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DUI NEWS

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THE STUNNING NEW LAWS OF 16

The General Assembly created some significant changes to the laws governing the crime of DUI in 2016. Beginning July 1, there will be major changes to our law. A DUI 6th offense will now be punished as a class C felony. Every DUI offender will be required to have an ignition interlock installed on their vehicle, if any alcohol was detected as part of their crime. The ignition interlock indigency fund is now titled the DUI Monitoring Fund. It can be used to pay for transdermal monitoring, electronic monitoring, G.P.S. monitoring and any other equipment used to monitor probationers. Garbage pick-up, once titled DUI Shaming, is no longer required by the statute.

IGNITION INTERLOCK

The change that will effect the most cases is the change to a mandatory ignition interlock law. In the past the convicted DUI offender would be ordered to install an ignition interlock, if the offender requested a restricted license. The new law creates a new section to the statute at TCA 55-10-205. The section begins with a dramatic change, COMPLIANCE BASED REMOVAL. If a person is ordered to install and use the interlock, the interlock will not be removed at the end of the term (example 1 year), unless the offender has one hundred twenty consecutive clean days. That means the person was not blocked from driving by the interlock for that number of days. COMPLIANCE BASED REMOVAL is a new term for us. Now, a person can not complete his/her time and be free of the interlock, unless the person completes that journey with sobriety. If there is not a 120 clean consecutive day period, the person will be required to keep the interlock for another 120 days, until there is a 120 day clean compliance period. Some of our offenders may be on the interlock for a lifetime! The order to install an interlock is no longer part of a restricted license application. A person can not opt out and wait out the time of license revocation by simply not requesting a restricted license.

The Court must fill out a form explaining why an interlock was not ordered and the reasons must follow the statutory requirement or the Department of Safety will require the interlock. If the court orders that a restricted license be issued without an ignition interlock device required, and the court's findings of fact demonstrate that installation and use of a functioning ignition interlock device is not required by § 55-10-409(b)(2)(B), the restricted driver license shall be subject to the geographic restrictions of § 55-10-409(c). The interlock law as passed is available to all on our website in the **Resources** drop down box at http://dui.tndagc.org.

DUI 6TH OFFENSE

This law is a little more simple. If a person commits and is convicted of a DUI after July 1, 2016 and the person has five prior DUI convictions per our current statute, the person is guilty of a Class C felony.

COUNTING THE PRIORS

The new law amended TCA 55-10-405. Subsections (b) and © of the section were re-placed with new language.

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RECENT DECISIONS

State v Hughes, 2016 WL 197929 Bramlage and McBride Expert Witnesses

This defendant crashed into a ditch. A citizen stopped to help her and contacted 9-1-1. Lt. Kevin Williams responded. Due to her confusion and responses, he asked if she was on any medications. Since she had oxycodone, lortab and xanax in her system, she was not in control of her vehicle. Two witnesses from the TBI lab, April Bramlage and Bethany McBride were affirmed as expert witnesses in the case. Bramlage was able to provide extensive testimony about the narcotics detected in the defendant's blood and their likely impact on the defendant's ability to operate a motor vehicle.

State v Loudermilk, 2016 WL 81292 Sentencing

After his 4th offense conviction was overturned and remanded, this guy was convicted of DUI 3rd offense. . He argued that the sentence is illegal because, during his first direct appeal, he completed a probationary period which exceeded the statutory maximum punishment for a Class A misdemeanor. We conclude that defendant's sentence is not illegal because he was not on probation pending the resolution of his direct appeal.

State v Nowakowski, 2015 WL 7873804 Harmless Error

In the midst of a garbled audiotape an officer mentioned the driver had previously been arrested for a DUI. No one heard it during the trial. There was no redaction or objection. The Court found that the inclusion of the comment was error, but harmless. "The sound from outside the vehicle is faintly recorded and shrouded with noise from inside the officer's vehicle. While the officers are waiting on the ambulance to arrive, they are positioned with Nowakowski outside her vehicle. Once the ambulance arrives and paramedics begin to assess Nowakowski, another female officer approaches the scene and fleetingly references "priors." Had the remark not been brought to this court's attention, it would have gone unnoticed. In our view, because the remark is barely audible, we are hesitant to conclude that it had any impact on the jury verdict, much less a substantial and injurious one.

State v Phillips, 2015 WL 9487797 The Insignificant Crime

This revocation of probation case should be offensive to anyone who cares about the victims of impaired driving. Phillips, through her public defender, claimed her probation should not have been violated, because she only committed a DUI. She claimed DUI is an insignificant crime, which should not reflect on her dedication to follow the rules of probation.

State v Kennedy, 2016 WL 692655 Pictured and Left

On the evening of November 16, 2013, shortly after 7:00 p.m., Caleb Hall was driving his girlfriend to the movie theater. Mr. Hall was "sitting about three cars deep at the stop sign" on Macon Road when a Mazda vehicle "took a wide right turn into the front left of [Mr. Hall's] vehicle, kind of went over the hood." Following the collision, Mr. Hall's girlfriend called the police while Mr. Hall got out of his vehicle. A woman, later identified as the defendant ,"stumbled" toward Mr. Hall. Mr. Hall described his initial interaction with the defendant as follows: Mr. Hall detected a "strong" smell of an alcoholic beverage emanating from the defendant and observed that the defendant was unable to stand or walk very well. Hall took a picture of the defendant, which was helpful when she left the scene.

The Prosecutors

No conviction occurs without diligent hard work from a Prosecutor. Those involved in these convictions were:

Walt Freeland, 25th
Mike McCusker, 30th
Linda Walls, 15th
Christi Thompson, 22nd
Sarah Keith, 6th
Carlin Hess, 21st
Ryan Desmond, 6th

The Officers

Prosecutors don't have a case without diligent hard work by law enforcement officers. Those involved in these convictions were:

Lt. Kevin Williams, THP
Jonathan Chalk, Memphis PD
Sgt. Scott Fulton, Mt Juliet PD
Trooper Phillip Long, THP
Deputy Jerry Massey, Knox County
Trooper Chuck Achinger, THP
Desmond Cook, Alcoa
Leslie Calhoun, Memphis

RECENT DECISIONS of the Tennessee Supreme Court

PROBABLE CAUSE TO STOP FOR CENTER LINE VIOLATION

State v William Whitlow Davis, SW 3rd, 2016 WL 537069 Tenn. Feb 11, 2016

This driver crossed the double yellow center line. He was stopped for a violation of the Rule of the Road, which requires a driver to remain on the right side of the road except for four exceptions: passing, construction, turn lanes and one way travel. Drivers are also required to move over for emergency equipment per another statute.

In this case none of the exceptions existed, Davis was simply over the double yellow as is not unusual for impaired drivers. The Tennessee Supreme Court in a unanimous decision by Justice Bivens upheld the traffic stop.

Police officer had probable cause to conduct traffic stop of defendant; officer observed defendant cross double yellow center lane lines of road with two left wheels of vehicle defendant was driving, as proscribed by statute governing driving upon right half of roadway, and none of four exceptions set forth by statute was present at time defendant drove vehicle over center lane lines. U.S. Const. Amend. 4; Tenn. Const. art. 1, § 7; Tenn. Code Ann. §§ 55-8-101(52), 55-8-101(22), 55-8-103, 55-8-115(a).

The Court made clear that this stop was based on probable cause, because the officer witnessed the misdemeanor. The Court urged prosecutors and law enforcement officers to know the difference between probable cause and reasonable suspicion and use the correct terminology.

REASONABLE SUSPICION TO STOP BASED ON CROSSING THE FOG LINE

State v Linzey Danielles Smith, SW3rd, 2016 WL 537119 Tenn Feb 2016

In this opinion the Court upheld a traffic stop after the driver crossed the fog line. In contrast (to Davis) the traffic statute at issue in this case, Tennessee Code Annotated section 55–8–123, provides, in pertinent part, as follows: Whenever any roadway has been divided into two (2) or more clearly marked lanes for traffic, the following rules, in addition to all others consistent with this section, shall apply:

(1) A vehicle shall be driven *as nearly as practicable* entirely within a single lane *and* shall not be moved from that lane *until the driver has first ascertained* that the movement can be made with safety[.]

Justice Bivens wrote: "Clearly, the primary purpose of Section 123(1) is to enhance highway safety. Just as clearly, a motorist must be allowed to leave her lane of travel in order to avoid obstructions or other dangers. Nevertheless, such excursions must be made as safely as possible, to wit, after the motorist checks the traffic conditions around her and maneuvers accordingly. However, it is not just deliberate lane excursions that may endanger other drivers or pedestrians. *Accidental* lane excursions, by definition, are made without the motorist first ascertaining their safety. Such inadvertent maneuvers may cause as much danger or damage as those made deliberately in the face of observed risks. Certainly, a motorist who is accidentally leaving her lane of travel creates a driving hazard at least to herself, if not to others."

"Therefore, based on the plain language of the statute, and guided by our concern for public safety, we hold that Section 123(1) is violated when a motorist strays outside of her lane of travel when *either* (1) it is practicable for her to remain in her lane of travel *or* (2) she fails to first ascertain that the maneuver can be made with safety. Thus, even minor lane excursions may establish a violation of Section 123(1) whether or not the excursion creates a specific, observed danger."

In both of these cases, the Court noted the need for the laws passed by the General Assembly for the protection of the public. In 2015 **380** persons died in crashes in which a driver failed to maintain his/her lane of travel. **7,157** people were injured in such crashes.

DRE – Drug Recognition Experts in Tennessee

by DRE Coordinator Richard Holt

Drug Recognition Experts or Drug Recognition Evaluators (DRE) are highly trained police officers or other approved Public Safety personnel in the detection of impaired drivers on substances other than alcohol or substances in combination of other drugs and alcohol. The DRE program is coordinated by the International Association of Chiefs of Police (IACP) and supported by the National Highway Traffic Safety Administration (NHTSA).

NECCESSITY AND INGENUUITY GIVE BIRTH TO THE DRE PROGRAM

The inception of the program began in the 1970's in Los Angeles, California. LAPD officers working DUI cases noticed that subjects were showing impairment that was inconsistent with low BAC readings. Those officers suspected drugs were the cause, but they lacked the knowledge and skills to support their suspicions. They began working with medical, psychological and other professional personnel to devise a simple systematic criteria to detect the signs and symptoms of drug impairment. From this collaboration developed a step by step protocol for the DRE program.

DO WE HAVE A PROBLEM?

The International Association of Chiefs of Police (IACP) asked this question prior to beginning a DRE Pilot Program in Tennessee. To answer this question we asked the Tennessee Bureau of Investigation Toxicology Section to supply the results of the next 100 blood sample cases submitted to the lab for those suspected of Impaired Driving with a B.A.C. below .10. Within a week we had the results of 200 samples, the results were conclusive. 200 cases with a BAC below .10 were delivered. TBI found that 88% had substances other than alcohol in the blood, the top category of drugs was Cannabis followed by depressants, Methamphetamine and Cocaine. Yes, we have a problem and one bigger than we first thought. Thus, IACP authorized a DRE Pilot Program in Tennessee.

Based upon the above statement management and supervisory personnel may deduce to get blood on all those suspected of driving impaired forget about breath testing. This would be a grave mistake. There are several reason we need to use breath tests. First, blood testing of all suspected impaired drivers unnecessarily backlogs the toxicology lab with subjects impaired on alcohol. The ECIR2 instruments are economical to maintain and calibrate and are scientifically valid. We should use them whenever possible and prosecute those cases vigorously based on all the facts of the case. Second, a breath test supplies a quick answer to the question of whether alcohol is part of the impairment observed. A low reading combined with signs of impairment that don't equal the low result gives the officer information that leads to calling in the DRE for further evaluation. If a DRE completes an evaluation on this subject with a .04 BAC and he concludes that certain drugs are acting in combination with alcohol to cause impairment, which is later supported by a blood test result, a guilty impaired driver will be convicted instead of being set free to offend again. Our numbers of Certified DREs are increasing and their impact on impaired driving cases has yet to be noticed. Fortunately, things are changing in Tennessee.

APPLICANTS FOR DRE TRAINING MUST BE ENDORSED BY THEIR DISTRICT ATTORNEY !

HOW ARE DREs SELECTED?

First and foremost the DRE's are selected from an application process and not appointed; the DRE Class is one they should want to attend as the curriculum is quit comprehensive. They must have at least 4 years of law enforcement experience, be proficient in Standardized Field Sobriety Testing (SFST) and have completed the "Advanced Roadside Impaired Driving Enforcement Course"(ARIDE) offered by the Tennessee Highway Safety Office.

Officers are trained in three phases to become certified as Drug Recognition Experts:

Drug Recognition Expert Pre-School (16 hours)
Drug Recognition Expert DRE School (56 hours)
Drug Recognition Expert Field Certifications (Approximately 40 – 60 hours)

DRE – Drug Recognition Experts in Tennessee (cont/d)

by DRE Coordinator Richard Holt

The Drug Evaluation and Classification (DEC) Program relies heavily on the SFSTs which are the foundation for the program. Once certified DREs become highly effective officers skilled in the detection and identification of persons impaired by alcohol and/or drugs. DREs are trained to conduct a systematic and standardized 12-step evaluation consisting of physical, mental and medical components. Because of the complexity and technical aspects of the DRE training, not all police officers may be suited for the training. Experience has shown that training a well-defined group of officers proficient in impaired driving enforcement works well and can be very effective. The DRE classroom training includes goals and learning objectives.

TRAINING GOALS

Determine if an individual is under the influence of a drug or drugs other than alcohol, or the combined influence of alcohol and other drugs, or suffering from some injury or illness that produces similar signs to alcohol drug impairment; Identify the broad category or categories of drugs inducing the observable signs and symptoms of impairment; and Progress to the Field Certification Phase of the training.

TRAINING OBJECTIVES

- Be able to describe the involvement of drugs in impaired driving incidents;
- Name the seven drug categories and recognize their effects;
- Describe and properly administer the psychophysical and physiological evaluations used in the drug evaluation and classification procedures;
- Prepare a narrative drug influence evaluation report;
- Discuss appropriate procedures for testifying in typical drug evaluation and classification cases, and;
- Maintain up-to-date DRE curriculum vitae

THE FIELD CERTIFICATION PROCESS

This is the final portion of the DRE training process and is done in the field. This presents some unique problems. Unlike alcohol, where we can dose volunteers in an Alcohol Workshop, we can not do that with drugs. In turn, we have to visit jail intakes and get volunteers to cooperate. Getting cooperation is sometimes a challenge, but there are adequate numbers of prisoners willing at every location we have conducted Field Certifications. Just from our observations almost 80% of the subjects that we have contacted at jail intakes are under the influence of drugs at the time of their arrest, this tell us something we already know – drugs are a problem in our communities and they are on our highways and roads under the influence of drugs and alcohol. The DRE candidates have to complete 12 Field Evaluations under the direction of an instructor, they work in teams of 3, one being the evaluator or the one conducting the 12 steps, one officer is the scribe or note taker for the evaluator and the third officer is observing. Six of the twelve evaluations for each officer must be the evaluator and they must observe a subject or subjects under the influence at least three different categories of drugs. Approximately 2/3 of the way through the Field Certification Process the candidate DRE will successfully complete a comprehensive Final Knowledge Exam.

HOW TO USE YOUR DRE

A law enforcement officer meets a driver suspected of DUI and performs field sobriety tests. The tests indicate that the subject is impaired. The officer suspects the impairment is caused by a substance other than or in addition to alcohol. The subject is arrested and submits a breathalyzer. The result is below .08. The officer suspects there is more there than the breath test result indicated. This is a situation where a DRE can help. The DRE should be called in and a blood test should be completed as soon as possible.

The DRE will perform a detailed diagnostic evaluation on the subject and will render an expert opinion on the following:

- Is the person in question impaired?
- Is the subject capable of operating a motor vehicle safely?
- What category or categories of drugs is effecting the suspect?
- Is the impairment due to illness or injury?

NEW LEGISLATION AFFECTING TRAFFIC SAFETY

55-10-405 (b) and (c)

Prior to this legislation **TCA 55-10-405 (b)** stated:
(b) For all purposes in this part the state shall use a conviction for the offense of driving under the influence of an intoxicant, vehicular homicide involving an intoxicant or vehicular assault involving an intoxicant that occurred in another state.

The new section, effective July 1, 2016 will state:
(b) If a person is convicted of a violation of § 55-10-401 in this state, for purposes of determining if the person is a multiple offender, the state may use a conviction for an offense committed in another state that would constitute the offense of driving under the influence of an intoxicant under § 55-10-401, vehicular assault under § 39-13-106, aggravated vehicular assault under § 39-13-115, vehicular homicide under §39-13-213(a)(2), or aggravated vehicular homicide under § 39-13-218, if committed in this state. If an offense in a jurisdiction other than this state is not identified as one (1) of the offenses named in this subsection (b), it shall be considered a prior conviction if the elements of the offense are the same as the elements of the comparable offense in this state.
(NOTE: The changes are underlined. I suspect we will see litigation that will require a court to determine if the out of state conviction has the same elements as the comparable offense here. The change from shall to may gives the State more discretion.)

Prior to this legislation **TCA 55-10-405 (c)** stated:
(c) For all purposes in this part a prior conviction for a violation of § 39-13-213(a)(2), § 39-13-106, § 39-13-218 or § 55-10-421, shall be treated the same as a prior conviction for a violation of § 55-10-401.

The new section states:
(c) For purposes of determining if a person convicted of a violation of § 55-10- 401 is a multiple offender, a prior conviction for vehicular assault under § 39-13-106, aggravated vehicular assault under § 39-13-115, vehicular homicide under § 39-13- 213(a)(2), or aggravated vehicular homicide under § 39-13-218 shall be treated the same as a prior conviction for driving under the influence of an intoxicant under § 55-10- 401, provided, the person was convicted of the prior offense before committing the instant violation of § 55-10-401.
(NOTE: The changes are underlined. The language "in this part" was removed, indicating that the definition is now chapter wide. That may have significance concerning other Sections in the Chapter. The Courts may have some fun with that change. The second change adds the requirement that the new violation to be a 2nd offense must occur after the conviction for the prior offense. A person can still collect five DUI 1st offenses, if the previous arrests had not resulted in a conviction.)

DUI PROBATION MONITORING FUND

Public Chapter 653 has opened the ignition interlock indigency fund to pay for other devices. The fund has been sparsely used until now as offenders could skip any interlock requirement by not applying for a restricted license. I would predict this fund will be used a great deal after July 1st. The fund can now be used to pay for ignition interlock, transdermal monitoring, electronic monitoring and any other monitoring device necessary to ensure compliance with conditions of probation.

UNDERAGE DWI

This law changes the age for underage DWI from 16-21 to 16-18. The .02 presumption remains for those 16 to 18 years of age as do the lesser penalties. If the driver is an adult, 18 years of age or older, the driver will be subject to the DUI laws, but will not be eligible for the lesser DWI penalties.

THE PROSECUTOR'S GUIDE TO PERFECTING A DIRECT APPEAL

Rachel Willis, Senior Counsel, Tennessee Attorney General

The defendant filed a motion to suppress the evidence and, on the hearing day, you come to court prepared to defend against it. You are certain the law and the facts are squarely on your side. But unfortunately, the trial judge doesn't see it that way and he or she orders that the evidence must be suppressed. Your immediate reaction: I want to appeal! To accomplish that, you should have a basic understanding of the appellate process. That begins with a reading of the Rules of Appellate Procedure. In particular, you need to understand Rules 3, 4, 9, and 10. You also should become familiar with Rules 24, 25, and 26 concerning preparation and filing of the appellate record.

The first question you must answer is whether your appeal is a direct appeal as of right pursuant to Rule 3, an interlocutory appeal pursuant to Rule 9, or an extraordinary appeal pursuant Rule 10. *See* Tenn. R. App. P. 3(c), 9, and 10. The answer depends on the charges in the indictment and the impact of the trial court's ruling on the prosecution.

The State has an appeal as of right only when the "substantive effect" of the order suppressing or excluding the evidence "results in dismissing an indictment, information, or complaint."[1] A suppression order has the substantive effect of dismissing a case if the evidence remaining is not sufficient to take the case to trial. To trigger an appeal under Rule 3(c), the suppression order must result in the entry of an order dismissing the indictment, information, or complaint.

For example, if the defendant is charged in a single-count indictment with DUI with a BAC of 0.08 percent or greater under Tenn. Code Ann. § 55-10-401(2) and the trial court suppresses the BAC test results, the ruling would prevent the case from being prosecuted and Rule 3(c) would allow the State to pursue an appeal as of right from an order dismissing the indictment.

To perfect an appeal pursuant to Rule 3(c), the State must file a notice of appeal with the trial court clerk's office within 30 days after the entry of the judgment being appealed. *See* Tenn. R. App. P. 3(c) and 4(a). First, however, you should contact the Criminal Appeals Division of the Attorney General's office about the appeal. Although the filing of a timely notice of appeal is your responsibility, the decision of whether to pursue the appeal in the appellate courts rests with the state Attorney General's office. *See* Tenn. Code Ann. § 8-6-109(b)(2). When you contact the Attorney General's office, be prepared to explain the facts, the grounds for the motion, the ruling of the trial court, and the reasons you believe an appeal is warranted. If the Attorney General's office agrees with your assessment of the case, the appeal will be taken.[2] At that time, the notice of appeal should be filed.[3]

On the other hand, a suppression order that eliminates the heart of the State's case so that there is no reasonable probability of a successful prosecution, but does not exclude all of the evidence, can be the basis of an interlocutory appeal under Rule 9 or an extraordinary appeal under Rule 10. Likewise, the appeal of an order that results in the dismissal of some, but not all, of the counts in the indictment can be pursued under Rule 9 or 10. These orders are not final judgments in the case, therefore interlocutory appeal is appropriate.

An example of this is a case where the defendant is charged in a single-count indictment with DUI under Tenn. Code Ann. § 55-10-401(1) and the trial court suppresses the BAC test results, but the arresting officer can still testify that the motorist was driving erratically, had blood-shot eyes and slurred speech, was unsteady on his feet, and failed a field sobriety test, the ruling does not prevent the case from being prosecuted. Under those circumstances, Rule 3(c) would not allow an appeal as of right. Instead, appellate review would be pursued through an interlocutory under Rule 9

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[1] The rules also provide for appeal by the State from entry of a judgment of acquittal, an order arresting the judgment, an order granting or refusing to revoke probation, and a final order in a habeas corpus, extradition, or post-conviction proceeding. *See* Tenn. R. App. P. 3(c).

[2] However, the Attorney General's decision is contingent upon the appellate record supporting the State's position. If the facts are not sufficiently developed in the record or the trial court made credibility determinations adverse to the State's position, the appeal may be dismissed. *See* Tenn. R. App. P. 15 (voluntary dismissal of appeal); State v. Morris, 24 S.W.3d 788, 795 (Tenn. 2000) (All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact, not the appellate courts).

[3] If you find yourself facing the deadline for filing the notice of appeal without having had the opportunity to contact the Criminal Appeals Division, you should file a timely notice of appeal to preserve the issue and then contact the Attorney General's office. If the Attorney General's office decides not to pursue the appeal, the appeal can be dismissed. *See* Tenn. R. App. P. 15. Also, the notice of appeal is not jurisdictional and the requirement of timeliness may be waived by the appellate court. *See* Tenn. R. App. P. 4 (a). Nevertheless, the notice of appeal should be filed in a timely manner except in extraordinary circumstances.

THE PROSECUTOR'S GUIDE TO PERFECTING A DIRECT APPEAL (cont'd)

Rachel Willis, Senior Counsel, Tennessee Attorney General

Similarly, if the defendant is charged with both DUI and DUI per se, and the trial court suppresses the BAC test results effectively dismissing the DUI per se count, the ruling does not prevent the case from being prosecuted for the remaining count of the indictment. Again, there would be no appeal as of right and Rule 9 provides the proper avenue for appeal.

An interlocutory appeal requires the permission of both the trial court and the appellate court. *See* Tenn. R. App. P. 9(b) and (c). You must file an application for permission to appeal within 30 days of the trial court's order on the motion to suppress specifically citing and explaining how the issue presented fits within one or more of the character of reasons for interlocutory appeal set out in the rule. *See* Tenn. R. App. P. 9(a). Before you begin the appeals process, however, you should contact the Criminal Appeals Division of the Attorney General's office about the appeal. As with direct appeals, the decision whether to pursue an interlocutory appeal rests with the Attorney General's office.

After gaining permission from the trial court to pursue the appeal, the State must file a separate application in the Court of Criminal Appeals within 10 days of that trial court order. The application to the appeals court must be accompanied by specific parts of the record (*see* Tenn. R. App. P. 9(d)), which you will be responsible for providing to the Attorney General's office.

If the trial court denies your application for interlocutory appeal under Rule 9, the State may be able to pursue extraordinary appeal under Rule 10. An extraordinary appeal is appropriate if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, or if necessary for complete determination of the action on appeal as otherwise provided in the rules of appellate procedure. *See* Tenn. R. App. P. 10 (a). "An extraordinary appeal is sought by filing an application for an extraordinary appeal with the clerk of the appellate court." Tenn. R. App. P. 10(b). An application for extraordinary appeal must be filed by the Attorney General so, if you feel that such an appeal is warranted, contact the Criminal Appeals Division about the case.

After a notice of appeal is filed on behalf of the State or the Court of Criminal Appeals grants an application for Rule 9 interlocutory appeal or Rule 10 extraordinary appeal, you will be responsible for ensuring that the appellate record is prepared and filed. *See* Tenn. R. App. P. 24, 25, and 26. The appellate record should include the indictment, the defendant's motion to suppress, the State's response, the trial court's order granting the motion, the notice of appeal, the transcript of the motion hearing, and any exhibits introduced.

The preparation and filing of the transcript are governed by Rule 24(b). *See* Tenn. R. App. P. 24(b). When the State appeals, the State has the responsibility to request preparation of a transcript. The transcript must convey a "fair, accurate, and complete account" of what happened in the trial court with respect to the issue being appealed. The transcript must be ordered from the court reporter, in a written request, within 15 days of the notice of appeal. *Id.* (second paragraph). A copy of the transcript request must be filed in the trial court clerk's office. The transcript itself must be filed with the trial court clerk within 90 days after the notice of appeal is filed and it must be certified by the court reporter or the prosecuting attorney. *Id.* (first paragraph). It is the appellant's responsibility to ensure that the transcript is filed and to notify the defendant's counsel of the filing. Failure to follow this procedure could result in dismissal of the appeal under Rule 26(b) of the Rules of Appellate Procedure.

After the transcript is filed with the trial court clerk, your job in perfecting the appeal is done. From that point, the trial judge may approve the record or it may be deemed approved. *See* Tenn. R. App. P. 24(f). Then the trial court clerk is required to complete and transmit the appellate record to the clerk of the appellate court. *See* Tenn. R. App. P. 25. When the record is filed in the appellate court, the Attorney General's Office will be notified and the briefing process will begin. *See* Tenn. R. App. P. 26.

If the Court of Criminal Appeals affirms the trial court's grant of the motion to suppress, the Criminal Appeals Division and the Solicitor General will decide whether to file an application for permission to appeal in the Supreme Court pursuant to Tenn. R. App. 11. The Attorney General's office will consult with you about the case and your input will be considered in the decision process.

About the Author

Rachel Willis is an Assistant Attorney General and an Appellate Team Leader in the Criminal Appeals Division of the Tennessee Attorney General's Office. As team leader, she supervises a team of five attorneys and trains new attorneys in appellate practice and procedure. She also carries her own caseload and has handled numerous cases in the state appellate courts, including over 30 cases in the Tennessee Supreme Court. In 2010, she was designated as a Senior Counsel in the Attorney General's Office.

NHTSA REGION 4 MEETING

Recently I attended the NHTSA Region 4 Law Enforcement Liaison meeting for two purposes. The first was to report to the hundreds of officers and NHTSA leadership about our progress in Tennessee concerning the effort of prosecutors to reduce the carnage on our roadways. The second was to be informed on upcoming practices, events and the goals of those who provide funds for our grants. We had a good representation of Tennessee LEL's and network coordinators and each Traffic Safety Resource Prosecutor from the region, except one dealing with a family issue. Carmen Hayes, the Regional Administrator, updated us about the current state of affairs in our region. Ms. Hayes started as an intern with NHTSA in 1987. She has a Masters Degree in Transportation and Management. She indicated that the five States of the Southeast Region experienced the loss of 32,719 lives in 2013 and all States had an increase in fatalities in preliminary numbers for 2014. By comparison, Tennessee did better than the others. Our increase was one per cent of less. Florida and Georgia had double digit increases. Much more work must be done. About 30% of the fatalities were due to impaired drivers. Ms. Hayes noted that speed related deaths in 2013 were down by 38%. Seat belt use has increased. Problems with alcohol, speed and seat belt usage are greatest at night. Nighttime seat belt enforcement is a high priority item. Ms. Hayes also pled with the States to use D.R.E.'s in checkpoints and saturation patrols and include data in the national DRE database.

Florida L.E.L. Janice Martinez became one of my favorite people when she taught about how to use social media as a friend. I leaned I could do a live broadcast using Periscope and link the broadcast to my twitter account. Who knew. I then completed a live broadcast of Washington T.S.R.P. Moses Garcia teaching about the impact of marijuana legalization in his State. I blasted an e-mail to let our prosecutors know the live broadcast was about to begin and I appreciate that some folks watched and benefitted. I plan to use this at future events in case you cannot attend.

Finally, **Lt. Colonel Jim Polan-Broward County SO** spoke about leadership in a time of crisis and the Broward County, FL response to the drug Flakka. His presentation asked each person to lead within their particular domain. He asked, **"Would You Follow You?"** Do you have the winning attitude, behavior, presence, credibility, decision making ability and vision to inspire others? Do you walk the walk and not just talk the talk? Are you willing to rock the boat when the boat needs rocking?

In Broward County, the number of hospitalizations from the drug Flakka has been drastically reduced in a six month time frame from 360 per month to 54 per month. The Flakka crisis was met head on by leaders who could respond quickly with awareness, education, community involvement and training. The quick response was possible due to a command structure in which members knew their roles and were trusted to be creative and meet the needs of the community. Tim Roberts and the Florida LEL's put together a program that is a credit to their leadership efforts. Hopefully those efforts will motivate us to double down on efforts to save lives on our Southeastern roadways.

Tennessee Data

Fatal Crashes

Between January 1 and March 31, 2016, The Tennessee Integrated Traffic Analysis Network (Titan) recorded that we had 57,395 crashes. There were 16,539 total injuries and 214 fatalities. 39 of the 214 fatalities were in alcohol related crashes. Twenty-five were in drug related crashes. Eleven fatalities were in crashes in which both drug and alcohol were involved. When the final calculation is done **24.7%** of the first quarter fatalities involved alcohol and or drugs.

Tracker Data

During the first quarter of 2016, 2,835 DUI Dispositions were entered by DUI Coordinators in twenty five judicial districts. In 66.8% of the cases, the driver was found guilty as charged. Twenty-two percent received reductions, for instance a 3rd pleading to a second. The 20th District (Nashville) closed 693 cases; the 15th District (Hartsville, Lebanon) closed 198 cases; the 21st District (Franklin) closed 170, the 22nd (Lawrenceburg, Columbia) finished 158 and the 1st (Johnson City) closed 157. New cases outnumbered the closed cases substantially. There were 3,398 new cases assigned, about 500 more than were closed. Six districts that lack a DUI Prosecutor did not and were not expected to submit data to the Tracker.

VEHICULAR HOMICIDE MURDERERS ROW

State v Riddle, 2015 WL 9487936

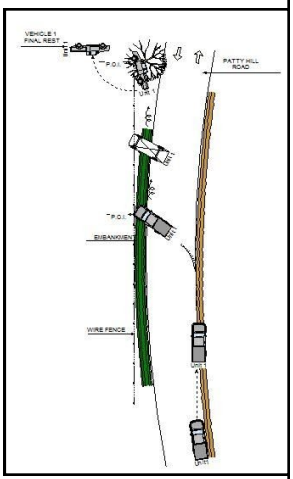
This defendant was convicted by a jury of vehicular homicide by intoxication. In 2007, she drove her Ford Mustang into the rear of a motorcycle driven by John Younce Jr., which was stopped at a stop light. She had a blood alcohol level of .15. On appeal the defendant complained that the blood test had been destroyed. The trial court found that from the time her blood was drawn, the Appellant had the opportunity to have the sample preserved and independently tested but that she may not have had the "incentive" to do so prior to being formally charged. The court also found that the State had no duty to preserve the blood sample, that the State was not negligent in destroying the sample, that the blood sample was destroyed in compliance with the TBI's policy, and that the State was acting in good faith when the sample was destroyed. The court found that because the test revealed a blood alcohol content of .15, the evidence had no apparent exculpatory value prior to its destruction. The court agreed with the State that the test was not the only evidence against the Appellant, noting her admission that she had consumed two beers that day and the two officers' statements that they smelled smell alcohol on her after the crash.

The Court of Criminal Appeals agreed with the Trial Court and added that the defendant had requested preservation prior to the indictment, but some time after the destruction period.

TIRED TRUCKED CONVICTED FOR RECKLESSNESS

In White County, Tennessee, Curtis Orlando Carter pled guilty to reckless vehicular homicide for killing Jeanne Mannes, 77, of Rock Island, TN. Carter was driving a Ryder Rental semi-tractor trailer. Mrs. Mannes was stopped at an intersection when Carter ran into the back of her car. Carter had been driving over 23 hours. Truck drivers are not permitted to drive more than 11 hours without a rest break and must cease driving after 14 hours. ADA Phillip Hatch prosecuted the case and gives credit for great investigatory work to Trooper Kevin Ballew, Sgt. Jimmy Jones and Lt. Alan England.

JURY CONVICTS AFTER 3 PASSENGERS ARE KILLED



In Campbell County, Kevin Fleming was convicted of three counts of Aggravated Vehicular Homicide after a four day trial. He ran off the roadway on July 21, 2014, overcorrected , struck an embankment, rolled over and crashed into a tree. His three passengers were killed. The diagram of the crash and satellite photo of the location may give an idea of how quickly a crash can occur ending three lives, when an impaired driver loses control. About 2 and a half hours after the crash, Fleming had a blood alcohol content of .07. He also had cocaine, cocoethylene and hydrocodone in his system in non-quantified amounts. Trooper Joseph Brown investigated the case, which was prosecuted by ADA Blake Watson. The deceased were Darrell Carroll, 39; Charles Morris, 43 and Carl Daugherty Jr., 52.

VEHICULAR HOMICIDE MURDERERS ROW

KILLER OF FORMER LEGISLATOR CONVICTED

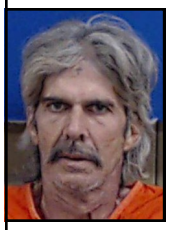
The tragic death of Kingsport businessman and former Legislator, Michael K. Locke, was the subject of a jury trial in Kingsport that ended with a jury verdict of guilt on February 22, 2016. In **State v James Hamm, Jr**., Prosecutors Leslie Tiller and Kent Chitwood presented a collection of witness statements and physical evidence that resulted in a guilty as charged result for Vehicular Homicide by Intoxication, Leaving the Scene of an Accident resulting in death, Reckless Endangerment, two counts and DUI. The offense occurred June 23, 2014.

Hamm

Hamm had a blood alcohol level of .37 forty-five minutes after the crash. Nine witnesses called 911 about his driving, the homicide and his departure from the scene. Hamm bought vodka at the Colonial Heights Package Store, then returned to his 2003 GMC Yukon XL. Rather than backing from his space, Hamm allegedly drove forward over the curb, across a sidewalk, and into the exterior wall of an adjacent restaurant in the strip mall, Rafael's. Diners called 911 to report the vehicle fleeing the scene, heading northbound on Fort Henry. Traffic cameras at the Fort Henry intersections with Lebanon Road and Moreland Drive captured Hamm's route, coupled with 911 calls of an erratic SUV. Approximately 25 seconds after Hamm's vehicle passed Moreland Drive, a motorist reported a pedestrian struck at the bridge just north of Sonic Drive-In, 3845 Fort Henry Drive. The pedestrian, Mr. Locke, was putting up signs for a political race at the time. Mr. Locke served in the Tennessee Army National Guard and U.S. Army reserve for 8 years. He was a member of the Kingsport Lifesaving Crew, Lynn View Community Center Board, Kingsport Parks and Recreation Board and the Friends of Allendale. He helped in the formation of the Sullivan County Young Republicans and was past president of the Dobyns-Bennett Quarterbacks Club. The Tennessee General Assembly dedicated the bridge to his memory.

Victim
Michael K Locke

20 YEAR SENTENCE FOR MORNING TIME KILLER



Brazzell

On December 5, 2013, Terry Brazzell, 54, of Nashville, ran a stop sign at the intersection of State Route 1847 and Highway 96 in Dickson County. He crashed into the vehicle of Mrs. Freddie Patterson, who lived 76 years before Brazzell took her life. The crash happened on a rainy day around 11:15 in the morning in Dickson County. Brazzell had drugs and alcohol in his system. He was sentenced to 20 years for Aggravated Vehicular Homicide on February 6, 2016.

Tennessee District Attorneys General Conference

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PREPARATION FOR CROSS EXAMINATION

The trial is approaching. As a prosecutor you have decided to go with a particular theme. You know what you want to be able to say in your final closing argument. You have prepared to pick a jury with your theme in mind. You have outlined the opening statement and prepared some visual aids. You have organized your direct examination and spoken to your witnesses about questions you plan to ask. You are sure there are no other videos from back up officers or body cameras or home/business security cameras or bystanders with phones, etc. You've picked out your courtroom attire. You've spent time thinking about the language you plan to use. You are ready to go. You walk into the office of an experienced prosecutor to double check everything. Then it happens.

She asks you, "Are you ready to cross examine the defense witnesses?" The wheels begin to turn. You decide you won't panic. You aren't even going to let her see you sweat. You laugh and respond, "that defendant won't take the stand. He's been to the big house. He knows better."

She asks, "What would he try to say if he took the stand?" You respond, "Just like everybody else, he'd say he had 2 beers and wasn't drunk or else he wasn't driving."

"So, who is going to say that for him?"

"It will be his lawyer."

"Besides him?"

"I don't know."

"Somebody is going to say it and get ready, because that somebody may be very attractive to your jury."

Now panic has set in. How can you prepare for cross examination of the defense witness or witnesses?

Assistant District Attorney **Tom Henderson** of the 30th Judicial District spoke at a conference for the DUI Training Division in 2004. Tom listed 11 points concerning the preparation phase of cross examination that are good points today, just as they were then. In addition to these points some officers will note the presence of lay witnesses at the scene. A drunken passenger may have been allowed to call for a ride home. A drunken passenger may have been charged with public intoxication. If there was a buddy with the defendant, the buddy will commonly testify he was the driver that night. If there was a buddy present, learn about him. Don't lose your case by failing to prepare for cross examination.

Here are the 11 hints from Tom Henderson:

1) Our first mistake is to assume that cross-examination is completely spontaneous and cannot be planned in advance.
2) We frequently plan our direct examination and then give no thought to our cross at all.
3) As a part of the preparation for your next trial, make a copy of the Court's instructions on credibility of witnesses and impeachment of witnesses.
4) It is a good outline of what to try to establish on cross.
5) It is useful for closing argument since it is what the judge will tell the jury to consider.
6) In order to plan cross, it helps to know who the defense witnesses are.
7) It is a mistake, of course, to assume that the defense has no witnesses just because our file and witnesses say there are no other witnesses.
8) In addition to looking at reciprocal discovery, jail visitation lists and defense subpoenas, ask yourself what the defendant would like to have said at the trial, remembering that the defendant is not constricted by concerns for the truthfulness of his testimony.
9) You have to assume that the defendant MAY testify in any case, even those who have horrendous records. Look out for the defendant who speaks proudly of his long record for burglary as evidence that he would not think of doing a robbery.
10) In many jurisdictions, the rule on impeachment does not allow the use for impeachment of the defendant, of prior convictions of a nature similar to the charges on trial.
11) Sometimes the defendant and/or his attorney figures that the defendant has nothing to lose by allowing his record in and will testify anyway.