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SUBPOENAS AND PUBLIC RECORD REQUESTS FOR POLICE AND PROSECUTION FILES

by Matt Hooper, ADA 25th District

Increasingly, defense attorneys are using subpoenas duces tecum and other tools in order to attempt to circumvent the discovery process or to harass the state or its witnesses with "fishing expedition" requests for police personnel files and other privileged and irrelevant records. Tennessee courts have generally disfavored this approach. This article addresses several such tactics, and how the state can respond. If a police department receives such a request, they should notify their D.A. immediately.

Subpoenas Duces Tecum for Personnel Files and Other Records

"Criminal defendants may not routinely have access to police personnel records." *State v. Butts*, 640 S.W.2d 37, 39 (Tenn. Crim. App. 1982). Only if the defense makes a "strong showing" that the records "will" reveal "material information" should the court conduct an *in camera* inspection of the records and release only those documents, if any, that are "material." *Id.* "Evidence is 'material' only if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed," or if the evidence is exculpatory enough that it "undermines confidence" in the defendant's guilt. *State v. Dotson,* 450 S.W.3d 1, 94 (Tenn. 2014). In no event should the court simply turn the records over to the defense without making the required *in camera* inspection and findings of materiality. *Butts*, 640 S.W.2d 37, 39.

In *Butts*, the defense subpoenaed the officer's personnel file, claiming they had "reason to believe that there have been prior complaints concerning over-aggressiveness … and/or ethnic prejudice" by the officer. *Id.* at 37-39. The court held this was not a strong enough showing to even require an *in camera* inspection. *Id.* For a case rejecting an attempt to subpoena records to uncover an informant's identity, see *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

"Standing" to Challenge Subpoenas

A motion to quash a subpoena may be filed under Tenn. Rule of Crim. Proc. 17 (d)(2) if the subpoena is "unreasonable" or "oppressive." The rules do not require "standing" to challenge a subpoena. But even if they did, the state obviously has a strong interest in preventing oppressive or unreasonable treatment of prosecution witnesses. Otherwise, witnesses could be intimidated into recanting, becoming uncooperative, or making themselves unavailable in both current prosecutions and future investigations. This "chilling effect" could even affect police officers. After all, what officer or department wants to zealously enforce the law or conscientiously report crime if doing so virtually guarantees that they will often need to obtain counsel to challenge needless, harassing invasions of privacy by defense counsel? Clearly, if the rules did require "standing" to challenge oppressive subpoenas, the state would have it in spades.

About the author:

Matt Hooper is a career prosecutor and a graduate of Washington University School of Law. He has served as the DUI prosecutor for the 25th Judicial District (Fayette, Hardeman, Tipton, Lauderdale, and McNairy Counties) since 2008.

RECENT DECISIONS
COURTS PROVIDE CLARITY FOR PASSED OUT DUI CASES

State v Gormsen, Tenn Crim App No. M2014-01731-CCA-R3-CD – Filed October 6, 2015

This case obviously differs from *Moats* in that Officer Boyd's emergency equipment was never activated. Officer Boyd noticed a car sitting in the middle of one lane of a residential, dead-end street with the vehicle's brake lights on at around 3:51 a.m. He pulled in behind the vehicle, in no way obstructing its path. He did not activate his emergency equipment. Instead, Officer Boyd walked up to the open window of a vehicle on the public roadway, just as any citizen might. The fact that Officer Boyd approached the defendant and addressed him while the defendant was parked on the public street does not implicate any Fourth Amendment concerns. *Williams*, 185 S.W.3d at 315.

On noticing that the car was running and that two people appeared to be unconscious and slumped over in the car, Officer Boyd began to attempt to rouse the defendant. When the defendant did not respond, Officer Boyd also shined a strobe light in the defendant's eyes. His efforts at rousing the defendant by speaking, shining the light, and raising his voice were unsuccessful, so Officer Boyd also reached in the open window to shake the defendant in order to wake him. Officer Boyd did not at this point detain the defendant, pursue him, order him to stop, block his path, or display a weapon. Neither did the defendant, who was apparently in a stupor, at any point attempt to terminate his contact with law enforcement.

Because Officer Boyd's interaction with the defendant prior to the time the defendant was seized was a consensual police-citizen encounter and because the seizure was supported by reasonable suspicion, we affirm the judgment of the trial court.

State v Latham, 2015 Tenn Crim App 2015 WL 5749887 **DON'T FENCE ME IN**

Caleb Latham was parked next to a dumpster in a Hardees's parking lot at 2:00 a.m. He was not in a parking space and his turn signal was on. An officer thought it was odd and drove toward the vehicle to see if there was criminal activity, a medical emergency or a sexual encounter happening at Hardees's. According to the Court, the officer made a mistake. Before finding out what was going on, he parked his patrol car in a way that blocked the Latham car from leaving the parking lot. There was a dumpster on one side, a fence on another and the patrol car behind. This amounted to a seizure without reasonable suspicion and the DUI conviction was reversed.

State v Coe, 2015 Tenn Crim App 2015 WL 3991037

Convicted of DUI 4th offense, this driver appealed, upset that he was not allowed to cross examine the officer on whether he had faced disciplinary action or used racial remarks while on the force. The Court affirmed the Trial Judge's ruling concerning the maneuver.

State v Cates, 2015 Tenn Crim App 2015 WL 5679825 **WHAT IS EXIGENT?**

In a case that befuddles prosecutors and officers, a decision has been issued that seems to say that the need to get a blood draw, before a driver is doped up for surgery is not exigency, because the officer was wrong in his determination of when the surgery would occur. The crash occurred in Elizabethton. It was bad. The engine of the vehicle flew 40 feet from the car that hit a pole. The passenger in the car was killed.

The injuries to Cates looked dire. Cates had an open leg fracture and possible internal injuries based on the high speed impact with the pole. An ambulance transported him to the hospital. Officers were sent to follow the ambulance and get a blood draw before surgery. The crash occurred at 1:47 a.m.. The blood was drawn at 2: 30.

To the surprise of the officers, surgery was not performed until 7 a.m. Once the driver was prepped for surgery, he was pumped full of drugs including Versid, an amnesiac. No witness testified whether he was given any drug for pain either during his ambulance ride of after his arrival at the hospital.

Getting a blood draw prior to the administration of medicinal drugs has got to qualify as an important exigent circumstance. The defense suppressed a blood draw in State v Corrine Reynolds, because a drug allegedly made her more compliant, thus invalidating her consent. The blood draw from the driver is intended to show what was in the blood when the crash happened, not what was in the blood after medications are administered. It appears the problem in this case is that officers anticipated a quick surgical response by the hospital, not a delayed response.

(More on pages 3 and 10)

THE REPEAT OFFENDER WALL OF SHAME

TWELVE YEARS FOR MULTIPLE OFFENDER

David Chadwick was placed on probation for two years for his sixth DUI offense in 2013 in Benton County. However, while out on probation, Chadwick was caught driving under the influence on September 20, 2014 in Benton County. After making bond but before trial on this seventh offense DUI, Chadwick was caught driving under the influence again in Decatur County on March 18, 2015. Chadwick's probation on his 2013 DUI was revoked and he was sentenced to five years incarceration to be served consecutively on each of his new DUI convictions in Benton and Decatur Counties, for an effective sentence of 12 years of incarceration in the Tennessee Department of Corrections on these DUI convictions.

State v Logan, 2015 Tenn Crim App 2015 WL 4515141 **ABANDONED VEHICLE SEARCHED**

In an attempted especially aggravated robbery case, the Court clarified that when a person leaves behind a vehicle and flees, the vehicle is abandoned and a subsequent search is permissible. The Court stated, "By leaving his crashed vehicle in a position that was blocking the roadway and fleeing in another vehicle, the defendant manifested through his own actions an intent to abandon the truck and its contents. As a result, the defendant maintained no reasonable expectation of privacy in the vehicle or the materials contained therein. Consequently, no search occurred for constitutional purposes, and neither the seizure of evidence from the truck at the scene or thereafter violated the defendant's constitutional rights."

DUI TRACKER REPORT

Data from 7/01/2015-10/01/2015

During this quarter, the DUI Tracker captured 2,761 DUI dispositions and 3,311 new DUI cases statewide, which accounts for about 46% of all quarterly dispositions. That's based on a typical annual average of about 23,000 dispositions per year or 5750 per quarter in Tennessee.

In this 4th quarter of our fiscal year, things looked very different as the Nashville office began entering all DUI dispositions from all courts. The Nashville/Davidson county results included 596 dispositions and 610 new cases. The districts with the next highest report of new cases were the 16th with 207, the 15th with 199, the 9th with 170, the 1st with 163 and the 22nd with 162.

The district with the most guilty as charged dispositions was the 20th with 251 followed by the 16th with 141, the 26th and 21st with 117 and the 15th with 107. Nashville had the most new cases 604 followed by the 15th with 240, the 16th with 235 and the 22nd with 205.

Sixty two percent of all drivers charged were found guilty as charged. The Tracker examines GAC numbers, but other cases can be seen as successful based on outcomes. For instance an office may reduce a DUI 4th offense to a DUI 3rd offense to get the driver the treatment and monitoring that is available for 3rd offenders, but not 4th offenders. If the driver responds well and never commits a DUI again, that reduction was successful. Prosecutors should still be wary of reducing a charge from a multiple offender count to a 1st offense, which eliminates the treatment and monitoring possibility, or from a DUI 1st to anything less, which will eliminate the conviction from being used to charge a DUI 2nd on the next occasion, thus eliminating the treatment and monitoring needed to eliminate recidivism.

WELCOME DIRECTOR ESTES

The Tennessee District Attorneys General Conference has a new Director. Former 10th District Attorney General, Jerry Estes, was selected as Director from a field of well qualified candidates by the thirty-one elected District Attorneys. He began his new position in July.

Director Estes served as the District Attorney in the 10th Judicial District from 1982 until 2006. Director Estes has served as President of the Tennessee District Attorneys General Conference, the Tennessee Bar Association Board of Governors, and The Tennessee Director on the National District Attorneys Association Board of Directors.

Director Estes is familiar with the world of impaired driving. He was one of the first District Attorneys in the State to receive a grant to retain a specialized DUI Prosecutor in his district. More than fifteen years ago I served as an Assistant Public Defender in the 10th District and often dealt with the assistant district attorneys who served under General Estes. Now I have the pleasure of working for him. Sherri Harper and I took rigorous notes one September morning as our Director spoke about traffic safety. What follows reflects the thoughts of Director Estes.

Role of the District Attorney

The role of the District Attorney is to serve as the lead law enforcement officer in the judicial district. It is his/her responsibility is to do what is fair and right. The prosecutor is the only lawyer that has a responsibility that is not defined by commitment to a client.

Providing safe communities and safe highways is an essential part of doing what is fair and right. It is not an accident that fatalities for impaired driving have significantly decreased since the Governors Highway Safety Office began providing funds for DUI prosecution units in 2003 and 2004. Communities are safer when DUI offenders are not able to commit the crime of impaired driving.

As the Chief Law Enforcement officer of the judicial district, the District Attorney identifies what problems exist and they put an emphasis on responding to those problems. That added emphasis affects crime and public awareness. Offices commonly seek grant funding to put an emphasis on the problem of impaired driving. Without the availability of grant funding, it would be very difficult to put dedicated prosecutors in positions in which they could be specialists.

DUI Prosecutors and Training

DUI Prosecutors are needed. DUI's tend to be the most complex misdemeanors and vehicular homicides are one of the most complex felonies due to issues of toxicology, physics and complex case law. Many defense lawyers now specialize in DUI cases. If we did not have dedicated DUI prosecutors, it would be very difficult for a District Attorney to counter the specialized defense attorney and his/her expert witnesses. Hand in glove with the need for specialized prosecutors is the training that helps the prosecutor master the subjects involved in DUI prosecution. Our Training Section has done an excellent job identifying weaknesses of those prosecuting DUI's and turning those weaknesses into strengths. Our DUI Training Section provided training to over 2,000 officers and 175 prosecutors last year. We need to continue to provide outstanding training to help officers and prosecutors to be better in their positions. This will translate into juries in Tennessee getting better facts & evidence when presented at trial.

Volume of Cases

In the first three quarters of 2015, DUI prosecutors resolved 7,400 DUI cases, but opened 8,125 cases. Last year district attorneys resolved 157,000 criminal cases in the criminal courts of the State, but opened over 163,000 cases. The volume of cases is growing every year. The State budget dedicates a miniscule amount of money to public safety and most of that goes to the Department of Corrections. A small percentage of the funds for public safety go to the offices of the District Attorney. "If we want safer communities, the State must put its money where its mouth is." The achievement of the Governors Highway Safety Office is an example that funds for prosecutors save lives. The concern for prosecutors is that grant funding could disappear in the future. If we want to continue to build on the success and achievements of the specialized DUI prosecutor program, the State must provide resources to make it happen.

(continued Page 5)

WELCOME DIRECTOR ESTES

Victims

As the District Attorney in the 10th Judicial District, I opened two victim assistance centers and one child advocacy center. I have served on the National Crime Victims Law Institute at Lewis & Clark Law School. I want to take this opportunity to talk about the special role that prosecutors serve in the life of crime victims.

As a young lawyer, one of my former high school teachers sent me a note. She wrote, Blessed are the Peacemakers and noted that lawyers were in unique positions to serve as peacemakers. That always stayed with me. As a young prosecutor I soon learned that we must all learn to forgive. Our government is in a unique position to help us reconcile with others by providing justice. Young lawyers should be aware that by doing their part to provide justice they are helping a person who is wronged by the criminal act of another.

Prosecutors make decisions based on what is right. Prosecutors are in unique positions to provide reconciliation for victims by providing justice. There is no closure. Especially when a death has occurred, the family of the deceased is forever scarred. Some scars will be less visible, but the scar remains. Nothing removes the harm caused by crime. Victims are helped when the prosecutor, representing the State, steps up to do justice. A person has a much better chance of reconciling what has happened to them if justice is done. The victim can move forward with their life. When the State gets a just resolution in a case, it is far better than if a person sought personal revenge.

The prosecutor is the tip of the spear when it comes to obtaining justice for the victim. It takes patience, willingness to listen and the ability to slow down and be present to help victims. Those traits are not natural for prosecutors, who are always in a hurry due to the high volume of cases they handle, so it is not easy to be patient, listen and be present. But it is absolutely necessary to effectively help victims.

I think prosecutors should remember the story of the Good Samaritan. The first person to walk past the crime victim was a lawyer in a hurry. The first thing the prosecutor must do to provide justice is stop and listen. A prosecutor should consider it an honor to serve victims. It is a gift and a privilege to help a person who has been unjustly wronged by a criminal act.

DID YOU KNOW

For 17 years Director Estes hosted the most listened to local weekly radio talk show in its time slot in Cleveland Tennessee, with simulcasts throughout East Tennessee. Guests included the prosecutors of Ted Bundy, Jeffrey Dahmer and other mass murderers.

DID YOU KNOW
Drug Recognition Experts

The following law enforcement officers have been qualified as experts in drug recognition and classification in Tennessee Courts:

William Butler in Lauderdale County by Judge Jody Walker;
Dwayne Stanford in Madison County by Judge Hugh Harvey;
R. Jay Phelps in Humphreys County by Judge Larry J. Wallace
Billy Pearce in Cheatham County by Judge Robert Burch;
Jason Mounts in Benton by Judge John W Whitworth

DO YOU KNOW THE DANGER MONTHS?

A female driver is most likely to be injured or killed in October.
A male driver is most likely to be injured or killed in May.

Don't ask me why! The data collected in the Titan program was analyzed by Jonathon Roach at the Department of Safety. In case you are wondering what month is most deadly without a gender analysis, it is October.

COPS IN COURT

The DUI Training Unit continues to take the Cops in Court class on the road. The eight hour P.O.S.T. certified course is intensive. The morning is filled with instruction focused on preserving credibility by protecting truthful testimony during intensive cross examinations. Emphasis is place on the role of telling the whole truth, which means making sure that the officer does not fudge and back away from the truth when challenged. It's all about delivering the truth to the trier of fact regardless of any case outcome. Recently the course was presented in Maynardville to thirty-five officers of the 8th Judicial District. District Attorney Jared Effler made it all possible. His Assistant DA's all came to help with the direct and cross examination exercise and a great day was had by all.

SEARCH WARRANT PREPARATION CLASS

The Tennessee Highway Patrol has designated one hour of in-service training to search warrant training for troopers. Every Friday about 35 of our troopers use a scenario to practice writing an affidavit for a search warrant in a DUI case, so when they need to write one they will have had some practice and direction. We appreciate the work of the troopers. It is a pleasure for Jim Camp and I to have the opportunity to teach this important hour long session.

PUBLIC RECORD REQUESTS (continued from page 1)

Brady Requests

Some attorneys attempt to obtain personnel files or other private records of officers via a motion for discovery. A prosecutor's most prudent response to a request for specific documents, particularly a request that is not simply a "canned," boiler-plate motion, is for the prosecutor to obtain and review the records for exculpatory material. Of course, in certain instances the request may be so clearly frivolous, or the records requested so outrageously voluminous and unlikely to yield exculpatory material, that it may be reasonable to forego such a review.

The approach courts take to such motions is similar to the approach they take in subpoena duces tecum cases. See, e.g., *State v. Parker*, 886 S.W.2d 908 (Mo. 1994), *cert. denied*, 514 U.S. 1098; *U.S. v. Driscoll*, 970 F.2d 1472 (6th Cir. 1992), *abrogated on other grounds*; and *State v. John Cote*, 2010 WL 3760637 (Tenn. Crim. App.).

Arrest Histories of Witnesses

If you have actual knowledge of a materially relevant arrest or conviction by a prosecution witness, the prudent thing to do is to disclose it. See *State v. James Murray*, 1998 WL 934578, *24-25 (Tenn. Crim. App.). However, the state has no general duty to perform any search for witness arrest histories. *Id.* There is "no authority under the Tennessee Rules of Criminal Procedure or in the decisional law of this state" which requires such searches. *State v. Baker*, 623 S.W.2d 132, 133 (Tenn. Crim. App. 1981). See also, *State v. Workman*, 667 S.W.2d 44 (Tenn. 1984).

Some defense attorneys file motions for the state to provide arrest records under a statute that governs disclosure of certain expunged records by clerks. If you receive such a motion, review the annotations to the statute cited, where you should find a case holding that the state has no obligation to provide arrest histories under that section.

Confidential Informants

Generally, the state is not required to disclose the name of a confidential informant, for obvious reasons. In *State v. Vanderford*, the court held that a defendant may never compel the discovery of a C.I.'s identity for the purpose of attacking a search warrant. 980 S.W.2d 390, 395-97 (Tenn. Crim. App. 1997)(*perm. to appeal denied*). The defense can only discover C.I. identity in limited circumstances, such as if the C.I. is an unindicted co-conspirator or is a witness to the crime actually charged (not just a related crime). *Id*.

See *Pennsylvania v. Ritchie*, 480 U.S. 39, for a case rejecting use of a subpoena duces tecum to discover an informant's identity.

Freedom of Information Act (F.O.I.A.)

Tennessee's F.O.I.A. is the Tennessee Public Records Act. In *State v. Richard Odom*, the court of criminal appeals held that the trial court erred by granting a motion for *in camera* inspection of the prosecutor's file under the Act. 2007 WL 1135516. Our courts will not allow the defense to "circumvent established procedure" by using such a request during the pendency of a criminal proceeding. *Id.* See also, *Swift v. Campbell*, 159 S.W.3d 565 (Tenn. Ct. App. 2004)(rejecting a F.O.I.A. request and applying the common law work product privilege to prosecutors); Rule of Evidence 502 (regarding the work product privilege); T.C.A. 23-3-105 (establishing the basic attorney-client privilege); and Rule of Professional Conduct 1.6, Comments 3 and 3a (the attorney-client and work product privileges apply to "all information relating to the representation, whatever its source," and includes government attorneys).

Finally, if you must respond to a public records request, you should consult T.C.A. 10-7-504, which has been completely revised recently and which specifically exempts many government records from prying eyes, including the personal information of police officers and certain victims.

Appeal

In at least one case, a defendant attempted to use an *ex parte* motion to obtain privileged records of the prosecution. *State v. Richard Odom*, 2007 WL 1135516. Besides being unethical under Rule of Professional Conduct 3.5, this tactic was definitively shown by a very well-reasoned opinion of the court of criminal appeals to be entirely without legal basis. *Id.* But prosecutors should be prepared to respond quickly to such surprise attacks. The *Odom* decision provides an excellent roadmap for defeating such efforts, including mention of the use of an extraordinary appeal in case the trial judge refuses to allow an interlocutory appeal. You need not and should not allow an erroneous trial court decision to compromise the privacy rights or safety of a witness or law enforcement officer.

UNDERSTANDING EVIDENCE FROM THE EYES Dwayne Stanford, THP/DRE

Law enforcement officers in Tennessee face multiple variables in their roles of enforcing driving under the influence statutes. *State v. Murphy* (1997) created the variable of isolation associated with the Horizontal Gaze Nystagmus Test. Many officers are afraid to conduct the test; however, the HGN test is the most reliable test within the battery of Standardized Field Sobriety Tests. Some officers conduct the HGN test, and the subject does not display indicators consistent with impairment. Where do we go from here? Think for a moment about why we are even conducting the HGN test in the first place. There must have been articulable facts associated with the traffic stop that raised the question of impairment. The process of administration of Standardized Field Sobriety Tests must continue.

The eyes will display varied responses to drugs, and officers should be familiar with the responses. Drug Recognition Experts have three separate processes to view the eyes. The preliminary examination, eye examination, and dark room examinations create a scenario to view eye responses. But, there are elements associated with impairment which will be prevalent roadside.

First, officers need to be familiar with the individual systems of the eye. The Lacrimal System produces tears. Tears moisten the eyes. Many drugs disrupt the proper function of the Lacrimal System and affect blink rate. The disruption of the Lacrimal System creates blurry vision due to a lack of lubrication, which will increase blink rate. Drugs that affect the Lacrimal System include analgesics, antidepressants, opioids, psychedelic agents, anxiolytics, anticholinergics, sedatives, and hypnotics. The next system affected is the Vascular System. Vasoconstriction is a constriction of the blood vessels in the eyes. The result is a white and clean conjunctiva. Common drugs associated with vasoconstriction include hallucinogens and central nervous system stimulants. A condition that many are familiar with is the evidence of vasodilation. One of the more common drugs associated with vasodilation is alcohol. Other drugs associated with vasodilation include depressants, inhalants, dissociative anesthetics, narcotic analgesics, and cannabis. Some create a stronger vasodilation response than others. Even with the apparent presence of vasodilation or observable blood vessels within the eyes, vision is not impaired. The administration of drugs that affect the sympathetic and parasympathetic systems create the variable associated with vision impairment. Prolonged use, especially from injectables, can create a permanent vision loss from the fillers (foreign substances), blocking blood flow within the eye. The process is a cumulative effect of the foreign substances within the drug and will, eventually, result in a permanent vision loss. Another obvious system affected by the introduction of drugs into the system is the accommodative system, which affects eye focus. The effects are obvious during the personal contact and pre-arrest screening phase. Drugs affecting the parasympathetic system will create ptosis or droopy eyelids. Eyes will be wide open when affected by drugs affecting the sympathetic system. The correlation is best described as thinking of a parachute as slowing down a falling object. The same is true with the parasympathetic system. Drugs mimicking these responses fall within the sympathomimetic and parasympathomimetic categories. The effect on the eyelids will depend on the drug dose and individual biochemistry of the user.

Officers commonly see effects on the oculomotor system during traffic stops. The system plays a vital role in the detection of impaired drivers. The oculomotor system controls one's eyes movements. Certain drugs create impairing indicators that are evident within the oculomotor system. The impairment of convergence, the creation of pronounced seccades, and the presence of a lack of smooth pursuit are the predicate of impairment of the oculomotor system. Drugs such as depressants, inhalants, dissociative anesthetics, and cannabis create impairment indicated in the oculomotor system.

The final component of the eye affected by drug use is the Visual Cortex. A phenomenon called synesthesia may be present with hallucinogens. Synesthesia is the transposition of senses in the human body. Hallucinogens shut down the brain, and they create an editing software effect within the brain. Users will commonly smell or hear colors. Hallucinogens also create visual inattention, which is the inability to process targets of focus.

In conclusion, officers enforcing impaired driving statutes need to be familiar with the indicators of impairment displayed by the eyes. The eyes have many systems that are affected by the introduction of drugs. By being familiar with the individual systems, officers are better able to understand and testify to the impairing elements of the most important component of driving, the eyes. Doctors Karl Citek, Christopher Borgman, Wilson McGriff and Richard Savoy provided vital instruction that developed inspiration for the creation of this article.

CHECKPOINT ANTOGONISTS

One of the most common technical assistance calls I receive from law enforcement officers asks the question of what to do when a driver refuses to lower the window at a traffic stop. Some of these drivers have pulled into a sobriety checkpoint to challenge the officers and try to gain fame with a camera and a You Tube video. The trend to refuse to lower a window probably started with an attorney in Florida. He held up a sign that stated:

I REMAIN SILENT
NO SEARCHES
I WANT MY LAWYER
Please put any tickets under the windshield wiper.
I am not required to sign.
I am not required to hand you my license.
Thus I am NOT opening my window.
I will comply with clearly stated lawful orders.

This sign can confuse and aggravate an officer, who is just trying to do his job, but each item has to be reviewed individually. This sign is similar to an attorney who bunches up six questions in one to confuse a witness.

First, he wants to be silent. That's fine. Even people suffering from being mute can committee crimes. We have to deal with it.

Second, he wants no searches. Officers must remember their 4th Amendment training. A search is not what occurs when an officer looks through a car window, looks at documents or smells the air. There is no expectation of privacy in any of those events. Any search of this driver would only occur, if he is arrested with probable cause.

Third, he wants a lawyer. Too bad. There is no right to counsel at a traffic stop.

The rest of his objections are his incorrect assumptions based on his incorrect reading of the Constitution.

In Tennessee, he is required to lower his window, deliver his license and sign any ticket. Sobriety checkpoints are permissible detentions based on State v Downey 945 SW 2d 102 (Tenn. 1997) and Michigan v Sitz 496 U.S. 444 (1990)

In Downey, the Tennessee Supreme Court permitted such checkpoints as exceptions to the warrant requirement and stated, "The drunk driver cuts a wide swath of death, pain, grief, and untold injury across the roads of Tennessee."

The driver has been legally stopped and is subject to two specific Tennessee statutes. TCA 55-8-104 states that: " No person shall willfully fail or refuse to comply with any lawful order of any police officer invested by law with authority to direct, control or regulate traffic." Failure to comply is a class C misdemeanor. If a driver at a checkpoint refuses to lower the window, an officer should attempt to present him with a citation for that offense.

The second law that mandates a specific behavior in the situation is TCA 55-10-207, which requires a driver to accept and sign the citation in lieu of arrest. Failure to sign the citation would cause the officer to arrest the driver. In addition the vehicle of the driver would probably have to be towed and impounded as it could not be left parked in the checkpoint site. All of that will be avoided if the driver simply complies and rolls down his window, so the officer can ascertain whether the driver smells like an alcohol impaired driver and exchange a few words with him.

No matter how the driver responds, an officer should remain calm and polite and explain things to the driver. Some young people have been intentionally misled by people, who misinterpret the Constitution to make themselves famous. Arrests and impoundments are not the purpose of a sobriety checkpoint. They could be a result if a driver attempts to follow the sad and incorrect advise of the Florida lawyer and his You Tube video.

VEHICULAR HOMICIDE MURDERERS ROW

TEN YEARS FOR RED LIGHT RUNNER WITH .10

David Diaz, 25, pled guilty for the vehicular homicide killing of a woman and her friend's unborn child. Diaz ran a red light with a blood alcohol level of .11. He crashed into a car being driven by Desmond Black. His mother, Donna Dickson, was killed as was the unborn child of passenger, Derika Hull. Probation was denied.

State v Aaron, 2015 Tenn Crim App 2015 WL 4183033

A suppression order concerning a Williamson County traffic stop has been reversed. The case has been remanded for trial. In this one, an idiot driver made a choppy, hesitant turn to the right. If he had not followed that turn by giving a trooper the universal middle finger sign of contempt, he might of gotten away with driving under the influence. After the turn and finger, the trooper made a u-turn and further observed the vehicle. It went about a mile while drifting in the lane, but then drifted into the continuous turn lane without using a signal in violation of TCA 55-8-123. The court cited State v Brotherton for the conclusion that reasonable suspicion and probable case can be based on the observation of a class C misdemeanor. The trooper testified he would not have stopped the car based on the wide choppy turn and finger flip, but those two items caused him to follow and focus on the car. I suspect the driver would not have given the trooper his middle finger salute, if sober. Alcohol is a depressant that affects the brain. Some people have pretty poor judgment when drinking. Apparently this driver was one of those.

TRAINED TO INVESTIGATE FATAL CRASHES

These officers completed the Crash Reconstruction Class Sevierville in August.
Instructors were Buck Campbell and Dale Farmer.

This group completed the Advanced Crash Reconstruction Class in McMinnville in September. Instructors were Buck Campbell and Eddie Sledge.

Tennessee District Attorneys General Conference

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VEHICULAR HOMICIDE
Remember the victims

EIGHT YEARS FOR PASSENGER HOMICIDE

Lucas Rippy (pictured on left) was traveling east on Thrasher Pike when his Ford Mustang left the road, hit a pole and flipped. Samantha Ownby (pictured on right) was ejected and KILLED. Rippy had a blood alcohol level of .14 two and a half hours after the crash.

TEN YEARS FOR DRUGGED DRIVER

Casey Daniel Gray was driving west on October 4, 2013 on Highway 70 in Benton County. He crossed into oncoming traffic and collided with an automobile driven by Joseph Aaron Goetz. Mr. Goetz was killed in the crash. Mr. Gray's minor child was a passenger in his automobile and suffered serious injury as well. A blood sample taken from Mr. Gray shortly after the crash indicated the presence of cocaine, hydrocodone, diazepam (Valium), alprazolam (Xanax), an marijuana.

TWELVE YEARS DRUGGED DRIVER

Ricky Myers crossed the center line on Strawberry Plains Road in Knox County and slammed into Cynthia Cross, a 44 year old Sevierville resident. Myers had oxycodone, diphenhydramine and alprazolam in his bloodstream. His sentence was enhanced due to two prior DUI convictions. Ms. Cross was a sign language interpreter for a school in South Carolina for seventeen years, who left behind her daughter, mother and many nieces.

EIGHT YEARS FOR .22 B.A.C. DRIVER

Patrick Evans had a blood alcohol level of .22 when he cut in front of another car attempting to make a left turn onto the entrance ramp of State Route 840 in Williamson County. Killed in the crash was Ralph Calendine, 66, of Columbia. He was a passenger in the vehicle driven by his wife, Lynda, who suffered incapacitating injuries in the wreck. Mr. Calendine was a veteran of the Army and a minister.

FIVE YEARS FOR KILLER OF CYCLIST

Phyllis Taylor left her lane and drove onto the shoulder of the road. She struck and killed Vince Freeman, 22, of Clarksville and drove away. Taylor was identified as the driver two days later, so no evidence of impairing substances could have been recovered, if it existed. Taylor pled guilty to vehicular homicide by recklessness. The victim of the homicide had celebrated the return of his dad from a deployment to Afghanistan. The joy of his homecoming was short lived. His mother told the Leaf Chronicle newspaper, "It's sickeningly ironic I feared that knock on the door for several months when my husband was deployed. Then the night he's home, the chaplain comes and tells me my son is dead and has been run over like a dog and left on the side of the road to die." To leave a person on the side of the road to die is disgusting and inhumane. Unfortunately, offenders continue to benefit by fleeing crash scenes and hiding evidence that may be in their bloodstream.

I'm a not a'gonna do it

By Tom Kimball and Jim Camp

One of my favorite jurists in my long career was the late Mayo C. Mashburn in the 10th Judicial District. The Judge was a colorful man, who often used colorful language. He ran his courtroom with an iron fist, cigars and a bit of profanity. In the dictionary the phrase "old school" is defined with his photograph. The first time I had a trial before him, I objected to some evidence and requested a mistrial. He looked at me for a minute as if he was trying to send laser beams from his eyes through my heart. He declared, "I'm a not a gonna do it Mr. Kimball. I'm a not a gonna do it." I got the message loud and clear. Later in the trial I objected again and on that occasion he stared me down a little longer and repeated the same language, but had a pained look on his face as if to ask if I would ever learn. By the time I raised a third objection, he barked at the court officer to take the jury out of the room, so he could try to remedy my erroneous ways. I did not budge. Throughout the first day of the two day trial, he depicted anger at every objection. On the second day, I presented proof and he constantly reminded me that the clock was ticking, attempting to make me go faster and get my presentation of witnesses over with. At the time I served my State as an Assistant Public Defender. I represented my client zealously within the bounds of the law. I did my job. The trial ended with a 6-6 hung jury. One of the jurors told me as I walked to my car that he voted not guilty, because he did not think the Judge was fair. I did not think Judge Mashburn meant to be unfair. I think he was testing me. I believe he wanted to see if I would stand up to pressure and continue to advocate during a challenging time. He wanted to see what I was made of. He wanted to see if I possessed courage. After that trial he never acted in that way towards me. In fact he was so respectful that the ADA's wondered why they were being picked on and I was not.

Ever since the decision in *Missouri v. McNeely* I have received reports of judges and magistrates proactively refusing to sign or even review search warrant requests for DUI cases. The most common quoted phrase is "Don't even think about bringing me a warrant to sign in a DUI". Another popular reported response: "If you are bringing me a warrant for a DUI there better be someone dead or close to it". Then there is my personal favorite: "If you think I'm getting out of bed in the middle of the night to sign a warrant for a DUI case you have another thing coming."

For a couple of decades in Tennessee, search warrants were not permitted. Then the General Assembly passed a law in permitting search warrants that became effective on May 12, 2012. Less than one year later, April 17, 2013, the United States Supreme Court issued the *Missouri v McNeely* opinion. In it the Court ruled that the dissipation of alcohol did not provide exigent circumstances by itself and that the State must seek a search warrant for a blood test in all but very unusual situations. Search warrants were clearly the preferred method to obtain evidence in DUI cases, if the driver did not consent to a test. Search warrants were to become much more common in Tennessee.

Some Courts act as if the General Assembly never passed a law and as if the Supreme Court never issued McNeely. They seem to yearn for the good old days, when search warrants were never requested, because they were banned. Understand, most jurisdictions have complied with the law and McNeely. They have established systems to permit an officer to do his/her job and obtain a search warrant. Some of the Courts that have failed to comply are in very rural areas. It can be hard to be the one judge available to sign a search warrant at 2 a.m.. When that occurs, the judge cannot call off court the next day. He/she has a docket to control. As hard as it might be, the court cannot reject search warrants and be fair.

> Rule 10 of the Code of Judicial Conduct defines inappropriate judicial conduct. It includes magistrates, court commissioners and judicial commissioners as those governed by the rules. Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence. Tenn. Sup. Ct. R. 10, RJC "Impartial," "impartiality," and "impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. Tenn. Sup. Ct. R. 10, RJC Terminology

A judge or magistrate cannot maintain impartiality and fairness to all, if the judge rejects search warrants without reading them, without weighing probable cause or by establishing a "Do Not Disturb" practice.

What's a District Attorney to do? We are being tested with this issue the way Judge Mashburn tested me in the courtroom. There are two choices. Confront the problem with courage or run away from the problem and let the Court know when things get rough the prosecutor runs away.