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TSC Adopts *Herring* Good Faith Exception

On March 12, 2019, the Tennessee Supreme Court (TSC) in *State v. McElrath*, No. W2015-01794-SC-R11-CD; No. W2015-01958-SC-R11-CD, (consolidated for appeal) 2019 Tenn. LEXIS 100 (March 12, 2019)[1] adopted the good-faith exception to the exclusionary rule established in *Herring v. United States*, 555 U.S. 135 (2009) which held that "when police mistakes are the result of negligence . . . rather than the systemic error or reckless disregard for constitutional requirements" then a person should not go free because of an error.[2] In applying this rule to the facts of the two cases against Jerome McElrath for possession of marijuana (consolidated for the purposes of appeal), the TSC found that neither warrantless arrest for trespassing fell within the good-faith exception and the marijuana found on the defendant during the searches incident to each arrest must be suppressed.[3]

Jerome McElrath was arrested on April 8, 2015, by Union City Police Officer Chris Cummings after McElrath was seen standing outside the community center on Union City Housing Authority property. Before arresting McElrath, Officer Cummings contacted dispatch to confirm his belief that McElrath was illegally on the property, after being on the "barred" list. Once Officer Cummings received confirmation, Officer Cummings approached the defendant and placed him under arrest for criminal trespass. After the arrest, Officer Cummings performed a search of McElrath incident to the arrest and located approximately ten grams of marijuana from his pocket.

Nineteen days later, on April 27, 2015, Officer Cummings was patrolling the area of the city that included the Union City Housing Authority property when he observed a fight with spectators watching. Officer Cummings broke up the fight and warned McElrath (a spectator to the fight) that he was barred from the property and needed to leave. Instead of leaving, McElrath continued to remain on the property and to make disparaging comments toward the officer. Based on the prior interaction with McElrath, Officer Cummings arrested McElrath for criminal trespass a second time. McElrath's behavior during the arrest required other officers to assist in the search of McElrath incident to his arrest. The search lead to the recovery of four grams of marijuana.

It was following a third incident that Officer Cummings learned that McElrath had actually been removed from the "barred" list effective on August 16, 2010, and the defendant's name appeared on an April 11, 2014 list of people who had been removed from the "barred" list. The "barred" list maintained by Lt. Melvin Dowell of the Union City Police Department still had the defendant's name on it on March 23, 2015, and May 11, 2015. The "barred" list was the one referred to for information provided by dispatch to Officer Cummings.

The trial court suppressed the evidence obtained from McElrath as a result the
(Continued on page 12)

Recent Decisions

State v. James Lucas Green, 2019 Tenn. Crim. App. LEXIS 179

Columbia Police Officer Chadwick Howell was on duty on June 30, 2016 when responding to a 911 call of a vehicle driving in opposing lanes of travel. Officer Howell located the vehicle sitting in the middle of the street and Mr. Green was "banging" on the horn. The vehicle was running and still in drive. Upon contact, Officer Howell smelled alcohol and observed many indicators of impairment. Mr. Green was unable to perform SFSTs and he admitted that he was intoxicated. Mr. Green was arrested for DUI 5th offense.

During jury selection, the only African-American juror was excused after it was discovered that her son had been prosecuted by the District Attorney. The defense objected, based upon *Batson,* stating that the prosecutor did not excuse a Caucasian juror, even though his son had been prosecuted also. The prosecutor stated that the excused juror's son had an "extensive" criminal history as opposed to the other family member and the court ruled that a *Batson* issue was not present. The CCA stated, "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral." "What *Batson* means by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection. (Citing *Purkett v. Elem,* 514 U.S. 765,769 (1990).) This case also had a good discussion regarding consecutive sentencing.

State v. Thomas Huey Liles, Jr., 2019 Tenn. Crim. App. LEXIS 85

Mr. Liles was involved in a minor traffic crash in which he rear-ended another vehicle. One of the investigating officers noticed that Mr. Liles' "pupils were almost pinpoint." After Mr. Liles was unable to preform SFSTs, he was arrested for DUI. Mr. Liles only admitted to drinking one beer. Sevier Co. Sherriff Deputy Jason Lewis, a DRE, was called to the hospital to evaluate Mr. Liles. Deputy Lewis determined that Mr. Liles was under the influence of a depressant. A blood test determined that Mr. Liles' BAC was 0.056 % and that he had Alprazolam (Xanax) in his system. Mr. Liles was convicted of DUI 2nd.

Although Mr. Liles complained of TBI bias based upon the BADT fees, the Tennessee Supreme Court in State v. Decosimo, 555 S.W.3d 494 (Tenn. 2018) ruled that the BADT fee system does not deprive a defendant of due prosses and it does not provide TBI scientist with either a direct, personal, substantial pecuniary interest or a sufficiently substantial institutional financial incentive that qualifies as a possible temptation to falsify or alter test results to produce more convictions.

State v. Nathan Todd Cooke, 2019 Tenn. Crim. App. LEXIS 61

On November 8, 2015, THP Sergeant Jimmy Jones observed Mr. Cooke standing beside a motorcycle, parked on the side of a four-lane divided highway. The motorcycle and an SUV were parked on the opposite sides of the roadway and both vehicles had their hazard lights on. Mr. Cooke girlfriend was driving the SUV. When the trooper stopped to offer assistance, an odor of alcohol was detected. Sgt. Jones observed many indicators of impairment during SFSTs and Mr. Cooke was arrested for DUI. A blood test indicated a BAC of 0.21 %.

Mr. Cooke brought a motion to suppress since Sgt. Jones turned on his blue lights as he drove past the motorcycle and eventually parked in front of Mr. Cooke. Sgt. Jones testified that he when he stopped, he did not know that Mr. Cooke was impaired, and that it is THP policy to stop for all stranded motorist unless they are attending to an emergency. The trial court denied the motion to suppress based upon the community caretaking doctrine. The Court of Criminal Appeals agreed that the trooper possessed specific and articulable facts which, viewed objectively and in the totality of the circumstances, reasonably warranted a conclusion that a community caretaking action was needed; and that the trooper's behavior and the scope of the intrusion was reasonably restrained and tailored to the community caretaking need. Although Sgt. Jones turned on his (Continued on page 3)

Recent Decisions (Continued)

blue lights as he approached Mr. Cooke, both the trial court and the CCA determined that not every use of blue lights amounts to a seizure and in this case, the use of the blue lights did not equate to a seizure. The lights were used for safety as two vehicles were stopped on opposite sides of the lanes, with their flashers on, and the motorcycle was parked very near the inside yellow lane line. The trooper did not tell anyone that they were not free to leave, he merely asked if they needed help. This was a brief police-encounter for which legal justification was not required. The CCA stated that even if the trooper had seized the defendant, the trooper's actions were a proper exercise of the community caretaking function.

State v. Horatio Lamont Harrison, 2019 Tenn. Crim. App. LEXIS 47

An officer was travelling down the road when Mr. Harrison started to pull out of a parking lot, causing the officer to move from his lane of travel to avoid hitting Mr. Harrison's vehicle. The officer then entered a parking lot, turned around and followed Mr. Harrison's vehicle. The officer then pulled Mr. Harrison over for failing to yield the right of way and for having a tinted license plate cover. At the motion to suppress, the trial court determined that Mr. Harrison only pulled out in to the roadway three to five inches, the officer was travelling fast, Mr. Harrison's view was obstructed and he stopped when he saw the officer's vehicle. Therefore, the trial court granted the motion to suppress.

During the motion to suppress hearing, the officer testified that after viewing the video, Mr. Harrison also crossed the fog line. The trial court refused to hear any testimony regarding the fog line. The CCA ruled that the trial court erred in not allowing the State to present its alternative theory that the Defendant's crossing the fog line violated section 55-8-123 and provided probable cause or a reasonable suspicion to justify the traffic stop. The case was remanded for a further hearing.

State v. Saul Aldaba-Arriaga, IN RE: Rader Bonding Company, 2018 Tenn. Crim. App. LEXIS 904

This case is important to remember for when a defendant is on bond for a DUI, but the Grand Jury later indicts for more severe charges. On October 4, 2015, Saul Aldaba-Arriaga was arrested and charged with DUI second offense and driving on a revoked license. (one class A and one class B misdemeanor) The defendant was given a bond of $7,500 for the DUI charge and $2,500 for the DORL charge. The defendant waived preliminary hearing and the case proceeded to the Grand Jury. Since the DUI involved a crash with injuries and the defendant had other prior DUI convictions, the Grand Jury indicted the defendant for reckless aggravated assault through the use of a deadly weapon, a DUI 4th offense, a DUI with a blood-alcohol concentration of .20% or more, failure to comply with financial responsibility with an accident causing injury and driving on a revoked license. (one class D felony, two class E felonies, one class A misdemeanor and one class B misdemeanor)

The defendant appeared for court on August 5, 2016, but the case was continued until September 16th. The defendant failed to appear at that time and the trial court entered a conditional judgement of forfeiture of the $10,000 bond. The bond company filed a motion to set aside the conditional judgement and to be relieved as the surety since the State abandoned the charges for which the bond was set. The State argued that the original charges were the basis for the indictment. The trial court denied the bond company's motion to set aside.

The Court of Criminal Appeals ruled that a bond agreement is a contract and that the bond agreement did not include any language expanding the bond company's obligations to include the greater indicted charges. By increasing the charges from a misdemeanor to felonies, the result was a unilateral alteration of the terms of the bond agreement. Therefore, the bonding company is discharged for the $7,500 obligation for the DUI second charge. However, the bonding company is still responsible for the $2,500 bond for the driving on revoked license charge since the Grand Jury indicted upon the same charge from general sessions and the charge was never disposed of.

Exigent Circumstances for Warrantless Blood Draws

The Fourth Amendment of the United States Constitution and Article I, Section 7 of the Tennessee Constitution prohibits unreasonable searches and seizures.[1] Searches conducted upon a warrant properly issued and executed are presumed reasonable under the law.[2] Conversely, searches conducted without a warrant are presumed to be unreasonable. There are a few exceptions to the warrant requirement that will justify a search. Recognized exceptions to the search warrant requirement include searches incident to arrest, plain view, stop and frisk, hot pursuit, consent to search, and search under exigent circumstances. If exigent circumstances are relied upon, the action or inaction of law enforcement cannot be used to create the exigency.[3]

Since the U.S. Supreme Court ruling, in *Missouri v. McNeely*, 569 U.S. 141 (2013), found that the natural dissipation of alcohol in the bloodstream did not create a per se exigency in every driving under the influence case, courts have been looking at this issue on a case-by-case, "totality of the circumstances" basis to determine if exigency exists.[4] After McNeely, the Tennessee Court of Criminal Appeals has had a number of cases to evaluate what constitutes exigent circumstances needed for a warrantless blood draw. Exigent circumstances were found to support the legality of the warrantless blood draw conducted in *State v. Walker*, No. E2013-01914 -CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 777, (August 8, 2014). The defendant was convicted of driving under the influence in Greene County and in his appeal alleged among other things, that the trial court erred in denying his motion to suppress the results of a mandatory blood draw due to the coercive nature of the implied consent form.[5] The defendant had crashed his motorcycle, injuring himself and his passenger. Trooper Sollie Rabun testified that he was dispatched to a motorcycle crash on November 20, 2011. When he arrived, ambulances and emergency medical personnel were in the process of transporting the driver of the motorcycle to the hospital. The passenger, however, was still on the scene with what appeared to be minor injuries.[6] Upon speaking with the passenger, Trooper Rabun could detect an odor of an alcoholic beverage on her person. Upon further investigation of the crash scene, Trooper Rabun found that the motorcycle had been driven off the road, into the ditch and he called for a tow truck to retrieve the motorcycle and to tow it from the crash scene. Because the tow driver was alone, the trooper assisted the tow truck driver in the retrieval of the motorcycle and after being on the scene for an hour or more, the trooper headed to the hospital to speak with the driver of the motorcycle. When the trooper arrived twenty minutes later at the hospital, he noticed the driver had a busted lip and was preparing to receive stitches. He explained to the driver that he was investigating the crash and asked what happened. When the driver answered that he "had missed the curve and ran into the ditch," Trooper Rabun noticed that the driver (defendant) had an odor of an alcoholic beverage about his person and blood shot eyes. He further noted that during the conversation the defendant was having trouble staying alert/awake and following the conversation. The defendant admitted to consuming a beer, and coming from the County Line Bar at the time he crashed. After the stitches were completed, the defendant was placed under arrest and advised of the implied consent law, which the defendant then signed, consenting to the test. The blood draw was conducted, over two hours after the trooper had been dispatched to the crash scene. The trooper further testified had he obtained a search warrant he would have had to call a supervisor to obtain the search warrant to fill it out and then locate a magistrate. Instead of addressing the constitutionality of the statute or the coercive nature of the implied consent form, the Tennessee Court of Criminal Appeals held that exigent circumstances justified the warrantless blood draw.

The "totality of the circumstances" based inquiry led to quite a different outcome in *State v. Kennedy*, No. M2013-02207-CCA-R9-CD, 2014 Tenn. Crim. App. LEXIS 930 (October 3, 2013). Multiple officers were on the scene and available to assist with the case. The minimal passage of time from the traffic stop or crash, the quick development of probable cause and the absence of an attempt to get a warrant impacted the outcome of the case. In *Kennedy*, the Court upheld the trial court's suppression of the blood test results finding that the facts within the record did not support the warrantless blood draw. Two Fairview officers were on patrol when they observed the defendant driving a red pickup. One of the officers was aware that the

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Exigent Circumstances (Continued)

defendant did not have a valid driver's license and therefore, the defendant was stopped. Signs of impairment were exhibited by the defendant and he was transported to the police department to have a "level surface" for performing the standardized field sobriety tests. The defendant refused to perform any field sobriety tests and was promptly arrested. The defendant was placed into holding and he was advised of the implied consent law. Within forty-seven minutes of the initial stop with the defendant, he refused to submit to a blood test and was transported to the hospital for his blood to be drawn. About thirty minutes passed at the hospital before the defendant's blood was drawn with two officers present with the defendant. At no time did any officer attempt to obtain a warrant. The officers were under the impression that no warrant was required, but the testimony suggested that had they attempted to do so, it would have taken about twenty minutes to one hour to obtain the warrant.[7]

Ignorance of the process or lack of experience regarding the process to obtain a warrant is not a factor in determining exigent circumstances, if there is no effort contemplated or made to obtain one. The Court of Criminal Appeals found that exigent circumstances were not present to justify the warrantless blood draw in *State v. Gardner*, No. E2014- 00310-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 1023 (Nov. 12, 2014) for this reason, combined with the small amount of time passed between the time the traffic stop began and the actual drawing of the blood. The defendant entered a plea of guilty to a second offense of driving under the influence in Greene County, reserving a certified question regarding the legality of the warrantless blood draw establishing his blood alcohol concentration of 0.08% or above.[8] The trial court found that the because the officer testified that he did not know how to obtain a search warrant, did not know about warrant forms, did not know where judges lived at the time, and the court house was closed at the time the traffic stop occurred, that "exigent circumstances existed based on the officer's lack of experience in obtaining such warrants, preparing search warrants, knowing what to do, finding officers, finding the district attorney's office, getting it prepared to get it all done." The Court of Criminal Appeals, however, disagreed and found that exigent circumstances did not exist. In reaching this conclusion, the CCA stated that the actual blood draw occurred within forty-five minutes of the traffic stop beginning, three officers were on the scene, one could have gone to the hospital with the defendant while another could have completed the forms for a warrant and contacted the judge who lived close by. Also, there was no showing that a significant delay would have occurred in getting the blood draw completed. Further, the Court found that there was no evidence within the record that the officers thought about or even discussed obtaining a warrant prior to the blood draw, nor did they attempt to contact dispatch regarding the need for a warrant. The Court found that the State failed to "present sufficient evidence showing that obtaining a search warrant in the present case, on the night of the traffic stop, would have significantly delayed the taking of the defendant's blood."

Experience, combined with late development of probable cause, changed things in a 2017 case. The Tennessee Court of Criminal Appeals found exigent circumstances justified the warrantless blood draw in *State v. Martin*, No. M2016-00615-CCA-R3-CD, 2017 Tenn. Crim. App. LEXIS 365 (May 11, 2017). In that case, Trooper Bryant Campbell was called to investigate a one-vehicle crash on Chapmansboro Road in Cheatham County. Upon his arrival, the driver and passenger were in an ambulance for transport to the hospital. Two deputies were on the scene but left about fifteen minutes after Trooper Campbell arrived. The local agency's policy was to turn over the investigation to the THP. The deputies didn't assist with the investigation nor did they indicate any suspicions about the driver. Trooper Campbell remained on the scene as required by the general orders and procedure of the Tennessee Highway Patrol, until the scene was cleared of the inoperable car by a tow truck. After leaving the scene, Trooper Campbell went to the

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Exigent Circumstances – Continued

hospital to speak to the passenger and the driver. The passenger admitted that the driver had been drinking. After the driver was finished with a CT scan, Trooper Campbell questioned her and observed an odor of an intoxicant and other signs of impairment. It was at that time that the trooper developed probable cause. He then read the implied consent form to the defendant and she refused. About two hours and fifteen minutes had passed since the time of the crash. Trooper Campbell testified that he acted quickly in requesting the blood because in his experience, in obtaining a warrant, it would have taken an additional hour for him to write and get magistrate approval for service. As the only trooper on duty in the area at the time, the passage of time since the crash, the late development of probable cause, and with his previous experience in obtaining a search warrant, the Court found that the facts in this case supported the finding of exigent circumstances for the warrantless blood draw.

The latest warrantless blood draw to be evaluated by the Court of Criminal Appeals involved a situation more serious than driving under the influence or aggravated assault while under the influence. It involved a vehicular homicide. In the 2-1 opinion of *State v. Oaks,* No. E2017-02239-CCA-R3-CD, 2019 Tenn. Crim. App. Lexis 93 (February 12, 2019), the Court of Criminal Appeals found that exigent circumstances did not exist to justify a warrantless blood draw. The defendant had collided with another vehicle head on and a fire resulted. Witnesses were able to get the defendant out, but the other driver died. When the first trooper arrived, the fire was being addressed and the defendant's medical condition had necessitated transport to the hospital. In speaking with others on the scene, the trooper was advised by an emergency response worker that the defendant had a strong odor of alcohol on him. When notified of this fact, he contacted dispatch and advised that he had a possible vehicular homicide. The trooper then notified his supervisor within ten minutes of his arrival on the scene of the situation. Then the trooper began securing evidence at the scene. The trooper's supervisor arrived on the scene. Neither the supervisor nor the trooper attempted to contact a judge or other troopers to secure a search warrant, yet both had the capability to get the process started and knew that other troopers could obtain a search warrant with information provided by troopers at the scene.

Two other troopers arrived on scene to assist in the investigation[9] and twenty minutes passed before the supervisor contacted dispatch communication to have another trooper to go to the hospital to investigate because alcohol was involved in the crash. Trooper Shelton arrived at the hospital within about five minutes of the dispatch. The trooper watched as medical personnel worked on stabilizing the defendant's condition for a few minutes. At this time, the trooper was made aware of the defendant's life-threatening condition and that the defendant was going to the operating room. Rather than get a search warrant, which in his experience would have taken approximately two hours, he requested the defendant's blood be drawn. At no time did the trooper at the hospital attempt to make any contact with a judge or anyone else to obtain a search warrant.

The Court found that the state failed to meet its burden to show that exigent circumstances existed, justifying a warrantless blood draw. In reaching this conclusion, the Court evaluated the evidence within the record, produced both at the motion to suppress hearing and at the trial. Specifically, the Court looked at whether the totality of the circumstances gave rise to an objectively reasonable belief that there was an emergent or compelling need to act and that there was insufficient time to obtain the warrant. In the case of warrantless blood draws to obtain the alcohol and/or drug content of blood, the evaluation would be at the time that probable cause is formed, to believe that the defendant was driving under the influence, because it is probable cause that triggers the ability to apply for and obtain a search warrant. The Court placed emphasis on the importance of the passage of time, the number of officers involved or available to the investigation, and the value of "actual facts," versus speculation, as to the condition or ability to obtain blood from a defendant in its analysis of the case. If, when probable cause was established, the warrant process had started, then there may have been time to secure the warrant. The problem was that no one attempted to start the process until over thirty minutes had passed, after probable cause was established. There were several troopers available to

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Exigent Circumstances - Continued

assist in the process, but no one tried. There was speculation regarding the seriousness of the defendant's condition, but no one followed up on the defendant's condition until the supervisor advised dispatch to have another trooper go to the hospital to check, twenty minutes after he was advised of probable cause. The exigency didn't manifest itself, according to the majority opinion, until well after probable cause was established.

What does this all mean? Like everything else, exigency is determined based on the "totality of the Circumstances." If probable cause is established by the facts within a reasonable time, officers need to get the search warrant process started. Waiting shows a lack of emergency and a lack of emergency shows a lack of exigent circumstances. If probable cause is not established by the facts within a reasonable time, after the driving event or time of crash, then officers should rely on experience to determine whether there is enough time to obtain a search warrant. Officers should never let a lack of experience keep them from reaching out for assistance. If other officers are present, then one of them needs to start the search warrant process.

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[1] The Fourth Amendment reads, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article I, Section 7 reads, "That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not be granted." Tennessee's protections regarding searches and seizures are viewed to be identical to that of the federal protections. *See State v. Turner,* 297 S.W.3d 155 (Tenn. 2009).

[2] *State v. Yeargan,* 958 S.W.2d 626 (Tenn. 1997).

[3] *State v. Carter,* 160 S.W.3d 526 (Tenn. 2005).

[4] The state of Missouri argued for a *per se* exigency and did not create a record for the Court to address specific facts to determine the reasonableness of the search at issue in *McNeely*. The majority opinion recognized that the metabolization of alcohol in the bloodstream and the resulting loss of evidence is among the factors that are to be considered in deciding whether a warrant is required. The Court failed to discuss or consider that driving under the influence encompasses drug impairment as well as alcohol impairment and therefore did not address the rates at which active metabolites of drugs dissipate (which varies considerably given the drug and how it is introduced into the body) would affect the issue of exigency in the opinion.

[5] This case was pre-*Birchfield vs. North Dakota,* 136 S.Ct. 2160 (2016).

[6] According to the testimony of Trooper Rabun, the passenger had a busted lip and scrap marks.

[7] There was testimony regarding the warrant process from a magistrate. The magistrate testified that in busy times, time sensitive issues take precedence and gave the time frame reported in the record.

[8] The defendant was only charged with DUI per se so the Court had to remand the case to the trial court for dismissal of the charge.

[9] One of the troopers that arrived was dispatched to another event and did not remain at the scene for the investigation. The scene was marked and photographed, and the evidence was secured by the troopers on scene. The critical incident response team (CIRT) came to the scene the following day to follow up with the investigation.

Upcoming Training

20/20 Medical Foundation of Eye Movements & Impairment - April 23 - 25, 2019, Memphis, TN
This seminar will be located at the Sothern College of Optometry in Memphis, TN 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 and SFST instructors. A mock trial scenario involving a DRE officer will be included.

Lethal Weapon/Vehicular Homicide Seminar - June 11 - 14, 2019, Pigeon Forge, TN
This course will be a joint effort with prosecutors and law enforcement officers from 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.

DUI Basic Trial Advocacy - August 5 - 7, 2019, Nashville, TN
This three-day trial advocacy course is designed to develop the courtroom skills of new prosecutors trying impaired driving cases. There will be a brief overview of toxicology and pharmacology. Courtroom skills regarding opening statements, direct and cross examinations and closing arguments will be discussed. Common defenses and ways to counter them are also included.

Tennessee Lifesaver's Conference - September 4 - 6, 2019, Murfreesboro, TN
The annual Lifesaver's Conference will offer many great presentations regarding the various aspects of investigating and prosecuting the impaired driver. There will also be presentations regarding legal updates and new legal trends regarding impaired driving.

DA's Conference, DUI Breakout - October 22, 2019, Murfreesboro, TN
Every year our DUI breakout session provides approximately four hours of education and training covering current impaired driving topics, including legal updates and new resources available to Tennessee prosecutors.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Impaired Driving Enforcement (ARIDE)
April 1-2, 2019, Hohenwald, TN
April 8-9, 2019, Collierville, TN
April 11-12, 2019, Fayetteville, TN
April 25-26, 2019, Denmark, TN
April 29-May 3, 2019, Jonesborough, TN (DUI/SFST also)
May 6-7, 2019, Gallatin, TN
May 20-24, 2019, Harriman, TN (DUI/SFST also)
June 3-4, 2019, Lenoir City, TN

DUI Detection & Standardized Field Sobriety Testing
April 8-10, 2019, Lebanon, TN
April 22-24, 2019, White House, TN
May 13-15, 2019, Franklin, TN
June 24-26, 2019, Springfield, TN

Drug Recognition Expert School (DRE)
July 29-August 8, 2019, Chattanooga, TN

DUI Tracker Report

DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from January 1, 2019, through March 29, 2019, and reflect the DUI Tracker conviction report for all judicial districts within 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 January 1, 2019, through March 29, 2019, since the last quarter were 1,488. This number is up from the previous quarter by 193. From looking at these numbers, we can see that the trend in DUI related dispositions in Tennessee has slightly increased, which is a change from the lower disposition trends that we have been observing throughout last year. The total number of guilty dispositions during this same period of January 1, 2019 through March 29, 2019 were 1,116. The total number of dismissed cases were 87. Across the State of Tennessee, this equates to 75% of all arrests for DUI made were actually convicted as charged. This percentage is slightly higher than the last quarter ending on December 31, 2018. Only 5.85% of the DUI cases during this current quarter were dismissed. Also, during this same period of time, only 226 of the total DUI cases disposed of were to different or lesser charges. Therefore, only 15.19% 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 January 1, 2019 through March 29, 2019. During this period, there were a total of 206 fatalities, involving 190 crashes, which is a significant decrease from the previous quarter.

The year-to-date total number of fatalities on Tennessee roads and highways is 206. This is equal to the 206 fatalities incurred last year at this same time. This year, like last year, we have started the year with a significant decrease in fatalities as opposed to the prior few years. Unfortunately, last year ended with a large increase of fatalities during the last quarter of the year. If we continue to educate the public about the dangers of impaired driving and we continue to enforce all traffic safety laws, we can prevent the needless and preventable deaths caused by impaired drivers. If you drink, don't drive.

Two Cops in Court trainings were conducted this quarter. The first was in Mount Juliet, TN on January 23, 2019. Thirty-two officers from six different agencies and eight prosecutors took part in the mock trial portion. The second was in Harrogate, TN on March 15, 2019. Thirty-five officers from thirteen agencies and twelve prosecutors took part in the mock trial portion. Cops in Court is the most popular training offered by the DUI Training Division. Our next Cops in Court training is being offered in jointly with ROCIC and is set for May 15, 2019 in Nashville, TN.

Establishing Chain of Custody For Blood Samples

Chain of custody is an area of the law that is often debated in DUI cases. Admissibility of evidence is controlled by *Tennessee Rule of Evidence* 901, which states, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims." "'[W]hen the facts and circumstances that surround tangible evidence reasonably establish the identity and integrity of the evidence,' it should be admitted.'" *State v. Gibson*, 2018 Tenn. Crim. App. LEXIS 754 Tenn. Crim. App. Oct. 3, 2018), citing *State v. Cannon*, 254 S.W.3d 287, 296 (Tenn. 2008). In describing the State's burden in proving chain of custody, our supreme court has stated, "Even though each link in the chain of custody should be sufficiently established, this rule does not require that the identity of tangible evidence be proven beyond the possibility of all doubt; nor should the State be required to establish facts which exclude every possibility of tampering. ...An item is not necessarily precluded from admission as evidence if the State fails to call all of the witnesses who handled the item…" *State v. Scott*, 33 S.W.3d 746, 760 (Tenn. 2000) (quoting Cohen, et al., *Tennessee Law of Evidence* Sec. 9.01(13)(c), at 624 (3rd ed. 1995).

There are four recent cases that discuss chain of custody and explain what is required to establish a proper chain of custody. The first case is *State v. Earnest Laning,* 2012 Tenn. Crim. App. LEXIS 597 (Tenn. Crim. App. Aug. 6, 2012) in which the arresting officer testified that he witnessed the blood draw, put the tubes in a sealed bag and he put identifying paperwork and the tubes into a sealed box. He then placed the box into a secure evidence locker that could only be opened by the evidence custodian. The officer did not know if the box was mailed or hand delivered to TBI. The TBI agent testified about all of their procedures at the TBI lab. The chain of custody was determined to be proper.

In *State v. Michael Joseph Arbuckle,* 2001 Tenn. Crim. App. LEXIS 931 (Tenn. Crim. App. Dec. 5, 2001), police officers testified about collecting the blood sample, sealing it in a protective box and placing it in a protective locker to be mailed to TBI. A TBI agent testified about their procedures of receiving and testing the sample. The chain of custody was determined to be proper.

In *State v. Pascasio Martinez,* 2017 Tenn. Crim. App. LEXIS 977 (Tenn. Crim. App. Nov. 21, 2017) an officer testified that he observed the blood draw and the tubes being sealed in a bag. He then put the bag into a sealed box and gave the box to another officer. The second officer testified that he put the box into a secured refrigerated lockbox that could only be opened by the evidence custodian. He then testified that it was his understanding that the box would be taken to TBI. A TBI agent testified about TBI's procedures relative to samples received by TBI. The chain of custody was determined to be proper.

The last case, *State v. Gibson*, 2018 Tenn. Crim. App. LEXIS 754 Tenn. Crim. App. Oct. 3, 2018), Deputy Sulewski testified that he observed the blood draw, filled out the necessary paperwork and put everything into a sealed box, which he gave to the Knox County Sheriff's Forensic Department and he was unaware of what happened to the box after that. A TBI agent testified about the procedures that are followed regarding blood samples at TBI. The CCA in *Gibson* held that the chain of custody was not properly established since Deputy Sulewski could not testify as to how the evidence was secured and processed for the six days that it was at the Knox County Sheriff's Forensic Department. The CCA relied on *State v. Reginald Bernard Coffee,* 2017 Tenn. Crim. App. LEXIS 798 Tenn. Crim. App. Aug. 31, 2017), in which a finger print exhibit had been opened many times and the officer did not testify as to how the exhibit was stored or who had access to it. "In the
absence of testimony about standard procedures for handling, storing, and transporting fingerprint evidence, this court concluded that it could not know whether the evidence had been tampered with…" *Id.* The only difference between the *Gibson* case and the other three cases is the lack of testimony regarding the security of the blood sample while in the police evidence room. Not everyone in the chain needs to be called to testify, however, there does need to be testimony regarding the procedures for storing, securing and transporting the

What Is The Remedy For An Unlawful Arrest?

In the case of *State v. Ochab,* 2016 Tenn. Crim. App. LEXIS 796, (Tenn. Crim. App. 2016), the defendant attempted to "suppress" her unlawful arrest and to "dismiss the indictment which resulted from" the unlawful arrest. In her motion, the defendant, argued that the trooper lacked probable cause to arrest her. The motion did not include a challenge to a search warrant and it did not challenge any specific piece of evidence.

On March 14, 2014, Trooper Randy McDonald observed the defendant's vehicle cross the fog line twice on Interstate 65 and the vehicle then touched the fog line an additional two times before the trooper initiated a traffic stop. Trooper McDonald observed the defendant to have bloodshot, watery eyes, slurred speech and she smelled of alcohol. The defendant denied drinking alcohol, she refused all field sobriety tests and she refused breath or blood alcohol testing. Trooper McDonald then arrested the defendant for DUI and he obtained a search warrant for a sample of the defendant's blood.

The trial court found that Trooper McDonald had reasonable suspicion to stop the defendant. However, based upon its viewing of the arrest video, the court determined that the defendant did not have slurred speech, she did not have dexterity issues, she did not stumble or sway and "that there is no probable cause to believe that the defendant had committed the offense of DUI at the time she was placed under arrest." The trial court "suppress[ed] the arrest and any evidence that was prepared subsequent to that unlawful arrest."

The Court of Criminal Appeals first indicated that the defendant's motion to suppress was more a motion to dismiss the indictment because she claimed the arrest was unlawful. However, dismissal of an indictment is not the proper remedy for an unlawful arrest. *See State v. Baker*, 966 S.W.2d 429, 432 (Tenn. Crim. App. 1997); *State v. Smith,* 787 S.W.2d 34, 35 (Tenn. Crim. App. 19889). Instead, the appropriate remedy in the criminal justice arena for an illegal arrest is suppression of any evidence obtained as a direct result of the illegal arrest. When no evidence emanates from the illegal arrest, the arrest is essentially inconsequential in the criminal justice arena. In this case, as in most DUI cases, almost all of the evidence is observed before the arrest. Therefore, no basis existed to suppress Trooper McDonald's testimony regarding his observations of the defendant prior to the point of the arrest.

The only evidence that could be considered for a suppression motion would be evidence collected after the arrest, which would be the blood draw. However, the blood sample was obtained as a result of a search warrant and the search warrant was not challenged. Therefore, the trial court failed to determine if the blood draw was obtained under the independent source doctrine, the inevitable source doctrine or the intervening circumstance doctrine. The CCA pointed out that based upon Trooper McDonald's affidavit, the magistrate made a probable cause finding and issued the search warrant, which, if valid, could have served to remove any taint associated with the defendant's arrest. *See United States v. Ponce,* 947 F.2d 646, 651 (2d Cir. 1991). The CCA stated that even if the arrest was unlawful, the ruling of the trial court would have to be vacated and the matter would need to be remanded to the trial court to determine the validity of the search warrant and its impact on the admissibility of the blood test.

The CCA then turned to the issue of did Trooper McDonald lack probable cause to arrest the defendant. The CCA first affirmed the trial court ruling that Trooper McDonald had reasonable suspicion to stop the defendant's vehicle due to it crossing and touching the fog line when it was not practicable to do so. *See State v. Smith,* 484 S.W.3d 393, 404 (Tenn. 2016). The CCA stated, "[a]ll information in the officer's possession, fair inferences therefrom, and observations, including past experiences, are generally pertinent." *Quoting, State v. Evetts,* 670 S.W.2d 640, 642 (Tenn. Crim. App. 1984). Since the trial court relied upon the video, the CCA also reviewed the video and concluded that due to the vehicle weaving, the odor of alcohol, the bloodshot and watery eyes, the stammering speech and based upon the totality of the circumstances, Trooper McDonald had probable cause to arrest the defendant. In consequence, the CCA reversed the ruling of the trial court and the case was remanded to the trial court for further proceedings.

Good Faith Exception (Continued)

illegal arrest under the exclusionary rule. The Court of Criminal Appeals affirmed the suppression of the evidence. The TSC granted permission to appeal to determine "whether, as a matter of state law, Tennessee should adopt the good-faith exception set for in *Herring.* Four of the five justices agreed that Tennessee should adopt this exception, with only Justice Sharon Lee dissenting on that issue.[4] Also, four of the five justices agreed that the evidence obtained should be suppressed with only Justice Holly Kirby applying the *Herring* good-faith exception to the exclusionary rule to permit the use of the evidence at trial.[5]

The majority found that there was no evidence in the record that Lt. Dowell, who was responsible for the list, ever reconciled the "barred" list and the "removed from" the "barred" list maintained by the department on a regular basis. In fact, the evidence supported that this did not occur because McElrath's name appeared on both lists for a significant amount of time. They also found that principles of collective knowledge wherein probable cause can be based on the information provided from another officer or officers that directs the arresting officer to act, necessitates or creates a responsibility of law enforcement to disseminate only accurate information.[6] For this reason, law enforcement was at fault in permitting records to remain uncorrected. The implication of this finding was that the majority found the error to be systemic.[7]

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[1] This opinion has not yet been published and the reporter citation is unknown at this time.

[2] *Herring* involved the arrest of an individual on a warrant that had been recalled. The warrant clerk reported that the warrant was active but had been recalled five months earlier. The error was discovered when the clerk went through the files to find the physical copy of the arrest warrant. The computer records did not correspond with the actual records. When the physical copy could not be located, the warrant clerk called the court clerk and was advised of the recall. As soon as the error was realized, the warrant clerk notified the officer. Although the mistake was noticed within 10-15 minutes, the defendant had already been arrested and the contraband seized.

[3] In its adoption of the *Herring* standard and application to the facts, the Court did looked at other jurisdictions and Tennessee's good-faith exception history.

[4] Justice Robert Page authored the opinion of the Court. Justice Sharon Lee wrote an opinion concurring with the suppression but dissenting from the adoption of the *Herring* good-faith exception and "preserve the efficacy of the exclusionary rule to redress constitutional violations and not justify negligent police conduct at the expense of constitutional rights."

[5] Justice Holly Kirby wrote an opinion concurring in the adoption of the *Herring* good-faith exception but dissenting from the result of the analysis used by the majority to suppress the evidence. Justice Kirby found that the facts here support a conclusion of mere negligence on behalf of the Union City Police Department and not systemic error or reckless disregard of constitutional requirements which would require suppression.

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