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DUI NEWS

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PUBLISHERS:
Terry E. Wood, TSRP
Linda D. Walls, TSRP
LAYOUT AND DESIGN:
Pat Mitchell

INSIDE THIS ISSUE:

TN DISTRICT ATTORNEYS GENERAL CONFERENCE,

Jerry Estes, Executive Director
226 Anne Dallas Dudley Blvd.,
Suite 800
Nashville, TN 37243

DUI Training Division
DUI Office: (615) 253-6734
DUI Fax: (615) 253-6735
e-mail: tewood@tndagc.org
Newsletters online at:
dui.tndagc.org/newsletters

Tennessee Highway Safety Office

312 Rosa L. Parks Ave.
William R. Snodgrass TN Tower
25th Floor
Nashville, TN 37243
Office: 615-741-2589

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STATE V. DECOSIMO UPDATE

In a unanimous decision, in *State v. Decosimo*, 2018 Tenn. LEXIS 471, the Tennessee Supreme Court reversed the judgment of the Court of Criminal Appeals. This case involved the constitutionality of T.C.A. Section 55-10-413, in which a $250 "blood alcohol or drug concentration (BADT) fee" was imposed upon every conviction of certain statutorily specified offenses, including driving under the influence. The Court of Criminal Appeals had ruled that this statute violated the defendant's right of due process and therefore the court granted the defendant's motion to suppress the results of the TBI blood alcohol test and dismissed the DUI charge.

Our Supreme Court first examined a line of United States Supreme Court cases regarding compensation based upon convictions. See *Tumey v. Ohio*, 273 U.S. 510 (1927); *Dugan v. Ohio*, 277 U.S. 61 (1928); *Ward v. Vill. Of Monroeville*, 409 U.S. 57 (1972). It was determined that since TBI forensic scientists do not perform judicial or quasi-judicial functions, the due process requirements of *Tumey* and its progeny do not apply. It was determined that the financial "influence alleged to impose bias" here is "exceptionally remote." So remote, that the defendant's constitutional challenge would not prevail even if the *Tumey* requirements did apply.

Although the defendant argued that the Tennessee Constitution provides greater protection than the United States Constitution, the TSC stated that the Fourteenth Amendment to the United States Constitution and article I, section 8 of the Tennessee Constitution are "synonymous" in the scope of protection that they afford. The defendant failed to point to a single decision in Tennessee or elsewhere granting relief under either a state or federal constitutional due process provision, on a similar due process challenge.

In rejecting the defendant's due process challenge, the TSC also disagreed with the CCA's conclusion that the BADT fee statute created a situation analogous to that of paying expert witness contingency fees. Since the TBI forensic scientists receive salaries, not dependent upon BADT fees, the BADT fee statute is not similar to an expert witness contingency fee arrangement. The TSC went further and rejected any resemblance to cases in which expert witnesses or attorneys have been disqualified for conflicts of interest. The Court explained that the allegation lacked merit because; (1) the *Tumey* requirements of neutrality that govern due process do not apply because TBI forensic scientists do not exercise judicial or quasi-judicial functions; and (2) even evaluated against the strict *Tumey* requirements, the BADT fee statute does not provide TBI forensic scientists with either a direct, personal, or substantial pecuniary interest; or even a sufficiently substantial institutional financial incentive that qualifies as a possible temptation to alter or falsify test results; and (3) the BADT fee statute does not create a situation comparable to an expert witness contingency fee arrangement. Therefore the judgment of the CCA is reversed.

RECENT DECISIONS

State v. Alisha Lynn Alsup, 2018 Tenn. Crim. App. LEXIS 475

On August 29, 2014, the defendant was arrested for DUI. On May 21, 2015, the Lawrence County Grand Jury indicted Ms. Alsup for DUI per se (BAC greater than .08%). On May 19, 2016, the Lawrence County Grand Jury returned a superseding indictment against Ms. Alsup for DUI by impairment and for DUI per se. The Court of Criminal Appeals ruled that the DUI by impairment charge in the superseding indictment broadened and substantially amended the DUI per se charge in the original indictment. Since the DUI per se charges were dismissed by a motion to suppress, the DUI by impairment charge is time-barred by the statute of limitations. This is a warning to carefully consider and always include all appropriate charges in the original indictment.

State v. Ramey Michelle Long, 2018 Tenn. Crim. App. LEXIS 485

Two deputies of the Henderson County Sheriff's Office stopped the Ms. Long for speeding on August 18, 2015. Ms. Long was returning home after attending classes at the Nashville School of Law. After smelling the odor of burning marijuana and observing signs of impairment, the deputies had Ms. Long perform SFSTs and they later searched the vehicle. Ms. Long performed poorly on the SFSTs and the deputies found prescription meds, beer, marijuana and a pipe in the vehicle. A jury convicted Ms. Long of DUI 2nd, simple possession and possession of paraphernalia. The Court of Criminal Appeals reaffirmed a search based upon probable cause after the smell of marijuana and allowed the non-custodial nature of statements made during a DUI investigation. The CCA also provided a great synopsis of the law regarding the admissibility of evidence during trial. The CCA affirmed the rulings of the trial court, including the jury imposed fines of $8,600.

State v. Darrell Wayne Smith, 2018 Tenn. Crim. App. LEXIS 488

Mr. Smith was convicted by jury trial of one count of DUI and one count of violation of the Financial Responsibility Statute. On May 11, 2011, Mr. Smith ran his vehicle off the road. After an investigation, Trooper Vespie arrested Mr. Smith for DUI. During the trial, the State called TBI Agent Adam Gray to testify regarding prescription drugs that were found in the defendant's blood (Oxycodone, NorDiazepam and Alprazolam). Agent Gray testified as to the therapeutic level of different drugs and the level of these drugs found in the defendant's blood. Agent Gray used a chart from the article, "Winek's Drug & Chemical Blood-level Data 2001". The Court of Criminal Appeals ruled that an expert may base an opinion upon clearly inadmissible hearsay, if the type is one that would be reasonably relied upon by experts in the field. The "Winek chart" is a source reasonably relied upon by the experts, including, "Drug Effects on Psychomotor Performance," by Basalt.

State v. Maegan Davis, 2018 Tenn. Crim. App. LEXIS 518

This is another case in which a defendant plead guilty to DUI and reserved a certified question, but failed to properly certify the question in accordance with Tennessee Rule of Criminal Procedure 37(b)(2) and *State v. Preston*, 759 S.W.2d 647. Although there were three different attempts made to form a proper certified question, the defendant offered no evidence that the State consented to the certified question or that the certified question was dispositive of the case.

State v. Patrick Tyler Harris, 2018 Tenn. Crim. App. LEXIS 535

The Court of Criminal Appeals reaffirmed that when a police officer observes a motorist commit an offense, such as running a stop sign, the officer will have **probable cause** to stop the motorist and the stop will pass constitutional muster. Citing *State v. Smith*, 484 S.W.3d On January 24, 2015, Trooper Roberts observed the defendant fail to stop for a stop sign at an intersection. Mr. Harris claimed that the stop sign was way off the road. Mr. Harris had also been drinking that night and he preformed poorly on the field sobriety tests.

RECENT DECISIONS (Continued)

State v. Angela Faye Daniel, 552 S.W.3d 832, 2018 Tenn. LEXIS 832

The Tennessee Supreme Court unanimously ruled that a good-faith exception should be applied to Rule 41's exclusionary rule when an officer obtains a blood sample pursuant to a search warrant, but fails to leave a copy of the search warrant with the defendant. On June 6, 2014, Officer Valentin arrested the defendant for DUI. Officer Valentin obtained a search warrant for blood and a sample of Ms. Daniel's blood was obtained, but Officer Valentin could not remember if she gave Ms. Daniel a copy of the search warrant. It is the officer's practice to normally give the defendant a copy. Rule 41 requires that the defendant receive a copy. Effective July 1, 2018, the TSC changed Rule 41 from "shall" grant a motion to suppress, to "may" grant a motion to suppress, so that a trial judge now has the discretion to determine if the officer acted in good faith. In all other states and in all federal jurisdictions, leaving a copy of the search warrant is ministerial in nature and does not invalidate a seizure. The TSC stated that the state has the burden of proving good faith on the part of the officer. The granting of the defendant's motion to suppress was reversed.

State v. Wellington Thomas, 2018 Tenn. Crim. App. LEXIS 592

On March 21, 2015, Officer Kennedy observed Mr. Thomas's vehicle touch the fog line twice and cross the centerline dividing the two southbound lanes for around six seconds (approximately 300 feet). Officer Kennedy testified that he could not see any obstructions within the defendant's lane and he did not use a turn signal, indicating an intent to change lanes. The Court of Criminal Appeals stated, "From Officer Kennedy's point of view, during the relevant time frame, a reasonable police officer would deduce that Defendant failed to maintain his lane by accidentally drifting across the centerline dividing the two southbound lanes after touching the fog line twice." … "'[t]he officer would have to investigate further in order to determine whether the driving maneuver violated Section [55-8-123(1)]' as described in *Smith."*

State v. Lloyd Rush Pratt, JR., 2018 Tenn. Crim. App. LEXIS 634

On February 15, 2015, a Perry County deputy responded to a single vehicle crash. Two people were found in the vehicle. The passenger was unavailable for trial because she had died before trial. Although Mr. Pratt admitted to driving to the deputy, a report of this statement was not recorded since the investigation was later taken over by a THP trooper. The statement was not included in the trooper's report. During trial, the defense argued that Mr. Pratt was not the driver and his statement had never been disclosed during discovery. The statements were excluded and a curative jury instruction was given. The trooper later testified that he determined that the defendant was the driver based upon statements. (indirect hearsay) A *Brady* violation was denied, but the legal discussion by the Court of Criminal Appeals is very thorough. The CCA determined that the curative jury instruction was insufficient and the admission of indirect hearsay was improper. The judgements of the trial court were reversed.

State v. Robert A. Franklin, 2018 Tenn. Crim. App. LEXIS 640

Mr. Franklin was stopped on June 15, 2012, during a sobriety checkpoint conducted by THP. Mr. Franklin preformed poorly on SFSTs and he was arrested for DUI. A blood sample was obtained and Mr. Franklin's BAC was found to be 0.12%. The Court of Criminal Appeals determined that the sobriety checkpoint was unconstitutional for a variety of reasons. Advance notice of this checkpoint had not been advertised or provided to the media, as pursuant to the checkpoint THP Order. Also, the CCA determined that officers at the checkpoint exercised substantial discretion at the scene and they exhibited substantial deviations from the checkpoint Order, which severely interfered with Mr. Franklin's privacy and liberty. The CCA also found a lack of adequate warning signs at the checkpoint scene. Finally, the CCA determined that many deviations from the checkpoint Order and THP written administrative guidelines weighed heavily against the constitutionality of the checkpoint. The judgments of the trial court were reversed.

THE DRUG EVALUATION CLASSIFICATION (DEC) PROGRAM

What is the DEC program and what qualifies a DRE as an Expert?

The Drug Evaluation and Classification (DEC) Program started in the early 1970s as an effort to address the increasing number of drugged drivers on our roads and highways. By combining evidence-based medical knowledge, experience regarding drug pharmacodynamics, and validated psychomotor tests, the DEC program enables highly trained police officers, certified as Drug Recognition Experts (DRE), to determine whether a suspect is under the influence of alcohol and/or drugs and, if so, by what category of drugs. Over the last five decades, a systematic and standardized program has been developed and refined using the expertise of physicians, optometrists, psychiatrists of behavioral health, pharmacologists, toxicologists and law enforcement officers. (*Drug Recognition Expert 7-Day School Course, Participant Manual,* (NHTSA, TSI, IACP), Revised 10/2015, herein after referred to as *DRE Manual*) DREs are employed by thousands of law enforcement agencies in every state of the United States, Canada and several other countries around the world. DRE testimony is readily accepted in almost all courts where DREs are employed.

In order to qualify as a DRE, a law enforcement officer must first be referred by their agency. The officer must already be proficient in the administration and interpretation of standardized field sobriety tests before they will be accepted into the DRE preliminary school. The preliminary training involves two days of instruction covering ten sessions using a 200 page manual. If the officer successfully competes the preliminary training, they will then proceed to the seven day classroom program, covering 30 sessions using an over 500 page manual. If the officer completes DEC training and passes a final exam, they must then complete the certification phase of their training, which involves evaluations of persons suspected of drug impairment. These evaluations are then compared and verified with the results of toxicological testing. In addition to the over 100 hours of initial training, the International Association of Chiefs of Police (IACP, the agency that certifies DREs) conducts annual training and provides current information based upon articles and studies relating to drug and alcohol impairment. DREs often participate in "wet labs" in which volunteers drink alcohol, perform SFSTs and are then assessed for impairment. Colorado, which legalized recreational marijuana, offers "green labs" in which volunteers are assessed for impairment after ingesting marijuana. (http://www.westword.com/news/green-lab-teaches-cops-how-to-know-when-a-driver-is-stoned-8544803)

In 1985, the National Highway Traffic Safety Association (NHTSA) and the Los Angeles Police Department conducted a two phase validation study. (*See e.g.* Compton, R., *Field Evaluation of the Los Angeles Police Department Drug Detection Program*, U.S. D.O.T. H.S. 807 012 (Feb. 1986); Bigelow, G., Bickel, W., Roache, J., Liebson, I., and Nowowieski, W., *Identifying Types of Drug Intoxication: A Laboratory Evaluation of a Subjection-Examination Procedure,* U.S. D.O.T. H.S. 806 753 (May 1985)). The first phase or the laboratory part of the validation study took place at John Hopkins University in Maryland. (known as the John Hopkin's Study) The participants were voluntarily dosed with different classifications of drugs, or a placebo. The DREs were successful in identifying 95% of the placebo, drug free, subjects as "not impaired." Similarly the DREs successfully identified 98.7% of the subjects that received strong doses of a depressant, stimulant or marijuana. Some subjects were given weak doses of drugs and the DREs identified 17.5% of those that ingested a weak dose of d-amphetamine and 32.5% of those given a weak dose of Marijuana. The DREs correctly identified the drug categories causing the impairment more than 90% of the time. Of course these studies were only able to allow dose levels at substantially lower levels than is often seen at street levels. The second phase of the validation study involved field evaluations of suspects arrested for DUI. None of these cases involved crashes and the suspects all agreed to summit to a blood test. Within the study, 21% of the suspects were found to have only one drug in their system, 47% of the suspects were found to have two drugs in their systems and 25% of the suspects had three or more drugs in their system. The blood tests confirmed the presence of at least one category "predicted" by the DREs 92.5% of the time.

Medical literature is saturated with articles and studies that support the DEC Program. (*See DRE Manual, supra,* and *Williams v. State,* 710 So. 2d 24 (Fla. 3d DCA 1998), *rehearing denied,* 725 So. 2d 1111 (Fla. 1998. the State provided the court with over 2,000 pages of medical literature. For a more extensive list, *see*

DEC PROGRAM (Continued)

https://ndaa.org/wp-content/uploads/1033558_DREMonograph_FinalWEB.pdf, hereafter referred to as *DRE Monograph*) In addition to the many research and medical validation studies mentioned above, several law enforcement and state agencies have conducted their own studies and DEC Program evaluations. (*See DRE Manual,* and *DRE Monograph, supra*) Most of these studies have documented corroboration rates, based on toxicology confirmation, near 90%, even though many laboratories do not test for many types of drugs.

By using a verified, systematic and standardized method of examining suspected drug-impaired drivers, the DREs can determine: (1) Whether the suspect is impaired; (2) Whether the impairment relates to drugs or a medical condition (a DRE is taught to recognize common medical conditions that cause signs of impairment); and if drugs, (3) Determine the category, or combination of categories, that is likely causing the impairment. The DREs do not make medical diagnoses. However, they do observe easily identifiable signs of impairment and based upon their extensive training and experience, develop an informed opinion as to impairment and the likely cause of the impairment. A DRE opinion is never based upon any one element of the examination, but on the totality of all facts that emerge. (*DRE Manual*)

The DEC evaluation method entails a 12-step process to assess a suspect's possible impairment due to drug use. The process includes: (1) Conduct a Breath Alcohol Test; (2) Interview the arresting officer, specifically about the suspect's behavior, appearance and driving pattern; (3) Conduct a preliminary examination of the suspect (including taking the suspect's pulse); (4) Conduct an Eye Examination, including HGN, VGN and lack of ocular convergence (different drug categories affect the eyes and nystagmus in different ways); (5) Conduct divided-attention psychophysical tests (some of these tests have a greater accuracy rate for specific drug categories); (6) Document the suspect's blood pressure, body temperature and take the pulse a second time); (7) Conduct a dark room examination, specifically looking for dilation, constriction and reaction to light; (8) Examine the suspect's muscle tone; (9) Examine for injection sites and take the pulse a third time; (10) Provide Miranda warnings and interview the suspect; (11) Form an opinion as to impairment and the category of drug or drugs involved (the DRE will use their training; experience; resources such as NHTSA's Drug and Human Performance Fact Sheet; the Drug Symptomatology Matrix; and a totality of their investigation and examination to form this opinion); and (12) A blood sample will be obtained and sent to the toxicology lab for analysis and confirmation (*DRE Manual*). The different drug categories used within the DEC program are: (1) CNS Depressants; (2) CNS Stimulants; (3) Hallucinogens; (4) Dissociative Anesthetics; (5) Narcotic Analgesics; (6) Inhalants; and (7) Cannabis.

Tennessee Rules of Evidence, Rule 702 states, "If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." A certified DRE, based upon their extensive knowledge, skill, experience, training and education should be able to easily articulate the reliability and validity of the DEC program sufficiently to satisfy Rule 702 and to be declared an expert in the area of drug impairment and identifying the category of drug causing the impairment. DREs and the DEC program are widely accepted in American Courts and many different jurisdictions have qualified DREs as experts to testify, based upon their training, knowledge and experience (*See DRE Manual,* and *DRE Monograph, supra*). In 2016, the Wisconsin Court of Appeals stated, "The DRE protocol, particularly as it relates to identifying drug-induced impairment, is the product of reliable principals and methods. The error rate for determining some sort of drug impairment is acceptable. The DRE protocol has been tested, published, and peer-reviewed, receiving adequate scrutiny in the relevant field. It is widely accepted and in use in the law enforcement community." *State v. Chitwood,* 2016 WI App 36, 369 Wis. 2d 132, 879 N.W.2d 786 (Wis. Ct. App. Apr. 13, 2016). In 2017, the Supreme Court of Canada issued a landmark opinion supporting the admissibility of DRE testimony and evidence. The SCC in *R. v. Bingley,* 2017 SCC 12, stated that, "[a]ll DREs undoubtedly possess expertise on determining drug impairment that is outside the experience and knowledge of the trier of fact." The SCC allowed the constable to render an expert opinion on drug impairment. *Id.*

WHY DO TOXICOLOGY RESULTS TAKE TIME TO RECEIVE?

This is the question I hear over and over from prosecutors, officers, judges, defense attorneys, defendants and victims daily. The answer is simple: the TBI analysts are interested in providing accurate, reliable and quality results. These results can only be obtained by following proper policies and procedures, which takes time.

The Tennessee Bureau of Investigation (TBI) Toxicology Unit in Nashville receives blood samples from across the state. These samples are received via drop box, which is located in the lobby of the evidence receiving area at the crime lab. Samples are transported by local law enforcement agencies, United States Postal Service, United Parcel Service, or by Federal Express. These samples are transported in blood alcohol kits, which are provided to the law enforcement agencies by the TBI. These kits include: bubble wrap, a plastic bag, 2 gray stopper tubes and an Alcohol/Toxicology Request form which is filled out by the officer/ Medical Examiner and the individual who draws the blood samples. The blood alcohol kits have flaps that are sealed and initialed by the officer/Medical Examiner. Upon receiving the samples at the lab, a Forensic Lab Technician breaks the seals on the blood alcohol kit, opening only one kit at a time. They then examine the contents of the kit, verifying the contents, and noting how and when the sample has been received. The lab technician then checks what is written on the tubes against the information on the Alcohol/Toxicology Request Form and then assigns a lab number that is unique to that evidence. Next they affix a label on the tubes with the assigned lab number, place the tubes in a rack, and pass the samples off to a toxicologist.

After receiving the samples from the lab technician, a toxicologist will place the samples in a cooled storage unit located within the TBI Toxicology Unit. When the samples are ready to be tested, the analyzing toxicologist will retrieve the samples from the storage unit. The toxicologist will confirm what is written on the tubes against what is written on the Alcohol/Toxicology Request form, just as the lab technician has previously done. They then set up an alcohol "run" using a number of checks and balances throughout the process. A computer generated list is prepared and the toxicologist refers to this list in setting up their "run." A second toxicologist checks the sample lab numbers and the sample positions against the generated list and signs a sheet stating they have done so. The original toxicologist takes a measured sample of the blood and places it into a vial to be tested on an alcohol instrument. As the test is being performed, the toxicologist checks the assigned lab number on the sample against the assigned position on the generated list. A "run" consists of the following: the first nine samples are calibrators and the tenth sample is a control. After the control are nine case samples, then another control sample, nine additional case samples, then another control sample, and so on, until 110 positions are full. There are 90 case samples in each alcohol "run". Within every sample throughout the run, an internal standard is added. The internal standard is a component that is used as a "chemical ruler". If there are any volatiles of interest within the samples, they are measured against this chemical ruler and plotted on a curve which is generated using the calibrators at the beginning of the run. The instruments that are used are headspace gas chromatographs and mass spectrometers (GC/MS). The GC/MS will identify components and indicate the amount that is found in the sample. Each sample preparation takes approximately 3 minutes to complete with a 25 minute incubation period before the samples are run. After the samples are prepared, it takes approximately 6 hours for a run to complete on the instrument. After the first run is finished, the toxicologist breaks down the run then rebuilds the run with the case samples being now in reverse order, following the same steps as in the prior run. After the forward and reverse runs are complete, the mean of the 2 results is reported. All ethanol results that are less than 0.05 gram%, must be within +/-10% of the mean. All ethanol results that are greater than 0.05 gram% must be within +/-5% of the mean. Any samples that are not within these ranges must be reanalyzed or reported out as positive, according to TBI's policies and procedures. Any DUI/MVA cases that are below 0.085 gram% will be sent for a drug screen. Any DUI/MVA cases above .085 gram% will have no further testing. All death cases and cases other than DUI/ MVA will be sent on for a drug screen. Any issues with the sample condition are noted while preparing the run. Any issues during the run are also noted in the case file. After all data is generated, the toxicologist will then place all paperwork in the case folder and do a review to make any needed corrections and to make notes. After the review is complete, the control data is placed on a spreadsheet in order to keep up with all data necessary to calculate measurement certainty. The tubes are then separated so cases with no further testing are

TIMING OF TOXICOLOGY RESULTS (Continued)

placed in a marked for destruction container and cases going on for a drug screen are placed in racks in the storage unit to be picked up by the next toxicologist conducting the drug screen testing. The cases and control packets are reviewed by a peer. After the reviews are completed and approved in the Laboratory Information Management System (LIMS), the reviewer will print the final report to be placed and stapled in the case folder. At this time, any report requests by subjects are appropriately handled. The folders for the cases going on for further testing are placed in a cabinet and the folders for the cases that are completed are filed in the Evidence Receiving Unit case file vault. This entire process, from the time the toxicologist begins their analysis, takes approximately a week to complete.

A preliminary drug screen is the first test done on cases that require further testing after the alcohol analysis is complete. The preliminary drug screen tests for families of drugs and helps the toxicologist know exactly which type of testing needs to be done on the samples. The families of drugs that the preliminary drug screen looks for are: opiates, THC, barbiturates, morphine, cocaine and benzodiazepines. The screening test used to do the preliminary drug screening is an Enzyme Linked Immunosorbent Assay (ELISA). As the toxicologist prepares the samples for testing, the run is checked against a computer generated list and double checked by another scientist. After preparation, the toxicologist puts samples on plates designed to indicate the presence of a certain drug. There are 92 case samples placed on the plate with 2 negative control samples and 2 positive control samples. The instrument detects any color changes in the samples during the analysis and reports the positive and negative results. The samples are then forwarded to the a toxicologist for confirmatory testing.

The first of the confirmatory tests performed is the basic (basic refers to pH) drug screen. Every sample submitted for a drug screen is analyzed using this method. This screen tests for a long list of drugs that are basic in pH and includes more possible drugs than any of the other tests. The extraction takes 1-2 days to prepare and 1-2 days to run the samples on the instrument. Each sample takes approximately 30 minutes to run on the instrument, a gas chromatograph/mass spectrometer (GC/MS). After the samples are run on the instrument, the toxicologist has to go through every single case and look to see if any drugs are in the samples and print the corresponding paperwork to put in the case folder. The entire process of the basic drug screen alone takes days to analyze and complete. Next, based upon the preliminary drug screen, the samples may be sent on for even further testing. There are specific tests performed for benzodiazepines, opiates and THC's that are all done by liquid chromatography/mass spectrometry (LC/MS/MS), which is more sensitive than the GC/MS. The benzodiazepines, opiates and THC's all have their own extractions and are run with different methods on the LC/MS/MS at separate times. The extractions all take approximately a day to extract and a day to run on the instrument. All of these extractions take days to analyze and complete along with all the checks that are in place for each one. Just like the alcohol testing, when all the drug testing is complete, all the paperwork, notes and reviews must be done by the toxicologist. The toxicologists enter all the control data into the spreadsheet for the measurement certainty calculations, they place the samples in the correct destruction containers, then they send their cases on for administrative and technical reviews by a second toxicologist. The peer reviewer has to review all the control packets and the case folders, and approve them in LIMS. When the reviews are complete, the final reports are printed and stapled in the case folders. Any report requests from subjects are taken care of at this time. The entire drug screen process takes weeks, or longer, depending upon the number of tests that are to be performed, as indicated by the preliminary drug screen.

Not only do the number of samples and tests increase each year, but there are a number of other factors that increase the demands of toxicology testing. With the increasing demands of new drug testing methods required to analyze for new and evolving drugs, toxicologists are often diverted off casework. With the need to also train newly hired toxicologists, experienced toxicologists' casework output decreases. Toxicologists are required to keep abreast of the newer methods and verification studies by going to meetings. Oh, and of course, toxicologists must be in court to testify on cases as well. So, if you find yourself or anyone else asking why toxicology results take so long, now you now know why. The Toxicology Unit is meeting their increasing demands while, most importantly, continuing to produce accurate, reliable and quality results.

UPCOMING TRAINING

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

TNDAGC Fall Conference - October 23-26, 2018, Memphis, TN
The DUI training department will offer a DUI breakout session on October 23, 2018, before the Fall Conference begins.

Cops in Court - November 7, 2018, Lawrenceburg , TN
This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trail presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation.

Victim Awareness Training - (Nashville Airport Marriott) December 5, 2018, Nashville, TN
The DUI training department will offer a one day training class focused on victim awareness in DUI cases. This training will coincide with the Mother Against Drunk Driver's "Night of Remembrance." During this event, MADD will recognize law enforcement officers and citizens for their great contributions to the enforcement and prevention of impaired driving in Tennessee.

Cops in Court - January 23, 2019, Mount Juliet, TN
This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trail presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation.

Protecting Lives, Saving Futures - February 11-12, 2019, Memphis, TN
This joint prosecutor/law enforcement officer training is designed to allow the participants to learn from each other, inside of a classroom, rather than outside of a courtroom shortly before trial. Topics covered include the detection, apprehension and prosecution of impaired drivers. Each prosecutor attending is required to recruit one to three law enforcement officers to attend the training together.

DUI Basic Trial Advocacy - March 5-7, 2019, Nashville, TN
This three-day trial advocacy course is designed to develop and improve the courtroom skills of DUI Prosecutors. The agenda includes an initial toxicology explanation and review. The course will then cover the different aspects of preparing an impaired driving case for trial, including how to defend common defense motions. The course will then address the multiple stages of a jury trial.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Impaired Driving Enforcement (ARIDE)
November 12-13, 2018, Union City, TN
January 7-8, 2019, Nashville, TN

DUI Detection & Standardized Field Sobriety Testing
October 15-17, 2018, McMinnville, TN
February 18-27, 2019, Hixson, TN (Instructor Class)

Drug Recognition Expert School (DRE)
(In-Service) October 4, 2018, Jackson, TN

DUI TRACKER

DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from July 1, 2018, through September 28, 2018, and reflect the DUI Tracker conviction report for all judicial districts in the State of Tennessee. These numbers include the Circuit Courts, Criminal Courts, General Sessions Courts and Municipal Courts. The total number of dispositions for the period from July 1, 2018, through September 28, 2018, since the last quarter were 1,322. This number is up from the previous quarter by 28. From looking at these numbers, we can see that the trend in DUI related dispositions in Tennessee has increased, breaking the lower disposition trends that we have been observing throughout the last year. The total number of guilty dispositions during this same period of July 1, 2018 through September 28, 2018 were 939. The total number of dismissed cases were 91. Across the State of Tennessee, this equates to 72.92% of all arrests for DUI made were actually convicted as charged. This percentage is slightly higher than the last quarter ending on June 30, 2018. Only 6.88% of the DUI cases during this current quarter were dismissed. Also, during this same period of time, only 181 of the total DUI cases disposed of were to different or lesser charges. Therefore, only 13.69% of the total cases were disposed of to another charge.

Fatal Crashes this last quarter

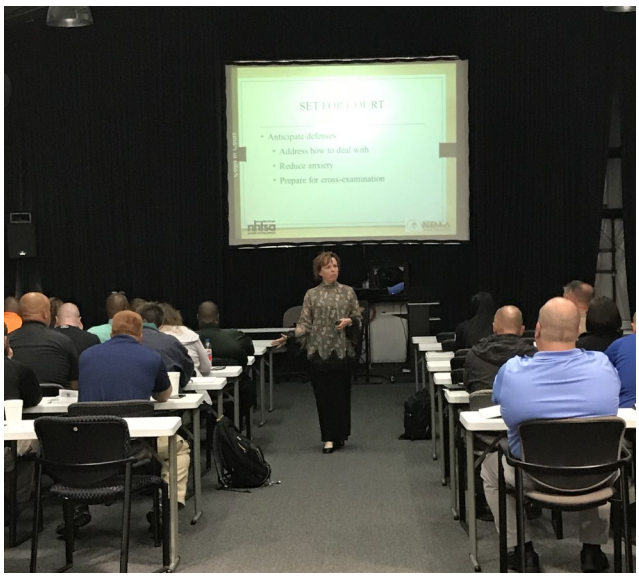
The following information was compiled from the Tennessee Integrated Traffic Analysis Network (TITAN) using an *ad hoc* search of the number of crashes involving fatalities that occurred on Tennessee's interstates, highways and roadways, from July 1, 2018 through September 28, 2018. During this period, there were a total of 274 fatalities, involving 261 crashes, which is an increase from the previous quarter. Out of the total of 274 fatalities, 40 fatalities involved the presence of alcohol, signifying that 14.59% of all fatalities this quarter had some involvement with alcohol. This percentage is slightly lower than the previous quarter. Further, there were a total of 30 fatalities involving the presence of drugs, signifying that 10.94% of all fatalities this quarter involved some form of drugs.

The year-to-date total number of fatalities on Tennessee roads and highways is 760. This is down by 1 from the 761 fatalities incurred last year at this same time. For most of the year, we experienced a considerable decrease from last year in the number of fatalities on our roads. Unfortunately we have seen a sharp increase within the last few months.

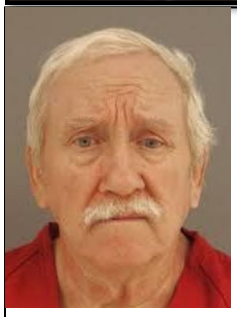
COPS IN COURT SEMINAR

On September 11, 2018, the Traffic Safety Resource Prosecutors, along with the 6th Judicial District's District Attorney's Office and the Knox County Sheriff's Office conducted a "Cops in Court Seminar" in which law enforcement officers from different local law enforcement agencies participated in an all day training seminar, including a mock trial exercise.

In the next few months, we will be presenting other "Cops in Court Seminars" in Hawkins and Lawrence Counties. There are many more training opportunities coming soon.



VEHICULAR HOMICIDE MURDERER'S ROW



State v. Lee Harold Cromwell, 2018 Tenn. Crim. App. 498

After a fireworks show in Oak Ridge, TN on July 4, 2015, Mr. Cromwell drove his pick-up in reverse through a crowded parking lot sideswiping a parked Thunderbird. He then stopped for a few seconds and reversed again, striking a van. Mr. Cromwell stopped again for a few seconds and then "floored it" in reverse, hitting many victims and vehicles. 37 year old James Robinson was plowed over and pinned underneath Cromwell's pick-up. Mr. Robinson was able to push his seven year old daughter out of harm's way before he was hit by the pick-up. Mr. Robinson died from his injuries. Initially, Mr. Cromwell claimed that his accelerator stuck, but upon inspection, no mechanical problems could not be found.

The defendant was convicted at a jury trial of one count of reckless vehicular homicide and eights counts of reckless aggravated assault. He was sentenced to 5 years on count one and a total of 12 years to serve in TDOC. To complicate matters, Mr. Cromwell claimed sovereign citizenship and he filed over $12 million in fraudulent liens on various people involved in this case. The trial court considered these actions by Mr. Cromwell during his sentencing hearing. The Court of Criminal Appeals affirmed the judgement of count one (reckless vehicular homicide), but reversed the eight convictions of reckless aggravated assault due to an improper jury instruction. These counts have been remanded to the trial court for a new trial.

Due to the many fraudulent liens filed by Mr. Cromwell against the various officials and participants involved in this case, he was tried and convicted in Davidson County for 14 counts of Forgery and 14 counts of Filing Fraudulent Liens. Mr. Cromwell was sentence to 25 years to serve in TDOC.

State v. James Douglas Hamm, Jr., 2018 Tenn. Crim. App. 561

On June 23, 2014, Mr. Hamm was observed by many witnesses purchasing a bottle of vodka, driving recklessly and running a red light, after hitting a nearby restaurant wall twice. Shortly thereafter, Michael Locke was helping to place political signs along the roadway near a bridge when he was struck by Mr. Hamm. The force of the collision propelled Mr. Locke off of the bridge and onto the rocks, 20 feet below. Mr. Hamm did not stop. He was seen further down the road, driving recklessly until he passed out behind the wheel and his vehicle came to a stop. Upon the arrival of law enforcement, Mr. Hamm was determined to be extremely intoxicated and stated three times, "I'm guilty. I been drinking." Mr. Hamm could not perform SFSTs, but a blood sample was obtained and his BAC was determined to be 0.373%.

A jury convicted Mr. Hamm of vehicular homicide by intoxication, leaving the scene of an accident involving death, reckless endangerment, DUI, failure to exercise due care and running a red light. The trial court sentenced Mr. Hamm to 10 years to serve for vehicular homicide, 2 years for reckless endangerment and 2 years for leaving the scene of an accident involving death, all consecutive, for a total effective sentence of 14 years to serve in TDOC. All other sentences were run concurrent.

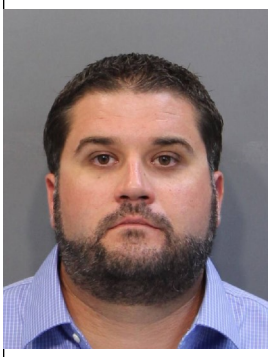
On appeal, the defendant claimed that the jury pool was poisoned by a juror's statements regarding having family members killed or injured by drunk drivers and she could not be fair. The juror was excused for cause and the judge denied the defendant's motion for a mistrial. The Court of Criminal Appeals found no abuse of discretion on the part of the trial judge and the judgments of the trial court were affirmed.

VEHICULAR HOMICIDE MURDERER'S ROW

State v. William H. Young, 2018 Tenn. Crim. App. 608

Just before sunrise on March 20, 2014, the victim, 55 year old Donna Giarruso, was driving her 13 year old son to middle school. As Ms. Giarruso was crossing Highway 58, her vehicle was struck by Mr. Young's vehicle. The impact was so forceful that the victim's vehicle was knock 253 feet from the point of impact, across multiple lanes of traffic, the center median, the highway shoulder and into a nearby field. The driver's side of the victim's vehicle was not visible as the defendant's truck intruded more than two feet into the victim's vehicle. An accident reconstructionist determined that Mr. Young was travelling 89 miles per hour at the point of impact, that he had accelerated five seconds before the impact to "100 percent throttle" and he applied his brakes for the first time 1.2 seconds before impact. The expert testified that if Mr. Young had been traveling at the posted speed limit, the collision would not have occurred. Many witnesses testified that Mr. Young was not speeding and that Ms. Giarruso just pulled out in front of the truck.

After a bench trial, the court found Mr. Young guilty of criminally negligent homicide, a lesser included offense to vehicular homicide. Mr. Young was sentenced to 18 months for the Class E felony. Mr. Young had requested judicial diversion, but that request was denied. Mr. Young appealed the denial of diversion. The Court of Criminal Appeals stated, "However, simply because a defendant meets the eligibility requirements does not automatically entitle him or her to judicial diversion. *State v. Bonestal*, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993)." The judgment of the trial court was affirmed.



State v. Henry Cofrancesco, III, 2018 Tenn. Crim. App. 725

Around 8 pm on May 21, 2016, Mr. Cofrancesco and his girlfriend were at a bar, drinking and arguing. It was still light out. At some point, Mr. Cofrancesco left the bar and sat in his vehicle. Suddenly, he started his vehicle, quickly drove over the curb and directly into the pathway of the motorcycle being driven by 60 year old Robert Benedict. Although Mr. Benedict was traveling at the speed limit, it was impossible for him to avoid the defendant's vehicle. Mr. Benedict died at the scene. Earlier in the day, Mr. Benedict attended his only daughter's high school graduation. After the collision, Mr. Cofrancesco got out of his vehicle and walked back into the bar. He later refused to perform SFSTs and he refused a blood draw. After obtaining a search warrant, a sample of Mr. Cofrancesco's blood was obtained. His BAC was 0.262%. He also tested positive for amphetamine.

Mr. Cofrancesco was indicted for vehicular homicide, possession of cocaine, failure to yield, leaving the scene of an accident involving death, failure to render aid, DUI, and DUI per se. He plead guilty to vehicular homicide and DUI per se. All other counts were dismissed. The trial court sentence Mr. Cofrancesco to 9 years to serve in TDOC. The court stated that confinement was necessary to avoid depreciating the seriousness of the offense. The court also found the offense "excessive or exaggerated" due to the high BAC and that he drove into a busy highway.

Mr. Cofrancesco appealed his sentence and the denial of alternative sentencing. The Court of Criminal Appeals stated that although the mere fact that the defendant killed someone while driving intoxicated is not sufficient, in and of itself, to deny probation, the trial court made sufficient findings to justify confinement.

T.C.A. SECTION 55-10-406 (IMPLIED CONSENT)

T.C.A. section 55-10-406 (the "implied consent statute") regulates when and how a breath test and/ or a blood test can be requested from a driver of a motor vehicle, if the law enforcement officer has probable cause to believe that the driver is under the influence. In subsection (a)(1), this statute states that an officer may request the operator of the vehicle to "submit to a breath test, blood test, or both tests for the purpose of determining the alcohol or drug content, or both, of that operator's blood." The courts have long recognized that a law enforcement officer has the authority to choose which test to request. *State v. Turner*, 913 S.W.2d 158, 162 (Tenn. 1995). The *Turner* court also stated, "In interpreting statutes, we are required to construe them as a whole, read them in conjunction with their surrounding parts, and view them consistently with the legislative purpose. (citations omitted) The construction must not be strained and must not render portions of the statute inoperative or void." *Id*. at 160.

T.C.A. sections 55-10-406(a)(2) - (e) refer to how breath tests are to be obtained under the implied consent statute. Most of this section of the statute is consistent with past versions of the statute, except a breath test can now be required pursuant to a lawful arrest as described in the United States Supreme Court case of *Birchfield v. North Dakota*, 136 S. Ct. 2160. (The Tennessee legislature indicated that their intent with the amendment of T.C.A. Section 55-10-406, was to comply with the *Birchfield* case.) T.C.A. sections 55-10-406 (f) - (k) refer to how blood tests are to be obtained. Subsection (f) states, "The implied consent given by the operator of a motor vehicle pursuant to subdivision (d)(1), is not sufficient to comply with the consent required to administer a blood test pursuant to this section. Unless…" Some have incorrectly interpreted this section to exclude blood tests from the implied consent statute. However, the legislature used the word **"Unless"**, indicating that if any of the conditions after the word **"Unless"** are met, then the implied consent provisions under subdivision (d)(1) are sufficient for a request for a blood sample. Therefore, as per the plain wording of the statue, if the operator reads the implied consent form (or has it read to them) and they sign it, or the officer obtains a search warrant, or a recognized exigent circumstances exist, then the implied consent statute and all consequences for its refusal are applicable. This reading of the statute is consistent with the *Birchfield* opinion which states, "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorist who refuse to comply. (citations omitted) Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them." *Id.* at 2185. The *Birchfield* court ruled that you could not threaten a motorist with criminal penalties for a refusal to a warrantless blood draw. The *Birchfield* court did not address criminal penalties for a refusal after a warrant is obtained or if exigent circumstances exist. T.C.A. section 55-10-407(e) states, "Any person who violates section 55-10-406 by refusing to submit to either test or both test (this includes a blood test), pursuant to section 55-10-406(4) shall be charged…"

Some have pointed to *State v. Henry*, 539 S.W.3d 223 as advocating this position, but it did not address this issue. In *Henry,* officers did not follow their own policies and procedures. They did not inform the driver of implied consent or the right to refuse a test. Also, they did not seek a warrant for blood when no exigent circumstances existed. The officers testified that they did not follow their own policy to get a search warrant after a refusal. Therefore, good faith did not apply. (The *Henry* arrest occurred after *Missouri v. McNeely,* S. Ct. 1552 (2013)) The issue of whether implied consent, absent an express refusal, is considered voluntary consent is still unsettled. The CCA has conflicting rulings and our Supreme Court has not addressed this issue.

Tennessee District Attorneys General Conference

226 Anne Dallas Dudley Blvd., Suite 800 Nashville, TN 37243-0890
Website: http://dui.tndagc.org

Terry E. Wood (615) 253-6734
Linda D. Walls (615) 232-2944
Pat Mitchell (615) 253-5684