TNDAGC

DUI NEWS

ISSUE 77
January 2022

PUBLISHERS:
Terry E. Wood, TSRP
Linda D. Walls, TSRP
LAYOUT AND DESIGN:
Cheyenne Johnson

INSIDE THIS ISSUE:

VH by Intoxication	1-3
Recent Decisions	4-5
Health Care Workers	6+12
Motorcycles in 2020	7
Upcoming Training	8
DUI Tracker Report	9
State v. Baumgartner	10-11

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.

VEHICULAR HOMICIDE BY INTOXICATION

The History of Sentencing for Vehicular Homicide by Intoxication: It is Now a Non-Probatable Offense

In 1989, the Tennessee General Assembly enacted Tennessee Public Chapter 591. In this Act, the offense of vehicular homicide, Tennessee Code Annotated Section 39-13-209, read as follows:

> (a) Vehicular homicide is the reckless killing of another by the operation of an automobile, airplane, motorboat, or other motor vehicle:
> (1) As the proximate result of conduct creating a substantial risk of death or serious bodily injury to a person; or
> (2) As the proximate result of the driver's intoxication as set forth in Section 55-10-401. For the purposes of this section, "intoxication" shall include alcohol intoxication as defined by Section 55-10-408, drug intoxication, or both.
> (b) Vehicular homicide is a Class C felony.
> (c) The court shall prohibit a defendant convicted of vehicular homicide from driving a vehicle in the state of Tennessee for a period of time not less than three (3) years nor more than ten (10) years.

The Act also provided punishment for a Class C felony as three (3) to fifteen (15) years depending upon the defendant's criminal history (sentencing range) and circumstances (enhancing/mitigating factors), with probation eligibility for sentences **eight years or less** in length under TCA Section 40-35-303.

In 1990, Tennessee Public Chapter 1038, did nothing to the content of the statute or the punishment aspect for vehicular homicide other than renumber it. TCA Section 39-13-209 thus became TCA Section 39-13-213.

In 1995, Public Chapter 415, which became effective on June 2, 1995, made vehicular homicide by intoxication a Class B felony. Specifically, the Act provided:

> SECTION 1. Tennessee Code Annotated, Section 39-13-213(b), is amended by deleting the current subsection (b) in its entirety and substituting instead the following language:
> (b) Vehicular homicide is a Class C felony, unless it is the proximate result of driver intoxication as set forth in subsection (a)(2), in which case it is a Class B felony.

This change, from a Class C felony to a Class B felony, changed the punishment for vehicular homicide by intoxication to a sentence range of eight (8) to thirty (30) years, depending upon the defendant's criminal history and circumstances, with probation eligibility for sentences at the minimum of eight years as a possibility under TCA Section 40-35-303.[1]

(Continued on page 2)

VEHICULAR HOMICIDE BY INTOX (Continued)

In 2005, the Tennessee General Assembly made various changes to the code.[2] One of those changes was to the probation eligibility provisions in TCA 40-35-303(a). Effective June 7, 2005, Section 7 of 2005 Tennessee Public Chapter 353 provided:

> Tennessee Code Annotated, Section 40-35-303, is amended by deleting subsection (a) and substituting instead the following:
> (a) A defendant shall be eligible for probation under the provisions of this chapter if the sentence actually imposed upon such defendant is ten (10) years or less. However, no defendant shall be eligible for probation under the provisions of this chapter if convicted of a violation of Section 39-17-417(b) or (i), Section 39-13-304, Section 39-13-402, Section 39-15-402 or Section 39-13-504. A defendant shall also be eligible for probation pursuant to Section 40-36- 106(e)(3).

The enactment of this public chapter effectively provided probation eligibility for individuals convicted of vehicular homicide by intoxication (or other B felonies not specifically precluded by the language of the statute) receiving a sentence of ten (10) years or less.

The "possibility" of a fully probated sentence remained in place for ten years until Representative William Lamberth proposed House Bill Number 42 aligning mandatory minimum sentences of incarceration with those for driving under the influence,[3] the lesser included offense for vehicular homicide by intoxication.[4] Signed on April 9, 2015, and effective on July 1, 2015, Section 3 of 2015 Tennessee Public Chapter 125 reads:

> Tennessee Code Annotated, Section 39-13-213, is amended by deleting subdivision (b)(2) and substituting instead the following:
> (2)
> (A) Vehicular homicide under subdivision (a)(2) is a Class B felony.
> (B) Any sentence imposed for a first violation of subdivision (a)(2) shall include a mandatory minimum sentence of forty-eight (48) consecutive hours of incarceration. The person shall not be eligible for release from confinement on probation pursuant to § 40-35-303 until the person has served the entire forty-eight-hour minimum mandatory sentence.

---

1. At the time of the enactment of 1995 Tenn. Pub. Ch. 415, T.C.A. 40-35-303 (a) read**: "**A defendant shall be eligible for probation under the provisions of this chapter if the sentence actually imposed upon such defendant is **eight (8) years or less**; provided, that a defendant shall not be eligible for probation under the provisions of this chapter if the defendant is convicted of a violation of § 39-17-417(b) or (i), § 39-13-304, § 39-13-402, § 39-15-402 or § 39-13-504. A defendant shall also be eligible for probation pursuant § 40-36-106(e)(3)" **(emphasis added).** Practically speaking, the general effect of the 1995 act changing the classification from a C to a B felony was to eliminate probation in Vehicular Homicide by Intoxication cases absent mitigating and/or enhancing factors.

2. Some of these changes appear to have been an overreaction to the United States Supreme Court ruling in *Blakely v. Washington*, 542 U.S. 296 (2004). Nevertheless, several changes were made in 2005 to Titles 39 and 40.

3. The summary of the bill may be located at:
https://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=HB0042&ga=109 by selecting the summary tab. The link was accessed and available at 3:05 p.m. on December 28, 2021.
Video discussing the reason for the bill and contents by Representative Lamberth may be located at:
https://tnga.granicus.com/MediaPlayer.php?view_id=278&clip_id=10154&meta_id=187537 by selecting HB0042 link. The link was accessed and available at 3:14 p.m. on December 28, 2021.

4. Driving under the influence has long been recognized as a lesser included offense of vehicular homicide by intoxication. *See State v. Rhodes,* 917 S.W.2d 708 (Tenn. Crim. App. 1995). Of course, a conviction on the lesser included offense would merge with the greater charge, yet courts were inconsistent in applying the mandatory minimums in such cases hence the need for statutory clarity on the matter and the use of the word "possibility" in this sentence.

(Continued on page 3)

VEHICULAR HOMICIDE BY INTOX (Continued)

(C) If at the time of sentencing for a violation of subdivision (a)(2), the person has one (1) prior conviction for an alcohol-related offense, any sentence imposed by the judge shall include a mandatory minimum sentence of forty-five (45) consecutive days of incarceration. The person shall not be eligible for release from confinement on probation pursuant to § 40-35-303 until the person has served the entire forty-five-day minimum mandatory sentence.
(D) If at the time of sentencing for a violation of subdivision (a)(2), the person has any combination of two (2) prior convictions for an alcohol-related offense, any sentence imposed by the judge shall include a mandatory minimum sentence of one hundred twenty (120) consecutive days of incarceration. The person shall not be eligible for release from confinement on probation pursuant to § 40-35-303 until the person has served the entire one hundred twenty-day mandatory minimum sentence.
(E) If at the time of sentencing for a violation of subdivision (a)(2), the person has any combination of three (3) or more prior convictions for an alcohol related offense, any sentence imposed by the judge shall include a mandatory minimum sentence of one hundred fifty (150) consecutive days of incarceration. The person shall not be eligible for release from confinement on probation pursuant to § 40-35-303 until the person has served the entire one hundred fifty-day mandatory minimum sentence.
(F) As used in this subsection, "alcohol-related offense" means a conviction for a violation of § 55-10-401, § 39-13-106, § 39-13-213(a)(2), or§ 39- 13-218.
(G) For purposes of sentencing under this subdivision (b)(2), a prior conviction for an alcohol-related offense may be used to enhance the mandatory minimum sentence regardless of whether it occurred before or after the effective date of this act, as long as the violation of this section occurs on or after July 1, 2015.

The end of probation for vehicular homicide by intoxication cases came in 2016 with the enactment of Tennessee Public Chapter 1021.[5] Effective on January 1, 2017, the act specifically added TCA Section 39-13-213(a)(2) to the list of offenses for which there is no probation eligibility as listed in TCA Section 40-35-303(a), no matter the length of the sentence given for the offense. Specifically, the Act provides:

> Tennessee Code Annotated, Section 40-35-303, is amended by deleting from subsection (a) the citation "§ 39-13-304" and substituting instead the citations "§ 39-13-213(a)(2), § 39-13-304".

At the time of the enactment of this public chapter, vehicular homicide as defined in (a)(2) read:

> (a) Vehicular homicide is the reckless killing of another by the operation of an automobile, airplane, motorboat or other motor vehicle, as the proximate result of:
> (2) The driver's intoxication, as set forth in § 55-10-401. For the purposes of this section, "intoxication" includes alcohol intoxication as defined by § 55-10-411(a), drug intoxication, or both;

Although there are recent vehicular homicide by intoxication cases in which probation has been awarded. *See State v. Trent,* 2020 Tenn. Crim. App. LEXIS 264. In all such cases, the offense date occurred before January 1, 2017. For all cases that occurred after January 1, 2017, probation is not allowed, pursuant to TCA Section 40-35-303(a). Also, in 2021, Public Chapter 434 expanded TCA Section 39-13-213(a)(2) to include boating under the influence pursuant to TCA Section 69-9-217(a). Therefore, any vehicular homicide by intoxication occurring now, whether on land or water, is ineligible for probation.

---

5. The bill summary may be located at: https://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=SB0035&ga=109 by selecting the summary tab. This link was accessed and available at 2:36 p.m. on December 28, 2021.
Video on the content of the bill may be located at: https://tnga.granicus.com/MediaPlayer.php?view_id=278&clip_id=12195&meta_id=261682 by selecting the link to SB0035. Although the sponsor of the bill, Senator Doug Overbey, uses the word "parole" in his description of the bill, clearly the statute is in regard to "probation". The referenced link was accessed and available at 2:40 p.m. on December 28, 2021.

RECENT DECISIONS

State v. Erik Sean Potts, 2021 Tenn. Crim. App. LEXIS 473 (Certified question on appeal)

This case involves a certified question appealed after a plea of guilty to a DUI second offense. The defendant was approached at a McDonald's drive thru and asked to pull over, "after he got his food." No DUI indicators were noticed until after he parked and exited his vehicle. "The burden of properly 'reserving, articulating, and identifying the issue' reserved for appellate review rests solely on the defendant." *State v. Pendergrass*, 937 S.W.2d 834, 838. As often is the case, the Court of Criminal Appeals was unable to conclude that the certified question herein, clearly identified "the scope and legal limits of the legal issue reserved" and whether it was actually dispositive of the case. *See* Tenn. R. Crim. P. 37(b)(2)(A)(i)-(iv). The CCA stated that a question is never dispositive "when we might reverse and remand." *State v. Wilkes*, 684 S.W.2d 663, 667 (Tenn. Crim. App. 1984). In this case, the certified question did not address the trial court's findings that the encounter with the defendant and police officer was consensual until the odor of alcohol was observed. Also, the CCA determined that the certified question was overly broad, requiring the CCA to "comb the record" to decern the scope and limits of the alleged constitutional violation. The certified question and the appeal were dismissed.

State v. William Jesse Clouse, 2021 Tenn. Crim. App. LEXIS 508 (Sentencing review)

Mr. Clouse pleaded guilty in Putnam County to three counts of vehicular assault and was sentenced to eight years in TDOC confinement. He appealed, contending that he should have been sentenced to split confinement. On July 10, 2017, Mr. Clouse drove into oncoming traffic, severely injuring three victims in three different vehicles. Mr. Clouse's BAC was 0.13%. He had a long history of traffic and other law convictions, including three prior DUIs. The CCA reviews challenges to the length of a sentence within the appropriate sentence range "under an abuse of discretion standard with a presumption of reasonableness." *State v. Bise*, 380 S.WW.3d 682, 708 (Tenn. 2012). Since the trial court considered all of the evidence and relevant factors required, the CCA affirmed the judgments of the trial court.

State v. Benjamin Barton , 2021 Tenn. Crim. App. LEXIS 518 (Discovery violation)

This case involves a common defense of drinking a half bottle of tequila after a crash. However, the Collierville Police Department had received a call of a red truck driving erratically on State Route 385, and approximately three minutes later, Officer Hillin found Mr. Barton in his red truck crashed and trying to assemble a jack to repair two flat tires. Mr. Barton displayed many signs of intoxication, including the smell of alcohol. His BAC was 0.175 %. The defense relied heavily on the fact that no one saw the crash and therefore, it could have been caused by debris in the roadway, rather than by impaired driving. Also, the vehicle was inoperable when the officer arrived and no one could say when Mr. Barton had been drinking.

The State introduced "elimination rate" testimony, through the TBI agent that analyzed the blood sample. The defense objected, noting that they received no discovery regarding this testimony. The trial court ruled that such testimony could have been reasonably anticipated and denied the defense request for a mistrial. The jury convicted Mr. Barton of DUI, DUI above .08% BAC, and reckless driving. The trial court sentenced Mr. Barton to 11 months, 29 days probation, after actual service of six months jail, noting that the defendant's assertion that he had downed half a bottle of tequila in the three minutes after the crash, was a "bunch of fooey" and the defendant would "have to think I fell off the load of turnip[s]" to believe the statement.

Mr. Barton appealed, based on insufficient evidence, a discovery violation and an error in ordering six months of incarceration. The jury's guilty verdict, approved by the trial judge, accredits the State's witnesses and resolves all conflicts in favor of the prosecution. *State v. Reid,* 91 S.W.3d 247, 277 (Tenn. 2002). "A verdict of guilt 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 verdict rendered by the jury." *Id.* at 277. The CCA ruled the evidence was sufficient. (Continued on page 5)

RECENT DECISIONS (Continued)

Regarding Mr. Barton's argument for a discovery violation, the CCA stated, "pretrial notice of expert testimony is not required by Rule 16." *State v. Spencer*, 2017 Tenn. Crim. App. LEXIS 551, 2017 WL 2800147, at *8 (Tenn. Crim. App. June 28, 2017). It is undisputed that there were no tangible objects withheld from the defense and that the testimony at issue is not the result of a report or scientific test. While a party may not seek to evade discovery by intentionally circumventing the creation of a report, *State v. Nichols*, 877 S.W.2d 722, 730 (Tenn. 1994), we do not think that the State here violated Rule 16. The judgments of the trial court were affirmed.

State v. Joseph Gevedon, 2021 Tenn. Crim. App. LEXIS 543 (Restitution was not a final order)

Mr. Gevedon pleaded guilty to two counts of DUI and other related charges. He agreed to serve three consecutive terms of 11 months, and 29 days on probation, after actual service of 96 hours in confinement. Restitution was to be determined at a later hearing. However, Mr. Gevedon was revoked on his probation shortly thereafter, and ordered to serve his sentence in confinement. Restitution was ordered at $30,490.76. Mr. Gevedon filed an appealed. However, the CCA noted that "setting a restitution amount without also setting payment terms therefore renders a judgment 'functionally incomplete' as it does not decide and dispose of the whole merits of the case leaving nothing for the further judgment of the court." *State v. David Allan Bohanon*, No. M2012-02366-CCA-R3-CD, 2013 WL 5777254, at *3 (Tenn. Crim. App. Oct. 25, 2013). Because the record contained no restitution payment terms, there was no final judgment from which the defendant could appeal. Therefore, the CCA dismissed the appeal.

State v. Lester Lee Doyle, 2021 Tenn. Crim. App. LEXIS 554 (Inconsistent verdicts by the jury)

In the early morning hours of January 19, 2019, Tennessee Highway Patrol Trooper Williams observed Mr. Doyle driving his truck, on Highway 191, without the truck's license plate being illuminated. Trooper Williams followed Mr. Doyle for approximately one-half mile and observed the truck "cross the fog line." A short video of the incident did not record the truck crossing the fog line and due to the Trooper's headlights while following the truck, it is unclear on the video if the license plate lamp on the truck was working. As Trooper Williams approached Mr. Doyle, many signs of intoxication were observed. Mr. Doyle performed poorly on the SFSTs and he admitted that he probably should not have been driving. Mr. Doyle was arrested for DUI, violation of the implied consent law, failure to illuminate the registration plate of his vehicle, and failure to maintain his vehicle within a single lane of the roadway laned for traffic.

A jury convicted Mr. Doyle for DUI second offense and violation of the implied consent law, but he was acquitted of failure to illuminate the registration plate of his vehicle, and failure to maintain his vehicle within a single lane of the roadway laned for traffic. Mr. Doyle appealed his conviction, claiming that the jury's acquittal of the traffic violations negated the "probable cause" for Trooper Williams to conduct the traffic stop. Mr. Doyle claimed "the verdicts were inconsistent."

The CCA noted that the correct standard for a traffic stop is reasonable suspicion, not probable cause. (or proof beyond a reasonable doubt). "Over forty years ago, this Court rejected the argument that reversible error occurred when a jury returned inconsistent convictions and acquittals…" *State v. Davis,* 466 S.W.3d 49, 76 (2015). The CCA also determined that there was sufficient evidence to convict of DUI. Judgments affirmed.

PROTECTION FOR HEALTH CARE WORKERS

Written Request and the Protection for Qualified Practitioners within T.C.A. § 55-10-406

In 1953, Tennessee passed legislation to prohibit individuals from driving under the influence. Sixteen years later, Tennessee adopted its first version of an implied consent law.[1] Throughout the fifty-two years of its existence, the wording, numbering, and structure of the implied consent statute has changed many times. To date, there have been thirty-seven public chapters that have impacted the content and wording of what is now T.C.A. § 55-10-406.[2] However, for at least forty-two years and perhaps more,[3] the statute has clearly provided protection to those who withdraw blood at the written request of a law enforcement officer against civil or criminal liability, except in cases of negligence.

Implied consent simply means that by someone's action, he or she has consented to something. In the context of driving under the influence, the person's driving on public roads, is the action by which he or she has consented to a chemical test to determine the alcohol content, drug content, or both of his or her **blood,** whether by a breath, blood, urine, or saliva test, or tests, if there is probable cause to believe that the person is driving under the influence.[4] In Tennessee, breath or blood samples are the samples designated by the General Assembly to be tested when there is probable cause to believe that an "operator of a motor vehicle is driving while under the influence of any intoxicant, controlled substance, controlled substance analogue, drug, substance, affecting the central nervous system, or combination thereof as prohibited by § 55-10-101, or . . . § 39-13-106, . . . § 39-13-115, . . . § 39-13-213(a)(2), . . . or § 39-13-218".[5] (Continued on page 12)

---

1. *See* T.C.A. § 55-10-406 (2020). *See also State v. Reynolds,* 504 S.W.3d 283, 299 (Tenn. 2016).
2. The most significant legislative changes in the wording and content of the statute have occurred as a reaction to court action. For instance, the General Assembly changed the language of the statute in 2017 in response to the United States Supreme Court decision in *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016). This reaction went further than the ruling and in 2019 the general assembly changed the language to reflect the ruling more accurately.
3. *State v. Shelton,* 649 S.W.2d 24, 26-27 (Tenn. Crim. App. 1983) which refers to T.C.A. § 55-10-406 in effect in 1979 that provides protection to the appropriate medical personnel from civil and criminal liability when withdrawing blood at the written request of a law enforcement officer.
4. *See* National Committee of Uniform Traffic Law and Ordinances April 24, 1963, Traffic Laws Commentary entitled "Recent Developments in Chemical Tests and Implied Consent Laws". *See also,* archived versions of § 55-10-406. Even the 1991 version, the earliest archived on LEXIS, provides "Any person who drives a motor vehicle in the state is deemed to have given consent to a test of determining the alcoholic or drug content of the person's **blood**; provided such test is administrated at the direction of a law enforcement officer having reasonable grounds to believe such person was driving under the influence. . ."
5. T.C.A. § 55-10-406.

DUI Prosecutor of the Year Award

Christopher Post, Assistant District Attorney and DUI Prosecutor from the 11th Judicial District was awarded the DUI Prosecutor of the Year Award for 2021. Chris was honored for his work in transforming the way that DUIs, Vehicular Assaults and Vehicular Homicide cases are investigated and prosecuted in the 11th Judicial District. Chris has been prosecuting DUI cases for the last six years in the 11th Judicial District. Prior to that, Chris worked in the 26th Judicial District.

MOTORCYCLES AND IMPAIRED DRIVING IN 2022

The sale of motorcycles is up 19.2 % from June 2020 to June 2021. According to Motorcycle Data, that was over 15 percent higher than what the big-name brands expected. The third quarter of 2021 has seen a leveling off of sales, mostly due to the crisis we face with the supply shortage of parts. I can speak to that topic very clearly, with THP Motorcycle units sitting at dealer's service centers for months at a time waiting on parts. In addition to motorcycle sales being up, we also have a spike in alcohol sales. A study published in the Journal of the American Medical Association[1] found an increase in alcohol consumption among survey participants to be 14% higher than consumption pre-pandemic. This study followed participants' alcohol consumption over a 6-week period for two separate groups in the summer of 2020. Researchers at the Johns Hopkins Bloomberg School of Public Health found that alcohol sales at retail locations in the week of March 21, 2020 were 54% higher than sales in the same week a year before.[2]

How do we as law enforcement officers use this data to make better enforcement efforts for the benefit of the motoring public, and for my office specifically, how does this translate to our efforts to educate those riding motorcycles. Data to many people may resemble that of the cartoon "Peanut's teacher" which no one could ever understand. I hope you as prosecutors look at the data to aid in saving lives and holding those accountable by speaking to jurors and relating that data, with the lives attached to them. Not an easy task, but one that is needed. In the year 2020, we lost 146 motorcyclists to fatal crashes—this year we lost 164, as of the last report that I received on 12-28-2021.

The breakdown looks like this in Tennessee. Specifically, as reported to the Tennessee Integrated Analysis Network. "TITAN":

Alcohol only in the bloodstream = 3
Alcohol and Opiates in the bloodstream = 2
Alcohol, Cocaine and Amphetamines = 2
Alcohol and "other drugs" = 2

Marijuana only in the bloodstream = 1
Marijuana and Alcohol in the bloodstream = 7
Marijuana, Amphetamines, and Alcohol = 3
Total: 20 Motorcyclist

Twenty lives, in all, are now gone and countless lives are touched by such tragedy. As you can see from the highlights, all but one category has a common theme: Alcohol. So, I reviewed the data and saw that we increased this year's overall fatally numbers by 18 lives, and if we could have prevented the 20 people that lost their lives by drinking and or using drugs, we would have seen an overall decrease. The year 2020 resulted in 12 fatal crashes, and 2019 resulted in 13 fatal crashes in which drugs and or alcohol were present in the bloodstream. This year though has seen a significant increase, nonetheless.

We want to change that for 2022! So, with our message presented more often and our Motorcycle Rider Education Program getting the message to every student, we hope to see those numbers decrease. We are building a "one-stop" website with an interactive dashboard for everyone to use. Some of that information may be very beneficial to you as prosecutors, and we hope that by the end of January, to have it up and running. It would show the crashes, injury, non-injury, and fatal crash statistics live from the previous date of you processing the information you seek. This data will be pushed to the site once per day, coming directly from the TITAN system.

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

---

1. https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2770975
2. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7763183/

UPCOMING TRAINING

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

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.

Protecting Lives, Saving Futures - February 15-16, 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. Each prosecutor attending is required to recruit one to three law enforcement officers to attend the training together.

20/20 Medical Foundation of Eye Movements & Impairment - March 24-25, 2022, Memphis, TN
This seminar will be located at the Sothern College of Optometry in Memphis, TN and it will be taught by faculty members and professors of optometry. The legal and physiological aspects of eye movement and the detection of impairment will be covered. Registration is open to prosecutors, drug recognition officers TBI analyst and SFST instructors. Officers will receive training needed to be qualified as an expert on HGN.

Lethal Weapon/Vehicular Homicide Seminar - June 28-30, 2022, Lexington, KY
This course will be a joint effort with prosecutors and law enforcement officers in Kentucky. It features all aspects of the investigation and prosecution of vehicular homicide cases. Included topics are: the role of the prosecutor at the scene of a fatality, expert cross-examination, toxicology and a group discussion of current vehicular homicide cases.

New DUI Prosecutor Academy - July 26-28, 2021, Franklin, TN
This three-day trial advocacy course is designed to develop courtroom skills of new prosecutors trying alcohol and drug related impaired driving cases. Included topics are Toxicology and Pharmacology, Common Defenses and Strategies to Counter Them, Courtroom Skills and Different Aspects of the DUI Trial.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Impaired Driving Enforcement (ARIDE)
January 17-18, 2022, Lenoir City, TN
January 31-February 1, 2022, Cleveland, TN
February 21-22, 2022, Tullahoma, TN
February 24-25, 2022, Franklin, TN
April 4-5, 2022, Jackson, TN

DUI Detection & Standardized Field Sobriety Testing
February 7-9, 2022, Dresden, TN
February 21-23, 2022, Pigeon Forge, TN
March 7-9, 2022, Newport, TN
March 28-30, 2022, Lenoir City, TN

Drug Recognition Expert School (DRE)
February 28-March 10, 2022, Gallatin, TN
April 11-21, 2022, Manchester, TN

DUI TRACKER

DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from October 1, 2021, through December 31, 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 October 1, 2021, through December 31, 2021, since the last quarter were 1,315. This number is down from the previous quarter by 362. From looking at these numbers, we can see that the trend in DUI related dispositions in Tennessee has slightly decreased, following the lower disposition trends that we have been observing throughout last year. DUI disposition trends are usually lower near the end of the year. The total number of guilty dispositions during this same period of October 1, 2021 through December 30, 2021 were 1,410. The total number of dismissed cases were 57, and 20 more were nolle prossed. Across the State of Tennessee, this equates to 77.49% of all arrests for DUIs made were actually convicted as charged. This percentage is slightly higher than the last quarter ending on September 30, 2021. Only 4.33% of the DUI cases during this current quarter were dismissed. Also, during this same period of time, 180 of the total DUI cases disposed of were to different or lesser charges. Therefore, 13.69% 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 October 1, 2021 through December 30, 2021. During this period, there were a total of 329 fatalities, involving 303 crashes, which is an increase from the previous quarter, but a decrease over this same time last year. Out of the total of 329 fatalities, 62 fatalities involved the presence of alcohol, signifying that 18.84% of all fatalities this quarter had some involvement with alcohol. This percentage is higher than the previous quarter. Further, there were a total of 38 fatalities involving the presence of drugs, signifying that 11.55% of all fatalities this quarter involved some form of drugs.

The year-to-date total number of fatalities on Tennessee roads and highways is 1,364. This is up by 112 from the 1,252 fatalities incurred last year at this same time. For most of the year, we experienced a considerable increase from last year in the number of fatalities on our roads. Unfortunately this increase has been steady throughout the year, outpacing last year's number of fatalities by an alarming amount. Let's make impaired driving enforcement a priority for 2022. Impaired driving is preventable. Let's do our part!

Cops in Court Seminar

On November 3, 2021, the DUI training staff, in partnership with various Rhea County police agencies, held a Cops in Court Seminar in Evensville, TN. Law Enforcement officers from all over Rhea County participated in the seminar and acquired information about the importance of communication, court procedure and evidence presentation in impaired driving related cases.

STATE V. BAUMGARTNER (WAS CONSENT VOLUNTARY?)

State v. Christapher Baumgartner, 2021 Tenn. Crim. App. LEXIS 551 (Voluntary consent)

On November 12, 2018, Mr. Baumgartner was involved in a crash in which his girlfriend and passenger, Jacklyn Sneed, was killed. THP Trooper Diaz was dispatched to a hospital to make contact with Mr. Baumgartner. During a forty-minute interview, Trooper Diaz determined that Mr. Baumgartner was “impaired on some kind of substance.” Trooper Diaz attempted HGN, but Mr. Baumgartner “could not keep his eyes open long enough to perform this test.” Trooper Diaz attempted some non-standardized tests, such as the finger-to-nose test and the counting backwards test. Every time Trooper Diaz tried to instruct Mr. Baumgartner on the tests, though, he kept closing his eyes and "referring to his girlfriend and asking her condition." Trooper Diaz asked Mr. Baumgartner for consent for a blood draw to which Mr. Baumgartner gave a verbal consent. Trooper Diaz then read the implied consent form and Mr. Baumgartner signed the form. The entire conversation was described as “calm.”

Mr. Baumgartner was charged with vehicular homicide by intoxication and DUI. Mr. Baumgartner filed a motion to suppress the blood draw asserting that he was unable to give consent because he was being treated with medication that impaired his cognitive ability to give voluntary consent. After a hearing on the motion, the trial court found the testimony of Trooper Diaz credible. However, the trial court also considered Mr. Baumgartner’s signs of impairment, his inability to follow instructions on the field sobriety tests and Trooper’s Diaz belief that he was impaired “by something other than alcohol.” The trial court was left with many unanswered questions, such as: What medication did the hospital give Mr. Baumgartner?; Did the medication affect his ability to process information?; Was he in a quasi-state of unconsciousness?; and, the court could not “make out” Mr. Baumgartner’s signature on the implied consent form. The trial court then found insufficient evidence provided by the State that Mr. Baumgartner’s consent was knowing and voluntary. The motion to suppress the blood draw was granted. The State filed an appeal.

Anytime a collection of a suspect’s blood sample is involved, the trial court will look to the constitutional limitations of the Fourth Amendment and Article I, Section 7 of the Tennessee Constitution, which protect against unreasonable search and seizures. See *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 2173, 195 L. Ed. 2d 560 (2016); *State v. Scarborough*, 201 S.W.3d 607, 616 (Tenn. 2006). Some well settled constitutional exceptions to the search and seizure limitations are: a knowing and voluntary consent; exigent circumstances; or a search warrant. The Court of Criminal Appeals stated, "one of the exceptions to the warrant requirement is a search conducted pursuant to consent." *State v. Bartram*, 925 S.W.2d 227, 230 ((Tenn. 1996) (citing *Schneckloth*, 412 U.S. at 219, and *State v. Jackson*, 889 S.W.2d 219, 221 (Tenn. Crim. App. 1993)). "The sufficiency of consent depends largely upon the facts and circumstances in a particular case." *Jackson*, 889 S.W.2d at 221. Whether consent exists and "'whether it was voluntarily given are questions of fact.'" *State v. Ashworth*, 3 S.W.3d 25, 29 (Tenn. Crim. App. 1999) (quoting *State v. McMahan*, 650 S.W.2d 383, 386 (Tenn. Crim. App. 1983)).

As you can see, any show of proof for consent is very fact driven and the facts, determined from the totality of circumstances, must show that the consent given was voluntary. *State v. Reynolds*, 504 S.W.3d 283, 307 (Tenn. 2016), (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *State v. Berrios*, 235 S.W.3d 99, 109 (Tenn. 2007)). The CCA indicated that although there were many facts which supported the argument that Mr. Baumgartner’s consent was voluntary, the trial court still concluded that the State failed to meet their burden of proving that the consent was voluntary. Since the trial court is in the best position to weigh the evidence, the CCA will give great weight to the trial court’s conclusions. The Appellee, as the prevailing party, is "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). Therefore, the CCA ruled that they could not say that the trial court erred by granting the Appellee’s motion to suppress. The rulings of the trial court were affirmed. (Continued on page 11)

STATE V. BAUMGARTNER (Continued)

An important legal point to highlight from this decision is that the defendant's signature on the implied consent form is not a sufficient fact, by itself, to prove that the defendant's consent is voluntary. It is only one factor to consider when determining whether the consent given was knowingly and voluntarily given. *State v. Henry*, 539 S.W.3d 223, 246 (Tenn. Crim. App. 2017). As the *Henry* court pointed out, the implied consent statute is not a per se exception to the Fourth Amendment and therefore any discussion as to whether the implied consent statute was properly complied with or violated is not the constitutional argument. The only relevant argument is whether or not the consent given was voluntary. *Id.* at 246.

A great discussion regarding consent and the implied consent statute can be found in *State v. Hafer*, 2020 Tenn. Crim. App. LEXIS 143. In the *Hafer* case, Ms. Hafer was involved in a crash, impaired on medication and could not follow instructions during field sobriety tests, causing the SFSTs to be terminated. She also claimed that the medication impaired her judgment and reasoning. Ms. Hafer was asked to provide a blood sample twice to which she agreed. An implied consent form was used, however, the I/C form used included a threat of criminal sanctions, which had recently been determined to be unconstitutional by the U.S. Supreme Court in *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2166-67, 195 L. Ed. 2d 560 (2016). . The trial court granted Ms. Hafer's motion to suppress and the State appealed, The CCA stated, "[n]o credible argument can be made that the statutory implied consent actually supplies the type of voluntary consent sufficient to create an exception to the warrant requirement." *Hafer* at *16. The CCA noted that the Supreme Court did not dismiss the *Beylund* defendant in *Birchfield*, for the criminal threats violation included in his implied consent form, but they remanded his case back to the trial court to determine if the consent was voluntary, in spite of the implied consent form violation. The CCA in *Hafer* determined that Ms. Hafer, based upon the totality of the circumstances, gave a knowing and voluntary consent to a blood draw before the unconstitutional implied consent form was read to her. Therefore, any facts that would indicate that the consent was involuntary did not show her "will was overborne" or "her capacity for self-determination critically impaired." Likewise, the CCA in the *Baumgartner* case, ignored the defendant's claims of a technical violation of the implied consent form.

It is interesting to note that the *Baumgartner* case involved major injuries, causing him to be in a stupor, also a passenger fatality was involved. The U.S. Supreme Court in *Mitchell v. Wisconsin,* 139 S. CT. 2525 (2019), held "[w]hen police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or **stupor** requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may **almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment**." *Id.* (Emphasis added). The general rule is, exigent circumstances exists when unconsciousness or a stupor causing a hospitalization is involved, or if fatalities are involved. Exigent circumstances should always be considered.

Assistant District Attorney Honored by MADD

On December 9, 2021, Mothers Against Drunk Driving held their annual Night of Remembrance. This is a statewide candlelight vigil and awards ceremony to honor Law Enforcement Officers, Volunteers and Community Partners. This year, ADA Elaine Heard was honored for her incredible efforts in prosecuting impaired drivers. ADA Heard supervises the 20th Judicial District's DUI prosecution unit and she prosecutes all types of impaired driving cases, including many Vehicular Assault and Vehicular Homicide cases.

HEALTH CARE WORKERS (Continued)

Although breath tests are easily administered, the reality is that breath tests provide alcohol blood content results only and do not provide any information regarding the drug content of the operator's blood. From 2007 to 2016, drug use among fatally injured drivers in the United States increased from 25 % to 42 %, thus indicating a rise in the use of drugs as a contributing factor in fatal crashes and the need for blood samples for accurate testing of impairment in those suspected of driving under the influence.[6] With the need for the use of blood samples in more cases, there is also a need for the assistance of those qualified to obtain those samples.[7]

The implied consent statute does not provide for nor require the use of a specific written request by law enforcement. The current statute merely provides in section (e):

> (1)(A) If blood tests of the operator of a motor vehicle are authorized pursuant to this section, a qualified practitioner who, acting at the written request of a law enforcement officer, withdraws blood from an operator for the purpose of conducting tests to determine the alcohol or drug content in the operator's blood, will not incur any civil or criminal liability as a result of the withdrawing of the blood, except for any damages that may result from the negligence of the person so withdrawing.
> (B) Neither the hospital nor other employer of a qualified practitioner listed in subdivision (e)(2) will incur any civil or criminal liability as a result of the act of withdrawing blood from any operator, except in the case of negligence.

The procedure employed by law enforcement officers to access these qualified practitioners and obtain blood samples in compliance with the implied consent statute varies from department to department, jurisdiction to jurisdiction, and with the facts of each case. Some rural areas, for instance, can access qualified individuals at emergency management agencies or fire departments while others rely on local hospitals. Although a written request to a qualified practitioner is not required for the admissibility of the results of blood tests in court or administrative proceedings, a written request should be utilized by law enforcement officers[8] to protect those who are working with law enforcement and to provide the means of securing the blood evidence in a safe, reasonable manner[9] consistent with the Fourth Amendment.[10] This should also prevent any fear or complaints on the part of the qualified practitioner regarding any liability in obtaining the blood draw.

---

6. https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/13839-drugged_facts_flyer_101918_v8_002.pdf
7. Those qualified are identified as "qualified practitioners" in T.C.A. § 55-10-406(e).
8. As stated, the statute does not provide an official form for the written request but only that the request be made in writing, to secure protection for those withdrawing the blood. In researching this article, the author consulted with the Tennessee Department of Safety and Homeland Security. Although the department developed and uses a form in its evidentiary procedures, it does not produce and is not obligated to provide a written request form for other agencies.
9. *See Briethaupt v. Abram,* 77 S.Ct. 408 (1957) (Blood test taken by a skilled technician is not such conduct that shocks the conscience, nor such a method of obtaining evidence that it offends a sense of justice); *Schmerber v. California*, 86 S.Ct. 1826 (1966) (Blood test is found to be reasonable: highly effective means of determining BAC, quantity of blood extracted is minimal, for most involves virtually no risk, trauma, or pain, and according to accepted medical practices).
10. *See Missouri v. McNeely,* 133 S.Ct. 1552 (2013) and *Mitchell v. Wisconsin,* 139 S.Ct. 2525 (2019).

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
Cheyenne Johnson (615) 253-5684