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DUI NEWS

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MIRANDA ISSUES AND DUI INVESTIGATIONS

In *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), the United States Supreme Court established procedural safeguards, commonly known as "Miranda Rights," to protect a defendant's 5th Amendment privilege against self-incrimination. These rights are so engrained in our society that the *Miranda* case has been cited over 68,000 times in various appellant decisions. A defendant must be given "Miranda warnings" and the defendant must knowingly and intelligently waive their rights before the state can conduct a **custodial interrogation**. However, the *Miranda* decision only applies "to the questioning of an individual who has been taken into custody or otherwise deprived of his freedom by the authorities in a significant way." *State v. Lullen,* 2017 Tenn. Crim. App. LEXIS 776 (Tenn. Crim. App. Aug. 28, 2017), quoting *State v. Dailey*, 273 S.W. 3d 94, 102 (Tenn. 2009). In the *Lullen* case, TBI agents interviewed the defendant in a hospital bed, while he was being treated for a bullet wound he received while trying to run from an officer. Mr. Lullen was determined to **not** be in custody at the time of the interview since he was never prevented from leaving the hospital. Mr. Lullen was later indicted and arrested for attempted second degree murder, assault and DUI.

As a general rule, "roadside DUI investigations" are **not custodial detentions**, requiring the notice and waiver of *Miranda* rights. The Tennessee Court of Criminal Appeals has stated, "In *McCarty*, the Court held that a temporary, public roadside detention accompaning a traffic stop is not so police dominated that the prophylactic rule of *Miranda* should apply." *State v. Snapp*, 696 S.W.2d 370, 371, 1985 Tenn. Crim. App. LEXIS 3124, *3; quoting *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 3150, 82 L. Ed. 2d 317 (1984). See also, *State v. White,* 2011 Tenn. Crim. App. LEXIS 509 (Tenn. Crim. App. Jul. 7, 2011), holding that the defendant was not in-custody during questioning for a DUI investigation, after the defendant was stopped for running a red light; and *State v. Davis*, 2012 Tenn. Crim. App. LEXIS 509 (Tenn. Crim. App. Dec. 27, 2012), holding that the defendant was not in-custody when required to file a report, after a crash, and was subsequently subjected to a DUI investigation. The CCA in *Davis* stated that, "Tennessee courts have frequently held that a person temporarily detained for a traffic stop, even one investigating a driver's intoxication, is not considered to be "in custody" for purposes of requiring *Miranda* warnings." *Id.* So, how far can the interrogation, related to a DUI investigation, proceed before the defendant is determined to be in custody?

"The question of whether a person is "in custody" for *Miranda* purposes is objective and does not depend upon the officer's subjective intention or the suspect's subjective perception. *State v. Stidham,* 2008 Tenn. Crim. App. LEXIS 1011, (Tenn. Crim. App. Dec. 30, 2008), quoting *State v. Crutcher*, 989 S.W.2d 295, 304 (Tenn. 1999). During a DUI investigation, the officer may determine early in the investigation that the defendant is not safe... (Continued on page 6)

RECENT DECISIONS

State v. Stephen A. Simpson, 2021 Tenn. Crim. App. LEXIS 372 (Seat belt traffic stop)

In the early morning hours of February 27, 2016, Loudon County Sheriff's Deputy, James Ketner, was sitting stationary, perpendicular to Highway 11, when he observed Mr. Simpson drive by in his truck. Deputy Ketner could see that Mr. Simpson was not wearing a seatbelt. A traffic stop was made at approximately 2:40 a.m. Deputy Ketner stated that as he made contact with Mr. Simpson and his passenger, Timothy Crawley, he could "smell the alcohol coming from inside the vehicle." An open container of beer could be seen in the cupholder. Mr. Simpson was "kind of lethargic" and "just slow to move, slow to answer questions." After Mr. Simpson exited the vehicle, the smell of alcohol was noticed coming off of him. Mr. Simpson admitted to drinking one beer at a bar "down the road." He also said that he had a fentanyl patch on his shoulder and that he had taken "Oxycodone or Oxycontin." A metal container with five Oxycodone pills was located in Mr. Simpson's pocket. During SFSTs, Mr. Simpson complained of "troubles with his hip." Deputy Ketner let Mr. Simpson perform a dexterity test and an alphabet test instead of the one-leg stand. Mr. Simpson showed signs of impairment during the walk-and-turn and alphabet tests. Deputy Ketner stated that the passenger, Mr. Crawley, told him that Mr. Simpson had "four or five" beers at the bar. Mr. Simpson refused a blood test.

Mr. Simpson filed a motion to suppress, based upon an unlawful traffic stop. The trial court ruled that the deputy's observation of the defendant driving without wearing a seat belt, gave the officer probable cause to stop the vehicle. Mr. Simpson's motion to suppress was denied. After a jury trial, Mr. Simpson was convicted for one count of DUI and one count of possession of a Schedule II controlled substance. Mr. Simpson filed an appeal. The Court of Criminal Appeals stated, "A warrant is not required for an investigatory stop 'when the officer has a reasonable suspicion, supported by specific and articulable facts, that a criminal offense has been or is about to be committed.'" (Citations omitted) Since the trial court credited the deputy's testimony that he positioned his car to observe passing vehicles, he was trained in seat belt detection in dark conditions and he was able to look in the defendant's vehicle and see that the defendant was not wearing a seat belt, then Deputy Ketner had a particularized and objective basis for believing that the defendant was committing the criminal activity of not wearing a seat belt while driving. Therefore, based upon the totality of the circumstances, Deputy Ketner had reasonable suspicion to conduct a brief, investigatory stop of the defendant's vehicle. "Further, the Sixth Circuit and this court have upheld investigatory stops based on seat belt law violations." *See U.S. v. Draper,* 22 Fed. Appx. 413, 415 (6th Cir. 2001); *State v. Carl Martin*, No. W2002-00066-CCA-R3 -CD, 2003 WL 57311, at *4 (Tenn. Crim. App. Jan. 2, 2003). The CCA also found that there was sufficient evidence for a trier of fact to find that Mr. Simpson drove under the influence as prohibited by law. The judgments of the trial court were affirmed.

20/20 Class: Understanding the Physiology of Eye Movements and Impairment

On August 9-10, 2021, the DUI Training Department, with staff members from the Southern College of Optometry in Memphis, TN, presented our 20/20 Class on involuntary eye movements caused by impairment. Participants included Prosecutors, Law Enforcement Officers and TBI Analysts. The courses included how to recognize nystagmus caused by alcohol and drug impairment. The students were also taught how to distinguish the difference between medical, environmental and impairment caused nystagmus. Our next class will meet in April of 2022.

WEAVING IN YOUR LANE ON TWO WHEELS?

It is no shock that drinking, drugged, and distracted driving is a problem in Tennessee. The fatality numbers just this morning was reported as 946. (Over 100 more than last year at this same time) The numbers are ever-increasing this year, and we are still in September. Now take away two of the four wheels.

As a Tennessee State Trooper of nearly 20 years and almost 16 years assigned to our motorcycle unit, I can vouch for those who work tirelessly to prevent such horrific events. The struggles we face as Law Enforcement Officer's (LEO) are formidable. The knowledge required to possess, and master these skills is not an easy task either, especially when it comes to the world of DUI.

DUI enforcement is a daunting task. Knowing how to properly administer the standardized field sobriety tests, understanding the different case laws that we must ensure that we follow, confirming that the clues are present, and documenting them in the manner required by our agency and prosecutor. Add to the complexity the other elements of officer safety, awareness of the surrounding, safety for the violator, the safety of the public who is driving past the event, and the list goes on and on.

Motorcycles present a unique problem for LEO's as well as prosecutors. The different skill sets needed to operate a motorcycle, and the unique lane usage requirements, are just two that stand out. Is conduct, such as moving or weaving inside the lane from left to right or right to left significant? Can balancing problems at a stop sign and or red light indicate the possibility of impairment?

I say that it does, and I think most of you would agree. Coordination of clutch and throttle while accelerating or decelerating. The ability to shift gears and apply the proper brake for the condition. (meaning the front brake (hand brake) or the rear brake (foot brake). In DUI training, we stress to LEO's that according to the National Highway Traffic Safety Administration (NHTSA), weaving in a lane on a motorcycle is an excellent indicator (50% or greater) and has a higher probability of an operator being DUI, than those in a car. This is of course, unless the motorcyclist is avoiding some hazard. (https://nhtsa.gov/sites/nhtsa.gov/files/4277-motorcyclists_web.pdf)

The importance of identifying, documenting, and communicating that information to the prosecutor so that they may easily ask the questions needed to adequately present this evidence is an integral part of what we must do as a team. The first phase of a DUI investigation is the "vehicle in motion," and more often than not, motorcycles will differ from those of vehicles with four wheels. Speaking with your LEO's, educating them and staying current yourselves is a constant process and even perhaps a challenge. But it is a challenge we must all accept and conquer in our pursuit of safety and justice.

Lieutenant Joseph Agee
Program Coordinator – Motorcycle Rider Education Program
Tennessee Department of Safety and Homeland Security

PERSPECTIVE AND PERCEPTION - IN JURY TRIALS

As a child, the words "I cannot" were not accepted by my parents. "Believe and you will achieve" was their mantra. To them it was all about keeping a positive point of view (perspective). Where I saw vast mountains or deep rivers, my parents taught me to see just how small those mountains were in relation to the sky and just how shallow those rivers were in relation to the depths of the ocean. According to them, your interpretation of things or events (perception) determines what lens (perspective) you chose to view the world around you. In essence, perspective and perception combined determine what actions one will take or not take in life or how one will respond or react to the world around them.

Why is this discussion important in the context of jury trials? To understand this, first one needs to understand the difference in the two. Perception is your understanding or interpretation of external stimulus (sound, sight, smell, touch, and taste) that is as personal and unique to you as your DNA. Perception is based upon your experiences, values, beliefs, traditions, role models, preferences, etc. so it is somewhat subjective. Perspective, however, is the angle or lens you are looking through, the framework used to look at things, or your point of view. Perspective is how you view yourself, others, and everything in the world around you.

In the context of a jury trial, the jury is the finder-of-fact. It is important to understand that the jury's perception of the process, the witnesses, the defendant, the judge, the defense attorney, and the prosecutor plays a significant role in the outcome of the trial. That is why it is essential for prosecutors to ask questions tailored to address the legal concepts, factual issues, witness(es), and the judicial process of the jury venire. The key is to learn about those beliefs of experiences (perception) to gauge the juror's true perspective (point of view) on each aspect of the case. If the view differs from your theory of the case or the point of view of the prosecution, then you must acknowledge that juror's right to his or her perspective, share the alternative perspective(s), and have that juror acknowledge that there is a bigger picture (other perspectives) to consider. To illustrate this point, look at the three photos below:

Now, let's switch gears and talk about perception and perspective in relation to eyewitness testimony. Prosecutors are not accustomed to discussing perception and perspective issues with witnesses, but defense attorneys often make this a central contention on cross-examination. (continued on page 5)

PERSPECTIVE AND PERCEPTION (Continued)

Perception and perspective in this context are more about the ability to perceive rather than the interpretation of the stimulus and the physical position of the witness versus the framework used to see what occurred. In the context of a driving under the influence case involving a crash, several variables determine what a witness can see. For example, a witness in a car behind a tractor-trailer truck when it rear-ends a vehicle in front of it, cannot see what was happening in front of the tractor-trailer truck. However, a witness who is sitting on their front porch looking at a two-lane highway, can see the collision that occurs on their side of the roadway from a side view. Even from that viewpoint, their perspective will not be the same as the tractor-trailer driver or car driver. Each has a different point of view of the action based on the ability or lack thereof to perceive what is happening and each view is important in developing a more complete perception of the actual facts.

The same can be true of video footage versus eyewitness testimony. Whether in-car camera or body camera, those cameras are in a set, non-moving position on an object that is either moving or stationary. The ability to perceive is limited by the perspective of the camera placement. On the other hand, neither the eyes nor the head are in a set, non-moving position so the ability for the human witness to perceive what is happening is greater than that of a camera lens. This is especially important for the jury to understand when the video does not clearly show what the officer observed or the signs of impairment that the officer describes in their testimony. Jurors want to see the impairment, but if they understand that the perspective of the video camera is not the same as the officers, then they will be more accepting of the officer's testimony.

As illustrated above, understanding the interplay of perception and perspective can aid prosecutors in presenting the evidence and in anticipating and addressing defense attacks levied upon the evidence. Insight is gained when individuals can understand and accept that not everyone interprets things the same way or sees things in the same light as us. That is why it is important to step back and look at the evidence with the big picture in mind and with all the angles covered. Afterall, it is the totality of the circumstances that matters in assessing whether there is probable cause and in whether the State has proven the elements of the offense beyond a reasonable doubt.

Cops in Court Seminar

On July 23, 2021, the Traffic Safety Resource Prosecutors presented our Cops in Court seminar in Harrogate, TN. Many local law enforcement officers and prosecutors participated in this all day seminar, which emphasized the importance of communication between law enforcement, prosecutors, judges and jurors. General Jared Effler and his staff from the 8th Judicial District helped significantly with presenting classes, mock trail practice and with providing breakfast and lunch for the participants.

MIRANDA ISSUES AND DUI (Continued)

to drive and that an arrest is eminent, but the detention is still not "custodial" until the officer takes objective steps to render the defendant "in custody" for *Miranda* purposes. In the *Stidham* case, after the defendant had failed her SFSTs, the officer asked her if she had taken any medication. Ms. Stidham stated that she had smoked a joint earlier and taken a hydrocodone. Ms. Stidham argued at trial, that these statements violated her 5th Amendment right, since the officer admitted that after the SFSTs he had already determined that he was going to arrest her and he was not going to let her drive away. The CCA stated, "an officer's personal belief that a suspect is subject to arrest is irrelevant to the custody issue if the belief is not communicated or otherwise manifested to the suspect being questioned." *Id.* at *15, citing *State v. Godfrey*, 1995 Tenn. Crim. App. LEXIS 226, at *3 (citing *McCarty*, 104 S. Ct. at 3151).

The CCA further stated, "[B]ecause the only relevant concern to the custody determination of a person seized pursuant to a traffic stop is a reasonable person's understanding of his or her freedom of movement, '[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time.'" *State v. Manzenberger,* 2021 Tenn. Crim. App. LEXIS 250 (Tenn. Crim. App. Jun. 3, 2021). So, what happens if the defendant was told that they were going to be arrested if they did not participate in the investigation? In the *Manzenberger* case, the officer asked the defendant to perform some field sobriety tests, after the officer smelled alcohol and the defendant admitted to consuming two Miller Lite draft beers. (The initial traffic stop was for speeding and a violation of the brake light law in Gatlinburg, TN) Mr. Manzenberger asked, "Just out of curiosity, what happens if I decline, sir?" The officer replied that he would be placed under arrest. The CCA stated, "Sergeant Hatfield's response in this case was conditioned on his hypothetical inability to further his investigation. Sergeant Hatfield did not tell the Defendant that he had already determined that the Defendant would definitely be arrested as a result of the traffic stop, and he did not raise the specter of arrest as a tool to coerce the Defendant into making a statement. Instead, he was responding to the Defendant's hypothetical question regarding what action he would take if the Defendant did not cooperate with further investigation. We conclude that a reasonable person in the Defendant's situation would conclude that Sergeant Hatfield's determination regarding whether to arrest the Defendant was being delayed until Sergeant Hatfield had furthered his investigation." *Id.* at *21. Mr. Manzenberger decided to participate in SFSTs, after which he was asked more questions regarding his intoxication.

The *Manzenberger* court went even further in their analysis of what was still considered the investigatory stage of a DUI stop, declaring that statements, which were made after the completion of the SFSTs, were still determined to be investigatory and not indicative of a custodial interrogation. After the SFSTs were completed, the officer asked the defendant "how many beers" he had consumed and Mr. Manzenberger gave answers of three, two and then two one-thousand. The officer then asked questions regarding whether or not he was feeling the effects of the alcohol, and finally asking, "On a scale of zero to ten, zero being completely sober and ten being really, really drunk, how do you feel right now?" Mr. Manzenberger replied, "three." The CCA stated, "We note that this court has previously determined that an inability to pass a field sobriety test does not convert a traffic stop into a custodial detention for *Miranda* purposes. *State v. Amber Lee Stidham*, 2008 Tenn. Crim. App. LEXIS 1011, 2008 WL 5397900, at *5 (Tenn. Crim. App. Dec. 30, 2008) (rejecting the defendant's contention that she was in custody after failing field sobriety tests)." *Id.*

Another issue involved in many DUI investigations, is whether or not the defendant has the mental capacity to waive their *Miranda* rights when there are determined to be intoxicated. The CCA stated, "A court may conclude that a defendant voluntarily waived his rights if, under the totality of the circumstances, the court determines that the waiver was uncoerced and that the defendant understood the consequences of waiver." *State v. Holden*, 2013 Tenn. Crim. App. LEXIS 204 (Tenn. Crim. App. March 8, 2013), quoting, *State v. Stephenson, 878 S.W.2d 530, 545 (Tenn. 1994)*. The *Holden* court determined that even when intoxicated, Mr. Holden answered many of the officer's questions appropriately, and therefore demonstrated that his waiver was voluntary and not coerced.

FINDING NEMO (a NEw MOtion in-limine)

Reading caselaw, statutes, and rules can sometimes lead us into a deep, sound sleep. It can be as dry as a desert for those who have no real interest in the parties or subjects contained therein. However, like a blind squirrel can find a nut every now and again, you may find some interesting things there. Recently, I decided to look at Rules 12 and 47 of the Tennessee Rules of Criminal Procedure. My exploration of these rules then led me to Title 40 of the Tennessee Code Annotated to statutes related to Pre-trial, Witnesses, Sentencing, and Post-Conviction issues. From there, well, I couldn't help but look at some Tennessee cases mentioned in the notes and annotations. Of course, this led me to the Tennessee Rules of Evidence regarding Relevancy. Low and behold, my exploration made me realize that it is never too late to learn things that may prove to be quite helpful, should I find myself involved in jury trials again.

To illustrate this point, let's look at sentencing. First, we all know that Tennessee Code Annotated Section 40-35-201 provides for separate hearings as to guilt and sentencing. Apart from capital murder and to the extent necessary to comply with the Tennessee Constitution's requirement that a jury assess a fine over fifty dollars, the judge cannot instruct, nor can the attorneys for the State or the defendant, comment on possible penalties for criminal offenses. Notice that even though the prohibition doesn't limit testimony from the witnesses testifying on the subject, that doesn't mean that attorneys can solicit such information without limitation at trial.

Now, look at the Tennessee Rules of Evidence. These rules **do provide limitations on witness testimony.** For the most part, possible penalties are not relevant under the Rule 401, and they are inadmissible under Rule 402. Like everything, there are exceptions to these rules depending upon the totality of the circumstances of the case. For example, a defendant's constitutional right to confront and cross-examine witnesses against him or her may permit questioning on the issue, if an investigator uses the possible penalties to elicit information from the defendant during an interview. *See State v. Echols,* 382 S.W.3d 266 (Tenn. 2012). In the same token, an officer would be able to testify to a defendant's statement of concern over losing his or her commercial driver license (CDL) as a reason for not properly providing a sample for a breath test. However, there is no exception that will permit a defendant with a CDL from stating that he or she will lose his or her livelihood if convicted of driving under the influence. *See State v. Coleman,* No. M2007-02089-CCA-R3-CD, 2009 Tenn. Crim. App. LEXIS 277 (Apr. 6, 2009).

Finally, look at the Tennessee Rules of Criminal Procedure. Rules 12 and 47 cover the Filing of Motions; time and form, specifically. In a case involving a CDL holder who will lose his or her CDL or be disqualified from operating a commercial motor vehicle upon conviction for the offense, a prosecutor should file a motion in-limine to preclude an attorney from discussing the disqualification, or results of a conviction upon his or her client's ability to operate a commercial vehicle for a living, as being prohibited under T.C.A. §40-35-201 and from eliciting testimony of any witness as it is irrelevant under Tenn. R. Evid. 401 and inadmissible under Tenn. R. Evid. 402. Alternatively, if the disqualification isn't "punishment" for the offense, but a lateral consequence of a conviction for the offense, such consequence is irrelevant as to whether the defendant is guilty of the offense or not, and should be prohibited under the rules of evidence.

UPCOMING TRAINING

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

TNDAGC Fall Conference - October 19-22, 2021, Chattanooga, TN (Also Virtually)
The DUI training department will offer DUI training sessions on October 21, 2021, during the DA Fall Conference, Thursday breakout sessions. The classes will cover legislative updates and drugged driving.

Cops in Court - November 3, 2021, Rhea County, Evensville, 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 1 p.m. to 4 p.m.

Victim Issues and DUI Cases - December 10, 2021, Nashville, TN
The DUI training department will offer three hours of training focused on victim issues in DUI cases. This training will cover victim issues and DUI specific issues. This training will be provided for prosecutors, DUI Coordinators and Victim-Witness Coordinators.

Cops in Court - January 20, 2022, (ROCIC) Nashville, TN
This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases. It also includes a mock trail presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation from 1 p.m. to 4 p.m. If there is an agency or area that wants a Cops in Court class, please contact Pat Hayes, DUI Administrative Assistant*(615) 253-5684.*

Protecting Lives, Saving Futures - February 23-24, 2022, Chattanooga, 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, with an emphasis on drugged drivers. Each prosecutor attending is requested to recruit one to three law enforcement officers to attend the training together. This is an excellent opportunity for relationship and skill building.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Due to rising Covid-19 numbers, all September and October trainings were rescheduled

Advanced Roadside Impaired driving Enforcement (ARIDE)
November 17-18, 2021, Clarksville, TN
November 22-23, 2021, Newport, TN

DUI TRACKER

DUI Tracker this quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from July 1, 2021, through September 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 July 1, 2021, through September 30, 2021, since the last quarter were 1,677. This number is down from the previous quarter by 434. From looking at these numbers, we can see that the trend in DUI related dispositions in Tennessee has decreased temporarily. Due to Covid-19, many court dockets are fluctuating. Most courts have returned to conducting jury trials, but consistency has not returned. In spite of these changes, our DUI prosecutors have continued to be vigilant in the prosecution of impaired driving cases in their districts. The total number of guilty dispositions during this same period of July 1, 2021 through September 30, 2021 were 1,238. The total number of dismissed cases were 100 and 39 were nolle prossed. Across the State of Tennessee, 73.82% of all arrests for DUI related charges were actually convicted as charged. This percentage is slightly lower than the last quarter ending on June 30, 2021. Only 7.93% of the DUI cases during this current quarter were dismissed or nolled. Also, during this same period of time, only 268 of the total DUI cases disposed of were to different or lesser charges. Therefore, only 15.98% of the total cases were disposed of to another charge. We must continue to contribute where we can within this process. The dangers of impaired driving never go away.

Fatal Crashes this quarter

The following information was compiled from the Tennessee Integrated Traffic Analysis Network (TITAN) using an *ad hoc* search of the number of crashes involving fatalities that occurred on Tennessee's interstates, highways and roadways, from July 1, 2021 through September 30, 2021. During this period, there were a total of 309 fatalities, involving 294 crashes, which is a large decrease from the previous quarter. Out of the total of 309 fatalities, 37 fatalities involved the presence of alcohol, signifying that 11.97% of all fatalities this quarter had some involvement with alcohol. This percentage is lower than the previous quarter. Further, there were a total of 29 fatalities involving the presence of drugs, signifying that 9.39% of all fatalities this quarter involved some form of drugs.

The year-to-date total number of fatalities on Tennessee roads and highways is 983. This is up by 104 from the 879 fatalities incurred last year at this same time. For most of the year, we have experienced a considerable increase from last year in the number of fatalities on our roadways. When Covid-19 orders shut down businesses and stay at home orders were issued, the number of people driving went down substantially. However, the traffic on our highways during this period of time increased the average speed of their vehicles and the rate of fatalities increased also. Currently, the number of Tennessee drivers is higher than last year and the number of fatalities is substantially higher. Speed is an incredible catalyst in increasing the number of fatalities in our state. Combined with an impairing substance, speed has a synergistic effect on fatality rates of involved crashes. With the increase of polydrug use, we are experiencing a greater danger of crashes and fatalities on our roads and highways. It is only with a united effort between law enforcement, prosecutors and other community leaders that will we be able to stem the tide of our rising fatality crashes. Please slow down, drive responsibly and arrive home safely.

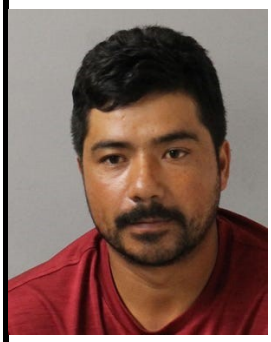
VEHICULAR HOMICIDE MURDERER'S ROW

State v. Thomas McLaughlin, 2021 Tenn. Crim. App. LEXIS 404

Thomas McLaughlin was convicted of vehicular homicide, after a head-on car crash that occurred on a two-lane road on March 24, 2017, in Union County. The victim, Roy Maples, died at the scene from his injuries. At trial, Mr. McLaughlin filed a motion in limine, to exclude the toxicology reports, since he was charged with vehicular homicide by recklessness and not by intoxication. The state argued that the toxicology report was "one of the many pieces of recklessness." The trial court allowed the testimony, finding that "the probative value outweighed any undue prejudice." The toxicology report showed the small presence of marijuana and methamphetamine in the defendant's blood at the time of the crash. It could not be determined when the marijuana and methamphetamine were taken or if there were having an impairing affect at the time. SFSTs were not administered at the crash scene. There were no witnesses to the crash and Mr. McLaughlin claimed that he was driving 40 mph when he crested a hill and saw the victim in three-quarters of his lane. (The speed limit was 35 mph) However, the physical evidence indicated that at the time of the crash, Mr. McLaughlin was well within the victim's lane of travel and his speed was over 40 mph, if not much faster. The victim's speedometer was stuck on 23 mph.

The defendant appealed, based upon his claim that the blood result evidence should have been excluded per Rule 404 (b) and under a plain error analysis. The Court of Criminal Appeals disagreed and stated that the rulings of the trial court were reasonable and that no plain error existed. Also, the evidence was sufficient to prove recklessness. Mr. McLaughlin was sentenced as a Range III, persistent offender, to 15 years in TDOC custody.

State v. Elvin Portillo, 2021 Tenn. Crim. App. LEXIS 383



On May 4, 2019, Mr. Portillo lost control of his vehicle on I-24. The victim, Bobby Douglas, swerved to avoid Mr. Portillo's vehicle, struck a guardrail and caught fire. While the victim was trapped in his burning vehicle, Mr. Portillo threw beers can out of his truck and then tried to flee. He was later constrained by witnesses at the scene. Mr. Douglas, died at the scene. Officers drove Mr. Portillo to a local hospital for treatment. Mr. Portillo showed all six clues on HGN and he admitted to drinking three 16-once beers a few hours before. His BAC was 0.186%. Mr. Portillo plead guilty to vehicular homicide by intoxication, to leaving the scene with death and to reckless endangerment. After a sentencing hearing, Mr. Portillo was sentenced to 16 years to serve in TDOC. (12 years, 2 years and 2 years, consecutive) The defendant appealed.

Mr. Portillo illegally entered the country. On a prior occasion, he was convicted for DUI and deported back to Honduras. Mr. Portillo then illegally re-entered the United States two months later. During the next six years, Mr. Portillo never reported to probation. The trial court sentenced Mr. Portillo to consecutive sentences, since he was on probation for the prior DUI conviction when he committed this vehicular homicide. The defendant tried to argue that the trial court failed to follow the "Wilkerson factors" found in *State v. Wilkerson,* 905 S.W.2d 933,938 (Tenn. 1995). However, the CCA pointed out that the defendant was given a consecutive sentence based upon TCA 40-35-115(b)(6) (committing an offense while on probation). Therefore, the Wilkerson factors do not apply. Wilkerson factors only apply to TCA 40-35-115(b)(4), "The defendant is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high. (continued on page 11)

VEHICULAR HOMICIDE MURDERER'S ROW

Wesley H. Luthringer v. State, 2021 Tenn. Crim. App. LEXIS 376

On February 24, 2014, Mr. Luthringer was driving a KIA Sedona, with two passengers, when he lost control on a curve on Highway 82 and crashed into three trees. He was wedged in the driver's seat while one passenger was found deceased on the roof of the vehicle. The other passenger was partially ejected and crushed by the vehicle. All three had been drinking and beer cans were found both inside and outside of the vehicle. The two victims, Ronald Neely and Donald Lazas died at the scene. No one was wearing seatbelts. A jury convicted Mr. Luthringer of aggravated vehicular homicide and he was sentenced to 48 years in TDOC. The CCA affirmed the convictions and the defendant later filed a pro-se petition for post-conviction relief, claiming that his two attorneys were deficient and did not explain the case or the charges to him. The Sedona belonged to Mr. Neely and Mr. Luthringer claimed to not be the driver. Mr. Luthringer also claimed to have suffered brain damage from the crash, resulting in short term memory loss and a complete loss of memory of the crash. The CCA ruled that Mr. Luthringer failed to establish that his attorneys were deficient and he failed to establish that their actions prejudiced him. The judgements of the trial court were affirmed.

State v. Aaron Joseph Dinguss, 2021 Tenn. Crim. App. LEXIS 370

On January 8, 2019, Mr. Dinguss was driving his best friend, Nathan Davis, home from a day at the lake. Mr. Dingus lost control of his vehicle while negotiating a curve on Beard Valley Road in Union County, TN. The vehicle left the roadway, struck a tree and came to a stop in a ditch. Nathan Davis died from his injuries at the hospital. Lab tests indicated that Mr. Dingus had marijuana present in his system and a BAC of .23%. (At the sentencing hearing, he admitted to drinking one-third of a bottle of vodka.) Mr. Dinguss plead guilty to one count of vehicular homicide by intoxication, a Class B felony and was sentenced to nine years at 30% (Range I offender) in TDOC custody. The trial court found two enhancement factors: (1) the Defendant's history of criminal convictions or criminal behavior in addition to those necessary to establish his range, and (10) the Defendant had no hesitation about committing a crime when the risk to human life was high. Mr. Dinguss appealed his sentence.

Nathan Davis was an organ donor and one of his kidneys was donated to his father, Luther Davis, who was suffering from diabetes and required dialysis three times a week. "It's a bitter-sweet thing," Luther Davis said. "I'm glad to have the kidney, but I would have loved to have had it any other way." (Nathan Davis and his father, Luther Davis, are pictured here.)

The sole issue raised on appeal is whether the trial court misapplied enhancement factor (10), because there was no evidence that anyone other than the victim was put at risk by the defendant's driving. The CCA agreed and stated that while there were residences in the area, there was no proof that any resident or of any other motorist was in the immediate area of the crash, at the time that it occurred. However, since Mr. Dinguss did not challenge enhancement factor (1) and he concedes that he received a sentence within the applicable range for his offense, the CCA determined that the judgment of the trial court was appropriate. "The record reflects that the trial court appropriately considered the evidence, the enhancement and mitigating factors and the principles of sentencing…" Accordingly, the sentence of the trial court was affirmed. (continued on page 12)

VEHICULAR HOMICIDE MURDERER'S ROW

State v. Cindy B. Hinton, 2021 Tenn. Crim. App. LEXIS 335

Ms. Hinton was convicted of Vehicular Homicide by Intoxication and Vehicular Homicide by Reckless Driving. The convictions were merged and she was sentenced to eleven years TDOC confinement. The trial court noted that at the time of this offense, alternative sentencing, including probation, was available in sentences for vehicular homicide, but the legislature has since amended TCA section 40-35-303 to eliminate that possibility. Ms. Hinton's case involved a crash that occurred on Interstate 24 on February 29, 2016. Eastbound traffic on I-24 had stopped due to a car crash near mile marker 31. Witnesses observed Ms. Hinton "barreling past" other slowing cars until her Ford Crown Victoria smashed into the rear of Brandi Vandiver's Toyota Corolla. The rear of the Toyota Corolla was crushed all the way to the front seats. There was no evidence of Ms. Hinton ever applying her brakes. Brandi Vandiver died at the scene.

Located in Ms. Hinton's car was a makeup bag on the driver's seat; an eyelash curler and mascara wand in the driver's side floorboard; and a large black mascara brush smear on the driver's deflated airbag. The rearview mirror was turned towards the driver's seat. While at the hospital, Ms. Hinton was concerned about her "new' and "expensive" makeup bag and she wanted it back. Trooper Bagnall also located three pill bottles that contained prescription medication and "a mixture of different types of pills" in one of the bottles. A blood sample indicated no alcohol, but is was positive for amphetamine (Adderall), fluoxetine (Prozac), diazepam (Valium), alprazolam (Xanax), metoprolol (Lopressor), doxylamine (Unisom), and dextromethorphan (an OTC cough suppressant). No SFSTs were conducted on Ms. Hinton.

Ms. Hinton appealed the sufficiency of the evidence regarding her intoxication and her sentence of eleven years. The Court of Criminal Appeals addressed the sufficiency argument, stating, "A guilty verdict may not be based solely upon conjecture, guess, speculation, or a mere possibility. (citations omitted) However, [t]here is no requirement that the State's proof be uncontroverted or perfect. *State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983)." The evidence showed that Ms. Hinton did not react to a long line of slowed traffic; a Trooper testified that lack of braking is consistent with distraction or impairment, or both; and the blood results indicated many impairing drugs. Therefore, a reasonable jury could have found that Ms. Hinton was intoxicated at the time of the crash and that Ms. Vandiver's death was a proximate result of Ms. Hinton's intoxication.

The CCA also determined that the trial court properly sentenced Ms. Hinton to eleven years. The CCA noted that in regard to enhancement (1), "the trial court was permitted to consider Defendant's expunged arrest (citations omitted)." Also, enhancement (10) was properly applied to vehicular homicide by intoxication since Ms. Hinton endangered numerous other people on the interstate. "Based upon the circumstances of the offense, the court was justified in imposing a higher-in-range sentence than the minimum."

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