TNDAGC

DUI NEWS

ISSUE 68
October 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.

MITCHELL V. WISCONSIN

The United States Supreme Court established a new "general rule" that if a DUI driver becomes unconscious and therefore cannot be given a breath test, then the "exigent circumstances rule almost always permits a blood test without a warrant." *Mitchell v. Wisconsin,* 588 U.S. ___, 139 S. Ct. 2525, 2531, 204 L. Ed. 2d 1040, 2019 U.S. LEXIS 4400 (2019). Law enforcement duties involving a DUI investigation with an unconscious driver, responding to a crash, attending to injuries, dealing with crash scene traffic control or dealing with emergency personnel, often may be incompatible with the procedures that would be required to obtain a warrant. *Id.*

In the *Mitchell* case, a report was received by the Sheboygan Police Department that the defendant, Gerald Mitchell, appeared to be very drunk and that he just climbed into a van and drove off. Officer Jaeger later located Mr. Mitchell near a lake. Mr. Mitchell could hardly stand without support, he was stumbling and slurring his words. Field sobriety tests were hopeless, if not dangerous, and a preliminary breath test registered a BAC of 0.24%.

Mr. Mitchell was arrested for operating a vehicle while intoxicated and he was transported to the police station for an evidentiary breath test. Once at the police station, Mr. Mitchell was too lethargic to give a breath test, so he was then transported to the hospital for a blood test. Mr. Mitchell lost consciousness on the ride to the hospital. While still unconscious, the officer read the implied consent form to Mr. Mitchell. After hearing no response, the officer requested the hospital staff to draw a blood sample. Mr. Mitchell stayed unconscious during the blood draw. The BAC, 90 minutes after his arrest, was 0.222%.

The trial court denied a motion to suppress the blood test results and the Wisconsin Intermediate Appellate Court and the Wisconsin Supreme Court affirmed the judgments of the trial court on the basis that the implied consent law, together with Mr. Mitchell's free choice to drive, satisfies any Fourth Amendment problems since, Mr. Mitchell's implied consent was never withdrawn.

Justice Alito, in *Mitchell,* stated that although their 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, their decisions have not rested on the idea that these laws create actual consent to all searches they authorize. Instead, they have based their decisions on a case-by-case basis, looking at the specific constitutional claims in each case. *Id* at 2532-2533. Over the last 50 years, they have approved many defining elements of implied consent laws. *Id.*

The *Mitchell* court gave a brief synopsis of their recent DUI related decisions. While testing conscious drunk-driving suspects, (Continued on page 12)

RECENT DECISIONS

State v. Kevin Todd Parton, 2019 Tenn. Crim. App. LEXIS 395

On October 11, 2015, soon after midnight, an officer observed a vehicle driving outside of its lane, stopping at a green light, veering off of the roadway and driving with the tires rubbing the curb. Mr. Parton, the driver of the vehicle, smelled of alcohol, acknowledged that he had been drinking and he failed the field sobriety tests. Two open cans of beers were located under the driver's seat. Mr. Parton consented to a blood draw (BAC was 0.183 %) and warrants were obtained from the magistrate. Unfortunately, only the warrant for DUI recited the circumstances of the offense. Two warrants for roadway violation and failure to comply with financial responsibility failed to include facts supporting the charged offenses. (The facts included, concerned another crime and defendant. These warrants were dismissed prior to the grand jury proceedings.)

Mr. Parton filed a Motion to Dismiss, claiming the dismissed warrants rendered the DUI warrant also void and the indictment was returned after the statute of limitations. (The main argument against the DUI warrant was that the magistrate was obviously acting as a rubber stamp and did not consider the actual allegations within the warrant.) Also, a mistrial was requested after the State asked the TBI agent if she had ever received a request for independent testing of the blood. The trial court struck the question after the defense's objection and the Motion for Mistrial was denied. The defense also challenged the chain of custody since a lab technician that handled the blood sample within TBI did not testify at trial.

Regarding the Motion to Dismiss, the Court of Criminal Appeals determined that Mr. Parton failed to include transcripts from the original hearing and therefore, it is presumed that the trial court's judgements were correct. *State v. Richardson,* 875 S.W.2d 671, 674 (Tenn. Crim. App. 1993). Also, the State timely commenced prosecution by binding the defendant over to the grand jury prior to the limitations period, even if no valid arrest warrant issued and the indictment was issued after the statute of limitations commenced. *State v. Stephen James Thompson,* 2010 Tenn. Crim. App. LEXIS 718. (A judicial finding of probable cause, at a preliminary hearing, is a sufficient commencement of the prosecution)

The CCA upheld the trial court's dismissal of the Motion for Mistrial. Although the question of whether a request was made by anyone for independent testing was clearly improper, (since it creates an unfair inference against the defendant) the trial court struck the question and no improper evidence was admitted. Also, the State's proof of guilt was strong. Finally, the CCA found the chain of custody sufficient. Although, their opinion reaffirms that the better practice is, to include testimony regarding the normal procedures for handling the blood sample, that all proper procedures were followed and that there was no evidence present that tampering occurred. (Particularly true for any person that is within the chain of custody, but does not testify.)

State v. Cedrick Dewayne Whiteside, 2019 Tenn. Crim. App. LEXIS 434

This case involved a crash on Interstate 40 in Henderson County. Trooper Williams of THP was called to the crash scene and he observed a single vehicle roll-over crash. A passenger was trapped in the passenger seat and Mr. Whiteside was standing near the vehicle. While attending to the passenger, Trooper Williams smelled alcohol in the vehicle and he observed an open container in the vehicle. The passenger was determined to be intoxicated. Mr. Whiteside admitted to driving and he admitted to drinking earlier. He also had a smell of alcohol coming from his person. Mr. Whiteside claimed another vehicle pulled out in front of him.

Mr. Whiteside gave Trooper Williams a false identification. Mr. Whiteside agreed to conduct field sobriety tests. However, during the walk and turn task, he struggled to maintain his balance at the beginning and then he refused to complete the task after he had started walking. Mr. Whiteside complained that a hip injury was preventing him from completing the task. He had not mentioned the hip injury before starting the SFSTs. After refusing all further SFSTs, Mr. Whiteside was arrested. He immediately became "extremely belligerent" and yelled many expletives and racial comments towards Trooper Williams. (Continued page 3)

RECENT DECISIONS (Continued)

A jury convicted Mr. Whiteside of DUI, criminal impersonation, driving on a revoked driver's license and failure to exercise due care. He appealed, complaining of insufficient evidence to convict him of DUI and failure to exercise due care. (A reckless endangerment charge was *nolle prosequi* prior to trial.)

On appellate review, the prosecution is afforded the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences which may be drawn therefrom. *State v. Davis,* 354 S.W.3d 718, 729 (Tenn. 2011) (quoting *State v. Majors,* 318 S.W.3d 850, 857 (Tenn. 2010). The CCA ruled that the smell of alcohol, the open container, the admission to drinking, the poor performance at the beginning of the walk and turn task, the refusal to complete further SFSTs and the "belligerent" outburst and behavior towards Trooper Williams was sufficient for a jury to reasonably find, beyond a reasonable doubt, that the defendant was unable to safely operate a motor vehicle and was thereby, guilty of driving under the influence.

However, the CCA did find that there was insufficient evidence for the jury to find Mr. Whiteside guilty of a failure to exercise due care, since the Trooper did not see the crash occur and there was no evidence presented as to any driving at an unsafe speed. (evidence of all elements of the statute must be presented and proven)

State v. Katrina Lynette Brown, 2019 Tenn. LEXIS 403

In the early morning hours of December 18, 2015, Corporal Cook of the Lewisburg Police Department stopped a vehicle due to the driver's side brake light not working. Ms. Brown was the driver and only occupant in the vehicle. Ms. Brown's driver's license had been suspended and she had active warrants out for her arrest. During the initial contact at the driver's door, Corporal Cook Smelled alcohol coming from the vehicle and he observed that Ms. Brown's eyes were bloodshot. Ms. Brown admitted to drinking "a few wine coolers" earlier in the evening. As Ms. Brown exited her vehicle, she used the vehicle to maintain her balance and Corporal Cook could now smell alcohol and marijuana coming from her person. Ms. Brown tried to walk away and would not comply with any of Corporal Cook's requests.

Later, Ms. Brown was handcuffed behind her back. At one point she reached under her shirt and pulled out a plastic baggie, while stating, "There it is, there it is, just take me to jail." The baggie contained 2.8 grams of marijuana and 3.7 grams of crack cocaine. Ms. Brown was taken to jail and while there, Corporal Cook read the implied consent form to Ms. Brown and asked her to perform SFSTs. Ms. Brown refused to perform the SFSTs and she refused to provide a blood sample.

Due to the large amount of cocaine found on Ms. Brown, she was charged with possession of a schedule II substance with the intent to sell, possession of a schedule II substance with the intent to deliver, possession of a schedule VI substance, DUI, driving on a suspended driver's license and violation of the implied consent law. After a bench trial, Ms. Brown was convicted of both cocaine charges, DUI and violating the implied consent law. She was sentenced to an effective sentence of ten (10) years, which was suspended to probation.

Ms. Brown appealed the conviction based upon the sufficiency of the evidence at trial. On appeal, a conviction removes the presumption of the Appellant's innocence and replaces it with one of guilt. *State v. Tuggle,* 639 S.W.2d 913, 914 (Tenn. 1982). Also, the guilt of a defendant, including any fact required to be proven, may be predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. See *State v. Pendergrass*, 13 S.W.3d 389, 392-393 (Tenn. Crim. App. 1999). Even though convictions may be established by different forms of evidence, the standard of review for the sufficiency of that evidence is the same, whether the conviction is based upon direct or circumstantial evidence. See *State v. Dorantes,* 331 S.W.3d 370, 379 (Tenn. 2011). As with most cases of this nature, a large amount of the evidence will be circumstantial and such evidence depends heavily upon the credibility of the witnesses. Therefore, the credibility of witnesses and circumstantial evidence are both very important areas to cover and emphasis with juries when trying these type of cases. The CCA affirmed the judgments of the trial court.

IN RE PETITION TO STAY ETHICS OPINION 2017-F-163

Every prosecutor in Tennessee knows that he or she has special responsibilities that are not applicable to other practicing attorneys. Afterall, the prosecutor:

> is to judge between the people and the government; he [or she] is to be the safeguard of the one and the advocate for the rights of the other; he [or she] ought not to suffer the innocent to be oppressed or vexatiously harassed, any more than those who deserve prosecution to escape; he [or she] is to pursue guilt; he [or she] is to protect innocence; he [or she] is to judge of circumstances, and, according to their true complexion, to combine the public welfare and the safety of the citizens, preserving both, and not impairing either. *Foute v. State*, 4 Tenn. 98, 99 (1816).

Considering the unique role of the prosecutor within the criminal justice system, ethical rules governing prosecutor conduct have developed over the years. The current ethical obligations for all practicing attorneys are contained within Tennessee Supreme Court Rule 8. Located within Tennessee Supreme Court Rule 8, can be found Rule of Professional Conduct 3.8, which sets out the ethical obligations of prosecutors within the judicial system. Rule 3.8 states:

The prosecutor in a criminal case:

> (a) shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
> (b) shall make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
> (c) shall not advise an unrepresented accused to waive important pretrial rights;
> (d) shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilty of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
> (e) shall not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
> (1) the information sought is not protected from disclosure by any applicable privilege;
> (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
> (3) there is no other feasible alternative to obtain the information;
> (f) except for the statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, shall refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent employees of the prosecutor's office from making an extrajudicial statement that the prosecutor would be prohibited from making under RPC 3.6 or this Rule; and discourage investigators, law enforcement personnel, and other persons assisting or associated with the prosecutor in a criminal matter from making an extrajudicial statement that the prosecutor would be prohibited from making under RPC 3.6 or this Rule.
> (g) when a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
> (1) if the conviction was obtained outside the prosecutor's jurisdiction, promptly disclose that evidence to an appropriate authority, or (Continued page 5)

IN RE PETITION TO STAY (Continued)

> (2) if the conviction was obtained in the prosecutor's jurisdiction, undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
> (h) when a prosecutor knows of clear and convincing evidence establishing a defendant was convicted in the prosecutor's jurisdiction of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

The United States Constitution, the Tennessee Constitution, statutory law, case law, and the Tennessee Rules of Criminal Procedure play a significant role in establishing the guidelines for prosecutors in our unique position to seek justice. Therefore, in March of 2018, when the Board of Professional Responsibility (Board) issued Formal Ethics Opinion 2017-F-163 (Opinion) stating that "Tennessee Rule of Professional Conduct 3.8 (d) is a separate ethical obligation of prosecutors which was not meant to be coextensive with a prosecutor's legal disclosure obligations" and further, finding that the "ethical duty to disclose information favorable to the defense is broader than and extends beyond *Brady"* and requires prosecutors to disclose the information "as soon as reasonably practicable", then these "guidelines" became blurred and broadened, to include unknown, unchartered, and unnavigable ethical waters.

Despite arguments from the United States Attorneys and the Tennessee District Attorneys General Conference (TNDAGC), the Board voted to not alter or rescind Formal Ethics Opinion 2017-F-163. As a result, the TNDAGC filed a petition with the Tennessee Supreme Court to vacate Opinion 2017-F-163 and renewed its request that the Court continue to stay the effectiveness of the Opinion. Based on the Tennessee Supreme Court's "original and exclusive authority to formulate and enforce rules governing the practice of law" and the need for a "full review of the issues raised", the Court granted the TNDAGC's motion for a stay, ordered additional briefing and heard oral arguments on the petition to vacate. On August 23, 2019, the Tennessee Supreme Court issued its unanimous opinion, vacating Formal Ethics Opinion 2017-F-163 and ruling that Rule 3.8(d) is "coextensive in scope with the obligations of a prosecutor as provided by applicable statute, rules of criminal procedure, our state and federal constitutions and case law."

Words can be interpreted differently unless the language is clear. The language contained within Rule 3.8 clearly provides that prosecutors "must provide information known to the prosecutor that tends to negate guilt of the accused or mitigates the offense". The Tennessee Supreme Court recognized that the Opinion would have required disclosure of "information favorable to the defense" separate from obligations currently imposed upon prosecutors and beyond that required by *Brady,* which would place prosecutors in the impossible position of looking beyond the known, to search and weigh the limitless unknown .

In reaching its decision, the Court recognized that *Brady* addresses the suppression ("known" to suppress vs. "unknown" failure to disclose) by the prosecution, of material evidence (evidence that had a reasonable probability of changing the result of the proceeding if it had been disclosed), either to guilt or to punishment, upon request by the defendant, irrespective of good faith or bad faith. Tennessee courts, with the Tennessee Supreme Court being the ultimate decision maker, have held that there are four elements to establishing a *Brady* violation: (1) defendant requested the information (unless of obvious exculpatory value and must release with/without request), (2) the State suppressed the information, (3) information was favorable to the defendant, and the information was material. These decisions have provided a framework for disclosure of information that complies with a defendant's Due Process rights. Expanding the duties of prosecutors beyond what is required by caselaw, the constitutions of the United States and Tennessee, statutory requirements, and the rules of criminal procedure, would have prosecutors essentially serving two masters. Not only would prosecutors have to satisfy clearly defined Due Process requirements and face the consequences within the confines of prosecuting a defendant, i.e. postponement of trial, dismissal of charges, etc., but also be subject to censure, suspension, and or disbarment for failure to meet an ethical role with no clear substance or definition. *In Re Petition to Stay the Effectiveness of Ethics Opinion 2017-F-163,* 2019 Tenn. LEXIS 372.

DIFFERENCES BETWEEN DUI AND BUI

Imagine the typical summer's day. Picture a boat full of people laughing, drinking beer. It's hot so keeping the boat moving or swimming is essential to staying cool. Can you picture it? Think about the person operating the boat on the water who has had too many beers. Consider the number of people out enjoying their day on the water as the operator drives around. Are you concerned about the safe operation of the boat? Now, picture those same people leaving the water to go home from their fun in the sun on the water. Those same people must get behind the wheel to drive to get home and haven't planned for a designated driver to take them. Are you concerned about the safe operation of the motor vehicle? Unfortunately, this is a very common scenario.

The law is different for each of the scenarios mentioned above. Boating under the influence (BUI), like driving under the influence (DUI) is a class A misdemeanor.[1] The penalties for BUI, however, are very different. If one is convicted of BUI first offense, they are fined two-hundred-fifty dollars ($250) to two thousand five hundred dollars ($2,500)[2]; DUI first offense the fine is three-hundred-fifty dollars ($350) to two thousand five hundred dollars ($2,500).[3] Incarceration for BUI first offense is in the discretion of the trial court with no mandatory minimums applicable, up to 11 months and 29 days; the minimum incarceration time for DUI first offense is dependent upon the blood alcohol content (BAC), ranging from 48 hours (if BAC is less than .20) to seven consecutive days (if BAC is .20 or higher), up to 11 months and 29 days. A person's privilege to operate any vessel subject to registration on the public waters of the state shall be suspended for a period not to exceed one (1) year for the first offense BUI. (BUI does not affect their driver's license, only their license to operate a vessel) In a DUI first offense conviction, a person's driving privilege is revoked for one year but he or she may apply for a restricted license.[4]

The second and third offenses for DUI and BUI follow a similar pattern with the penalties still being less for BUI. By way of illustration, mandatory jail time doesn't apply in BUI cases until the third offense which requires confinement of not less than thirty days. In comparison, a DUI third offense requires a minimum service of 120 days. DUIs become felonies when a person acquires four (4) or more, but BUIs never become a felony.

Calculations of priors to be used for enhancement are different for BUI versus DUI. To calculate the priors for BUI the time is ten (10) years for convictions.[5] In DUI cases, you look at the prior ten (10) years and if you find one, you can go back ten (10) more years from the immediate prior, offense date to offense date, but no more than (20) years.[6]

Like DUIs, BUIs cannot be diverted.[7] This means that neither are subject to expungement under pre-trial or judicial diversion. But if one is not careful, there is an issue when there is a greater charge that results from a BUI and the person pleads to the greater charge but doesn't plead to the BUI. When does this happen? Well, if a person is injured as a result of an intoxicated boating operator's actions, he/she cannot be charged with vehicular assault (VA). The person is charged with aggravated assault instead. Both are class D felonies, but a VA cannot be diverted. The same is not true for aggravated assaults by recklessness and BUIs.[8] Also, a BUI will not result in a greater charge when someone is injured, despite the operator's history on the water or blood alcohol content, whereas a DUI may result in an aggravated vehicular assault under certain circumstances.[9]

If a person is killed as a result of a BUI or DUI, then the operator in either case may be charged with a vehicular homicide (VH).[10] The language of the statute includes "operation of an automobile, airplane,

DIFFERENCES BETWEEN DUI AND BUI (Continued)

motorboat or other motor vehicle". A DUI based VH is a class B felony whereas a BUI based VH is a class C felony.[11] Whether the VH is BUI or DUI based, however, will not make a difference regarding an operator's driver's license. The statute provides for a loss of driving privileges for three (3) to ten (10) years.[12] Unlike a DUI, a BUI based VH will never rise to the level of an aggravated vehicular assault, no matter the operator's history on the water.[13]

Although the DUI statutes have been amended and revised extensively during the last ten (10) years, the BUI statutes have not been amended since 2007. Perhaps it is time for the legislature and other concerned agencies to review and consider a BUI legal update. Although it is very dangerous to operate a boat while being under the influence, this dangerous conduct is being compounded by the same BUI operator then getting into the driver's seat of their vehicle and driving home. Quite often the impaired drivers are also towing their boat on a trailer. Imagine an impaired driver having the added responsibilities and complications of pulling a trailer loaded with a boat, driving down the Interstate and while returning home from an exhausting day at the lake! In support of Tennessee's quest to reach zero fatalities, more awareness, training, and resources need to be directed towards, not only the prevention of DUIs, but also the prevention of BUIs. Fatalities caused by DUIs and BUIs are all preventable, yet so much more still needs to be accomplished.

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1) *See* T.C.A. 69-9-217 for the definition of BUI and T.C.A. 69-9-219(c)(1)(A) for its designation as a class A misdemeanor. *See* T.C.A. 55-10-402 for DUI.
2) *See* T.C.A. 69-9-219(c)(1)(A).
3) *See* T.C.A. 55-10-402(a)
4) T.C.A. 55-10-404
5) T.C.A. 69-9-219(c)(1)(C)(3).
6) T.C.A. 55-10-405
7) *See* T.C.A. 69-9-219 (c)(1)(C)(4) for BUI and T.C.A. 40-35-313(a)(1)(B)(I)(c) for DUI.
8) *See footnote 7 above.* The same provision that specifically prevents diversion of DUIs and VAs doesn't deny diversion of an aggravated assault by recklessness, a class D felony.
9) *See* T.C.A. 39-13–115 for the elements of an aggravated vehicular assault.
10) T.C.A. 39-13-213 contains the elements of vehicular homicide.
11) T.C.A. 39-13-213(a)(1) would include BUI, while T.C.A. 39-13-213(a)(2) is DUI specific.
12) T.C.A. 39-13-213 (c).
13) T.C.A. 39-13-218.

UPCOMING TRAINING

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

TNDAGC Fall Conference - October 23-25, 2019, Murfreesboro, TN
The DUI training department will offer a DUI breakout session on October 22, 2018, from 1 p.m. to 5 p.m., before the Fall Conference begins.

Cops in Court - October 24, 2019, THP Training Center, Nashville, 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. The mock trial presentation portion will take place on November 22, 2019.

Cops in Court - November 22, 2019, THP Training Center, Nashville, 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 from 8 a.m. to Noon.

Victim Awareness Training - (Nashville Airport Marriott) December 13, 2019, 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" on December 12, 2019. 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.

Protecting Lives, Saving Futures - February 12-13, 2020, Knoxville, 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. Dr. Ferslew will be a presenter.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Impaired Driving Enforcement (ARIDE)
October 7-8, 2019, Kingsport, TN
November 25-26, 2019, Gallatin, TN
December 9-10, 2019, Memphis, TN
January 6-7, 2020, McMinnville, TN
March 23-24, 2020, Clarksville, TN
April 27-28, 2020, Clinton, TN

DUI Detection & Standardized Field Sobriety Testing
October 14-18, 2019, Harriman, TN
February 18-27, 2019, Hixson, TN
March 23-27, 2020, Townsend, TN

Drug Recognition Expert School (DRE)
October 28-November 7, 2019, Pigeon Forge, TN

DUI TRACKER

DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from July 1, 2019, through September 30, 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 July 1, 2019, through September 30, 2019, since the last quarter were 1,483. This number is up from the previous quarter by 35. From looking at these numbers, we can see that the trend in DUI related dispositions in Tennessee has increased slightly, which is consistent with the disposition trends that we have been observing throughout the year. The total number of guilty dispositions during this same period of July 1, 2019 through September 30, 2019 were 1,051. The total number of dismissed cases were 86 and 60 were nolle prossed. Across the State of Tennessee, 72.48% of all arrests for DUI made were actually convicted as charged. This percentage is slightly higher than the last quarter ending on June 30, 2019. Only 9.84% of the DUI cases during this current quarter were Dismissed or nolled. Also, during this same period of time, only 239 of the total DUI cases disposed of were to different or lesser charges. Therefore, only 16.11% 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, 2019 through September 30, 2019. During this period, there were a total of 291 fatalities, involving 267 crashes, which is an increase from the previous quarter. Out of the total of 291 fatalities, 65 fatalities involved the presence of alcohol, signifying that 21.33% of all fatalities this quarter had some involvement with alcohol. This percentage is higher than the previous quarter. Further, there were a total of 42 fatalities involving the presence of drugs, signifying that 14.43% of all fatalities this quarter involved some form of drugs.

The year-to-date total number of fatalities on Tennessee roads and highways is 835. This is up by 24 from the 811 fatalities incurred last year at this same time. For most of the year, we have experienced a considerable increase from last year in the number of fatalities on our roadways. With the increase of polydrug use, we are experiencing a greater danger of crashes and fatalities on our roads and highways. It is only with a united effort between Law Enforcement, the District Attorney's Office and other Community Leaders that will we be able to stem the tide of rising fatalities.

THSO DIRECTOR'S AWARD

On September 5, 2019, the Traffic Highway Safety Office, at their yearly Lifesaver's Conference, presented Assistant District Attorney Greg Eshbaugh with the THSO's Director's Award for DUI Prosecutor of the Year. Greg was recognized for his outstanding efforts in partnering with the THSO to improve traffic safety and to save lives. Greg is a DUI prosecutor in the 6th Judicial District's Office in Knoxville, TN.

VEHICULAR HOMICIDE MURDERER'S ROW

State v. Joshua Michael Ward, 2019 Tenn. Crim. App. LEXIS 437

On Memorial Day weekend, thousands of outdoor enthusiasts, all-terrain vehicle riders and country music fans flock to Scott County, Tennessee to enjoy many events associated with Brimstone Recreation's White Knuckle Event along the North Cumberland off-highway trail system. On May 27, 2016, at this event, several incidents involving ATV riders were reported in the area. Around 7:35 p.m., an SXS ATV being driven by Joshua Ward, went over an embankment on River Road and plunged approximately 150 feet down a steep cliff, eventually coming to rest on its top in the river below. Mr. Ward was able to extricate himself from the vehicle while it was underwater. Mr. Ward's passenger was not so fortunate. Ms. Danielle Stahley, 25, was strapped into the passenger seat with a helmet. However, as the vehicle rolled down the cliff, Ms. Stahley's seat was ripped from the vehicle and she was struck by the roll cage, eventually she became lodged between a log and the embankment. Ms. Stahley died at the hospital from her injuries.

Mr. Ward had admitted to drinking earlier in the day and he showed signs of impairment. However, due to evidentiary and witness problems, the vehicular homicide indictment was dismissed and Mr. Ward pled guilty, by criminal information, to reckless homicide, a class D felony. After a sentencing hearing, Mr. Ward was sentenced to three years, with ninety days to be served in confinement and the remainder on probation. Mr. Ward appealed the fact that he was not given diversion. The decision to grant or deny judicial diversion is reviewed for an abuse of discretion. *State v. King,* 432 S.W.3d 316, 324. The CCA found that the trial court considered all of the relevant factors and ruled appropriately. The judgements were affirmed.

State v. Johnthony K. Walker, 2019 Tenn. Crim. App. LEXIS 574

Most Tennesseans recall back on November 21, 2016, when a school bus being driven by Mr. Johnthony K. Walker crashed on Talley Road in Chattanooga with thirty-seven elementary school children on board. As a result of the crash, six children were killed and more than twenty other children were injured. Sadly, Mr. Walker was speeding at the time of the crash and he appeared to have been texting around that time. A jury convicted Mr. Walker of six counts of criminally negligent homicide, eleven counts of reckless aggravated assault, seven counts of assault, one count of reckless endangerment, one count of reckless driving, and one count of the use of a portable electronic device by a school bus driver. The trial court sentenced Mr. Walker to an effective sentence of four years.

Mr. Walker appealed the denial of judicial diversion and an alternative sentence. Although most of the *Parker* and *Electroplating* factors weighed in favor of diversion for the defendant, the offense committed was so shocking, so violent and reprehensible to the court that this factor outweighed all of the other factors in denying judicial diversion. A court cannot deny judicial diversion merely because a death was involved. *See State v. Jared Booth Spang,* 2015 Tenn. Crim. App. LEXIS 87. However, the nature and circumstance of the offense, if all other relevant factors have been considered, can outweigh all others that favorably reflect upon the defendant. *State v. George William King,* 2002 Tenn. Crim. App. LEXIS 979, citing *State v. Curry,* 988 S.W.2d 153, 158 (Tenn. 1999).

Although the trial court is required to automatically consider probation as a sentencing option, *see* Tennessee Code Annotated section 40-35-303(b), no criminal defendant is automatically entitled to probation as a matter of law, *see State v. Davis*, 940 S.W.2d 558, 559 (Tenn. 1997). It was noted that the trial court laboriously examined each factor to be considered and denied probation. The CCA affirmed judgments of the trial court.

RELATED CASE LAW

On occasion, cases will be decided that will affect all areas of criminal law. Even though the subject matter of the case is not related to traffic safety, these cases are important as to how our traffic related cases need to be handled. A few such cases were recently decided by the Tennessee Supreme Court and the Tennessee Court of Criminal Appeals. *In Re Petition to Stay the Effectiveness of Ethics Opinion 2017-F-163,* 2019 Tenn. LEXIS 372 was decided on August 23, 2019 by a unanimous Supreme Court. (A complete discussion of this case can be found on pages 2 and 3). *In Re Petition* clarified the duties of all prosecutors regarding certain discovery issues in criminal cases.

Another recent Tennessee Supreme Court decision was *State v. Hassan Falah Al Mutory,* 2019 Tenn. LEXIS 298 (Tenn. August 7, 2019). A long followed practice in Tennessee was to dismiss a conviction of a deceased defendant, if the defendant died while his/her appeal as of right was still pending. In *Mutory,* the defendant was convicted of reckless homicide after firing a gun at a house party and killing a fellow party-goer. Mr. Mutory was sentenced and he timely appealed his conviction. However, before the CCA could rule upon the appeal, Mr. Mutory died. His attorney filed a motion asking the CCA to apply the doctrine of "abatement ab initio," which the TSC adopted in *Carver v. State,* 398 S.W.2d 719 (Tenn. 1966). The effect of abatement ab initio "is to stop all proceedings ab initio (from the beginning) and render the defendant as if he had never been charged." Timothy A Razel, Note, *Dying to get away with it: How the Abatement Doctrine Thwarts Justice & What Should Be Done Instead,* 75 Fordham L. Rev. 2193, 2195 (2007).

The TSC noted that 28 other states do not apply this doctrine and changes in the legal landscape regarding restitution and a recognition of victim's rights have caused a move away from the doctrine of abatement ab initio. Tennessee passed the Victim's Bill of Rights in 2014. Tenn. Code Ann. Sections 40-38-101 to 40-38-117 (2014 & Supp. 2018). The Tennessee Constitution was amended in 1998 to protect the rights of victims. Tenn. Const. art. I, Section 35. The TSC in *Mutory* determined that the doctrine of abatement ab ignition must be abandoned and the decision in *Carver v. State* is thereby overruled. Although the Court left open the idea that a future appeal could continue after a defendant's death (on a case-by-case basis), Mr. Mutory's appeal was dismissed and the judgment of the trial court was reinstated.

Finally, the Tennessee Court of Criminal Appeals decided the case of *State v. Arnold Asbury,* 2019 Tenn. Crim. App. LEXIS 591 (Tenn. Crim. App. September 19, 2019), which clarified Tenn. R. Crim. P. 11(c) and the procedures regarding a plea agreement. Mr. Asbury plead guilty to two different cases for an effective sentence of 17 years in TDOC as a Multiple offender. It was also agreed that Mr. Asbury could turn himself in to jail the following Friday. However, since the trial court was not comfortable with the delay in confinement, the judge refused to sign the judgments until after Friday (One judgment was accidentally signed by the judge). The judge stated to Mr. Asbury that if he didn't show up to the jail on Friday, then the judgments would not be signed and the judge has not accepted the plea. At that point, Mr. Asbury could be facing a future sentence as a Career offender or even consecutive sentences. The judge then accepted the pleas, but the sentencing was delayed until after that Friday.

Needless to say, Mr. Asbury did not show up on Friday and was arrested approximately 4 months later. Mr. Asbury moved to withdraw his plea, which was denied. The trial court sentenced him to 30 years TDOC consecutive to 11/29. The CCA upheld the trial court's denial of Mr. Asbury's motion to withdraw plea. However, the CCA reversed the judgments of the trial court based upon the trial court not following Tenn. R. Crim. P. 11(c). Mr. Asbury plead guilty contingent on a specific sentence to 17 years as a Range II offender. The trial court could only accept the plea, defer its decision until after it considered the presentence report, or reject the plea. Although the trial court stated that it would reject the plea if Mr. Asbury did not report to jail on time, the trial court did not actually reject the plea. Instead, the court failed to follow the specific sentence agreed to. At that point, the trial court should have allowed Mr. Asbury the opportunity to withdraw his plea, since the plea was conditioned upon a specific result. Since the court failed to comply with Rule 11(c)(5), the judgments were reversed and remanded for a hearing for the court to accept or reject the plea agreement.

MITCHELL V. WISCONSIN (Continued)

their arrests, taken alone, justify warrantless breath tests, but not blood tests, since breath tests are less intrusive. *Birchfield v. North Dakota,* 579 U.S. ____, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (slip op., at 35). Also, "BAC tests, under the 'exigent circumstances' exception—which, as noted, allows warrantless searches 'to prevent the imminent destruction of evidence.'" *Missouri v. McNeely,* 569 U.S. 141, 149, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). Although, the fleeting quality of BAC evidence alone is not enough. *Id.* at 156. But in *Schmerber v. California,* 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), it did justify a blood test of a drunk driver who had gotten into a car crash that gave police other pressing duties, for then the "further delay" caused by a warrant application really would have threatened the destruction of evidence. *Id.* at 152.

The *Mitchell* court pointed out that "[L]ike *Schmerber,* this case sits much higher than *McNeely* on the exigency spectrum. *McNeely* was about the minimum degree of urgency common to all drunk-driving cases. In *Schmerber,* a car accident heightened that urgency. And here Mitchell's medical condition did the same." *Mitchell* at *2533*, 204 L. Ed. 2d 1046. "The important question here is what officers may do when a driver's unconsciousness (or stupor) eliminates any reasonable opportunity" for an evidentiary breath test? *Id.* at 2534. The *Mitchell* court emphasized that search warrants will be required for blood tests in most common drunk-driving cases. (*McNeely)* However, when other circumstances such as crashes (*Schmerber*) or unconscious drivers (*Mitchell*) are involved, then the "exigency spectrum" is raised and "other duties" combined with the "imminent destruction of evidence" may conflict with the procedures required for a law enforcement officer to obtain a search warrant. In such cases, a warrantless blood draw is reasonable under the Fourth Amendment exception for exigent circumstances, since "there is a compelling need for official action and no time to secure a warrant.". *McNeely,* 149, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (quoting *Michigan v. Tyler,* 436 U.S. 499, 509, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978)). "In those cases, the need for a blood test is compelling, and an officer's duty to attend to more pressing needs may leave no time to seek a warrant. The importance of the needs served by BAC testing is hard to overstate. The bottom line is that BAC tests are needed for enforcing laws that save lives." *Mitchell,* at *2535*, 204 L. Ed. 2d 1048.

Justice Alito went in-depth to emphasize that highway safety is a "vital public interest", a "compelling interest", and "paramount" to saving lives. He stated that when it comes to promoting highway safety, BAC limits make a big difference and a BAC limit of .08 has corresponded with a dramatic drop in highway deaths. Also, enforcing BAC limits obviously requires an accurate test and the extraction of blood samples for testing is a highly effective means of measuring the "influence of alcohol". Such testing requires promptness, since alcohol dissipates from the bloodstream "by the minute". Finally, Justice Alito stated that when a breath test is unavailable to promote those interests, "a blood test becomes necessary". "For these reasons, there clearly is a 'compelling need' for a blood test of drunk-driving suspects whose condition deprives officials of a reasonable opportunity to conduct a breath test." *Id.* (remember to argue the raised exigency spectrum when appropriate)

"Thus, exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. (So *Schmerber* controls when other pressing factors are present) *Id.* at 2537, 204 L. Ed. 2d 1051. (remember to present all other factors that prevented a warrant application when arguing exigent circumstances) "It would be perverse if the more wanton behavior were rewarded—if the more harrowing threat were harder to punish." *Id.*

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