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

STATE V. MCKINNEY NO PROBATION FOR VH**State v. Stephen Jacob McKinney, 2022 Tenn. Crim. App. LEXIS 15
(E2020-01730-CCA-R3-CD, 2022 WL 122867)**

The Tennessee Court of Criminal Appeals has stated that T.C.A. section 40-35-303(a) and the clearly worded intent of the Tennessee legislature, is to remove vehicular homicide by intoxication as an offense for which probation is available. Therefore, probation shall not be ordered in any case involving a conviction for vehicular homicide by intoxication. (T.C.A. section 39-13-213(a)(2)). T.C.A. section 40-35-303(a) states, "...no defendant shall be eligible for probation under this chapter if convicted of a violation of section 39-13-213(a)(2)," (Vehicular Homicide by Intoxication).

The McKinney case involved a long night of drinking that continued into the early morning hours of May 12, 2019. Mr. McKinney lost control of his pickup truck, crossing over a divided roadway, and eventually striking a tree. His passenger, Brent Johnson, died as a result of the crash. Mr. McKinney was transported to the hospital and his blood alcohol level tested at .285%. He pled guilty on October 7, 2020, to vehicular homicide by intoxication to eight years, with the trial court to determine the method and manner of service.

After a thorough analysis of the sentencing statutes, the trial court concluded that the plain language of T.C.A. section 40-35-303(a), precluded probation for the offense of vehicular homicide by intoxication. Mr. McKinney was then sentenced to serve eight years in TDOC custody with loss of his driver's license for a period of five years. Mr. McKinney appealed his sentence.

Mr. McKinney argued to the CCA that T.C.A. section 39-13-213(b)(2)(B) states that, "Any sentence imposed for a first time 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 section 40-35-303 until the person has served the entire forty-eight hour minimum mandatory sentence." The defense argued that both statutes could be interpreted harmoniously together if Mr. McKinney was immediately released on parole after the service of the mandatory forty-eight hour period of confinement.

The Stated argued that T.C.A. section 39-13-213(b)(2)(B) contemplated probation eligibility within the bounds of T.C.A. section 40-35-303, after the person has served the mandatory forty-eight hour period, and section 40-35-303 was then amended by the legislature to explicitly say... (Continued on page 12)



Recent Decisions

State v. Robert Shane Cole, 2022 Tenn. Crim. App. LEXIS 33 (Sentence to Serve is Appropriate)

While deputies were speaking to a victim of a threats and a disturbance, Mr. Cole called the victim, and while on speaker, stated that he was coming there with his whole crew to “tear the place up.” The victim identified Mr. Cole as the person that created the first disturbance. Shortly thereafter, deputies spotted Mr. Cole’s Honda Pilot passing in front of the victim’s residence. Upon stopping the vehicle, Mr. Cole was found with 0.74 grams of methamphetamine, a methamphetamine pipe and several open cans of Budlight beer. Mr. Cole’s driver’s license was revoked and he showed many signs of being intoxicated. Mr. Cole had four prior convictions for DUI.

Mr. Cole plead guilty to DUI fifth offense, Driving While Revoked, Harassment and assorted misdemeanor drug charges. (Mr. Cole also pled guilty to similar drug charges in a second case) The length and manner of sentencing was to be determined by the trial court. At the sentencing hearing, it was determined that Mr. Cole had a lengthy criminal history, including convictions for motor vehicle offenses, aggravated kidnapping and especially aggravated robbery. His prior history of supervision while on probation and parole reflected many repeated violations. The trial court sentenced Mr. Cole to five years to serve in TDOC custody, as a Range II offender, for DUI fifth offense. The misdemeanor sentences were run consecutive to the DUI sentence. Mr. Cole appealed.

Any challenge to a trial court’s sentence is reviewed “under an abuse of discretion standard with a ‘presumption of reasonableness.’” *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). The Court of Criminal Appeals noted that the trial court was heavily influenced in its sentencing determination by the defendant’s extensive criminal history and his past failures on probation and parole. Since Mr. Cole’s criminal history is “abysmal” and his past interactions with the criminal justice system have not caused him to reform his conduct, Mr. Cole has failed to demonstrate that the trial court abused its discretion in ordering him to serve his effective five year, eleven month, and twenty-nine-day sentence. The judgments of the trial court were affirmed.

State v. Lance White, 2022 Tenn. Crim. App. LEXIS 74 (Pro Se Motion to Correct Sentence)

This case is a warning to pro se litigants that file motions on appeal. In December 2013, Mr. White was indicted for multiple motor vehicle charges, including one count of DUI fourth offense. On March 28, 2019, Mr. White plead guilty to some of the charges and a jury convicted him of the others, including DUI fourth offense. At the sentencing hearing, two months later, the trial court sentenced Mr. White to six years as a Range III, career offender for DUI fourth offense, a Class E felony. He was also sentenced on the many misdemeanor counts, all concurrent. His driver’s license was revoked for eight years. The trial court stated that if Mr. White was approved for the Daily Reporting Center, then the court would consider releasing him. Mr. White was given pretrial jail credits from April 27, 2018 to January 26, 2019 and from March 28, 2019 to May 6, 2019.

On July 22, 2020, the trial court revoked Mr. White’s probation and he was ordered to serve the remainder of his six-year sentence. (He was found in violation of the terms of the Daily Reporting Center). Mr. White filed a “Motion to Correct Sentence,” claiming that he had served his eleven months, twenty-nine days at seventy five percent release eligibility, when he was sentenced on May 6, 2019, and therefore, he should have immediately been released to probation and he was wrongly placed in the Daily Reporting Center. The trial court dismissed this motion, ruling that the sentence was not illegal, since the trial court had the prerogative to place the defendant in the Daily Reporting Center. Mr. White appealed, claiming that he never should have been in the Daily Reporting Center, therefore, he should be put back on probation.

(Continued on page 3)

Recent Decisions (Continued)

Unfortunately for Mr. White, he failed to cite to any case law, statute, or rule in his pro se motion to correct sentence, or in his appellate brief. *See* Tenn. R. App. P. 27(a)(7) (requiring appellant's brief to include "the contentions of the appellant with respect to the issues presented, and the reasons therefore, including the reasons why the contentions require appellant relief, with citations to the authorities and appropriate references to the record...relied in"); Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."). Therefore, Mr. White's appeal was dismissed.

State v. Jo C. Borden, 2022 Tenn. Crim. App. LEXIS 118 (Incorrect Sentencing Range)

On April 19, 2019, Mr. Borden was driving his 1997 Dodge Dakota, while under the influence of marijuana, valium and other possible narcotics. He crashed into a school bus, severely injuring his passenger, Aimee Kilburn. Mr. Borden admitted to officers that he was under the influence of marijuana and the other narcotics. Ms. Kilburn suffered traumatic brain injury and remained unconscious for about forty-five days after the crash. She never recovered her full reasoning abilities and was described by her mother as "being a 41-year-old, 10-year-old." On May 14, 2019, while sitting in jail, Mr. Borden both called and wrote a letter to a friend, requesting the friend to threaten and harm the victim, Aimee Kilburn, and to "take care of that for me."

Mr. Borden pled guilty to two counts of Retaliation for Past Action in case number 19-360-3 and one count of Vehicular Assault, three counts of Reckless Aggravated Assault, one count of Reckless Endangerment with a Vehicle, and three counts of Driving on a Revoke Driver's License in case number 19-361-3. The trial court sentenced Mr. Borden to an effective 5 years in case number 19-360-3 consecutive to an effective sentence of 10 years in case number 19-361-3, as a Range III, persistent offender, all to serve in TDOC custody. Mr. Borden appealed his sentence based upon a claim of abuse of discretion for the consecutive sentences and the Range III offender status was incorrectly determined.

Regarding sentencing issues, the CCA reviews all decisions under an "abuse of discretion standard with a presumption of reasonableness." *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). The Tennessee Supreme Court expanded its holding in *Bise* to trial courts' decisions regarding consecutive sentencing. *State v. Pollard*, 432 S.W. 3d 851, 859 (Tenn. 2013). The trial court articulated that consecutive sentencing was appropriate since Mr. Borden committed the current offenses while he was on probation for Theft of property under \$500 and for Escape, pursuant to T.C.A. section 40-35-115(b)(6)(2020). Also, the trial court noted that Mr. Borden had an extensive history of criminal convictions and activities, not just to a consideration of the offenses before the sentencing court. (Since 1997, Mr. Borden accrued thirty-three convictions, with eight of those being felony convictions. The CCA determined that the trial court did not abuse its discretion in imposing consecutive sentencing.

Regarding Mr. Borden's offender status range, Mr. Borden had eight prior felony convictions on his record. However, four Forgery under \$1,000.00 offenses all occurred within a twenty-four hour period on December 7, 1996 and two Aggravated Burglary offenses occurred within a twenty-four hour period on December 12, 1996. (the conviction date for all of these offenses occurred on May 8, 1997). Mr. Borden argued that pursuant to T.C.A. section 40-35-107(b)(4) in 1997, the four Forgery convictions should be considered one conviction and the two Aggravated Burglary convictions should be considered one conviction, under the twenty-four hour merger rule. Section 40-35-107(b)(4) was amended in 2009 to exclude Aggravated Burglary offenses from the twenty-four hour merger rule, which only applies to all Aggravated Burglary offenses that occurred after August 17, 2009. Since Mr. Borden's offenses occurred in December of 1996 and his convictions occurred in May 1997, the twenty-four hour merger rule applied to the Forgery convictions and to the Aggravated Burglary convictions. Therefore, Mr. Borden has only four prior felony convictions that can be used to establish offender Range status. Thus, Mr. Borden is a Range II, multiple offender and this case was remanded to the trial court for resentencing Mr. Borden as a Range II, multiple offender.



Using Out of State Convictions as Priors

It happens more often than not. A person commits a felony in Tennessee and has a history of criminal convictions within and without the state. This was the situation in *State v. Henderson*, No. W2020-01725-CCA-R3-CD, 2022 Tenn. Crim. App. LEXIS 96 (Mar. 4, 2022).

On December 19, 2018, the defendant, Darius Henderson, drove away from a Citgo gas station in Jackson, Tennessee in a 2008 Nissan Altima that did not belong to him. The victim and another gas station customer caught up with the stolen Altima, but the defendant was able to get away from them. Officer John Hasz with the Jackson Police Department spotted the Altima, got in behind it, initiated his blue lights, but was not successful in apprehending the defendant until the Altima was blocked by traffic and the defendant ultimately stopped. Inside the vehicle was the sole occupant-driver, the defendant.

Arrested and charged with theft of property with a value of \$2,500 or more, but less than \$10,000 and evading arrest, the defendant was tried and convicted on both counts. Upon review of the defendant's criminal record, the State filed a notice of request for enhanced punishment based upon four (4) prior Tennessee convictions and a then filed a subsequent motion for consecutive sentencing. At sentencing, a presentence report was entered, without objection, reflecting the four felony convictions in Tennessee, including: (1) 2016 theft of property over \$1,000, a class D felony, (2) 2013 theft of property over \$500 but less than \$1000, a class E felony, (3) statutory rape, a class E felony, and (4) aggravated robbery, a class B felony, as well as 2016 convictions for "Criminal Damage to Property-2nd Degree, Terroristic Threats and Simple Battery." The State, however, only argued that the defendant was a Range II offender based on the Tennessee convictions. At the request of the presiding judge, the State presented certified copies of the Georgia indictments, and the resulting convictions, but maintained that the Georgia convictions would have been misdemeanor offenses under Tennessee law.

At sentencing, the trial court found the defendant to be a Range III offender based on the four (4) Tennessee felony convictions and "Georgia conviction for criminal damage to property in the second degree."¹ The court found that because the defendant had received a four (4) year sentence to serve 60 days in jail with probation for the balance and ordered to pay restitution in the amount of \$2,010.95 in the judgment, the Georgia offense would be a felony in Tennessee. Upon this finding, the court then ordered the defendant to serve twelve (12) years as a Range III offender for the theft of property with a value of \$2,500 or more, but less than \$10,000 (D Felony) and six (6) years as a Range III offender for the charge of evading arrest (E Felony) for an effective sentence of 18 years to serve.

The defendant moved for a new trial, arguing that the court erred in its determination that he was a Range III offender rather than a Range II, specifically as it related to the use of the Georgia conviction. The defendant's motion was denied with the court providing the same rationale for its decision as it had provided in the sentencing hearing. The defendant then timely appealed the issue. On appeal, the Court of Criminal Appeals reversed the judgment of the trial court and remanded the case back for the defendant to be sentenced as a Range II offender.

1.) O.C.G.A. § 16-7-23 reads, "(a) A person commits the offense of criminal damage to property in the second degree when he: (1) Intentionally damages any property of another person without his consent and the damage thereto exceeds \$500.00; or (2) Recklessly or intentionally, by means of fire or explosive, damages property of another person. (b) A person convicted of the offense of criminal damage to property in the second degree shall be punished by imprisonment for not less than one nor more than five years."

Using Out of State Convictions (Continued)

In finding that the trial court erred, the Court of Criminal Appeals first examined the statutory requirements to establish a person as a Range III persistent offender in T.C.A. § 40-35-107(a)(1),² what constitutes “prior convictions” in T.C.A. § 40-35-107(b)(5),³ as well as the required burden of proof in T.C.A. § 40-35-107(c)⁴ and then examined the statutory requirements to establish a person as a Range II multiple offender in T.C.A. § 40-35-106.⁵ Next, the court proceeded to apply the foreign conviction analysis set out within the statutes as detailed in *State v. Vick*, 242 S.W.3d 792 (Tenn. Crim. App. 2007). Looking at the three parts of the foreign conviction analysis: (1) whether the foreign conviction is a “cognizable” offense under Tennessee law, (2) whether the foreign conviction is a “named felony” in Tennessee (a felony with the exact same name as a crime in Tennessee), and (3) if it is not a “named felony” then the court must determine if the elements of the foreign felony at the time of the defendant’s conviction “was analogous to a felony offense under Tennessee’s law as it existed at the time it was committed.” *Henderson* at *11 [citing *Vick* at 795 (citing *State v. Brooks*, 968 S.W.2d 312, 313-14 (Tenn. Crim. App. 1997))], the court found that the record contained no proof that the manner in which the defendant committed the Georgia offense. Because the Georgia offense, based upon the elements, could be committed in such a way as to constitute a misdemeanor or a felony offense in Tennessee at the time it was committed in 2013, the State failed to prove beyond a reasonable doubt that the Georgia offense would have been a felony in Tennessee. As a result, there was insufficient evidence to enhance the defendant’s sentence beyond that of a Range II offender.⁶

2.) “(a) A persistent offender is a defendant who has received: (1) Any combination of five (5) or more prior felony convictions within the conviction class or higher or within the next two (2) lower felony classes, where applicable; or (2) At least two (2) Class A or any combination of three (3) Class A or Class B felony convictions if the defendant's conviction offense is a Class A or B felony.”

3.) “(b) In determining the number of prior convictions a defendant has received: . . . (5) Prior convictions includes convictions under the laws of any other state, government, or country that, if committed in this state, would have constituted an offense cognizable by the laws of this state. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used by the Tennessee court to determine what classification the offense is given.”

4.) “(c) A defendant who is found by the court beyond a reasonable doubt to be a persistent offender shall receive a sentence within Range III.”

5.) The statute reads, in pertinent part: “(a) A multiple offender is a defendant who has received: (1) A minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes, where applicable; or (2) One (1) Class A prior felony conviction if the defendant's conviction offense is a Class A or B felony. (b) In determining the number of prior convictions a defendant has received: . . . (5) Prior convictions include convictions under the laws of any other state, government or country that, if committed in this state, would have constituted an offense cognizable by the laws of this state. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used by the Tennessee court to determine what classification the offense is given. (c) A defendant who is found by the court beyond a reasonable doubt to be a multiple offender shall receive a sentence within Range II. (d) The finding that a defendant is or is not a multiple offender is appealable by either party.”

6.) Because the Court of Criminal Appeals addressed the failure of proof at the sentencing hearing on the Georgia conviction being used as a prior felony in Tennessee as a basis for reversal, the court did not specifically address the fact that the State did not seek enhancement above Range II in the notice filed pursuant to T.C.A. § 40-35-202 nor did the State make the argument for a Range III sentence at the trial court level.



Upcoming Training

THE UPCOMING TNDAGC DUI TRAINING SCHEDULE

Cops in Court - April 28, 2022, ROCIC, Nashville, TN

This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases and how to communicate this to the jury. It also includes a mock trial presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation from 8 a.m. to Noon. This exercise will feature a marijuana impaired DUI case.

Cops in Court - May 11, 2022, THP Training Center, Nashville, TN

This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases and how to communicate this to the jury. It also includes a mock trial presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation from 8 a.m. to Noon. This exercise will feature a marijuana impaired DUI case.

Cops in Court - May 17, 2022, Algood, Nashville, TN

This course teaches law enforcement officers the challenges and difficulties associated with impaired driving cases and how to communicate this to the jury. It also includes a mock trial presentation in which each officer experiences a direct and cross examination. Prosecutors are encouraged to participate in the mock trial presentation from 8 a.m. to Noon. This exercise will feature a marijuana impaired DUI case.

Lethal Weapon/Vehicular Homicide Seminar - June 28-30, 2022, Lexington, KY

This course will be a joint effort with prosecutors and law enforcement officers from Kentucky. It features all aspects of the investigation and prosecution of vehicular homicide cases. Included topics, are the role of the prosecutor at the scene of a fatality, expert cross-examination, toxicology, qualifying an expert and a group discussion of current vehicular homicide cases.

DUI Prosecutor Academy - July 26-28, 2022, Franklin, TN

This three-day trial advocacy course is designed to develop courtroom skills of prosecutors trying DUI cases. We will discuss trial strategies, openings and closings, toxicology issues, jury selection, direct and cross-examination and common defense challenges when dealing with impaired drivers.

TENNESSEE HIGHWAY SAFETY OFFICE TRAINING CLASSES

Advanced Roadside Impaired Driving Enforcement (ARIDE)

April 4-5, 2022, Jackson, TN
 April 7-8, 2022, Greenville, TN
 April 8-9, 2022, Brownsville, TN
 April 28-29, 2022, Bristol, TN
 May 23-24, 2022, Crossville, TN

DUI Detection & Standardized Field Sobriety Testing

April 4-6, 2022, Evansville, TN
 April 11-13, 2022, Jonesborough, TN
 April 18-21, 2022, Springfield, TN
 May 9-11, 2022, Charlotte, TN
 May 23-25, 2022, Knoxville, TN

Drug Recognition Expert School (DRE)

April 11-21, 2022, Manchester, TN
 May 9-19, 2022, Nashville, TN (THP only)

DUI Tracker Report

DUI Tracker this last quarter

The results below were taken from the Tennessee Integrated Traffic Analysis Network (TITAN) from January 1, 2022, through March 31, 2022, and reflect the DUI Tracker conviction report for all judicial districts within the State of Tennessee. These numbers include the Circuit Courts, Criminal Courts, General Sessions Courts and Municipal Courts. The total number of dispositions for the period from January 1, 2022, through March 31, 2022, since the last quarter were 1,556. This number is up from the previous quarter by 241. From looking at these numbers, we can see that the trend in DUI related dispositions in Tennessee has increased, which is a change from the lower disposition trends that we have been observing last quarter. The total number of guilty dispositions during this same period of January 1, 2022 through March 31, 2022 were 1,143. The total number of dismissed and nolle cases this last quarter were 117. Across the State of Tennessee, this equates to 73.5% of all arrests for DUI made were actually convicted as charged. This percentage is slightly lower than the last quarter, ending on December 31, 2021. Only 7.52% of the DUI cases during this current quarter were dismissed or nolle. Also, during this same period of time, only 259 of the total DUI cases disposed of were to different or lesser charges. Therefore, only 16.65% of the total cases were disposed of to another charge.

Fatal Crashes this last quarter

The following information was compiled from the Tennessee Integrated Traffic Analysis Network (TITAN) using an *ad hoc* search of the number of crashes involving fatalities that occurred on Tennessee's interstates, highways and roadways, from January 1, 2022 through March 31, 2022. During this period, there were a total of 241 fatalities, involving 263 crashes, which is a significant decrease from the previous quarter. Out of the total of 241 fatalities, 49 fatalities involved the presence of alcohol and 32 fatalities involved the presence of drugs, signifying that 33.6% of all fatalities this quarter involved some form of alcohol and/or drugs.

The year-to-date total number of fatalities on Tennessee roads and highways is 241. This is less than the 279 fatalities incurred last year at this same time. This year has started with substantially less fatalities than last year. We need to stay vigilant in our prosecution of impaired drivers. Save lives, don't drive impaired.

On March 7-8, 2022, the Advanced Drug-Impairment Assessment through Physiology and Toxicology (ADAPT) training was conducted at the Middle Tennessee State University Campus in Murfreesboro, TN. This was a joint training sponsored by TBI and the Tennessee Highway Safety Office. Participants included law enforcement officers, TBI analysts and prosecutors from all parts of Tennessee. DUI prosecutors gave a presentation regarding the use of DRE officers in a DUI case. We look forward to more of these joint trainings in the future.





SUFFICIENT EVIDENCE FOR IDENTITY

The Court of Appeals in Knoxville had two cases challenging the sufficiency of the evidence establishing the identity of a defendant at trial, *State v. Daron Hall*, No. E2020-01634-CCA-R3-CD, 2022 Tenn. Crim. App. LEXIS (Mar. 2, 2022) and *State v. Sterling White*, No. E2021-00307-CCA-R3-CD, 2022 Tenn. Crim. App. LEXIS 100 (Mar.7, 2022). Ironically, both these cases involve driving-related offenses, the same trial judge, and assistant district attorneys at trial with the judgments of the trial court being affirmed in each case.¹

In both *Hall* and *White*, the initial encounters with police officers ended with the drivers leaving before an arrest could be made or a citation issued. The defendant in *Hall* was traveling in Knoxville without using his headlights during a rainy early morning in November of 2016. The officer² stopped the car and found that the driver unable to provide a driver's license. The officer attempted to identify the driver through police records using social security number, name, but the information provided by the driver was incorrect based upon the photographs associated with the information. When asked to step out of the car, the driver instead took off. Rather than pursue to car, the officer provided dispatch with a description of the car and the driver. Later, the officer received information from another officer who had interacted with an individual matching the description during a separate investigation. Based on that information, the officer searched a database and was able to identify the defendant as the driver that had fled from him earlier. He obtained charges³ for the defendant for evading arrest, driving while license suspended, criminal impersonation, violating the motor vehicle light law (driving without headlights on) and operating a motor vehicle without a proper license plate.



The defendant in *White* was identified by the officer⁴ based upon a photograph located in an official database after an occupant in the car identified the defendant as the driver. In *White*, the officer saw a silver Honda “doing circles, almost donuts” in an intersection before the car pulled into the parking lot where the officer was sitting. Once in the parking lot, the car traveled toward the police car causing the officer to leave his patrol car. The officer was able to see the passenger and the driver, a black male wearing a ball cap and a white or gray tank top, when the car traveled past him and stopped briefly before leaving the parking lot. He followed the car lost sight of it, but later spotted the car occupied by the same individuals who had switched seats. He witnessed the car drive the wrong way on a one-way street and initiated a traffic stop. The female driver was asked to step out the car where the officer confirmed she had been the passenger in the earlier incident. As the officer spoke with the female, the male moved to the driver's seat of the car and drove away. Later the car was found abandoned, but the female provided the name of the male she who had been with her. From that, the officer confirmed the person named was in fact the person he had seen. The officer then obtained charges⁵ for evading arrest, reckless driving, and leaving the scene. (Continued on page 9)

1. It appears from the case numbers that *Hall* was tried, and the case appealed in 2020, and *White* was tried, and the case appealed in 2021, with the Honorable Steven Sword presiding in both. Assistant District Attorneys Phillip Morton and Ta Kisha Fitzgerald were the prosecutors in both cases. The Honorable Robert Montgomery wrote the opinion on each.

2. Knoxville Police Officer J.D. Hopkins.

3. The opinion is not clear as to whether the officer obtain a warrant or instead presented the case directly to the grand jury.

4. University of Tennessee Police Officer Jeffery Quinn.

5. The opinion is not clear as to whether the officer obtain a warrant or instead presented the case directly to the grand jury.

SUFFICIENT EVIDENCE FOR IDENTITY (Continued)

The officers in both cases identified the defendants based on photographs obtained after they had seen and perceived the event. Each made in court identifications as well. Videos were also provided to the jury in each case confirming officer accounts of how the offenses transpired. In both cases, the Court of Criminal Appeals evaluated the sufficiency of the evidence as to the identity of the perpetrator of the offenses in the same exact way, “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.” Expanding on this, the court in each case provided that a crime may be proven using “direct evidence, circumstantial evidence, or a combination of the two.” Since identity is an essential element of any crime, circumstantial evidence alone may be sufficient to establish the perpetrator’s identity and that is a question for the jury to determine. Looking at the record of the testimony in both cases and evaluating the evidence, the court found that the evidence sufficient to establish the defendant’s identity as the perpetrator and affirmed the judgments of the trial court.⁶

6. Ironically, both defendants also contended that the trial court erred in denying motions to continue the case made on the morning of trial. In both cases, the criminal court of appeals found that the trial court did not abuse its discretion in denying the motions.

RECENT DUI TRAININGS

Protecting Lives, Saving Futures—Chattanooga, TN



On February 15-16, 2022, the DUI Training Department presented the Protecting Lives, Saving Futures seminar. This seminar focused on DUI prosecutions involving drug impaired drivers. We discussed the pharmacology and human response factors regarding alcohol and drugs. The Drug Evaluation Classification program was emphasized and the participants were informed of the abilities of DREs and their ability to identify known signs of drug impairment, including the specific drug classification. This seminar is offered every year and is beneficial for both prosecutors and officers involved in the investigation and prosecution of impaired driving cases.

20/20 Understanding the Physiology of Eye Movements and Impairment

On March 24-25, 2022, the DUI Training Dept., in conjunction with the Southern School of Optometry, presented the 20/20 Eye Movement seminar. Faculty members from Southern, along with Dr. Karl Citek, informed the participants of known signs and indications of alcohol and drug impairment that can be observed by involuntary movements of the eyes. They also informed us of how to distinguish these movements from movements caused by medical conditions or the environment around the suspect. This seminar is also offered every year.



VEHICULAR HOMICIDE MURDERER'S ROW

State v. Terry Lee McAnulty, 2022 Tenn. Crim. App. LEXIS 2 (Proximate Cause of the Crash)

Brian Stimpson and his wife Cheryl Ann Stimpson were taking an afternoon ride on their 2009 Harley-Davidson Street Glide motorcycles on December 1, 2018. Mr. Stimpson was in the lead and Mrs. Stimpson was following as they neared their neighborhood. An approaching truck, driving erratically, pulled to the edge of the road and then pulled back and crossed the center line, into Mr. Stimpson's lane. Mr. Stimpson pulled all the way off of the road and the truck struck Mrs. Stimpson's motorcycle. Cheryl Ann Stimpson was thrown off of her motorcycle and into a barbwire fence. Mrs. Stimpson's leg was severed at the calf and she suffered severe head trauma. Mrs. Stimpson died of her injuries within minutes.

When police arrived minutes later, Mr. McAnulty was sitting in the driver's seat of his Ford F-250 truck that had crossed the road and hit a tree on the same side of the road where Mrs. Stimpson was lying. Officer Young smelled alcohol and he observed that Mr. McAnulty had glossy, bloodshot eyes and "real bad" slurred speech. Mr. McAnulty grabbed an open beer can and put it under his seat. Officer Young found three "unopened Natural Light cans in a 12-pack, that was still cold." SFSTs were refused and Mr. McAnulty was transported to the hospital after a sample of blood was drawn by the EMT on scene. His BAC was .211%. Mr. McAnulty testified that the victim crossed into his lane and struck his truck as he tried to avoid the collision and therefore, the collision was not proximately caused by his intoxication.

The jury convicted Mr. McAnulty of vehicular homicide over .20%, vehicular homicide by intoxication, vehicular homicide by reckless conduct and violating the financial responsibility law. He also had two prior convictions for DUI. Mr. McAnulty appealed based upon insufficiency of the evidence regarding the proximate cause of the collision. The CCA stated, "Regarding the proximate cause inquiry, our supreme court has adopted a three-pronged test: (1) the conduct must have been a substantial factor in bringing about the harm being complained of; (2) there is no rule or policy that should relieve the wrongdoer from liability because the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence." *Wilson v. American Sys.*, 397 S.W.3d 552, 558 (Tenn. 2013) (citing *Hale v. Ostrow*, 166 S.W.3d 713, 719 (Tenn. 2005)). There was sufficient evidence for the jury to conclude that Mrs. Stimpson died from the injuries she sustained after being struck by the defendant and that the defendant's truck crossed into the oncoming lane of traffic, where he encountered the Stimpsons. This evidence was more than sufficient to establish that Mr. McAnulty's intoxication was the proximate cause of Mrs. Stimpson's death. The judgment were affirmed.

State v. Janet Hinds, Hamilton County



On February 23, 2019, Chattanooga Police Officers, Jarrod Justice and Nicholas Galinger, were inspecting a water hazard that was overflowing from a manhole cover on Hamill Road in Hixson, TN. While Officer Galinger was standing in the roadway, Janet Hinds, struck him with her SUV and then she continued to drive to her home, without slowing or stopping. Officer Galinger died from his injuries. He had just recently graduated from the Chattanooga Police Academy one month earlier. The entire incident was captured on both of the officers' body cameras. Evidence indicated that Ms. Hinds was traveling between 47 and 53 mph, with the posted speed limit of 35 mph for that portion of the roadway. Officer Justice testified that all other vehicles that passed earlier, had slowed to almost a stop as they passed the barrier in the road.

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VEHICULAR HOMICIDE MURDERER'S ROW

Earlier in the evening, Ms. Hinds had been eating and drinking at the Farm to Fork restaurant in Ringgold, GA. Her receipt from the restaurant indicated that she had consumed 76 ounces of beer and a shot of vodka before attempting to drive home. Mike Lyttle from TBI testified that, based upon the amount of alcohol she consumed, the time period, her weight and other factors, her BAC would have been between .11 to .15 % at the time of the crash. Ms. Hinds claims that she thought she hit a street sign in the middle of the road and she drove immediately home. Her SUV was missing its grill and there was damage to the hood, fender and windshield, including hair and human tissue mixed in with the broken glass.

Ms. Hinds daughter-in-law, Melissa Hinds, was in another part of the same restaurant that night celebrating with office friends and she had offered to drive Janet Hinds home that night, but the offer was refused. After the crash, Janet Hinds called Melissa to tell her that she thought she hit a street sign, but she did not stop. The next day, when the local news reported the death of Officer Galinger, Melissa called Janet Hinds to tell her that she had killed a police officer and she needed to turn herself in. Janet Hinds waited An additional day to call an attorney and meet, before calling the police station.



District Attorney M. Neal Pinkston and ADA Cameron Williams prosecuted Ms. Hinds for Vehicular Homicide by Intoxication, Reckless Driving, Leaving the Scene of an Accident Involving Death, DUI, Failure to Report an Accident and other related traffic offenses. After a four day trial, the jury convicted Ms. Hinds on eight of the ten counts in the indictment. The jury was transported in from Davidson County and sequestered, due to pretrial publicity. In February of this year, Judge Poole sentenced Ms. Hinds to an effective sentence of eleven years to serve in TDOC custody.



District Attorney M. Neal Pinkston was honored by Mothers Against Drunk Driving at their annual Tennessee Statewide Night of Remembrance and Awards Ceremony for his efforts in the Janet Hinds case and in prosecuting vehicular crimes in the 11th Judicial District. General Pinkston stated, “Drunk Driving investigation and prosecution, including the efforts involved in the Janet Hinds trial, was a total team effort between law enforcement and our local prosecutors.” General Pinkston later presented his award to Interim Chattanooga Police Chief Eric Tucker for safe keeping, and in honor of Officer Galinger, as it rightfully belongs at 3410 Amnicola Highway.



STATE V. MCKINNEY (Continued)

that those convicted of vehicular homicide by intoxication are ineligible for probation. Also, if a conflict exists, T.C.A. section 40-35-303(a), as the later enacted statute, should be given primacy.

The CCA stated, “Legislative intent is to be ascertained whenever possible from the natural and ordinary meaning of the language used.” *Quoting Walker v. Sunrise Pontiac-GMC Truck, Inc.*, 249 S.W.3d 301, 309 (Tenn. 2008). Also, the “general rule” is that when two acts conflict and cannot be reconciled, the prior act will be repealed or amended by implication to the extent of the inconsistency between the two. *Hayes v. Gibson County*, 288 S.W.3d 334, 337 (Tenn. 2009). The inclusion of vehicular homicide by intoxication in the list of probation ineligible offenses was made pursuant to a 2016 amendment to the statute, with an effective date of January 1, 2017. T.C.A. section 39-13-213(b)(2)(B) was amended in 2015.

The CCA concluded that the Legislature’s intent to make a defendant convicted of vehicular homicide by Intoxication ineligible for probation is clear and unambiguously expressed in the language of the amendment to the probation statute. Also, the language of T.C.A. section 39-13-213(b)(2) is not in direct conflict with the probation statute because of its provision that any release on probation is to be pursuant to the probation statute. The practical effect of the amendment to the probation statute, however, is that a defendant convicted of vehicular homicide by intoxication will never be eligible for release on probation. To the extent that the two statutes cannot be reconciled, the amendment to the probation statute repeals, by implication, the conflicting provisions of T.C.A. section 39-13-213. *See, e.g., Chartis Casualty Company v. State*, 475 S.W.3d 240, 246 (Tenn. 2015) (Although repeal by implication is not favored ... this doctrine does apply when a more recent, more specific statute is irreconcilable with a former statute on the same subject.) Therefore, the judgment of the trial court is affirmed.

NEW TSRP ADMINISTRATIVE ASSISTANT



Welcome Cheyenne Johnson, our new Administrative Assistant assigned to the TSRP/DUI education unit. Cheyenne is a Tennessee native. She received her BA in History and Secondary Education at the College of Charleston, SC. Upon graduation, she taught at a low income school in coastal Beaufort, South Carolina. In January of 2020, Cheyenne moved back home to Tennessee and continued her education career in Rutherford County. While teaching in the classroom, she mentored new teachers and ensured that they were successful in their new profession. Through these mentorships, Cheyenne found her true passion within education. In January of 2022, she left teaching in the classroom and accepted a position in the TSRP/DUI training unit at the Tennessee District Attorneys General Conference. This opportunity at the conference allows Cheyenne to assist law enforcement officers and prosecutors to train and excel in their fields. Cheyenne is looking forward to working with all law enforcement agencies and prosecutors across the state!

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