TNDAGC

DUI NEWS

ISSUE 67
July 2019

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This material was developed through a project funded by the Tennessee Highway Safety Office and the National Highway Traffic Safety Administration.

2019 LEGISLATIVE UPDATE

A number of new traffic safety laws take effect in 2019. A pressing issue this year involved the amendment of the Implied Consent Statute. (TCA 55-10-406) Public Chapter 187 takes effect on July 1, 2019 and it substantially amends TCA 55-10-406. Requests for blood samples is returned to the implied consent portion of the statute with all civil, administrative and evidentiary penalties allowed by law. All criminal penalties have been removed from the statute. Also, consent for breath and blood samples, outside of implied consent are recognized and accepted into evidence. If consent is not obtained, then a search warrant or exigent circumstances will be needed to obtain a blood sample. A breath sample can be obtained, without consent, incident to a lawful arrest.

Public Chapter 412 now prohibits the use of hand held telephones while driving. Ear pieces or other Bluetooth technology will be allowed while using only one button to initiate or terminate the voice communication. Any violation will be a class C misdemeanor with a fine only. (See pages 5-7).

Public Chapter 486 affects many different laws within the one legislation: (1) This legislation removes the Habitual Motor Vehicle Offender Act from law and it reinstates the driver's license of any prior HMVO offender upon petition; (2) All future Failure to Appear convictions will be class A misdemeanors, that must be served consecutively to the sentence for the offense upon which the Failure to Appear occurred; (3) Unlawfully taking, sending or possessing drugs or controlled substances into a penal facility will now be a class D felony. Also, unlawfully taking or sending a telecommunication device into a penal facility will now be a class D felony; (4) When determining DUI enhancements for multiple offender status, prior convictions for vehicular assaults, aggravated vehicular assaults, vehicular homicides and aggravated vehicular homicides will be counted regardless of whether the prior conviction occurred within ten (10) years of the present violation; (5) A conviction for a DUI fifth offense will now be classified as a class D felony, with the same minimum sentence requirements as a DUI fourth offense; (6) All DUI offenders, after January 1, 2020 and sentenced as DUI 7th or above, shall serve their sentence at 100%, and no prior sentence reduction credits shall reduce the sentence greater than 15%; (7) A local jail or workhouse may use an alternative facility for the incarceration of a DUI offender; (8) Last, but not least, all Judges of the Chancery and Circuit Courts now have statewide jurisdiction to write search warrants in any district. (See pages 7 & 11). Most of this Public Chapter takes effect on July 1, 2019.

Public Chapter 485 affects aggravated assault. If the victim of the assault is a minor at the time of the offense and the assault was committed by discharging a firearm from within a motor vehicle, the offense shall be punished one classification higher. Also, if the victim of a voluntary manslaughter is a minor and the assault was committed by discharging a firearm from within a motor vehicle, the offense shall be punished one classification higher.

RECENT DECISIONS

State v. Louis Dane Devillier, 2019 Tenn. Crim. App. LEXIS 182

Mr. Devillier plead guilty to three separate misdemeanors in exchange for concurrent sentences with a hearing to determine the manner of service. He pled guilty to a DUI that occurred on March 12, 2015 when he crashed his GMC Denali as he left the roadway and entered a ditch. He told the Trooper that this was the third vehicle he had crashed in 2015 and he had admitted to drinking two beers earlier. (His BAC was .196 after 1 1/2 hrs.) Mr. Devillier also pled guilty to a theft that occurred on June 17, 2015 and he pled guilty to a perjury charge from January 7, 2016. The defendant sought a probated sentence, but the court sentenced Mr. Devillier to serve his sentence in jail.

A trial court's sentencing decisions are generally reviewed for abuse of discretion, with a presumption of reasonableness granted to within-range sentences. The appealing party has the burden of proving the sentence improper and the Court of Criminal Appeals determined that Mr. Devillier failed to meet his burden.

State v. David Mack Brewer, 2019 Tenn. Crim. App. LEXIS 239

On April 26, 2019, Mr. Brewer had driven his truck, loaded with timber, to PCA paper mill in Hardin County. While trying to unbind the timber, Mr. Brewer was observed to be obviously intoxicated. He was stumbling around and he had urinated on himself. Trooper Childers was called to the paper mill. By the time Trooper Childers had arrived, Mr. Brewer was standing outside of his truck a short distance away. The trial court granted a motion to suppress based upon the fact that Trooper Childers had not observed Mr. Brewer driving.

The Court of Criminal Appeals applied the Supreme Court's ruling in *State v. Butler*, 108 S.W.3d 845 (Tenn. 2003), and determined that there was sufficient evidence to determine that Mr. Brewer was in physical control of his truck. The CCA gave a very thorough examination of the *Butler case* and stated, "If the evidence in *Butler* was sufficient to establish the defendant's guilt of DUI by physical control beyond a reasonable doubt, then the evidence in the case *sub judice* is certainly sufficient to establish probable cause that Defendant committed DUI by physical control, and it was committed in the presence of Trooper Childers." In the *Butler* case, a deputy sheriff saw an intoxicated man in a Walmart parking lot, approximately one hundred yards from his motorcycle. The motorcycle's spark plug had been removed and it was in Mr. Butler's pocket. The Tennessee Supreme Court determined that Mr. Butler was in physical control of his motorcycle. Likewise, the CCA determined that Mr. Brewer was in physical control of his truck and they reversed the ruling of the trial court.

State v. Jacob Smith, 2019 Tenn. Crim. App. LEXIS 293

On November 6, 2017 at 4 a.m., Mr. and Mrs. White were awakened to the sound of a vehicle crashing into their home. When the Whites went outside, they saw Mr. Smith, with a gash on his forehead. Mr. Smith asked them not to call the police, but when told that they were going to call the police, Mr. Smith left the scene. Mr. Smith was later contacted at his house with the odor of alcohol on his breath. Mr. Smith admitted to drinking a twelve-pack of beers, but he refused to perform SFSTs. A blood or breath test was not ordered because one deputy thought the other deputy was going to order the test. Mr. Smith gave different accounts of what occurred during the crash. A jury convicted Mr. Smith of DUI and leaving the scene of an accident. He was sentenced to 11, 29 probation after five days incarceration.

On appeal, Mr. Smith argued that since the only evidence against him was the smell of alcohol, the evidence against him was insufficient to support a conviction of DUI. *See State v. Bell,* 429 S.W. 3d 524, 536 (Tenn. 2014). If the odor of alcohol is insufficient to establish probable cause for an arrest, then it must be insufficient to support a conviction, beyond a reasonable doubt. However, the Court of Criminal Appeals determined that the evidence also established a crashed vehicle into a house, a leaving of the scene of the crash, an admission

RECENT DECISIONS (Continued)

to drinking a twelve-pack of beer, bloodshot, red, glossy eyes and a statement that he could not perform standardized field sobriety tests because he was too intoxicated to do so. It probably did not help that a few days after the wreck, he apologized to the White's next door neighbor for knocking down their mail box because he had drunk too much that night. A totality of the facts was sufficient. The judgments of the trial court were affirmed. A further lesson to be learned is never assume that another officer will order a chemical test, read the implied consent form or give the Miranda rights.

State v. Jared Worthington, 2019 Tenn. Crim. App. LEXIS 300

A Shelby County jury convicted Mr. Worthington of DUI per se and reckless driving. He was sentenced to 11, 29 probation after 10 days to serve in the county jail. On July 31, 2016, Mr. Worthington was arrested for DUI after crashing his pick-up into a utility pole. Although Mr. Worthington performed well, but not perfectly on the SFSTs, he had an odor of alcohol, bloodshot eyes and a Breathalyzer test showed his BAC was .141%.

Mr. Worthington was initially tried on charges of DUI, DUI per se and reckless driving, but the jury was unable to reach a verdict and a mistrial was declared. The State dismissed the DUI by impairment charge and retried the other two charges. A TBI special agent testified that the Breathalyzer was calibrated and working properly. The trial court refused to allow the defense to ask about any bias regarding the collection of BADT fees by the TBI. Mr. Worthington also objected to the trial court's ruling regarding its handling of the officer's video. The trial court ruled that most of the video was not relevant to the DUI per se charge. The CCA agreed that the need to prove impairment nor the rebuttable presumption apply in DUI per se cases.

Mr. Worthington also complained that the trial court shifted the burden of proof by asking the defense if they intended to put on any proof, while in the presence of the jury. Since he did not present any authority for this argument, the CCA denied it. The judgements of the trial court were affirmed.

State v. Paul Thomas Welch, Jr., 2019 Tenn. Crim. App. LEXIS 326

In June of 2017, the Monroe County Grand Jury indicted Mr. Welch of vehicular assault by intoxication, driving without a driver's license and no insurance. The Grand Jury no true billed four additional counts, including a charge of DUI. After the indictment was returned, Mr. Welch moved the trial court to dismiss the vehicular assault charge on the grounds that the Grand Jury's refusal to charge DUI precluded an indictment for vehicular assault by intoxication. He argued that since DUI is a lesser included offense, the vehicular assault charge should be dismissed. The trial court agreed with Mr. Welch and dismissed the vehicular assault charge. The State appealed.

Mr. Welch argued that since the trial court did not dismiss the entire indictment, the State does not have a right to appeal. The CCA stated that "it has always been the law in this state that 'each count' of a multiple-count indictment 'is a separate indictment.' *Wiggins v. State,* 498 S.W.2d 92 (Tenn. 1973), *see also State v. Lea,* 41 Tenn. 175, 177-78 (1860)." Therefore, the State has a right to appeal via Rule 3.

The CCA conducted a review de novo and determined that since the Grand Jury deliberations are in private, it is impossible to understand why they indicted the vehicular assault and not the DUI. Also, since the Grand Jury does not determine guilt or innocence of an accused, the decision to not indict the DUI charge cannot be interpreted as a judgment on the legal sufficiency of the evidence underlying that, or any other charge presented. Since indictments are not open to challenge on the ground of inadequate or incomplete evidence before the Grand Jury to support it, an indictment returned by a Grand Jury, if valid on its face, is enough to call for trial of the charge on the merits. Since there was no valid reason for the trial court to dismiss the Grand Jury's indictment and the law does not allow a dismissal of an indictment based upon a seemingly inconsistent decision rendered by them, the ruling of the trial court was vacated and the indictment was reinstated.

One Prosecutor's Perspective: THP CIRT

Naïve and intimidated, I first began getting a sense of what the Tennessee Highway Patrol Critical Incident Response Team (THP CIRT) was when I became the docket manager for Division II Criminal Court in Wilson County. The main cases that I handled on the docket were driving offenses. Driving Under the Influence, Felony Evading Arrest, Driving While Suspended, etc. those cases filled my dockets. Occasionally, First Degree Murders and other cases would be placed on the docket to give relief to Division I Criminal Court. For the most part, however, the homicides that I became involved in prosecuting were those that had no motive, the vehicular homicides.

I knew little about crash reconstruction. I knew that it involved some science and math. I knew that there was something called tire marks, but I was clueless as to the different types. To me, when I heard the word yaw, I thought "yawn". Then Sgt. Allan Brenneis of THP CIRT came into this lost prosecutor's life. It was Allan Brenneis that "dumbed down" the science for me. It was Sgt. Brenneis that explained to me what a yaw mark was, what it looked like, and how the tires made the mark as the tires slipped sideways. It was Sgt. Brenneis and the other members of the THP CIRT that gave me a first-hand look at what they did to "reconstruct" a crash and got me hooked on prosecuting vehicular homicides.

Before this article, if I were to poll individuals across the state, I wondered how many would know exactly what the letters "C-I-R-T" stood for and what their role is with the Tennessee Highway Patrol. The Critical Incident Response Team is a specialized unit with the Tennessee Highway Patrol. The unit was formed after the 1990 crash in McMinn County that involved 99 vehicles to provide a uniform response to such incidents. [1] Today, CIRT consists a total of twenty individuals divided into four teams and two bureaus: Teams 1 and 2 in the East Bureau and Teams 3 and 4 in the West Bureau (see the map on page 5). Each team covers over 20 counties each. Yes, over 20 counties for each team. There are two lieutenants, four sergeants, and 14 troopers that make up the entire unit.

CIRT's job, directive, or purpose, is to assist the field operations bureau with crash and crime scene documentation, investigation, and evidence collection. Or, for those who need a simplified explanation of CIRT's role within the THP, the primary purpose is to assist those troopers who work the roadways of this state in the documentation, investigation and evidence collection at crashes and crime scenes utilizing the Tennessee Highway Patrol as the primary agency. CIRT is notified and/or requested in all crashes involving a fatality that will or there is a strong likelihood that felony charges may result against one or more drivers, any motor vehicle crash with two or more fatalities regardless of the number of vehicles involved or likelihood of charges, crashes involving Tennessee Department of Safety and Homeland Security vehicles or members, crashes involving a commercial motor vehicle where the vehicle's equipment may be a causation factor of the crash or the causation is not easily discernable, and any fatal crash that occurs in a Tennessee Department of Transportation work zone.

I understand that if I start spouting off just what it takes for the men and women of CIRT to do their job, this article will lose its desired message. If you are a prosecutor of vehicular homicides and you don't know the CIRT team members in your district, you need to find them. Even if CIRT is not the investigating agency on your case (Metro-Davidson County has their own unit), CIRT will still be a valuable resource for you. They can help with terms, concepts, etc. that help explain the dynamics, physics, and kinematics of a crash. Their assistance will aid you in the effective presentation of evidence and cross examination of experts in your case.

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[1] The multi-vehicle crash was on I-75 on December 11, 1990. Twelve people were killed, and 47 others were injured when low-lying, thick fog settled in the area making it impossible for drivers to see ahead. Instinctively, drivers applied the brakes and slammed into each other in a chain-reaction. *See* archive.knoxnews.com/news/local/fog-in-1990-sparks-tennessees-deadliest-car-wreck-ep-359829614-356511081.html/

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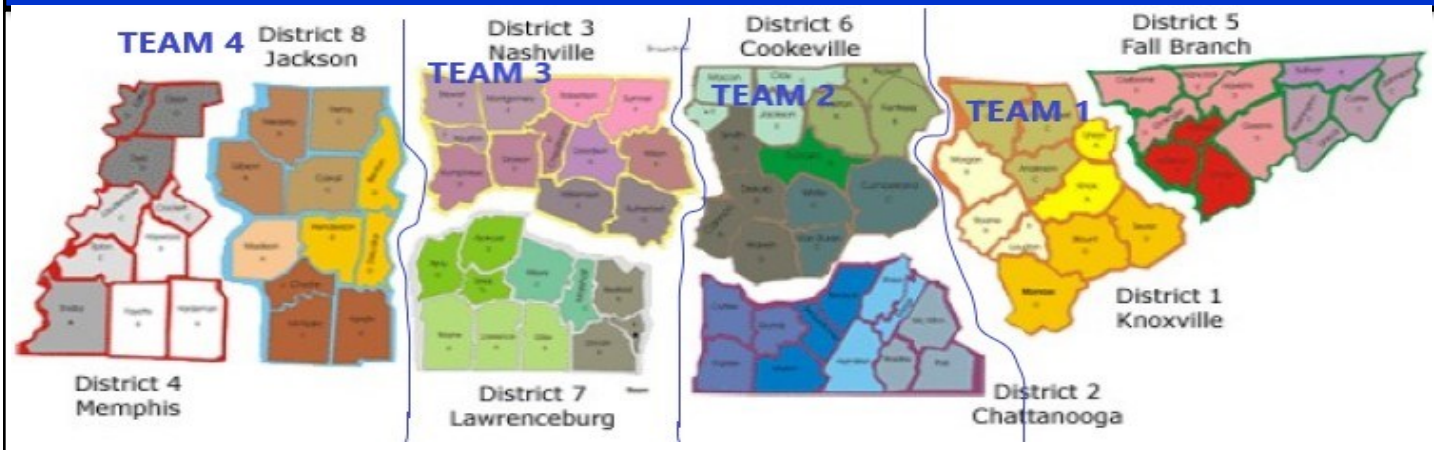
THP CIRT (Continued)



The CIRT Teams are listed in the photo above in blue. The THP Districts are listed above in black. Lt. Andy Shelton commands the West Bureau (Teams 4 and 3). Lt. Justin Boyd commands the East Bureau (Teams 2 and 1).

Coming together to teach prosecutors are THP CIRT and the TNDAGC. Pictured in the photo from left to right are:

Lt. Justin Boyd, THP CIRT
Trooper Kevin Curtis, THP CIRT
TSRP Terry Wood
Administrative Assistant Patricia Mitchell
TSRP Linda Walls
Lt. Andy Shelton, THP CIRT
Trooper Jason Goslee, THP CIRT
Sgt. Tim Hearn, THP CIRT

A more in-depth look at Public Chapter 412

The word is out about Public Chapter 412, known by the media as the "Hands Free Tennessee" law, the act changes Tennessee Code Annotated Section 55-8-199 in its entirety. Effective July 1, 2019, the law provides limits to the use of "stand-alone electronic devices" (SAED) and "wireless telecommunications devices" (WTD) by operators of motor vehicles. The new law defines a stand-alone electronic device as "a portable device other than a wireless telecommunications device that stores audio or video data files to be retrieved upon demand by a user". A wireless telecommunications device is more than just a cellular or portable telephone. A WTD includes a "text-messaging device, a personal digital assistant, a stand-alone computer, a global positioning system receiver, or substantially similar device that is used to initiate or receive communication, radio, citizens band radio, citizens band radio hybrid, commercial two-way radio communication device or its functional equivalent, subscription-based emergency communication device, prescribed medical device, amateur or ham radio device, or in-vehicle security, navigation, autonomous technology, or remote diagnostics system."

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Public Chapter 412-Continued

On July 1, 2019, a person operating a motor vehicle on any road or highway in this state is prohibited from physically holding or supporting a WTD or SAED with any part of his/her body. An operator **eighteen years of age or older,** however, can use an earpiece, headphone device, or smart watch to "conduct voice-based communication" or use only one button on the WTD to "initiate or terminate a voice communication". Writing, sending or reading any text-based communication by a driver will also be prohibited except any person **eighteen years of age or older** can use a device that automatically converts a voice-based communication to written form or use a GPS for navigation through the use of the device. Reaching for a WTD or SAED by the driver while operating a motor vehicle on the road or highway in this state that requires the driver to leave the seated position or no longer properly restrained by the safety belt isalso prohibited.

Viewing navigation data is permitted under the law, but watching videos or movies on WTD or SAED devices is prohibited. Further, recording or broadcasting video on a WTD or SAED is prohibited unless the electronic devices used are ones used for the sole purpose of continuously recording or broadcasting video within or outside the vehicle.

Use of a driver's hand to activate or deactivate a WTD or SAED is permitted if the device is mounted on the vehicle's windshield, dashboard, or center console "in a manner that does not hinder the driver's view of the road and the driver's hand motion is a swipe or tape of the driver's finger doesn't activate a camera, video, or gaming features or other viewing, recording, amusement or other non-navigational functions, other than features or functions related to the transportation of persons or property for compensation or payment of a fee.

Law enforcement officers, campus police, public safety officers, emergency medical technicians, emergency medical technician-paramedics, firefighters (both volunteer and career), emergency management agency officers, and employees or contractors of utility service providers are exempt when those individuals are using the device in the actual discharge of his/her official duties. Emergency communications are also exempt. Specifically, a person can call law enforcement agencies, medical providers, fire departments and other emergency service agencies while driving if the use is necessitated by a **bone fide emergency, that threatens human health, life, or property.**

Nothing in the law prohibits the use of a WTD or SAED by driver's who are lawfully stopped or parked or who leave their motor vehicle. Lawfully stopped and parked is not defined within the public chapter, but state law, municipal and county ordinance and case law will have to address the issue.

Although violation of this law is considered a class C misdemeanor, fines are dependent upon the circumstances of the violation. For example, for first and second violations that do not involve an accident, the fine will not exceed fifty dollars ($50), but the third or subsequent offenses or if the violation involved an accident then the fine is one hundred dollars ($100). If the violation is within a work zone with employees present or in a school zone when the flashers are operating then the fine is two hundred dollars ($200). First offenders may attend and complete a driver education course pursuant to Tennessee Code Annotated Section 55-10-301 in lieu of the fine. Court costs are limited to ten dollars ($10) and other fees and taxes are not applicable to this offense. Further, a

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Public Chapter 412—Continued

traffic citation based only upon a violation of this law is considered a moving violation.

In case you are wondering, Tennessee's new law is not unique in banning use of hand-held cellular devices. According to the Governors Highway Safety Association, nineteen states (including Tennessee), the District of Columbia, Puerto Rico, Guam and the U.S. Virgin Islands prohibit **all drivers** (minors and adults) from using hand-held cellphones while driving. Although the language of the statutes vary, all those state and territorial laws permit an officer to cite a driver for using the hand-held phone without any other traffic offense having to take place. For comparison purposes, forty-eight states, the District of Columbia, Puerto Rico, Guam and the U.S. Virgin Islands prohibit all drivers from texting and driving.

For further information on our law, the Tennessee Highway Safety Office has a website designed to educate and encourage compliance with the new law, https://handsfreetn.com.

Public Chapter 486, Section 14: General Assembly Expands Circuit and Chancery Jurisdiction for the Issuance of Search Warrants

In the case of *State v Frazier,* 558 S.W.3d 145 (Tenn. 2018), the Tennessee Supreme Court held that the trial court properly granted the defendants' motion to suppress drugs and drug paraphernalia seized from their homes pursuant to a search warrant issued by a judge from a district outside where the property was located. In reaching that decision, the Court found that the record did not contain an order of interchange, designation, appointment or other lawful conveyance of jurisdiction pursuant to Tennessee Code Annotated §§ 17-1-203,[1] 16-2-502[2] and the good faith exception to the exclusionary rule did not apply because the case didn't involve an inadvertent, clerical, or technical error.[3] Further, the Court interpreted § 40-1-106 (2018)[4] as a listing of judicial officials who are magistrates for the purposes of issuance of warrants and not a statute that conferred statewide jurisdiction.

The Tennessee Supreme Court pointed out that the General Assembly may confer statewide jurisdiction to circuit court judges and chancellors for the issuance of search warrants via legislation. The Court cited one statutes in which the General Assembly conferred "broader jurisdiction" for the issuance of warrants authorizing the interception of wire communications. Specifically, the General Assembly gave the authority to issue those warrants in Tennessee Code Annotated § 40-6-304 (a) "to a judge of competent jurisdiction in the district where the interception of a wire, oral or electronic communication is to occur, or in any district where jurisdiction exists to prosecute the underlying offense to support an intercept order under § 40-6-305."

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UPCOMING TRAINING

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

DUI Basic Academy - August 5-7, 2019, Nashville, TN (Airport Hilton)
This course will give the prosecutor the skills needed to conduct an impaired driving trial. Subjects covered will include dealing with opening statements, direct examination, cross examination, closing arguments, blood and alcohol pharmacology, SFSTs, working with DREs, handling common DUI defenses.

Conference DUI Breakout - October 22, 2019, Murfreesboro, TN
Every year our DUI breakout session provides approximately four hours of education and training covering current DUI topics and legal updates.

Victim Issues - (TBA) December, 2019, Nashville, TN
The DUI training department will offer a one day training class focused on victim's issues involved 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.

Lethal Weapon, Vehicular Homicide Seminar 2019

On June 11-13, 2019, law enforcement officers and prosecutors gathered in Pidgeon Forge, TN to participate in a joint training seminar, covering all aspects of prosecuting vehicular homicide cases. The seminar started with a staged crash at Walters State Community College parking lot. The Tennessee Highway Patrol CIRT team conducted the crash and they presented strategies and procedures that are used in the investigation of vehicular homicide cases. John Kwasnoski, professor at Western New England College was our featured speaker and he covered all aspects of investigating vehicular homicides.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Impaired Driving Enforcement (ARIDE)
September 23-24, 2019, Greeneville, TN

DUI Detection & Standardized Field Sobriety Testing
July 15-17, 2019, Sevierville, TN

Drug Recognition Expert School (DRE)
July 29-August 8, 2019, Chattanooga, TN
October 28-November 7, 2018, Pigeon Forge, TN

Law Enforcement Instructor Development
July 15-19, 2019, McMinnville, TN
July 22-26, 2019, Germantown, TN
August 19-23, 2019, Denmark, TN

DUI TRACKER

DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from April 1, 2019, through June 28, 2019, 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 April 1, 2019, through June 28, 2019, since the last quarter were 1448. This number is down from the previous quarter by 40. From looking at these numbers, we can see that the trend in DUI related dispositions in Tennessee has slightly decreased this quarter, in keeping with the disposition trends that we had been observing over the last year. The total number of guilty dispositions during this same period of April 1, 2019 through June 28, 2019 were 1046 The total number of dismissed cases were 87. Across the State of Tennessee, this equates to 72 % of all arrests for DUI made were actually convicted as charged. This percentage is slightly lower than the last quarter ending on March 31, 2019. Only 6% of the DUI cases during this current quarter were dismissed. Also, during this same period of time, only 230 of the total DUI cases disposed of were to different or lesser charges. Therefore, only 15.9% 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 April 1, 2019 through June 28, 2019. During this period, there were a total of 266 fatalities, involving 247 crashes, which is an increase from the previous quarter. Out of the total of 266 fatalities, 45 fatalities involved the presence of alcohol, signifying that 16.9% of all fatalities this quarter had some involvement with alcohol. Further, there were a total of 21 fatalities involving the presence of drugs, signifying that 7.9% of all fatalities this quarter involved some form of drugs.

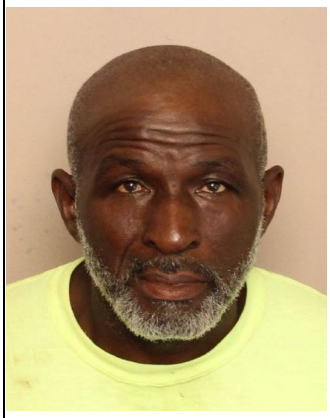
The year-to-date total number of fatalities on Tennessee roads and highways is 499. This is up by 9% from the 455 fatalities incurred last year at this same time. This is a significant increase, from last year, in fatalities on our roads. A greater effort needs to be made towards our goal of reducing fatalities in Tennessee.

20/20 Eye Movements Seminar

The DUI Training Department held our annual 20/20 Eye Movement Seminar in Memphis, TN in April. Over 60 participants were taught the medical, environmental and drug impaired causes of nystagmus. Participants were also taught how to identify the different forms of nystagmus and how to present this evidence to a jury. Later, in August of this year, the DUI Training Dept. will be presenting the DUI Basic Academy at the Hilton Nashville Airport. Registration is closing soon.

VEHICULAR HOMICIDE MURDERER'S ROW

State v. Ben Vaughn, Davidson County Criminal Court Docket No. 2018-B-1415



Around 7:45 p.m. on March 12, 2018, Ben Vaughn (65) was traveling southbound in the northbound lanes of traffic on Ellington Parkway in a 2016 Chevy Cruze when he struck an Infiniti sedan being driven by Ulondria Bond. Miss Bond was transported to the hospital with non-life threatening injuries as was Bond's two-year-old son who was in a child safety seat in the back seat. Miss Bond's front seat passenger, 28-year-old Denisha McKinney, however, suffered serious injuries and died as a result of those injuries shortly after arriving at hospital. Vaughn was found to have slurred speech and officers could smell an odor of an alcoholic beverage doming from his person. After he was Mirandized, Vaughn admitted to drinking two Bud Lights earlier in the evening. Vaughn was read the implied consent law and consented to having his blood drawn for testing. Metro-Nashville Crime Lab analyzed the alcohol content of Vaughn's blood which was a .23 level at the time it was drawn. The real shame is that Vaughn should not have been driving. His license was revoked at the time. Vaughn had three prior convictions for Driving Under the Influence, with two of those priors occurring within the ten year time period, 2014 and 2015, in Davidson County. Vaughn pled guilty to the charge of Aggravated Vehicular Homicide on March 21, 2019, and received a 15-year sentence in the Tennessee Department of Corrections. Kudos to ADAG Kyle Anderson for his prosecution efforts in this case.

State v. Majano-Rodas, Davidson County Criminal Court Docket No. 2018-D-2305

On August 28, 2018, at approximately 5:48 a.m., Metro-Nashville police responded to a motor vehicle crash on Donelson Pike near BNA Drive. Jose Majano-Rodas was found to be one of the drivers involved in the crash. At the scene of the crash, Majano-Rodas officers detected an "obvious" odor of an alcoholic beverage on Majano-Rodas's breath and person and also stated he had been drinking the night before. After he was Mirandized in Spanish, he told officers that he had been drinking alcohol after getting off work the night before from about 7:00 p.m. until 11:00 p.m., woke up around 4:00 a.m. and had a "few shots of whiskey" before leaving home. Officers determined that Majano-Rodas had been driving his 2004 Toyota Camry northbound on Donelson Pike when he struck a curb, crossed over the grass median, and collided with a 2015 Nissan Sentra driven by 54-year-old William Newcomb. Mr. Newcomb was transported to Vanderbilt Medical Center where he died of his injuries. Based on the totality of the circumstances, Mr. Majano-Rodas was advised of the implied consent law in Spanish, verbally responded that he understood the advisement, and gave consent to a blood test to determine the alcohol and/or drug content of his blood. The blood was drawn at Summit Medical Center and analyzed by Metro-Nashville Crime Lab. The lab determined that the alcohol content of Majano-Rodas blood was .299 at the time it was collected. On April, 2, 2019, Majano-Rodas entered a guilty plea to the charge of vehicular homicide and received an 8 year sentence in the Tennessee Department of Corrections. Majano-Rodas should never had been behind the wheel in Tennessee at the time of this crash. He was driving without having a license. Thanks again to ADAG Kyle Anderson for seeing this case to a lawful resolution.

Public Chapter 486-continued

Although Public Chapter 486 contains a great deal of legislative changes to the code, section 14, makes the intent of the General Assembly to confer statewide jurisdiction to circuit court and chancery court to issue search warrants clear. In plain language, section 14 adds the following language to Tennessee Code Annotated § 40-1-106 effective July 1, 2019: "The judges of chancery and circuit courts have statewide jurisdiction to issue search warrants pursuant to chapter 6, part 1 of this title in any district."

As with all new legislation, there are caveats that other statutes and rules are still applicable unless otherwise address. Such is the case here. It should be noted that with even with the enactment of Public Chapter 486, Rule 41 and the other statutory requirements title 40, chapter 6, part 1 are still applicable. One should remember that search warrants are required to be directed to and must be served by the sheriff or any deputy sheriff where the warrant is issued or any constable or any other law enforcement officer with authority in the county.[5] Also, the search can only be executed by the law enforcement officer, or one of those, to whom it is directed.[6] Others may aid or assist in the execution of the warrant but the officer to whom it is directed must be present and participate in the execution.

For the full language of Public Chapter 486, as well as other new laws, go to https://tnsos.org/acts/PublicActs.111.php?showall for an interactive list and summary of those laws enacted in the 111th General Assembly.

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[1] T.C.A. § 17-1-103 reads, "The judges and chancellors are, not withstanding § 17-1-102, judges and chancellors for the state at large, and as such, may**, upon interchange and upon other lawful ground**, exercise the duties of office in any other judicial district in the state." **(Emphasis added.)** Note that T.C.A. § 40-6-102, provides for the grounds of issuance of a search warrant, which includes "any other ground provided by law."

[2] T.C.A. §16-2-502 reads, "Each trial court judge shall continue to be officially known and designated as either a chancellor, circuit court judge, criminal court judge, or law and equity court judge, depending upon the position to which the chancellor or judge was elected or appointed prior to June 1, 1984. Any judge or chancellor may exercise **by interchange, appointment or designation** the jurisdiction of any trial court other than that to which the judge or chancellor was elected or appointed." **(Emphasis added.)**

[3] *See State v. Reynolds,* 504 S.W.3d 283 (Tenn. 2016) and *State v. McElrath*, 569 S.W.3d 565 (Tenn. 2019) for adoption and application of the good faith exception to the exclusionary rule by the Tennessee Supreme Court.

[4] T.C.A. § 40-1-206 (2018) read, "The judges of the supreme, appellate, chancery, circuit, general sessions and juvenile courts throughout the state, judicial commissioners and county mayors in those officer's respective counties, and the presiding officer of any municipal or city court within the limit of their respective corporations, are magistrates within the meaning of this title." Title 40 of the Tennessee Code Annotated codifies criminal procedure.

[5] Tenn. R. Crim. P. Rule 41 (c)(3)(C)(i)-(ii). *See also,* T.C.A. § 40-6-105.

[6] Tenn. Crim. P. Rule 41(e)(1).

ETHICS FOR PROSECUTORS

The Standing Committee on Ethics and Professional Responsibility for the American Bar Association recently issued Formal Opinion 486, regarding the obligations of prosecutors in negotiating plea bargains for misdemeanor offenses. These obligations include, "the duty to ensure that each charge incident to a plea has an adequate foundation in fact and law, to ensure that the accused is informed of the right to counsel and the procedure for securing counsel, to avoid plea negotiations that jeopardize the accused's ability to secure counsel, and , irrespective of whether an unrepresented accused has invoked the right of counsel, to avoid offering pleas on terms that knowingly misrepresent the consequences of acceptance or otherwise pressure or improperly induce acceptance on the part of the accused." This opinion is based upon the ABA Model Rules of Professional Conduct, as amended by the ABA House of Delegates through August 2018.

Formal Opinion 486 is divided into five parts. Part I emphasizes the unique role that prosecutors play in the administration of justice. Part II identifies the practices that have developed in different jurisdictions to manage misdemeanor pleas. Part III addresses the need for guidance and then it examines the text and scope of Model Rule 3.8(a)-(c) as they apply to misdemeanor plea bargaining. Part IV identifies the specific obligations of a prosecutor with respect to the accused's right to counsel. Finally, Part V interprets the Model Rules as they apply to negotiations and the entry of plea bargains.

The unique role of a prosecutor is that of a "minister of justice" not simply that of an advocate. (Model Rule 3.8) Canon 5 of the 1908 ABA Canons states that the primary duty of a prosecutor is not to convict, but to see that justice is done. Since misdemeanors account for 80 % of most criminal dockets, it is critical to achieve a fair process of obtaining guilty pleas. Therefore, practices involving misdemeanor pleas should not require, encourage, threaten or dissuade a defendant from requesting counsel.

Rule 3.8(a) prohibits the prosecution of "a charge that the prosecutor knows is not supported by probable cause." The prosecutor must actually exercise informed discretion with respect to the selection and prosecution of each charge. This is especially true when deciding to offer a plea to a lesser or different charge. There must be probable cause to support the plea or the charge should be dismissed.

Rule 3.8(b) requires the prosecutor to make reasonable efforts to assure that the accused has been advised and afforded their right to counsel. An accused person also has a constitutional right to proceed without the assistance of counsel, but the waiver of such assistance must be knowing, voluntary and intelligent. Finally, Rule 3.8(c) provides that a prosecutor "shall not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing. Of course, the Rule does not apply to individuals who have elected to proceed pro se with the approval of the tribunal, or when the accused has knowingly waived the rights to counsel and silence.

There are often collateral consequences to a guilty plea. Even a plea to a misdemeanor can lead to denial of employment, denial of a professional license, deportation and a loss of a wide range of public services. A prosecutor will rarely know all of the potentially relevant collateral consequences of accepting a plea or the exact nature of any subsequent sentence enhancement. However, if the prosecutor knows the consequences of a plea, including those that are particular to the accused, then the prosecutor must disclose them.

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