TNDAGC

DUI NEWS

ISSUE 74
April 2021

PUBLISHERS:
Terry E. Wood, TSRP
Linda D. Walls, TSRP
LAYOUT AND DESIGN:
Pat Hayes

INSIDE THIS ISSUE:

TN DISTRICT ATTORNEYS GENERAL CONFERENCE,

Guy R. Jones, Executive Director
226 Anne Dallas Dudley Blvd.,
Suite 800
Nashville, TN 37243

DUI Training Division
DUI Office: (615) 253-6734
DUI Fax: (615) 253-6735
e-mail: tewood@tndagc.org
Newsletters online at:
dui.tndagc.org/newsletters

Tennessee Highway Safety Office

312 Rosa L. Parks Ave.
William R. Snodgrass TN Tower
25th Floor
Nashville, TN 37243
Office: 615-741-2589

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

911 Call Justifies a Traffic Stop

The Tennessee Court of Criminal Appeals (CCA) found reasonable suspicion justified the traffic stop of a vehicle leading to the arrest of three individuals involved in three distinct criminal episodes on one night in *State v. Eli Kea*, No. E2019-00890-CCA-R3-CD, 2021 Tenn. Crim. App. LEXIS 72 (Mar. 20, 2021). Between the hours of 1:00 a.m. and 3:00 a.m. on January 13, 2017, five calls were received by 911 dispatchers in Knoxville, Tennessee. The first call came in at 1:36 a.m. and after the caller hung up, the dispatcher returned the call. The caller, later identified as Titus Ware, stated that he and a friend had been robbed and hung up the phone on the original call to get police to respond as soon as possible. At the same time Mr. Ware made his call, another call was received by 911 where the caller, identified as Kovacs Jefferson, told the dispatcher that someone had walked up to him and his friend and asked them to give up "what [they] had". Neither man could describe the face of the person, but each stated the person was wearing a long (trench like) orange coat with a hood and carrying a black gun. Both Mr. Ware and Mr. Jefferson had been in the Austin Homes neighborhood in Knoxville when they were approached. At 2:32 a.m. a woman who identified herself as Michelle, called 911 after hearing approximately 6 gunshots out front of her residence on the twenty-six-hundred block of MLK. Four minutes later, 911 received a call from Rochelle Evans who lived on the same block reporting that she had heard gunshots and something hitting her house. Because of prior shootings, Ms. Evans had a camera set up outside her home. Upon reviewing the footage, Ms. Evans told the dispatcher that she saw someone in a white or cream-colored PT Cruiser firing gunshots into her home. At 3:03, the fifth call was received by 911. This call from Melissa Everette, was regarding a gunshot wound she received as she was walking from a friend's home crossing Magnolia Avenue. Ms. Everette heard four to six gunshots, realized she had been shot in the foot, and described the shots coming from "a newer model, white, four-door vehicle, that was "not really a SUV," but more of "a coupe-like car".

After the 2:32 a.m. 911 call, Sgt. Chris Bell of the Knoxville Police Department (KPD) was dispatched to the home of Rochelle Evans. Upon his arrival at approximately 2:40 a.m., Sgt. Bell received a description of the vehicle involved in the shooting and provided the description over the radio for other law enforcement officers to be on the look out for a white PT Cruiser. KPD Sgt. Nathaniel Skellenger heard the radio transmission and as he approached Magnolia Avenue at 3:02 a.m., he encountered a white PT Cruiser. According to Sgt. Skellenger, the PT Cruiser was the only vehicle on the road at that time. He followed the vehicle, waited for backup, and then initiated the traffic stop at 3:03 a.m. as it entered the Austin Homes neighborhood.

After stopping the vehicle, police discovered that three individuals were inside the PT Cruiser. Destin McMillan was the driver; (Continued page 12)

Recent Decisions

State v. Edward Wayne Shumacker, 2021 Tenn. Crim. App. LEXIS 60

THP Trooper Naipo observed Mr. Shumacker driving on Lee Highway without wearing a seatbelt on November 24, 2017, which was the day after Thanksgiving. Trooper Niapo "could see the shiny buckle" above Mr. Shumacker's shoulder and he did not have a license plate on his car. Upon contact, Trooper Naipo smelled alcohol and observed Mr. Shumacker to have "bloodshot watery eyes." Initially, Mr. Shumacker gave a false name and date of birth, but eventually it was discovered that Mr. Shumaker's driver's license had been revoked and the car was not properly registered. Trooper Naipo arrested Mr. Shumacker after he gave the trooper "enough clues" during SFSTs and the investigation to determine that Mr. Shumacker was impaired. A blood sample was obtained two and one half hours later and the result was a BAC of 0.094% . A jury convicted Mr. Shumacker of DUI and DUI per se, driving on a revoked driver's license and violation of the seatbelt law. Mr. Shumacker stipulated to having five prior DUI convictions, for a resulting conviction of DUI 6th offense as a Class C felony. The DUI and DUI per se counts were consolidated and he was sentenced to twelve years in TDOC custody, as a Range III persistent offender. Mr. Shumacker appealed the judgments.

Before trial, the defense had requested the TBI's extensive scientific reports for his blood tests, claiming that the reports were relevant and material to his defense and that they contained *Brady* material (*See, Brady v. Maryland*, 373 U.S. 83 (1963). It was argued that the material was needed to prepare for cross-examination and to have an expert determine whether or not any problems with the testing existed. A TBI agent testified that the scientific reports included approximately 140 pages for a sample blood test and she tests about 90 samples per week, which would amount to more than 10,000 pages. Each sample is tested twice and the results are reviewed by another toxicologist. "We have so many quality control policies," that I would catch a problem or my reviewer would. The State argued that the reports were work product, not material to the defense and would not be used in the State's case-in-chief. It was "much ado about nothing" and a "fishing expedition." The trial court denied the request and stated that Mr. Shumacker was not entitled to the additional information. The Court of Criminal Appeals stated, "In order to make a showing of materiality, the defendant 'must do more than emphatically state he needed certain discovery. He must show how the discoverable items were material to the preparation of his defense.'" *State v. Thomas Dee Huskey*, No. E1999-00438-CCA-R3-CD, 2002 WL 1400059, at *59 (Tenn. Crim. App. At Knoxville, June 28, 2002). "Where … the movant simply hopes that a later expert evaluation might reveal some flaw …, the subpoena is 'nothing but a classic fishing expedition.'" *State v. Elizabeth Gay Tindell,*No. E2008-02635-CCA-R3-CD, 2010 WL 2516875, at 16, (Tenn. Crim. App. At Knoxville, June 22, 2010). The CCA found this case factually similar to *State v. Zane Allen Davis*, No. M2000-00737-CCA-R3-CD, 2000 WL 1879518 at *4 (Tenn. Crim. App. At Nashville, Dec. 28, 2000) (the defense requested TBI raw data, handwritten notes, line graphs and tabulated data printed by the testing equipment.) In sum, the CCA concluded that Mr. Shumacker failed to show that the requested discovery was material to the preparation of his defense.

Mr. Shumacker also objected to the TBI agent's expert testimony about "BAC scenarios." The CCA ruled, "[I]t is well-settled that 'the allowance of expert testimony, the qualification of expert witnesses, and the relevancy and competency of expert testimony are matters which rest within the sound discretion of the trial court.'" *State v. Rhoden*, 739 S.W.2d 6, 13 (Tenn. Crim. App. 1987). The CCA stated that TBI Agent Douglas's testimony was neither outside her area of expertise nor confusing to the jury. Therefore, we conclude that the trial court did not abuse its discretion. The CCA also found that the twelve year TDOC sentence was not excessive. The judgments of the trial court were affirmed.

State v. Regina Jackson, 2021 Tenn. Crim. App. LEXIS 80

On September 14, 2013 Officer Joseph Olivas responded to a call of a "possibly intoxicated" woman at a residence. A second call reported that the woman had left "in a silver gray Toyota car." Officer Olivas saw a vehicle matching the description, stopped in front of a gated entrance (Continued on page 3)

Recent Decisions (Continued)

to St. Martha's Catholic Church. The officer stopped his vehicle "a little past the driveway" and he approached Ms. Jackson. While retrieving her license and registration, Ms. Jackson fumbled with paperwork, slurred her speech and had bloodshot eyes. There was no working recording equipment available on the police vehicle, so officer Olivas had another officer come to the scene. Officer Olivas was ARIDE and DRE trained. Ms. Jackson performed poorly on all SFSTs and admitted using Xanax and Zoloft. A jury convicted Ms. Jackson of DUI and the parties stipulated to a prior offense. A timely appeal was filed.

Although the officer did not observe the defendant driving, he saw a stopped vehicle matching the description received from a citizen caller "within minutes" and "approximately one-half mile away," which corroborated the caller. "The objective facts on which an officer relies may include his or her own observations, information obtained from other officers or agencies, offenders' patterns of operation, and information from informants." *State v. Watkins,* 827 S.W.2d 293, 294 (Tenn. 1992). "Information provided by known citizen informants 'is presumed to be reliable' because they 'have necessarily gained their information through first-hand experience' and have provided the information 'in the interest of society or personal safety.'" *State v. Luke,* 995 S.W.2d 630, 636 (Tenn. Crim. App. 1998)(citing *State v. Cauley,*863 S.W.2d 411, 417 (Tenn. 1993); *State v. Melson,*638 S.W.2d 342, 354 (Tenn. 1982). The Court of Criminal Appeals determined that the citizen informant was sufficiently-reliable and the officer had sufficient reasonable suspicion to approach Ms. Jackson, at which point officer Olivas observed signs of impairment. The judgment of the trial court was affirmed.

State v. Donnie Bridges, 2021 Tenn. Crim. App. LEXIS 86

On July 31, 2014, Detective Ferrell of the Knox County Sheriff's Office was on duty when he heard a call of a possible impaired person on a motorcycle at the Weigel's gas station on Central Avenue Pike. Det. Ferrell responded within 2-3 minutes and he noticed a motorcycle parked at the gas pumps. He pulled in behind the motorcycle and got out of his vehicle. (His new police vehicle was not equipped with video) As Mr. Bridges came around a truck, he made a 45-degree angle away from the motorcycle and staggered to a trash can. He reached into his pocket, acted like he was coughing and threw something into the can. When Det. Ferrell asked what he threw into the can, Mr. Bridges "mumbled cocaine." Det. Ferrell later recovered a baggie of cocaine from the trash can. The motorcycle was registered to Mr. Bridges, whose driver's license was revoked. SFSTs were not performed, due to Mr. Bridge's condition. A blood test revealed a BAC of 0.114%.

TBI received the blood sample on August 7, 2014, analyzed the sample on September 23, 2014 and destroyed the sample on April 6, 2015. Mr. Bridges filed a motion to dismiss or suppress pursuant to *State v. Ferguson,* 2 S.W.3d 912 (Tenn. 1999). S.A. Tiller testified that it was TBI's policy to destroy evidence after 60 days, unless they received a request to "hold" evidence. No such request was received at TBI. "[t]he State is not required to preserve samples taken for the limited purpose of determining the defendant's blood-alcohol level." *State v. Jordan,* 325 S.W.3d 1, 82 (Tenn. 2010). Moreover, "it is apparent that blood cannot be preserved indefinitely." *State v. Grace Ann Blair,* 2016 WL6776356, at *8 (Tenn. Crim. App. At Nashville, Nov. 16, 2016).

This case included a relevant chain of custody discussion, emphasizing the need for testimony from the time of the blood draw, until the sample is received at TBI. Many cases state that an officer must testify to knowledge of the procedures of storage and transportation to indicate a reasonable assurance of identity and the lack of tampering, loss, substitution or mistake. (See *State v. Scott,* 33 S.W.3d 746, 760 (Tenn. 2000). It also included a discussion on; when the indictment alleges facts in the conjunctive, but the statute defines in the disjunctive. "Historically, when two means of committing an offense were charged in the conjunctive in a single count of a presentment as part of the same transaction, proof of either sufficed to support a conviction." *State v. Zan Ray McCracken,* 2001 WL 812250, at *3 (Tenn. Crim. App. At Knoxville, July 19, 2001). The judgments of the trial court were affirmed.

Utilizing Judicial or Duces Tecum Subpoenas

Securing and Using Medical Records in DUI Cases: Utilizing Judicial Subpoenas in the Investigation and the Subpoena Duces Tecum for Evidence at Trial[1]

It has been said that "No man can hope to find out the truth without investigation" and "If we have the truth, it cannot be harmed by investigation."[2] The investigation of driving under the influence and related criminal offenses, is a complex, detailed quest for the truth. When those investigations involve hospitalization of the defendant and/or the victim, the search for the truth often requires the securing of evidence found in medical records.[3] For this reason, it is important for officers, prosecutors, and judges to know how those records may be obtained without offending federal or state laws. The purpose of this article is to provide general information on how to obtain medical records during the investigation and for use at trial.[4]

Any discussion regarding patient privacy must begin with the federal law on the subject. The Health Information Portability and Accountability Act of 1996 (HIPPA)[5], is described within 1996 US Public Chapter 104-191, as "An [a]ct [t]o amend the Internal Revenue Code of 1986 to improve portability and continuity of health insurance coverage in the group and individual markets, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, to simplify the administration of health insurance, and for other purposes."[6] Designed to improve the efficiency and effectiveness of the nation's health care system as well as allow people who lose their jobs to retain health care coverage without concern over pre-existing conditions or other barriers to health coverage, HIPPA allows the electronic transmission of health care information among covered entities and associated business entities. However, with electronic transmission comes privacy issues and concerns. To address these potential issues and concerns, HIPPA delegated (Continued on page 5)

---

1. This article merely covers the basic information regarding the statutory procedure for obtaining medical records in Tennessee as it relates to driving under the influence and related offenses. This article does not begin to discuss issues of discovery, ethics, record redaction, etc. that may be implicated once the records are provided. Parties should always consult additional sources regarding these issues before providing information obtained using either the judicial subpoena or subpoena duces tecum process.

2. These quotes are attributed to George F. Richards and J. Rueben Clark, respectively. The remainder of Clark's quote is "If we have not the truth, it ought to be harmed."

3. In misdemeanor DUI cases, the content of the blood of the defendant is relevant to the investigation. In vehicular assault and vehicular homicide cases, the nature and extent of injuries, treatment, or the death is relevant to the investigation. If the records are requested by the patient, he/she is charged by the health care provider to produce the records. Of course, an individual may consent to the release of this information, but a judicial subpoena may also be obtained. It is important for officers and prosecutors to communicate with the victim about the necessity of the medical records to establish serious bodily injury or death, and/or enhancement of sentence.

4. A major caveat to this article is that it is **not** meant to give guidance regarding obtaining mental health records. Compelling Involuntary disclosure of mental health records requires compliance with Tennessee Code Annotated Sections 33-3-105, *See In re Centerstone,* No. M2016-00308-CCA-WR-CO, 2017 Tenn. Crim. App. LEXIS 21 (Jan. 17, 2017. Also, it is important to note there are additional privacy rules for those receiving mental health or substance abuse disorders as they relate to psychotherapy notes and other issues. (*In re Centerstone* does not apply to judicial subpoenas for medical records other than mental health records.)

5. For more information regarding patient privacy under HIPPA, go to https://www.hhs.gov/hipaa/for-individuals/index.html or https://aspe.hhs.gov/report/health-insurance-portability-and-accountability-act-1996

6. https://www.congress.gov/104/plaws/publ191/PLAW-104publ191.pdf

Subpoenas (Continued)

regulation of the release of personal health information by the covered entities (health care providers, health care plans, etc.) and their business associates (independent medical transcriptionists, CPA firms, etc.) between each other and to third parties[7] to the Department of Health and Human Services (DHSS). In response, DHSS developed specific rules governing the release of information. These regulations do not preclude the release of information to law enforcement and courts. In fact, in the context of investigations and prosecutions of criminal offenses, the regulations balance the interest of the individual and the interest of the community and permit the release of personal health information "[a]s required by law, including laws that require the reporting of certain types of wounds or other physical injuries (child abuse or neglect or a victim of abuse, neglect, or domestic violence) and in compliance with, and as limited by, the relevant requirements of a court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer; a grand jury subpoena; or an administrative request, including an administrative subpoena or summons, a civil or an authorized investigative demand, or similar process authorized under law, provided that the information sought is relevant and material to a legitimate law enforcement inquiry, the request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and de-identified information could not reasonably be used."[8]

Obtaining Medical Records During the Investigation

In Tennessee, the use of a judicial subpoena under Tennessee Code Annotated Section 40-17-123 to obtain medical records in driving under the influence related cases is an effective, lawful evidentiary tool for law enforcement. The statute provides the procedure for a law enforcement officer "to obtain a subpoena for the production of books, papers, records, documents, tangible things, or information and data electronically stored **for the purpose of establishing, investigating or gathering evidence for the prosecution of a criminal offense.**" (**emphasis added**). Consistent with the spirit of HIPPA federal regulations, to obtain a judicial subpoena, an officer must provide a sworn affidavit to a judge of a court of record or a general sessions' judge who serves the county of the officer's jurisdiction, providing "a statement that a specific criminal offense has been committed or is being committed and the nature of the criminal offense;" "the articulable reasons why the law enforcement officer believes the production of the documents requested will materially assist in the investigation of the specific offense committed or being committed;" "the custodian of the documents requested and the person, persons or corporation about whom the documents pertain;" "the specific documents requested to be included in the subpoena;" and "the nexus between the documents requested and the criminal offense committed or being committed." The statute further provides that the judicial subpoena shall be granted if the judge finds that the affiants have presented a reasonable basis for believing that:

> **(A)** A specific criminal offense has been committed or is being committed;
> **(B)** Production of the requested documents will materially assist law enforcement in the establishment or investigation of the offense;
> **(C)** There exists a clear and logical nexus between the documents requested and the offense committed or being committed; and
> **(D)** The scope of the request is not unreasonably broad or the documents unduly burdensome to produce.

(Continued on page 8)

---

7. https://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html?language=es

8. 45 CFR § 164.512 (2021).

Upcoming Training

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

Cops in Court - April 9, 2021, Jackson, TN
This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases and how to communicate this to the jury. 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. This exercise will feature a marijuana impaired DUI case.

Protecting Lives, Saving Futures - April 13-14, 2021, Pickwick Landing, TN
This joint prosecutor/law enforcement officer training is designed to allow the participants to learn from each other, inside of a classroom, rather than outside of a courtroom shortly before trial. Topics covered include the detection, apprehension and prosecution of impaired drivers. Each prosecutor attending is requested to recruit one to three law enforcement officers to attend the training together. Dr. Ferslew will be a presenter.

Cops in Court - April 22, 2021, Clarksville, TN
This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases and how to communicate this to the jury. 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. This exercise will feature a marijuana impaired DUI case.

Prosecuting the Drugged Driver - May 19-20, 2021, Alcoa, TN
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.

Lethal Weapon/Vehicular Homicide Seminar - June 8-10, 2021, Nashville, TN
This course will be a joint effort with prosecutors and law enforcement officers from Kentucky. It features all aspects of the investigation and prosecution of vehicular homicide cases. Included topics, are the role of the prosecutor at the scene of a fatality, expert cross-examination, toxicology, qualifying an expert and a group discussion of current vehicular homicide cases.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Impaired Driving Enforcement (ARIDE)
April 1-2, 2021, Woodbury, TN
April 5-6, 2021, Murfreesboro, TN
April 8-9, 2021, Brownsville, TN
April 15-16, 2021, Savannah, TN
April 29-30, Evensville, TN
May 3-4, 2021, Mount Pleasant, TN

DUI Detection & Standardized Field Sobriety Testing
April 26-30, 2021, Bluff City, TN
May 3-5, 2020, Oak Ridge, TN
May 4-6, 2021, Germantown, TN
May 10-13, 2021, Springfield, TN

Drug Recognition Expert School (DRE)
May 10-20, 2020, Nashville, TN (THP only)

DUI Tracker Report

DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from January 1, 2021, through March 30, 2021, 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, 2021, through March 30, 2021, since the last quarter were 465. This number is substantially down from the previous quarter by 945. From looking at these numbers, we can see that the trend in DUI related dispositions in Tennessee has greatly decreased, which is a change from the higher disposition trends that we have been observing throughout last year. The total number of guilty dispositions during this same period of January 1, 2021 through March 30, 2021 were 343. The total number of dismissed and nolled cases this last quarter were 55. Across the State of Tennessee, this equates to 73.76% of all arrests for DUI made were actually convicted as charged. This percentage is slightly higher than the last quarter ending on December 31, 2020. Only 11.83% of the DUI cases during this current quarter were dismissed or nolled. Also, during this same period of time, only 59 of the total DUI cases disposed of were to different or lesser charges. Therefore, only 12.69% 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, 2021 through March 30, 2021. During this period, there were a total of 270 fatalities, involving 247 crashes, which is a significant decrease from the previous quarter. Out of the total of 270 fatalities, 46 fatalities involved the presence of alcohol and 43 fatalities involved the presence of drugs, signifying that 32.9% 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 270. This is more than the 230 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.

This year, the Traffic Safety Resource Prosecutors of the TNDAGC will host the 20/20 Class: Understanding the Physiology of Eye Movements and Impairment, on August 9-10, 2021, in Memphis, TN. The Southern College of Optometry and their faculty, along with Dr. Karl Citek of Pacific Univ. College of Optometry, will present the common signs of alcohol and drug impairment that can be observed by involuntary eye movements. They also discuss medical and environmental causes of eye movement and how to tell the difference. This is an invaluable class for DUI investigations and Prosecutions. Come join us in August.

Subpoenas (Continued)

If the judge finds that all the criteria set out above exists as to some of the documents requested but not all of them, the judge may grant the subpoena as to the documents that do and not to the ones that do not. Of course, if the judge finds that all the criteria set out above does not exist as to any of the documents requested, the judge shall deny the request for a subpoena. If it is issued by the court, the court shall prepare or cause to be prepared the subpoena that describes the specific materials requested and set the date and manner that the documents are to be delivered to the officer. If the subpoena is issued by a judge of a court of record, it may be served by the officer in any county of the state by personal service, registered mail, or by any other means with the consent of the person named in the subpoena. If the subpoena is issued by a judge of a general sessions court it shall be served by an officer with jurisdiction in the county of the issuing judge, but may be served by personal service, registered mail, or by any other means with the consent of the person named in the subpoena. The officer should maintain a copy of the subpoena and endorse the time, date, and method of service as proof of service.[9]

Obtaining Medical Records for Use as Evidence at Trial

Tennessee law recognizes that hospital records are the property of the various hospitals, are not public records, and are subject to the confidentiality requirements of the law.[10] Realizing the importance of communication between health care providers and patients, Tennessee specifically provides for the protection of the communication between health care providers during treatment of the patient consistent with federal regulations. Also consistent with those regulations, Tennessee has codified the procedure for the use of the subpoena duces tecum to obtain and use medical records for as evidence at trial.[11] The process provides issuance of the subpoena and notice to the adverse party; the sealing, delivery, and opening of the records; and admissibility of the records with accompanying affidavit in lieu of requiring the presence of the custodian of the records by the court.[12] Although not specified within the law, prosecutors should be mindful not to provide extra-judicial disclosure of the content of these records. Of course, once these records are made a part of the trial record, it is up to the court to provide the appropriate protection orders to ensure the information contained within the record is not disclosed outside of the judicial process for which the records were obtained.

---

9. Upon receipt of the medical records by law enforcement, records should be timely reviewed and secured. Like with the retention of evidence in other cases, orders regarding the use, disposal, or retention of the medical records in evidence, should be obtained upon the completion/close of the investigation and court action.

10. *See generally,* T.C.A. §10-7-504 and § 68-11-304.

11. See T.C.A. § 66-11-401, *et seq.*

12. Pursuant to T.C.A. § 66-11- 405, "The records shall be accompanied by an affidavit of a custodian stating in substance: (1) That the affiant is duly authorized custodian of the records and has authority to certify the records; (2) That the copy is a true copy of all the records described in the subpoena; (3) That the records were prepared by the personnel of the hospital or community mental health center, staff physicians, or persons acting under the control of either, in the ordinary course of hospital or community mental health center business at or near the time of the act, condition or event reported in the records; and (4) Certifying the amount of the reasonable charges of the hospital or community mental health center for furnishing such copies of the record." This statutory language in combination with the language found in T.C.A. § 66-11-402(b) which states, "[a]ny party intending to use this section shall furnish the adverse party or the adverse party's attorney a copy of the subpoena duces tecum not less than ten (10) days prior to the date set for the trial of the matter for which the records may be introduced," satisfies evidentiary requirements under Rules 803 (6) and 902 (11) of the Tennessee Rules of Evidence.

Pro Se Waiver to Attorney Representation

Have you ever heard the saying, "Be careful of what you ask for, you may get it"? Well, for the non-indigent defendant, those words could have extensive consequences. If you, by your statements and actions, indicate that you are representing yourself in a criminal proceeding, regardless of the fact you did not sign a waiver of counsel, you may well be held to what you asked for according to the Court of Criminal Appeals (CCA) ruling in *State v. Tammy Lynn Walker*, No. E2019-00501-CCA-R3-CD, 2021 Tenn. Crim. App. LEXIS 29 (Jan. 20, 2021). It is possible that through your actions and words, an explicit waiver to representation by an attorney may be determined, even in the absence of a signed waiver.

The right to counsel is a constitutional safeguard deemed necessary to insure fundamental human rights of life and liberty. *Walker*, at *25 (Quoting *State v. Holmes*, 302 S.W.3d 831, 838 (Tenn. 2010)). As prosecutors and officers of the court, we have a responsibility to protect Constitutional rights, both for the State and the accused, whether they are represented by counsel or not. Although the Sixth Amendment of the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant a right to counsel. *Id.* (See Gideon v. Wainwright, 372 U.S. 335, 339, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)), "[T]he accused may instead assert the right to self-representation." *Id. (*Quoting *Lovin v. State*, 286 S.W.3d 275, 284 (Tenn. 2009)). Of course, we are all familiar with President Abraham Lincoln's quote, "He who represents himself has a fool for a client."

Following a bench trial in which Ms. Walker represented herself, she was convicted of passing a worthless check, a Class D felony. On appeal, Ms. Walker contends that her waiver of counsel was not knowing and voluntary. After reviewing the transcripts and discussions between the trial court and the defendant, the CCA found that Ms. Walker initially expressed an intention to proceed pro se at her Arraignment and continued to affirm in subsequent proceedings in which she appeared without counsel: that she had been represented in general sessions court on this case, had also been represented in prior cases that resulted in convictions for worthless checks and concluded that the defendant understood her right to counsel and that her decision was "clear and unequivocal based upon her statements and conduct." Further, while the trial court did not mechanically ask all of the questions suggested by *Von Moltke v. Gillies,* 332 U.S. 708 (1948) and its progeny*,* the CCA found that the trial court assessed the defendant's age and education, informed her that she would be held to the same standard as a lawyer, directed her to the rules of court, advised her of the range of punishment for the offense for which she was charged and that the payment of the check was not a defense to the prosecution for passing a worthless check. Also, the defendant continued to represent herself and never questioned the court's statements that she was appearing pro se. Lastly, while a written waiver of counsel provides prima facie evidence of an explicit waiver of the right to counsel, the CCA noted that Tennessee Rules of Criminal Procedure rule 44 only requires a written waiver if the defendant is indigent.

Important takeaways from this case include: (1) The court should determine whether or not the defendant wishes to exert their right of self representation; (2) The court should determine whether or not the request is clear and unequivocal; (3)The court should determine whether or not the request is knowing and voluntary by extensively questioning the defendant regarding their ability to represent themselves. (*State v. Smith*, 987 S.W.2d 871, 875 (Tenn. Crim. App. 1998) **which also list a set of standard questions that the court should ask**, (quoting *United States v. McDowell*, 814 F.2d 245, 251-52 (6th Cir. 1987))); (4) The court should warn the defendant that self-representation is unwise. *Id* at 877-78, see also, *State v. Herrod*, 754 S.W.2d 627, 629-30 (Tenn. Crim. App. 1988); (5) Finally, the court should determine whether or not the defendant is indigent and if so, require a written waiver. Likewise, prosecutors should request that the above process be followed.

DUI is a Strict Liability Crime

Many times a defendant or their attorney may claim that the defendant did not intend to drive or that they were not aware that their prescription drug would impair them or was actually impairing their ability to drive. They may also claim that they were not aware that they were driving because their intoxication or a prescription caused a "black-out" or a diminished capacity on their ability to form the intent to drive. (Ambien?) However, these types of arguments are not valid defenses to DUI charges. Although, diminished capacity could negate a mental element of a specific intent crime, such as First Degree Murder (See *State v. Smith,*1996 Tenn. Crim. App. LEXIS 452), DUI does not have a culpable mental state element. DUI is a strict liability crime with no intent required for a DUI conviction. In the case of *State v. Turner,* 953 S.W.2d 213, 1996 Tenn. Crim. App. LEXIS 618, the CCA stated, "we note that this court has previously observed that there is no culpable mental state required for guilt of driving under the influence. *State v. Fiorito,* 1995 Tenn. Crim. App. LEXIS 937, No. 03C01-9401-CR-00032 (Tenn. Crim. App. at Knoxville, November 27, 1995). See also *State v. Mabe*, 1994 Tenn. Crim. App. LEXIS 711, No. 03C01-9402-CR-00051 (Tenn. Crim. App. at Knoxville, October 25, 1994) ("we doubt that the offense [of driving under the influence] requires as an element that the defendant have the specific intent to drive the vehicle, in addition to having physical control"). Indeed, considering our supreme court's decision in *State v. Lawrence*, 849 S.W.2d 761 (Tenn. 1993), the definition of the offense of driving under the influence "plainly dispenses with a mental element." See *Tenn. Code Ann. § 39-11-301.* In the *Turner* case, the defendant staggard across a parking lot and sat in his car when he was approached by a police officer. "Thus, by defining the offense of driving under the influence to encompass the mere physical control of a vehicle, the legislature clearly signaled its intention to create a crime imposing strict liability." *Id*.

However, in general, a minimum requirement required for criminal liability is the performance of a voluntary act. *Id.* What the State needs to prove in a DUI case is that the defendant ***while impaired***, made a voluntary act of being in control of a motor vehicle or was actually driving the motor vehicle. What then constitutes a voluntary act? An instructive case on this matter is *State v. Donald Bradford Slagle, Jr.*, 2006 Tenn. Crim. App. LEXIS 751. In the *Slagle* case, the defendant claimed that he ingested "Ambien," which produced such a so-called altered state of consciousness, so that his acts of driving were not voluntary. The Court of Criminal Appeals disagreed. Shortly after midnight on March 14, 2002, Sergeant Billy Hall of the Loudon County Sheriff's Department was on patrol on Highway 11 when he passed a pickup truck that would not dim his high beams. Sgt. Hall turned around and activated his blue lights. Mr. Slagle took over a half-mile to come to a stop. Sgt. Hall smelled a strong odor of alcohol and Mr. Slagle admitted to drinking a couple beers and taking medication. He refused all SFSTs. Mr. Slagle claimed to have taken Ambien before going to bed and then not remembering anything until he woke up in a jail cell. He was convicted after a court trial. On appeal, Mr. Slagle claimed that there was no evidence that he voluntarily left his house and placed himself behind the wheel of his vehicle. Mr. Slagle relied on the *Turner* case, a "minimum requirement for culpability is the performance of a voluntary act." *State v. Turner,* 953 S.W.2d 213, 1996 Tenn. Crim. App. LEXIS 618. The CCA stated that Mr. Slagle's argument obscured the distinction between a voluntary act and mental culpability, which is not required in this case. The distinction being that in order to establish the voluntary act, the proof requires only that the Appellant chose to drive and that this choice was **the product of effort or determination**, not that the Appellant intended to act unlawfully. *Slagle* at *10. (emphasis added). The CCA pointed out; the fact that the person who drives, is or has been entitled to use such drugs, under the laws of this state, shall not constitute a defense to the violation of DUI. *Id* at *11. Thus, if driving is not voluntary because the defendant chose to take a drug which produced a so-called altered state of consciousness, the result would be that use of this drug would result in an absolute defense in all DUI prosecutions. "We do not believe the General Assembly intended such a result in its codification of TCA 55-10-401." *Id*. Voluntarily taking a drug and/or drinking alcohol with the serious result of blackout spells or amnesia is not a defense to the voluntary act of controlling or driving a motor vehicle while impaired in that state of altered consciousness. Accordingly, Mr. Slagle was determined to be voluntarily driving his vehicle on a public roadway while under the influence of an intoxicant. Interesting to note, Mr. Slagle was arrested for DUI, with the same arguments, approximately ninety days after this offense. Mr. Slagle was convicted for DUI (Continued on page 11)

DUI is a Strict Liability Crime (Continued)

In that case also and his appeal was denied for similar reasons.

In the case of *State v. Blair*, 2016 Tenn. Crim. App. LEXIS 863, the trial court granted a motion to dismiss because TBI destroyed a blood sample, a little over a year after the arrest, but before it was tested for drugs. The trial court found that the sample contained potentially exculpatory evidence which could have shown Ms. Blair's actions were involuntarily undertaken while she was under the influence of Ambien. The CCA disagreed and overruled the trial court.

On September 14, 2013, Ms. Blair was stopped after complaints from private citizens to 911. After observations of intoxication and poor performance on SFSTs, Ms. Blair was arrested for DUI and a sample of blood was taken. On November 18, 2013, TBI tested the sample for alcohol, but since the BAC result was 0.17%, greater than the statutory limit of 0.8%, no further testing for drugs was conducted and the report contained the statement that the sample would be destroyed after 60 days. The sample was destroyed on November 3, 2014, over one year after the initial arrest. A defense expert testified that measurement of the concentration of Ambien was necessary to determine if Ms. Blair suffered from automatism or involuntary behavior and amnesia at the time of the incident. First, the CCA determined that there was no *Ferguson* issue, (See *State v. Ferguson,* 2 S.W.3d 912 (Tenn. 1999)) as the state does not have a duty to preserve blood samples taken for determining the alcohol content of the defendant. (See, *State v. Margaret Laverne Riddle,* 2015 Tenn. Crim. App. LEXIS 1044; *State v. John N. Moffit,* 2010 Tenn. Crim. App. LEXIS 1052; and *State v. Gary C. Bullington,* 2006 Tenn. Crim. App. LEXIS 495). Second, the CCA determined that the presence of Ambien would not negate an element of the crime of driving under the influence. The CCA specifically followed the ruling of *State v. Kain,* 24 S.W.3d 816, 819 (Tenn. Crim. App. 2000) stating, "a defendant whose intoxication results from knowingly ingesting a prescription drug and alcohol cannot avail himself of the involuntary intoxication defense." *Blair,* at *22 (quoting *State v. Turner,* 953 S.W.2d 213, 215 (Tenn. Crim. App. 1996*)*. "Accordingly, there is no mental state which proof of intoxication could negate." *Id.* Further, there are significant policy reasons to prevent the voluntary use of such intoxicants from presenting an absolute defense in all DUI prosecutions. *Id.* At *23. "Accordingly, the Defendant, who chose to take the prescription medication with several alcoholic drinks, cannot now claim that her subsequent acts were completely involuntary." *Id.*

What happens if you did not intend to drive impaired, but merely chose to help out a friend? In *State v. Jones*, 2003 Tenn. Crim. App. LEXIS 660, the CCA addressed this question of **intent** to drive impaired and strict liability. On December 9, 2000, Brenda Jones had consumed two mixed drinks at her home and went to bed. Later, she was awakened and requested to drive home two intoxicated house guests. During the ride, the intoxicated rear passenger snatched her by the hair and pulled her loose from the steering wheel. The crash killed the front seat passenger, Ms. Adams. A blood sample from Ms. Jones revealed a BAC of .10%. Ms. Jones tried to argue a mitigating factor during sentencing, that she had no intent to commit the crime of DUI, but only drove at the urging of Ms. Adams, who was fighting with her husband and wanted to go home. In the defendant's words, she was "trying to do a good deed." "We find the Appellant's argument misplaced because the offense of DUI is a strict liability offense; thus, there is no requirement that an intent to violate the law existed." *Id.* At *16. (Quoting, *State v. Turner*, 953 S.W.2d 213, 215 (Tenn. Crim. App. 1996)).

Often in cases with no actual driving observed, there is still **circumstantial evidence** that the defendant was driving or in physical control of the motor vehicle. See *State v. Butler*, 108 S.W.3d 845 (Tenn. 2003). In the *Butler* case, the defendant was found 100 yards from his motorcycle, with the spark plug to the motorcycle in his pocket. There was still sufficient circumstantial evidence to prove that the defendant drove to the parking lot, and was also in physical control of the motorcycle where he was located. *Id.* Strict liability involves no illegal intent or intent of any kind. Also, voluntary intoxication of alcohol and drugs does not make the voluntary act of driving an **involuntary** act. The act of driving involves effort and hundreds of voluntary acts.

911 Call Justifies a Traffic Stop (Continued)

Eli Kea was the front seat passenger; and Richard Wynn was the backseat passenger. Two of the three jumped out and tried to flee the scene. One of the occupants, Kea, remained seated at first but tried to slip away as the others attempted to flee. Wynn dropped a handgun and a magazine as he ran. All three individuals were apprehended and taken into custody. Upon searching the PT Cruiser, officers located a red puffer type coat with a hood, a box of 9mm ammunition with 20 bullets removed, and two spent 9mm casings. Kea filed a motion to suppress arguing that Sgt. Skellenger lacked sufficient reasonable suspicion to conduct an investigatory stop of the PT Cruiser and that all the evidence gained from the traffic stop should be suppressed. The trial court found that Sgt. Skellenger articulated a reasonable suspicion for making an investigatory stop. In reaching this conclusion, the trial court noted that at the time of the stop, Sgt. Skellenger encountered a vehicle that "matched identically" to the description relayed by Sgt. Bell, the vehicle was encountered within close proximity to and within a short period of time after the shooting at a time of day when not many other vehicles were on the road, and the video clearly shows that this particular vehicle was connected with the shooting at the house.

The CCA agreed with the trial court. Citing *State v. Davis,* 354 S.W.3d 718 (Tenn. 2011), *State v. Day,* 263 S.W.3d 891 (Tenn. 2008) and *State v. Watkins,* 827 S.W.2d 293 (Tenn. 1992), recognizing that a trial court's determination of whether a police officer has reasonable suspicion supported by specific, articulable facts is an objective, fact-intensive inquiry that requires a court to consider the totality of the circumstances (including, but not limited to, objective observations, information obtained from other police officers and agencies, information obtained from citizens, and the pattern of operation of certain offenders) established by the proof, the CCA found four factors supported the investigatory stop of the PT Cruiser. Those factors were:

> (1) Ms. Evans reported that her house had been fired upon, that she had surveillance equipment, and that she had viewed the recording and saw shots fired from a white or cream-colored PT Cruiser;
> (2) [T]he Location where Sergeant Skellenger observed the vehicle was in close proximity to Ms. Evan's [sic] home and only a short period of time had elapsed between Ms. Evan's [sic] report and Sergeant Skellenger's observation of the vehicle;
> (3) Sergeant Skellenger testified that there were few other cars on the road at the time and that PT Cruisers were not common in the area; and
> (4) [T]he level of danger in this situation was apparent, and Sergeant Skellenger had a reasonable basis for assuming the suspects in the PT Cruiser were armed and dangerous and had fired from inside their vehicle.

Or, more simply, the CCA found that the information was provided by a known citizen with personal knowledge gained from viewing a video depicting the actual shooting, that information was relayed to police officers, the information was sufficiently corroborated by Sergeant Skellenger before the traffic stop was initiated, and Sergeant Skellenger was able to articulate the reasonable basis for the traffic stop. Likewise, 911 calls from citizens with knowledge gained from observing dangerous driving or bad behavior can provide sufficient reasonable suspicion for an officer to stop and investigate a vehicle that matches the description given by the citizen, for a DUI stop. See the recently decided cases of *State v. Regina Jackson*, 2021 Tenn. Crim. App. LEXIS 80. (As outlined on page 2, herein) and *State v. Clark*, 2020 Tenn. Crim. App. LEXIS 273.

Tennessee District Attorneys General Conference

226 Anne Dallas Dudley Blvd., Suite 800, Nashville, TN 37243-0890
Website: http://dui.tndagc.org

Terry E. Wood (615) 253-6734
Linda D. Walls (615) 232-2944
Pat Hayes (615) 253-5684