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DUI NEWS

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When is Consent Considered Voluntary?

The Court of Criminal Appeals, in *State v. Pamela Kidd Hafer*, 2020 Tenn. Crim. App. LEXIS 143, recently gave an in-depth analysis regarding consent for a blood test as an exception for a search warrant, pursuant to the Fourth Amendment. The *Hafer* case involves a defendant's voluntary consent to a blood draw, after a crash. The defense argued that the implied consent form read by the officer included a threat of criminal sanctions and was invalid pursuant to the recent U.S. Supreme Court case of *North Dakota v. Birchfield,* 136 S. Ct. 2160 (2016); they also argued that Ms. Hafer was in a crash and under the influence of drugs and could not understand the legality of her consent; and they argued that she was not informed or aware of her right to refuse the blood test.

On August 2, 2013, Officer Shuler of the Knoxville Police Department responded to a rolled vehicle on the ramp between I-40 eastbound to 640 eastbound. Witnesses had described Hafer's driving as "erratic" and "all over the road", before she made contact with another vehicle and crashed. Officer Schuler contacted Ms. Hafer, who was unsteady on her feet and slurred her words. Officer Shuler stated that he smelled alcohol, although there was no evidence of alcohol in Ms. Hafer's blood sample and she denied drinking. Standardized Field Sobriety Tests were attempted and stopped due to fear for Ms. Hafer's safety, as she was stumbling around, and traffic was still passing by. Officer Shuler asked if Ms. Hafer would submit to a blood test and she replied, "Sure." The officer testified that she also said yes to an earlier request. Officer Shuler later read an implied consent form, which referred to criminal sanctions, and again asked if Ms. Hafer would submit to a blood test. Ms. Hafer again replied, "Yes."

The trial court, in *Hafer*, stated, the only two ways to get a blood sample in Tennessee, were by a warrant or exigent circumstances, and that "[t]he implied consent statute is just not a viable way to travel at this point." However, our Tennessee Supreme Court has stated, "[W]ell settled among the exceptions to the warrant requirement, and the one with which we are engaged here, is consent to search." *State v. Cox*, 171 S.W.3d 174, 179 (Tenn. 2005). Consent to search, voluntarily given, acts as an exception to both the state and federal warrant requirements. *Florida v. Bostick*, 501 U.S. 429, 438 (1991). Of course, the legal standard to determine whether the consent given by Ms. Hafer was voluntary, is an analysis based upon the totality of the circumstances. *State v. Ashworth*, 3 S.W.3d 25, 29 (Tenn. Crim. App. 1999) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973).

However, did the mention of criminal sanctions, during the recitation of the implied consent waiver, coerce or overcome the voluntariness of Ms. Hafer's consent? The defense argued that the U.S. Supreme Court in *North Dakota v. Birchfield*, 136 S. Ct. 2160 (2016) states yes. The CCA recited the *Birchfield* court stating, how it had "referred approvingly to the general concept of implied-consent laws that impose civil penalties and (Continued on page 12)

Recent Decisions

In Re: Rader Bonding Company, Inc., 2019 Tenn. LEXIS 529

This case involved a bond agreement entered on a defendant's arrest for DUI second offense, a Class A Misdemeanor ($7,500) and driving on a revoked driver's license, a Class B misdemeanor ($2,500). That same day, Rader posted the $10,000.00 bond. The defendant, at a later hearing, waived a preliminary hearing and the case was bound over to the grand jury. However, the grand jury indicted the defendant with a DUI fourth offense, a Class E felony and driving on a revoked driver's license, a Class B misdemeanor and some additional charges. The defendant then failed to appear and his bond was forfeited. Rader argued that the initial charges from the General Sessions court were abandoned for new charges in the indictment. The trial court disagreed. The Tennessee Supreme Court stated that although the DUI second was different in penalty and sentence from the DUI fourth offense charged in the indictment, the DUIs were the same charge and therefore, the bond is forfeited and the judgment of the trial court is upheld. The bond on the revoked driver's license had previously been forfeited. Therefore, alleging additional DUI priors in the indictment at the grand jury (i.e. charging a DUI 4th in the indictment when the initial petition was for a DUI 2nd in General Sessions), does not change the nature of the DUI charge, but it does affect the penalty regarding the DUI charge if the defendant is later convicted.

State v. Robert D. Cameron, III, 2020 Tenn. Crim. App. LEXIS 29

On September 11, 2016, Mr. Cameron was involved in a motor vehicle crash on Interstate 24. He stopped and exchanged information with the driver of the other vehicle. Officer Bush was dispatched to the accident and as she approached two parked vehicles on the side on the interstate, she activated her blue lights on her patrol vehicle. The vehicle that was parked in front then pulled out onto the interstate and drove away. Officer Bush asked the remaining driver if the other vehicle was involved in the accident. The driver said "yes", and Officer Bush then activated her emergency siren and pursued Mr. Cameron's vehicle, pulling it over one-half mile away. Mr. Cameron was ordered out of his vehicle. He stated that the other driver photographed his information and he believed that he was free to leave. After confirming that the first driver did not give the defendant permission to leave, Officer Bush handcuffed Mr. Cameron. Officer Bush smelled the odor of alcohol and asked if he had anything to drink. Mr. Cameron stated that he drank three beers over the last two hours. Mr. Cameron was convicted of DUI after a bench trial. The Court of Criminal Appeals found that although Mr. Cameron was seized as soon as Officer Bush activated her blue lights, stated specific and articulable facts provided sufficient reasonable suspicion for Officer Bush to conduct an investigatory stop. Specifically, Officer Bush was dispatched to an accident, a party to the accident pointed to a fleeing vehicle as being part of the accident and the officer did not have an opportunity to know the seriousness of the accident or whether there were any injuries. Therefore, an investigatory stop was reasonable, Officer Bush then observed the odor of alcohol, which was confirmed by the defendant's admission. After, a poor performance during standardized filed sobriety tests, Mr. Cameron was lawfully arrested for DUI.

State v. Brian Sherrill, 2020 Tenn. Crim. App. LEXIS 150

At 11:18 p.m. on November 4, 2016, Mr. Sherrill was pulled over while driving his 1979 Chevrolet pick-up truck. Deputy Staggs, of the Lake County Sheriff's Office, conducted the traffic stop on the pick-up for having "a brake light out on the driver['s] side of the vehicle." While Deputy Staggs was waiting on Mr. Sherrill's driver's license check, a K-9 officer arrived on the scene, a sniff test was conducted and the dog indicated that contraband was present inside of the pick-up truck. Deputy Staggs testified that Mr. Sherrill then gave permission for a search. During the search, officers found 15 grams of methamphetamine, a set of digital scales, small zip-lock baggies, medium zip-lock baggies with the corners cut out, a glass pipe with residue and $120 cash "all in small currency." Mr. Sherrill argues that the body camera footage from the K-9 officer showed that both of his brake lights were functioning properly during the traffic stop. An officer moved the vehicle forward during the stop and both brake lights could be seen working on video. (Continued on page 3)

Recent Decisions (Continued)

During a motion to suppress hearing on April 23, 2018, the state called an expert mechanic to testify that an older vehicle could have the lights working sporadically due to electrical wiring issues. The defense submitted the K-9 body camera footage and the court reset the hearing for July 23, 2018 to view the recording. Before the next hearing, the state filed a response conceding that the brake light was working when the K-9 officer was on scene, but still maintained that the brake light was not operational when the vehicle was initially stopped. (The k-9 footage did not show the initial stop). The state also argued that before the initial stop, when Mr. Sherrill was driving towards him, Deputy Staggs observed Mr. Sherrill driving without wearing a seat belt and that was the reason that he turned around to follow the defendant, which was also noted in his report. The trial court granted the motion to suppress, based upon the brake light issue. The CCA determined that, based upon a totality of the circumstances, from a purely objective perspective, reasonable suspicion existed that a traffic violation had occurred (the seat belt violation), *State v. Smith,* 484 S.W.3d 393, 400 (Tenn. 2016). (State v. Smith has a great discussion regarding reasonable suspicion.) Since the trial court did not consider the seat belt violation, the judgment of the trial court is reversed.

State v. Blake Gregg, 2020 Tenn. Crim. App. LEXIS 165

Mr. Gregg plead guilty to twenty-four counts involving four cases. (The charges involved mostly drug and driving offenses.) The trial court sentenced Mr. Gregg to serve a ten (10) years sentence, in one case, in TDOC custody, followed by a remaining fourteen (14) years of his effective sentence, in the other cases, on supervised probation. (For a total effective sentence of 24 years) Mr. Gregg appealed his sentence. Using the purposes and principles of our Sentencing Act *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012), such an application involves a consideration of "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant… in determining the sentence alternative or length of a term to be imposed." T.C.A. Section 40-35-103(5). However, "[c]onvicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society and evincing failure of past efforts at rehabilitation" are not considered favorable candidates for alternative sentencing. *Id.* Section 40-35-102(5)-(6)(A). When a trial court orders confinement and therefore rejects any form of alternative sentencing such as probation, split confinement, or periodic confinement, it must base the decision to confine the defendant upon considerations set forth in Code section 40-35-103(1). The record, in the *Gregg* case, indicated that Mr. Gregg had a long history of criminal convictions and that he frequently failed to comply with the terms of his probation. Although the trial court relied heavily upon Mr. Gregg's lack of candor, the court also specifically considered both the defendant's criminal history and his failure to comply with sentences involving release into the community. Therefore the record supports the trial courts findings and the CCA accordingly affirmed the judgments of the trial court.

State v. Michael Eugene Rutherford, 2020 Tenn. Crim. App. LEXIS 167

Mr. Rutherford plead guilty to possession of cocaine with intent to sell or deliver, aggravated assault, simple possession of marijuana, DUI 2nd offense, vandalism and violating the financial responsibility law. (These offenses involved two cases.) After a sentencing hearing, Mr. Rutherford was sentence to 10 years to serve in TDOC and the defendant appealed. Of course, the standard of review is an abuse of discretion with "a presumption of reasonable to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act." *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). Anytime a sentence of ten (10) years or less is actually imposed upon a defendant, it is mandated that the trial court consider probation as a sentencing option. *See* T.C.A. Section 40-35-303(a). The defendant bears the burden of establishing his "suitability for full probation." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999), *see* T.C.A. Section 40-35-303(b). Such a showing required the defendant to demonstrate that full probation would "subserve the ends of justice and the best interest[s] of both the public and the defendant." *State v. Dykes,* 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990). Mr. Rutherford could not demonstrate such. The CCA affirmed the judgments of the trial court.

Thoughts on Sentencing in DUI Cases

As prosecutors, our primary focus is proving the essential elements of the criminal offense beyond a reasonable doubt. In our focus, we sometimes gloss over or fail to emphasize those additional facts that establish the surrounding circumstances of the offense. While the officer is tasked to testify to the totality of the circumstances justifying an arrest decision, the prosecutor should keep in mind that those very same circumstances may be a justification for enhancement of the defendant's sentence beyond that of the presumptive minimum. Therefore, it is important to fully develop testimony and evidence at trial that can be used by the judge to provide a just and fair sentence that encompasses the purposes of the criminal code and principles of sentencing set out in Tennessee law.

The Sentencing Reform Act of 1989 as codified in T.C.A. §40-35-101, *et. seq.* (herein referred to as SRA) has the primary purpose to "assure fair and consistent treatment of all defendants by eliminating unjustified disparity in sentencing and providing a fair sense of predictability of the criminal law and its sanctions."[1] The SRA provides for the classification of criminal offenses, the classification of offenders, and the factors to consider in the sentencing process. While seeking to discourage criminal behavior under limited resources, the SRA requires that the sentence imposed, "bear a relationship to the seriousness of the offense" and provides for the use of alternative sentencing in some cases, reserving incarceration for those who pose the more serious risk to the community.[2]

Recognizing the need for deterrence and notice,[3] the Sentencing Commission intended that the purposes of the SRA be read in conjunction with Tennessee Code Annotated Section 39-11-101, which reads:

> The general objectives of the criminal code are to:
> (1) Proscribe or prevent conduct that unjustifiably and inexcusably causes or threatens harm to individual, property, or public interest for which protection through the criminal law is appropriate;
> (2) Give fair warning of what conduct is prohibited, and guide the exercise of official discretion in law enforcement, by defining the act and the culpable mental state that together constitute the offense;
> (3) Give fair warning of the consequences of violation, and guide the exercise of official punishment, by grading of offenses; and Prescribe penalties that are proportionate to the seriousness of the offense.

Although those committing Class C, D, or E felonies are "presumed to be a favorable candidate for alternative sentencing" the SRA also provides that evidence to the contrary can overcome this presumption.[4] So, given the fact that most driving related offenses are either misdemeanors, (DUI first through third offense), E felonies (DUI fourth), D felonies (fifth offense), or C felonies (sixth offense)[5] the presumptive sentence is alternative sentencing after the statutory minimum time is served (an exception is for C felonies of DUI 7th or above where the sentence is to be served at 100%, regardless of the range of the offender, which may be reduced by good time credit of 15%).[6] Therefore, it is important to give proper diligence and effort in establishing the facts and circumstances surrounding the commission of the offense to prove the enhancing factors that apply for use by the judge at sentencing.[7]

Prosecutors are required to give pre-trial notification of any intent to seek enhanced punishment as to the range of the offender above that of the standard, range I.[8] Following a finding of guilt, the sentencing court may require the district attorney to file "a statement with the court setting forth any enhancement or mitigating factors the district attorney general believes should be considered by the court."[9] The mitigating and enhancing factors for sentencing purposes are found in Tennessee Code Annotated Section 40-35-113 and 114, respectively. For the purposes of driving under the influence and related offenses, it is important to note that under most factual circumstances, one or more of those enhancing factors may apply. For example, in most driving under the influence cases, the offender will not be the only person on the roadway at the time of the offense. One enhancing factor that **may** apply in most of the driving under the influence cases is "[t]he defendant had no hesitation about committing a crime (Continued on page 5)

Thoughts on Sentencing (Continued)

when the risk to human life was high."[10] What needs to be established in the proof are the facts and circumstances of the offense that made the risk to human life high.[11] Such facts may include the time of the offense, the type of roadway, the location of the offense, the number of other people in the area of the offense (zone of danger), the type of vehicle used by the offender, or passengers in the car with the offender (including number and/or age of those passengers), etc., in addition to those indicators of impairment documented in the three phases of the driving under the influence investigation (vehicle in motion, personal contact, and pre-arrest screening). These facts will not only paint a picture of what the officer or other witnesses observed, but they will also give the Court the information it may use in its determination as to whether the defendant's actions posed a risk to human life that may be characterized as high.[12]

Some evidence supporting enhancement of a sentence beyond the minimum cannot be used or developed during the testimony until the guilt phase of a trial. Although a defendant's prior criminal history and/or prior criminal behavior can be used to enhance a defendant's sentence beyond the statutory mandatory minimums, that criminal history, including release/bond status at the time of the offense, cannot be fully addressed until after the finding of guilt.[13] If the defendant's status at the time of the offense or his criminal history is at issue, the state should be prepared to provide evidence of such status or criminal history at the time of sentencing. Certified copies of prior convictions, certified driving histories, the presentence report, testimony of the probation officer who prepared the report, testimony of the bonding agents, and other certified court records, are all sources of evidence of prior criminal behavior or history of the defendant that may be used not only for enhancement in misdemeanor cases above the minimums,[14] but may also be used to establish the proper range for felony convictions, or enhancement within the range on felony convictions as well.[15]

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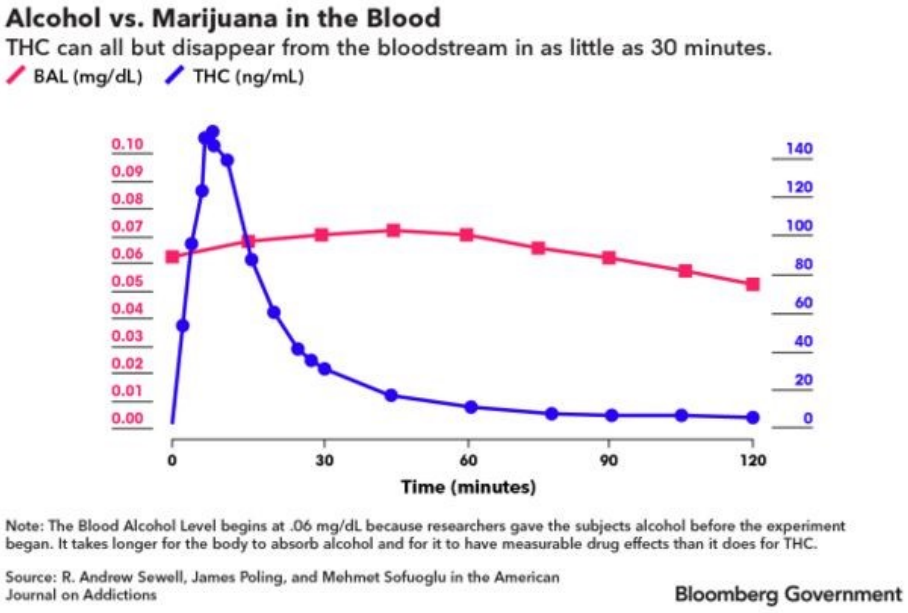
1. T.C.A. §40-35-102(2).
2. *See generally,* T.C.A. §40-35-102, Sentencing Commission Comments.
3. *Id.*
4. T.C.A. §40-35-102(6)
5. T.C.A. §55-10-402 sets out the mandatory minimum sentences for DUI related cases. Sentencing in DUI related cases is unique in that after service of his/her mandatory incarceration time, a defendant must serve the remainder of his/her sentence on probation. T.C.A. §55-10-402(e) reads, "**All persons sentenced under this part shall, in addition to service of at least the minimum sentence, be** required to serve the difference between the time actually served and the maximum sentence on probation." (emphasis added).
6. T.C.A. §40-35-501(v).
7. *S*ee T.C.A. §55-10-402 for the specific minimum time that must be served and other "special" sentencing requirements in DUI related cases. T.C.A. §40-35-203, 209.
8. T.C.A. §40-35-202(a).
9. T.C.A. §40-35-202(b)(1). The court may also require the defendant to file a statement with the court regarding known mitigating factors to him/her and indicate those that should be considered by the court. It is important to note that no defendant can be considered an especially mitigated offender under T.C.A. §40-35-109, unless he/she has no prior felony convictions and the court finds mitigating factors and no enhancing factors. (emphasis added).
10. There is no real dispute that driving under the influence is one offense that has a potential for property damage, serious bodily injury, or death of another. Out of the 36,560 fatalities occurring on our nation's roadways in 2018, 10,511 (29%) were alcohol-related fatalities according to National Center for Statistics and Analysis. (2019, October). 2018 fatal motor vehicle crashes: Overview. (Traffic Safety Facts Research Note. Report No. DOT HS 812 826). Washington, DC: National Highway Traffic Safety Administration.
11. Upon the entry of a plea of guilty, a recitation of the facts of the case is provided to the court. This recitation is important in those cases where there is an "open plea" with or without a sentencing hearing. A sentencing hearing will allow additional proof to be placed into the record and should be utilized to effectively provide facts and circumstances for enhancement of the sentence beyond that of the mandatory minimums. For an example, look at State v. Fulcher, No. M2007-02160-CCA-R3-CD, 2009 Tenn. Crim. App. LEXIS 45 (Jan. 20, 2009).
12. The judge must state on the record the enhancing and mitigating factors that he/she takes into consideration in imposing the sentence. See T.C.A. §40-35-210--Imposition of Sentence-Evidence to be Considered-Presumptive Sentence-Sentence Explanation.
13. *See generally,* Tenn.R.Evid. 401-404, 608-609. Usually, defendant's criminal history is not admissible at trial. The defendant's criminal history, including his/her status at the time of the offense (on probation, on bond, or other pre-trial or post-trial classification), is not relevant to the issue of whether or not the defendant was or wasn't driving under the influence in the pending case. The defendant, however, may open the door for that information to be relevant and admissible. A notice of intent to use prior convictions for purposes of impeachment should be filed to provide for the jury out hearing should the defendant "open the door" to the admissibility of those convictions. A prosecutor should also routinely file a "statement of enhancing factors" under T.C.A. §40-35-114 for the court to consider in all cases in which the defendant has a criminal history, even in misdemeanor driving under the influence cases.
14. Misdemeanor sentencing is covered by T.C.A. §40-35-302. In those cases, a separate sentencing hearing is not required, but enhancing and mitigating factors can be considered in calculating the percentage of sentence to be served in actual confinement prior to consideration for work release, furlough, trusty status and related rehabilitative programs. See also, State v. Troutman, 979 S.W.2d 271, 274 (Tenn. 1998) ("While trial courts cannot deviate from the length of the DUI sentence, trial courts do retain some discretion in determining what portion of the eleven month and twenty-nine day sentence a defendant will serve in confinement.").
15. The standard of appellate review for sentencing decisions is the "abuse of discretion standard, accompanied by a presumption of reasonableness". See State v. Bise,380 S.W.3d 682 (Tenn. 2012). The Tennessee courts of criminal appeals applied this standard in misdemeanor sentencing too in State v. Derrick Jerome Miller, No. M2019-00214-CCA-R3-CD, (Tenn. Crim. App. Nashville, Aug. 20, 2019) and State v. Willard Hampton, No. W2018-00623-CCA-R3-CD, (Tenn. Crim. App. Jackson, Mar. 12, 2019).

Marijuana and Driving Stoned

Recently, Bloomberg Government reported that the first three states to legalize recreational marijuana have seen car crashes soar, with law enforcement and regulators struggling to define driving high and determining ways to fight it. (https://about.bgov.com/news/pot-legal-states-struggle-to-stem-rise-in-driving-while-stoned/). According to data complied by the Insurance Institute for Highway Safety, Colorado, Oregon and Washington saw a combined 5.2% increase in the rate of police reported crashes after legalizing recreational marijuana, compared with neighboring states where such sales are illegal. This study tallied crash rates between 2012 and 2016. Auto-insurance collision claims in the above three states increased 6% since legalization, compared with the neighboring states without legal marijuana, according to the Highway Loss Data Institute.



Unlike alcohol, there is not a scientifically proven THC-impaired driving level. The main reason is due to the fact that THC (THC is the impairment inducing, active metabolite in marijuana), is fat soluble, while alcohol, is water soluble. (i.e, alcohol accumulates in the blood-stream (water based) while THC accumulates in the brain, liver and other fat cells of a body. (fat based). "The presence in the blood of marijuana, unlike alcohol, does not necessarily indicate impairment," said Staci Hoff, research director at the Washington Traffic Safety Commission. Staci also stated, "THC can all but disappear from the bloodstream in as little as half an hour, making it difficult to capture evidence that a person is too high to drive." "In Washington state, prosecutors are seeing more cases involving marijuana and driving because weed is now more accessible," said Moses Garcia, Traffic Safety Resource Prosecutor, MRSC. Helen Witty, president of Mothers Against Drunk Driving stated, "Drunk driving is still the No. 1 killer on our roads, but drugged driving, as it's legalized across this country, is a huge, emerging issue." She also stated, "I'm sorry that the legalization has happened before the science is there because I think that's a huge danger for our society and the protection of our people."

In a study presented in *Clinical Chemistry* 59:3, 478-492 (2013) titled, "Cannabis Effects on Driving Skills", it's authors, Rebecca L. Hartman and Marilyn A. Huestis, found that increased blood THC concentrations and driving within an hour after smoking were strongly associated with higher crash and culpability risks, with THC– induced driving performance decrements lasting greater than two (2) hours after smoking. Also, impairment experiments identified DATs (divided attention tasks) and executive-function tasks as the most sensitive to cannabis' effects. Critical-tracking tests, reaction times, divided-attention tasks, and lane-position variability all show cannabis-induced impairment. Epidemiologic data show that the risk of involvement in a motor vehicle accident (MVA) increases approximately 2-fold after cannabis smoking. Combining alcohol with THC exacerbated the observed effects.

This study was conducted because cannabis is the most prevalent illicit drug identified in impaired drivers. The authors also noted that past studies have been unreliable, showing mixed results, due to the prior studies using urine as the biological matrix (urine can only test for the inactive metabolite of cannabis, which can be detected for days after use, therefore, the subject would often be (Continued on page 7)

Marijuana and Driving Stoned (Continued)

observed well after acute effects have dissipated), historically there have been delays in sample collection, low THC levels were often used and polydrug use (multiple drugs) with potential to contribute to impairment were often found. This study found that experimental studies of driving performance under the influence of cannabis are the most rigorous way to evaluate impairment causality.

One of the more disturbing findings within this study, was what public attitudes revealed toward driving while under the influence of cannabis (DUIC). One fourth (26.3%) of 320 drivers who smoked cannabis in the previous year indicated a >90% likelihood of future DUIC, even after being shown the data on increased crash risk. Only 7.5% reported they would be unlikely to drive. The majority indicated >50% probability of future DUIC, even given the higher MVA risk. Regular smokers who had previously DUICs emphasized that publicity campaigns would not deter them from future DUIC. Only a high likelihood of apprehension and punishment was a better deterrent. Study findings suggested that random roadside testing (with arrest of those found cannabis positive) would be a better deterrent than advertising campaigns promoting the hazards of DUIC. In conclusion, the study found that "[C]onsuming cannabis before driving, with or without alcohol, is a common occurrence that produces substantial morbidity and mortality on the roadway."

The Bloomberg Government article indicated that Drug Recognition Experts (DREs) were the main law enforcement "defense against marijuana-impaired driving." "DREs found about 30% of people they screened in 2018 were impaired by cannabis, making it the top identified drug category in the U.S." A study presented in *Accident Analysis and Prevention* 92 (2016) 219-229 titled, "Drug Recognition Expert (DRE) examination characteristics of cannabis impairment", authored by, Rebecca L. Hartman, Jack E. Richman, Charles E. Hayes and Marilyn A. Huestis, found that study results support the cannabis impairment training taught in the Drug Evaluation and Classification Program (DECP) used by DREs. (The DECP is used in the U.S., Canada, England, Germany, China and other countries). Specific and reliable cannabis impairment indicators were identified and recorded. No significant differences were detected in outcome measure prevalences between cases with <5 *ug*/L and >5 *ug*/L blood THC. (although collection timing of the blood samples significantly affects the measured THC concentration levels as THC leaves the blood quickly) This study noted that drugged driving increased in recent decades, even as driving under the influence (DUI) of alcohol decreased. This study was based upon 302 DRE evaluations in which cannabis was the only drug category observed by the DRE and a blood test confirmed that cannabis was the only drug detected. These 302 cases were then compared against 302 evaluations on non-impaired individuals.

The psychophysical tests used in the DECP challenge suspects' coordination and ability to divide attention and follow directions. This is important since driving involves many complex, divided attention tasks and any intoxicant or drug that impairs divided attention, will also impair that person's ability to safely operate a motor vehicle. A DRE utilizes combined results from the various tests and observations throughout the 12-step DECP evaluation to form an opinion. This study identified a number of specific indicators that DREs are able to easily observe and recognize as evidence of cannabis impairment, based upon sensitivity, specificity, positive and negative predictive values, and efficiency. For example, the most reliable indicators of cannabis impairment include: elevated pulse; lack of convergence; rebound dilation; swaying; eyelid tremors; body tremors; missing finger-to-nose; on the One Leg Stand, swaying and using arms to balance; on the Walk and Turn, improper turn, using arms to balance, stopping and missing heel-to-toe. Again, no significant differences were detected in the test results between cases with blood THC measured <5 *ug*/L and those with >5 *ug*/L blood THC. Combined observations on psychophysical and eye exams produced the best indicators of cannabis impairment.

We have made great strides in convincing the public that they should not drink and drive, as proven by the declining numbers of drunk drivers, however, the same cannot be said for marijuana and driving. The attitudes of many marijuana users is that driving after use is acceptable. It is not. Impairment by any drug or intoxicant which prevents the clearness of mind or control of oneself to safely operate a motor vehicle is illegal.

Upcoming Training

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

Cops in Court - June 26, 2020, Harrogate, 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.

Prosecuting the Drugged Driver - August 11 - 12, 2020, Nashville, TN (Moved from June 17-18, 2020)
This seminar begins with an overview of the drugged-impaired driving problem in Tennessee and the use of a Drug Recognition Expert (DRE) as an effective tool in prosecuting these cases. We will discuss toxicology issues, jury selection and common defense challenges when dealing with drugged drivers. (Date may change due to any Coronavirus requirements.)

Lethal Weapon/Vehicular Homicide Seminar - Lexington, KY (*Cancelled*)
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, expert cross-examination, toxicology and a group discussion of current vehicular homicide cases.

Tennessee Lifesaver's Conference - August 26 - 28, 2020, Franklin, 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 20, 2020, Chattanooga, TN
Every year our DUI breakout session provides approximately four hours of education and training covering current impaired driving topics, including legal updates, trial strategies and new resources available to Tennessee prosecutors.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Impaired Driving Enforcement (ARIDE)
September 7-8, 2020, Pulaski, TN

DUI Detection & Standardized Field Sobriety Testing
June 1-3, 2020, Gallatin, TN
June 15-19, 2020, Cleveland, TN
July 13-15, 2020, Mountain City, TN

Drug Recognition Expert School (DRE)
June 15-25, 2020, Nashville, TN
September 21-October 1, 2020, Cookeville, TN
October 19-29, 2020, Jonesborough, 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, 2020, through March 31, 2020, 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, 2020, through March 31, 2020, since the last quarter were 1,517. This number is up from the previous quarter by 324. From looking at these numbers, we can see that the trend in DUI related dispositions in Tennessee has 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 30, 2019 were 1,488. The total number of dismissed and nolled cases this last quarter were 110. Across the State of Tennessee, this equates to 72.5% of all arrests for DUI made were actually convicted as charged. This percentage is slightly lower than the last quarter ending on December 31, 2019. Only 7.25% of the DUI cases during this current quarter were dismissed or nolled. Also, during this same period of time, only 288 of the total DUI cases disposed of were to different or lesser charges. Therefore, only 18.89% 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, 2020 through March 31, 2020. During this period, there were a total of 230 fatalities, involving 207 crashes, which is a significant decrease from the previous quarter. Out of the total of 230 fatalities, 42 fatalities involved the presence of alcohol and 30 fatalities involved the presence of drugs, signifying that 31.3% of all fatalities this quarter involved some form of alcohol and/or drugs.

The year-to-date total number of fatalities on Tennessee roads and highways is 230. This is more than the 206 fatalities incurred last year at this same time. 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 feel different, you drive different. Don't drive impaired.

The DUI Education Department of the TNDAGC hosted the 20/20 Class: Understanding the Physiology of Eye Movements and Impairment, on March 12-13, 2020 in Memphis, TN. The Southern College of Optometry and their faculty, along with Dr. Karl Citek of Pacific University College of Optometry, informed the class of common signs of alcohol and drug impairment that can be observed by involuntary eye movements. They also discussed the difference between movement caused by impairment and movement caused by a medical or environmental condition.

VEHICULAR HOMICIDE MURDERER'S ROW

State v. Steven Dale Davidson, Jr., 2020 Tenn. Crim. App. LEXIS 14

This case involves love, passion and volatile relationships resulting in the death of Nick Culver on April 15, 2016. Mr. Davidson was in a romantic relationship with Christy Flewellen. Christy had recently left her husband, Joshua Flewellen. At 4 a.m., on April 15, the defendant, Christy and their friend, Jayce Passons decided to go to Joshua Flewellon's home to retrieve Christy's green GMC truck. Mr. Passon wore a black ski mask. When they arrived at Joshua Flewellen's house, Joshua, Nick Culver (victim) and Lacey Davidson (Defendant's sister) were all in the house. Christy started her green GMC truck and Joshua, hearing this, jumped off of the roof of his house, into the back of the green GMC truck and climbed into the passenger seat of the truck, through the truck's window. The defendant, Mr. Passons, the defendant's sister and the victim all followed in their respective vehicles. The victim was driving a white Toyota and the defendant drove a yellow Dodge truck. The group drove to the parking lot of the Bear Cove Baptist Church.

At the church, Christy and Joshua got into a physical fight. The defendant intervened and he pinned Joshua to the ground by his throat. The victim kicked the defendant off of Joshua Flewellen, but the defendant did not fight with the victim. At some point, the defendant's sister hit the defendant's truck with a "maul", putting a hole in the hood of the defendant's truck. The group left the parking lot. Christy Flewellen left in her green GMC truck with Joshua Flewellen still in the passenger seat. The defendant's sister jumped into the back of the truck. The victim drove away in his Toyota and the defendant, with Mr. Passons left in the defendant's Dodge truck. The victim passed Christy Flewellen and then stopped in front of the truck. The GMC braked hard, tossing Lacey around in the back of the truck. Christy then drove around the victim's car. The victim had exited his Toyota and was standing inside the hinge of the open driver's door. The defendant accelerated and swerved toward the victim, striking him and pushing his car some distance. The Dodge truck went onto the opposite shoulder and then hit the victim's car again. The defendant then drove home, painted the truck black and hid it in the woods. The victim, having been struck and dragged for some distance, died from his injuries.

The defendant was convicted of voluntary manslaughter and vehicular homicide. Mr. Davidson had plead guilty to prior felonies for which he was on probation at the time of this case. The trial court sentenced the defendant to ten (10) years to serve, consecutive to four years for the probation violation. The court considered both aggravating and mitigating factors, giving greater weight to the aggravating factors. Mr. Davidson appealed his sentence. Specifically, the defendant objected to the court's application of enhancing and mitigating factors. All of the factors that the trial court must consider are listed in T.C.A. Section 40-35-210 (b). The CCA reviewed the trial court's judgment under an abuse of discretion standard. *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). The burden of showing that a sentence is improper is upon the appealing party. *See* T.C.A. Section 40-35-401, Sentencing Comm'n Cmts.; *see also State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001). Moreover, if the sentence is within the appropriate range and the sentence is in compliance with the purposes and principles listed by statute, appellate courts may not disturb the sentence even if they had preferred a different result. *See State v. Carter,* 254 S.W.3d 335, 346 (Tenn. 2008). "[a] trial court's misapplication of an enhancement or mitigating factor does not invalidate the sentence unless the trial court wholly departed from the 1989 Act, as amended in 2005." *Bise*, 380 S.W.3d at 706. The CCA found that the sentence was within the appropriate range and the trial court articulated its reasons for the sentence. Although some of the trial court's considerations were erroneous, (Continued on page 11)

VEHICULAR HOMICIDE MURDERER'S ROW

the enhancing and mitigating factors are merely advisory and any misapplication in this case does not give the CCA grounds for reversal when the trial court's sentence otherwise conformed with the mandates of the Sentencing Act. *See Bise,* 380 S.W.3d at 709-10; *Carter,* 254 S.W.3d at 346. *See also, State v. Andrew Young Kim,* No. W2017-00186-CCA-R3-CD, 2018 WL 1679346, at *11 (Tenn. Crim. App. Apr. 6, 2018); *State v. Joshua Iceman,* No.M2016-00975-CCA-R3-CD, 2017 WL 4805118, at *32 (Tenn. Crim. App. Oct. 24, 2017), *perm. app. denied* (Tenn. Feb. 14, 2018); *State v. Richard Dickerson,* No. W2012-02283-CCA-R3-CD, 2014 WL 1102003, at *12 (Tenn. Crim. App. Mar. 19, 2014) (all three cases concluded that the trial court improperly considered two of three enhancement factors it applied but, nonetheless, otherwise conformed with the mandates of the Sentencing Act, so the respective defendants were not entitled to relief). The CCA ruled that Mr. Davidson was also not entitled to relief and the judgments of the trial court were affirmed.

State v. Johnny David Key, 2019 Tenn. Crim. App. LEXIS 802

Mr. Key plead guilty to one count of vehicular homicide, a Class B felony, and one count of vehicular assault, a Class D felony. The agreement called for a range I sentence of eight years, concurrent to four years, with the manner of service to be determined by the trial court. After a sentencing hearing, Mr. Key was ordered to serve an effective eight-year sentence in TDOC custody. Mr. Key appealed his sentence. On June 20, 2016, Mr. Key veered from his lane of travel into oncoming traffic and collided head-on with a van being driven by Sarah Phillips. Her passenger and then-fiancé, Jeremy Banks, died from his injuries sustained in the crash and Ms. Phillips was also injured. Mr. Key's blood alcohol content was 0.131%. Mr. Key initially denied drinking, but later admitted to drinking six beers on the day of the crash. Mr. Key's weight was listed as 340 lbs at the time and he complained of pain from mowing and moving furniture that day. He told his wife that he was going to buy more beer, due to the pain, but she suggested an Epsom salt bath instead of drinking beer.

Mr. Key was a then-forty-nine-year-old with no prior criminal history. The risk assessment reflected that Mr. Key was at low risk to reoffend. The trial court noted this assessment, that Mr. Key accepted responsibility, that he would comply with rehabilitative requirements, that measures less restrictive than confinement had not been applied, that no proof showed confinement was particularly suited to provide an effective deterrent and that the seriousness of the offenses was reflected in the charged offenses. However, the trial court found that unduly depreciating the seriousness of the offenses by granting probation was the compelling concern of the court. The court found that the defendant was willing to get in a car and drive after drinking despite his having been urged not to by another person and his causing the death of one person and the injury of another. The trial court stated that this was the "overriding factor in determining this defendant is not a good candidate for alternative sentencing" His actions were completely foreseeable. The trial court ordered Mr. Key to serve his effective eight-year sentence in custody.

In determining whether the trial court abused its discretion, the CCA noted that the defendant's vehicular homicide conviction was a Class B felony and as such, he was not considered to be a favorable candidate for an alternative sentence for this offense. *See* T.C.A. Section 40-35-102(6)(A) (2018). The record reflects that the trial court engaged in a detailed analysis of the statutory factors and determined that the egregious nature of the offense required confinement in order to avoid depreciating the seriousness of the offense. The evidence that the defendant chose to drive on a frequently traveled road while he was intoxicated, well beyond the legal limit, was compelling to the trial court. Also, Mr. Key's conduct caused great damage to two victims and the defendant himself. The CCA affirmed the judgments of the trial court.

Voluntary Consent (Continued)

evidentiary consequences on motorists who refuse to comply." Although the *Birchfield* court stated that it is coercive to impose criminal penalties on the refusal to submit to a blood test, when the *Birchfield* court applied its ruling to the different petitioners, it only referred Beylund's case back to the trial court for a hearing to determine whether or not his consent was still voluntary based upon a totality of the circumstances. (Beylund had consented to a blood test after being threatened with criminal penalties if he refused the blood test. The threat of criminal penalties was determined to be only *one* factor to consider, when determining the voluntariness of consent.) "[s]ometimes consent to a search need not be express, but may be fairly inferred from context." *Id.*

The CCA, in the *Hafer* case, then discussed whether a warrantless blood draw was justified based upon the driver's implied consent to submit to them. Although the U.S. Supreme Court has chosen not to directly answer this question, the CCA concluded that no credible argument could be made that the statutory implied consent actually supplies the type of voluntary consent sufficient to create an exception to the warrant requirement. The CCA noted that the *Birchfield* court relied upon voluntary consent and the *Mitchell v. Wisconsin,* 139 S.Ct. 2525 (2019) case relied upon exigent circumstances. In the *Hafer* case, the CCA determined that, based upon a totality of the circumstances, Ms. Hafer voluntarily gave consent twice, before the implied consent form was read to her. They also concluded that the officer's advisory did not extract the defendant's consent "on pain of committing a criminal offense." *Birchfeild*, 136 S. Ct. at 2186.

Ms. Hafer also claimed that she was under the influence of many medications that impaired her judgment and reasoning, although she provided no evidence at the hearing to support such a conclusion. The blood test results indicated that Ms. Hafer had carbamazepine, diazepam, nordiazepam, and clonazepam in her system, but no medical evidence was presented to suggest what effect, if any, these medications would have on her ability to voluntarily consent to a blood draw. Nothing in the video or the testimony of the witnesses suggested that she was injured, too intoxicated or too impaired to understand her circumstances and to voluntarily consent to a blood draw. She used a cell phone while she was in the police vehicle to place a call and she stated that she was "going to jail." No evidence suggests that the defendant's "will was overborne" or that "her capacity for self-determination was critically impaired." *State v. Reynolds,* 504 S.W.3d 283, 307 (Tenn. 2016) (citing *Cox*, 171 S.W.3d at 185). (Merely claiming to be too impaired is not enough.)

In addition, Ms. Hafer claimed that she did not know that she could refuse the blood test. The CCA stated, '[K]knowledge of the right to refuse,' however, 'is not a prerequisite of a voluntary consent.' *Schneckloth*, 412 U.S. at 234. … Our state supreme court has specifically 'decline[d] to impose a requirement that the subject be informed of the right to refuse consent' and has '[i]nstead, … continue[d] to adhere to the *Schneckloth* totality of the circumstances criteria, which may specifically include a subject's knowledge of the right to refuse consent.' *State v. Cox*, 171 S.W.3d 174, 184 (Tenn. 2005)." The State argued "Good Faith" on the part of the officer, but the CCA found that Hafer's consent was voluntary. Therefore, the good faith argument was not addressed. The *Hafer* court appears to have minimized the ruling in *State v, Henry,* 539 S.W.3d 223 (Tenn. Crim. App. 2017) and decided to follow prior state and federal case rulings regarding the voluntariness of consent. The CCA reversed the trial court's granting of the defendant's motion to suppress and the case was remanded to the trial court for further proceedings consistent with this opinion.

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