opportunity to utilize DRE's in the prosecution of cases. Utilizing DRE's can help in the successful prosecution of DUI cases in Tennessee, and, depending on the jurisdiction, may be able to be qualified as an expert under TRE 702. DRE's have a 12 part evaluation beginning with interviewing the arresting officer and conclude with the final toxicology report generated by the state's TBI labs.

Dr. Richard Savoy, Professor, Southern School of Optometry presented a session entitled *HGN: Eye Movements and Expert Witness Testimony*. Dr. Savoy discussed three eye movements to look for when an officer conducts the HGN tests. The officer should look for lack of smooth pursuit, distinct and sustained nystagmus at the maximum deviation, and onset of nystagmus prior to 45 degrees. Officers are taught to look for specific types of responses with the eyes in suspected DUI offenders during the 'Divided Attention Ability' process.

In the afternoon session of the first day, Kenneth Ferslew, PhD, DABFT of the James H. Quillen College of Medicine at ETSU, broke down the pharmacology of Drugs and Alcohol. As cases are analyzed, it is important to use a 'Rule of Thumb' in determining the elimination of alcohol in the blood that Dr. Ferslew suggested. Blood ethanol elimination in the body averages 17 mg/dL/hour (0.017 g%/hour). Dr. Ferslew outlined a 'Three Prong' approach to assessing if alcohol or drugs contributed to an accident. One, was there misoperation of the vehicle (including accidents and observed actions). Two, was the person's psychomotor performance impaired (field sobriety testing and clinical assessments). Three, were the concentrations of alcohol or drugs in their blood sufficient to produce the psychomotor impairment noted. It is also important to remember that combining alcohol with other depressants can produce a multiplicative effects on the central nervous system. When looking at combinations of substances in toxicology reports, even therapeutic concentrations can produce toxic and potentially lethal effects.

The following day we had the privilege of receiving a case law update from the Honorable Judge Thomas Woodall. Matt Gilbert, Chandler Harris and Kyle Anderson gave a very good presentation regarding hot DUI defenses.

We also received a very interesting perspective on alternative DUI sentencing from Norma Broussard from Jefferson Parish in Louisiana. It was eye opening as to what we could do to treat addiction as opposed to only trying to arrest our way out of the problem. We also had Ellen Abbott come speak to us regarding the recent change in the treatment alternative to jail time regarding multiple offenders.

All in all it was a very informative and eye-opening conference. From learning what our officers are trained to see and do to learning about alternative ways to reduce impaired driving, the conference gave all who attended a fresh perspective on what our job is meant to be, SAVING LIVES.

ABOUT THE AUTHOR

Terry Stevens was hired by Russell Johnson, the District Attorney General for the 9th Judicial District which includes Loudon, Meigs, Morgan and Roane Counties, as the district's first full-time DUI prosecutor in September 2013. Prior to this position, he was in private practice for approximately four years after graduating from The University of Tennessee College of Law in May 2009.

RECENT DECISIONS

State v Wells, 2014 WL 4977356 Mandatory Draws, Exigent Circumstances, Search Warrants

In another decision analyzing a post-McNeely case, Judge Williams issued a 25 page decision examining search and seizure, exigent circumstances, consent, implied consent as an exception to the warrant requirement, revocation of consent, forcible blood draws, the constitutionality of TCA 55-10-406(f), the "Right of Refusal" and legislative history of the statutes.

Facts:

- Driver wrecked and left scene. He was found 20 minutes later. Five officers had responded.
- Driver admitted drinking, SFST's depicted impaired state, was a multiple offender, refused test.
- SFST's took 12-15 minutes.
- Driver was taken to hospital across the street. One hour wait until blood test without consent.
- A 24 hour Magistrate was available about 10 minutes from the scene.

Here are some conclusions this author drew from the case.

1) There were insufficient exigent circumstances to excuse lack of search warrant in this case. Unlike the case of **State v Walker** in which a search warrant would have caused undue delay necessitating a blood draw before a search warrant could be obtained, in this one the search warrant could have been acquired during the one hour wait at the hospital by a fellow officer;
2) Implied consent does not act as substitute for exigency or a search warrant;
3) The privilege of driving does not alone create consent for a forcible blood draw.
4) Blood draw requires probable cause and
    a. a search warrant
    b. voluntary consent
    c. exigent circumstances
    d. some other exception to the 4th Amendment
5) License suspensions enumerated in the statute for multiple offenders depict a system of consequences for someone who refuses to cooperate, even if the blood is drawn after the refusal. Judge Williams appears to believe the intent of the Legislature is to get a blood sample in every multiple offender case. There is no reason to have a license suspension sanction except to have it apply to those who refuse and then get tested after a search warrant is issued.
6) Subsection (f) is constitutional. It requires the officer to get a blood test, but does not stop the officer from getting a search warrant or rely on an exception to the SW requirement like exigency or consent.

State v Chrystak, 2014 WL 3954040 IMPLIED CONSENT AND BLOOD DRAW

The Defendant refused a blood test, then changed his mind after being informed that as a repeat DUI offender, the statute required the officer to obtain a blood sample with or without his consent. The Trial Judge determined a violation of the implied consent law occurred when he refused testing, prior to changing his mind after being informed of his status.

In an opinion by Judge Thomas, it appears that a No Harm No Foul analysis was applied. Citing **State v Cochran**, 2007 WL 2907281, the Judge stated the purpose of the implied consent statue was satisfied, i.e, the defendant's blood was drawn for a determination of his intoxication level.

This decision appears to be in conflict with the Wells decision. It appears that the refusal to test, evaporates if the blood is drawn after the refusal.

VEHICULAR HOMICIDE MURDERERS ROW

State v Crisp, 2014 WL 3540646 PROBABLE CAUSE BASED ON TOTALITY

In Lincoln County, the defendant pled guilty to vehicular homicide by intoxication, a count of vehicular homicide by recklessness, vehicular assault and a violation of the open container law. He ran into another car head on at 7:52 A.M. killing Tommie Mitchell, 88 and seriously injuring Wanda Flynn, 66. His blood alcohol level was .19 after a night of fishing. He received an eight year sentence to serve. The defendant argued that he had done well enough of the walk and turn and one leg stand test to negate probable cause. The Court citing **State v Bell**, 429 S.W.3d 524 disagreed. "The defendant was involved in a head-on collision which occurred mainly in the opposing lane of traffic. The victim had told law enforcement that he was so far in her lane that she veered into his to try to avoid him. He smelled of alcohol and had red eyes. He acknowledged having consumed two twenty-four ounce beers, and several beer cans and a half-empty whiskey bottle were found strewn from the passenger's side door of his car. Considering the totality of the circumstances, there was probable cause to arrest the defendant for DUI ". The defendant did not help himself on the night of the crash when he accused the living and deceased victim of tearing up his truck.

TWENTY YEARS AND FAMILY DEVASTATION

Jason Page, 45, pled guilty and received a twenty year sentence for aggravated vehicular homicide in Dyersburg. Page, a 3rd DUI offender driving on a revoked license, ran a stop sign and crashed and killed 61 year old Gary Walker of RoEllen. Page did not know who the victim was at the time. It turned out to be his father in law. Page had a .30 BAC.

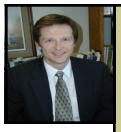
ADVANCED CRASH RECONSTRUCTION

Twelve officers completed a recent Advanced Crash Investigation Class. The class was held at the Tennessee Law Enforcement Training Academy from September 15-26. The Advanced Crash Investigation Course provided officers with advanced mathematical skills and investigative techniques. During the 80 hour class students received training on conservation of linear momentum, advanced time and distance analysis, airborne analysis, vector diagramming, vehicle inspection, court room testimony, resume preparation, and work numerous projects in order to prepare for the Crash Reconstruction Course.

During this class students were able to perform numerous testing applications that they can use in their investigations. Each student participated in acceleration testing and deceleration testing utilizing Vericom computers with wet asphalt surfaces and conducted head light and tail lamp examinations.

The GHSO instructors were Brad Brandon and Rachel Gober from Franklin Police Department and Dale Farmer GHSO instructor.

Officers completing this important course are now qualified to take the Crash Reconstruction course. Graduates were. Kellie Belgarde, Clarksville; Rafael Bello, Smyrna; Scott Bilbrey, Sumner County; Joshua Brownlee, Lebanon; Fred Lee, Manchester; Justin Long, Cookeville; Will Page, Putnam County; Joshua McDonald, National Park Service; John Roberson, Nashville; Kenny Sullivan, Manchester; Jerry Sumerour, Dickson and Cliff Thompson, Brentwood.



Let Me Exhibit the Right Way to Exhibit

Jim Camp

Over the years I have had many opportunities to observe young prosecutors in trial advocacy workshops as well as in actual trial practice. It is always a delightful and encouraging experience. But from a critical instructor's point of view we are always on the lookout for behaviors and habits that can be improved. One of the trial techniques most often lacking is the ability to properly introduce exhibits.

Exhibits are obviously important. They constitute tangible proof. Something the jury can see or hear or touch. Exhibits can constitute Real Evidence (physical items which constitute the foundation or physical substance or a crime), Demonstrative Evidence (used to explain or illustrate facts to be presented) and Documentary Evidence (writings or records).

The introduction of exhibits seems like one of the most basic of all trial practice elements. It is for this very reason that prosecutors have a tendency to take the procedure for granted. I would like to spend some time here reviewing the proper steps to take when we introduce this evidence.

The basics cannot be ignored. First we must determine if it is relevant pursuant to Rules 401 and 402. Does it tend to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence?

If the exhibit is relevant evidence, is its probative value substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence? If it passes muster under Rule 403 we must prepare for the introduction of the exhibit.

All exhibits should be organized prior to trial. It is extremely helpful to have an exhibit list prepared. This allows you to evaluate the exhibits and determine if they are sufficient or unnecessary. It also will allow you to keep track of which exhibits have been introduced, received and denied at trial. The list should also indicate which witness will be used to introduce each exhibit. This forces you to preplan its introduction. The exhibits should be pre-marked preferably in the order in which you intend to introduce them and copies should be made for the court and defense counsel.

Exhibits can only be introduced after a set of procedural steps are taken. Failure to follow these steps gives the impression of the prosecutor lacking skill and experience. Doing it the right way every time creates an impression of skill and professionalism. Examples relating to the introduction of a document prepared by a law enforcement witness will be featured in the next issue of the newsletter.

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