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RECENT APPLICATION OF THE GOOD-FAITH EXCEPTION

Last year, the Tennessee Supreme Court recognized a good-faith exception to the exclusionary rule in *State v, Reynolds,* 504 S.W.3d 283 (Tenn. 2016) as outlined in the DUI News, Issue 58. The Supreme Court reasoned that evidence need not be suppressed when a law enforcement officer, while operating under an objectively reasonable good-faith reliance on binding precedent, obtains the evidence in violation of the defendant's Constitutional rights. Since the *Reynolds* decision, the Tennessee Supreme Court has remanded a number of cases to be reconsidered in light of that decision.

One such case is *State v. Cates,* 2017 Tenn. Crim. App. 624, 2017 WL 3017290. This case was originally reported in the DUI News, Issue 59 when the Court of Criminal Appeals on May 19, 2015, ruled that exigent circumstances did not justify the warrantless blood draw and the defendant's vehicular Homicide conviction was vacated. This case involved a traffic accident in which the defendant's passenger was killed. The defendant suffered an open fracture to his leg and was transported to the hospital for possible surgery. Eleven officers were at the scene processing the crime scene.

The Tennessee Supreme Court on November 16, 2016, remanded the case to be reconsidered in light of *Reynolds* and the Court of Criminal Appeals has now ruled that the officer was in strict compliance with binding precedent at the time; therefore, a good-faith exception should apply and the conviction was affirmed. The Court also noted that the officer does not need to consciously consider or actually rely upon the binding precedent, but his conduct must be in "strict compliance" with the binding precedent. *State v. Cates,* 2017 Tenn. Crim. App. 624, 2017 WL 3017290. (See footnote 3 of the *Cates* case)

The Tennessee Supreme Court also remanded the case of *State v. Melvin Brown,* 2017 Tenn. Crim. App. 995. The *Brown* case involved an accident in which a third party was injured. The arresting officer obtained a warrantless blood draw based upon the mandatory blood draw provisions of the implied consent law at the time of the arrest. The Court of Criminal Appeals ruled that exigent circumstances were not present and the mandatory blood draw did not dispense of the need for a warrant; therefore the blood test results were suppressed.

After the Tennessee Supreme Court remanded the case on November 22, 2016, the Court of Criminal Appeals ruled that the good-faith exception to the exclusionary rule as adopted in *Reynolds* applies and the blood sample of the defendant shall not be suppressed. They reasoned that since the blood was withdrawn prior to the United States Supreme Court case of *Missouri v, McNeely,* 569 U.S. 141 (2013), the officer acted in objectively reasonable good-faith reliance on binding appellate precedent when he obtained the blood sample without a warrant.

RECENT DECISIONS

***State v. Arnold Travis Nunnery,* 2017 Tenn. Crim. App. LEXIS 622, 2017 WL 2985084 (July 13, 2017)**

While investigating a call about someone throwing beer cans out of a white pickup, a responding officer saw a pickup matching the description and he observed the driver was not wearing a seatbelt. Following dispatch confirmation that it was the same pickup, a traffic stop of the pickup was conducted in Lewis County, TN. The driver, Mr. Nunnery, admitted to drinking five beers and he performed poorly on SFSTs. Mr. Nunnery was arrested for DUI with priors. Mr. Nunnery refused consent to a blood draw and the officer obtained a search warrant. While at the hospital, Mr. Nunnery refused to cooperate with the blood draw and stated, "nobody is sticking a needle in me, nobody is taking my blood." The on-duty nurse refused to take the defendant's blood due to the hospital's policy of not withdrawing blood by force from someone who refuses to cooperate. The officer then had the nurse to sign a "State of Tennessee Medical Provider Refusal to Comply with TCA 55-10-406(f) Request for Blood Withdrawal" form. The Appellate Court noted that the law was amended on July 1, 2014 and the form is no longer valid. After speaking with the District Attorney's Office, the officer contacted other nearby counties and he eventually took Mr. Nunnery to a hospital in Perry County for the blood draw, which was accomplished approximately 2 1/2 hours after the initial arrest. The officer presented the Perry County nurse with the Lewis County warrant. Although Mr. Nunnery was still initially uncooperative, a Perry County doctor was able to get Mr. Nunnery's cooperation after a short discussion. The defendant's BAC test result was .205%.

The Trial Court suppressed the blood draw due to the blood being obtained and seized in Perry County after the warrant was obtained and signed by a local magistrate in Lewis County. Simply put, the specific requirements of the search warrant were not followed, which limited the search to within Lewis County. The Court of Criminal Appeals agreed and affirmed the ruling of the Trial Court. The Appellate Court also found no exigent circumstances supporting the blood draw since there was no evidence presented that the officer attempted to find an on-duty doctor, EMT or any other person qualified to draw blood in Lewis County. Also, there was no evidence presented that other officers were unavailable to assist the arresting officer in obtaining a warrant in Perry County. If other officers are available to help in obtaining a warrant, exigent circumstances will often not be supported under the totality of the circumstances. Multiple attempts to obtain a warrant need to be explored when proceeding on exigent circumstances. The court also emphasized that medical personnel should never be threatened for declining to forcibly draw a defendant's blood. The jury trial is still pending.

***State v. Daniel T. Maupin,* 2017 Tenn. Crim. App. LEXIS 879 (September 28, 2017)**

The defendant, Mr. Maupin, was driving a fully-loaded tractor trailer on Highway 46 when he turned left from the center turn lane in front of the victim, a 16 year old, driving a pickup truck towing a trailer with a lawnmower on it. Although the victim was traveling an appropriate speed, he could not stop because the trailer did not have brakes and it weighed as much as the pickup, thereby pushing the pickup into the tractor trailer. The victim was killed upon impact. A test of the defendant's blood was positive for Adderall and Oxycodone. After an emotional week-long trial, the jury convicted the defendant of the lesser-included offenses of DUI and criminally negligent homicide. The trial judge sentenced the defendant to two years, suspended after actual service of six months. The defendant argued that he should have been granted judicial diversion on the criminally negligent homicide conviction. The trial judge denied diversion in order to avoid depreciating the seriousness of the offense, the death of a 16 year old boy, who did nothing wrong. The Appellate Court discussed all of the factors that needed to be considered by the court in making their sentencing determination, as found in *State v. King,* 432 S.W.3d 316, 326.; *State v. Electroplating, Inc.,* 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998); *State v. Parker,* 932 S.W.2d 945, 958. The Trial Court did not refer to all of the factors.

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RECENT DECISIONS (Continued)

However, the Court of Criminal Appeals stated that a recitation of all of the factors is not required as long as the record reflects that the trial court considered the *Parker* and *Electroplating* factors in rendering its decision and that it identified the specific factors applicable to the case before it. The Appellate Court also stated that even if they had conducted a de novo review of the sentencing, they would have reached the same conclusion, that diversion should have been denied.

***State v. Gabriel Toban,* 2017 Tenn. Crim. App. LEXIS 888**
(October 3, 2017)

A former law enforcement officer, while travelling on interstate 65, observed a vehicle slowly move across the lanes of travel and then stop in the middle of the interstate. When the witness approached the vehicle, Mr. Toban was found "unconscious" in the driver's seat. The witness was able to get the vehicle off to the side of the interstate and they waited for police to respond. THP Sergeant Jeff Reed arrived, smelled alcohol and stated that Mr. Toban had "all of the signs of impairment." Trooper David McDonald arrived a short time later and conducted an investigation. Mr. Toban performed poorly on field sobriety tests and after being read implied consent, he refused consent for a blood draw. Trooper McDonald obtained a search warrant and a sample of the defendant's blood was collected approximately 2 1/2 hours after the initial contact. Mr. Toban's BAC was .18%. After a jury trial, Mr. Toban was convicted of DUI third offense.

The Court of Criminal Appeals determined, using a totality of the circumstances approach, that there was sufficient evidence to convict the defendant, Mr. Toban, of DUI third offense. The defendant complained that the trial court refused a plea agreement offered during the first day of trial. This first trial ended in a mistrial; however, a plea agreement was offered after Sergeant Reed testified, but before the mistrial was declared. The trial judge refused to accept the plea because he was not willing to waste the jurors' time and that a jury trial should not begin only to settle the case before the jury renders its verdict. After a second request, the judge stated that he was unwilling to accept a plea to first offense DUI at a minimum sentence. The Appellate Court stated that Tennessee Criminal Procedure Rule 11 "permits the trial judge to impose reasonable pretrial time limits on the court's consideration of plea agreements, a practice which will allow the maximum efficiency in the docketing of cases." Tenn. R. Crim. P. 11(c)(2)(B), Advisory Comm'n Cmts. The Appellate Court also stated that the defendant, "has no entitlement to a specific plea agreement" *State v. Randell Murphy,* 2012 WL 1656735, at *4 (Tenn. Crim. App. May 9, 2012) and "…a valid reason for rejecting a plea agreement is that the proposed sentence is considered too lenient under the circumstances." *State v. Hines,* 919 S.W.2d 573, 578. There is no absolute right to plead guilty. *State v. Williams,* 851 S.W.2d 828, 830. (The first trial ended in a mistrial because the State's prosecuting officer was not the first witness in the State's case-in-chief, yet he was present in the courtroom in violation of the sequestration rule pursuant to Tennessee Rule of Evidence 615.)

***State v. Julia Sanford,* 2017 Tenn. Crim. App. LEXIS 963, 2017 WL 5466674**
(November 14, 2017)

The defendant, Ms. Sanford, was stopped for failure to maintain her lane of travel. Officer Brian Blumenberg was travelling down a divided four lane road in Chattanooga when he observed Ms. Sanford's vehicle travelling in the opposite direction, partially in the fast lane and partially in the turn lane, but proceeding straight. Officer Blumenberg turned around and caught up to Ms. Sanford's vehicle which was now traveling in both the straight lane and the right-hand "turn only" lane. These lanes were separated by a solid white line. At this point, Officer Blumenberg turned on his blue lights. It was unclear on the officer's video if Ms. Sanford's vehicle was located traveling within her lane of travel. The Trial Court found the officer's testimony credible even though the video did not illustrate it or contradict it. The Trial Court denied Ms. Sanford's

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RECENT DECISIONS (Continued)

motion to suppress the stop and she then entered a plea of guilty to DUI.

The Court of Criminal Appeals found that the Trial Court correctly considered all of the factors required when determining a "failure to maintain lane" analysis as stated in *State v. Smith,* 484 S.W.3d 393. The Tennessee Supreme Court stated in the *Smith* case that TCA section 55-8-123(1) was 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." *Id.* "[E]ven minor lane excursions may establish a violation of section 123(1) whether or not the excursion creates a specific, observed danger." *Id.* The Trial Court and the Court of Criminal Appeals found that Officer Blumenberg was able to sufficiently state "specific and articulable facts" justifying the vehicle stop based upon the officer's reasonable suspicion that Ms. Sanford failed to maintain her lane of travel when it was practicable to do so. The Appellate Court stated that the proper inquiry into the legality of the stop was the articulable and reasonable suspicion of the officer that a traffic violation had occurred, not whether in fact a violation had occurred. The ruling of the Trial Court to deny the defendant's motion to suppress was affirmed.

***State v. Pascasio Martinez,* 2017 Tenn. Crim. App. LEXIS 977**
(November 21, 2017)

During a nighttime traffic stop, the defendant, Mr. Martinez, drove by in a silver SUV, without his headlights on. Officer Darrin Carden left the traffic stop, caught up to Mr. Martinez's vehicle and pulled it over, even though Mr. Martinez's headlights were on at that time. Officer Carden lost sight of the vehicle for "just a second" as it crested a hill, but he was "very sure" that it was the same vehicle. Officer Carden smelled a strong odor of alcohol on Mr. Martinez's breath and he admitted to drinking two beers. Mr. Martinez performed poorly on the standard field sobriety tests and he displayed many indicators of being impaired. Officer Carden received consent to obtain a blood sample, which was obtained, identified, sealed and placed in the secured police department "confiscation box." He further testified that only a member of the police department could get the sample out and it was his understanding that the sample would be removed from the confiscation box by a member of the confiscation department and would be taken to the TBI. A TBI agent, Regina Aksanov, testified that she was a forensic scientist in the TBI's toxicology unit and the blood sample was removed from a secured "drop box" at TBI by an evidence technician. She further testified that the evidence technician would have noted if the blood sample had been tampered with and there were no notes in her file indicating such. Mr. Martinez's BAC test result was .168%. Two certified DUI priors of the defendant were presented at trial, along with his official driving record, which listed a third DUI conviction. The defendant was convicted of DUI fourth offense.

The defendant, Mr. Martinez, attacked the chain of custody as incomplete because only the arresting officer, Officer Carden, and the TBI analyst, Regina Aksanov, testified at trial. The Court of Criminal Appeals stated that the State is not required to call all of the witnesses that handled the sample. When the facts and circumstances that surround tangible evidence reasonably establish the identity and integrity of the evidence, it should be admitted into evidence. *State v. Cannon,* 254 S.W.3d 287, 296. Since the sample went from one locked box to another, per standard procedures and without any indication of tampering, the sample was properly admitted into evidence.

Mr. Martinez also complained that he was denied his right of confrontation in regard to his third prior DUI conviction. The Court of Criminal Appeals stated that the defendant's official driving record and its accompanying certification were not testimonial; therefore, the admission of the official driving record to prove a third prior DUI was proper. (The Court noted that this question was one of first impression and they agreed with the majority view on this issue.)

ADMITTING BREATH AFTER A SENSING VIOLATION

What can be done once it is discovered that an officer violated the *Sensing* requirements while conducting a breath test for blood alcohol on a DUI suspect? Usually a *Sensing* violation by the officer will result in the trial court granting a motion to suppress the alcohol/breath test results; however, in some cases, a TBI agent's testimony may satisfy any evidentiary issues raised by the *Sensing* violation.

The Tennessee Supreme Court in *State v. Sensing,* 843 S.W.2d 412 (1992) allowed the admissibility into evidence of breath test results for blood alcohol upon the testimony of an officer, if the test was conducted according to instructions approved by the forensic service division of TBI. The long history of breath testing was discussed in *Sensing,* citing *Fortune v. State,* 197 Tenn. 691, 277 S.W.2d 381 (1954), which held that the testing of breath was not so generally known. Ten years later the Supreme Court in *Pruitt v. State,* 216 Tenn. 686, 393 S.W.2d 747 (1965) found that the Borkenstein Breathalyzer was reliable, but an expert was still required to testify for the admissibility of the breath test result. Which brings us back to *Sensing* and the Court's ruling that "[S]ince *Pruitt,* in 1965, there has been a vast advancement in scientific technology relative to blood alcohol testing as well as the technical training in the operation of breath testing devices…" *Id.* at 414. Therefore, a testing officer could testify about the results of the breath test if they were able to show (1) that the tests were preformed in accordance with the standards and operating procedures promulgated by the forensic service division of the TBI, (2) that they were properly certified in accordance with those standards, (3) that the evidentiary breath testing instrument used was certified by the forensic service division, was tested regularly for accuracy and was working properly when the breath test was performed, (4) that the motorist was observed for the requisite 20 minutes prior to the test, and during this period, they did not have foreign matter in their mouth, did not consume any alcoholic beverage, smoke or regurgitate, (5) evidence that they followed the prescribed operational procedure, [and] (6) identify the printout record offered in evidence of the result of the test given to the person tested. *Id.* at 416.

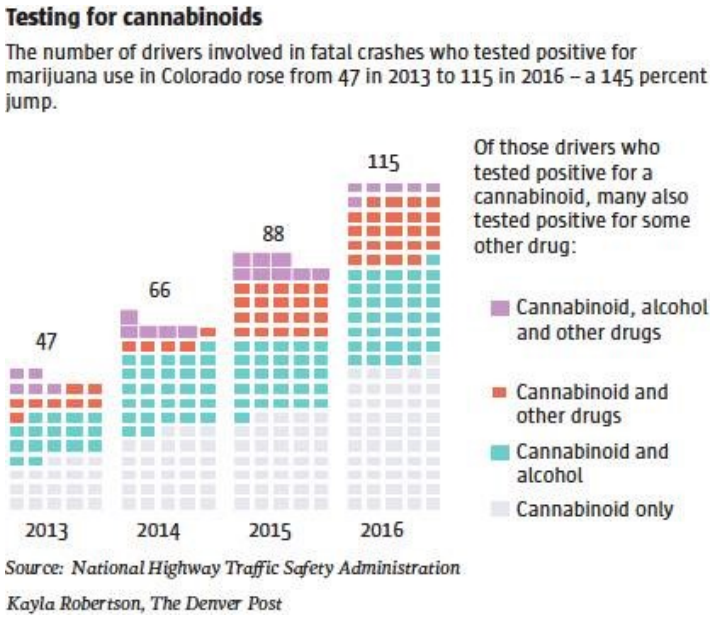
In *State v. Deloit*, 964 S.W.2d 909 (Tenn. Crim. App. 1997), the Court of Criminal Appeals stated, "Our view is that if the state complies with the requirements of *Sensing,* it is entitled to the presumption that the test results are reliable and the results may be admitted into evidence without the benefit of an expert. If not, the state may still use the traditional rules of evidence to lay the foundation for admitting the evidence but there is no presumption of reliability. *Id.* at 913 (citing Tenn. R. Evid. 702, 703). Recently the Court of Criminal Appeals in *State v. Henderson,* 2017 Tenn. Crim. App. LEXIS 153, stated that they agreed with the ruling in *Deloit* and they allowed into evidence the results of a breath test upon the testimony of an expert, after finding a *Sensing* violation on the part of the testing officer.

In the *Henderson* case, the arresting officer stopped the defendant for speeding and he noted that Ms. Henderson exhibited signs of physical impairment. She performed poorly on the field sobriety tests and after being read the implied consent advisement, she volunteered to take a breath test. While Ms. Henderson was sitting in the "breathalyzer room" and during the twenty-minute observation period, the officer stepped into the hallway to speak to his Sergeant. Although the officer never lost visual contact with the defendant while standing in the door way, he did have a "divided attention" while speaking to his sergeant. The officer complied with all other *Sensing* requirements. The breath test results were .274%. The parties stipulated that Agent Robert Miles from the TBI was qualified to offer expert testimony. Agent Miles testified that he is responsible for the maintenance and calibration of the breathalyzer machine. He also testified that the purpose of the twenty-minute waiting period is to ensure there is nothing that would induce mouth alcohol in the test subject. He explained that the machine used in this case, the ECIR II, has built-in safeguards regarding mouth alcohol. Also, the officer followed the two test protocol, which would indicate mouth alcohol by showing a variance in the results. In this case there were no indicators of mouth alcohol and the test was an "excellent example of a successful test." The Appellate Court ruled that the *Sensing* requirements were not properly followed; however, the State may properly introduce the breath test results through the expert testimony of Agent Miles. The judgment of the Trial Court was reversed.

COLORADO MARIJUANA IMPACT UPDATE

The Rocky Mountain High Intensity Drug Trafficking Area (RMHIDTA) is tracking the impact of marijuana legalization in the state of Colorado. They have recently published the 168 page, 5th volume of their annual report this last October. (The full report can be found at www.rmhidta.org) Within the report, the RMHIDTA collects and reports comparative data in the areas of impaired driving and fatalities, youth marijuana use, adult marijuana use, marijuana related hospital admissions and other marijuana related issues. As background, Colorado first allowed for the use of medical marijuana in November of 2000. However, actual medical use was very limited until 2008 when the Colorado judiciary, and later the Colorado Board of Health, greatly expanded the rules for access to medical marijuana and its use. From 2000 to 2008 less than 6,000 caregivers applied for medical marijuana patient permits. By the end of 2009, over 38,000 new medical marijuana patient applications were submitted (the number of applications increased to 116,000 by 2015) and by mid-2010 over 900 marijuana dispensaries were operating as caregivers. During this same time period, the federal government changed its policies and chose to move its enforcement from marijuana dispensaries to only arresting marijuana traffickers. In November of 2012, Colorado voters legalized marijuana for recreational use and the first marijuana retail businesses were open and operational by January of 2014.

By comparing the data collected by the RMHIDTA, we can see that traffic deaths in which the driver tested positive for marijuana increased dramatically after the recreational legalization of marijuana in Colorado. In 2014 there were 55 reported marijuana related traffic deaths and by 2016, the reported marijuana related traffic deaths more than doubled to 123. (These numbers are slightly different than the numbers reported by the Denver Post) Also, the 2013 to 2016 four year average of marijuana related traffic deaths increased by 66 percent from compared to the four year average (2009 to 2012) prior to recreational legalization, when only medical marijuana use was legal. "And the numbers probably are even higher. State law does not require coroners to test deceased drivers specifically for marijuana use in fatal wrecks - some do and some don't." *The Denver Post,* August 27, 2017. "THC levels in drivers killed in crashes in 2016 routinely reached levels of more than 30 ng/mL… [t]he year before, levels only occasionally topped 5 ng/mL." *The Denver Post,* August 25, 2017.



Another alarming trend is the number of people driving shortly after using marijuana. In a survey conducted by the Colorado Department of Transportation, they indicated that 57% of people who reported using marijuana drove within two hours after consumption and that they did so on 11.7 out of 30 days. By comparison, 38% of respondents who drank alcohol admitted to driving within two hours after consumption and only reported doing so on 2.8 of 30 days. According to the RMHIDTA study, both Colorado youth and adults ranked number one in the nation for past month marijuana use, for 2014/2015, which represents their latest results. Unfortunately, both of these statistics are substantially higher than the national average. A contributing factor might be that as of August 1, 2017, Colorado had licensed 498 retail marijuana stores that provide recreational marijuana compared to 392 Starbucks and 208 McDonald's. In addition, Colorado has 507 Licensed medical marijuana dispensaries. The profile of Colorado's medical marijuana cardholders and of their reported medical condition is listed as 93% severe pain, 6% cancer, glaucoma and/or HIV/AIDS, and 3% for seizures. According to the National Institute on Drug Abuse, marijuana is the most commonly used illicit substance and has become the most commonly detected non-alcoholic substance among drivers in the United States. (www.drugabuse.gov) Unfortunately, all marijuana impaired driving statistics are trending upward.

DRE DRUG EVALUATIONS

As the access and use of marijuana, opioids and prescription medications continue to rise, law enforcement officers are encountering drug impaired drivers in greater numbers than ever before. This dangerous trend has created the need for law enforcement officers to acquire specialized training for the detection and prosecution of drugged drivers. The Tennessee Highway Safety Office provides training for the detection of drugged drivers through programs such as the Advanced Roadside Impaired Driving Enforcement course (ARIDE) and the Drug Evaluation and Classification Program (DEC).

The DEC program provides a standardized and systematic method of examining a person suspected of impaired driving, to determine whether the subject is impaired and, if so, whether the impairment is drug related or medically related. The DEC Program educates prosecutors and toxicologists on the DRE process and the drug categories. The method taught is based upon a variety of observable signs and symptoms which are known to be reliable indicators of drug impairment. The process has been standardized so that it will be conducted in the same manner, upon every individual, which will result in a reliable assessment of the impairment. If the impairment is drug related, the officer can then determine the broad category of drugs that is producing the observed impairment. There are seven broad categories of drugs that have been identified to cause drug impairment. These drug categories are; central nervous system depressants, central nervous system stimulants, hallucinogens, dissociative anesthetics, narcotic analgesics, inhalants and cannabis. Of course, officers often observe multiple categories of drug usage and can observe a combination of indicators within the same individual. The specific drug ingested cannot always be determined, but the officer should be able to narrow the cause of the impairment to within a category of drugs. Officers that complete this training and the certification process are then certified as Drug Recognition Experts (DRE) by their state DRE coordinator and their certification information is then forwarded to the International Association of Chiefs of Police (IACP).

The DRE program was developed by police officers from the Los Angeles, California Police Department in the early 1970s. In response to officers encountering drivers being under the influence of drugs, with very little or no alcohol in their systems, two LAPD sergeants collaborated with various medical doctors, research psychologists, and other medical professionals to develop a simple, standardized procedure for recognizing drug influence and impairment. The officers' drug recognition methods were officially recognized by LAPD management in 1979, and adopted by the National Highway Traffic Safety Administration in the early 1980s. DRE training and certification standards are now defined by the IACP. The drug evaluation conducted by the DRE involves a twelve step protocol which is standard throughout the United States. As of December of 2015, there were approximately 7,900 certified DREs across the United States.

Recently, there has been critical national media attention regarding a DRE trained officer from Cobb County Georgia, focusing on three of his 2016 arrests for drugged driving. (Marietta Daily Journal, September 25, 2017) In each of the three cases, the individuals were arrested for driving under the influence of suspected marijuana. In all three cases, a later blood test indicated no drugs present. Each of these cases were eventually dismissed. The American Civil Liberties Union (ACLU) has joined with each of these plaintiffs in suing the officer and his agency for false arrest. The main complaint against the officer is that he did not complete the 12-step DRE protocol in each of these cases. The arresting officer has an exemplary record, with a high accuracy of lab test confirmations. Therefore, the focus of criticism has been that the DEC program and protocol were not properly followed. The same officer also received an award from Mothers Against Drunk Driving (MADD) in 2016 for his over 90 DUI arrests throughout that year. Although mistakes cannot be eliminated in every case, this incident is an example of how training and protocol need to be followed to maintain the integrity of the investigation. The civil case and investigation are still ongoing.

In Tennessee, our State DRE Coordinator is Tony Burnett. He runs an excellent DEC program, which has qualified several of our DRE officers to testify as experts in various courts regarding indicators of drug impairment that each trained officer observed during their DRE exam, including testimony regarding horizontal gaze nystagmus (HGN).

UPCOMING TRAINING

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

Cops in Court - January 10, 2018, Murfreesboro; TN and February 6, 2018, Oak Ridge, TN
This course focuses on increasing the ability of law enforcement officers to communicate effectively and confidently in the courtroom by presenting the underlying rational and importance of understanding courtroom testimony, report writing, preparation, direct examination and cross examination. Using local prosecutors in a courtroom scenario, this training offers realistic and practical applications for all law enforcement officers.

Protecting Lives, Saving Futures - March 6-7, 2018, Oak Ridge TN and May 24-25, 2018, Franklin TN
This joint prosecutor– law enforcement officer training is designed to allow everyone to learn from each other inside of a classroom rather than outside of a courtroom, shortly before a trial. Topics covered include the detection, apprehension and prosecution of impaired drivers. Each prosecutor attending is required to recruit 1 to 3 law enforcement officers to attend the training together.

20/20 Medical Foundation of Eye Movements & Impairment - April 24-25, 2018, Memphis TN
This seminar will be located at the Southern College of Optometry in Memphis, Tennessee, and it will be taught by faculty members and professors of optometry. The legal and physiological aspects of eye movement and the detection of impairment will be covered. Registration is open to prosecutors, drug recognition officers (DRE) and SFST instructors. A mock court scenario involving a medical expert will be included.

Vehicular Homicide/ Crash Reconstruction - June 13-15, 2018, Kentucky
This course is designed for the more experienced prosecutor and will be a joint effort with Kentucky. It features all aspects of the investigation and prosecution of vehicular homicide cases. Included topics are the role of the prosecutor at the scene of a fatality, working with hostile witnesses, working with victim family members and the effective use of visual aids at trial.

Drugged Driver - August 15-16, 2018, Jackson TN
This course will explore all aspects of the investigation and prosecution of drugged driving cases. Subjects covered will include dealing with experts on direct and cross examination, working with DREs, search warrants and common defenses.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Impaired Driving Enforcement (ARIDE)

January 8-9, 2018, Springfield TN
February 12-13, 2018, Kingsport TN
March 5-9, 2018, La Vergne TN
March 19-23, 2018, Memphis TN

DUI Detection & Standardized Field Sobriety Testing

January 29-31, 2018, Gallatin TN
March 5-7, 2018, Morristown TN
March 5-9, 2018, La Vergne TN
March 19-23, 2018, Memphis TN
March 19-21, 2018, Norris TN
March 26-28, 2018, Humbolt TN

DUI TRACKER

DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from October 1, 2017, through December 28, 2017, and reflect the DUI Tracker conviction report for districts in the State of Tennessee. These numbers include the Circuit Courts, Criminal Courts, General Sessions Courts and Municipal Courts. The total number of arrests for the period from October 1, 2017, through December 28, 2017, since the last quarter were 1,197. This number is down from the previous quarter by 340. From looking at these numbers, we can see that the trend in DUI related arrests is down in Tennessee from the last quarter and substantially lower than six months ago. The total number of guilty dispositions during this same period of October 1, 2017 through December 28, 2017 were 848. The total number of dismissed cases were 92. Across the State of Tennessee, this equates to 70.8% of all arrests for DUI made were actually convicted as charged. This percentage is slightly lower than the last quarter ending on August 31, 2017. Only 7.39% of these DUI cases were dismissed. Also, during this same period of time, only 204 of the total DUI cases disposed of were to different or lesser charges. Therefore, only 16.39% of the total cases were disposed of to another charge.

Fatal Crashes this last quarter

The following information was compiled from the Tennessee Integrated Traffic Analysis Network (TITAN) using an *ad hoc* search of the number of crashes involving fatalities that occurred on Tennessee's interstates, highways and roadways from October 1, 2017 through December 28, 2017. During this period, there were a total of 226 fatalities involving 203 crashes, which is a decrease from the previous quarter. However, this is still far too many people dying on our roadways in Tennessee. We need to be vigilant in our message to slow down, wear your seat belt and do not drive while impaired. Out of the total of 226 fatalities, 32 fatalities involved the presence of alcohol, meaning that 14.16% of all fatalities this quarter had some involvement with alcohol. This number is lower than the previous quarter. Further, there are a total of 20 fatalities involving the presence of drugs, which means that 8.85% of all fatalities this quarter involved some form of drugs. There were 8 fatalities that directly involved a hit and run where the driver absconded from the scene of the crash. This equates to 3.5% of all fatalities involved a hit and run. An additional 2 fatalities resulted in a hit and run crash where the driver left the scene, but the vehicle remained and was abandoned.

Regarding distracted driving, there were 104 fatalities as a result of 90 crashes where distracted driving was a contributing factor. Distracted driving is a broad category that includes cell phones, in-vehicle multi media and entertainment systems, passengers and many other reasons that cause the driver to become distracted from their driving responsibilities. As has been recently reported by many different media organizations, distracted driving is a growing and deadly problem for Tennessee's drivers, passengers and pedestrians. Approximately 46% all fatalities that occurred this last quarter designated distracted driving as a contributing factor to the cause of the crash. The year-to-date total number of fatalities on Tennessee roads and highways is 1,002. This is down by 21 from the 1,023 fatalities incurred last year at this same time. Impaired and distracted driving has been steadily increasing throughout the year. It is apparent that further education and enforcement is needed. The automotive industry has contributed a mixed bag of useful and harmful technology available to the driver. With automatic braking and lane departure warnings a number of crashes have been avoided; however, many newer vehicles are also including more sophisticated entertainment and navigational systems which result in distracting the vehicle's driver for longer periods of time. For a driver on the interstate, a short distraction can result in the driver's attention being diverted from the roadway while the vehicle travels over a distance equal to the length of a football field. During this same period of time, other vehicles could slow, change lanes or any number of crash inducing factors could occur. If that same driver has taken medication or any other intoxicating substances that affect the driver's reaction time, the chance of a crash increases exponentially. As Sergeant Phil Esterhaus from Hill Street Blues would always say, "Let's be careful out there!"

VEHICULAR HOMICIDE MURDERER'S ROW

***State v. Daniel Edrick Lutrell,* 2017 Tenn. Crim. App. LEXIS 592, 2017 WL 2876249, July 6, 2017**

On April 4, 2015, the defendant, Daniel Lutrell, was driving to Bolivar when he attempted to pass the SUV in front of him. As he pulled out, he then realized that he would also have to pass a white car in front of the SUV. As he accelerated to approximately 70 to 75 mph, he then observed an oncoming car that he could not avoid. The two vehicles collided and the driver of the other vehicle, Darius Traylor, died from his injuries. Mr. Lutrell admitted to drinking vodka earlier. A test of Mr. Lutrell's blood was conducted and the results was a BAC of .079%. On July 18, 2016, the defendant entered an open plea to vehicular homicide (by conduct creating a substantial risk of death or serious bodily injury), reckless aggravated assault and passing in a no-passing zone.

During the sentencing hearing, Mr. Lutrell testified that he served in the U.S. Army Reserves and that he was deeply sorry for the offenses herein. The Trial Court sentenced the defendant to the maximum of six years to serve after describing the collision as one which easily could have been prevented had the defendant been following the rules of the road. Judge Allen stated that probation would "unduly depreciate the seriousness of the offenses," and that confinement was, "particularly suited to provide an effective deterrent to others who are likely to commit similar offenses." The Court of Criminal Appeals stated that the trial court is free to select any sentence within the applicable range so long as the length of the sentence is consistent with the purposes and principals of the "Sentencing Act." The sentence of the Trial Court was affirmed.

***State v. Tyler James Schaeffer,* 2017 Tenn. Crim. App. LEXIS 898, October 6, 2017**

It is never a good sign when the Court of Criminal Appeals starts their opinion with, "This case should serve as a cautionary tale for any prosecutor, defense attorney, or trial court…" On September 16, 2012, the defendant, Tyler Schaeffer, was driving his vehicle on Highway 441 in Sevier County while texting about an impending drug deal. His vehicle crossed the centerline and collided head-on with a church van, killing two passengers and injuring eleven others. A blood test revealed that the defendant had methylone, methamphetamine and marijuana metabolite in his bloodstream.

On March 3, 2014, the defendant was sentenced to a 100 year sentence for unrelated federal convictions. On September 2, 2014, Mr. Schaeffer plead guilty to two counts of vehicular homicide, and other charges with a negotiated sentence of 40 years to be served concurrently with his 100-year federal sentence. Federal custody was refused until the state sentence was fully served. One year later, the defendant filed a petition for post-conviction relief claiming, among other things, ineffective assistance of counsel. The trial court denied the PCR petition and the defendant appealed.

The Court of Criminal Appeals decided that the defendant did receive ineffective assistance of counsel since his trial counsel and all of the plea paperwork represented that the state sentence of 40 years would be served concurrent to the federal sentence of 100 years; however, neither trial counsel, the District Attorney, nor the Trial Court possessed the power to impose concurrent sentencing on the federal government. (See *United States v. Means,* No. 97-5316, 1997 WL584259, at *2, 6th Cir. Sept. 19, 1997.) "[a] state court provision requiring federal and state sentences to run concurrently is not worth the paper on which it is written." *See Taylor v. Sawyer,* 284 F.3d 1143, 1150 (9th Cir. 2002) The promise of concurrent sentencing was empty and the defendant did not get the benefit that he bargained for. Therefore, the Appellate Court granted the defendant's PCR petition and remanded the case to the Trial Court for further negotiations.

VEHICULAR HOMICIDE MURDERER'S ROW

***State v. Steven Dare Steelman, Jr.,* 2017 Tenn. Crim. App. LEXIS 936, October 30, 2017**

This case involved a single vehicle crash, on November 23, 2014, in which the defendant hit a telephone pole and then a tree, killing his son and injuring his nephew. Mr. Steelman smelled of alcohol, his speech was slurred and he preformed poorly while conducting SFSTs. The defendant admitted to drinking moonshine and smoking marijuana the night before. A blood sample was tested and Mr. Steelman's BAC was .14% and, marijuana metabolites were also present in his blood. The defendant had two prior convictions for DUI. After a jury trial, Mr. Steelman was convicted of aggravated vehicular homicide, DUI 3rd and other related charges. The trial court sentenced the defendant to 32 years confinement.

The Court of Criminal Appeals found sufficient evidence to sustain the convictions and they ruled that the defendant's sentence of 32 years was not excessive. Although the defendant argued many double jeopardy issues, the court determined that vehicular assault and reckless endangerment with a deadly weapon do not violate double jeopardy, nor is one a lesser included offense of the other. The court did find that driving under the influence is a lesser included offense of vehicular assault and therefore merged the defendant's convictions for third offense DUI, third offense DUI per se and vehicular assault.

***State v. Kevin E. Trent,* 2017 Tenn. Crim. App. LEXIS 710, November 3, 2017**

The defendant, Kevin Trent, plead guilty to one count of vehicular homicide for causing a collision, while driving impaired, that resulted in the death of a mother of four, Karen Freeman, from severe brain trauma. Although the vehicle crash occurred on May 3, 2012, the victim did not die of her injuries until October of 2013. During the sentencing hearing, the defendant testified how he had lost both of his arms below the elbows and his left leg in a motorcycle accident in 2005. Even with these injuries, Mr. Trent claimed that he was able to drive without modifications to his vehicle. Mr. Trent denied drinking or using drugs, other than prescribed oxycodone and xanax, which were prescribed after the motorcycle accident. After a test of the defendant's blood, it was determined that oxycodone was present above therapeutic levels and that xanax was present within therapeutic levels. The trial court sentenced the defendant to eight years confinement in TDOC.

The defendant appealed his sentence and the Court of Criminal Appeals determined that the trial judge did not properly articulate, in the record, its reasons for imposing the sentence; therefore, the Appellate court reversed the Trial Court's ruling and imposed a sentence of probation. The Tennessee Supreme Court agreed to hear this matter and in reviewing the actions of the Trial and Appellate courts, Justice Bivins delivered a complete and thorough recitation of the sentencing act, emphasizing the importance of articulating "fully and coherently" the various aspects of the sentencing decision as required by our statutes and case law. "our ruling in *Bise* specifically requires Trial Courts to articulate the reasons for the sentence in accordance with the purposes and principles of sentencing in order for the abuse of discretion standard with a presumption of reasonableness to apply on appeal." *State v. Pollard,* 432 S.W.3d 851, 861 (Tenn. 2013)(citing *Bise,* 380 S.W.3d at 698-99).

The Supreme Court agreed with the Appellate Court that the reasons for denying probation were not properly articulated by the Trial Court. However, the Supreme Court also ruled that the record was not clear enough for the Appellate Court to undertake an independent review of the record when the trial court failed to make the sufficient findings in the case. Moreover, the Appellate Court ignored the fact that the burden of proving suitability for full probation is on the defendant, not the State. The decision of the Court of Criminal Appeals was reversed and the case was remanded to the Trial Court for a new sentencing hearing.

CONGRATULATIONS

Congratulations to ADA Tessa N. Lunceford for being named Tennessee Highway Safety Office's East Tennessee DUI Prosecutor of the Year for 2017. General Lunceford was recognized for her excellent work in prosecuting DUI, Vehicular Assault and Vehicular Homicide cases in addition to her extensive officer training and victim advocacy work. District Attorney General, Jared Effler, of the 8th Judicial District, stated, "I'm extremely proud of General Lunceford for her service to the residents of the 8th Judicial District. This award affirms Tessa's commitment to improving public safety in our community."

Congratulations to ADA Karen Willis for being named Tennessee Highway Safety Office's Middle Tennessee DUI Prosecutor of the Year for 2017. General Willis was instrumental in getting a third trial court for handling the large DUI caseload within the 19th Judicial District. She has handled over 100 DUI cases this year, including three vehicular homicide cases. "I think our program, that we developed, is excellent and we have a great success story in the courts," said District Attorney General John Carney of the 19th Judicial District. "Karen has a really good record of going to court and getting convictions. That award didn't really surprise me."

MADD TENNESSEE STATEWIDE NIGHT OF REMEMBERANCE

On December 14, 2017, Mothers Against Drunk Driving held their annual statewide night of remembrance and awards ceremony at the Millennium Maxwell House Hotel in Nashville, TN. We would like to thank and congratulate all of this year's award winners for their great work in the enforcement and prevention of impaired driving in Tennessee. The Tennessee District Attorneys General Conference also held their victim witness and DUI coordinator training during the event. Phaedra Marroitt-Olsen, MADD's State Director for Tennessee, along with many other MADD representatives, spoke to the participants about the traumatic issues that the victims of impaired drivers experience. We were also provided information regarding the many resources that are now available through MADD and other partners in the battle to prevent impaired driving.

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