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MVHO AND THE "CRIMINAL SAVINGS STATUTE"

On May 24, 2019, the Tennessee Legislature approved of a law removing the statutory crime of **Motor Vehicle Habitual Offender** (MVHO, previously TCA sections 55-10-601 through 55-10-618) and the Legislature replaced the statute's prior provisions with a method to petition the court to reinstate any driver's license revoked, pursuant to the prior MVHO Act. This law became effective on July 1, 2019. (2019 Tenn. Public Acts, ch. 486, section 3.)

TCA section 39-11-112 is known as the criminal savings statute and it states:

> "When a penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, the offense, as defined by the statute or act being repealed or amended, committed while the statute or act was in full force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense. ... in the event the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act."

Therefore, if the method of reinstating a driver's license which was revoked by the MVHO Act is considered a lessor penalty, then the lesser penalty provision of the criminal savings statute will apply and all convicted MVHO defendants that were sentenced after July 1, 2019 should benefit and be sentenced to no penalty. (lessor than the penalty provided for in the prior statute) However, if the intent of the Legislature was to merely repeal the MVHO Act, then any defendants that were sentenced after July 1, 2019 would be sentenced to the provisions of the prior MVHO Act under the criminal savings statute and thus be sentenced to the MVHO Act as it existed prior to July 1, 2019. *See State .v Sherman,* 2007 Tenn. Crim. App. LEXIS 558 (Tenn. Crim. App. 2007).

In *State ex rel. Stewart v. McWherter*, 857 S.W.2d 875, 1992 Tenn. Crim. App. LEXIS 877 (Tenn. Crim. App. 1992), the Court of Criminal Appeals stated, "In the past, when a criminal statute creating a crime was repealed, any defendant that **violated the statute before the repeal** would be convicted and sentenced according to the prior statute as it appeared before the repeal. The criminal savings statute has never been interpreted to apply to convictions and sentences which were already received when a subsequent act or amendment provided for a lesser penalty. By their terms, the former and present savings statutes relate to active prosecutions, not past cases for which sentences are being served." (emphasis added) *See also*, *Villanueva v. Tennessee Dep't of Correction*, 1999 Tenn. App. LEXIS 178 (Tenn. App. 1999). Likewise, the criminal savings statute does not apply to probation revocation hearings when the defendant was convicted and sentenced before the amended statute, but the revocation of probation was heard after the amended statute. (Continue on page 12)

RECENT DECISIONS

State v. Tharcisse John Nkurunziza, 2021 Tenn. Crim. App. LEXIS 180

This case involved the appropriateness of sentencing enhancements used to determine the sentence length on a charge of vehicular assault. Mr. Nkurunziza was indicted for Vehicular Assault, Reckless Driving, DUI per se, DUI and Failure to Provide Proof of Financial Responsibility. Mr. Nkurunziza pled guilty to the Vehicular Assault charge and requested a sentencing hearing. On April 5, 2017, Mr. Nkurunziza drove his Chevrolet Impala the wrong direction on I-40 eastbound, near Ashville Highway, causing a head-on collision with a Ford SUV. A search warrant for a blood draw was obtained, three hours later, and Mr. Nkurunziza's BAC was .207 gram percent. The victim, Mr. Tedder received many leg fractures which required extensive treatment, surgeries and rehabilitation. Medical records indicated Mr. Nkurunziza's BAC to be .237, two hours after the crash. Mr. Nkurunziza told medical staff, "I drink for a living."

The trial court sentenced Mr. Nkurunziza as a Range I, standard offender to four years to be served as ten months in jail, followed by supervised probation. Mr. Nkurunziza appealed the sentence, claiming that the sentence was excessive, because the trial court misapplied all three enhancement factors that it relied upon. The State acknowledged that the trial court did misapply enhancement factors (1) a previous history of criminal convictions or criminal behavior, and (6) the personal injuries inflicted upon the victim were particularly great, even though the State argued for them during the sentencing hearing. However, the trial court did properly apply enhancement (10) the defendant had no hesitation about committing a crime when the risk to human life was high. Also, the record supported the trial court's denial of full probation.

The standard of review is an abuse of discretion with a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). Although the trial court should consider enhancement and mitigating factors, the statutory factors are advisory only. *See* Tenn. Code Ann. section 40-35-114; *see also Bise,* 380 S.W.3d at 701. Although enhancement factor (10) does not apply to vehicular assault, unless the record does indicate that *any other person* was actually threatened by the defendant's driving. *State v. Rhodes,* 917 S.W.2d 708, 714 (Tenn. Crim. App. 1995). It is appropriate, as in this case, when the defendant crossed over into the opposite lanes on an interstate, in an urban area, and strikes a vehicle head-on. *State v. Davis Oliver Brown,* No. 03C01-9608-CR-00313, 1997 WL 785671, at *3 (ten. Crim. App. At Knoxville, Dec. 16, 1997). The judgment of the trial court was affirmed.

State v. Jamie Lee Blankenship, 2021 Tenn. Crim. App. LEXIS 197

On January 19, 2018, Mr. Blankenship pled guilty to MVHO and DUI second offense. He was sentenced to one year, six months at thirty percent release eligibility for the MVHO charge and eleven months, 29 days, after service of 45 days jail on the DUI charge. The sentences were to run concurrent. Mr. Blankenship was released on probation, after approximately five months in the workhouse, and shortly thereafter, violated his probation (by never reporting). The trial court ordered Mr. Blankenship to serve the remainder of his sentence and the defendant appealed, claiming that he should have been given split confinement followed by reinstatement of probation for an extended duration.

Probation revocation rests in the sound discretion of the trial court and will not be overturned by this court, absent an abuse of that discretion. *State v. Leach,* 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995). As this court has repeatedly cautioned, "[A]n accused, already on probation, is not entitled to a second grant of probation or another form of alternative sentencing." *State v. Jeffrey A. Warfield*, No. 01C01-9711-CC-00504, 1999 Tenn. Crim. App. LEXIS 115, 1999 WL 61065, at *2 (Tenn. Crim. App. at Nashville, Feb. 10, 1999); see also *State v. Timothy A. Johnson*, No. M2001-01362-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 136, 2002 WL 242351, at *2 (Tenn. Crim. App. at Nashville, Feb. 11, 2002). Trial courts are given great latitude during revocation of probation violation rulings and any subsequent sentencing decisions. Therefore, the Court of Criminal Appeals affirmed the judgments of the trial court. (Continued on page 3)

RECENT DECISIONS (Continued)

State v. Cedarius J. Robertson, 2021 Tenn. Crim. App. LEXIS 245

Mr. Robertson, was convicted by a jury, in Madison County, of being a Convicted Felon in Possession of a Firearm, a class B felony; Tampering with Evidence, a class C felony; Driving under the influence (DUI) and DUI per se, class A misdemeanors; Possessing a Handgun while Under the Influence, a class A misdemeanor; and Failing to Maintain his Lane of Travel, a class C misdemeanor. After a sentencing hearing, the trial court merged the DUI convictions and ordered that he serve an effective thirteen-year sentence in confinement. Mr. Robertson appealed, based upon insufficiency of the evidence.

On September 30, 2018, Trooper Jones observed a black Chevrolet Silverado moving from one lane to another, crossing both the center dividing line and the fog line. Trooper Jones turned on his blue lights, but Mr. Robertson did not stop until he turned into a liquor store, which was "quite a ways" from the initial attempted traffic stop. Trooper Jones immediately smelled alcohol coming from inside the vehicle and he saw a pistol on the floor board at Mr. Robertson's feet. Mr. Robertson was removed from his vehicle and put unhandcuffed in the back of Trooper Jones' vehicle. Mr. Robertson stated that he "drank some beer, had a couple of shots, and he knew he was drunk." Mr. Robertson was too intoxicated to finish the SFSTs. Mr. Robertson was "extremely cooperative" and he consented to a blood draw, which was conducted three-hours after the traffic stop. His BAC was .145 gram percent. On appeal, Mr. Robertson claimed that he was "so under the influence that it contributed to his inability to perceive what was on the floor board of his truck."

When an appellant challenges the sufficiency of the convicting evidence, the standard for review, by an appellate court, is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Tenn. R. App. P. 13(e). The CCA found sufficient evidence existed and affirmed the judgments of the trial court.

State v. Eric Manzenberger, 2021 Tenn. Crim. App. LEXIS 250

Mr. Manzenberger was stopped for Speeding and having a Malfunctioning Brake Light, but after further investigation and his poor performance on SFSTs, he was ultimately charged with DUI. The defense filed a motion to suppress several statements that he made to law enforcement during the traffic stop, since he was not informed of his right to remain silent. Mr. Manzenberger asked the officer, "what would happen if he declined to perform SFSTs," and the officer said that he would be "placed under arrest." The defense argues that he was in custody from that point on and he should have been read Miranda rights. After the SFSTs were performed, the officer continued to ask Mr. Manzenberger about how much he had to drink, if he felt "buzzed or anything." The officer then asked, "On a scale of zero to ten, zero being completely sober and ten being really, really drunk, how do you feel right now?"; and Mr. Manzenberger answered "Three."

"Miranda warnings are required only when a suspect is subjected questioning or its functional equivalent while in custody." *State v. Walton*, 41 S.W.3d 75, 82 (Tenn. 2001). Both parties agreed that Mr. Manzenberger was being questioned during the traffic stop. Therefore, the only question is whether Mr. Manzenbereger was considered in custody during the questioning. The custody analysis requires determining "whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest." *State v. Anderson*, 937 S.W.2d 851, 855 (Tenn. 1996). The United States Supreme Court has stated that a person is not "in custody" for the purposes of *Miranda* when the person is temporarily detained for a traffic stop, "including one involving intoxication." *Berkemer v. McCarty,* 468 U.S. 420, 436 (1984). The CCA determined that a reasonable person in Mr. Manzenberger's situation would conclude that the officer's determination regarding whether to arrest the defendant was being delayed until the officer had furthered his investigation. *See Abrahamson v. State,* 623 S.E.2d 764, 767 (Ga. Ct. App. 2005). The judgments were affirmed. (Continued on page 4)

RECENT DECISIONS (Continued)

State v. James Michael Martin, 2021 Tenn. Crim. App. LEXIS 256

On August 3, 2017, Mr. Martin was involved in a single car crash, when his vehicle left the roadway and became wedged in a wooded area at the bottom of a ravine. After an hour and a half, Mr. Martin was rescued from his vehicle. Officers at the scene observed signs of impairment and Mr. Martin admitted to drinking "four or five beers" and taking Oxycodone earlier in the evening. Mr. Martin performed poorly on the SFSTs and he could not complete them. Mr. Martin consented to giving a blood sample and his BAC was 0.147 gram percent. Mr. Martin filed a motion to dismiss because a video of the SFSTs could not be located. The officer believes that a tape was made, but he is not certain, because the department was changing video technology at the time. Mr. Martin argued that the State should have a duty to video record all encounters between law enforcement and suspects. "However, there is no general requirement for law enforcement to electronically record their activity, *State v. Godsey*, 60 S.W.3d 759, 771 (Tenn. 2001), or to conduct any particular type of investigation, or utilize any particular investigative technique. *State v. Brock*, 327 S.W.3d 645, 698 (Tenn. Crim. App. 2009) (quoting *State v. Best*, No. E2007-00296-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 744, 2008 WL 4367529, at *13 (Tenn. Crim. App. Sept. 25, 2008)); *See also, State v. Pendergrass,* No. E2013-01409-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 260, 2014 WL 1232204, at *7 (Tenn. Crim. App. Mar. 25, 2014), *perm. app. denied* (Tenn. Aug. 26, 2014) (noting that *Ferguson* "does not require the *creation* of evidence").

The CCA discussed the standards set in *State v. Merriman,* 410 S.W.3d 779 (Tenn. 2013) as applied to *State v. Ferguson,* 2 S.W.3d 912 (Tenn. 1999). Since the jury convicted Mr. Martin of DUI per se, his performance on SFSTs, even if contradictory to the officer's testimony, would have no bearing on the concentration of alcohol in his blood. The video was immaterial. The CCA also allowed statements made to the nurse as being made to a third party and not at the direction of the officer. The judgments of the trial court were affirmed.

State v. Riley Christopher Wilburn, 2021 Tenn. Crim. App. LEXIS 278

Mr. Wilburn was convicted of DUI by a Giles County Circuit Court jury. On appeal, Mr. Wilburn contends that the trial court erred in denying his motion to dismiss on the basis that the indictment was fatally flawed, because it alleged two offenses in a single count. (DUI and DUI per se). The CCA was asked to determine if DUI by intoxication and DUI per se are separate offenses, which must be charged by separate counts of an indictment, or whether they may be alleged alternatively in a single-count and, whether juror unanimity is required as to the specific means by which a defendant commits the offense, when they are charged disjunctively in a single-count indictment.

The CCA stated, "When the offense may be committed by different forms, by different means or with different intents, the forms, means or intents may be alleged in the same count in the alternative." T.C.A. § 40-13-206(a) (2018). It was noted that DUI is a continuing crime and when DUI is charged in separate counts of an indictment alleging alternate theories, the convictions for the separate counts are merged into a single judgment of conviction. *See, e.g., State v. Cooper,* 336 S.W.3d 522, 524 (Tenn. 2011) (holding that separate judgments of conviction for DUI by intoxication and DUI per se arising from the same incident violates double jeopardy and that the convictions must be merged into a single judgment).

The CCA Concluded, in accord with the legislative history and previous judicial interpretations of the DUI statute, that DUI by intoxication and DUI per se are alternative means of committing DUI, not separate offenses. Also, with respect to the issue of juror unanimity, the CCA concluded that because Mr. Wilburn was charged with a single offense, he is not entitled to juror unanimity as to the particular mode or modes of the offense which the jury found he committed. *See* T.C.A. § 40-18-112 (holding that juror certainty as to the same intent, mode or mean is not required to convict if they agree that the act was committed). *See also, State v. Adams,* 24 S.W.3d 289 (Tenn. 2000); *State v. Lemacks*, 996 S.W.2d 166 (Tenn. 1999). Judgments affirmed.

THE NEED FOR GOOD COMMUNICATION

Whether prosecutors realize it or not, communication requires the complete development of effective listening and speaking skills. Why is listening important? Simply stated, we must listen to witnesses in order to convey information to a third-party, without distorting or redefining the details of what happened. It is the cornerstone of our jobs as prosecutors to seek and present the truth to the jury, so that justice may be done. Communication is defined by the Oxford English Dictionary as "[t]he imparting or exchanging of information by speaking, writing, or using some other medium" or "[t]he successful conveying or sharing of ideas and feelings." (Oxford Dictionary Online, May 29, 2018, 9:05 AM). The word communication originated in Latin from the noun "communicatio" which was formed from the verb "communicare" meaning "to share". (Google Dictionary, May 29, 2018, 9:28 AM).

As prosecutors, we need to formulate questions that elicit descriptive testimony. It is not enough for a witness to say a "white, pickup truck" when more descriptive language like "a white, quad-cab GMC pickup truck with a large dent in the driver's side door, just below the door handle" would provide for a more complete visualization of what the witness saw. Repeating the description provided by the witness in the next question helps the jury get a mental picture of the action, "When you saw this white, quad-cab GMC pickup truck with the large dent in the driver's side door, just below the door handle, as you described it, did you see any other cars or trucks on the roadway?" Now, think about the testimony you elicited from the witness and add in the photographic evidence (if there is such evidence), that matches that description. Isn't the testimony in combination with the photographs of the described pickup truck more powerful? Doesn't this description support the credibility of your witness with the jury?

The more information we hear, absorb, and re-communicate accurately to the jury, the better. That is why it is important to meet with and listen to each witness before trial. During the pre-trial meetings, we should not interject any information into the conversation that potentially could alter or distort the memory of the witness. The best practice is to listen first and then ask questions based on what the witness tells us. Always compare the information provided in the conversation with any prior statements made by the witness to law enforcement. If the statements given to law enforcement seems to be more detailed, or varies in minor ways with what the witness says during the pre-trial meeting, or omits some details provided in the meeting, then it may be necessary to discuss those issues with the witness in such a way as to encourage open and honest communication regarding the completeness and accuracy of the information provided within those prior statements. Addressing any issues with witness memory or statement accuracy at the pretrial meeting will reduce anxiety and reduce the chance that omissions or additions to testimony at trial will catch a prosecutor off-guard and/or potentially cause a mistrial.

Ultimately, it is our job to communicate the facts of a case to the jury through the witnesses and evidence presented at trial. The rules of evidence and ethics permit prosecutors to make reasonable inferences from the evidence presented in the case, but there are limitations. For instance, a prosecutor cannot misstate the evidence, speak to the credibility of witnesses, or refer to matters not within the court record. Therefore, it is of the utmost importance that we listen to the evidence presented at trial, make note of that evidence, and reconvey this information in summation honestly, completely, and accurately.

So, the next time you meet with any witness, whether the witness is law enforcement, a lay witness, or an expert witness in crash reconstruction, toxicology, etc.; listen first and then ask questions for clarification. If you follow this pre-trial interview plan, you just may get a clearer understanding of just how the witness's testimony helps prove your case, beyond a reasonable doubt, and better communicate that understanding and information to the jury at trial.

LEGISLATIVE UPDATE

The 112th Tennessee General Assembly convened on January 12, 2021 and adjourned on May 5, 2021. During the four-month term, the general assembly addressed a variety of issues related to traffic safety, motor vehicles, and/or regarding driver's license issuance.

First, Public Chapter 55, the 2021 Precious Cargo Act was passed to "empower citizens to communicate specific needs to law enforcement and first responders." Essentially, this law will permit an owner or lessee of a motor vehicle who needs assistance, with expressive language or communicating needs to a first responder, or who needs assistance with exiting a motor vehicle; to request, at the time of initial application or renewal of registration, a special designation of that need, in the Tennessee Vehicle Title and Registration System (VTRS). Special documentation from a healthcare provider as outlined in the act, would be required at the time the owner or lessee makes the request. This information would be made available to law enforcement, only for the purpose of ensuring safe and efficient response and interactions with those in need. This act will take effect on January 1, 2022.

On March 29, 2021, Governor Lee signed Public Chapter 56, specifically providing that an electric wheelchair is not a motor vehicle for the purposes of Title 55. This act was effective upon Governor Lee's signature.

Prior to the enactment of Public Chapter 105 on April 7, 2021, a juvenile charged with delinquent act of theft of a motor vehicle, under Tennessee Code Annotated §39-14-103, would not trigger a placement in a secure detention facility absent other facts/factors. After the enactment, however, courts are given that option, if there is probable cause to support the delinquent petition. This public chapter took effect when it was signed by Governor Lee on April 7, 2021.

When Public Chapter 108 was enacted on April 8, 2021, most people focused on the expansion of those permitted to carry a handgun, openly or concealed, and where it may be done, and not on other provisions of the act, related to those who will now be prohibit from carrying a firearm with the intent to go armed. The act amended T.C.A. § 39-17-1307 to add those convicted of driving under the influence of an intoxicant, two (2) or more times within the prior ten (10) years, or one (1) time within the prior five (5) years, as those prohibited from carrying a firearm, with the intent to go armed. This act goes into effect on July 1, 2021.

For those convicted of a human trafficking offense, as defined in T.C.A. § 39-13-314 or an equivalent offense in another jurisdiction, Public Chapter 112 provides for suspension for life or disqualification from obtaining a commercial driver's license (CDL). This act went into effect on April 13, 2021.

Trailer hitch balls are a common vehicle accessory here in Tennessee. Recognizing that some trailer hitch balls are mounted in front of registration plates, on a number of those vehicles, Public Chapter 174, effective on April 20, 2021, provides that this cannot be considered when determining whether a license plate or registration sticker is clearly visible for purposes of T.C.A. § 55-4-110.

Signed by Governor Lee on April 20, 2021, Public Chapter 176 provides that occupants on autocycles that are **not fully enclosed** must wear a helmet beginning on July 1, 2021.

License plate readers and privacy are the focus of Public Chapter 201. Effective April 22, 2021, this act provides that captured plate data from automatic license plate reader systems must be treated as confidential and not open for inspection by members of the public, under T.C.A. § 10-7-504.

Beginning on July 1, 2021, members of the general assembly may request, in writing, copies of crash reports for crashes resulting a person's death, in the member's district. Public Chapter 225 does provide that a crash report that is subject to an on-going investigation or court order requiring the information, to remain Confidential, and shall not be released and that federal and state privacy laws … (Continued on page 7)

LEGISLATIVE UPDATE (Continued)

regarding identifiable information, apply to the reports released to members of the general assembly.

Recovery and tow vehicles responding to an emergency call from a law enforcement agency, may lawfully use the shoulder of the roadway to get through traffic. Public Chapter 243 was signed by Governor Lee and went into effect on April 28, 2021.

The dangers posed by those evading arrest and resulting damages have been a concern of the general assembly for the past few years. This year was no exception. Public Chapter 278, the Spencer Bristol Act, enacted in response to the death of Spencer Bristol, of the Hendersonville Police Department, makes evading arrest a class C felony if it results in bodily injury to a law enforcement officer and a class A felony if it results in the death of a law enforcement officer, regardless of whether the defendant evaded on foot or by motor vehicle. Further, the act provides mandatory confinement in cases involving evading arrest by a motor vehicle. This act takes effect on July 1, 2021.

Photographic evidence of a fatal motor vehicle accident that depicts a deceased minor victim shall be treated as confidential and not open for inspection by members of the public, unless the custodial parent or legal guardian waives confidentiality, under Public Chapter 304. This act, of course, does not restrict Rule 16 disclosure requirements and does not deny or limit access to other information related to the motor vehicle crash, that is open to public inspection. This act takes effect on July 1, 2021.

Owners, occupants, or others having lawful right to the exclusive use and enjoyment of property, who knowingly allow a person, under 21 years of age, to consume alcoholic beverages on their property, will be committing a class A misdemeanor and could lose or be denied driving privileges at the discretion of the court having jurisdiction over the defendant, under Public Chapter 430. This act takes effect on July 1, 2021.

Boating Under the Influence jail penalties were changed to be more in-line with Driving Under the Influence jail penalties, by Public Chapter 434, effective on July 1, 2021. Also, within the act, Vehicular Homicide and Vehicular Assault now include boats and other vessels subject to registration under title 69, chapter 9, part 2.

The Caitlyn Kaufman Interstate Safety Act, Public Chapter 450, permits the installation of surveillance Cameras, operated by law enforcement agencies for the purpose of aiding in criminal investigations or searches for missing or endangered persons, to the extent that the use is consistent with the continued use, maintenance, and safety of the highway, does not interfere with the free and safe flow of traffic, and are not used to enforce or monitor state or local traffic violations, or the issuance of traffic citations. This act went into effect on May 14, 2021.

Beginning on July 1, 2021, forensic analysts, if permitted by the court and the defendant agrees, and other requirements are satisfied, may testify remotely in a criminal proceeding, under Public Chapter 501.

Public Chapter 505, effective July 1, 2021, makes reckless endangerment by discharging a firearm from within a motor vehicle a class C felony.

The definition of an “eligible petitioner” for purposes of expunction, will not include those convicted of offenses involving the manufacture, delivery, sale, or possession of a controlled substance and at the time of the offense held a commercial driver license or committed the offense within a commercial motor vehicle regardless of the driver’s license held by that person, under Public Chapter 539. Effective July 1, 2021.

Finally, with overwhelming support of both houses of the general assembly and Governor Lee, drag racing will be a class A misdemeanor beginning July 1, 2021, with the enactment of Public Chapter 573. For more details regarding these legislative acts, go to https://sos.tn.gov/division-publications/acts-and-resolutions.

UPCOMING TRAINING

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

Cops in Court - July 23, 2021, Harrogate, TN
This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trail presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation from noon to 4 p.m.

Mastering CDL Masking - July 27, 2021, Nashville, TN
CDL holders that commit prior traffic offenses, have a substantially higher chance of being involved in a DUI crash and a higher percentage of commercial vehicle crashes, involving fatalities and serious bodily injuries. Many of these crashes can be prevented by preventing CDL masking. (The practice of hiding CDL traffic convictions by pleas, diversion or dismissals)

20/20 Medical Foundation of Eye Movements & Impairment - August 9+10, 2021, Memphis, TN
This seminar will be taught by faculty members of the Southern College of Optometry and by Dr. Citek. The legal and physiological aspects of eye movements and the detection of impairment will be covered. This class is limited to prosecutors, TBI toxicologists, drug recognition officers and SFST instructors (with ARIDE).

Cops in Court - September 22, 2021, Nashville, TN (THP Cadets)
This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trail presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation from noon to 4 p.m.

DA Conference: DUI Breakout - October 21, 2021, Chattanooga, TN (Thursday)
Every year our DUI breakout session provides approximately three hours of education and training, covering current DUI topics and legal updates. This year we will feature classes on drugged driving and legal updates.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Impaired Driving Enforcement (ARIDE)
July 19-20, 2021, Manchester, TN
July 26-27, 2021, Algood, TN
September 13-14, 2021, Bartlett, TN
September 27-28, 2021, Martin, TN

DUI Detection & Standardized Field Sobriety Testing
July 12-14, 2021, Jacksboro, TN
July 20-22, 2021, Jonesborough, TN
August 2-4, 2021, Lafayette, TN
August 23-27, 2021, Ashland City, TN (SFST Instructor)

Drug Recognition Expert School (DRE)
July 29, 2021, Jonesborough, TN (In-Service)
July 30, 2021, Knoxville, TN (In-Service)
August 18, 2021, Franklin, TN (Pre-Conference)
August 23 - September 3, 2021, Pigeon Forge, TN
October 11-21, 2021, Denmark, TN

DUI TRACKER

DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from April 1, 2021, through June 30, 2021, and reflect the DUI Tracker conviction report for all judicial districts in the State of Tennessee. These numbers include the Circuit Courts, Criminal Courts, General Sessions Courts and Municipal Courts. The total number of dispositions for the period from April 1, 2021, through June 30, 2021, since the last quarter were 2,111. This number is substantially up from the previous quarter by 1,646 cases. Due to the reopening of the courts after Covid-19, all DUI related dispositions in Tennessee have dramatically increased this quarter. The total number of guilty dispositions during this same period of April 1, 2021 through June 30, 2021 were 1,603. The total number of dismissed cases were 115. Across the State of Tennessee, this equates to 75.94% of all arrests for DUI made were actually convicted as charged. This percentage is slightly higher than the last quarter ending on March 31, 2021. Only 8.43% of the DUI cases during this current quarter were dismissed or nolle prossed. Also, during this same period of time, only 303 of the total DUI cases disposed of, were to different or lesser charges. Therefore, only 14.35% of the total cases were disposed of to a charge other than the original charge.

Fatal Crashes this last quarter

The following information was compiled from the Tennessee Integrated Traffic Analysis Network (TITAN) using an *ad hoc* search of the number of crashes involving fatalities that occurred on Tennessee's interstates, highways and roadways, from April 1, 2021 through June 30, 2021. During this period, there were a total of 370 fatalities, involving 339 crashes, which is an increase from the previous quarter. Out of the total of 370 fatalities, 74 fatalities involved the presence of alcohol, signifying that 20% of all fatalities this quarter had some involvement with alcohol. This percentage is higher than the previous quarter. Further, there were a total of 68 fatalities involving the presence of drugs, signifying that 18.38% of all fatalities this quarter involved some form of drugs.

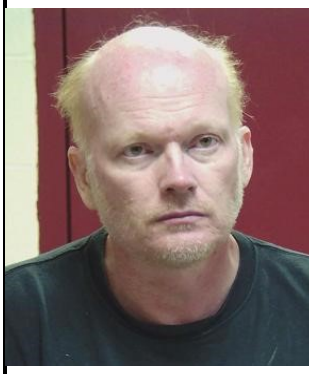
The year-to-date total number of fatalities on Tennessee roads and highways is 650. This is up by 141 from the 509 fatalities incurred last year at this same time. This increase in alcohol and drug related fatalities is shocking. We have got to stop the unconscionable death and injuries caused by the completely preventable crime of impaired driving.

Lethal Weapon/Vehicular Homicide Seminar

The DUI Training Department held our annual Lethal Weapon/Vehicular Homicide Seminar in Nashville, TN, on June 8-10, 2021. This was a joint training seminar, with law enforcement officers and prosecutors from Tennessee and Kentucky. Participants attended a staged bicycle/vehicle strike and learned how to better present vehicular homicide evidence to a jury. Professor John Kwasnoski taught extensively on how to investigate, diagram and understand crashes and their causes. This seminar will be provided next year in Kentucky. Please do not miss this great opportunity.

VEHICULAR HOMICIDE MURDERER'S ROW

State v. Douglas E. Alvey, 2021 Tenn. Crim. App. LEXIS 218



This is not the usual vehicular homicide case that is reported in the DUI Newsletter, as the State in this case decided to dismiss the Vehicular Homicide charge and to proceed at trial on charges of premeditated First Degree Murder and Leaving the Scene of an Accident resulting in Injury or Death. As with most cases in which the defendant leaves the scene of the crash, any evidence of impairment is remote, at best.

On September 6, 2016, the victim, Walter Hale, a manager and supervisor at the We Care Thrift Store in Dayton, Tennessee was eating lunch in his vehicle, while parked on the side of the thrift store. Mr. Alvey had been inside the store, but left without making any purchases. He then drove his white Ford pickup truck to the rear of the thrift store, circled and stopped, and threw a piece of furniture on the ground, near the store loading dock, destroying the piece of furniture. As Mr. Alvey started to leave the area, Mr. Hale stepped in front of the truck with his arm outstretched, appearing to signal to Mr. Alvey to stop. Mr. Alvey sped up and struck Mr. Hale with the truck. Initially, Mr. Hale was thrown onto the hood of the truck and tried to hold onto the windshield wipers. Mr. Alvey continued to speed out of the parking lot, throwing Mr. Hale off of the vehicle and into some shrubbery and rocks across the road. Mr. Hale died from his injuries four days later. Mr. Alvey quickly left the area in the opposite direction of his home.

A jury convicted Mr. Alvey of First Degree Murder and Leaving the Scene. The trial court sentenced the defendant to a life sentence and two years concurrent. Mr. Alvey appealed the convictions based upon the sufficiency of the evidence, specifically regarding that he acted with premeditation. The standard of review for the appellate court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,*443 U.S. 307, 319 (1979). "A guilty verdict 'removes the presumption of innocence and replaces it with a presumption of guilt, and [on appeal] the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict.'" *State v. Bland,*958 S.W.2d 651, 659 (Tenn. 1997); *see State v. Tuggle,* 639 S.W.2d 913, 914 (Tenn. 1982).

The defense argued that the only factor from which the jury could infer premeditation was Mr. Alvey's use of his vehicle as a deadly weapon against an unarmed victim. They argued that there was no proof that Mr. Alvey made preparations to kill the victim, made any declarations of intent to kill or procured a weapon to kill. However, the State contended that in addition to using the vehicle as a deadly weapon against an unarmed victim, Mr. Alvey exhibited calmness immediately after the killing and the killing was committed with "particular cruelty." Also, there was no provocation from Mr. Hale and Mr. Alvey failed to render aid to Mr. Hale. The CCA determined that there was sufficient evidence to support a finding of premeditation. The jury could infer that Mr. Alvey saw Mr. Hale waving at him to stop and rather than stopping, Mr. Alvey accelerated, striking Mr. Hale. Then, Mr. Alvey continued driving through the parking lot with Mr. Hale on the hood of his vehicle until Mr. Hale was flung off the vehicle, when Mr. Alvey made a hard left out of the parking lot. Although the incident lasted only seconds, the CCA stated that there was sufficient time for Mr. Alvey to "exercise reflection and judgment." A video showed that Mr. Alvey's brake lights were in working order, but his brakes were never applied from the time Mr. Hale appeared around the corner of the building through the time that he struck Mr. Hale and drove out of the view of the camera. Mr. Alvey never rendered aid and Mr. Hale did nothing to provoke Mr. Alvey. The judgments of the trial court were affirmed.

U.S. SUPREME COURT - LANGE v. CALIFORNIA

Lange v. California, 2021 U.S. LEXIS 3396, 141 S.Ct. 2011, 594 U.S. ___ (2021)

Arthur Lange was driving in Sonoma, California, listening to loud music with his windows down, and repeatedly honking his horn. He was doing this as he passed a California Highway Patrol officer. The officer began to follow Mr. Lange and eventually turned on his overhead lights to signal that Mr. Lange should pull over. Mr. Lange was only a about a hundred feet (about a four-second drive) from his home. So instead of stopping, Mr. Lange entered his attached garage. The officer followed Mr. Lange and entered the garage. The officer observed signs of impairment and he had Mr. Lange perform SFSTs. Mr. Lange did not do well on the SFSTs and he was arrested for DUI and a noise infraction. Mr. Lange's BAC was over 0.24 grams percent.

Mr. Lange filed a motion to suppress based upon the officer's warrantless entry of his garage, in violation of the Fourth Amendment. The State argued that the pursuit of a suspected misdemeanant always qualifies as an exigent circumstance, authorizing a warrantless home entry. The trial court agreed and the California Court of Appeal affirmed the State's argument in full. The California Supreme Court denied review. Since different state courts are divided over whether the Fourth Amendment always permits an officer to enter a home without a warrant, in pursuit of a fleeing misdemeanor suspect, the United States Supreme Court granted certiorari to resolve the conflict. Justice Kagan delivered the opinion of the Court.

The ultimate touchstone of the Fourth Amendment is "reasonableness." *Brigham City v. Stuart,* 547 U.S. 398, 403 (2006). Generally a warrant is required for an officer to enter a home, but the "warrant requirement is subject to certain exceptions." *Id.* at 403. One important exception is exigent circumstances, like when the needs of the officer are so compelling that a warrantless search is objectively reasonable. *Kentucky v. King,* 563 U.S. 452, 460 (2011). Most U.S. Supreme Court cases have generally applied the exigent-circumstances exception on a "case-by-case basis." *Birchfield v. North Dakota,* 579 U.S. 438, ___ (2016). Whether a "now or never situation" actually exists—whether an officer has "no time to secure a warrant"—depends upon facts on the ground. *Riley v. California,* 573 U.S. 373, 391 (2014); *Missouri v. McNeely,* 569 U.S. 141, 149 (2013). So this issue should be considered by "looking at the totality of the circumstances" confronting the officer as he decides to make the warrantless entry. *Id.* at149.

"[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines,* 569 U.S. 1, 6 (2013). Physical entry of the home is the chief evil against which the Fourth Amendment is directed. *Payton v. New York,* 445 U.S. 573, 587 (1980). The Amendment thus draws a firm line at the entrance to the house. *Id.* at 590. Although it was argued that officers pursuing any fleeing suspect, whether felon or misdemeanor, allows a warrantless home entry, the U.S. Supreme Court disagreed. Due to the fact that misdemeanors vary widely and may be sometimes minor, and less violent, this Court has held that when a minor offense alone is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry. *See Welsh v. Wisconsin,* 466 U.S. 740, 750 (1984). Although a suspect's flight changes the calculus and many flights will create a need for police to act quickly, "no evidence suggests that every case of misdemeanor flight poses such dangers." Justice Kagan reasoned that there are several different situations when waiting for a warrant is unlikely to hinder a compelling law enforcement need. *See Mascorro v. Billings,* 656 F. 3d 1198, 1207 (CA10 2011). "In misdemeanor cases, flight does not always supply the exigency that this Court has demanded for a warrantless home entry."

Justice Kagan summarized by stating, "[O]ur Fourth Amendment precedents thus point toward assessing case by case the exigencies arising from misdemeanants' flight. That approach will in many, if not most, cases allow a warrantless home entry. When the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting. ... But the need to pursue a misdemeanant does not trigger a categorical rule allowing home entry, even absent a law enforcement emergency." The CCA judgment was vacated and case remanded.

MVHO (Continued)

Therefore, the only MVHO cases that are affected by the lesser penalty portion of the criminal savings statute, are cases in which the defendant was convicted under the prior MVHO Act, but sentenced after July 1, 2019. All defendants that were convicted and sentenced before July 1, 2019 were properly convicted and sentenced under the prior MVHO Act and sentencing guidelines.

The Court of Criminal Appeals has recently ruled on three cases which definitively decided whether or not the MVHO amendment was a repeal or a lessor penalty. In the first case of *State v. Marvin Maurice Deberry,* 2021 Tenn. Crim. App. LEXIS 165, Mr. Deberry was convicted of MVHO and other traffic offenses on May 15, 2019. On July 8, 2019, (after the July 1, 2019 effective date of the MVHO amendment) Mr. Deberry was sentence to five years as a Range II offender for the MVHO offense. After a "Motion for Modification of Sentence", the trial court ordered that the criminal savings statute applied, the prior sentence would be vacated and Mr. Berry would be sentenced to, no fine and no jail time.

The CCA looked at statutory construction, legislative intent and other sources to determine that "no penalty is a lessor penalty" regarding the amended MVHO statute. The Legislature made many statements that parts of the new law increased penalties of important offenses while other parts reduced penalties for other offenses. The CCA agreed that there has been a change in legislative priorities regarding the MVHO. Therefore, the CCA affirmed the trial court's modification of Mr. Deberry's sentence to no penalty for his MVHO conviction.

In the second case, *State v. Anthony Lee Carter*, 2021Tenn. Crim. App. LEXIS 275, Mr. Carter was convicted for MVHO violation on August 1, 2019 (after the July 1, 2019 effective date of the MVHO amendment), along with felony evading arrest and other traffic crimes, which occurred on September 17, 2018. Mr. Carter was sentenced as a Range III offender to an effective sentence of twelve years. Mr. Carter's sole issue on appeal was whether the criminal savings statute applied to his MVHO conviction and sentence. The CCA confirmed that "no penalty is a lesser penalty" and remanded the case back to the trial court for entry of a new judgment reflecting a sentence of zero days for the MVHO conviction. Interesting to note, the criminal savings statute saves the felony conviction for MVHO, which occurred after the amendment, but reduces the sentence to zero fine and zero jail time.

In the third case, *State v. George H. Person,* 2021 Tenn. Crim. App. LEXIS 280 (2021 Tenn. Crim. App.) Mr. Person plead guilty to two counts of violation of the MVHO Act, along with other traffic crimes. Both the entry of the pleas and the sentencing took place in 2020, after the amendment to the MVHO Act became effective. The trial court imposed no sentence on the MVHO convictions and six months probation on his other convictions of driving on a revoked driver's license. The CCA, using the same logic and research regarding the legislative intent and statutory history, as they used in the above cases, determined that it was the intent of the Legislature that the MVHO amendment provide a "decreased punishment" and the lesser "penalty to nothing constituted the imposition of a lesser penalty" under the criminal savings statute. The MVHO felony conviction is not affected. Therefore, the judgments of the trial court were affirmed.

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