



DUI NEWS

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THE IMPORTANCE OF JURY SELECTION

Think of jury selection like this: you are preparing for a bench trial. The judge comes in and before any proof is presented, you get the opportunity to question the judge on a number of relevant topics. If you don't like the judge's opinions or experiences, you politely ask the judge to leave and then you can converse with another judge. You don't have to keep that judge either. In fact, you get to continue questioning judges until you find a judge you think will pay attention, use common sense, follow the law, apply the law appropriately and be fair. How great is that! That process is known as jury selection, choosing the trier of fact for our jury trials.

By the time a case is set for trial, you should be able to prove the elements of the case beyond a reasonable doubt, or the case should not be set for trial. You cannot change the facts, but you can change who the trier of facts will be. That is the juror that will hear and decide the weight and relevance of the facts. If the jury comes back with a verdict of not guilty, it is not because they were a "bad jury." The reason is usually because you did not properly voir dire them, or investigate and inform them regarding the law and the subject matter involved. You must also show them that it is acceptable to say guilty once the proof has been presented.

The most troublesome thing that a juror has ever said to me was, "We all think he was guilty, but we do not think that you proved it beyond a reasonable doubt." (If they all thought he was guilty, then I did prove it beyond a reasonable doubt, but I never voir dired on reasonable doubt). This was after a DUI jury trial in which the jury acquitted the defendant. They were not a "bad jury," but I did a very poor job during jury selection. If you are only concerned about where they live and where they are employed, but do not also focus on the law and the nature of your case, then you are missing an opportunity to find out if they know and understand the law and how the facts of your case will relate to the law. Twelve jurors will have twelve different interpretations of the law. This missed opportunity will result in the disappointment of hung juries or acquittals.

Start jury selection by helping to reduce the stress of jury service. Most citizens have never been asked personal questions in a public setting before, or even been inside of a courtroom. They are usually anxious over what they will be asked and if anything will be embarrassing. Be the gracious host. Explain the process and start with "softball" questions like the pronunciation of their name and their occupation. Look them in the eye when they respond, be attentive and ask follow up questions. Have a conversation. There is information that you need, but you can ask it in a way that reduces stress and embarrassment. For example, don't ask if they smoke marijuana or suffer from alcoholism. Instead, ask if they have ever been in a situation in which drugs were used, or have they or their family members ever been impacted by alcoholism. If they are forthcoming great. If not, you still have valuable information to consider. (Continued on page 12)



RECENT DECISIONS

State v. Kimberly Ann Lennon, 2020 Tenn. Crim. App. LEXIS 396 (Drugged driver, ARIDE)

This case involved an automobile collision in which the defendant was not the at-fault driver. The other driver admitted to running a stop sign. THP Trooper, Joshua Potts, was called to the scene and met with both drivers. At the time of the investigation Trooper Potts was an instructor for Advanced Roadside Impaired Driving Enforcement (ARIDE) classes, which teaches law enforcement officers to “detect impairment other than alcohol.” By the time of the trial, Trooper Potts had become certified as a Drug Recognition Expert (DRE) and an SFST instructor. Initially Trooper Potts smelled alcohol and marijuana when Ms. Lennon got out of her vehicle and she admitted to taking prescription medication. The defendant indicated many signs of impairment during the field sobriety tests. A blood sample indicated a BAC of 0.062%, 2 1/2 hours after the collision. Testimony of a TBI agent indicated a possible BAC of 0.08 to 0.12 at the time of the collision. Ms. Lennon’s blood was also positive for alprazolam (Xanax) and marijuana (THC). A TBI agent testified to the increased impairment effects of taking alcohol, alprazolam and marijuana together. A jury convicted Ms. Lennon of DUI and the Court of Criminal Appeals confirmed the judgments of the trial court based upon the sufficiency of the evidence presented at trial.

State v. Jimmy M. Cruse, 2020 Tenn. Crim. App. LEXIS 433 (Sufficiency of the evidence)

During a traffic stop on November 18, 2017, Deputy King of the Madison County Sheriff’s Office observed Mr. Cruse drive by and then crash into a guardrail on the shoulder of Highway 45 in Jackson, TN. While checking on Mr. Cruse, Deputy King observed the defendant to have “watery” and “reddish” eyes, he had urinated on himself and he showed indications of impairment. An opened whiskey bottle was found in the vehicle. Officer Overton, Jackson Police Department, arrived at the scene and took over the investigation. Mr. Cruse said that he thought Deputy King was pulling him over and he became scared and crashed. Mr. Cruse performed poorly on field sobriety tests and he was arrested. One opened and one empty beer bottle, in addition to the opened whiskey bottle was discovered in the vehicle. After reading the implied consent form, Mr. Cruse offered giving up names of drug dealers and murderers, etcetera, in exchange for being let go. A jury found Mr. Cruse guilty of DUI 3rd offense and the trial court sentence him to serve eleven months, twenty-nine days in the Madison County Jail. Mr. Cruse claimed that there was insufficient evidence to convict him and the jury should have given greater weight to his testimony over the testimony of the officers. The Court of Criminal Appeals determined that the weight of the evidence and the credibility of the witnesses was properly determined by the jury and the evidence was reconciled in favor of the State. The CCA will not reweigh the evidence. The judgments of the trial court were affirmed.

State v. David Rivera, 2020 Tenn. Crim. App. LEXIS 487 (Reasonable suspicion, taillight dim)

Mr. Rivera was stopped on the Parkway in Pigeon Forge, TN for driving with a “passenger side taillight out.” A video of the incident showed that the right rear running light was initially dimly lit, then not lit for 23 seconds and then dimly lit again, while the left rear running light stayed brightly illuminated. On cross examination the officer stated that the light was operational, but “it’s not in good working order.” The officer stopped the vehicle for a violation of TCA 55-9-402. The said light had been repaired previously with taillight tape. Mr. Rivera performed poorly on SFSTs and was arrested for DUI 4th offense. Mr. Rivera plead guilty to DUI 4th offense and reserved a certified question of law pursuant to TRCP Rule 37. Mr. Rivera complained that if light repairs did not return the light to factory specifications, than a repaired light would always provide a reasonable basis for an investigative stop, which was not contemplated by State v. Brotherton, 323 S.W.3d 866 (Tenn. 2010). The Court of Criminal Appeals noted that the Tennessee Supreme Court in Brotherton emphasized that reasonable suspicion does not require evidence proving the defendant actually violated the law, only that the officer had probable cause to believe that a violation had occurred. In Brotherton the officer mistook a fog light for a brake light. After reviewing the video, the CCA determined that the trial court properly ruled the officer had probable cause to stop the defendant’s vehicle. (Continued on page 3)

RECENT DECISIONS (Continued)

State v. Mary Ann Scates, 2020 Tenn. Crim. App. LEXIS 533 (Consecutive sentencing factors)

On the evening of March 28, 2017, Cassandra Coleman, her two daughters and a friend were struck from behind by Ms. Scates vehicle, causing the victim's vehicle to roll several times. The victims suffered broken bones and other severe injuries. Ms. Scates indicated impairment on several SFSTs and was arrested for DUI 2nd offense, reckless aggravated assault and vehicular assault. The prior DUI conviction involved a single vehicle crash. Ms. Scates admitted to a problem of driving while on prescribed medication. Ms. Scates plead guilty to the above charges and was sentenced to 4 years for the reckless aggravated assault consecutive to 4 years for the vehicular assault. The other counts were run concurrent for an effective sentence of 8 years confinement. Ms. Scates appealed the consecutive sentencing order. A trial court may order multiple offenses to be served consecutively if it finds by a preponderance of the evidence that a defendant fits into one of seven categories enumerated in TCA Section 40-35-115(b). "Any one of these grounds is a sufficient basis for the imposition of consecutive sentences. State v. Pollard, 432 S.W.3d 851, 862 (Tenn. 2013). The judgments of the trial court were affirmed by the CCA.

State v. Jonathan Montgomery, 2020 Tenn. Crim. App. LEXIS 538 (Physical control of vehicle)

On March 3, 2017, Officer Sevier of the Smyrna Police Department came upon a vehicle in a ditch with Mr. Montgomery standing next to it. As the officer came closer, Mr. Montgomery stumbled away from the scene and threw away the keys to the vehicle once he was stopped. Officer Sevier smelled alcohol on Mr. Montgomery and he had slurred speech. He also had cuts on his forehead, which the defendant said he obtained while shaving. The defendant refused SFSTs or to have his blood drawn. The vehicle had four bottles of whiskey, one of which was empty, one three-fourths empty and two were full. The vehicle was registered to Mr. Montgomery. A blood draw was obtained with a search warrant. His BAC was 0.208%. The jury convicted Mr. Montgomery of DUI 6th offense and he was sentenced as a Range I standard offender to three years incarceration. Mr. Montgomery appealed the sufficiency of the evidence since no one observed him driving. The Court of Criminal Appeals examined the totality of the circumstances and applied the five factors used to determine physical control of a vehicle as stated in State v. Butler, 108 S.W.3d 845, 850 (Tenn. 2003) quoting State v. Lawrence, 849 S.W.2d 761, 765 (Tenn. 1993). The CCA determined that "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." The judgments of the trial court were affirmed.

State v. Fallon Jenkins Moore, 2020 Tenn. Crim. App. LEXIS 574 (911 call citizen/anonymous)

At approximately 2:35 a.m., a 9-1-1 call was received from a concerned citizen, Chris Flint, regarding a possible drunk driver in Bristol, TN. Mr. Flint stated two females just left a bar and were extremely under the influence. He tried to call them an Uber, but they were about to get into a gray or silver Ford or Hyundai parked near a motorcycle. He gave a location near State Line Bar and a description of the females as middle aged. Officer Keller of the Bristol Police Department responded to the scene within two minutes of the call. As officer Keller arrived near State Line Bar, he was flagged down by a man who said he was the caller and pointed to a silver vehicle parked near a motorcycle. The officer observed two people with long hair in the vehicle. The taillights of the vehicle were illuminated. Officer Keller initiated his blue patrol lights based upon reasonable suspicion to investigate further. A video of the entire incident was played for the court. The trial court granted a motion to suppress and the state appealed. If information is received from a known informant, the information "'is presumed reliable,' especially 'where circumstances indicate the information was gained from first-hand experience, and the motivation for communicating with law enforcement authorities is based upon the interest of society or personal safety.'" State v. Christian Philip VanCamp, 2014 WL 7399671, at 4* (Tenn. Crim. App. Dec. 29, 2014) (quoting State v. Day, 263 S.W.3d 891, 904 (Tenn. 2008). The CCA determined that Chris Flint was a concerned citizen and presumed reliable and even if the tip was anonymous, sufficient information was corroborated. The order of the trial court was reversed. (Continued on page 4)



RECENT DECISIONS (Continued)

State v. Janice A. Campbell, 2020 Tenn. Crim. App. LEXIS 592 (Certified question not dispositive)

Deputy Tyler, Franklin County Sheriff's Office, received a dispatch request to make contact with Ms. Campbell, driving a gray Buick at TJ's Liquor store. Deputy Tyler could not locate Ms. Campbell or her gray Buick. A second dispatch regarding the defendant and her Buick sent the deputy to an address on Clark Road. At that address, Micki Peters, defendant's daughter, advised the deputy that Ms. Campbell just left and is probably going to an address on Round the Mountain Road. Deputy Tyler then went to Round the Mountain Road and made contact with Ms. Campbell inside of the home. They walked outside to talk, and Deputy Tyler smelled alcohol and noticed Ms. Campbell was very unsteady on her feet. Ms. Campbell admitted to drinking George Dickel. She failed SFSTs and a blood draw indicated a BAC of 0.19%. Ms. Campbell filed a motion to suppress based upon the officer not observing the defendant driving and she was in a private home when the officer first made contact. The trial court denied to motion to suppress. Ms. Campbell entered a guilty plea to DUI and reserved a certified question on appeal. The state and the court agreed that the question would be dispositive of the case. The CCA stated that they "must make an independent determination that the certified question is dispositive." State v. Dailey, 235 S.W.3d 131, 135 (Tenn. 2007) Since the defendant's daughter saw the defendant driving while highly intoxicated, the motion would not be dispositive. The appeal was dismissed.

State v. Terry William Smith, 2020 Tenn. Crim. App. LEXIS 600 (Split confinement, TCA 40-35-501)

Mr. Smith was observed travelling at a high rate of speed on I-75 in Hamilton County. Chattanooga Police Officer Buckner gave chase and observed Mr. Smith leave I-75 in a dangerous manner, run a red light and evade Officer Buckner. Officer Buckner eventually stopped Mr. Smith, observed the smell of alcohol, red watery eyes and an unsteady gait. An empty container of Twisted Tea, Hard Ice Tea was found in the vehicle. A search warrant was obtained, and Mr. Smith's BAC was 0.152%. A jury convicted Mr. Smith of DUI, felony reckless driving, evading arrest and other associated crimes. The trial court sentenced him to two years split confinement. (Probation after 11 months, 29 days jail) The Court of Criminal Appeals ruled that the evidence was more than sufficient to support the convictions. Although the CCA found spit confinement appropriate, "inmates with felony sentences of two (2) years or less shall have the remainder of their original sentence suspended upon reaching their release eligibility date." T.C.A. Section 40-35-501(a)(3). (Seven months, six days in Mr. Smith's case) Since the original sentence exceeds this amount, the sentence must be modified to seven months, six days confinement. All other judgments of the trial court are affirmed.

State v. Jennifer Danine Harper, 2020 Tenn. Crim. App. LEXIS 612 (Sufficiency of the evidence)

Ms. Harper and her vehicle were involved in a crash on I-65 in White House. Ms. Harper stated that she was rear-ended and forced off the road. The front bumper was missing and there was fresh damage to the rear of the vehicle. Officer Pearce arrived on scene and smelled alcohol on Ms. Harper's breath, but she denied any alcohol consumption. Ms. Harper performed poorly on two SFSTs and was arrested for DUI. An inventory search of the vehicle found no alcohol containers. A warrant was obtained for a blood sample, which indicated a BAC of 0.162%. A jury trial was waived and at the court trial, Ms. Harper testified that after the crash, she was upset, nervous and worried. She claims to have chugged ten to eleven ounces of a bottle of bourbon in the back seat of the vehicle and then threw the bottle in the back seat. A TBI agent testified earlier that she would have had to drink eight "standard drinks" to get to 0.162% BAC. Ms. Harper claimed that she recovered the bottle from the back of the vehicle after she picked it up from the tow yard. She provided no witnesses to the bottle's recovery and she did not provide the bottle as evidence. The trial court found Ms. Harper's testimony not credible, but Officer Pearce's testimony was found credible and consistent with the video. The CCA ruled, "As this court has repeatedly stated, questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this court." State v. Tuttle, 914 S.W.2d 926, 932 (Tenn. Crim. App. 1995). All judgments were affirmed.

THE NEED FOR CASE REVIEW

Look at the photo below. What is the first thing you see? How would you describe it? Have someone else look at the photo. Ask that person what he or she sees. Is it the same thing? Did you each describe it the same way? The answer most likely is no. Why? Well, just like those twelve jurors use their individual life experiences and knowledge to look at the evidence, individual prosecutors do as well.



During my career, I have attended several training classes, tried more than a few cases, read a handful of books, and asked a whole lot of questions. The one thing that I have learned in my twenty-three years of practice (twenty-one as a prosecutor) is that there is always more to learn, more to the story, more to look at, and more to communicate than my human brain can process under normal circumstances. Now, add the stress of preparing for and responding to motions and trials to the mix and my human brain's ability is narrowed. At those times, it is best to remember the adage, "two heads are better than one" and ask for another person's perspective on the facts and the evidence.

I remember one case where all I could see was the facts, just the facts, and not the circumstances surrounding those facts. In my mind, I was ready for anything. I had talked with the victim's family, the investigating officers, hearing witnesses (no one saw the offense, they just heard it) and was stuck on a certain view. Then, I reviewed the case and talked with another assistant in the office, Assistant District Attorney Laura Bush. It was only after speaking to her that I was able to broaden my focus. After talking with her, I could see some of the possible issues with the evidence in the case and how a jury may view such evidence. It was with her guidance that I was able to step back and see the center and the perimeter issues. After that meeting, I was able to talk again with everyone involved and the case was resolved to the satisfaction of the victim's family, the investigators, and the witnesses.

Out of curiosity, did you see the old man or the kissing couple in the photo? It doesn't matter, both are there. If you concentrate on the center of the photo, you clearly see the couple kissing under an arbor. If you just focus on the perimeter, you see the old man's face. The same analogy can be said of case review, if you focus merely on the elements of an offense, you may overlook possible defenses or defense arguments and be ill prepared to effectively address and minimize issues. So, the next time you are preparing for a motion hearing or a trial, take a step back and review the case with another prosecutor in your office. After all, you don't want to be the person who doesn't see the forest for the trees or in our example the kissing couple for the old man.

Cops in Court Seminar

On September 10, 2020, the Traffic Safety Resource Prosecutors presented our Cops in Court seminar in Johnson City, TN. Many local law enforcement officers and prosecutors participated in this all day seminar which emphasizes the importance of communication between law enforcement, prosecutors, judges and jurors. The on-scene investigation may be fantastic, but if that information is not properly communicated to the other justice participants, then the DUI case will not be treated appropriately nor will it end with a reasonable result.





INFOTAINMENT SYSTEMS in CRASH INVESTIGATIONS

According to the United States Department of Homeland Security (USDHS), “[m]odern vehicles have an average of 70 computers and five networks that connect the computers and generates about 25 gigabytes of data per hour.”¹ These systems cover more than just the safety functions such as seat belt usage, airbag deployment, automatic head light or windshield wiper activation; they also cover driver activity, vehicle movement, and the use of various vehicle functions (opening and closing of any and all doors, trunk, and hood).

In the early 2000’s, automobile manufactures began installing in-vehicle infotainment and telematic systems. Early, basic systems would permit Bluetooth cellular phone integration and radio control via push button activation on the steering wheel or touch screen activation in the center dashboard-console area of the vehicle. Current infotainment systems, depending on the vehicle manufacturer now provide: (1) head-up display to allow for the driver to continue looking at the roadway, (2) liquid crystal display or thin film transistors screens to provide more ease in selection of functions, (3) smartphone pairing to allow for use of cellular devices to send and receive calls, texts, and access contact lists hands-free, (4) application usage (Pandora, Google Maps, Apple CarPlay, etc.), (5) climate control functions, (6) multimedia support, and (7) car performance assessment and functions (rear view camera display, park assist, fuel and battery usage, etc.).² These systems create navigational and driver control data generated during the operation of the vehicle. These systems also acquire data from connected devices like smartphones, media players, USB drives, or SD cards.

In 2013, the USDHS Science and Technology Division recognized the value of this data and began supporting the development of iVe by Berla Corporation. A digital forensic tool kit, iVe helps law enforcement agencies operating with a warrant to obtain digital evidence from vehicle navigation and infotainment systems.³ Since 2013, other companies have developed their own applications to access and acquire digital information including DIGITPOL, US Forensic, KinetiCorp, and Bosch, just to name a few, with each company competing to have their software support more and more models from major manufacturers as the market continues to add and change infotainment and telematic systems.

So, how can this data stored in the infotainment system benefit a crash reconstructionist/investigator? Depending on whether the vehicle is supported by the digital forensic software, the data that can be retrieved from infotainment and telematic systems, which can indicate the Bluetooth ID from paired and unpaired phones; the history of the vehicle’s geographical location; provide photo, media files, and music file content; the call logs, history of radio data systems (RDS) information (time, station identification and programming), etc.⁴ This information may be helpful to law enforcement to determine what events contributed to or caused a crash. Depending on the facts of the case, this information may be used to support other evidence of impaired or distracted driving. Also, this information may have practical application in the prosecution of theft, kidnapping, stalking, and non-vehicular crimes as well.

1. <https://www.dhs.gov/publication/st-project-ive-vehicle-navigation-infotainment-system-forensics-law-enforcement-fact>
2. <https://concisesoftware.com/car-infotainment-system-guide/#:~:text=An%20in%2Dvehicle%20infotainment%20system,commands%2C%20and%20many%20other%20features.>
3. *Id.*
4. Various sources were consulted. Just like the data provided by event data recorders in triggering events, the data provided by infotainment and telematic systems is very much dependent upon the forensic company used and the vehicle manufacturer.

ROADS DEADLIER AS THE COUNTRY DROVE LESS

The National Safety Council (NSC) estimates that the United States saw a twenty percent jump in motor vehicle death rates in the first six months of 2020, despite quarantines.¹ The rate increase comes in spite of a seventeen percent drop in the number of miles driven between January and June. According to preliminary data, roads were deadlier even as the country drove less. Tennessee crash data also indicates an increase in death rates this year, in spite of the number of vehicles on the roads and the miles traveled being substantially less. As of September 29, 2020, Tennessee has recorded approximately 879 fatalities involving 817 crashes, which is an increase of 44 fatalities over this same time period last year.² This is all during a period of government shut downs and Covid-19 shelter-in-place orders. According to NSC estimates, the twenty percent increase in the death rate is the highest jump NSC has calculated for a six-month period since 1999.³ One noticeable factor is that with less vehicles on the roads, the speed of the remaining vehicles travelling has increased considerably.

In June, when many states ended three straight months of quarantine, the number of miles driven across the United States remained thirteen percent lower than the previous year, but the fatality rates and the number of fatalities both skyrocketed. (The rate of death per 100 million miles driven jumped a staggering thirty-four percent)⁴ These more dangerous roads will reverse traffic safety gains made over the last few years. After three straight years of rising fatality numbers between 2015 and 2017, the United States had been experiencing a leveling off and even a small decline in overall fatalities. Seven states with notable increases were:

- Vermont, 10 more deaths, an increase of 91%
- Connecticut, 45 more deaths, an increase of 44%
- D.C., 5 more deaths, an increase of 42%
- South Dakota, 11 more deaths, an increase of 34%
- Rhode Island, 8 more deaths, an increase of 31%
- Arkansas, 51 more deaths, an increase of 21%
- Missouri, 68 more deaths, an increase of 18%⁵



The NSC and their partners are committed to working to improve roadway safety by urging motorists to: obey speed limits, even if roads are clear and traffic is light; practice defensive driving, buckle up, designate a sober driver or arrange alternative transportation (Uber, Lyft, taxi or phone a friend), get plenty of sleep to avoid fatigue and drive attentively, avoiding distractions; Stay engaged with teen drivers' habits and practice with them frequently (tips are available at DriveitHOME.org); follow state and local directives and stay off the roads if officials have directed you to do so; be aware of increased pedestrian and bicycle traffic, particularly in urban areas (including electric scooters), conversely, pedestrians and bicyclists should be careful as streets become congested again; and, organizations and employers are encouraged to join the "Road to Zero Coalition," a 1,500 member group committed to eliminating roadway deaths by 2050.⁶ Speed kills, drive safe!

1. <https://www.nsc.org>.
2. See DUI Tracker page 9 (TITAN Network).
3. <https://www.nsc.org>.
4. Id.
5. Id.
6. Id.



UPCOMING TRAINING

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

Cops in Court - October 5, 2020, Sumner County Sheriff's Office, Gallatin, TN

This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trial presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation from 1 p.m. to 4 p.m.

TNDAGC Fall Conference - October 20-23, 2020, (Virtual on Zoom)

The DUI training department will offer DUI training sessions on October 20, 2020, from 12:45 p.m. to 4 p.m., before the Fall Conference general training seminars begin.

Cops in Court - November 17, 2020, ROCIC Training Center, Nashville, TN

This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trial presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation from 1 p.m. to 4 p.m.

Ethics in Media, Victim Rights and DUI Cases - December 1, 2020, (Virtual training)

The DUI training department will offer two hours of training focused on ethics in DUI cases. This training will cover ethics issues regarding victim rights, media relations and DUI specific issues. This training will be provided for prosecutors, DUI Coordinators and Victim-Witness Coordinators.

Cops in Court - December 3, 2020, 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 trial presentation in which each officer experiences a direct and cross examination.

Cops in Court - January 28, 2021, Pigeon Forge, TN

This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trial presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation from 1 p.m. to 4 p.m.

YOU KNOW THE RISKS



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TENNESSEE HIGHWAY SAFETY OFFICE

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Traffic Crash Investigation

October 5-16, 2020, Cleveland, TN

Law Enforcement Instructor Development

October 26-30, 2020, Fort Campbell, Kentucky

DUI TRACKER

DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from July 1, 2020, through September 30, 2020, 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, 2020, through September 29, 2020, since the last quarter were 1,556. This number is up from the previous quarter by 39. From looking at these numbers, we can see that the trend in DUI related dispositions in Tennessee has increased slightly. Due to Covid-19, many courts were closed or moved dockets to virtual hearings. Only a few courts have returned to conducting jury trials. In spite of these changes, our DUI prosecutors have continued to be vigilant in the prosecution of impaired driving in their districts. The total number of guilty dispositions during this same period of July 1, 2020 through September 29, 2020 were 1,088. The total number of dismissed cases were 86 and 42 were nolle prossed. Across the State of Tennessee, 69.92% of all arrests for DUI related charges were actually convicted as charged. This percentage is slightly lower than the last quarter ending on June 30, 2020. Only 8.23% of the DUI cases during this current quarter were Dismissed or nolle. Also, during this same period of time, only 300 of the total DUI cases disposed of were to different or lesser charges. Therefore, only 19.28% of the total cases were disposed of to another charge. Even with closed courtrooms and virtual dockets, the judicial process continues. We must continue to contribute where we can within this process. Impaired driving does not stop due to Covid-19.

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, 2020 through September 29, 2020. During this period, there were a total of 346 fatalities, involving 319 crashes, which is a large increase from the previous quarter. Out of the total of 346 fatalities, 58 fatalities involved the presence of alcohol, signifying that 16.76% of all fatalities this quarter had some involvement with alcohol. This percentage is lower than the previous quarter. Further, there were a total of 38 fatalities involving the presence of drugs, signifying that 10.98% of all fatalities this quarter involved some form of drugs.

The year-to-date total number of fatalities on Tennessee roads and highways is 879. This is up by 44 from the 835 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. When Covid-19 rules shut down businesses and stay at home orders were issued, the number of people driving went down substantially and the number of fatalities decreased. However, the traffic on our highways during this period of time increased the average speed of their vehicles and the rate of fatalities increased also. Currently, the number of Tennessee drivers is still less than last year, but the number of fatalities is higher. Speed is an incredible catalyst in increasing the number of fatalities in our state. Combined with an impairing substance, speed has a synergistic effect on fatality rates of involved crashes. 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, prosecutors and other community leaders that will we be able to stem the tide of rising fatalities. Please slow down, drive responsibly and arrive home safely.



VEHICULAR HOMICIDE MURDERER'S ROW

State v. Catherine Ann Pinhal, 2020 Tenn. Crim. App. LEXIS 477

Ms. Pinhal plead guilty in 2019 to vehicular homicide by reckless conduct, a Class C felony, and two counts of possession of contraband in a penal facility, a class C felony. On September 22, 2018, Ms. Pinhal drove her



Cadillac Escalade into the oncoming lane of travel striking' head-on a Honda Element being driven by Gilda York. Ms. York, a teen mentor and community volunteer, died at the scene of the crash. Ms. Pinhal was transported to the hospital where she admitted that she had been driving and smoking marijuana. A blood sample was taken, which indicated several prescription and illicit drugs were in her system at the time of the crash. On November 3, 2018, Ms. Pinhal turned herself in on warrants from the vehicular homicide case. She was asked multiple times if she had any contraband on her person, which she denied. During a search, a small bag containing methamphetamine was found around her waistband. On December 27, 2018, a greeting card addressed to Ms. Pinhal, from her boyfriend, contained suboxone that had been melted down. It was similar to other cards she had received in the jail. Investigators reviewed jail calls and discovered conversations regarding the sending of suboxone in the greeting cards.

At the sentencing hearing, it was discussed that Ms. Pinhal had previous convictions for speeding, evading arrest, theft, drug possession, possession of drug paraphernalia and driving on a suspended driver's license, in addition to multiple probation violations. Although she graduated from high school in 2009, she admitted to alcohol and marijuana use since 2002. She also admitted to frequent methamphetamine and cocaine use. Ms. Pinhal had entered eight substance abuse treatment programs between 2009 and 2016. Metro Crime Lab Toxicology Supervisor Amanda Sweet testified that Ms. Pinhal had evidence of marijuana, methamphetamine, amphetamine, fentanyl, norfentanyl, cocaine, benzoylecgonine, diazepam (Valium), nordiazepam and alprazolam (Xanax) in her system at the time of the crash. Ms. Sweet testified that the amounts of fentanyl and methamphetamine in Ms. Pinhal's system were at "toxic" levels. Many alternative drug programs were discussed at the sentencing hearing. It was also disclosed that Ms. Pinhal suffered from PTSD syndrome, bipolar disorder II and generalized anxiety was 7 to 8 months pregnant.

The victim, Gilda York, had many family and community members testify about her extensive community involvement. Ms. York started "Ambassadors and Social Graces" a teen mentorship program that promoted service in the community. She was also involved in "countless" other community groups in the Hendersonville area.

The trial court sentence Ms. Pinhal to six years for the vehicular homicide and four years for each possession of contraband in a penal facility conviction. The six years was imposed consecutive to one of the four year sentences for an effective sentence of ten years to be served in confinement. Ms. Pinhal appealed. The standard of review for appeal is an abuse of discretion with a presumption of reasonableness. State v. Caudle, 388 S.W.3d 273, 278-79 (Tenn. 2012). The trial court denied alternative sentencing based upon the need to protect society, Ms. Pinhal's long history of criminal conduct, consisting of drug and driving related offenses and because less restrictive measures of confinement had been unsuccessfully applied, both "recently and frequently." The trial court also imposed consecutive sentencing based upon Ms. Pinhal's extensive criminal history (ven though no felony convictions) and since her behavior indicated little or no regard for human life. The Court of Criminal Appeals concluded the trial court's orders were appropriate and affirmed the judgments.

VEHICULAR HOMICIDE MURDERER'S ROW

State v. Benjamin R. Franklin, 2020 Tenn. Crim. App. LEXIS 511



On October 12, 2015, William Griggs, 20, his partner Kassidy Leonard, 19, and their 12 day old daughter were travelling northbound on Highway 13 in Houston County when their Saturn sedan was struck, head-on by Mr. Franklin's Dodge truck. Mr. Franklin had drifted approximately three feet into the northbound lanes of travel and the tires of his truck ran over the Saturn, causing the Saturn to push down and spin, while the truck flipped up and over, The front of the Saturn was unrecognizable. William and the baby were deceased upon impact and Kassidy died while at the scene. Mr. Franklin was thrown from his vehicle, but was treated and transported to a nearby hospital. Hospital staff stated that Mr. Franklin was "combative" and appeared to have something "on board." They also had problems finding a vein for IVs and noticed scars overlying his veins, consistent with IV drug usage. Mr. Franklin admitted to prior IV drug usage of "Oxyies." THP Sergeant Brenneis testified that neither vehicle had mechanical problems and the crash was consistent with crashes involving "impairment or intoxication." TBI agent Castelbuono testify that he received a blood sample from Mr. Franklin, but the blood sample was too small and the results indicated "hospital administered drugs." Agent Castelbuono also received a urine sample from Mr. Franklin that tested positive for amphetamine, methamphetamine, lidocaine, and oxycodone. During an interview with THP Sergeant Boyd, Mr. Franklin admitted to taking "oxycontin," without a prescription, in the days prior to the crash. Mr. Franklin also admitted to falling asleep and causing a fatal car crash in Princeton, Indiana, on a prior occasion.

A Houston County jury convicted Mr. Franklin of three counts of vehicular homicide by intoxication and three counts of vehicular homicide by reckless driving. At the sentencing hearing, family members of the victims' gave impact statements regarding how William and Kassidy had a surviving three year old son. The presentence report reflected an extensive prior criminal history for Mr. Franklin of two felonies and thirty-four misdemeanors, twenty-five of which were traffic related. The trial court gave great weight to Mr. Franklin's prior history of criminal convictions and conduct, found that he failed to comply with conditions of probation at the time the offense was committed, that he had no hesitation about committing a crime when the risk to human life was high and the court found no mitigating factors existed. The trial court sentenced Mr. Franklin to twelve years for each vehicular homicide by intoxication count to be served consecutively and six years each for the vehicular homicide by reckless driving counts. The last three counts were merged with the first three counts for an effective sentence of thirty-six years. Mr. Franklin appealed both perceived trial errors and sentencing issues.

The Court of Criminal Appeals ruled that the trial court did not abuse its discretion by admitting the urine test results as they were relevant to the issue of intoxication; the three crash scene photographs were properly admitted into evidence; the evidence presented at trial was legally sufficient to prove intoxication (The "State is not burdened with 'an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt.'" Jackson v. Virginia, 443 U.S. 307, 326 (1979)); no manifest necessity for mistrial existed from the trial transcripts; and, the length of sentence and consecutive sentencing was proper. A review of the trial court's sentencing determination is under an abuse of discretion standard. State v. Bise, 380 S.W.3d 682, 707 (Tenn. 2012). "This court will uphold the trial court's sentencing decision 'so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by the statute.'" Id. at 709-10. The CCA affirmed the judgments of the trial court.



JURY SELECTION (Continued)

Of course you need to investigate and inform regarding the applicable laws and the nature of the case. You cannot recite enough what the burden of proof is. Jurors must understand that beyond a reasonable doubt is not proof beyond a shadow of a doubt, beyond all doubt or an absolute certainty of guilt. Use analogies to demonstrate reasonableness. Is it possible that an alien caused a vehicle to veer off the road then injected the driver with an intoxicating substance? Sure, it is possible, but is it reasonable? How about getting on an elevator in an old building? Is it possible the elevator is unsafe? At what point is it reasonable to doubt the integrity of the elevator? Explore the difference between drunk (not the standard) and impaired drivers (mental and/or physical impairment). Most jurors have had experience with both drunk and impaired people. Discuss the pattern jury instructions regarding impaired driving, expert witnesses, circumstantial evidence and of course, reasonable doubt. Ask them if they will listen to the instructions the judge gives them and follow the law, even if they did not realize what the law actually requires. By doing this, the jurors will anticipate the coming evidence and will focus on the task that they have been given.

Juror opinions regarding alcohol and drug use is very important in every DUI case. Find out what signs and symptoms of use that they know and recognize. Once you start this conversation you will usually get many jurors talking about their own experiences. Ask about whether family members or friends have been involved in or impacted by impaired drivers. Jurors tend to give more credibility to fellow jurors and their opinions and experiences as opposed to prosecutors and defense attorneys. Do not make the jurors uncomfortable in doing so. If a juror states that a friend or family member was lost to an impaired driver, ask permission from them to dig deeper. Be cautious as to how you handle surprise answers.

In most DUI cases, the star witness is the investigating officer. Juror attitudes towards law enforcement is very important (especially in today's charged environment). Since perceptions are often formed by the media, there will be some jurors that will have negative opinions towards law enforcement. Although you may intend to excuse these jurors, you cannot leave negative comments hanging without a response. Without scolding or judging, point out the fact that there are good and bad people in every profession and that it is unfair to paint an entire profession with one brush. Shouldn't everyone be judged based upon their own Conduct? Since they do not know the officer in your case, can they set their opinions aside and be fair to the officer and consider the evidence as presented? Whether the responses are negative or positive from your perspective, you can generate a lively discussion and gain valuable information in determining who would make an appropriate juror for your trial. Converse, rather than interrogate, and call the jurors by their name (a seating chart can be very helpful).

We ask jurors to use their common sense, but prosecutor must do the same. You should be able to realize when you are offending someone. Jury selection is no different. If a juror is looking uncomfortable with your line of questioning, you should abandon that conversation and move to another juror or another subject. Your professionalism and courtesy can and should be calming, with the goal of promoting open conversation. Jury trials are usually not won or lost with engaging openings and closings. You cannot control the way a witness will testify or the way a judge will rule on a matter, but you can control the selection of the jury. Your ability to encourage open and calm conversations will help you to make wise choices while choosing the jurors. Most of this article is from the wisdom and writings of Sarah Z. Garner, TSRP, North Carolina.

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